

# Clarifying the Exceptional Circumstances Test in *Trencon*: An Opportunity Missed

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## I INTRODUCTION

In *Trencon* the Constitutional Court undertook to clarify the test for exceptional circumstances in s 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for determining whether a court should substitute an administrator's decision with its own.<sup>1</sup> In relevant part, s 8(1)(c) of the PAJA reads:

The court or tribunal, in proceedings for judicial review ... may grant any order that is *just and equitable*, including orders—

...

- (c) setting aside the administrative action and—
  - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
  - (ii) in *exceptional cases*—
    - (aa) *substituting* or varying *the administrative action* or correcting a defect resulting from the administrative action.<sup>2</sup>

While Khampepe J acknowledged that the wording of s 8(1) read with s 8(1)(c)(ii)(aa) makes substitution an 'extraordinary remedy' and that remittal is, for this reason, 'still almost always the prudent and proper course',<sup>3</sup> her complicated (and even contradictory) formulation of the test and her proclivity for fairness dilute the exceptional nature of the remedy and do little to clarify when substitution is warranted. In the context of failing public procurement, it is perhaps understandable that courts would more readily come to the assistance of parties aggrieved by defective administrative processes. Khampepe J suggested as much in *Trencon* when she alluded to the 'vital role' that tendering plays in the delivery of goods and services to the South African public; the '[l]arge sums of public money' involved; and the immense power the government wields in making

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<sup>1</sup> *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22, 2015 (5) SA 245 (CC), 2015 (10) BCLR 1199 (CC) ('*Trencon*') at para 32.

<sup>2</sup> Emphasis added.

<sup>3</sup> *Trencon* (note 1 above) at para 42.

tender awards.<sup>4</sup> But as Plasket J cautioned in *Intertrade*, and s 8(1) of the PAJA makes clear, overzealous judicial intervention is not the panacea for all cases of administrative breakdown:

[C]ourts, when considering the validity of administrative action, must be wary of intruding, even with the best of motives, without justification into the terrain that is reserved for the administrative branch of government. These restraints on the powers of the courts are universal in democratic societies such as ours and necessarily mean that there are limits on the powers of the courts to repair damage that has been caused by a breakdown in the administrative process.<sup>5</sup>

This warning explains why we require a guided approach to determining whether substitution is justified. In her note on the same case, Lauren Kohn concludes that the *Trencon* judgment goes ‘some way’ in achieving the delicate balance between certainty and flexibility.<sup>6</sup> But it is on this point that we diverge. While it is true that legal rules are no longer the be-all and end-all of our legal system, and courts are plainly required to balance rulemaking with the more elastic, normative demands of the Constitution,<sup>7</sup> my argument is that in its drive for flexibility the Court has unjustifiably sacrificed certainty and the value of providing guidance to lower courts and future litigants on how to exercise the discretion in question. In the words of Wallis: ‘High-flown rhetoric and sonorous phraseology are no substitute for principled analysis and reasoning and clarity of expression.’<sup>8</sup>

## II THE TRADITIONAL APPROACH TO SUBSTITUTION

It is a generally accepted principle of our common law that a court will be reluctant to assume decision-making power for itself where the discretion has been entrusted to another functionary.<sup>9</sup> This flows from the separation of powers<sup>10</sup> and, most crucially, from the appreciation of the proper purpose of judicial review, which is ‘to scrutinise the legality of administrative action, not to secure a decision by a judge in place of an administrator’.<sup>11</sup> For this reason, and barring special reasons (or ‘exceptional cases’ under the PAJA), the courts have

<sup>4</sup> *Ibid* at para 1.

<sup>5</sup> *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape, and Another* [2007] ZAECHC 149, 2007 (6) SA 442 (Ck), [2008] 1 All SA 142 (Ck) (‘*Intertrade*’) at para 46.

<sup>6</sup> L Kohn ‘The Test for “Exceptional Circumstances” where an Order for Substitution is Sought: An Analysis of the Constitutional Court Judgment in *Trencon* against the Background of the Separation of Powers’ in this volume at 91.

<sup>7</sup> Constitution of the Republic of South Africa, 1996.

<sup>8</sup> M Wallis ‘Commercial Certainty and Constitutionalism: Are they Compatible?’ 22, available at <http://scholar.ufs.ac.za:8080/xmlui/bitstream/handle/11660/1789/WallisM.pdf?sequence=1>.

<sup>9</sup> See, eg, *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20, 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) (‘*Premier, Mpumalanga*’) at para 50 and *Johannesburg City Council v Administrator, Transvaal and Another* 1969 (2) SA 72 (T) (‘*JCC*’) at 76E.

<sup>10</sup> See, eg, *Premier, Mpumalanga* (note 9 above) at para 51; *Intertrade* (note 5 above) at para 45; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6, 2012 (4) SA 618 (CC), 2010 (5) BCLR 457 (CC) (‘*SCAW*’) at para 95 and *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11, 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) (‘*Doctors for Life*’) at para 37.

<sup>11</sup> L Baxter *Administrative Law* (1984) 481.

reiterated that the proper course is ‘almost always’<sup>12</sup> to remit the matter to the decision-maker for reconsideration.<sup>13</sup>

Deciding when to substitute has persistently vexed the courts. This power has, however, been recognised in circumstances where: (i) the end result is a foregone conclusion such that remittal would be a ‘mere formality’ or ‘waste of time’ given the inevitability of the outcome;<sup>14</sup> (ii) there is a delay causing unjustifiable prejudice to the affected party;<sup>15</sup> (iii) bias or incompetence on the part of the administrator is established such that ‘it would be unfair to require the applicant to submit to the same jurisdiction again’;<sup>16</sup> or (iv) where the court finds itself in ‘as good a position’ as the administrator to take the decision itself.<sup>17</sup> What has not been clear or consistent is how factors (i)–(iv) interact: is any factor sufficient on its own to justify substitution or are the factors sufficient only in combination with other factors? Are certain factors necessary preconditions for substitution? Or are they all simply weighed together in deciding whether there is an ‘exceptional case’ justifying substitution?

## A The Relationship between the Factors

In *Johannesburg City Council v Administrator, Transvaal (JCC)*, the *locus classicus* on substitution, the Johannesburg City Council sought approval from the provincial administrator to erect a power station on a farm in the area.<sup>18</sup> Prior to granting an approval the administrator was obliged to call upon the Electricity Supply Commission (Escom) to furnish a report on the proposal. During this process, Escom offered to supply the required electricity itself, leaving the administrator to decide which of the options would be most advantageous. The council’s application was twice refused in favour of Escom and both times the refusal was reviewed and set aside. However, on the second occasion, the Appellate Division was tasked with deciding whether to take the decision itself or refer it back to the administrator for reconsideration. Notwithstanding that the administrator’s errors had already resulted in a three-year delay – and that he had been twice mistaken – the court was not satisfied that the council’s case for self-generation of electricity was so ‘overwhelmingly strong that no reasonable man could decide otherwise’.<sup>19</sup> In essence, the court found that mere delay (factor (ii)) would be insufficient on its own to warrant substitution and that the result must, in addition, be a foregone conclusion (factor (i)).

There are, however, cases where the courts have suggested that delay could be an independent basis for substitution. An example is *Ruyobeza*, a case about a refugee’s request for a certificate of clearance from the Standing Committee on

<sup>12</sup> *Gauteng Gambling Board v Silverstar Development Ltd and Others* [2005] ZASCA 19, 2005 (4) SA 67 (SCA) (‘*Silverstar*’) at para 1.

<sup>13</sup> See *JCC* (note 9 above) at 76E.

<sup>14</sup> *Ibid* at 76E–G; *Baxter* (note 11 above) at 682.

<sup>15</sup> *JCC* (note 9 above) at 76F; *M v Minister of Home Affairs and Others* [2014] ZAGPPHC 649 at paras 166 and 175–176.

<sup>16</sup> See, eg, *JCC* (note 9 above) at 76F–G.

<sup>17</sup> *Silverstar* (note 12 above) at paras 28 and 39; *Baxter* (note 11 above) at 681–684.

<sup>18</sup> Note 9 above.

<sup>19</sup> *Ibid* at 77E.

Refugee Affairs, which is required for the applicant's subsequent application for an immigration permit.<sup>20</sup> Although Thring J remarked that evidence had been presented pertaining to the 'the high level of violence still prevalent in Burundi',<sup>21</sup> the court's resolution to substitute its decision for that of the committee seems to have been based entirely on the prejudice and unfairness of the present and future delays (factor (ii)).<sup>22</sup> In response to *Ruyobezza*, however, in *Radjabu Binns-Ward* J concluded that:

Issues such as the prejudice occasioned by delay ... cannot justify the granting of asylum in circumstances in which it is not *sufficiently clear* that an applicant qualifies for refugee status in terms of s 3 of the Refugees Act.<sup>23</sup>

For this, the judge relied on the reasoning of Murphy J in *Tantoush*.<sup>24</sup> While in that instance Murphy J accepted that there had been both bias and prejudicial delay, he said that the most important reason why substitution was warranted was that the evidence before the court demonstrated that the applicant qualified for refugee status.<sup>25</sup> It was unclear whether Binns-Ward J and Murphy J respectively regarded the fact that the applicants qualified for refugee status as indicating that remittal would serve no purpose because the outcome was a foregone conclusion (factor (i)), or whether the courts felt that they were in as good a position as the relevant refugee body to take the decision (factor (iv)). Either way, both judgments suggest that something more than delay is needed to justify substitution. What these cases show is that a mere delay – without the outcome being a foregone conclusion or the court being in as good a position – will not be a sufficient basis for substitution.

In *Competition Commission*, following an unsatisfactory decision regarding an application for an exemption under the Competition Act 89 of 1998, the Supreme Court of Appeal (SCA) refused to accept the complainant's argument that the court a quo 'was in as good a position as the Commission to grant or refuse exemption and that, *for this reason alone*, the matter was rightly not remitted'.<sup>26</sup> The court cited with approval Baxter's view that '[t]he mere fact that a court considers itself as qualified to take the decision as the administrator *does not of itself*

<sup>20</sup> *Ruyobezza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C), 2003 (8) BCLR 920 (C) ('*Ruyobezza*'). See also *Airoadexpress (Pty) Ltd v Chairman of the Local Road Transportation Board, Durban and Others* [1986] ZASCA 6, 1986 (2) SA 663 (A) ('*Airoadexpress*').

<sup>21</sup> *Ruyobezza* (note 20 above) at 54F.

<sup>22</sup> *Ibid* at 65C–H. See also *Reizis NO v MEC for the Department Sport, Arts, Culture and Recreation and Others* [2013] ZAFSHC 20 ('*Reizis*') at para 38, where the court, relying on *Ruyobezza* (note 20 above), seemed to regard delay as an independent factor. See further *Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg and Another* 1985 (2) SA 790 (A) at 805F–H concerning a refusal to grant certain private road-carrier permits. Miller JA, in directing that the desired permits be issued, said that it was of 'considerable importance ... in the organisation and running of [the appellant's] business' that there be 'clarity and assurance as to the means of conveyance of its products'.

<sup>23</sup> *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others* [2014] ZAWCHC 134, 2015 (1) All SA 100 (WCC) ('*Radjabu*') at para 34 (emphasis added).

<sup>24</sup> *Tantoush v Refugee Appeal Board and Others* [2007] ZAGPHC 191, 2008 (1) SA 232 (T) ('*Tantoush*').

<sup>25</sup> *Ibid* at para 128.

<sup>26</sup> *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* [2002] ZASCA 101, 2002 (4) All SA 145 (SCA) ('*Competition Commission*') at para 15 (emphasis added).

justify usurping the administrator's power'.<sup>27</sup> Thus, on the court's reasoning, factor (iv) (in as good a position) would not, without more, justify substitution. However, by remarking that '[a] reasonable apprehension of bias on the part of an administrator is, of course, an established ground for refusing a remittal',<sup>28</sup> the SCA seemed to be saying that bias (factor (iii)), unlike factor (iv), could be an independent justification for substitution. This appears also to have been the view taken by the courts in *JCC*<sup>29</sup> and *Erf 167 Orchards*.<sup>30</sup>

However, in *Harerimana*, notwithstanding the court's suggestion that bias on its own would justify substitution, Davis J went on to consider what decision the court could make practically given the information before it.<sup>31</sup> This appears to have been an acknowledgement that if the court lacked sufficient information to decide whether the applicant in question was entitled to refugee status, it might not have been able to take the decision itself. Here it seems that substitution owing to bias (factor (iii)) would depend on the court being in as good a position (factor (iv)). In *Premier, Mpumalanga*, too, O'Regan J acknowledged the relationship between factors (iii) and (iv):

[A] court should be slow to conclude that there is bias such as to require a court to exercise a discretion particularly where the discretion is one conferred upon a senior member of the executive branch of government.<sup>32</sup>

In *Silverstar*, when the decision of the Gauteng Gambling Board (GGB) not to award a gambling licence to Silverstar Development was taken on review, the SCA emphasised that since administrators are 'generally best equipped by the variety of [their] composition, by experience, and [their] access to sources of relevant information and expertise to make the right decision', a court is 'required to recognise its own limitations'.<sup>33</sup> Importantly, this was one of the first cases to suggest – without finding definitively – that factor (iii) (in as good a position) was a kind of threshold consideration for substitution. Heher JA reasoned further that, since 'the court *a quo* was not merely in as good a position as the [GGB] to reach a decision but was faced with the inevitability of a particular outcome if the [GGB] were once again to be called upon fairly to decide the matter', substitution was warranted.<sup>34</sup> Although the court did not conclude that factors (i) (foregone conclusion) and (iv) (in as good a position) were necessary preconditions, it did appear to regard the presence of both factors as strengthening the case for substitution.

The court's approach in *Silverstar* was taken further in *Intertrade*, where Plasket J concluded that '[t]he availability of proper and adequate information and the institutional competence of the Court to take the decision' are 'necessary

<sup>27</sup> Baxter (note 11 above) at 684 (emphasis added).

<sup>28</sup> *Competition Commission* (note 26 above) at para 16.

<sup>29</sup> *JCC* (note 9 above) at 76F–77A.

<sup>30</sup> *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another* [1998] ZASCA 91, 1999 (1) SA 104 (SCA) ('*Erf 167 Orchards*') at 109F.

<sup>31</sup> *Harerimana v Chairperson, Refugee Appeal Board and Others* [2013] ZAWCHC 209, 2014 (5) SA 550 (WCC) ('*Harerimana*') at paras 34–42.

<sup>32</sup> *Premier, Mpumalanga* (note 9 above) at para 51.

<sup>33</sup> *Silverstar* (note 12 above) at para 29.

<sup>34</sup> *Ibid* at para 39.

prerequisites ..., apart from “exceptional circumstances”, for substitution.<sup>35</sup> Therefore, despite the court’s finding that there had been an ‘alarming degree of ineptitude, a lack of appreciation of what is required, a lack of judgment, rationality and common sense, and a disturbing contempt for the Constitution and for the people of the province that the Constitution seeks to protect from abuses of public power’,<sup>36</sup> Plasket J desisted from ordering substitution. In his view, even gross incompetence and the ‘shameful treatment’ of the aggrieved party over ‘a protracted period’ would not justify this remedy unless the court possessed the necessary information or requisite ‘institutional competence’ to take the decision itself.<sup>37</sup> In this regard Plasket J explained that these factors are minimum requirements for rational decision-making.<sup>38</sup> The effect of this dictum is that even gross incompetence cannot justify substitution in the absence of factor (iv).

This was also the approach adopted in the subsequent unreported judgment in *M v Minister of Home Affairs*, where the High Court reasoned that provided the court is ‘in a position practically to make the decision’,<sup>39</sup> and that one of the factors (i), (ii) or (iv) is also present, substitution will be appropriate. In essence, the court emphasised factor (iii) (in as good a position) as a precondition (in the sense that the court must be able to make the decision itself) and saw the other factors as strengthening the case for substitution.<sup>40</sup> Bias, for example, would not on its own justify substitution, but would nevertheless support the case for substitution. Notably, however, in contrast to what Plasket J concluded in *Intertrade*, the courts in *Erf 167 Orchards* and *Airoadexpress* had suggested that ‘gross incompetence’ could be an independent basis for substitution.<sup>41</sup>

In the earlier judgment of *Livestock*, the court reviewed and set aside a decision of the Livestock and Meat Industries Control Board.<sup>42</sup> It did so on the basis that the board did not have the power to refuse transfer of registration of a certificate to operate a butchery purely on grounds that the area was ‘adequately and conveniently catered for by the existing butcheries in the area’.<sup>43</sup> In deciding whether to substitute, Holmes AJA relied on the following factors: the fact that the board had ‘closed its mind’ to the matter (suggesting that it would not be able to be independent if the matter were remitted); that no other ground (other than the area being adequately catered for) was invoked to justify its refusal (suggesting that the matter was a foregone conclusion); the varying attitude of the board (suggesting possible incompetence); and the delay and frustration that had resulted in a loss of trade profits for the aggrieved party.<sup>44</sup> The court found that the

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<sup>35</sup> *Intertrade* (note 9 above) at para 43.

<sup>36</sup> *Ibid* at para 5.

<sup>37</sup> *Ibid* at para 43.

<sup>38</sup> *Ibid*.

<sup>39</sup> *M v Minister of Home Affairs* (note 15 above) at para 166.

<sup>40</sup> *Ibid* at paras 165–166.

<sup>41</sup> *Erf 167 Orchards* (note 30 above) at 109F and *Airoadexpress* (note 20 above) at 680F.

<sup>42</sup> *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) (‘*Livestock*’).

<sup>43</sup> *Ibid* at 348G.

<sup>44</sup> *Ibid* at 349H–350B.



‘cumulative effect’ of these factors meant that substitution was justified. In effect, none of the factors was decisive, but taken together they merited substitution.<sup>45</sup>

What the above discussion shows is that the courts have taken a varying approach to substitution, essentially oscillating between regarding the factors as individually sufficient, particularly in relation to bias and incompetence;<sup>46</sup> sufficient in combination with other factors; as necessary prerequisites; or simply factors to be weighed in determining whether to grant substitution. The contradictory way in which the courts have regarded the interplay of factors was highlighted by Khampepe J in *Trencon* as a reason for revisiting the exceptional circumstances test.<sup>47</sup>

To compound this uncertainty, the courts have invoked considerations of fairness in differing ways. As a result, it is unclear whether fairness is the overriding test that the courts apply, a separate factor to be considered alongside the other existing factors, or no more than an underlying value that guides a court’s assessment of these factors in deciding whether exceptional circumstances are present.

## **B The Role of Fairness**

The relevance of fairness has its roots in the much-quoted dictum of Holmes AJA in *Livestock*:

The court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and ..., although the matter will be sent back if there is no reason for not doing so, *in essence it is a question of fairness to both sides*.<sup>48</sup>

Baxter too, relying on *Livestock*, says that fairness is the ‘overriding principle’.<sup>49</sup> More recently, in *Competition Commission*, the SCA held that ‘[t]here will accordingly be no remittal to the administrative authority in cases where [this] will operate procedurally unfairly to both parties’.<sup>50</sup> And in *Harerimana*, Davis J said that in deciding whether to order substitution, fairness ‘must be uppermost in the mind of a court’.<sup>51</sup> But is fairness the test that courts apply or is it merely a principle that underlies the concrete criteria discussed in part II.A above? In other words, has the test for substitution been fairness or was it always ‘exceptional circumstances’, with fairness playing a supporting role in the application of the factors?

In *Livestock*, notwithstanding Holmes AJA’s earlier dictum, fairness was not the overriding basis for non-remittal. Rather, it guided the court’s application of various other factors: the fact that the outcome was a foregone conclusion (since there was no lawful basis for the board’s refusal to register the butchery in question); the unfairness that would result from further delay; the unfairness

<sup>45</sup> Ibid at 350A.

<sup>46</sup> See further *Vukani Gaming Free State (Pty) Ltd v Chairperson of the Free State Gambling and Racing Board and Others* [2010] ZAFSHC 33 (*Vukani*) at para 26, where the court said that gross incompetence, long delay and inevitability of outcome would individually constitute exceptional circumstances.

<sup>47</sup> *Trencon* (note 1 above) at para 41.

<sup>48</sup> *Livestock* (note 42 above) at 349F–H (emphasis added).

<sup>49</sup> Baxter (note 11 above) at 681, with reference to *Livestock* (note 42 above).

<sup>50</sup> *Competition Commission* (note 26 above) at para 14.

<sup>51</sup> *Harerimana* (note 31 above) at para 29.

of remitting given the administrator's possible incompetence; and the unfairness of remitting where the board's independence had been brought into question.<sup>52</sup> Further, in *Competition Commission* the SCA remarked that '[a]ll that can be said is that considerations of fairness may in a given case require the Court to make the decision itself provided it is able to do so'.<sup>53</sup> In effect, once the court resolved that it was able to take the decision itself, it considered whether there were other equitable considerations that favoured or militated against substitution. Similarly, in *M v Minister of Home Affairs* the court said:

Fairness to both sides is an important consideration. Sometimes fairness to the applicant can tilt the scale in his or her favour, and considerations of fairness may in a given case require the court to make the decision itself *provided it is able to do so*.<sup>54</sup>

Again, only once factor (iv) (in as good a position) was established did the court consider whether there were other equitable considerations that would support substitution. For example, the court said that the possibility of 'a further lengthy delay' in deciding on the applicant's refugee status and the adverse effect this would have on the applicant's minor daughter tilted the scale in favour of substitution.<sup>55</sup>

In *Intertrade* Plasket J reasoned that fairness underpinned factor (iv) in the sense that without this prerequisite, it would not be fair or rational for the court to take the decision itself.<sup>56</sup> In the subsequent decision of *Silverstar*, although fairness was seemingly given a much more visible role (the fact that nothing could be 'gained by remittal'<sup>57</sup> was also relevant to the question of fairness), it was still arguably not elevated to a decisive test. In this regard the court said that since a 'lack of fairness to the Board or the reasonable possibility of prejudice to the public were not probable consequences of non-remittal' (because the outcome was a foregone conclusion) and since there were 'equitable considerations' favouring *Silverstar* (significant delay and the board's stubborn opposition to *Silverstar*), substitution was justified.<sup>58</sup> This case suggested that fairness underlies factors (i) (foregone conclusion), (ii) (delay) and (iv) (lack of independence) in the sense that where the outcome is certain (together with further equitable considerations), refusing substitution may not be fair. Therefore, even though fairness was given significant attention in this case, its purpose was to inform the question whether there were exceptional circumstances rather than elevate the principle to a decisive test.

In *JCC* the court reasoned that substitution would be justified '[w]here the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again'.<sup>59</sup> Here the principle underpinned factor (ii) and was concerned with the

<sup>52</sup> *Livestock* (note 42 above) at 349H–350B.

<sup>53</sup> *Competition Commission* (note 26 above) at para 15 (emphasis added).

<sup>54</sup> *M v Minister of Home Affairs* (note 15 above) at para 165 (emphasis added).

<sup>55</sup> *Ibid* at paras 175–176; *Vukani* (note 46 above) at para 51.

<sup>56</sup> *Intertrade* (note 5 above) at para 43.

<sup>57</sup> *Silverstar* (note 12 above) at para 40.

<sup>58</sup> *Ibid*.

<sup>59</sup> *JCC* (note 9 above) at 76F–H.



unfairness of remitting to a biased administrator. This also seems to have been the approach in *Harerimana*, where Davis J reasoned that

[t]o remit the appeal to the body, which in so determined a fashion has resisted this review application, would, at the very least, be unfair. The conduct of [the board] promotes a perception that it is a body which is now biased and not sufficiently independent in respect of [the] applicant's case. It would thus be unfair for it to be required to reconsider its own decision, that it obviously considers to be correct, both in substance and procedurally.<sup>60</sup>

While Hoexter is correct that '[f]airness to both sides has always been and will most certainly remain an important consideration',<sup>61</sup> the courts have not clearly articulated what role fairness actually plays in deciding whether to substitute. That said, rather than an overarching test for substitution, considerations of fairness appear to have played a supporting role in relation to factors (i)–(iv), some favouring substitution (such as the fact that the court is in as good a position to take the decision itself) and others cutting against it (such as the fact that the outcome is not foregone or the fact that further delay occasioned by remittal would not be prejudicial to the aggrieved person).

But in *Trencon*, rather than refining our understanding of fairness in the context of a substitution order, the decision has, as we shall see, left it unclear whether fairness is now the decisive test for determining whether substitution is warranted; a separate factor that must be weighed against factors (i)–(iv);<sup>62</sup> or whether it remains an underlying value that reveals which factors are relevant and how they should be weighed. And more seriously, in its drive for flexibility and preference for ill-defined conceptions of fairness, the Court has failed to provide sufficient direction to lower courts and litigants on how to exercise the discretion in question. The flexibility required by the Constitution (in this context, determining the 'just and equitable' remedy) does not sanction murky judicial reasoning, nor does it permit judges to shy away from laying down clear principles of law.<sup>63</sup>

The upshot is that a guided approach to substitution is required, one which, for example, clarifies the existence or otherwise of any strict requirements for substitution; the relative weight to be attached to each of the existing factors; and ultimately, the role of fairness in the overall decision to substitute or remit. Guidance is not the same as strait-jacketing the discretion in question. It means

<sup>60</sup> *Harerima* (note 31 above) at para 32.

<sup>61</sup> C Hoexter *Administrative Law in South Africa* (2nd Edition, 2012) 553.

<sup>62</sup> See, eg, *Reizis* (note 22 above) at para 39, where the court applied fairness as an independent factor alongside factors of foregone conclusion, bias and incompetence, and the prospect of further delay.

<sup>63</sup> See S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 788–792 and especially at 789, where he quotes Justice O'Regan: 'As a member of the bench, I am required to issue a judgment; and in that judgment, I am required to lay down a rule of law that binds both the parties before the court and South African society as a whole; however, if laying down a rule of law makes me, ipso facto, a positivist, then a positivist of some stripe my office commits me to be.' (Justice K O'Regan 'Dignity, Application and the Rule of Law', a paper presented at the *Conference on Dignity and the Jurisprudence of Laurie Ackermann* University of Cape Town, 27 July 2007.) On the value of legal rules, see in general A Fagan & F Schauer 'Rules – in Law and Elsewhere' in F Schauer (ed) *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (2009) Chapter 2, especially at 35.

that ‘courts ... can – and ought to – generate rules of law that are determinate enough to guide the behaviour of state and non-state actor[s]’.<sup>64</sup>

### III *TRENCON: THE FACTS*

On 18 May 2012 the Industrial Development Corporation (IDC) invited tenders from building contractors for the upgrade of its head office in Sandton, Johannesburg. The tender followed a two-step trajectory, beginning with a pre-qualification phase (to identify the best proposals based on technical capability, environmental management, personnel capabilities, financial standing and litigation history) followed by a competitive-bidding phase (involving actual bidding and an evaluation based on considerations such as price and broad-based black economic empowerment). The process engaged the expertise of various procurement bodies at the IDC, as well as independent consultants.

In the first phase the Request for Proposals stipulated that the closing date for submission would be Monday 4 June 2012 at noon. Those contractors who were shortlisted in the first round would be eligible to participate in the competitive-bidding phase that followed. Trencon Construction (Pty) Ltd, Basil Read (Pty) Ltd and five other contractors were shortlisted and invited to tender on the basis that the site handover would be on 6 September 2012. The second phase involved a multistage process of evaluation, assessment and approval by various procurement bodies at the IDC, culminating in a final decision on the award of the tender by its Executive Committee (Exco).

Trencon tendered a price of R 117 112 972,21 provided, crucially, that the site handover date of 6 September 2012 remained unchanged. During the evaluation process, the consultants sought clarification from the bidding parties on the cost implications if the site handover were delayed until 1 October 2012, or even beyond that date. In response, Trencon advised that it would charge a 6 per cent escalation fee (approximately R 315 000,00 excluding VAT), whereas Basil Read indicated that its price would remain fixed notwithstanding the delay. When the various bids were evaluated, all the IDC’s in-house procurement bodies, together with the consultants, recommended that Trencon be appointed as the preferred contractor (subject to certain conditions, such as a revised contract value). Importantly, even with the price increase, Trencon’s offering scored the highest points on both price and empowerment. In spite of this, when the final decision went before the Exco, it resolved to appoint Basil Read. Trencon’s tender had, in its view, failed to maintain a fixed price for the 120-day period as required by the tender conditions and was therefore non-responsive.

Trencon approached the High Court to review the IDC’s decision primarily on the basis that the latter had misunderstood the tender provisions relating to contract price adjustment by failing to differentiate between CPAP Adjustments (increases in the costs of labour, materials, plant and goods) and Default Adjustments (increases arising from other delays such as site handover). While the former costs were required to remain fixed for 120 days, price increases arising from the latter were not prohibited. The High Court accepted this distinction,

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<sup>64</sup> Woolman (note 63 above) at 789.

holding that the IDC had committed a material error of law in concluding that the tender documents prohibited any price escalations in relation to delays in site handover.<sup>65</sup> Trencon's bid was thus found to be compliant and responsive, and the award of the tender to Basil Read was set aside.

However, Mothle J went further, finding that there were exceptional circumstances warranting substitution: Trencon's bid had scored the highest points throughout the process; it had been favoured as the preferred bidder by all of the IDC's procurement bodies; and the IDC had been unable to present any evidence why the tender should not be awarded to Trencon or why the court would be justified in cancelling the contract, ordering that the process start afresh, and thus further delaying implementation of the project.<sup>66</sup> Regarding the alternative argument that the matter be remitted to the IDC with instructions to award the tender to Trencon, the court reasoned essentially that it 'would make no difference' if it were to take the decision itself and that the decision, barring the material error of law, was a foregone conclusion.<sup>67</sup> Mothle J also remarked that the court was 'qualified' to take the decision itself, and that, considering the 'substantial' amount of public funds involved and the fact that further delay would 'cause unjustifiable prejudice to Trencon, the IDC and National Treasury', there was no reason, given the 'urgency of the matter', to refer the decision back to the IDC.<sup>68</sup> In his reasoning, Mothle J prioritised factor (i) (foregone conclusion) and seemed to regard factors such as delay (factor (ii)), that the court was qualified to take the decision (factor (iv)) and that the tender implicated public money, as strengthening the case for substitution.

On appeal, the SCA accepted that the IDC had made a material error of law, but did not agree that substitution was warranted.<sup>69</sup> This was notwithstanding its acceptance that the only reason for Trencon's non-appointment, which the IDC also conceded, was the said error.<sup>70</sup> The SCA said that the High Court had 'overlooked the fact that the IDC was not obliged to award the tender to the lowest bidder or at all', for which reason the outcome was not a foregone conclusion.<sup>71</sup> It further criticised the High Court for failing to give proper consideration to the separation of powers as well as the question of delay.<sup>72</sup> In the latter regard Maya JA reasoned that over two years had elapsed since the beginning of the tender process, which meant that the information before the court, and the basis upon which the tenders had been evaluated, was outdated. The lower court's order thus failed to consider 'unavoidable supervening circumstances such as price increases'.<sup>73</sup> In essence, the SCA found that none of factors (i)–(iv) had been present and that substitution could not, therefore, be justified.

<sup>65</sup> *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2013] ZAGPPHC 147, 2013 JDR 1267 (GNP) ('Trencon HC') at paras 28–31.

<sup>66</sup> *Ibid* at para 53.

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Industrial Development Corporation of South Africa Ltd v Trencon Construction (Pty) Ltd and Another* [2014] ZASCA 163, 2014 (4) All SA 561 (SCA), 2014 JDR 2154 (SCA) ('Trencon SCA').

<sup>70</sup> *Ibid* at para 11.

<sup>71</sup> *Ibid* at para 18.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid* at para 19.

IV EXCEPTIONAL CIRCUMSTANCES IN *TRENCON*: THE MISSED OPPORTUNITY

Owing to the lack of guidelines in s 8(1)(c)(ii)(aa) of the PAJA, Khampepe J said that it was of ‘great import’ that the test for exceptional circumstances be revisited.<sup>74</sup> But rather than sharpening the existing approach, the Court has obfuscated it through a rather complicated weighing exercise that seems to turn, ultimately, on what is fair:

[G]iven the doctrine of separation of powers, in conducting [the] enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.<sup>75</sup>

In parts 1–3 below I propose to unpack and ultimately critique the Court’s stated test based on the following broad structure and using somewhat different numbering:

1 *Separation of Powers*

- (a) Is the court in as good a position as the administrator to make the decision?  
And if so,
- (b) Is the decision a foregone conclusion?

2 *Other Relevant Factors*

- (c) If (a) and (b) are answered affirmatively, are there further considerations such as delay, good faith, bias or incompetence that favour substitution?

3 *Fairness*

- (d) Notwithstanding the existence of (a), (b) and (c), would substitution be just and equitable in the circumstances?

1 Separation of Powers

In the earlier stages of the litigation, the SCA criticised the High Court for failing to balance the substitution remedy against the requirements of the separation of powers and of judicial deference.<sup>76</sup> This moved Khampepe J to prioritise considerations (a) and (b). In particular, she reasoned that the test should be informed ‘not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator’.<sup>77</sup>

<sup>74</sup> *Trencon* (note 1 above) at para 41.

<sup>75</sup> *Ibid* at para 47.

<sup>76</sup> *Trencon* SCA (note 69 above) at para 18.

<sup>77</sup> *Trencon* (note 1 above) at para 43.

While there is nothing objectionable in principle about an approach that emphasises these factors, which is arguably what earlier cases endeavoured to do,<sup>78</sup> the real difficulty arises from the disconnect between the chronological scheme that the Court proposes and the particular wording of the judgment. Specifically, Khampepe J explains that only '[o]nce a court has established that it is in as good a position as the administrator' will it be 'competent to enquire into whether the decision of the administrator is a foregone conclusion',<sup>79</sup> and that 'thereafter'<sup>80</sup> it should consider other relevant factors. This appears to impose a chronological trajectory that a court should follow in determining whether the case is an exceptional one. But then, confusingly, Khampepe J says that factors (a) and (b) 'inevitably hold greater weight' and that they must be considered 'cumulatively'.<sup>81</sup>

Though in her evaluation of the case Lauren Kohn recognises that it is not 'entirely clear' from the judgment whether factors (a) and (b) are 'strict requirements' or simply requirements that weigh more heavily, she argues that on a purposive interpretation of the judgment, the Court intended these factors to be strictly present, particularly given Khampepe J's emphasis on accommodating the separation of powers within the rubric of the test.<sup>82</sup> But my argument is that it is simply unclear from the wording of the judgment – and even the scheme proposed by the judgment as a whole – whether factors (a) and (b) are intended to be preconditions for substitution (in the sense that a box must be ticked in each case before the factors listed in (c) can be considered), or whether these factors must merely be weighted more heavily against other factors, such as those in (c) and ultimately fairness in (d). That said, there is a strong argument that at least factor (a) should be treated as a strict requirement for substitution. This, as Plasket J explained in *Intertrade*, is because it would almost never be rational or fair to order substitution where a court is not in as good a position as the administrator to take the decision itself.<sup>83</sup> In the end, if the Court intended to impose preconditions for substitution – and in doing so, to limit a court's discretion in ordering the remedy – then it ought to have said so openly and clearly.

Turning to the distinction between (a) and (b), Khampepe J recognises the difficulty of drawing a bright-line divide between these two factors, explaining that they are 'interrelated and interdependent'.<sup>84</sup> Nevertheless, she says that the difference lies in the fact that factor (a) speaks to the nature of the decision: '[E]ven where the administrator has applied its skills and expertise and a court has all the relevant information before it, the *nature of the decision* may dictate that a court defer to the administrator', which she reasons is 'typical in instances of policy-laden and polycentric decisions'.<sup>85</sup> Conversely, in circumstances where the decision 'is not polycentric and is guided by particular rules or by legislation',

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<sup>78</sup> See, eg, *Intertrade* (note 5 above) at para 43.

<sup>79</sup> *Trencon* (note 1 above) at para 49 (emphasis added).

<sup>80</sup> *Ibid* at para 47.

<sup>81</sup> *Ibid*.

<sup>82</sup> Kohn (note 6 above) at 103.

<sup>83</sup> *Intertrade* (note 5 above) at para 43.

<sup>84</sup> *Trencon* (note 1 above) at para 50.

<sup>85</sup> *Ibid* (emphasis added).

the decision may warrant a lesser degree of deference to the administrator.<sup>86</sup> In effect, Khampepe J seems to be saying that to satisfy requirement (a) a court must be both qualified to make the decision (in the sense that it has the necessary information before it) and institutionally competent to do so, in the sense that the decision must not be of a policy-laden or polycentric kind.

While the High Court failed to provide any explanation as to why it thought it was qualified to take the decision itself,<sup>87</sup> Khampepe J introduced two helpful substantive requirements to justify her conclusion that the court was in fact qualified: (1) The administrator's expertise must not be required at all (where, for example, the decision is of a judicial nature) or, (2) if it is required, it must not be required any longer (where, for example, the administrative process is at a stage where any specialised knowledge has already been applied). In the case of both (1) and (2) the court must also have all the pertinent information before it in order to take the decision itself. Khampepe J concluded that (2) was satisfied for the following reasons: The material error of law had occurred in the final stages of the procurement process; 'all technical components of the process' had already been undertaken by the various IDC bodies; and all that was left was for Exco to approve the recommendations.<sup>88</sup> The Court had also had 'the benefit of the record, with all the pertinent information and recommendations that would have been before Exco'.<sup>89</sup> Moreover, the Court said that the IDC had failed to explain 'how its administrative expertise could come into play at this point or on what basis it could decide differently'.<sup>90</sup>

For the above reasons, Khampepe J concluded that the court was as qualified as the IDC to award the tender to Trencon. She did not, however, consider whether the court was institutionally competent to make that order. If factor (a) is in fact a strict requirement, as the Court can be read to have suggested, then apart from being qualified to order substitution, Khampepe J ought, in addition, to have considered whether taking the decision itself would have given rise to issues of polycentricity. In explaining why polycentric matters are generally ill-suited for consideration by courts, Fuller referred to the multitude of intersecting interests and issues to which such decisions can give rise.<sup>91</sup> In this case, for instance, a relevant consideration may have been the fact that a partially fulfilled contract would have to be terminated and replaced with a new agreement with considerable financial implications for both the IDC and the public purse.

Turning to factor (b), foregone conclusion, the Court said that this is satisfied where there is 'only one proper outcome of the exercise of an administrator's discretion and "it would merely be a waste of time to order the [administrator] to reconsider the matter"'<sup>92</sup> or, put differently, 'remittal would serve no purpose' since there would be no 'discretion left to exercise'.<sup>93</sup> In concluding that the

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<sup>86</sup> Ibid at para 49.

<sup>87</sup> *Trencon* HC (note 65 above) at para 53.

<sup>88</sup> *Trencon* (note 1 above) at para 57.

<sup>89</sup> Ibid at para 58.

<sup>90</sup> Ibid.

<sup>91</sup> See L Fuller 'The Forms and Limits of Adjudication' (1978–79) 92 *Harvard Law Review* 353.

<sup>92</sup> *Trencon* (note 1 above) at para 49, quoting from *JCC* (note 9 above) at 76E–F.

<sup>93</sup> *Trencon* (note 1 above) at para 59.



outcome of the tender process was foregone, the court relied on the fact that Trencon had scored the highest points throughout the process (even following the proposed price escalation); that all of the IDC's in-house bodies as well as its external experts had recommended that it be awarded the tender; and that it was common cause that Trencon's non-appointment could only be attributed to Exco's material error of law. In response to the IDC's contention that it retained a discretion not to award the tender to the highest points-earner, or not to award it at all, the Court reasoned that, irrespective of the validity of any other bid, the question was whether the IDC was bound to award the tender to Trencon. And, in the absence of 'objective criteria or justifiable reasons',<sup>94</sup> it concluded that the IDC was in fact bound, especially because Trencon was the highest points-earner and Exco had not cited any other reason (besides its material error of law) for its decision.<sup>95</sup>

What is of crucial significance in relation to this factor is Khampepe J's emphatic view that a court will be competent to enquire whether this factor has been met only after it has made a positive finding in (a). In her assessment, 'there can never be a foregone conclusion unless a court is in as good a position as the administrator'.<sup>96</sup> She also explained that it would be more difficult to establish the inevitability of a particular outcome where the administrator's unique expertise and experience have not been adequately applied to the matter.<sup>97</sup> This statement demonstrates a significant development from the traditional approach and does provide some clarity, since establishing that a particular outcome is a foregone conclusion is now dependent on a court's having the requisite institutional expertise and competence to decide the issue.

## 2 Other Relevant Factors

While the cases reflecting the traditional approach did not distinguish between different forms of delay, Khampepe J draws a distinction between a delay resulting in a change of circumstances (or pre-judgment delay) and delay occasioned by remittal. This seems to be what she had in mind when she said that delay 'could cut both ways'.<sup>98</sup> Regarding the second form, if the further delay arising from remittal would be prejudicial to the affected party, who has already waited a very long time for a decision, then substitution may be appropriate. This is in contrast to the first form, where delay may, for instance, favour remittal if the administrator's needs have changed fundamentally; the circumstances have been drastically altered; or if further delay would have a negative impact on the public purse (or, presumably, on those depending on the services being procured). This consideration is particularly relevant to the procurement context, where tenders depend very much on the needs of the administration at a particular time. However, the Court's suggestion that a drastic or fundamental change in circumstances occasioned by delay would favour remittal may be read to suggest

<sup>94</sup> Ibid at para 63.

<sup>95</sup> Ibid at para 65.

<sup>96</sup> Ibid at para 50.

<sup>97</sup> Ibid at para 49.

<sup>98</sup> Ibid at para 51.

that a lesser change would not. In response, I argue that even a minor change may favour remittal depending on how this factor is weighted against the other relevant factors.

In relation to delay occasioned by the litigation process – a form of pre-judgment delay – the Court was emphatic: ‘What must be stressed is that [such a delay] should not easily clout the court’s decision in reaching a just and equitable remedy’<sup>99</sup> and that, particularly in appeals, ‘delay is inevitable’.<sup>100</sup> Moreover, Khampepe J cautioned that if a litigation delay were always to work against substitution, it would have the undesirable consequence of encouraging state parties to engage in protracted litigation so as to avoid substitution.<sup>101</sup> In essence, she said that delay caused by the appeal process will almost never work against substitution owing to the rule that ‘an appeal should be decided on the facts that existed when the original decision was made’.<sup>102</sup> In support of this, the Court relied on a general statement made by Froneman J in *Billiton Aluminium*.<sup>103</sup> But even in that judgment it was recognised that ‘[t]his is not an inflexible rule and after-the-fact evidence may be admitted ... in “exceptional cases that cry out for the reception of post-judgment facts”’.<sup>104</sup> And, more pointedly, surely this rule cannot extend to the remedy that is just and equitable. If facts on the ground have changed, of course that is relevant to what relief is going to be appropriate in the circumstances.<sup>105</sup> In particular, if the tender is now not needed at all, why must the government procure something that it no longer needs? Or if the needs of government have changed or the market landscape could provide more competitive bids, why should it be bound by the existing tender and the present bidders? Khampepe J said that the public purse matters as a reason in favour of substitution. Why then could it not also work against substitution, as these examples suggest that it should?

Khampepe J went on to say that even if reliance could be placed on the delay occasioned by changed circumstances in this case (which, she added, was not possible since the IDC had not adduced any evidence to this effect),<sup>106</sup> a mere change in price was insufficient to establish a change in circumstances.<sup>107</sup> It is not entirely clear what she means by a change in price, but presumably she is referring to the price bidders would be willing to charge. Wishing to take the distinction between public and private law seriously, Khampepe J then reasons that contract-price adjustment is the subject of ‘ordinary contractual negotiations’ between the parties and cannot, therefore, have a bearing on the appropriate remedy in public

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<sup>99</sup> Ibid at para 52.

<sup>100</sup> Ibid at para 53.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid at para 52.

<sup>103</sup> *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* [2010] ZACC 3, (2010) 31 ILJ 273 (CC), 2010 (5) BLLR 465 (CC) (‘*Billiton Aluminium*’) at para 35.

<sup>104</sup> Ibid at para 36, quoting the words of Comrie J in *Van Eeden v Van Eeden* 1999 (2) SA 448 (C) at 453A.

<sup>105</sup> Section 38 of the Constitution states that ‘[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief’.

<sup>106</sup> *Trencon* (note 1 above) at para 73.

<sup>107</sup> Ibid at para 72.

law.<sup>108</sup> But logically, the fact that a bidder may no longer be willing to charge the price at which it tendered initially must necessarily impact on a court's decision to order substitution, irrespective of the area of law it is apparently subject to.

Traditionally, factors such as bias or incompetence have sometimes been treated as sufficient on their own to warrant substitution and sometimes not.<sup>109</sup> *Trencon* perpetuates this uncertainty. In relation to bias or incompetence, consistent with the traditional view, the Court says that where it would be unfair to require the applicant to resubmit itself to the administrator's jurisdiction, this 'would weigh heavily in favour of substitution'.<sup>110</sup> Good faith is a further factor considered in *Trencon*, where Khampepe J explains that 'the fact that the IDC acted in good faith when it was moved by a material error of law should be a *strong consideration*'.<sup>111</sup> However, stating that these factors weigh heavily or are strong considerations is not guidance enough, since it remains unclear from the scheme of the judgment whether any of the factors under (c) can be considered in the absence of establishing (a) and (b). On the one hand, if (a) and (b) are interpreted as strict requirements then the factors in (c) will never be separate grounds upon which substitution can be granted. On the other hand, if (a) and (b) are not strict requirements, but only have to be weighted more heavily, it seems possible that the presence of any one of these factors could justify substitution – assuming that this is what fairness demands.

### 3 Fairness

Relying on the dictum in *Livestock*, Khampepe J said that even before the PAJA, 'courts almost invariably considered the notion of fairness'.<sup>112</sup> In articulating a role for fairness, she located the power to substitute in s 8(1)(c)(ii)(aa) of the PAJA in the context of a court's wider discretion to make 'any order that is just and equitable' in terms of s 8(1).<sup>113</sup> The effect, as Khampepe J explained, is that 'even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution'.<sup>114</sup> Therefore, in addition to exceptional circumstances, a court would still be required to satisfy itself that substitution would be fair to all parties. The suggestion here is that fairness is essentially a separate factor to be taken into account over and above the existing factors. But later on Khampepe J wrote that '[t]he *ultimate consideration* is whether a substitution order is just and equitable'<sup>115</sup> and went on to explain (by example) that 'having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence'.<sup>116</sup> Taken to their logical conclusion, these latter statements could be read to suggest that what matters

<sup>108</sup> *Ibid* at para 75.

<sup>109</sup> Compare, eg, *JCC* (note 9 above) at 76F–77B and *Competition Commission* (note 26 above) at paras 17–18 with *Intertrade* (note 5 above) at para 43.

<sup>110</sup> *Trencon* (note 1 above) at para 54.

<sup>111</sup> *Ibid* at para 77 (emphasis added).

<sup>112</sup> *Ibid* at para 36.

<sup>113</sup> *Ibid* at para 35.

<sup>114</sup> *Ibid*.

<sup>115</sup> *Ibid* at para 47 (emphasis added).

<sup>116</sup> *Ibid* at para 54.

ultimately is fairness, or simply that fairness (not exceptional circumstances) is the test that courts should apply.

Despite this somewhat confusing formulation, a constructive reading of the judgment suggests that it was probably not Khampepe J's intention to elevate fairness to being the overriding test or to treat it as a separate factor, but rather to introduce a degree of flexibility to ensure that courts do not formalistically stick to the established factors by, for example, engaging in a rigid box-ticking exercise in deciding whether substitution is justified. My view is that it was not necessary for the Court to use fairness in this way: the existing factors have never been exhaustive and it has always been open to the courts to add to the list in light of the facts and circumstances of a particular case. The flexibility that Khampepe J is calling for is therefore inherent in the discretionary power itself and need not be derived from the principle of fairness. The crucial point is that the established factors are, in fact, concrete manifestations of equity, some motivate for substitution (such as the fact that the outcome is forgone) while others cut against it (such as where the delay has meant that the existing contract is near completion). In effect, the function of fairness is to inform the question whether exceptional circumstances are present. Put differently, it is the underpinning or normative basis of the existing factors. It is certainly not, and has never been, a separate, stand-alone reason for substitution.

In the subsequent case of *Westinghouse*,<sup>117</sup> the SCA revisited the *Trencon* test. In this case, following the finding that Eskom had unlawfully awarded a tender to Areva for the replacement of steam generators at the Koeberg nuclear power station in the Western Cape, the SCA was asked to substitute Areva with another contractor, Westinghouse. Notwithstanding the finding that Eskom had acted unlawfully in relying on considerations not contained in the bid criteria, Lewis JA held that it would not be equitable to award substitution for the following reasons: Eskom should still be given an opportunity to rerun the tender process and to decide whether the criteria it had considered was in fact vital;<sup>118</sup> further delay resulting from substitution would be undesirable given that the work under the existing contract had already commenced and that there was a deadline looming;<sup>119</sup> and the award of the tender to Westinghouse was not clearly a foregone conclusion, especially if these additional considerations (that Eskom deemed vital) were taken into account.<sup>120</sup> In deciding whether substitution was justified Lewis JA, applying the *Trencon* test, did not treat fairness as a separate factor or a decisive test. Rather, these concrete factors (with their basis in fairness) informed, and ultimately justified, the court's decision to remit rather than substitute.

The Court's approach to fairness in *Trencon* also raises important questions about its repeated preference for flexibility at the expense of developing some

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<sup>117</sup> *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another* [2015] ZASCA 208, 2016 (3) SA 1 (SCA), 2016 (1) All SA 483 (SCA) ('*Westinghouse*'). When this judgment went on appeal to the Constitutional Court in *Areva NP Incorporated in France v Eskom Holdings Soc Ltd and Others* [2016] ZACC 51, the issue of substitution was not revisited owing to the Court's dismissal of the matter on a narrow procedural basis.

<sup>118</sup> *Westinghouse* (note 117 above) at para 76.

<sup>119</sup> *Ibid* at para 77.

<sup>120</sup> *Ibid* at para 78.

real law.<sup>121</sup> While it is easy (and at times justified) to criticise rules as being formalistic and characteristic of a different age of adjudication unsuited to the kind of transformative adjudication that our Constitution demands, the fact remains that there is significant value in rule-based reasoning: it is helpful for litigants and courts trying to understand and apply the law. This can provide a safety net against arbitrary and unjust decision-making by guiding the exercise of judicial discretion, and has the real benefit of truncating litigation by encouraging predictability in legal outcomes.<sup>122</sup> A good example of this kind of reasoning is the *Intertrade* judgment, which essentially found that no matter how egregiously an administrator has behaved, it can never be fair or rational for a court to order substitution where it lacks the necessary information or requisite institutional competence to take the decision itself.<sup>123</sup> In effect, the judgment stands for the proposition that in the absence of factor (a), ordering substitution would, in general, not be justified. The purpose of laying down this rule was not to impose rigidity on a court's discretionary powers but to provide direction on how this particular discretion ought to be exercised.

## V CONCLUDING REMARKS

This note has levelled two main criticisms against the exceptional-circumstances enquiry in *Trencon*. The first relates to the absence of clarity as to the nature and content of (and also the relationship between) the various factors that underlie the test, both under the traditional approach and as they were interpreted and applied in *Trencon*. The second relates to the uncertainty occasioned by the Court's

<sup>121</sup> See, eg, *Lee v Minister for Correctional Services* [2012] ZACC 30, 2013 (2) SA 144 (CC), 2013 (2) BCLR 129 (CC), where the Court introduced a flexible standard for assessing factual causation in the delictual context. In essence, it reasoned that where a strict application of the common-law test for factual causation would lead to an injustice, it should be applied flexibly. Moreover, in *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23, 2014 (6) SA 123 (CC), 2014 (10) BCLR 1195 (CC) a minority of the Court concluded that the appropriate standard for assessing the lawfulness of the implementation of a valid affirmative action measure was fairness. In a contractual context, in *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) Ngcobo J found that a time-bar clause in a contract could be declared contrary to public policy on grounds that it was unreasonable or unfair. This dictum has given rise to the impression that fairness is now the standard for not enforcing promises in contracts, as evidenced by the subsequent approach in *Botba and Another v Rich NO and Others* [2014] ZACC 11, 2014 (4) SA 124 (CC), 2014 (7) BCLR 741 (CC), where the Court concluded that '[t]o the extent that the rigid application of the principle of reciprocity may ... lead to injustice, our law of contract, based as it is on the principle of good faith, contains the necessary flexibility to ensure fairness' (para 45). Again, in *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16, 2014 (4) SA 474 (CC), 2014 (8) BCLR 869 (CC), which concerned the enforceability of a private arbitration award in contravention of a statute, Froneman J resorted in his minority judgment to the standard of fairness as a reason for enforcing the arbitration award. He reasoned that '[p]ublic policy in the interpretation, application and enforcement of contracts embraces issues of fairness. Fairness is one of the core values of our constitutional order. When the enforcement of arbitration awards on the basis of public policy is at stake, fairness lies at the heart of the enquiry, not at its periphery' (at para 126).

<sup>122</sup> See F Schauer 'Formalism' (1998) 97 (4) *Yale Law Journal* 509. See further JC Froneman 'Legal Reasoning and Legal Culture: Our "Vision" of Law' (2005) 16 *Stellenbosch Law Review* 3 and G Quinot 'Substantive Reasoning in Administrative-Law Adjudication' (2010) III *Constitutional Court Review* 111. Both Froneman and Quinot recognise the value, and necessity, of formal (not formalistic) reasoning in adjudication.

<sup>123</sup> *Intertrade* (note 5 above) at para 43.

resort to fairness as a flexibility-enhancing mechanism in the overall substitution enquiry.

In justifying the Court's approach, Khampepe J explained that it 'accords with the *flexibility* embedded in the notion of what is just and equitable'.<sup>124</sup> But in fixing on flexibility, the Court has compromised on some much-needed clarity in this area and the importance of giving guidance to courts and litigants on how this discretion ought to be exercised. And while there is an inevitable tension between certainty, on the one hand, and the flexibility of more variable standards on the other, a legal system simply cannot function without a minimum level of certainty.<sup>125</sup> Woolman says the following in this regard:

An approach to constitutional adjudication that makes it difficult for lower court judges, lawyers, government officials and citizens to discern, with *some degree of certainty*, how the basic law is going to be applied, and to know, with *some degree of certainty*, that the basic law is going to be applied equally, constitutes a paradigmatic violation of the rule of law.<sup>126</sup>

For these reasons – the lack of clarity as to the interplay between the factors and Khampepe J's treatment of fairness – I cannot agree with my colleague, Lauren Kohn, that the Court achieved the desired balance between certainty and flexibility. In the end, and whatever the state of public procurement may be in South Africa, the courts need a principled, guided basis for deciding whether to substitute. *Trencon* missed its chance.

<sup>124</sup> *Trencon* (note 1 above) at para 55 (emphasis added).

<sup>125</sup> See *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34, 2016 (1) SA 621 (CC), 2016 (1) BCLR 28 (CC) at para 37 and *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) at para 26, where the court acknowledges the centrality of legal certainty in our constitutional state.

<sup>126</sup> Woolman (note 63 above) at 763 (emphasis added).