THE INFLUENCE OF THE *OUDEKRAAL* AND *KIRLAND* DECISIONS ON THE LEGAL STATUS OF AN INVALID ADMINISTRATIVE ACTION

BY

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DECLARATION

By submitting this dissertation electronically, I declare that the entirety of the work therein is my own original work, that it has not been submitted for any degree or examination in any other university or institution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Obakeng Terence Van Dyk

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ABSTRACT

An administrative action that does not comply with the Constitution of the Republic of South Africa (the Constitution) and/or the Promotion of Administrative Justice Act (PAJA) is invalid. This position is in line with the rule of law. However, since administrative acts are performed by public functionaries who appear to have the necessary authority, it is usually in the domain of the courts to decide whether those acts are indeed invalid. The current legal position dealing with the legal nature and status of invalid administrative action is centred around two court decisions, namely *Oudekraal Estates (Pty) Ltd v City of Cape* (*Oudekraal*) and *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* (*Kirland*). The Courts in both decisions held that if an invalid administrative act is not set aside by a competent court, it will continue to be binding and give rise to legal consequences. The main objective of this study is to analyse the legal nature of invalid administrative action and how the *Oudekraal* and *Kirland* decisions influenced the status of invalid administrative decisions. This study will also investigate the anomaly that invalid administrative decisions can lead to legally binding consequences.

In the *Kirland* decision, two different approaches to the treatment of invalid administrative action were proposed by the majority and minority judgments. Both these approaches were anchored in two different principles of the rule of law, one approach by Cameron J favouring the principle of legal certainty, and the other approach advanced by Jafta J favouring the principle legality. In the discussion of the *Kirland* decision, the merits and demerits of the two approaches were evaluated. The discussions of these two approaches by the majority and minority judgments reveal that more work still needs to be done to ensure that a balance is struck between the principles of legal certainty and legality. This study explored ways on how best to manage the collision between legality and legal certainty.

In the analysis of the *Oudekraal* and *Kirland* decisions, it also became evident that the status and nature of invalid administrative action cannot be divorced from an enquiry on whether such decisions can be varied or revoked. For that reason, this study investigated whether the *Oudekraal* and *Kirland* decisions altered the common

law position that enabled a public authority to vary or revoke its own invalid decisions, in certain instances, without approaching the courts.

Furthermore, this study used the Life Esidimeni-matter to better understand some of the practical implications and influence of the *Oudekraal* and *Kirland* decisions on the treatment of invalid administrative action. Finally, the study explored the possible introduction of administrative tribunals into our law to enable more people to have access to an efficient forum that could ensure that injustice is limited.

Keywords: Invalid administrative action, legal status of invalid administrative action, presumption of validity, rule of law, legality, legal certainty, administrative tribunal, collateral challenge, second actor theory, revocation and variation of administrative acts

LIST OF ACRONYMS

ADR Alternative Dispute Resolution

MEC Member of the Executive Committee

NGO Non-Governmental Organisation

PAJA Promotion of Administrative Justice Act

SCA Supreme Court of Appeal

SITA State Information Technology Agency

CHAPTER 1

1.1 Main research problem

An administrative action that does not comply with the Constitution of the Republic of South Africa (the Constitution)[1] and the Promotion of Administrative Justice Act[2] (PAJA) is invalid.[3] The current legal position dealing with the legal nature and status of invalid administrative action is centred around two court decisions, *Oudekraal Estates (Pty) Ltd v City of Cape*[4] (*Oudekraal*) and *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd*[5] (*Kirland*).[6] Briefly, the Courts in both decisions held that if an invalid administrative act is not set aside by a competent court, it will continue to be binding and give rise to legal consequences. The main objective of this study is to analyse the legal nature and legal consequences of invalid administrative action and how the *Oudekraal* and *Kirland* decisions influenced that state of affairs.[7]

Besides analysing the legal status of invalid administrative action in South Africa, this study will carefully examine the majority and minority judgements in the *Kirland* case. The reason for this is that the Constitutional Court judges were divided on the treatment of invalid administrative action. The majority and minority judgments relied on different tenets of the rule of law, that is, legal certainty and legality, and came to different conclusions.[8] The fact that both decisions relied on the rule of law, which is a constitutional principle, presents interesting and important points of discussion that this study will grapple with.[9] In my opinion, more academic attention should be directed towards understanding the tension between the rule of law principles of legali-

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1 The Constitution of the Republic of South Africa, 1996.

2 3 of 2000.

3 See sections 2 and 33 of the Constitution and section 6(2) of PAJA. Also see *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20 and *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at paras 48-49.

4 *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

5 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC).

6 These decisions are discussed in greater detail in chapter 2 at paras 2.4 and 2.5.

7 This legal position is not without exception. In cases where a subject is forced to comply with an invalid administrative action, they can raise a collateral challenge. Collateral challenges are discussed in chapter 2 at para 2.4.2.

8 This point is discussed in chapter 2 at paras 2.5.2 and 2.8 respectively.

9 Boonzaier is of the view that "[t]hese tensions within the rule of law, and the Court's deployment of it, confirm that further academic treatment is needed." (2015:2). Also see Price 2013:661.

ty and legal certainty. In an attempt to determine whether the two different approaches in *Kirland* would bring about different legal and practical consequences to the status and nature of the invalid administrative act, an investigation of the merits and demerits of the two approaches will be undertaken. It is expected that this exercise will create clear principles and guidelines for administrative law lawyers and state functionaries who deal with the legal status of invalid administrative actions.

However, the current legal position is not without legal and practical difficulties.[10] For example, in terms of the current legal position, if an invalid administrative decision is not taken on judicial review by the right actor, such a decision will stand and be treated as legal irrespective of the fact that it did not comply with the law.[11] It is the aim of this study to investigate the legal and practical difficulties that this legal position might present in the current constitutional dispensation.[12]

At a practical level, there seems to be no uniform treatment of invalid administrative action. An example of a departure from the current legal position can be found in *The Report into the "Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province" No Guns: 94+ Silent Deaths and Still Counting* (Life Esidimeni-matter),[13] (Health Ombud's Report), written by the Health Ombud, Professor Makgoba (the Ombud). He found the licencing of Non-Governmental Organisations (NGOs), which was an administrative action, to be unlawful and that the licences issued were also invalid.[14] Despite the Ombud not being a competent court, the government, and all concerned complied and acted in accordance with his findings and

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10 For example, it can be said that the legal position on invalid administrative decision can likely "validate" invalid administrative if not taken on judicial review. This point will be taken further in chapters 2 and 3.

11 This proposition is in line with both *Oudekraal* and *Kirland* decisions. See the argument made by Cameron J in his *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) (*Merafong*) at para 43.

12 This study will also discuss some of the theoretical problems raised by the cases discussed in this study. See chapter 2 at paras 2.7-2.8.

13 See the Health Ombud's Report. Available at http://ohsc.org.za/final-report-into-the-circumstances-surrounding-the-deaths-of-mentally-ill-patients-gauteng-province/. Accessed on 5/04/2019. Also see the arbitration award issued, available at http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf. Accessed on 5/04/2019.

14 Health Ombud Report at page 19, at para 5.2.5 where the Ombud held that "[i]t was also established during the investigation that the licensing process was unlawful because: unauthorised officials signed documents without proper delegation; NGOs were issued with licences without being properly inspected for compliance; The licence did not specify the service requirements". Also see Health Ombud Report at page 39 where the Ombud held that "there were several unlawful and irregular licenses issued to the NGOs by the Director of Mental Health."

even reissued new licences in an attempt to correct the earlier invalid licences (without a competent court setting the original administrative action aside).

The above discussion demonstrates that the status of invalid administrative action cannot be removed from an enquiry on whether such decisions can be varied or revoked by an administrator. Therefore, this study will also investigate whether the current legal position governing status and nature of invalid administrative action altered the common law position that enabled a public authority to vary or revoke its own invalid decisions in certain instances without approaching the courts.[15]

This study notes that one of the significant challenges for administrative law is the "exaggerated prominence of judicial review as the main avenue for judicial review".[16] The current judicial review process before a court of law can be lengthy, slow and expensive.[17] It should be noted that both the Constitution[18] and PAJA[19] empower a court or tribunal to review an administrative decision. With this presumption in mind, coupled with the need for an efficient administration, this study will examine whether now is not the opportune time to consider administrative tribunals in an attempt to halve the load of the courts.[20] Commenting on tribunals, Wade and Forsyth said that tribunals are an important aspect of administrative law machinery. They argue that if there are satisfactory tribunals in place, there will be less judicial review required by courts.[21] Administrative tribunals can also make administrative justice more accessi-

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15 Baxter 1984:372-382. Also De Ville 2003:79-81 and Hoexter 2012:276-280. Also see Pretorius 2020:20, where he argues as follows: "It is clear from *Kirland* (unsatisfactory though that decision is in some respects) that the author of a facially invalid decision is, in the absence of statutory authorisation, not entitled to reverse or disregard that decision himself. If he doubts the validity of his own decision, he must take it on review, failing which it remains effective pro tempore. It is debatable whether *Oudekraal* provided authority for this principle; but the principle now seems established. The question remains whether the principle applies across the board, even in the exceptional instances in which, at common law, it perhaps did not apply."

16 Quinot 2015:25.

17 Wade & Forsyth 2004:907. Also see Armstrong 2011:186 and Quinot 2015:25.

18 Section 33 of the Constitution.

19 Section 6 of PAJA.

20 In her Masters dissertation, Gillian Armstrong made this observation: "The South African government currently spends, indeed wastes, a significant amount of money on administrative law litigation. Due to the limitations of judicial review, even after the high costs of litigation and the long duration of court proceedings, the results achieved may still be unsatisfactory. Furthermore, judicial review is unsuited to giving effect to systemic administrative change and the improvement of initial decision-making."
Also see Wade and Forsyth 2004:906.

21 Wade & Forsyth 2004:906. Devenish *et al* argue that: "[t]he exercise of administrative power consequently impacts directly and significantly on the lives of individuals. The prohibitive costs of challenging administrative decisions in the High Courts has the effect of forcing individuals to accept decisions of the administration, even though they are profoundly aggrieved, either

ble to South Africans since such forums are usually associated with resolving disputes in quicker and cheaper and will in the process be of great benefit to the public purse.[22]

1.2 Reasons for the selection of this topic

It is worth repeating that the main aim of this study is to investigate the legal nature and consequences of invalid administrative action. The *Oudekraal* case, a Supreme Court of Appeal decision, is the principal decision where a South African court had to comprehensively deal with the legal consequences of defective administrative action and how such action should be treated. This unquestionably makes the *Oudekraal* decision significant in South African administrative law.[23] Owing to its importance, the *Oudekraal* decision will form the basis of the discussion of the legal consequences of invalid administrative action.

However, the Supreme Court of Appeal is not the only superior court that has been required to rule on the status and effect of invalid administrative action. The Constitutional Court has also dealt with matters dealing with this issue.[24] *Kirland* was the first matter where the Constitutional Court was asked to pronounce on the status and effect of invalid administrative action.[25] In *Kirland*, the Constitutional Court was invited to decide on the correctness of the *Oudekraal* decision.[26] The Court found *Oudekraal* to be good law and applied it.[27] This is why the discussion and analysis of *Oudekraal* are of great importance to this study, due to the fact that the decision was foundational to the *Kirland* decision. The *Kirland* decision is also significant to this

by the decisions or the process through which the decisions have been reached." (2001:444) Also see page 448.

22 Wade & Forsyth 2004:907. Also see Quinot 2015:25.

23 Pretorius (2020:1) regards the *Oudekraal decision* as probably the most annotated Supreme Court of Appeal judgment of recent times. This clearly shows that this decision is not only important to administrative law, but to our law in general.

24 For the purposes of this study the following Constitutional Court cases are of great importance and relevance: *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd; Merafong City Local Municipality v AngloGold Ashanti Ltd*; *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC); *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* 2019 (3) SA 621 (CC); 2019 (4) BCLR 429 (CC) and *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* 2020 (4) SA 375 (CC); 2020 (1) BCLR 41 (CC).

25 This case is discussed in greater detail in chapter 2 at para 2.5.

26 See *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 68. Pretorius (2020:20) is of the view that Cameron J did not have to rely on *Oudekraal* and only did so because the state parties had invited the court to decide on the correctness of Oudekraal.

27 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at paras 100-106.

area of the law because, in that matter, the highest court in the land lent its voice on this issue. As already mentioned above, the Court in *Kirland* was divided into two sides, one side favouring legal certainty and the other side favouring legality, both being tenets of the rule law.[28] There is a possibility that one day the minority's position might very well become the majority position in later decisions or the Constitutional Court might be able to merge or find a middle ground between the two approaches advanced in the *Kirland* decision. It is for these reasons that an academic study dealing with these possibilities is essential for the growth of administrative law.[29] To reach that point, it is prudent to also look at the merits and demerits of the approaches advanced by the Constitutional Court decisions on this issue. The assessment of those two approaches in this study will also highlight the constitutional importance of the *Kirland* decision.[30] It is for these reasons that the *Oudekraal* and *Kirland* decisions will be foundational to this study. In addition to the *Kirland* decision, this study will also discuss relevant Constitutional Court decisions.[31]

Another practical reason for the discussion of these two cases is that this study will help clarify the legal and practical implications of a finding that an administrative act that is invalid is binding until set aside by a court. In both *Oudekraal* and *Kirland,* the Courts held that the presumption that administrative acts are valid until declared otherwise by a competent court is fundamental to the functioning of a modern administration.[32] This study will also evaluate this proposition.[33]

1.3 Key questions to be answered

1. According to *Oudekraal* and *Kirland* decisions, what is the legal status of invalid administrative action and what are the legal and practical consequences of these decisions for the legal status?

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28 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* at para 39; Pretorius 2005:833; Hoexter 2015:218.

29 Boonzaier 2015:2. Also see Price 2013:661.

30 See chapter 2 at paras 2.5-2.8.

31 Among the relevant decisions of the Constitutional Court is: *Merafong City Local Municipality v AngloGold Ashanti Ltd; Department of Transport and Others v Tasima (Pty) Ltd; Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* and *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others.*

32 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 37, *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at paras 88-91. These cases are discussed in chapter 2 at paras 2.4-2.5.

33 See chapter 2 of this study at paras 2.4-2.8.

2. Would the minority's approach in *Kirland* have had any significant bearing on the current practical and legal consequences of invalid administrative action?
3. Following on this, using the Life Esidimeni-matter as an example, does the current legal position permit state functionaries to correct their earlier invalid decisions by agreement with the person concerned without a court first setting aside the earlier invalid decision? Did *Oudekraal* and *Kirland* close the door to the common law position on the administrator's ability to revoke or rescind its decisions?
4. What recommendations can be made and what conclusions can be drawn from the study?

1.4 Terminology

In this study, the words invalid, defective and unlawful will be used interchangeably to refer to administrative acts or decisions that did not comply with the Constitution or any other law of the Republic. Unless the context provides otherwise, this study will refer to administrative action within the meaning of section 33 of the Constitution and not necessarily administrative action as defined in PAJA. It should also be noted that throughout this study, the presumption of validity is used to refer to the fact that an invalid administrative action is treated as valid and effective, and may continue to have legal consequences until set aside by a competent forum.

1.5 Research methodology

The primary methodology in this study will be a literature study. Several sources such as case law, legislation, academic articles, academic textbooks and postgraduate dissertations will be analysed. This study will also draw from foreign jurisdictions in the Commonwealth in order to properly understand the current legal position in South Africa. This study will investigate the merits and demerits of the approaches advanced by the majority and the minority in the *Kirland* and *Merafong City Local Municipality v AngloGold Ashanti Ltd* (*Merafong*) decisions and the practical and legal consequences of each approach. In the discussion of the merits and demerits of the two approaches, comparisons will be made with how other jurisdictions in the Commonwealth have dealt with the issues raised by the decisions which are the sub-

ject of this discussion. This study will use the Journal for Juridical Science referencing and formatting style.

1.6 Chapter outline

Chapter 1 of this study will deal with the introduction and background of this study. In chapter 2, this study will discuss the current legal status and nature of invalid administrative action, as well as the practical and legal consequences thereof. This will be achieved by firstly analysing the legal position before the Supreme Court of Appeal decision in *Oudekraal*. This analysis will include a discussion of the legal position on the variation and revocation of administrative decisions and the doctrine of *functus officio,* amongst other things. This discussion will be followed by a detailed analysis of the *Oudekraal* and *Kirland* decisions and their legal and practical consequences for the legal status of invalid administrative action. In this analysis, it would also be considered whether the position adopted by minority judgments in *Kirland* and *Merafong* would have had any significant bearing on the current practical and legal consequences of invalid administrative action. To conclude, this chapter will deal with the theoretical tension between legal certainty and legality.

In chapter 3, the legal foundation from chapter 2 regarding the current legal and practical status of invalid administrative action will be used to fully discuss and analyse the Life Esidimeni-matter. This discussion will be introduced by the analysis of the relevant legislative framework. The Life Esidimeni-matter will be used to establish whether the current legal position permit state functionaries to correct their earlier invalid decisions by agreement with the person concerned without a court first setting aside the earlier invalid decision. Chapter 4 will deal with recommendations and conclusion of this study. This chapter will also consider whether it would be practical for our law to introduce administrative tribunals to alleviate the pressure on the court's judicial review workload.

CHAPTER 2: The legal status and nature of invalid administrative action

2.1 Introduction

This chapter will discuss and analyse the current legal status and nature of invalid administrative action as well as the practical and legal consequences thereof. It will achieve this by analysing the Supreme Court of Appeal's decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[1] and the Constitutional Court's decision in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd.*[2] I will begin by briefly discussing the legal position on the treatment of invalid administrative actions before the *Oudekraal* decision. This brief discussion aims to provide a helpful background that will assist in fully understanding these two decisions. This chapter will also evaluate the merits and demerits of the two different approaches proposed in *Kirland* on the treatment of invalid administrative action, one approach by Cameron J favouring legal certainty, and the other by Jafta J favouring legality. At the end of that excursus, the expectation is that the opposing approaches will be clarified in a manner that might allow for later development of the middle ground between these two opposing principles of the rule of law.

2.2 Treatment of invalid administrative acts before *Oudekraal*

In administrative law, there used to be a debate on whether invalid administrative acts were deemed to be void or voidable.[3] Since time immemorial, administrative acts carried out contrary to legal precepts were treated or characterised as "void", sometimes referred to as "absolutely void" or "void *ab initio*", or "voidable".[4] This distinction served some purpose in certain instances.[5] Administrative acts that were not authorised by law were generally said to be void.[6] Since a "void" administrative ac-

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1 *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

2 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*).

3 Hoexter 2012: 546. Also see Burns and Beukes 2006:519.

4 Baxter 1984:355-357; *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others*, 2001 (3) SA 344 (N) at 356B-G and the authorities referred to therein; De Ville 2003:326-327 and Wade and Forsyth 2004:305.

5 For example, a void decision, as opposed to a voidable decision, could be ignored by the administrative functionary concerned and that would have resulted in there being no need to review the decision in question. See De Ville 2003:327 where this and other instances are discussed.

6 *Bhengu v Registering Officer for Bloemfontein Native Location* 1935 OPD 108 at 112, *Duckworth v Publications Control Board* 1971 (4) SA 436 (D) at 441E-G. Also see Baxter 1984:355-357 and De Ville 2003:326-327.

tion was regarded as having no legal existence, a public authority could ignore the relevant act and take a new decision regarding the matter at hand.[7] A court reviewing a "void" administrative act was compelled to "set it aside with all its consequences".[8] In contrast, an administrative act influenced by an error of law but performed within the powers of the relevant administrator was said to be "voidable".[9] Administrative decisions were deemed to be "voidable" because it was assumed that such acts were performed within the bounds of the administrator's powers and for that reason were valid and effective until set aside by a court.[10] Baxter argued that since administrative acts are performed by public functionaries who appear to have the necessary authority, it is in the domain of the courts to authoritatively make a determination as to whether those acts are within the powers of the public functionary in question.[11] According to Baxter, the proposition that administrative acts are voidable finds its roots in the "presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta"*.[12] This presumption of validity is one of the vehicles promoting legal certainty.[13] In terms of this maxim, until the administrative action in question is found to be unlawful, there is no certainty that it is.[14] The presumption of validity has been recognised by the Constitutional Court[15] and the Supreme Court of Appeal.[16]

This presumption of validity is not without criticism.[17] This distinction between "void" and "voidable" was how courts classified invalid administrative action and ascribed different consequences to acts found to be "void" or "voidable". This characterisation

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7 De Ville 2003:326-327. Also see Baxter 1984:355-357.
8 De Ville 2003:327.
9 De Ville 2003:327.
10 Wade and Forsyth 2004:305.
11 Baxter 1984:355. Also see Boonzaier 2015:2 and Pretorius 2020:5.
12 Baxter 1984:355-356. See *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 27, where the Court quotes Baxter. Also see Wolf's discussion of the origin of this principle (2018:692-694). Also see Pretorius 2009:563, who is of a different view. His views are discussed below in para 2.7.
13 Pretorius 2005:833. Also the discussions of the *Oudekraal* and *Kirland* decisions below in paras 2.4 and 2.5 respectively.
14 Baxter 1984:355.
15 *Njongi v MEC, Department of Welfare,* 2008 (4) SA 237 (CC); 2008 (6) BCLR 571 (CC) at paras 44-45 and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC).
16 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 27.
17 The criticisms that have levelled against the presumption of validity are discussed below at para 2.7.

was not always without problems.[18] As early as 1984, Baxter already argued that the dichotomy between "void" and "voidable" was inappropriate in administrative law.[19] Highlighting his discomfort with this distinction, he said that:

> [T]he question of validity has to be looked at from two points of view: namely, the principle of legality itself, and the application of that principle within the constitution. In so far as an unlawful act contravenes the principle of legality, being therefore unauthorized, it may be said to be 'void'; but for the purpose of the practical application of the principle of legality, 'void' can very seldom, if ever, mean 'absolutely void' since legal uncertainty, the acquiescence in unlawful action and the refusal of judicial remedies may all leave unimpugned a formally void act, and the presumption of validity renders the act legally effective. ... The use of the term 'voidable' to describe these latter acts is fundamentally misleading since it causes confusion concerning their formal status − in so far as it falsely suggests that they are *authorized* − and because it misdescribes the role of the courts − in so far as it implies that absence of annulment thereby *ratifies* otherwise invalid but effective acts.[20]

Due to the conceptual difficulties raised by Baxter above, there was a move by courts to depart from the distinction.[21] The move away from this distinction was completed when the Supreme Court of Appeal decided *Oudekraal*.[22] The Constitution of the Republic of South Africa (the Constitution)[23] characterises "law or conduct inconsistent with it" as invalid.[24] The Constitution now enjoins a reviewing court to

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18 In *Hoffman-La Roche v Secretary of State for Trade and Industry* [1975] AC 295 at 365, an English decision, Lord Diplock held that: "It leads to confusion to use terms as 'voidable', voidable *ab initio*, void or a nullity as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or latent defects, before its validity has been pronounced on by a Court of competent jurisdiction."

19 Baxter 1984:357 and Wolf 2018:688. Also see Hoexter 2012:546.

20 Baxter 1984:356-357.

21 The passage from Baxter quoted in the text, was quoted with approval in *Transnet Bpk h/a Coach Express en 'n Ander v Voorsitter, Nasionale Vervoerkommissie, en Andere* 1995 (3) SA 844 (T) at 846F-847E. See Davis J in *Spier Properties (Pty) Ltd and Another v Chairman of the Wine and Spirit Board and Others* 1999 (3) SA 832 (C) at 845F-846B and Wolf 2018:688. Also see comments made by Nicholson J in *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others* at 356B-G. Also see the judgment of Binns-Ward AJ in *Searle v Mossel Bay Municipality and Others* (CPD case no. 1237/09, 12 February 2009, unreported) on the void and voidable dichotomy. De Ville (2003:331) had suggested that this dichotomy should be done away with in the new constitutional dispensation. Also see *Oudekraal Estates (Pty) Ltd v City of Cape Town* at paras 29-31; Saller 2005:725 and Hoexter 2012:546.

22 In *Oudekraal,* the Court said that the distinction between factual and legal existence can adequately explain how an invalid act can give rise to legally valid consequences. See *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 29. However, before *Oudekraal*, despite the criticism levelled against "void" or "voidable" and the problems they present, some of our courts continued to use this characterisation. See, among others, *Spier Properties (Pty) Ltd and Another v Chairman, Wine and Spirit Board, and Others* at 845. Also see *Transnet Bpk h/a Coach Express en 'n Ander v Voorsitter, Nasionale Vervoerkommissie, en Andere* 1995 (3) SA 844 (T) at 846F-847E.

23 Constitution of the Republic of South Africa, 1996.

24 Section 2 of the Constitution.

declare "any law or conduct that is inconsistent" with it, invalid.[25] Consequently, administrative action that is not "lawful, reasonable and procedurally fair" no longer needs to be branded as "void" or "voidable" – it is simply invalid.[26]

The above discussion demonstrates that the status and nature of invalid administrative action cannot be divorced from an enquiry on whether such decisions can be varied or revoked. If such a possibility exists, then it will be necessary to examine the circumstances in which variation or revocation is possible. It is appropriate to first deal with the legal position concerning variation and revocation of administrative acts before dealing with *Oudekraal* and *Kirland* decisions because this issue was raised in one of those decisions. That discussion, which follows below, is aimed at providing the necessary background to the discussions of the *Oudekraal* and *Kirland* decisions.

2.3 Variation and revocation of administrative action before *Oudekraal*

Administrative functionaries are responsible for "the nuts and bolts of everyday state operation".[27] Administrative decisions can have different levels of importance in the lives of those affected by the decision in question. For instance, administrators have powers to accept and or reject claims conferring financial benefits, or exercise powers in a manner that can advance or prejudice a career, powers to determine degrees of disablement, and powers to select beneficiaries for benefits.[28] Administrative decisions do not only affect individuals subjected to them.[29] Society at large might base its actions on the assumption of the lawfulness of a particular administrative decision.[30] Due to that reason alone, undoing an administrative decision could

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25 Section 172 of the Constitution. Also see section 8 of the Constitution. This point is also discussed by Quinot and Maree 2015:42.

26 Section 33 of the Constitution.

27 Freund and Price 2017:202. For a detailed discussion of the nature of the functions performed by administrators, see Baxter 1984:57-58 and Hoexter 2012:10-12.

28 See Baxter 1984:2. Also see Devenish *et al* (2001:444) and Armstrong (2011:57-58), where she quotes a discussion of Govender outlining some of the responsibilities the state has to the individual. See also Hoexter 2012:10.

29 See Baxter 1984:2, Devenish *et al* 2001:444, Armstrong 2011:57-58 and Hoexter 2012:10.

30 According to Baxter, disputes in administrative law are trilateral due to the fact that they always involve an individual, the public authority and the general public. This is due to the fact that administrative decisions are never really bilateral but can have general effects. See Baxter 1984:57-58. Also see *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2014 2 All SA 493 (SCA) at para 20.

potentially have an impact on several subsequent actions or decisions.[31] If an administrative functionary can change its decision "willy-nilly", such a situation could lead to what has been termed "intolerable uncertainty".[32]

Revocation and variation can take two forms. It can be a variation and revocation of general administrative action or legislative administration action.[33] In the case of legislative administration acts, the answer to the question of revocation and variation of administrative acts is easily answered by the Interpretation Act.[34] Section 10(3) of the Interpretation Act states that "[w]here a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws". This provision, therefore, allows for revocation and variation of legislative administrative acts like rules and regulations by the administrator or body empowered to make them. In the case of general administrative acts, the wording of section 10(1) of the Interpretation Act could lead to a conclusion that there is no general principle that administrative decisions cannot be varied or revoked.[35] That provision provides that "when a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires". Simply put, this provision could be interpreted as granting an administrator the authority to exercise powers granted by the empowering provision as and when the administrator deems fit to do so.[36]

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31 *Welgemoed v The Master* 1976 (1) SA 513 (T) at 520E and *Khumalo v MEC for Education, KwaZulu Natal* 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) at para 47.

32 *Sachs v Dönges* NO 1950 (2) SA 265 (A) at 284; Also Baxter 1984:372 and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* (SCA) at para 21. Pretorius 2009:537. Also see *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at para 75, where Mogoeng CJ cautioned against disregarding "binding and constitutionally or statutorily sourced decisions".

33 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 128 and 135; *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd* [2007] 1 All SA 154 (SCA) at para 27, and *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) at para 10.

34 33 of 1957. These powers should be exercised in accordance with the Constitution and PAJA. Also See Hoexter 2012:276.

35 Hoexter 2012:276.

36 Hoexter 2012:276. It should be noted that the Supreme Court of Appeal in *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd* at para 27 held that: "The question whether or not legislation impliedly provides authority (for revocation in this case) ultimately depends upon an interpretation of the statute concerned." Therefore, be-

Understandably, the above-discussed provisions allowing for revocation and variation of administrative decisions can lead to a lack of certainty and finality in administrative law. The *functus officio* doctrine was South African law's response aimed at giving expression to the principle of finality.[37] According to Baxter, once an administrator has rendered their decision, they become *functus officio* if the empowering provision does not make allowance for the variation or revocation of the decision in question.[38] The courts have also held that "a person to whom a statutory power is entrusted is *functus officio* once he has exercised it, and he cannot himself call his own decision in question".[39] Pretorius, who writes extensively on the doctrine of *functus officio*,[40] states that:

> According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.[41]

It is, therefore, clear that the general position is that once a decision has been made, that decision is final and cannot be varied or revoked.[42] However, Baxter lists instances where an administrator can vary its decisions.[43] There are also instances where legislation makes provision for variation and revocation of an administrative

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fore the Interpretation Act is consulted, the statute should first be interpreted to determine whether it confers powers of variation or revocation.

37 Pretorius 2005:833.

38 Baxter 1984:372-373. Also see De Ville 2003:74-76.

39 *Thompson t/a Maharaj & Sons v Chief Constable, Durban* 1965 (4) SA 662 (D) at 667C. Also see *De Freitas v Somerset West Municipality* 1997 (3) SA 1080 (C) at 1082I.

40 South African courts and one of the leading textbooks on administrative law have quoted Pretorius's work on occasion when dealing with the doctrine of *functus officio*. See, for example, *PT Operational Services (Pty) Ltd v Retail and Allied Workers Union obo Ngweletsana 2* (2013) 34 ILJ 1138 (LAC) at para 24; *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* [2013] 3 All SA 435 (SCA) at para 23; *Liban Abdi Mohamed v the Minister Of Home Affairs and Others* [2016] ZAWCHC 13 at para 30; and *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) at footnote 36. Hoexter 2012:278 at footnotes 163 and 169.

41 Pretorius 2005:832. This position espoused by Pretorius was adopted by the courts in *Retail Motor Industry Organisation v Minister of Water & Environmental Affairs* at para 23 and *PT Operational Services (Pty) Ltd v Retail and Allied Workers Union obo Ngweletsana 2* at para 24.

42 *Retail Motor Industry Organisation v Minister of Water & Environmental Affairs* at para 25.

43 Baxter 1984:372-373.

decision.[44] Pretorius acknowledges that this rule is not an absolute one.[45] It is safe to conclude from the above authorities that whether or not an administrator is *functus officio* will be determined through the interpretation of the empowering provision to ascertain whether it provides for revocation or variation.[46]

This discussion concludes the part of the study that dealt with the treatment of "invalid" administrative action before the *Oudekraal* decision. With this helpful background, it is now convenient to start the discussion of the two cases that are the subject of this study. What follows below is a discussion of how the courts in these decisions dealt with the status and nature of invalid administrative action. However, little attention will be given to the remedy the courts granted after entertaining the merits of the review. The reason is that remedies are generally discretionary and will almost always depend on the circumstances of each case.

The difficult task of striking a balance between legality and legal certainty as competing rule of law principles is an ever-present issue in administrative law. What follows below is an analysis which explores how South African courts have tried to reconcile these two competing principles. The *Oudekraal* decision kick-starts the discussion on how Courts have grappled with these competing principles of the rule of law.

2.4 *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*

In this matter, Oudekraal Estates was the owner of undeveloped land adjacent to the suburb of Camps Bay, Cape Town. Oudekraal Estates' immediate predecessor in title had secured the approval for the development of the land as a township in terms of the relevant Ordinance.[47] In 1996, decades after the approval of the township, Oudekraal Estates sought approval of the engineering services plan, as a further step that would have led to the establishment of the township.[48] The Cape Metropolitan Council (City Council) refused to approve this plan because the City Council was

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44 Some legislation explicitly provides for variation and revocation of decisions in certain instances. See sections 59(3)(a) and 62 of the Local Government: Municipal Systems Act 32 of 2000; section 80 of the Local Government: Municipal Structures Act 118 of 1998; section 28 of the Marine Living Resources Act 18 of 1998 and section 19(4) of the Property Valuation Act 17 of 2014. It should also be noted that in these listed provisions, variation or revocation is always subject to vested rights.

45 Pretorius 2005:832.

46 Pretorius 2005:864.

47 Township Ordinance 33 of 1934 (Cape) (Ordinance).

48 *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2002 (6) SA 573 (C) (*Oudekraal* High Court judgment) at 581C-J.

of the view that Oudekraal Estates' right to establish the township lapsed when it failed to obtain approval of the general plan and its lodgement within the prescribed period.

Oudekraal Estates approached the High Court seeking declaratory relief that the extensions of time granted by the administrator were *intra vires* (within powers) and every subsequent act involved in the establishment and approval of the township were all *intra vires* and of full force and effect.[49] The High Court held that once the administrator had approved the application for a township, such permission lapsed after 12 months if the general plan was not submitted.[50] According to the Court, if the extension of time granted was not in compliance with the time periods prescribed by the Ordinance, that extension was a nullity.[51]

The High Court allowed the collateral challenge raised by the City Council due to the potential for a breach of religious rights.[52] The Court held that:

> Were this Court, notwithstanding the finding that the Administrator's actions and consequent registration were not lawful, to grant applicant relief and hence proclaim that an illegal action had now transmogrified into a legal decision, it would undermine the very principle of legality which is now so central to our constitutional enterprise.[53]

Here, the High Court placed more weight on the principle of legality than legal certainty. The Court dismissed Oudekraal Estates' application.[54] Dissatisfied with this turn of events, Oudekraal Estates approached the Supreme Court of Appeal.

The Supreme Court of Appeal, in a joint unanimous judgment by Howie P and Nugent JA, held that when all the relevant factors are considered, the administrator's decision to approve the township on the terms granted was invalid.[55] The Court found that the administrator's permission to approve the township was "unlawful and

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49 *Oudekraal* High Court judgment at 578B-E.
50 *Oudekraal* High Court judgment at 587E.
51 *Oudekraal* High Court judgment at 587E.
52 *Oudekraal* High Court judgment at 595D.
53 *Oudekraal* High Court judgment at 593D.
54 *Oudekraal* High Court judgment at 596I. However, at 596C, the Court was of the view that the value of certainty in administrative decisions required it to allow the City Council's collateral challenge.
55 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 25.

invalid at the outset".[56] After this finding, the Court proceeded to determine the consequences that should follow from its finding.[57] The Court held as follows:

> Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.[58]

The Court reviewed the relevant authorities on this subject,[59] including the legal position in the United Kingdom. The Court then relied on and applied the United Kingdom case of *Boddington v British Transport Police*.[60] The Supreme Court of Appeal referred to passages of the *Boddington*-decision where that Court cited with approval Professor Christopher Forsyth's[61] analysis of the legal status of invalid administrative action.[62] The Court went on to say that:

> In our view the apparent anomaly – which has been described as giving rise to 'terminological and conceptual problems of excruciating complexity' – is convincingly explained in a recent illuminating analysis of the problem by Christopher Forsyth. Central to that analysis is the distinction between what exists in law and what exists in fact. Forsyth points out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts.[63]

The Supreme Court of Appeal also held that once accepted that invalid acts exist in fact but not in law and that their factual existence can produce legally valid conse-

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56 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 26.

57 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 26.

58 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 26.

59 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at paras 27-34.

60 [1998] UKHL 13; [1999] 2 AC 143 [HL]; [1998] 2 All ER 203; [1998] 2 WLR. *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 32.

61 Christopher Forsyth: "'The Metaphysic of Nullity': Invalidity, Conceptual Reasoning and the Rule of Law" in Essays on Public Law in Honour of Sir William Wade QC ed Christopher Forsyth and Ivan Hare (Clarendon Press) 141.

62 In *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143 [HL]; [1998] 2 All ER 203; [1998] 2 WLR at 172B-D, the Court held: "The best explanation that I have seen is by Dr. Forsyth who summarised the position as follows in 'The Metaphysic of Nullity, Invalidity, Conceptual Reasoning and the Rule of Law,' at p. 159: 'it has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by a (sic) analysis of the law against the background of the familiar proposition that an unlawful act is void.'"

63 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 29.

quences, there is no need to have recourse to a concept of voidability or a presumption of validity.[64] The Court explained that the distinction between factual and legal existence could adequately explain how an invalid act can give rise to legally valid consequences.[65] The Court reasoned that in these circumstances, what needs to be determined is whether the second actor, acting with the honest belief that the first act was valid, has the power to validly act, despite the invalidity of the first act.[66]

Importantly, the Court also held that "if the validity of consequent acts is dependent on no more than the factual existence of the initial act, then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court".[67] The Court concluded that the validity of each of the steps taken in terms of the Ordinance was not dependent on the legal validity of the administrator's approval, but merely upon the fact that it was given.[68] The Court also pointed out that this case highlighted another aspect of the rule of law, that is, "a public authority cannot justify a refusal on its part to perform a public duty by relying … on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it".[69] The Court was of the view that the City Council's reliance on a collateral challenge to the validity of the administrator's decisions was misplaced and therefore did not allow it.[70] The Court was of the view that since, among other things, a real possibility existed that another court might be called upon to set aside the approval of the township,[71] the Court refused to grant the relief sought by Oudekraal Estates.[72]

Oudekraal was subsequently applied by the Constitutional Court.[73] The *Oudekraal* decision is important for a number of reasons. For the purpose of this chapter, I will

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64 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 29.
65 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 29.
66 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 29.
67 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 31.
68 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 32.
69 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 37.
70 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 39.
71 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 46. Also see *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) at footnote 59.
72 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at paras 40-51.
73 *Njongi v MEC, Department of Welfare,* 2008 (4) SA 237 (CC); 2008 (6) BCLR 571 (CC) at paras 44-45, *Camps Bay Ratepayers' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 62 and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) and in other cases that followed the *Oudekraal* and *Kirland* decisions. See *South African Reserve Bank*

only refer to four reasons. Firstly, the *Oudekraal* decision was the first decision where a superior court authoritatively dealt with the legal status and nature of invalid administrative action and the consequences attached to such action. Secondly, the Court adopted the second actor theory that meant that there was no longer a need to refer to the concept of voidability discussed above. Thirdly, the Court's view on the non-discretionary nature of collateral challenges was significant and had great relevance in subsequent cases dealing with collateral challenges. Lastly, the *Oudekraal* decision is now authority for the position that an invalid administrative action is capable of giving rise to legally binding consequences.

Certain aspects of the *Oudekraal* decisions were not explored by the Constitutional Court in *Kirland*, and, therefore, a separate exposition of some of those aspects is warranted. Next follows a discussion on the second actor theory as adopted by the Court in *Oudekraal*. That discussion will be followed by the Court's take on collateral challenges.

2.4.1 The second actor theory

The Supreme Court of Appeal in *Oudekraal* adopted Forsyth's second actor theory. This theory is built on the perception that while unlawful administrative acts (the first acts) do not exist in law, they clearly exist in fact and those unaware of their invalidity (second actors) may take decisions and act on the assumption that these (first) acts are valid.[74] According to Forsyth, whether the first actor has made a valid decision will depend on the second actor's legal powers.[75]

In *Oudekraal,* the Supreme Court of Appeal held "that the Administrator's permission was unlawful and invalid at the outset".[76] The Court also held that the proper enquiry in consecutive administrative acts would be to distinguish between factual and legal

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and Another v Shuttleworth and Another 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC) at para 32, and *President of the Republic of South Africa and Others v South African Dental Association and Another* 2015 (4) BCLR 388 (CC) at para 12. For cases that comprehensively dealt with the *Oudekraal* and *Kirland* decisions see: *Merafong City Local Municipality v AngloGold Ashanti Ltd*; *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC); *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* 2019 (3) SA 621 (CC); 2019 (4) BCLR 429 (CC) and *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* 2020 (4) SA 375 (CC); 2020 (1) BCLR 41 (CC).

[74] Wade & Forsyth 2004:303. Forsyth 2006:223. Also see Hoexter 2012:548.

[75] Forsyth & Hare 1998:144. Also see Forsyth 2006:219-224, where he discusses guidelines that will help determine the powers of the second actor.

[76] *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 26. Also see Forsyth 2006:218.

existence when dealing with an invalid administrative act.[77] This approach adopted by the Court signalled a welcome departure from the "void" and "voidable" dichotomy and thereby eliminating the conceptual difficulties that resulted from this duality.[78] By so doing, the Supreme Court of Appeal in *Oudekraal* endorsed Forsyth's proposition that "while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions".[79] This decision brought a welcome certainty in our law concerning the treatment of invalid administrative action, by our courts.[80] In Elliot's discussion of the second actor theory, he correctly points out, in my opinion, that the advantage of the second actor theory is that it would preserve theoretical orthodoxy by recognising the voidness (invalidity) of the original unlawful act.[81] This theoretical orthodoxy prevents the voidness (invalidity) of the initial act from automatically setting off the domino effect under which all subsequent acts would fall.[82]

The second actor theory is not without criticism. Before the *Oudekraal* decision was decided, this theory already drew criticism from two British lawyers, Pleming and Robb.[83] They expressed some reservations about this theory due to what they believe to be the theory's inability to find the balance between legality and legal certainty.[84] Commentators here at home have raised similar concerns.[85] Saller, in her analysis of Constitutional Court's decision in *Jaftha v Schoeman and Others, Van*

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77 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at paras 26-31.

78 Forsyth 2006: 218. Also see Saller 2005:725. Van Eetveldt (2018:14, 18-19), relying on Forsyth's interpretation of *Oudekraal*, is of the view that the second actor theory did not "give the final word on whether invalid administrative acts are strictly void or strictly voidable". Freund and Price (2017:192) refer to the position adopted in South African Administrative law as "a via media between the two extremes".

79 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 29.

80 Saller 2005:739. Also see Boonzaier 2015:12 and footnote 72, where he argues that the certainty brought about by the *Oudekraal* decision, even goes beyond second actor cases as the *Kirland* decision showed.

81 Elliot 2005:98.

82 Elliot 2005:98. Pleming and Robb (1999:255) are of the opinion that the failure of the "void"/ "voidable" analysis to provide clear instances when an unlawful administrative action should have legal effect, is the main reason why the second actor theory should be broadly welcomed. Also see Saller 2005: 725.

83 Pleming and Robb 1999:254-258.

84 Pleming and Robb 1999:256.

85 Saller 2005:725. Pretorius's analysis (2009:537-565) of the *Oudekraal* decision indicates that the decision did not attain this balance. Van Eetveldt goes as far as arguing that the second actor theory should be done away with, at least in the context of collateral challenges. See Van Eetveldt 2018:80-85, where he discusses some of the problems with the second actor theory, and other methods used by courts. Van Eetveldt's solution is a section 36 analysis as suggested by Quinot and Maree (2015:41-42).

Rooyen v Stoltz and Others,[86] argues that the claim that the second actor theory adopted in *Oudekraal* was able to strike a balance between legality and certainty should be received with scepticism.[87] Pleming and Robb also question the circumstances in which it will be right to afford more weight to the principle of legal certainty than the principle of legality and suggest that the courts should always start the analysis on the powers of the second actor strongly favouring legality over certainty.[88] They warn against the danger that the protection of legal certainty may slip into the protection of administrative convenience.[89] Pleming and Robb believe that the analysis of the second actor theory does not give enough weight to the principle that the state is subject to the law.[90] Mindful of these facts, Saller advocated for a case by case approach to capture the constitutional balance that must be struck between legality and legal certainty.[91] According to Saller, the incorporation of the second actor theory should be welcomed because the second actor theory "requires a court to concentrate on the question that is surely the most relevant: what are the consequences of an invalid administrative act?".[92] Saller argues that an interpretation of the second actor's empowering provision that allows for a foreseeable infringement of the constitutional rights of any person can never be acceptable in law.[93]

Saller's article highlights the *Oudekraal* decision's failure to resolve the imbalance between legality and legal certainty adequately.[94] This remains the fact despite the introduction of the second actor theory to our law.

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86 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC). In this case, the Constitutional Court declared section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 unconstitutional for its failure to provide judicial oversight in execution against immovable property of the debtor. However, the Court did not mention whether its order operated prospectively or retroactively only.

87 Saller 2005:729.

88 Pleming and Robb 1999:256.

89 Pleming and Robb 1999:256. Freund and Price (2017:194-196,199-207) are of the view that since the tension between legality and legal certainty cannot be completely resolved, it should be properly managed. They are of the view that the courts should use its discretion in their attempts to manage the tension between legality and legal certainty. They provide a non-exhaustive list of factors that should guide the court.

90 Pleming and Robb 1999:256. Also see Freund and Price 2017:193-194.

91 Saller 2005:731. Also see Freund and Price 2017:194-196,199-207.

92 Saller 2005:726.

93 Saller 2005:739. Freund and Prince (2017:202) are of the view that "[a]dministrative law generally deals with the nuts and bolts of everyday state operation, rather than matters of high constitutional import. In this context, putting up with a degree of illegality on exceptional occasions in the name of certainty, efficiency and practicality can help things to run smoothly, without necessarily compromising constitutional fundamentals".

94 Saller 2005:739.

One final comment should be made regarding the second actor theory. This theory completely ignores, especially in the context of South Africa where corruption is rife, that the original or first act might be tainted by corruption.[95] The second actor theory could potentially allow a decision tainted by corruption to stand and produce a subsequent decision that is perfectly valid. This situation has the ability to lead us to lawlessness which the constitutional provisions discussed above were designed to guard against.[96] As much as this study supports the move away from "the often tortured distinction between void and voidable administrative acts",[97] it also accepts and supports the comments made by the Saller and Pleming and Robb on the limitations of the second actor theory.

From the above, it is clear that *Oudekraal* was unable to introduce or bring about a conclusive and smooth departure from the "void" and "voidable" dichotomy.[98] The Constitution's mandate to everyone exercising public power is to act in a manner that is "lawful, reasonable and procedurally fair". The second actor theory should not be used to absolve state functionaries from acting in a manner that is consistent with constitutional norms. It is therefore essential for South African courts to be mindful of these criticisms and not to interpret actions of the first actor in a manner that permits the state or its functionaries to escape the rule of law. Taking heed of these comments will provide the courts with the impetus to continue improving on how best to deal with the status and consequences of invalid administrative action.

2.4.2 Collateral challenge

One cannot speak of the influence of the *Oudekraal* decision and leave out a discussion of collateral challenges.[99] A collateral challenge is raised in proceedings that are

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95 The authorities relied on from the United Kingdom on the second actor theory mostly focus on criminal prosecution based on invalid administrative action. See Forsyth & Hare 1998:153. Also see Pleming and Robb 248-250 and Forsyth 2006:212.

96 Forsyth argues that if too much weight is attached to legal certainty, that situation "would amount to an unlimited grant of power to all second actors. The crucial point about the second actor theory is that the powers of the second actor are determined by law". Forsyth 2006:220.

97 Saller 2005:739.

98 Saller 2005:725-740 and Pretorius 2009:537-565. Also see comments made by Pleming and Robb (1999:255-256) on the *Boddington* decision.

99 Brand and Murcott (2014:60-63) and Van Coller (2016:75-80) use the *Oudekraal* decision as a point of departure for their discussion of collateral challenges. To highlight the importance of the *Oudekraal* decision to collateral challenges, chapter 2 of Van Eetveldt's Master's dissertation examines the legacy of the *Oudekraal* decision (2018:11-31). Pretorius (2020:1) regards the *Oudekraal decision* as probably the most annotated Supreme Court of Appeal judgment of recent times.

not designed directly to impeach the validity of the administrative act in question.[100] A collateral challenge will generally be available to a person challenging the validity of an administrative decision when threatened by a public authority with coercive action.[101] In *Oudekraal*, the Court held that "in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence".[102] According to the Court, this is due to the fact that "the validity of the administrative act constitutes the essential prerequisite" for an administrative decision to have legal force.[103] However, the Court still refused to allow the collateral challenge that the City Council raised and regarded that collateral challenge as being misplaced.[104] The following passage from the judgment is important in fully appreciating the Court's reasoning in the matter. The Court said:

> [T]he rule of law dictates that the coercive power of the state cannot generally be used against the subject unless the initiating act is legally valid. [A] public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it.[105]

It appears from the above passage from *Oudekraal* that the Court barred the state from relying on collateral challenges because it viewed it as a remedy that can be raised by a subject against the coercive public power.[106] Forsyth argues that the effect of what the Court said in the above-quoted passage suggest "that all public authorities must accept as valid the decisions of other authorities – or launch a challenge to their validity in court".[107] There are other Supreme Court of Appeal cases decided in the same breath,[108] for example, the Supreme Court of Appeal's decision

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100 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 35.

101 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 32-37 and *3M South Africa (Pty) Ltd v Commissioner of the South African Revenue Service* [2010] 3 All SA 361 (SCA) at para 32, relying on *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd & Others* 1993 (2) SA 245 (C) at 252J–253D. *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* at para 13. Also see *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2016 (2) SA 176 (SCA) at para 17 and *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para 36.

102 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 36. Here the Court was dealing with the comments of the High Court on the court's discretion to allow a collateral challenge. See *Oudekraal* High Court judgment at 590-593. Also see Forsyth 2006:225.

103 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 36.

104 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 39.

105 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 37.

106 See *Oudekraal Estates (Pty) Ltd v City of Cape Town* at paras 35-36 where the Court explains the instances where a collateral challenge will be available.

107 Forsyth 2006:224.

108 See *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* [2015] 2 All SA 657 (SCA) at para 14, *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2016 (2)

in *Merafong City Local Municipality v AngloGold Ashanti Ltd*.[109] The Supreme Court of Appeal in that matter concluded that an organ of state was barred from relying on a collateral challenge.[110] That Court came to this conclusion after relying on and applying both *Oudekraal* and *Kirland* decisions. [111] Brand and Murcott had already predicted that this would happen from their interpretation of the Constitutional Court's decision in *Kirland,* which is discussed below.[112] In their comments on collateral challenges, Brand and Murcott said that "Cameron J's judgment suggests that it will not be enough to raise, collaterally in defence, the invalidity of an administrative act, but that at the very least, a counter-application must be brought in relation to the invalidity of the administrative conduct that is the subject of the dispute".[113] However, the Supreme Court of Appeal's proposition that a collateral challenge is not available to an organ of state was later rejected by the Constitutional Court in *Merafong*.[114] The Constitutional Court held that the fact that the Merafong Municipality was an organ of state did not preclude it from raising a collateral challenge.[115] The Court also refuted Forsyth's interpretation of paragraph 37 of *Oudekraal*.[116] Cameron J held that if one reads paragraph 37 of *Oudekraal* in its entirety, it is apparent that the parts of paragraph 37 of *Oudekraal* relied on by Forsyth did not imply "a general rule of thumb to the effect that all public authorities must accept as valid the decisions of other authorities – or launch a challenge to their validity in court" as suggested by Forsyth.[117]

SA 176 (SCA) (*Merafong* SCA) at para 17, and *Tasima (Pty) Ltd v Department of Transport* [2016] 1 All SA 465 (SCA) at paras 25-27.

109 *Merafong City Local Municipality v AngloGold Ashanti Ltd* (*Merafong* SCA) at para 17.

110 In *Merafong City Local Municipality v AngloGold Ashanti Ltd* (*Merafong* SCA) at para 17, the Court held: "[T]he collateral challenge Merafong Municipality sought to mount against the ruling does not avail it because it is an organ of State. It is established in our law that a collateral challenge to the validity of an administrative action is a remedy available to a person threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative action in question. The notion that an organ of State can use this shield against another organ of State is simply untenable."

111 *Merafong City Local Municipality v AngloGold Ashanti Ltd* (*Merafong* SCA) at para 15.

112 Brand and Murcott 2014:60-63.

113 Brand and Murcott 2014:63. Also see the cases discussed under the collateral challenge remedy in Brand and Murcott 2014:60-63.

114 *Merafong City Local Municipality v AngloGold Ashanti Ltd.*

115 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 59-68.

116 Forsyth 2006:224. See *Merafong City Local Municipality v AngloGold Ashanti Ltd* at footnote 68.

117 See *Merafong City Local Municipality v AngloGold Ashanti Ltd* at footnote 68.

The Court's reasoning in *Merafong* on collateral challenges is somewhat confusing because it represents a departure from the reasoning adopted in both *Oudekraal* and *Kirland*. In *Kirland*, the Court advocated for a direct review of administrative action by the state.[118] As seen above, in *Merafong*, the Court held that collateral challenges could be raised by the state. It may be argued that the reasoning by both the majority and minority in *Merafong* goes against the actual purpose of collateral challenges. The development of collateral challenges can lead to possible confusion in practice since the only determining factor seems to be the delay.[119] The reasoning in *Merafong* seems to clash with what was said by the Court in *Kirland*,[120] if not theoretically but practically. It remains to be seen how the courts will balance the administrator's need to either counter apply or be allowed to raise a collateral challenge in cases that do not involve delay. This balancing exercise will become more interesting when an organ of state wants to raise a collateral challenge against its own decision due to what the Constitutional Court said in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (Gijima)*. The Court held:

> It seems inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights. This must, indeed, be an indication that only private persons enjoy rights under section 33.[121]

An investigation on whether an organ of state will enjoy the right to just administrative action when raising a collateral challenge against its own decision is beyond the aim of this study. However, the Constitutional Court's finding in *Merafong* that organs of state can raise a collateral challenge means that organs of state are entitled to ignore decisions they deem invalid. If such organs of state are compelled to comply, they will be allowed by the courts to raise a collateral challenge successfully. This development that organs of state can also raise a collateral challenge seems to be contrary to the *Oudekraal* decision.[122]

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118 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty)* at paras 82-83.

119 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 83, and *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) at paras 138-140. Van Eetveldt (2018:6) argues that the "law on indirect review lacks coherent organising principles".

120 Paras 82 and 83.

121 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC). For further reading see De Beer 2018:613-630 and Boonzaier 2018:642-677.

122 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 37. Also see Forsyth 2006:220.

2.5 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*

From the above analysis of the *Oudekraal* decision and various commentaries on it, it is evident that that decision was not accepted without criticism. Some of the criticism levelled against the *Oudekraal* decision will become clearer in the discussion of subsequent Constitutional Court decisions. The discussion of the *Kirland* decision will give the reader an idea of the precarious position courts find themselves in when adjudicating the legal status and effect of invalid administrative decisions. The *Kirland* decision will also show that finding the right balance between certainty and legality is never a simple task, particularly when guided by a Constitution that proclaims that law or conduct inconsistent with it is invalid. The discussion of the *Kirland* decision follows.

2.5.1 Factual background and litigation history

In this matter, Kirland Investments applied to the superintendent-general for approvals to build and operate hospitals in Port Elizabeth and Jeffreys Bay.[123] These applications were in fulfilment of the requirements set by the relevant regulations.[124] An advisory committee was appointed to evaluate all applications that were submitted.[125] The advisory committee recommended that Kirland Investments' applications be rejected.[126] This recommendation was accepted by the superintendent-general.[127] Before he could inform Kirland Investments that its applications had been rejected, he was involved in a car accident that kept him away from work for a period of six weeks.[128] During his leave of absence, an acting superintendent-general was appointed.[129]

The Member of the Executive Council of Health in the Eastern Cape (the MEC) requested a meeting with the acting superintendent-general.[130] In that meeting, the MEC persuaded the acting superintendent-general to approve Kirland Investments' applications.[131] The acting superintendent-general acted in accordance with the

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123 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 6.
124 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 4.
125 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 7.
126 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 7.
127 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 7.
128 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 7.
129 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 8.
130 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 9.
131 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 10.

wishes of the MEC and sent Kirland Investments written approval of their applications.[132] Upon the superintendent-general's return from leave, he sent Kirland Investments letters withdrawing the earlier approvals.[133] Kirland Investments were informed of their right to appeal the decision to the new MEC of Health, but their appeal was unsuccessful.[134]

Kirland Investments then instituted review proceedings in the High Court. It sought, among others, orders reinstating the approvals issued by the acting superintendent-general; and an order setting aside the initial decision of the superintendent-general in terms of which Kirland Investment's applications were refused.[135] The High Court found that the procedure followed in withdrawing the approval had not been fair and stood to be set aside as being procedurally unfair in terms of section 6(2)(c) of the Promotion of Administrative Justice Act[136] (PAJA).[137] That Court also set aside the decision of the acting superintendent-general and remitted the applications back to the superintendent-general for reconsideration.[138]

The State parties appealed to the Supreme Court of Appeal. That Court adopted the language of *Oudekraal* and held that for as long as the decisions taken by acting superintendent-general "had not been set aside on review they existed in fact and had legal consequences".[139] The Court dismissed the appeal and held that just like the High Court in this matter,[140] it had no jurisdiction to set aside the approvals granted by the acting superintendent-general.[141] This was due to the Court's finding that the approvals were never taken on review.[142] The State parties appealed to the Constitutional Court.

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132 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 12.
133 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at paras 15-16.
134 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 17.
135 *Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute MEC* for Health, *Eastern Cape and Another* [2012] JOL 28310 (ECG) (*Kirland* High Court judgment) at para 1.
136 3 of 2000.
137 *Kirland* High Court judgment at para 28.
138 *Kirland* High Court judgment at para 30.
139 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 219 (SCA) (*Kirland* SCA judgment) at para 22.
140 See *Kirland* SCA judgment at para 27 where the Court concluded that the High Court had no jurisdiction to decide in the validity of the approval.
141 *Kirland* SCA judgment at para 35.
142 *Kirland* SCA judgment at paras 26 and 35.

2.5.2 Constitutional Court

At the Constitutional Court, four judgments were produced. The first judgment, which was the minority judgment, was written by Jafta J and supported by two of his colleagues.[143] The second judgment was written by Cameron J, the majority judgment, and supported by five of his colleagues.[144] There were two other judgments prepared by Zondo J and Froneman J dealing with whether there was a counter-application by the state parties. The views expressed by Jafta J in his minority will be discussed separately below.[145]

The majority judgment refused to entertain the validity of the approvals because of the state's failure to formally apply to set aside the decision.[146] Cameron J held that even in cases where the decision is defective, "government must formally apply" to court to have that decision set aside.[147] The Court held that formally applying to a court to set aside a decision, gives the reviewing court the opportunity to properly consider all the effects of that decision on those subject to it.[148] The reasoning was that this was due to the fact that despite being defective, a decision "may have consequences that make it undesirable or even impossible to set it aside".[149] The Court then addressed the state parties' argument that they were entitled to ignore the approvals of the acting superintendent-general because the approvals were a nullity.[150] Cameron J rejected this argument and relied on and applied *Oudekraal* and held that:

> [T]he Department's argument entails that administrators can, without recourse to legal proceedings, disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken. This is a licence to self-help. It invites officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public. And it would undermine the courts' supervision of the administration.
>
> …

143 Madlanga J and Zondo J concurred in the judgment of Jafta J.
144 Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Mhlantla AJ and Nkabinde J concurred in the judgment of Cameron J.
145 See para 2.7 below.
146 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 82.
147 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 64. Also see Hoexter (2015:216-218) where she deals with the procedural arguments or approaches advanced by the majority and minority judgments in *Kirland* on whether there should have a counter-application or not.
148 *MEC for Health, Eastern Cape and Another v Kirland Investment (Pty) Ltd* at para 64.
149 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 65.
150 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 89.

> The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality.[151]

In conclusion, the majority judgment held that the approval communicated to Kirland Investments remained effective until properly set aside and could not be ignored or withdrawn by administrative order.[152]

There is another interesting and appropriate decision that deserves to be included in this discussion. That decision is *Merafong City Local Municipality v AngloGold Ashanti Ltd*. In *Merafong*, the Constitutional Court was presented with another opportunity to clarify both the *Oudekraa*l and *Kirland* decisions. As will soon become apparent, it is necessary and important for purposes of this study, to include a brief discussion of this case here. The *Merafong* decision dealt with the manner in which Merafong Municipality handled a decision of the Minister of Water Affairs (the Minister). Acting in terms of the provisions of the Water Services Act,[153] the Minister overturned Merafong Municipality's decision to levy a surcharge on water for industrial use.[154] Merafong Municipality defied the Minister's decision on the grounds that the relevant decision was invalid and continued levying the surcharge.[155] Cameron J, again writing for the majority,[156] had this to say about the legal implications of *Oudekraal* and *Kirland* decisions:

> The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.[157]

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151 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at paras 89 and 103. These quoted passages echo what the Supreme Court of Appeal said in *Oudekraal* (para 26).

152 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 105.

153 See section 8(9) of Water Services Act 108 of 1997.

154 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 1.

155 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 1.

156 With Moseneke DCJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurring. The minority judgment was written by Jafta J with Bosielo AJ and Zondo J concurring. Some aspects of the minority judgment are discussed below.

157 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 41. Also see *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* at paras 94-95.

Cameron J also cautioned against *Kirland* being regarded as preserving "possibly unlawful administrative action" as indefinitely effective.[158] The learned Justice said that all that the *Oudekraal* principle did was to put a provisional brake, for rule of law reasons and good administration, on the determination of invalidity.[159] However, Cameron J submitted that the *Oudekraal* principle does not mean that the invalidity cannot be reversed.[160] The allegedly unlawful action can still "be challenged by the right actor in the right proceedings".[161] This simply means that until the allegedly unlawful administrative action is challenged, for rule of law reasons, that the administrative action stands.[162]

It can be said that the Constitutional Court decision in *Merafong* completes the picture of how our courts treat invalid administrative actions. It is now apposite to briefly give a short summary of the legal position on the status of invalid administrative acts. That summary follows next.

2.6 Summary of the current legal status of invalid administrative action

The court decisions discussed above have already dealt with the legal status and nature of invalid administrative in some detail. However, I believe it is still necessary to summarise the effects of both the *Oudekraal* and *Kirland* decisions under one umbrella. What follows now is a summary of what the courts in those decisions said.

What can be gleaned from the above cases is that an allegedly invalid administrative action that is not taken on review before a competent court will continue to exist and

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158 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 43. Also see *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* at paras 94-95.

159 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 43. Also see *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* at paras 94-95.

160 Pretorius (2020:12-13) cautions against using a phrase like the "*Oudekraal* principle". Pretorius rightly argues, in my opinion, that there was more than one principle that flowed from the *Oudekraal* decision. In addition to the usage of the phrase by Cameron J in the passage from *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 43, also see the judgments referred to by Pretorius in footnote 31. Also see *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* at paras 33-47.

161 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 43. Here, the Court echoed what the Supreme Court of Appeal said in *Oudekraal*. See *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 28. Also see *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* at para 95 where Cameron J again restates this.

162 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 41 and 43. See *Department of Transport and Others v Tasima* (*Pty) Ltd* at paras 147-148. Also see *Swart v Starbuck and Others* 2017 (5) SA 370 (CC); 2017 (10) BCLR 1325 (CC) at para 35, *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* at paras 94-95 and *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* at para 52.

produce legal consequences as if it were valid.[163] A decision that is allegedly invalid cannot and should not be treated as non-existent.[164] This is to ensure both certainty and finality in administrative decision-making and to allow people the opportunity to organise their affairs accordingly.[165] This state of affairs is due primarily to the operation of the presumption of validity.[166] Unless the empowering provision makes allowance for a variation or revocation of a specific administrative act, the administrator will not be allowed to vary or revoke its decisions.[167] Additionally, taking an allegedly invalid administrative decision on judicial review will not suspend the legal effect of the administrative decision in question.[168] A litigant wishing to suspend the operation of an administrative decision pending review must apply to the court for an interdict *pendente lite*.[169] The *Kirland* decision held that the state ought to counter-apply to set aside its own decision it alleges to be unlawful, where the other party goes to court to enforce compliance with an administrative act.[170]

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163 This is the authority flowing from both the *Oudekraal* and *Kirland* decisions. See paras 2.4 and 2.5. Also see *South African Reserve Bank and Another v Shuttleworth and Another* at para 32, and *President of the Republic of South Africa and Others v South African Dental Association and Another* at para 12.

164 The Supreme Court of Appeal in *Kirland* and *Oudekraal* warned state functionaries against deciding the validity of their own decisions. *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 29, *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at paras 66 and 90. *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 36.

165 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 46.

166 Baxter 1984:355-356, De Ville 2003:321-323, and *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 27. See Hoexter 2012:544 and 547. Also see the decisions that have been quoted in this study that relied on the *Oudekraal* and *Kirland* decisions.

167 See para 2.3 above.

168 De Ville 2003: 332-334. *Gründer v Gründer en Ander* 1990 (4) SA 680 (C) at 683H-683I; *Coalcor (Cape) (Pty) Ltd v Boiler Efficiency Services CC* 1990 (4) SA 349 (C) at 358. Also see Hoexter 2012:559.

169 The requirements that a litigant must meet are: "(i) a prima facie right that might be open to doubt; (ii) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (iii) the balance of convenience favourable to the grant of the interdict; and (iv) the absence of any other adequate remedy." These requirements were set out in *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189, which must be read with *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688C-D, as was done by the Supreme Court of Appeal in *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 228G-H. For further reading, see *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at paras 45-47 and *City of Cape Town v South African National Roads Agency Limited and Others* 2015 (6) SA 535 (WCC) at paras 63-75, and *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at paras 49-75.

170 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at paras 82-85. Also see *Department of Transport and Others v Tasima* (Pty) Ltd at para 146. However, in his minority opinion in *Magnificent Mile*, Jafta J argued that the Supreme Court of Appeal in that decision had rightly abandoned the formalistic requirement for a counter-application that was adopted in *Kirland*. See *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* at paras 101-102.

It is also apparent from the discussion of these cases that only the courts can pronounce on the validity of an administrative act.[171] It is not for the administrator or the person subjected to the decision to decide whether or not the administrative act is valid.[172] If anyone alleges that an administrative decision is invalid, unless they can rely on a collateral challenge,[173] they ought to go to court to have it set aside.[174] This is because legal remedies are the province of the courts, and the courts alone.[175] In consecutive administrative acts, a court will foremost determine whether the "substantive validity" of the first administrative act was a "necessary precondition" for the validity of the administrative acts that followed.[176] If the reviewing court finds that the validity of the second act was dependent on the factual existence of the first act, then the second act will be legal and binding until the first act had been set aside by a court.[177] In my opinion, determining whether the first administrative act was a "necessary precondition" for the validity of the second administrative act can only be done by a competent court when interpreting the relevant empowering provision. Once the first act is declared invalid and set aside by a court, all acts performed on the basis of the validity of that first act will also be invalid.[178] It should also be noted

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171 This position is also supported by all members of the Constitutional Court, regardless of their approach to the treatment of invalid administrative action. The writer of the minority judgement in *Kirland*, Jafta J, in his minority opinion in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* crisply said, albeit it in a slightly different context, that "[w]hat is also evident from this section is the fact that the power to declare conduct that is inconsistent with the Constitution invalid is reserved for courts. Even so, it is only courts with the necessary competence which may exercise the power to nullify conduct that is inconsistent with the Constitution". Also see *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* at paras 82-83.

172 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 37, *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at paras 88-91 and *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 36. Also see *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* at paras 50-51, where Madlanga J explains that this state of affairs is informed by rule of law reasons.

173 For a discussion on collateral challenges see para 2.4.2 of this chapter.

174 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 26 and *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 40 and 42.

175 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 27, *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at paras 88-91 and *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 36.

176 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 31. Also see *Camps Bay Ratepayers' Association and Another v Harrison and Another* at para 62.

177 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 37. Also see *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* at para 40.

178 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at footnote 74, relying on the Supreme Court of Appeal decision in *Seale v Van Rooyen N.O.; Provincial Government, North West Province v Van Rooyen N.O.* 2008 (4) SA 43 (SCA) at para 13. Also see *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) at para 31-34.

even in cases were an administrative act found to be invalid, courts still have a discretion to not set aside that invalid administrative decision.[179]

In concluding this short discussion, it is necessary to point out that at the moment, South African administrative law does not classify or categorise invalid administrative decisions. As a result, the most serious defective administrative acts are treated the same way as those that are less serious. This lack of a classification of invalid administrative action means that even the most trivial administrative irregularity will remain valid and binding until set aside by a competent court.[180] In my opinion, it is in keeping the spirit of section 33(3), which seeks to "promote an efficient administration", to treat defective administrative decisions differently and accord them different consequences.[181]

2.7 An examination of the position put forward by Jafta J

As was already stated before, two approaches to the treatment of invalid administrative action were put forward by the Constitutional Court in *Kirland*.[182] Jafta J's approach, which was the approach of the minority, is anchored around the principle of legality. In *Kirland*, Jafta J did not apply *Oudekraal* or distinguish it from *Kirland*. It will become apparent below that the learned Justice only expressed his views on *Oudekraal* in the later judgement of *Merafong*. For that reason, his minority judgments in both *Kirland* and *Merafong* will be considered in this paragraph to determine whether his approach is satisfactory.

At the outset, it should be pointed out that in *Kirland*, Jafta J was of the view that despite there being no formal application to set aside the decision of the acting superin-

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179 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 36. Also see *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA); *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA); *Seale v Van Rooyen NO* at para 13 and *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) at para 9.

180 According to Freund and Price (2017:204) it is "important to distinguish between serious and trivial irregularities by paying close attention to the nature of the defect in question". Wolf (2018:702) is of the view that "[t]he obligation to uphold and respect administrative justice would further require that the legislature should regulate the status of defective administrative acts that are gravely serious, to prevent them from taking effect". This study embraces these suggestions.

181 Wolf (2018:707) argues that the Legislature should also create clarity regarding the status of gravely serious defective administrative action, to prevent injustice.

182 See para 2.5.2 in this chapter.

tendent-general, the validity of such decision should be entertained by the courts.[183] The learned Justice was of the view that an unlawful "conduct must not be allowed to remain in existence on the technical basis" that there was no application to set it aside.[184] In his view, this would be contrary to the principle of legality.[185] According to him, the factual existence of an invalid administrative act cannot render that particular act legally enforceable.[186] In Jafta J's opinion, the *Oudekraal* and *Kirland* decisions go against the rule of law in that they allow a decision that is invalid to become legally enforceable and capable of producing legal consequences.[187] Jafta J, who is the most prominent critic of the presumption of validity in our judiciary,[188] argues that this presumption goes against both the Constitution and Constitutional Court precedent.[189] In *Merafong*, Jafta J expressed his misgivings with the presumption of validity in these words:

> The one difficulty with the statement that says an invalid administrative act may be valid and binding until set aside is how it is applied in practice. Bearing in mind that what gives validity to such act is not the correct exercise of power by the decision-maker, but the failure to seek the setting aside of the invalid act, the question that arises is: at what point of the invalid act does the failure trigger validity and binding effect? Surely it cannot be as soon as the invalid

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183 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 43.

184 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at paras 43 and 50. See Hoexter 2015:217. Also see comments made by Henrico on legal certainty regarding pleadings. (2018:295).

185 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 89. Also see *Department of Transport and Others v Tasima* (*Pty) Ltd* at para 88.

186 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 125-126. See Jafta J's discussion of the *Oudekraal* decision in *Department of Transport and Others v Tasima* (*Pty) Ltd* at paras 87-93. Compare with *Swart v Starbuck and Others* at para 98, where the learned Justice wrote for the minority and held that: "This is because an invalid act that was performed unlawfully cannot render legal another act which is unlawful. Nor can an unlawful act justify another act that is unlawful." Also see *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* at paras 79-91, where the learned Justice again discusses the *Oudekraal* and *Kirland* decisions.

187 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 89. Also see *Department of Transport and Others v Tasima (Pty) Ltd* at paras 81 and *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* at para 85.

188 In his minority decision in *Genesis Medical Scheme v Registrar of Medical Schemes and Another* 2017 (6) SA 1 (CC); 2017 (9) BCLR 1164 (CC) at paras 107-118, Jafta J applied this presumption of validity.

189 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 114 and 139 and *Department of Transport and Others v Tasima (Pty)* at para 123. In his minority opinions in these judgments, Jafta J is of the view that the proposition in *Kirland* goes against the Constitutional Court decisions in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC), *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC), and *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC). The learned Justice argues that these decisions held that "an illegal administrative act has no legal force and as such cannot be enforced" and therefore the presumption of validity pays no regard to the supremacy of the Constitution which expressly declares that conduct that is inconsistent with it is invalid.

decision is made. It is not clear to me whether the invalid act automatically changes into a valid act or some further decision must be taken.

With regard to an illegal administrative act, the difficulty is at what point does the legality principle cease to operate. … How then can it be said that an illegal act becomes valid merely because public officials failed to have it set aside? Does this imply that section 33 of the Constitution which requires that administrative action be lawful ceases to apply if there is a failure to set the action aside?[190]

It is clear that the presumption of validity does have the ability to validate "invalid" administrative action in instances whereby judicial review proceedings are not instituted, or the court refuses to entertain the judicial review application.[191]

Jafta J also states that *Oudekraal* is not authority for the proposition that an invalid administrative act is binding as long as it is not set aside by a competent court because "no court has the power of converting an unconstitutional and invalid act with no legal force into a valid act with binding effect".[192]

Some academics share some of the views put forward by Jafta J.[193] Forsyth also deals with legal objections to this presumption of validity, other than as an interim measure.[194] Forsyth contends that the presumption of validity is not a general principle that has a wider significance.[195] According to him, saying that there exists such a

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190 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 132-133. In one of the latest judgment by the Constitutional Court to grapple with this subject, Madlanga J, in *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* at para 55 said this about the approach adopted by Jafta J to invalid administrative action: "My immediate practical, if not legal, difficulties are manifold. Who rebuts the presumption [of invalidity]? Who – outside of a court process – determines that the invalidity of the administrative action has been proven and that, therefore, the presumption has been rebutted; and how do they do that? What if there is disagreement on whether the illegality has been proven?"

191 For example, in cases where the Court does not entertain the validity of an allegedly invalid administrative due to delay.

192 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 116. Also see Pretorius 2009:537. Pretorius (on the *Oudekraal* judgment) explains that the Court stated that it was not permissible for the Council to disregard the Administrator's approval of the township application merely because it believed that such approval was invalid; that approval could not be ignored until it was set aside in judicial review proceedings. According to Pretorius, in general terms, *Oudekraal* was concerned with the question "whether, or in what circumstances, an unlawful administrative act might simply be ignored, and on what basis the law might give recognition to such acts". He argues that the question that required the Supreme Court of Appeal's attention was whether the invalid initial act could be ignored in view of the fact that later acts had been performed pursuant to it and that the principles articulated in *Oudekraal* should be viewed in this context.

193 For instance, Wolf (2018:697) is of the view that "Jafta J is correct, however, in so far as he reasoned that no court has the power of converting an unconstitutional and invalid act into a valid act. The minority errs, however, in so far as they reasoned that a defective administrative act is not legally binding and enforceable once it has taken effect."

194 Forsyth & Hare 1998:153. Also see Forsyth 2006:224.

195 Forsyth & Hare 1998:153.

general presumption of validity, grants the decision-maker a general warrant of authority to make decisions of whatever kind.[196] Forsyth explains that if we are to accept this as a general presumption of validity that will mean that everything done by the decision-maker, however incorrect, is to be upheld, save where a court, in its discretion, decides to intervene.[197] He is of the view that there is no legal basis for this proposition and that this is a tendency that should be countered rather than encouraged.[198] Jafta J supports this view.[199] According to him, this proposition gives license to a state functionary to undermine the Constitution and the rule of law.[200]

Jafta J's interpretation and understanding of *Oudekraal*, as expressed in *Merafong*[201] and *Tasima*,[202] appear to be in line with the views expressed by Pretorius in his commentary on the *Oudekraal* decision.[203] In his 2020 article, Pretorius went as far as endorsing Jafta J's interpretation of one of the *Oudekraal* principles.[204] Pretorius has also admitted that in Constitutional Court cases that followed *Oudekraal*, the

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196 Forsyth & Hare 1998:153.

197 Forsyth & Hare 1998:153.

198 Forsyth & Hare 1998:154. See Forsyth 2006:224. Also see Pretorius 2009:537.

199 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 127.

200 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 139.

201 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 119.

202 In *Department of Transport and Others v Tasima (Pty)* at para 88, Jafta J said: "*Oudekraa*l lays down a narrower principle that applies in specific circumstances only. That principle draws its force from the distinction between what exists in law and what exists in fact. An invalid administrative act that does not exist in law cannot itself have legal force and effect. Yet the act may still exist in fact, for example an administrative act performed without legal power. It exists in fact until set aside on review. However, since the act does not exist in law, it can have no binding effect." This is similar to what Jafta J said in *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 119.

203 In his analysis of the *Oudekraal* decision, Pretorius (2009:564) concluded that it was "a misconception to regard the Supreme Court of Appeal's decision in the Oudekraal case as authority for a comprehensive proposition that administrative action must be regarded as valid and binding until reviewed and set aside by a court. *Oudekraal* was concerned with a narrower question, namely the effect of an invalid prior administrative act upon a further administrative act performed pursuant to the initial act. In this regard, the Supreme Court of Appeal held that where a 'second actor', assuming the initial act to be valid, performed a subsequent act, and where the factual existence rather than the substantive validity of the initial act was a precondition for the validity of the subsequent act, the latter act could be regarded as valid until the initial act was set aside." Pretorius's views on the *Oudekraal* decision received judicial support in the Labour Court decision in *Gardner and Others v Central University of Technology, Free State* [2010] ZALC 75 at paras 54-58. These views were subsequently upheld by the Labour Appeal Court in *Gardner and Others v Central University of Technology, Free State* [2012] ZALAC 23 at para 85. The court held that "I agree with the Court *a quo* that the decision in *Oudekraal Estates,* above, was no authority for the proposition that every unlawful and invalid administrative act remained binding until such time that it was set aside in judicial proceedings." The *Kirland* decision has since overruled these findings. Pretorius (2020:14) has since admitted this fact.

204 After quoting Jafta J's analysis of *Oudekraal* in *Merafong* at para 119, Pretorius declares that interpretation to be "a correct assessment of one of the *Oudekraal* principle". See Pretorius 2020:26 at footnote 100.

Court "adopted an interpretation of *Oudekraa*l broader than, if not incompatible with, the analysis propounded in [his] initial article. In particular, the Constitutional Court has interpreted the *Oudekraal* doctrine as extending 'well beyond second-actor cases and [as admitting] of no exception, even in cases involving clear illegalities.'"[205]

In Wolf's discussion of cases that dealt with the presumption of validity, she questions whether the presumption of validity is compatible with the concept of rule of law and certain provisions of the Constitution.[206] Wolf concludes that the presumption of validity is outdated[207] and incompatible with the concept of the rule of law, section 33 and section 8(1)[208] of the Constitution.[209] She rightly points out that the purpose of section 33(1) is to compel administrative functionaries to act in a manner that is lawful, reasonable and procedurally fair, and not to shield them when they fail to act in accordance with its commands.[210] According to her, "it is a contradiction in terms to argue that an administrative act is valid until declared invalid. [211] The presumption of validity, she argues, fundamentally starts from the wrong footing, that is, that the validity of administrative action depends on the remedy that is granted, rather than the constitutional norms underpinning its validity.[212]

Jafta J is of the view that our administrative law can still be functional without the presumption of validity.[213] Wolf is of the view that PAJA's definition of an administrative action[214] prohibits the operation of the presumption of validity.[215] According to

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205 Pretorius 2020:14. This fact was earlier pointed out by Boonzaier (2015:12) and Freund and Price (2017:198). For his initial analysis, see Pretorius 2009: 537-565.

206 Wolf 2018:692-695.

207 Wolf 2018:694. This view is shared by Jafta J in both his dissenting judgments in *Tasima* and *Merafong*.

208 This section provides that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".

209 Wolf 2018:692-695.

210 Wolf 2018:694.

211 Wolf 2018:694. According to her, "the same measure cannot be both valid and invalid" at the same time.

212 Wolf 2018:694.

213 In *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 130, Jafta J concludes that: "In our law an unlawful act is void ab initio and thus it can have no legal force and effect." Pretorius on the other hand surveyed cases by our courts where they had declared that an invalid administrative action is void and concludes that: "These cases indicate that, in instances of patent illegality or clear lack of jurisdiction, the relevant administrative act is a nullity and has no legal effect and may be disregarded without any need for judicial intervention." Jafta J and Pretorius advocate for an elimination of the presumption of validity, as a general rule, from our law.

214 In terms of section 1 of PAJA, administrative action means-
any decision taken, or any failure to take a decision, by-
(a) an organ of state, when-

Wolf, the characterisation of administrative action as having a "direct, external legal effect" implies that when an administrative decision has been made known to the subject concerned, that decision becomes legally binding irrespective of whether it is valid or not.[216] In terms of the approach suggested by Wolf, an administrative decision will only become effective if it has been properly communicated to the subject concerned and only then can one examines whether the effective decision is valid or invalid.[217]

In order to explain the "direct, external legal effect" criterion, Wolf relies on the German Administrative Procedure Act[218].[219] Some of the provisions she relies on from the German Administrative Procedure Act sets out in greater detail what constitutes an invalid act[220] and how it can be withdrawn.[221] It should be pointed out that in terms of the German Administrative Procedure, "even though the administrative act is void and not legally binding and enforceable, it must nevertheless be withdrawn for the sake of legal certainty".[222] PAJA does not have provisions that are comparable to

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(i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
which adversely affects the rights of any person and which has a direct, external legal effect.

215 Wolf 2018:695.

216 Wolf 2018:695.

217 Wolf 2018:695.

218 Administrative Procedure Act (Verwaltungsverfahrensgesetz, VwVfG), 25 May 1976.

219 Wolf 2018:678-686.

220 For example, section 44 of the German Administrative Procedure Act, in relevant parts provides that:
"(1) An administrative act shall be invalid where it is very gravely erroneous and this is apparent when all relevant circumstances are duly considered.
(2) Regardless of the conditions laid down in paragraph 1, an administrative act shall be invalid if:
1. it is issued in written or electronic form but fails to show the issuing authority;
2. by law it can be issued only by means of the delivery of a document, and this method is not followed;
3. it has been issued by an authority acting beyond its powers as defined in section 3, paragraph 1, no. 1 and without further authorisation;
4. it cannot be implemented by anyone for material reasons;
5. it requires an action in contravention of the law incurring a sanction in the form of a fine or imprisonment;
6. it offends against morality."

221 The withdrawal of an invalid administrative decision will be in accordance to section 48 of the German Administrative Procedure Act. That section in relevant parts provides:
An unlawful administrative act may, even after it has become non-appealable, be withdrawn wholly or in part either retrospectively or with effect for the future. An administrative act which gives rise to a right or an advantage relevant in legal proceedings or confirms such a right or advantage (beneficial administrative act) may only be withdrawn subject to the restrictions of paragraphs 2 to 4.

222 Wolf 2018:284.

the German Administrative Procedure Act. However, some of our legislation have comparable provisions to the extent that they provide administrators with clear guidance in instances whereby the subject has acted in an unlawful manner to procure an administrative decision[223] or in cases resulting from a delegation of authority.[224] For example, section 28[225] of the Marine Living Resources Act provides clear guidance on what should happen in cases of an invalid administrative decision. Section 28 spells out, in great detail, the administrator's powers to vary and revoke the invalid administrative decision and the process the administrator should follow. However, it should be noted that the provision only deals with unlawful administrative decision resulting from the actions of the subject and not the administrator. Having said that, it cannot be disputed that provisions similar to section 28 of Marine Living Resources Act, provided that they also set out the consequences of an invalidly issued administrative decision, are capable of bringing about the much-needed balance between legality and legal certainty.

This study accepts these criticisms against the presumption of validity as entirely valid. It is argued that even the bench in *Oudekraal* was aware of some of the points raised above against the presumption of validity and that is why the learned Judges held that "[t]he apparent anomaly that an unlawful act can produce legally effective

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223 See section 28 of the Marine Living Resources Act 18 of 1998.

224 See section 59(3)(a) of the Local Government: Municipal Systems Act 32 of 2000 and section 19(4) of the Property Valuation Act 17 of 2014.

225 For example, section 28 of the Marine Living Resources Act 18 of 1998 provides clear guidance on what should happen in cases of invalidity. That section provides:

(1) If a holder of any right, licence or permit in terms of this Act -

(a) has furnished information in the application for that right, licence or permit, or has submitted any other information required in terms of this Act, which is not true or complete;
(b) contravenes or fails to comply with a condition imposed in the right, licence or permit;
(c) contravenes or fails to comply with a provision of this Act;
(d) is convicted of an offence in terms of this Act; or
(e) fails to effectively utilise that right, licence or permit,

the Director-General may by written notice delivered to such holder, or sent by registered post to the said holder's last known address, request the holder to show cause in writing, within a period of 21 days from the date of the notice, why the right, licence or permit should not be revoked, suspended, cancelled, altered or reduced, as the case may be.

(2) The Director-General shall after expiry of the period referred to in subsection (1) refer the matter, together with any reason furnished by the holder in question, to the Minister for the Minister's decision.

(3) When a matter is referred to the Minister in terms of subsection (2), the Minister may -

(a) revoke the right, licence or permit;
(b) suspend the right, licence or permit for a period determined by the Minister;
(c) cancel the right, licence or permit from a date determined by the Minister;
(d) alter the terms or conditions of the right, licence or permit; or
(e) decide not to revoke, suspend, cancel, alter or reduce the right, licence or permit.

consequences is sometimes attributed to the effect of a presumption that administrative acts are valid."[226] When the judges branded this presumption of validity an anomaly, they were aware that it deviated from the principles of administrative law and by consequence, the Constitution.[227]

Another aspect of Jafta J's approach is centred around section 172(1) of the Constitution. That section, in relevant parts, provides:

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

When interpreting this section, Jafta J is of the view that when a court is deciding a constitutional matter under this section, it adopts a two-stage approach. The first enquiry involves determining whether the relevant law or conduct is constitutionally compliant.[228] Jafta J holds that section 172(1)(a) of the Constitution obliges every court to make a declaration of invalidity if it finds any law or conduct to be inconsistent with the Constitution.[229] This the courts *must* do whenever they decide a constitutional matter within their powers. During this first stage, Jafta J holds that the Constitution provides courts with no discretion.[230] When a court finds that the law or conduct complained of is inconsistent with the Constitution, it must declare such law or conduct invalid.[231] He argues that only once the declaration of invalidity has been made, may the court proceed to the second stage where it "considers the effects of

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226 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 27.

227 In the new constitutional era, the presumption was accepted in *Oudekraal Estates (Pty) Ltd v City of Cape Town*; *Njongi v MEC, Department of Welfare* at paras 44-45, *Bengwenyama Minerals (Pty) Ltd v Genorah Resources* at para 85 and in other cases that followed *Oudekraal* that are discussed in this study. See Wolf 2018:694. Pleming and Robb (1999:256) make a similar point.

228 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 60. A similar argument is made *in Department of Transport and Others v Tasima (Pty)* at para 77. Also see *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 117 and 135.

229 This approach was affirmed by the Constitutional Court *in Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* at para 84 and *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) and *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 60. A similar argument is made *in Department of Transport and Others v Tasima (Pty)* at para 77. See *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 117 and 135. For further academic reading, see Quinot and Maree 2015:27-41.

230 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 46.

231 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 46.

the declaration of invalidity" will have on the relevant parties.[232] At the second stage of the enquiry, the court has discretion.[233]

In terms of Jafta J's approach, when courts are presented with evidence that law or conduct is inconsistent with the Constitution, courts should not be prevented by issues of delay in instituting judicial review[234] or technicalities[235] from declaring such law or conduct invalid. Jafta J argues that if courts fail to declare conduct that is inconsistent with the Constitution invalid, they would be giving themselves powers "to make valid administrative conduct that is unconstitutional", which the courts do not have under the Constitution.[236] This proposition that courts must always decide on the validity of an administrative decision, as argued by Jafta J, goes against a string of decisions that held that "[a]n invalid administrative act may be 'validated'[237] by the failure of a person entitled to challenge it to do so, by lapse of time or by a Court's refusal to enquire into its validity."[238] However, from my reading of the Constitutional Court's decision in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*, it appears that the majority per Theron J,[239] endorsed Jafta J's views that delay

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232 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 61. A similar argument is made *in Department of Transport and Others v Tasima (Pty)* at para 77. Also see *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 117 and 135.

233 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 46, Also see the Constitutional court decision in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) at para 101.

234 See *Department of Transport and Others v Tasima (Pty)* at paras 77-81. At para 81, Jafta J held that "[n]o amount of delay can turn an unlawful act into a valid administrative action. This is because apart from the rule of law, section 33(1) of the Constitution prescribes that administrative action must be lawful."

235 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 44.

236 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 60.

237 *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2010 (1) SA 333 (SCA) at para 33. The application of the delay rule would in a sense "validate" a nullity.

238 *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory)* 1991 (2) SA 527 (C) at 532I. Cases where the court found the delay in instituting judicial review to be unreasonable: *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 42C-D. These cases have since been applied in the new constitutional dispensation. See *Spier Properties (Pty) Ltd and Another v Chairman of the Wine and Spirit Board and Others* 1999 (3) SA 832 (C) at 835F-G and *Oudekraal Estates (Pty) Ltd v City of Cape* at para 46. Also see Constitutional Court decisions in *Khumalo v MEC for Education: KwaZulu-Natal* and *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC). Also see *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 43 and *Oudekraal Estates (Pty) Ltd v The City of Cape Town* at para 33.

239 With Basson AJ, Dlodlo AJ, Goliath AJ, Mhlantla J and Petse AJ concurring.

cannot be a factor that prevents a court to declare conduct that is inconsistent with the Constitution invalid.[240]

Now that the approach proposed by Jafta J had been fully set out above, it is apposite to revisit the question we asked in chapter 1. It will be remembered that at the beginning of this study, we asked whether the approach of the minority in *Kirland* could have had any significant bearing on the current practical and legal consequences of invalid administrative action. This study is of the view that this question should be answered in the negative.

The proposition by Jafta J that "an invalid administrative act does not exist in law and that an unlawful act is void" is not new to our law. There are cases decided in the pre-constitutional era where our courts have held that some orders, due to the fact that they were "null and void" or "void ab initio", could be ignored with impunity.[241] This position is, in some instances, supported by the current legal position.[242] The current legal position does this by offering a person forced to comply with invalid administrative action a remedy in the form of a collateral challenge.[243] Supporters of the proposition that an unlawful act is void are of the view that only "flagrant" invalid administrative actions can be ignored.[244] However, if an administrative act can be ignored due to flagrant invalidity without recourse to the courts, this means that anyone can be a judge in their own case. Unfortunately, this is the "self-help" Cameron J warned about in *Kirland.*[245] The practical consequences of an invalid administrative decision, which would exist in fact but not in law, are not properly spelt out in Jafta J's approach. It has already been accepted that "the description of an administrative

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240 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* at para 101. Cameron J and Froneman J with Khampepe J concurring, dissented from Theron J's finding on the issue of delay. See *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* at para 110.

241 *Norris v Mentz* 1930 WLD 160, *Davies v Bekker NO & Smit* 1934 TPD 384 at 386, *Brandfort Munisipaliteit v Esterhuizen* 1957 (1) SA 229 (O), *Coalcor (Cape) (Pty) Ltd v Boiler Efficiency Services CC* 1990 (4) SA 349 (C). Also see the cases referenced in para 2.2 of this chapter.

242 Freund and Price 2017:192.

243 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 32, *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) at para 50 and *3M South Africa (Pty) Ltd v Commissioner of the South African Revenue Service* at para 32. Also see the cases referred to in *Merafong City Local Municipality v AngloGold Ashanti Ltd* at footnote 36.

244 See Pretorius 2009:565; *Coalcor (Cape) (Pty) Ltd v Boiler Efficiency Services CC* at 357I–358C and the authorities discussed there; *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory)* at 532D-J. Compare with *Pikoli v President of the RSA* 2010 (1) SA 400 (GNP):408C–F and *Master of the High Court, North Gauteng High Court, Pretoria v Motala* 2012 (3) SA 325 (SCA) para 14.

245 *MEC for Health, Eastern Cape v Kirland Investments (Pty)* Ltd at para 103.

act as void would not give any or sufficient weight to the principle of legal certainty".[246] It should be accepted that even though Jafta J's approach puts more weight on the principle of legality, his approach will always come short with regards to ensuring legal certainty. In my concluding chapter, I will argue that the approach advanced by both Cameron J and Jafta J to invalid administrative comes short in ensuring that there is a balance between the principle of legality and legal certainty. I then offer suggestions in chapters 3 and 4 that could ameliorate this legal conundrum.

2.8 Collision between legality and legal certainty: An examination

At the beginning of this study, I stated that the main difference between the two approaches put forward by the Constitutional Court to the treatment of invalid administrative decisions is based on the different tenets of the rule of law, legality and certainty. I have since dealt with those two approaches. From those discussions, in my opinion, it is clear that the collision between legality and legal certainty had not yet been resolved and will persist. It is, therefore, necessary for this study to briefly discuss these specific aspects of the rule of law.

What is the collision between legality and certainty all about? The discussion that follows is aimed at answering that question. It is trite that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.[247] Our courts have held that public power will only be legitimate when exercised lawfully.[248] All this is in line with the doctrine of legality, which is an offshoot of the rule of law.[249] The doctrine of legality is one of the consti-

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246 Pleming and Robb 1999:255.

247 See sections 2 and 33 of the Constitution and section 6(2) of PAJA. Also see *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* at para 20 and *Affordable Medicines Trust and Others v Minister of Health and Another* at paras 48-49.

248 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 56 and *Affordable Medicines Trust and Others v Minister of Health and Another* at paras 48-49. Also see Konstant 2015:88 and Van Der Sijde 2015:213-214.

249 Section 1(c) of the Constitution. See *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* at para 17; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 68. Also see Plasket 2002:84 and Hoexter 2004:189.

tutional controls by which the exercise of public power is regulated by the Constitution.[250]

The doctrine of legality is but one side of the rule of law coin. The other side is the principle of legal certainty.[251] In most legal texts, legal certainty is discussed without providing its definition.[252] Legal scholars and judges seldom define legal certainty, and therefore, a universally-accepted definition of legal certainty is not easily accessible.[253] What is usually said of legal certainty is that it is a tenet of the rule of law.[254] At a general level, legal certainty is "the idea that the law must be sufficiently clear to provide those subject to legal norms with the means to regulate their own conduct".[255] Legal certainty can also be described as "a state in which the law is reasonably predictable and stable".[256] Moreover, legal certainty is an assumption that a rule or decision of an administrative body which has not been challenged in an appropriate forum, is lawful, and that all subject to it will act accordingly.[257] The above information reveals how interlinked legal certainty and legality are. For instances, both these principles have similar elements like predictability.[258] Furthermore, legal certainty assumes compliance with the principle of legality during the making of administrative decisions.

Against this background, it is now appropriate to examine how the approaches by Cameron J and Jafta J differ. On the one hand, Jafta J contends that due to the fact that section 33(1) of the Constitution requires administrative action to be lawful,[259] a proposition that an invalid administrative act that exists in fact is binding and en-

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250 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* at para 17; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* at para 58 and *Affordable Medicines Trust and Others v Minister of Health and Another* at para 48.

251 Henrico 2018:293.

252 Summers (2010:161-189) discusses the collision between legal certainty and legality without providing a definition for it. Also see Wolf 2018:684, Henrico 2018:289, Scott (2013:61-62 and 64; 2018:108 and 186.) This is not only the norm in South African law. See Raitio (2003:125) who speaks about the lack of a definition of legal certainty in European Law.

253 Brown 2018:1.

254 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* at para 39; Pretorius 2005:833; Hoexter 2015:218.

255 Fenwick and Wrbka 2016:1.

256 Brown 2018:1 and Henrico 2018:293. Also see Madala J's minority judgement in *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-67.

257 Feldman 2014:15.

258 *MEC for Health, Eastern Cape v Kirland Investments (Pty)* Ltd at para 103. Also see Plasket 2002:420.

259 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 95-96. Also see *Department of Transport and Others v Tasima (Pty) Ltd* at para 81.

forceable until set aside by a competent court collides head-on with the principle of legality.[260] On the other hand, the majority through Cameron J argues that a situation whereby public officials can declare, by themselves, that an administrative act is a nullity enables them to disregard decisions they deem to be in breach of the principle of legality. The majority argues that the situation whereby a public official can ignore "irregular administrative action" on the basis that it is a nullity, "invites a vortex of uncertainty, unpredictability".[261] This, the majority contends, mistakes the nature of the mandate the Constitution entrusts to public officials.[262] Cameron J is of the view that the Constitution does not require public officials to act without erring because there is no right to a perfect administration.[263]

Undoubtedly, these two principles of the rule of law point in different directions.[264] On the one hand, the principle of legality requires compliance with legal precepts when making administrative decisions. On the other hand, legal certainty requires that even if there is suspected non-compliance with the principle of legality in the making of an administrative decision, such decision must be followed or a competent forum should be approached to challenge that decision. Courts are therefore required to find a balance between these competing principles when they collide.[265] The Court in *Oudekraal* attempted to provide guidance on the matter. It held that a reviewing Court's discretionary power to grant or withhold a remedy "constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide".[266] The Court elaborated by saying that:

> In our view that analysis of the problems that arise in relation to unlawful administrative action recognises the value of certainty in a modern bureaucratic State, … and it also gives proper

[260] *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 89 and 140. Also see *Department of Transport and Others v Tasima (Pty) Ltd* at para 81.

[261] *MEC for Health, Eastern Cape v Kirland Investments (Pty)* Ltd at para 88. This point was also made earlier in *Oudekraal Estates (Pty) Ltd v City of Cape* at para 26 and 37. Also see *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 40-41 and *Department of Transport and Others v Tasima (Pty) Ltd* at para 147.

[262] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 88.

[263] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 88. Cameron J relied on his judgment at the Supreme Court of Appeal in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at para 17.

[264] Freund and Price 2017:186.

[265] Forsyth 2006:220-224 and Freund and Price 2017:193-196. Also see *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others; Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* and *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*.

[266] *Oudekraal Estates (Pty) Ltd v City of Cape* at para 36.

> effect to the principle of legality, which is fundamental to our legal order. While the legislature might often, in the interests of certainty, provide for consequences to follow merely from the fact of an administrative act, the rule of law dictates that the coercive power of the state cannot generally be used against the subject unless the initiating act is legally valid. And this case illustrates a further aspect of the rule of law, which is that a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it.[267]

Forsyth, commenting on the above passage from the *Oudekraal* decision, said that "[t]he desirable objective of certainty in the modern bureaucratic state can hardly be denied, but adopted too absolutely this principle would amount to an unlimited grant of power to all second actors."[268] Forsyth convincingly argues that certainty cannot always trump all other values and that in certain circumstances, other values will and should be favoured over certainty.[269] The views expressed by Forsyth here are adopted in this study as being the more reasonable approach. The Court in *Oudekraal*, and almost all cases that followed it, failed to provide guidance on the instances where courts should give greater weight to the principle of legal certainty over legality.[270] A reading of the decisions that followed *Oudekraal* reveals that our courts tend to favour legal certainty over the principle of legality.[271]

What one can conclude from this short discussion is that trying to find a balance between certainty and legality is a complicated task. On the one side, administrative lawyers and judges face a situation whereby the rule of law demands predictability and certainty in administrative law, and conversely, the rule of law also requires that all exercise of public power should be lawful. Another take away from this discussion is that the task of trying to find a balance between legality and certainty cannot be left to courts alone.[272] Other arms of the government must play their roles too by consistently striving to make decisions that are lawful so as to minimise the instanc-

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267 Para 37.

268 Forsyth 2006:220. This passage was also quoted with approval by Davis J in *Van Der Westhuizen and Others v Butler and Others* 2009 (6) SA 174 (C).

269 Forsyth 2006:224. Also see Pleming and Robb 1999:256.

270 Pleming and Robb 1999:256.

271 The collision between certainty and legality is much clearer in cases where judicial review is instituted together with interim interdict applications. See Summers 2010:161-187. It might be worth stating here that South African administrative law's tendency to favour certainty over legality might stem from the presumption of validity. This presumption of validity is discussed elsewhere. See para 2.7 in this chapter.

272 According to section 8(1) of the Constitution, "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".

es where one would have to struggle to find the balance.[273] However, one can expect that the courts will do their part in managing the tension between legality and certainty. Courts can do that by ensuring that they deliver well-reasoned decisions that "reflect a principled, coherent, and reasonably predictable approach" on how best to manage the tension between these two competing principles of the rule of law.[274] In cases of flagrantly invalid and irregular administrative decisions, courts could order that their judgment be sent to the relevant institution to ensure that such acts are avoided in the future.[275]

In conclusion, it appears that the collision between these two tenets of the rule of law will continue to create tension in administrative law until a middle ground between these two principles of the rule of law is found. Until then, the best available solution might be to manage the tension between legality and legal certainty, even if it is on a case by case basis.

2.9 Conclusion

From the above discussion and analysis of the *Oudekraal* and *Kirland* decisions, it is clear that an administrative act, despite being invalid, will remain effective and produce consequences that are legal and binding. However, we learned that this legal position is not without exception. A subject is entitled to ignore an administrative act he believes to unlawful with impunity. When that subject is coerced into compliance by the administrator, they can raise a collateral challenge. What the above discussion also illustrates is the challenging tasks faced by courts when deciding with the

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273 According to section 196(4) of the Constitution, the Public Service Commission is empowered to, among other things, "investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service". The courts can involve the Public Service Commission in cases where courts find that the state had brazenly failed to act in accordance with the Constitution. This will be taken further in chapter 3 and 4. Also see Govender 2015:190-191.

274 Freund and Price 2017:207. Well-reasoned judgments will also "enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future." *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 25. Also see Henrico 2018:294. Wolf is of the view that the difference in the reasoning of the majority and the minority of the Constitutional Court was considerably narrowed down in *Tasima* (2018:698). Pretorius (2020:28) on the other hand believes that "terminological and jurisprudential tangle that bedevilled *Kirland* and *Merafong* has been clarified somewhat by *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others*".

275 In *Vumazonke & Others v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 6 SA 229 (SE) at paras 18-21 and 44, Plasket J ordered that copies of the judgment be sent to, among others, the chairperson of the Human Rights Commission; and the chairperson of the Public Service Commission.

legal consequences of invalid administrative action. This is because of the constant clash between the rule of law principles of legal certainty and legality. Following my analysis of these two decisions, I am of the opinion that unless some changes are made to our administrative law, there will always be a loser between legal certainty and legality. This study will continue discussing those suggestions below.

CHAPTER 3: Practical effects of the *Oudekraal* and *Kirland* decisions through the lens of the Life Esidimeni-matter

3.1 Introduction

In this chapter, I will use the Life Esidimeni-matter as a lens through which I will evaluate the practical effects of the *Oudekraal*[1] and *Kirland* decisions.[2] The Life Esidimeni-matter dealt with different aspects of the *Oudekraal* and *Kirland* decisions which I believe are relevant to this study. For instance, the Life Esidimeni-matter invites us to investigate again who is authorised to declare an administrative act invalid. Another interesting point about the Life Esidimeni-matter is that, instead of going through a normal judicial review process to remedy the effects of the "invalid" administrative decisions, the affected parties opted for a much speedier alternative dispute resolution (ADR) process, albeit at the behest of the Ombud. This study will look at this interesting avenue and determine whether it would not be beneficial if something similar could be introduced to our administrative law. It is for these reasons, and additional ones that follow below, that I am of the view that the Life Esidimeni-matter raises significant and relevant questions which this study must answer. Before discussing the Life Esidimeni-matter, it is first necessary to briefly deal with the applicable legislative provisions that are relevant to the discussion of that matter. After the discussion of the Life Esidimeni-matter, this study will deal with questions that link the Life Esidimeni-matter to the *Oudekraal* and *Kirland* decisions. In an attempt to answer these questions, reliance will be placed on the relevant discussions addressed in the previous chapters.[3]

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1 *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) (*Oudekraal*).

2 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*).

3 The discussions from chapter 2 which are relevant to this chapter are the status and legal nature of "invalid" administrative action. The analysis of when an administrator can revoke or vary its previous decisions, discussed at para 2.3, will be equally relevant to this chapter. I will also rely on some of the criticism levelled against the presumption of validity which I discussed in chapter 2 at paras 2.4-2.6.

3.2 The Life Esidimeni-matter

3.2.1 Legislative framework

The National Health Act[4] makes provision for the establishment of the Office of Health Standards Compliance[5] (the Office) and the appointment of the Ombud.[6] The Ombud is tasked with investigating complaints relating to health norms and standards.[7] After each investigation, which should be conducted in "a fair, economical and expeditious manner",[8] the Ombud must submit a report together with their recommendations to the Chief Executive Officer of the Office.[9] Once the investigation is complete, the Ombud must inform the relevant parties of the findings and recommendations.[10] Any person aggrieved by any finding or recommendation of the Ombud may lodge a written appeal with the Minister within 30 days of gaining knowledge of that decision.[11] Once an appeal has been received, the Minister must appoint an independent *ad hoc* tribunal for the adjudication of the appeal in the prescribed manner.[12] The three-person *ad hoc* tribunal is chaired by a retired judge of a High Court or a retired magistrate, and two persons appointed on account of their knowledge of the health care industry.[13] The *ad hoc* tribunal may confirm, set aside, or vary the Ombud's decision and must notify all relevant parties of its decision.[14] These are some of the provisions which will assist us in better understanding the discussion of the Life Esidimeni-matter.

It is now apposite to deal with what transpired in the Life Esidimeni-matter. However, the discussion that follows will be limited to facts that are relevant to the ambit of this study.

4 61 of 2003.
5 Section 77 of the National Health Act.
6 Section 81 of the National Health Act.
7 Section 81A(1) of the National Health Act.
8 Section 81A(1) of the National Health Act.
9 Section 81A(9) of the National Health Act.
10 Section 81A(11) of the National Health Act.
11 Section 88A(1) of the National Health Act.
12 Section 88A(2) of the National Health Act.
13 Section 88A(3) of the National Health Act.
14 Section 88A(4) of the National Health Act.

3.2.2 Background

In 2015, the Gauteng Provincial Health Department (the Department) decided to cancel the service level agreement it had with a private health facility called Life Esidimeni.[15] This cancellation resulted in mental health care users (patients) being moved from Life Esidimeni facilities. The intention was that those patients would be accommodated at government facilities and non-governmental organisations (NGOs), from 1 October 2015.[16] The Department called this process of moving patients from Life Esidimeni facilities the Gauteng Mental Health Marathon Project (Marathon Project).[17] During the Marathon Project, patients started dying at NGOs.[18] On 13 September 2016, the Member of Executive Council (MEC) for Health in Gauteng Province announced to the Gauteng Provincial Legislature that 36 patients had died during the Marathon Project.[19] Following this announcement, the Minister of Health requested the Ombud, Professor Malegapuru Makgoba (the Ombud), to investigate the "circumstances surrounding the deaths of mentally ill patients in the Gauteng Province".[20]

The Ombud conducted the investigation as requested by the Health Minister. After the conclusion of the investigations, the Ombud, as required by the National Health Act,[21] released the "Report into the circumstances surrounding the deaths of mentally ill patients: Gauteng Province" (Health Ombud's Report). The Ombud made several findings and recommendations in the Health Ombud's Report.[22] It was found that:

15 Health Ombud Report at page 1. See The Report into the 'Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province' No Guns: 94+ Silent Deaths and Still Counting. Available at http://ohsc.org.za/final-report-into-the-circumstances-surrounding-the-deaths-of-mentally-ill-patients-gauteng-province . Accessed on 5 April 2019. Also see Life Esidimeni Arbitration Award at para 5 available at http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf. Accessed on 5 April 2019.

16 Life Esidimeni Arbitration Award at para 2. Health Ombud Report at page 32.

17 Health Ombud Report at page 1 and Life Esidimeni Arbitration Award at para 5.

18 See https://www.safmh.org.za/index.php/news/item/125-press-release-safmh-board-statement-on-death-of-36-mental-health-care-users and https://www.timeslive.co.za/news/south-africa/2016-09-13-36-transferred-psychiatric-patients-have-died-in-gauteng/. Accessed 3 March 2019.

19 Health Ombud Report at page 1 and Life Esidimeni Arbitration Award at para 84.

20 Health Ombud Report at pages 1-2.

21 See section 81A(9) of the National Health Act.

22 This study will only deal with the findings and recommendations that are relevant to this chapter.

1. National Health Norms and Standards were breached by all the NGOs visited and inspected;[23]
2. There were several unlawful and irregular licences issued to the NGOs by the Director of Mental Health;[24]
3. It was also established during the investigation that the licensing process was unlawful because:
   i. unauthorised officials signed documents without proper delegation;
   ii. NGOs were issued with licences without being properly inspected for compliance;
   iii. The licences did not specify the service requirements.[25]
4. All these irregular activities are serious contraventions of the law and rendered these NGOs illegal and the department liable.[26]

After making these findings, the Ombud "declared" the licences of several NGOs invalid.[27] The Ombud also recommended that the Department stop the Marathon Project.[28] With regard to NGOs that were found to have been operating unlawfully, the Ombud recommended that appropriate legal proceedings be instituted, or administrative action be taken against those NGOs.[29] Furthermore, the Ombud recommended that the National Department of Health must review all 27 NGOs involved in the Gauteng Marathon project. All those that did not meet "health care standards should be de-registered, [be] closed down and their licences revoked in compliance with the law".[30] The Ombud also recommended that the National Minister of Health must lead and facilitate an ADR process, jointly with the Premier of the Province of Gauteng, with all the affected individuals and their families.[31] The ADR process was aimed at

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23 Health Ombud Report at page 39.
24 Health Ombud Report at page 39.
25 Health Ombud Report at page 19.
26 Health Ombud Report at page 38.
27 Health Ombud Report at page 19, at para 5.2.5 where the Ombud held that: "[i]t was also established during the investigation that the licensing process was unlawful because: unauthorised officials signed documents without proper delegation; NGOs were issued with licences without being properly inspected for compliance; The licence did not specify the service requirements". Also see Health Ombud Report at page 39 where the Ombud held that "there were several unlawful and irregular licenses issued to the NGOs by the Director of Mental Health."
28 Recommendation 1 of the Health Ombud Report at page 54.
29 Recommendation 10 of the Health Ombud Report at page 54.
30 Recommendation 11 of the Health Ombud Report at page 54.
31 Recommendation 17 of the Health Ombud Report at page 55.

determining "mechanisms of redress and compensation".[32] Former Deputy Chief Justice Dikgang Moseneke was appointed to lead the ADR process.

3.2.3 The arbitration proceedings

As per the Ombud's recommendation,[33] the families of the affected patients, together with the Department, the Office of the Premier, and the National Department of Health (collectively referred to as the Government), drafted the terms of reference for the ADR process. All the parties agreed that, in these circumstances, arbitration was the most appropriate process to achieve the objectives set out by the Health Ombud. The arbitration was intended to facilitate closure and redress for families and patients who had suffered as the result of the Marathon Project.[34] Family members and Government officials involved in the Marathon Project were all allowed to testify and give their side of the story. These testimonies were aimed at assisting the affected families in getting closure and also helping the Arbitrator to determine the suitable compensation.[35] This process took 43 days of hearing oral evidence and an additional two days of legal arguments.[36] The evidence given at the arbitration was more or less consistent with the testimony given during the Ombud's investigations.

At the hearings, the Deputy Director of Mental Health Services, who had been in charge of overseeing NGOs during the Marathon Project, testified that during the Marathon Project, normal assessment processes of NGOs were not followed.[37] She also stated that NGOs did not comply with the licensing requirements.[38] Furthermore, she testified that there were no assessment reports completed for aspirant NGOs.[39] With regard to the licensing process during the Marathon Project, she said that the licensing process was not in line with legal requirements and departmental practices.[40] The Arbitrator summarised these licencing defects as follows:

> Aside the licensing fraud and unlawfulness at the point of issue, the licences had many other defects. They reflected incorrect addresses, incorrect mental health care user classifications, and were all backdated to 1 April 2016 regardless of the date of signature. All licences were is-

32 Recommendation 17 of the Health Ombud Report at page 55.
33 Recommendation 17 of the Health Ombud Report at page 55.
34 Life Esidimeni Arbitration Award at para 5.
35 Life Esidimeni Arbitration Award at para 11.
36 Life Esidimeni Arbitration Award at para 4.
37 Life Esidimeni Arbitration Award at para 46.
38 Life Esidimeni Arbitration Award at paras 46-47.
39 Life Esidimeni Arbitration Award at paras 46-47.
40 Life Esidimeni Arbitration Award at para 47.

> sued by Dr Manamela despite her not having legal authority to do so and at least some, if not all, licences were re-issued by Dr Selebano following his interview with Professor Makgoba and were backdated to 1 April 2016. Dr Selebano admitted to having re-issued and backdated licences after he had closed the non-governmental organisations concerned. Non-governmental organisations were licensed for their planned number of beds and not for beds actually available. Other non-governmental organisations did not even have premises let alone beds at the time they received a licence from the Department for 150 beds. Some of the non-governmental organisations were not licensed. Some non-governmental organisations were licensed for more people than they could accommodate, whilst others, accepted more people than they were licensed for.[41]

For the purposes of the discussions that will follow below, it is necessary to recap the information discussed above. We have learned that the investigation conducted by the Ombud led to him recommending that the Marathon Project being discontinued; licences which were signed by the incorrect official were withdrawn and then re-issued with the correct official signing them. In the discussion that follows below, I will deal with some questions that arose from the exposition of the Life Esidimeni-matter that are relevant to the *Oudekraal* and *Kirland* decisions.

3.3 Questions arising from the Life Esidimeni-matter

It will be remembered that this study is concerned with an invalid administrative action,[42] and relevant to this chapter is the fact that licences were issued in an unlawful manner. We also learned that the Ombud, in his investigations into the whole matter, *declared* the administrative actions invalid and an arbitration process was followed to determine the remedy. The Life Esidimeni-matter poses questions that are relevant to the *Oudekraal* and *Kirland* decisions. The first question that we must ask in general terms is whether legislation can authorise an independent body like an Ombud to determine or pronounce on the validity or not of an administrative act. If found that legislation can grant such powers, I will evaluate whether such powers were indeed granted to the Ombud.

3.3.1 Was the Ombud empowered to declare licences unlawful?

In order to answer this question, it is necessary to direct our attention to the legislative framework created by the National Health Act. I will follow the known legal inter-

41 Life Esidimeni Arbitration Award at para 48.
42 See chapter 1 at para 1.1.

pretative tools[43] to interpret the relevant provisions of the National Health Act to determine whether such provisions clothed the Ombud with powers to declare the licences awarded to NGOs during the Marathon Project unlawful. The relevant provision to determine whether the Ombud had the authority to determine validity, is section 81A, which lists the functions of the Ombud. Section 81A in relevant parts provides:

> (1) The Ombud may, on receipt of a written or verbal complaint relating to norms and standards, or on his or her own initiative, consider, investigate and dispose of the complaint in a fair, economical and expeditious manner.
>
> (2) A complaint referred to in subsection (1) may involve an act or omission by a person in charge of or employed by a health establishment or any facility or place providing a health service.

If the words in this provision are afforded their ordinary grammatical meaning, as they must,[44] I am led to conclude that there is nothing in this provision[45] that indicates that the Ombud has the powers to pronounce on the legality of any acts concerning health matters in South Africa. The Ombud is only required to monitor and ensure compliance with health norms and standards. There is nothing in section 81A that indicates that the Ombud had powers to investigate any administrative conduct that led to the licencing of a specific health establishment.[46] Additionally, in terms of the National Health Act, the Ombud is not required to be assisted by someone who is a seasoned legal practitioner.[47] It is, therefore, safe to conclude that the National Health Act did not grant the Ombud the powers to determine the validity of the licences granted during the Marathon Project.

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43 My interpretation of these provisions will be informed by what the courts said in *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 37; *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at paras 13-14; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18 and *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

44 See *Cool Ideas 1186 CC v Hubbard* at para 28 and the sources listed at footnote 18 of the judgment.

45 Or any of the provisions of the National Health Act, as I will indicate below.

46 The National Health Act (section 1) defines a health establishment as "the whole or part of a public or private institution, facility, building or place, whether for profit or not, that is operated or designed to provide inpatient or outpatient treatment, diagnostic or therapeutic interventions, nursing, rehabilitative, palliative, convalescent, preventative or other health services".

47 For example, section 79B of the National Health Act requires that the Board, which is the accounting authority of the Office must compose of "one member appointed on account of his or her knowledge of the law". The same Act in section 88A(3) provides for an establishment of an *ad hoc* tribunal that is headed by a retired high court judge or magistrate. However, it should also be noted that none of provisions of the National Health Act prohibits the Ombud from being assisted by a legal practitioner.

On the authority of *Oudekraal* and *Kirland*, determination of the validity of an administrative decision can only be made by a competent court or forum.[48] In my opinion, it should, therefore, be accepted that the findings made by the Ombud regarding licences were outside the powers granted to him by the National Health Act. The provisions of the National Health Act are not capable of an interpretation that gives the Office or the Ombud the power to determine the validity or invalidity of administrative decisions.[49] However, this study does not argue that the Ombud's findings on invalidity were incorrect. What this study is merely saying is that the Ombud was not the correct forum or body to make those legal findings.

Despite my conclusion that the Ombud was not empowered to declare licences invalid, I cannot, in this case, see any alternative way available to the Ombud to appropriately explain the circumstances that led to the death of patients without making a finding on licences. In an attempt to illustrate this point, I will look at provisions that govern the licencing of NGOs providing healthcare services. Section 66 of the Mental Health Care Act gives the Minister powers to make regulations on the licencing of health establishment providing health care services.[50] In line with section 66, General Regulations were published.[51] The regulation relevant to this research is regulation 43,[52] which deals with the licensing of community facilities.

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48 See *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 31 and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 64.

49 My interpretation is in line with what the Courts said in *Natal Joint Municipal Pension Fund v Endumeni Municipality* at para 18 and *Cool Ideas 1186 CC v Hubbard and Another* at para 28.

50 Section 66(1)(o) of the Mental Health Act.

51 These regulations constitute some of the norms and standards that the Ombud is tasked with monitoring their compliance.

52 Regulation 43 provides:

(1) Any service which is not a designated psychiatric hospital or care and rehabilitation centre, but which provides residential or day-care facilities for 5 people or more with mental disorders must in terms of the Act
  (a) obtain a licence from the provincial department concerned to operate; and
  (b) be subjected to at least an annual audit by designated officials of the provincial department concerned.

(2) The conditions of a licence contemplated in sub-regulation (1) must be clearly stipulated by the provincial department concerned and must include -
  (a) the physical address of the relevant service;
  (b) the number of people to be accommodated;
  (c) whether such service is to be used for children, adults or geriatrics;
  (d) service requirements;
  (e) the duration of the licence; and
  (f) that the licence is not transferable.

(3) If a condition of a licence as contemplated in sub-regulation (1) or (2) is not complied with, the provincial department concerned may withdraw that licence.

The Department's failure to comply with regulation 43 when issuing licences, meant that patients were sent to NGOs that were not, among other things, fit to house patients. In my opinion, to make a proper conclusion on the circumstances that led to the death of patients, the Ombud had to make a finding on non-compliance with regulation 43 when licensing the NGOs during the Marathon Project and that therefore, the licences were granted in an unlawful manner.[53] It falls outside of the ambit of this study to delve into whether or not the National Health Act should have clothed the Ombud with powers to decide the validity of administrative decisions that pertain to health norms and standards. However, if that were to happen, the National Health Act would have to be amended accordingly.

3.3.2 Can parties agree on invalidity and appropriate remedy?

It should be pointed out that following the publication of the Ombud's report, the families of patients or even the government could have challenged the findings and/or recommendations made by the Ombud.[54] The parties' choice not to challenge those findings meant that they also accepted the Ombud's determination that the licences issued during the Marathon Project were issued unlawfully. Therefore, it can be said that the parties accepted, without the intervention of the courts, that the issuing of licences was unlawful. Therefore, the only outstanding issue for determination by the ADR process was the appropriate "remedy" that should flow from such unlawful administrative decisions. In light of the *Oudekraal* and *Kirland* decisions, it will be beneficial for this study to determine whether parties can, without court intervention, agree on the invalidity of earlier decisions and then remedy the effects of this "invalidity".

Could the administrator and the person(s) subjected to an invalid administrative decision agree on the invalidity of the decision? In my opinion, this question should be answered in the affirmative. I believe that the administrator and the subject can only agree that an administrative decision is invalid if no third parties will be prejudiced by

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[53] Alternatively, it can be argued in terms of section 81A(6) that the Ombud may, when considering or investigating a complaint in terms of this section, require the assistance of or refer the complaint to any other authority established in terms of legislation or any other appropriate and suitable body or entity to investigate similar complaints. In this case, the Ombud did not refer his findings of invalidity to another authority.

[54] See section 88A(1) of the National Health Act.

such agreement.[55] This study is, therefore, of the view that the *Oudekraal* and *Kirland* decisions did not close the door to litigants (the administrator and the affected person) to agree on the "invalidity" of an administrative decision. In my opinion, the practical consequences of agreeing on invalidity can, in some instances, be tantamount to correcting or revoking that administrative decision in question.

However, in cases where the parties are trying to terminate pending litigation by opting to settle out of court, it remains to be seen whether courts will, despite the warning in *Kirland* that parties cannot decide on validity,[56] allow parties to do so.[57] Even though "an expedited end to litigation may not only be in the parties' interest, it may also serve the interests of the administration of justice",[58] such interests should not allow parties to assume the court's power[59] to decide on the validity of administrative decisions.[60] This reasoning is supported by the Constitutional Court's finding in *Eke v Parsons* that the terms of a settlement agreement between litigating parties can

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55 See Baxter 1984:372-373 where he lists instances where variation of an earlier decision without the intervention of the courts will be necessary and legally permissible. This passage from an Australian case, *Comptroller-General of Customs v Kawasaki Motors Pty Ltd* (1991) 103 ALR 661, offers support to the fact that courts need not always be approached. The Court in that matter held that:
"It would … be strange if an administrative order remained valid until set aside by an order of a court even though the decision-maker did not seek to uphold the order. Courts have long recognised the rule of policy that there is a public interest in the avoidance of litigation and the termination of litigation by agreement when it has commenced. The argument that disputed orders could not be treated, by agreement of all concerned, as void would directly conflict with that rule. Parties would be forced into pointless and wasteful litigation."

56 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 37, *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at paras 88-91 and *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) at para 36.

57 Also see Jafta J's minority *in Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* 2019 (5) SA 1 (CC); 2019 (2) BCLR 165 (CC) at para 70, where the learned Justice argues that parties could not, by agreement, have overturned a decision of the Court that held that an administrative action was invalid. Froneman J, writing for the majority, also made a similar point at para 3. It is therefore fair to assume, by analogy, that our courts will be circumspect when required to make an order of court, a settlement agreement between parties which has the effect of deciding on the validity of administrative action.

58 *Eke v Parsons* 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 22. Also see *Ex Parte Le Grange and Another In re: Le Grange v Le Grange* [2013] ECGHC 75 at para 36. In the South African Law Reports, this is reported as *PL v YL* 2013 (6) SA 28 (ECG).

59 This is due to the fact that judicial review is still performed by courts.

60 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 29, *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at paras 66 and 90 and *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 36. Also see *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* 2019 (3) SA 621 (CC); 2019 (4) BCLR 429 (CC) at para 96. Compare with *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC); 2013 (9) BCLR 989 (CC) at para 1.

only be made an order of court if such settlement agreement is in line with both the Constitution and the law.[61]

In the Life Esidimeni-matter, to remedy the effects of the "unlawful" licences, the parties embraced the Ombud's recommendation to establish an ADR process to reach what the courts would have deemed a "just and equitable order" in terms of the Constitution and Promotion of Administrative Justice Act[62] (PAJA).[63] The recommendation of an ADR process was an unusual method to remedy the effects of unlawful administrative action. That ADR process, at least concerning the Life Esidimeni-matter, was not seated in the National Health Act.[64] It was also an unusual avenue because, in terms of our law, administrative law disputes are resolved by "a court or, where appropriate, an independent and impartial tribunal".[65] The ADR process is also not akin to a tribunal as defined in section 1 of PAJA.[66] The ADR process collides head-on with the Constitutional Court's statement that "there is only one system of law" informed by the Constitution.[67]

In conclusion, despite my finding that the parties could, in these circumstances, agree on the invalidity of administrative action, the ADR process recommended was not in line with the relevant legislative provisions. What I am concerned with here is not the merits of the matter, but merely an examination of the processes. It will be argued below that even though the relevant laws were circumvented by opting for the ADR process, without the presence of a speedier process, like an independent administrative tribunal, the ADR process was, in these circumstances, the best-case scenario.

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61 *Eke v Parsons* at para 26. Also see *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* at para 13.

62 3 of 2000. Section 8 of PAJA.

63 See section 38 of the Constitution.

64 The National Health Act, at section 88A only refers to an establishment of an ad hoc tribunal when there is an appeal against the decision of the Ombud.

65 Section 33(3)(a) of the Constitution and section 6 of PAJA.

66 Section 1 of PAJA defines a tribunal as "any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action".

67 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44.

3.3.3 Are administrators still permitted to vary or revoke their earlier invalid decisions?

With regard to licences granted during the Marathon Project, it can be argued that the Department could have easily revoked the licences because it was allowed to do so in terms of regulations 43. However, I do not think it would have been that simple. The Department totally disregarded regulation 43 when it issued licences to NGOs during the Marathon Project. For instance, the Department failed to conduct the audit required by regulation 43 before issuing the licences. For that reason, it would have been quite odd for the Department to make a U-turn by relying on regulation 43 to get themselves out of a sticky situation of their own making.[68] Nevertheless, I am willing to reluctantly accept that the Department could have still used regulation 43 to withdraw the licences they had unlawfully issued.

This study's uneasiness with this state of affairs has led me to question what the legal position would have been had there been no regulation 43 which the Department could have relied on to withdraw the licences. I, therefore, believe that it is necessary to investigate whether the current legal position grants administrators the power to correct their earlier decisions in instances where no legislative provision for revocation exists.[69] In chapter 2, I said that in limited instances under common law, the administrator could revoke or vary its previous decisions.[70] That was before the *Oudekraal* and *Kirland* decisions. What is then the current legal position concerning the administrator's ability to vary or revoke its earlier decision in the absence of empowering provision?[71] Below I interpret both *Oudekraal* and *Kirland*, using Mhlantla

68 In one instance, the Department during the Marathon Project had knowingly placed adults at an NGO that caters for children in direct conflict with regulation 43. See Health Ombud Report at page 10. This situation will be similar to the situation in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) at para 9. In that matter, the State Information Technology Agency (SITA), an organ of state, had decided not to follow section 217 of the Constitution which provides that "[w]hen an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective". However, the SITA later alleged that the contract could not be upheld because it had (knowingly) ignored section 217 of the Constitution.

69 I embrace the instances listed by Baxter 1984:372-373.

70 See this discussion in chapter 2 at para 2.3 of this study.

71 The question is simple in instances where the empowering provision explicitly grants the administrator the ability to vary or revoke its earlier decisions. Where the empowering provision provides for variation or revocation, the administrator must exercise such powers in accordance with the relevant provisions of PAJA.

JA's guidance in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd*.[72] After my interpretation of the relevant passages from both *Oudekraa*l and *Kirland* decisions, I answer the question with a conditional yes. Additionally, my conclusion is bolstered by the existence of section 10(1) of the Interpretation Act.[73]

The *Oudekraal* and *Kirland* decisions seem to have given courts and administrators the impression that the administrator's power to revoke or vary no longer exists unless the power to do so has been explicitly stated in the empowering legislation.[74] However, this study's interpretation of the *Oudekraal* and *Kirland* decisions reaches a different conclusion.[75] As previously stated, in *Oudekraal*, the Court held that "a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it".[76] What this means, as was explained in *Kirland*, is that a public authority cannot ignore its own administrative action because it deems the decision or action to be invalid.[77] The law requires action from the public authority in question – it must follow a proper process to have the administrative decision they believe to be invalid, set aside.[78] Ignoring an administrative decision means that such a decision is treated as if it does not exist.[79]

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72 *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA). The learned Justice held that: "In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention." This decision was quoted with approval by the Constitutional Court in *Eke v Parsons* at para 29 and *National Union of Metalworkers of SA on behalf of Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)* 2017 (7) BCLR 851 (CC) at para 11.

73 33 of 1957, which states that: "When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

74 See Pretorius 2020:29-30.

75 According to Pretorius (2020:20), *Kirland* is authority that an administrator who issued an invalid decision is, in the absence of statutory authorisation, not entitled to vary that decision by themselves. This study agrees that an administrator cannot unilaterally vary or revoke its decision.

76 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 37.

77 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 65.

78 *Oudekraal Estates (Pty) Ltd v City of Cape Town* at para 26 and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 103.

79 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at paras 65-68. A person subjected to an invalid administrative decision is in a different position because they are able to raise a collateral challenge when an administrator compels them to comply with an invalid administrative decision. Collateral challenges are discussed in chapter 2 at para 2.4.2.

On the other hand, variation or revocation of an administrative decision requires some action from the relevant administrator. Here the administrator is not ignoring an administrative act but producing some act.[80] That is why in *Kirland*, Cameron J said that: "When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside".[81] In most but not all instances, this means that the administrator must formally apply to a court to set the defective decision aside.[82] This means that an administrator is barred from changing any of its decisions unilaterally. These guiding principles were not observed by the administrator in *Kirland*.[83] It is for these reasons that the Court in *Kirland* held that there is "a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights".[84] Secondly, I believe the Supreme Court of Appeal was therefore correct in its finding that the administrator in Kirland was *functus officio*.[85] The approval granted Kirland Investments rights or benefits and it was therefore unfair to deprive it of such rights, and consequently, that approval had to be deemed final.[86] I am also persuaded that a proper process mentioned in *Kirland* will not always point to a process before a court by what the Court said in *Merafong*. In that matter, the Court held that:

> Both [*Oudekraal* and *Kirland*] recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances. [87]

The above passage does not say that whenever the administrator believes an administrative decision is invalid, that administrator is obliged to treat it as valid or insti-

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80 *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* at para 13, which was quoted with approval by this Court in *Eke v Parsons* at para 29.

81 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 65.

82 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 65.

83 In *Kirland*, there was no proper process, and there was also no court application instituted by the administrator to set the administrative decision in question aside.

84 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 82.

85 See *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 219 (SCA) at para 22.

86 See my discussion of the *functus officio* principle in chapter 2 at para 2.3.

87 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 42.

tute court proceedings to set it aside.[88] It might be that the reason an administrator is not obliged to always go to Court to set aside an invalid decision is that it is believed that the administrator can correct some of its defective administrative decisions without court intervention. Therefore, one should not interpret the *Oudekraal* and *Kirland* decisions as barring the administrator from ever correcting or revoking its earlier decisions in compliance with procedural fairness. The circumstances of each case will "dictate the actions of the public authority" on whether the possibility to revoke or vary a decision exists.[89] I also find this passage from *Kirland* persuasive in my understanding that revocation and variation are still possible in some cases.[90] There the Court held:

> "[T]he Constitution anticipates imperfection [in the making of administrative decisions], but makes [such imperfection] subject to the corrections and constraints of the law. The task of public officials is thus to act in accordance with the law and the Constitution, which includes being subject to correction when they err."[91]

I do not read the words "to act in accordance with the law and the Constitution" to mean that when correcting an administrative decision, the error should only be corrected by a court. I assume that it is also in line with separation of powers to expect administrators to be allowed to withdraw or correct some of their defective decisions, without court intervention, which will not prejudice anyone and which, if left intact will prejudice others. Wolf has argued that section 8(1) of the Constitution compels an administrator to correct defective administrative action or revoke it.[92] On the other hand, Pretorius's argument for revocation is slightly different. He argues that the power to revoke an earlier decision by an administrator might flow from the administrator's implied powers.[93] He gives an example that "if a public body were empow-

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88 Freund and Price argues that "our law neither requires us to comply with every administrative act unless and until it is set aside or quashed on review by a court, nor permits us to ignore every administrative act that we correctly suspect to be unlawful." Freund and Price 2017:187.

89 The circumstances of each case will vary and the *functus officio* principle might dictate the actions of the administrator.

90 I also do not think that our interpretation of court decisions should have the effect of nullifying section 10(1) of the Interpretation Act.

91 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 88. Also see *In Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at para 17.

92 Wolf 2018:694. She argues that section 8(1) "precludes the executive from relying on the presumption of validity to fend off challenges of invalidity in objection procedures simply by awaiting a court ruling on the matter."

93 Pretorius 2005:862. In *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd* [2007] 1 All SA 154 (SCA) at para 27, the Court held that: "The question whether or not legislation impliedly provides authority (for revocation in this case) ultimately depends upon an interpretation of the statute concerned. …The test for implying the provision, therefore, is whether it is necessary for the efficacious operation of the statute".

ered by statute to appoint officials to enable it to perform its functions, the power to terminate their services (which is effectively a revocation of the initial appointment) must be taken to be an implied power".[94] In this example given by Pretorius, the administrative decision in question, the appointment, is valid. However, that same example can easily be applied to some invalid administrative decisions. It can therefore be said that the task of determining whether an administrator can vary or revoke its decision will be found in the interpretation of the empowering provision to determine whether such provision grants the administrator the power to vary or revoke its decision.[95]

With this background, it is appropriate to now return to the Life Esidimeni-matter to determine whether in that matter, if there were no regulation 43, the administrator would have been allowed to correct the licencing defects without approaching a court. For example, we learned above that in the Life Esidimeni-matter, some NGOs had licences noting a physical address which did not correspond with the physical address where the NGO was based.[96] That was in conflict with regulation 43, which among other things stipulates that the conditions of a licence must be clearly specified by the provincial department concerned and must include "the physical address of the relevant service". Even absent regulation 43, which allows the Department to withdraw a licence if one of the conditions listed in regulation 43 is not complied with, it would have been absurd for the Department to go to court to declare that licence unlawful and set it aside. It is in those instances that the administrator should be allowed to withdraw an administrative act, or correct it without there being a need to approach a court to declare the administrative decision in question invalid.

It is to be accepted that for the Department to either withdraw or correct the licences, it would have had to afford the relevant NGO procedural rights in line with PAJA. The *Oudekraal* and *Kirland* decisions barred administrators from acting unilaterally when dealing with defective administrative decisions. My argument is that in instances

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94 Pretorius 2005:862. Hoexter (2012:278) cautions that "the demands of the Constitution must be borne in mind: the legislature would not be entitled to confer an unlimited or too extensive power of revocation, as this would undermine the rule of law".

95 Pretorius (2020:30) also advocates for this position. In his minority opinions in *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 119 and *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) at para 92, Jafta J also stressed the importance of the relevant empowering provisions in determining the powers of an administrator.

96 Life Esidimeni Arbitration Award at para 48.

where there are clear errors, and the administrator is not *functus officio,*[97] the administrator in question must adhere to section 3 of PAJA and the Constitution when correcting the errors.[98] Regarding errors that the administrator will not be competent to correct,[99] the administrator must correct those errors through the assistance of the courts.[100] I do not want to belabour my point, but I am of the view that the administrator must "use the correct legal process" to correct any of its "invalid" decisions.[101] This is more so in cases where third parties will not be prejudiced if the decision was to be revoked or varied.[102]

I pause here to point out that, despite what I have said above, it is not clear which defective administrative decisions can be corrected by an administrator and which ones cannot. This discussion again highlights one of the problems with this area of our law that I mentioned in passing in the previous chapter.[103] South African administrative law does not classify invalid administrative decisions.[104] Our law treats the most serious invalid administrative acts the same way it treats the less serious. This blanket treatment becomes increasingly onerous when applying the presumption of validity from *Oudekraal* and *Kirland* without any judicial or legislative guidance on which invalid administrative decisions can be corrected by the administrator and which ones should be taken on judicial review to be set aside. To say that an invalid

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97 Pretorius 2005:832. Also see *PT Operational Services (Pty) Ltd v Retail and Allied Workers Union obo Ngweletsana 2* (2013) 34 ILJ 1138 (LAC) at para 24 and *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and another* [2013] 3 All SA 435 (SCA) at para 23.

98 Hoexter 2012:276.

99 For example, the administrator might be *functus officio*.

100 *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* at para 86.

101 *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* at paras 1 and 86. See *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 103 and in *Department of Transport and Others v Tasima (Pty)* at para 229.

102 For example, in instances "where the document recording or communicating the decision contains clerical errors, or other accidental errors or omissions; where the decision has been procured by fraud [Fraud unravels everything. *Firstrand Bank Ltd t/a Rand Merchant Bank & Another v Master of the High Court, Cape Town & Others* [2013] ZAWCHC 173 at paras 20-27]; or the circumstances of the person affected by the decision have changed". See Orr and Briese 2002:11. Also see Baxter 1984:372-373 and Pretorius 2009:555.

103 See the concluding remarks made in chapter 2 at para 2.8.

104 According to Freund and Price (2017:204) it is "important to distinguish between serious and trivial irregularities by paying close attention to the nature of the defect in question". Wolf (2018:702) is of the view that "[t]he obligation to uphold and respect administrative justice would further require that the legislature should regulate the status of defective administrative acts that are gravely serious, to prevent them from taking effect". This study embraces these suggestions.

administrative act, no matter how minuscule or innocent it is, may only be set aside by a court would have been more sustainable if our law classified invalid administrative decisions. In my humble opinion, the administrator's ability to revoke or vary its decision in some limited instances was not altered by the *Oudekraal* and *Kirland* decisions. If I am wrong in my interpretation of these decisions that in some instances some errors can be corrected by the administrator, then the presumption of validity as espoused in both *Oudekraal* and *Kirland* decisions is practically and constitutionally unsustainable.

3.4 Concluding remarks on the Life Esidimeni-matter

The Life Esidimeni-matter illustrates some of the practical difficulties the consequences of the invalid administrative decisions might pose to the administrator and persons affected by such decisions. In this matter, the affected parties still had an option to institute judicial review proceeding to challenge some of the administrative decisions taken in this matter. By agreeing to abide by the findings of the Ombud, the affected parties opted to utilise a speedy and efficient ADR process to resolve their dispute. Without swift action from the Ombud, it is likely that more patients could have lost their lives. Judicial review proceedings can be a time-consuming exercise, and in cases like the Life Esidimeni-matter, time was not on the side of all concerned. It can be said that the Ombud's recommendation provided the Government, which up to that point had refused to cooperate with the families,[105] with a quicker mechanism to remedy a situation which had turned ugly. The faster and efficient ADR process also ensured that the effects of the "invalid administrative decisions" were mitigated in an expeditious manner.

The ADR process adopted in the Life Esidimeni-matter invites us to ask ourselves whether an impartial and independent administrative tribunal should not be consid-

105 The affected families had already protested against the Marathon Project and had unsuccessfully tried to obtain a court interdict to stop the Department from implementing the Marathon Project. See Health Ombud Report at page 10. See *The South African Depression and Anxiety Group and Others v MEC for Health, Gauteng and Others* (Unreported case number 08904/16, 15 March 2016). The applicants in this matter launched an urgent application at the High Court of South Africa, Johannesburg Gauteng Division, seeking an order interdicting the State from discharging mental health care users from the Life Esidimeni facilities, either to their families or to alternative facilities. The Court, in a judgment delivered by Vally J, dismissed the applicants' application.

ered as an alternative to judicial review of administrative decisions by courts.[106] This study accepts that an administrative tribunal was not the forum used in the Life Esidimeni-matter. However, one of the takeaways from that matter is that our law is in need of a "speedier, cheaper and more accessible" process to review administrative decisions.[107] When one looks at the law reports,[108] it becomes clear that parties to judicial review cases are mostly individuals or organisation with the financial means to challenge administrative decisions they believe to be unlawful.[109] This study is of the view that an introduction of an administrative tribunal is in line with sections 33 and 34 of the Constitution.[110] These rights are interrelated.[111]

Our courts have held that the right of access to courts is "essential for constitutional democracy under the rule of law".[112] The right to access courts requires both a negative and positive obligation from the State.[113] In order to ensure that people do not

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106 This proposition finds support in section 33(3)(a) of the Constitution and section 10(2)(a)(iii) of PAJA. It should therefore be argued that the Minister should act in accordance to PAJA and work towards creating "independent and impartial tribunals, in addition to the courts, to review administrative action".

107 In her Masters dissertation, Armstrong observes that the "South African government currently spends, indeed wastes, a significant amount of money on administrative law litigation. Due to the limitations of judicial review, even after the high costs of litigation and the long duration of court proceedings, the results achieved may still be unsatisfactory. Furthermore, judicial review is unsuited to giving effect to systemic administrative change and the improvement of initial decision-making." Armstrong 2011:185-186. Also see Wade and Forsyth 2004:906.

108 For example, all the court cases that are discussed in this study were undertaken by litigants who have the financial means to do so. None of the litigants were disadvantaged private individuals.

109 There seems to be a paucity of judicial review cases against low level administrators, whose decisions can have an adverse effect on the poor and marginalised. It should then be assumed that the decision by the poorer members of society to not review "invalid" administrative action is attributed to the fact that they are unable to do so due to the fact that approaching courts is expensive. This is the only reasonable conclusion to be made since it cannot be assumed that the poorest and most marginalised members of society will always be granted or offered the most perfect of administrative decisions.

110 Both these sections make provision for the use of independent and impartial tribunal as a forum for dispute resolution. Section 33(3)(a) provides:
National legislation must be enacted to give effect to these rights, and must:-
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.
Section 34 provides: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

111 Hoexter 2000:498. For a similar view, albeit in a different context, also see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 112.

112 *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) at para 1. Also see Iles 2013:711.

113 In *Trinity Asset Management (Pty) Ltd v Investec Bank Limited* 2009 (4) 89 (SCA) at para 58, Jafta JA (as he then was), in a minority judgment, held that "the main purpose of [section] 34 is to confer on litigants the right of access to courts and other independent and impartial tribu-

resort to self-help, a fact cautioned against by the majority in *Kirland*,[114] there ought to be an elimination of obstacles that might bar people from vindicating their right to access courts.[115] This simply means "that everyone who has a dispute must be able to bring a dispute to a court or tribunal to seek redress".[116] Right now, it cannot be said that our system allows everyone who wants to bring a dispute before our courts to do so. This is clearly not in line with sections 34 and 33.[117] This is one of the reasons why this study advocates for the introduction of administrative tribunals.[118] The introduction and availability of an independent and impartial administrative tribunal will ensure that defective administrative decisions are corrected in an efficient, speedier and inexpensive manner. Additionally, the characteristics of an independent tribunal[119] might ensure that the ever-present collision between legality and legal certainty is appropriately managed.[120]

I believe that if we are to persist with the presumption of validity, especially in a country where millions of its citizens do not have the financial means to institute judicial review proceedings to set aside an invalid administrative decision, we are consti-

nals. The section places an obligation on the state to establish such fora". The majority judgment did not oppose this point.

114 See *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at paras 82 and 103. In support of this, one of the cases it relied on was *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC). Relevant to this discussion is this passage where Mokgoro J elaborates how access to courts can curb self-help (para 22). She held that: "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance." Also see Iles 2013:717-721.

115 Nyenti 2016:3.

116 Nyenti 2016:3.

117 It should be noted that the rights in these section do not have the "within its available reasons" caveat that one sees in the socio-economic rights. Therefore the state cannot use the costs excuse for its inability to give full effect of sections 33 and 34 rights.

118 It should also be noted that the jurisdiction from which the legal position discussed in this study was inherited, have administrative tribunals in place In the United Kingdom there is the Tribunals and Inquiries Act 1992 making provision for tribunals. See the discussion of statutory tribunals by Wade & Forsyth 2004:905-960. Also see Elliot 2005:696-714. This study will also argue for the introduction of tribunals in South Africa.

119 See Armstrong 2011:56, Baboolal-Frank 2019:61-64 and *Sidumo v Rustenburg Platinum Mines Ltd* at para 82.

120 For instance, tribunals are more accessible for the general public due to the fact that approaching a tribunal would cost less. Another factor relevant to our discussion is the fact that the process of a tribunal is speeder and this fact might contribute towards ensuring that there is a proper balance between legality and certainty. See Armstrong 2011:65-66.

tutionally obliged to introduce independent administrative tribunals.[121] It is beyond the auspices of this study to prescribe the appropriate model for an administrative tribunal.[122]

The Life Esidimeni-matter also highlights the tension between legality and certainty that was discussed in the previous chapter.[123] According to Freud and Price, since the tension between legality and legal certainty cannot "be mechanically resolved or wished away", it must be managed sensibly.[124] The Life Esidimeni-matter also shows how complex the task of trying to balance these competing principles of the rule of law can be. As it was alluded to in the previous chapter,[125] institutions like the Public Service Commission[126] can also assist in trying to balance the tension between legality and legal certainty. Govender suggests that it "may be necessary for the [Public Service Commission] to have a dedicated subcommittee seeking to ensure proper compliance with the requirements of PAJA".[127] This study supports this suggestion and is of the view that the office of the Public Protector should also be one of the institutions that can be utilised in an attempt to manage the collision between the two different rule of law principles.[128]

Additionally, our courts can also ensure that institutions like the Public Protector are made aware of their judgments in instances of gravely serious cases of maladministration.[129] The Public Protector, just like the Public Service Commission, can, on its

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121 In 1995, Rabie (1995:205), reflecting on administrative appeals tribunals and before the enactment of PAJA, said that: "Although there are currently many other urgent socio-economic needs in the country, it may be argued - that it is not a matter of whether the State can afford to pay for an effective administrative appeals system, but rather whether it can afford not to." (1995:205).

122 Dissertations by Armstrong (See 2011:170-185) and Baboolal-Frank (See 2019:172-179) deal extensively with the specifics of what the unified tribunal system they advocate for in South Africa should look like.

123 See para 2.8 in chapter 2.

124 Freund and Price 2017:208.

125 See the discussion in chapter 2 at para 2.8.

126 The Public Service Commission was introduced by section 196 of the Constitution.

127 Govender 2015:191.

128 The public protector was introduced by section 182 of the Constitution. Section 182(1) in relevant parts provides:
The Public Protector has the power, as regulated by national legislation:-
(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.

129 In *Vumazonke & Others v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 (6) SA 229 (SE) (paras 18-21 and 44), Plasket J ordered that copies of the judgment be sent to, among others, the chairperson of the Human Rights Commission and the chairperson of the Public Service Commission.

own accord, investigate these cases to ensure that in future, the concerned organs of state or officials are brought to book. This will encourage public officials to always strive to act in a manner that is "lawful, reasonable and procedurally fair" whenever they exercise public power or perform public functions. It cannot be gainsaid that if a special administrative body within the Public Service Commission could inform, educate and advise decision-makers on administrative law norms, as Govender suggests,[130] what happened in the Life Esidimeni-matter can be avoided. Furthermore, this body might even lead to increased compliance with the Constitution and PAJA. This study accepts that in a country with scarce resources like our own, Govender's suggestion might have high cost implications on the state. However, it must be remembered that the egalitarian "principle of good administration do not necessarily come cheap".[131] Hopefully, with a committee like this in place, administrators will ensure that the decisions they make are informed by relevant laws.

3.5 Conclusion

In this chapter, this study investigated the practical effects of the *Oudekraal* and *Kirland* decisions through the lens of the Life Esidimeni-matter. Using the facts in the Life Esidimeni-matter, this study determined whether the *Oudekraal* and *Kirland* decisions make provision for an independent body like an Ombud to pronounce on the validity of an administrative decision. This study found that the Legislature can actually grant an independent body the power to pronounce on the validity of administrative decisions. However, it was concluded, after interpreting the relevant legislative provisions that such powers were not granted to the Ombud. This study concluded that the Ombud had no powers to pronounce on the validity of the licences. The Life Esidimeni-matter also directed us to determine whether an administrator and the person affected by an administrative decision can agree on the invalidity of such a decision without approaching a court. It was found that in some instances, the parties could agree to treat an administrative decision as invalid without court intervention.

The Life Esidimeni-matter also led to an interpretation of the *Oudekraal* and *Kirland* decisions to determine whether those decisions still permit administrators, in certain

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130 Govender 2015:191.
131 Hoexter 2000:492.

circumstances, to revoke or vary their earlier decisions without approaching a court first to set the decision aside. After analysing relevant passages from these two decisions, this study concluded that administrators are still allowed, in some instances, to correct certain defective administrative decisions without having to approach the courts. The speedy ADR process adopted by the parties in the Life Esidimeni-matter to remedy the effects of invalid administrative decision invited us to ask whether our law will not benefit from the introduction of administrative tribunals which would also have the same efficiency. This study is also of the view that other organs of state like the Public Service Commission should be involved to ensure compliance with the Constitution and PAJA.

CHAPTER 4: Recommendations and conclusion

4.1 Introduction

This study aimed to determine the legal status of invalid administrative action and how such acts can lead to legally binding consequences.[1] In line with that aim, the preceding chapters of this study discussed the status of invalid administrative action.[2] The *Oudekraal*[3] and *Kirland*[4] decisions were also discussed to determine their influence on the status and nature of invalid administrative.[5] From those discussions, we learned that since administrative acts are performed by public functionaries who appear to have the necessary authority, it is usually in the domain of the courts to determine whether administrative decisions taken were within the powers of the public functionaries.[6] Until a competent court declares a decision invalid and sets it aside, such a decision will be treated as valid and binding.[7] However, this legal position is not without exception. In cases where a "subject is sought to be coerced by a public authority into compliance with an unlawful administrative act",[8] that subject can raise a collateral challenge.[9] As was seen in *Merafong City Local Municipality v AngloGold Ashanti Ltd*,[10] collateral challenges are not only limited to private parties; an organ of state is not barred from raising it.[11]

This study also evaluated the merits and demerits of the two different approaches to the treatment of invalid administrative action proposed in *Kirland* decision by the majority and minority judgments.[12] Those two approaches were anchored in two different principles of the rule of law, one approach by Cameron J favouring the principle of legal certainty, and the other approach advanced by Jafta J choosing the principle

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1 See chapter 1 at para 1.2.

2 The status of invalid administrative decision was central to chapters 1, 2 and 3.

3 *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) (*Oudekraal*).

4 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*).

5 See chapter 2 at paras 2.4 -2.6.

6 See chapter 2 at paras 2.4 -2.6.

7 See chapter 2 at paras 2.4 -2.6.

8 *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* at para 32.

9 For a discussion on collateral challenges, see chapter 2 at para 2.4.2.

10 *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) (*Merafong*).

11 *Merafong City Local Municipality v AngloGold Ashanti Ltd* at paras 59-68. Also see *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para 36.

12 See chapter 2 at paras 2.5 – 2.8.

legality.[13] Both approaches of the majority and minority judgments were criticised for not adequately providing a balance between the principles of legal certainty and legality.[14]

In chapter 3, the Life Esidimeni-matter was used to demonstrate some of the practical implications or influence of the *Oudekraal* and *Kirland* decisions on the treatment of invalid administrative action.[15] Following that discussion, it was concluded that our administrative law needed to make some changes to ensure that there is either a balance between legal certainty and legality or the collision of these principles is properly managed.[16] This study accepts that more theoretical work needs to be done to find an alternative to the current legal position that tends to favour legal certainty whenever it collides with legality. However, it is beyond the auspices of this study to develop a theoretical alternative to the current legal position.

In this chapter, this study will elaborate on some of the practical suggestions that have been briefly discussed in the previous chapter.[17] This study has already highlighted that the decisions that followed the *Oudekraal* and *Kirland* decisions clarified some issues that might have been unclear in the *Oudekraal* and *Kirland* decisions.[18] For that reason, this chapter will not canvass points that had already been clarified by later decisions.

This chapter will be limited to discussing suggestions on how best to manage the collision between legality and legal certainty. One of the main shortcomings I highlighted from the *Oudekraa*l and *Kirland* decisions is their inability to adequately balance the rule of law principles of legality and certainty.[19] For that reason, it should not come as a surprise that this chapter will mostly focus on suggestions aimed at balancing these competing principles of the rule of law. Additionally, this study will

[13] See chapter 2 at paras 2.6 – 2.8.
[14] See chapter 2 at paras 2.6 – 2.8.
[15] See chapter 3 at para 3.3.
[16] See the concluding remarks made in chapter 2 at para 2.8 and chapter 3 at para 3.4.
[17] See the concluding remarks made in chapter 2 at para 2.8 and chapter 3 at para 3.4.
[18] For example, *Merafong* clarified that an organ of state was not barred from raising a collateral challenge. See chapter 2 at paras 2.5.2 and 2.6 and chapter 3 at para 3.3.3. Wolf is of the view that the difference in the reasoning of the majority and the minority of the Constitutional Court was considerably narrowed down in *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC). Pretorious argues that "terminological and jurisprudential tangle that bedevilled *Kirland* and *Merafong* has been clarified somewhat by *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* 2019 (3) SA 621 (CC); 2019 (4) BCLR 429 (CC)".
[19] See chapter 2 at para 2.11.

also discuss the possible introduction of administrative tribunals and the improvement that such an introduction is hoped to bring.

4.2 Recommendations

4.2.1 Managing the tension between legality and certainty

In the previous chapters, it was argued that the *Oudekraal* and *Kirland* decisions did not bring about the desired balance between the principles of legality and certainty.[20] This study also criticised the presumption of validity that is part of our administrative law.[21] Additionally, it was argued that the approach suggested by Jafta J that "an invalid administrative act does not exist in law and that an unlawful act is void" was not entirely new to our law.[22] This study asserted that "the description of an administrative act as void would not give any or sufficient weight to the principle of legal certainty".[23] One of the reasons why Jafta J's approach was found not to be satisfactory is the fact that it is not clear what the practical consequences of an invalid administrative decision that exists in fact should be.[24] This study, therefore, concludes that the current legal position on the treatment on invalid administrative decisions requires a theoretical approach that is capable of ensuring a balance between the rule of law principles of legality and certainty. However, that exercise is beyond the auspices of this study.

In the previous chapters, it was also pointed out that since the tension between legality and legal certainty cannot "be mechanically resolved or wished away", it must be managed.[25] In line with this suggestion, it was argued that since the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state", each of these role-players can and should play a role in managing the tension or finding a balance between legality and legal certainty.[26] That discussion follows below.

It asserted in chapter 2 that the judiciary might be one of the institutions that are best placed to find a balance between legality and legal certainty.[27] This is because

20 See chapter 2 at paras 2.4.1 and 2.8.
21 See the concluding remarks made in chapter 2 at para 2.8 and chapter 3 at para 3.4.
22 See Chapter 2 at para 2.7.
23 Pleming and Robb 1999:255, as discussed in chapter 2 at para 2.7.
24 See the criticism levelled against this approach in chapter 2 at para 2.7.
25 Freund and Price 2017:208. Also see Wolf 2018:707.
26 See the concluding remarks made in chapter 2 at para 2.8.
27 See the concluding remarks made in chapter 2 at para 2.8.

courts are normally tasked with resolving disputes concerning the tension between the legality and legal certainty. When presented with this challenge, courts should endeavour to produce well-reasoned decisions that "reflect a principled, coherent, and reasonably predictable approach" on how best to manage the tension between these two competing principles of the rule of law.[28] This point will be equally relevant even when courts depart from their earlier decisions dealing with these competing principles of the rule of law.[29] Our courts, especially the Constitutional Court as the apex court, should continue producing well-reasoned judgments of an exemplary precision. Clear and well-reasoned judgments will assist other courts, administrative lawyers, administrators and academics in working towards an approach that will be able to find a balance between legality and legal certainty.

Another role that this study believes our courts can play concerns cases of persistent and severely and flagrantly flawed invalid administrative decisions. In those cases, courts can order that their judgment be sent to institutions that could assist in ensuring that such acts are avoided in the future.[30] It is not a novel idea. In *Vumazonke & Others v MEC for Social Development, Eastern Cape*, Plasket J ordered that copies of the judgment in that matter be sent to, among others, the chairperson of the Human Rights Commission and the chairperson of the Public Service Commission.[31] Plasket J did not make this order to prompt an investigation. The learned Justice accepted that conducting an investigation into the conduct he described in that decision was in the discretion of those institutions.[32] Our courts have held that institutions like that the Public Service Commission and the office of the Public Protector are an "important defence against maladministration and corruption".[33] In his commentary on the *Kirland* decision, Govender argues that the Public Service Commission should have "a specialist body within it to reflect on the various judgments, learning lessons,

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28 See the concluding remarks made in chapter 2 at para 2.8.

29 *Biowatch Trust v Registrar, Genetic Resources* at para 25. Also see Froneman J's judgment in *Department of Transport and Others v Tasima (Pty) Ltd* at paras 224-230. In the same matter Zondo J also pointed out at para 221 that in addition to following precedent, consistency in adjudication was also important.(2020:28)

30 See the concluding remarks made in chapter 2 at para 2.8 and chapter 3 at para 3.4.

31 *Vumazonke & Others v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 6 SA 229 (SE) at paras 18-21 and 44.

32 *Vumazonke & Others v MEC for Social Development, Eastern Cape, and Three Similar Cases* at para 21.

33 *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] 4 All SA 719 (SCA) at para 2. The involvement of these institutions in discussed in chapter 2 at para 2.8 and chapter 3 at para 3.4.

and informing, educating and advising decision-makers of emerging norms of administrative law – so that mistakes are not repeated."[34] Govender is of the view that if cases decided by our courts are ignored, the same errors and irregularities are bound to be repeated.[35] The involvement of these institutions might ensure that investigations into systematic inefficiency and maladministration within organs of state are undertaken and even remedied. Possible investigations by these institutions might also result in the culture of observing the rule of law in administrative decision-making and ultimately lead to the reduction of invalid administrative decisions.

It will be recalled that in the previous chapters, we concluded that in cases of invalid administrative decisions, variation or revocation of those decisions is of great importance.[36] It was also mentioned in chapter 2 that Wolf suggested that our law adopt something similar to the German Administrative Procedure Act[37] due to the links she says the Promotion of Administrative Justice Act[38] (PAJA) has with that legislation.[39] The provisions of the German Administrative Procedure Act set out in some detail, the administrator's power to vary or revoke its decisions in cases of invalid administrative action.[40] PAJA does not have provisions that are comparable to the German Administrative Procedure Act. However, some of our legislations have comparable provisions to the extent that they provide administrators with clear guidance in instances whereby the subject has acted in an unlawful manner to procure an administrative decision[41] or in cases resulting from a delegation of authority.[42] For example, section 28 of the Marine Living Resources Act provides clear guidance on what should happen in cases of an invalid administrative decision. Section 28 spells out, in great detail, the administrator's powers to vary and revoke the invalid administrative decision and the process the administrator should follow. However, it should be noted that the provision only deals with unlawful administrative resulting from the actions of the subject and not the administrator. Having said that, it cannot be dis-

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34 Govender 2015:191.
35 Govender 2015:191.
36 See this discussion in chapter 2 at para 2.3 and chapter 3 at para 3.3.3.
37 Administrative Procedure Act (Verwaltungsverfahrensgesetz, VwVfG), Germany, 25 May 1976.
38 3 of 2000.
39 See chapter 2 at para 2.7.
40 See sections 42, 44 and 48 of the German Administrative Procedure Act.
41 See section 28 of the Marine Living Resources Act 18 of 1998.
42 See sections 59(3)(a) of the Local Government: Municipal Systems Act 32 of 2000 and section 19(4) of the Property Valuation Act 17 of 2014.

puted that provisions similar to section 28 of Marine Living Resources Act, provided that they also set out the consequences of an invalidly issued administrative decision, are capable of bringing about the much-needed balance between legality and legal certainty. This study is of the view that the Legislature can also ensure that there is a balance between legality and legal certainty by enacting provisions similar to section 42,[43], 44,[44] and 48[45] of the German Administrative Procedure Act. This can be done by including such provisions in the empowering provision or even including such provisions in PAJA.

In conclusion, it should be pointed out that the suggestions offered here are not exhaustive. In my opinion more can be done by other bodies not mentioned under this heading, to ensure that legality and legal certainty are encouraged. This is especially true when considering that promoting an efficient administration is in this country's best interests.

4.2.2 Possible introduction of an administrative tribunal

In chapter 3, I discussed the appeal of the Alternative Dispute Resolution (ADR) process adopted by the parties in the Life Esidimeni-matter.[46] Despite the ADR process being different from administrative tribunals, I then asked whether our law could benefit from the introduction of administrative tribunals since both fora have similar benefits.[47] After briefly interpreting sections 33 and 34 of the Constitution, it was concluded that there is a constitutional mandate to introduce independent administrative tribunals.[48] I will now revisit that discussion here.

It will be recalled that in *Kirland*, Cameron J rightly observed that "[g]overnment is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty".[49] We also learned that Kirland Investments was at the receiving end of what the Supreme Court of Appeal described as "a sorry tale of mishap [and] maladministration" at the

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43 This section provides for the correction of obvious errors in an administrative decision.
44 This section sets out instances whereby an administrative decision will be invalid.
45 This section deals with the withdrawal of an administrative decision.
46 Chapter 3 at para 3.4. This is should not be taken to mean that I argue for the ADR process adopted in that matter should be transplanted to the independent administrative tribunals.
47 Chapter 3 at para 3.4.
48 Chapter 3 at para 3.5.
49 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 82.

hands of the Government.[50] This study can confidently predict that if Kirland Investments was “an indigent or bewildered” company without the financial means to institute judicial review proceedings against the Government, they would have had to accept the Government’s conduct. This prompts me to consider the fate of people affected by an invalid administrative decision but who do not have the financial means to institute judicial review proceedings before the courts. I believe that the potential injustice illustrated by the facts in *Kirland* supports the proposition that tribunals will lead to a more effective administration of the law.

The Courts in *Oudekraal* and *Kirland* held “that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process.”[51] It was mentioned in preceding chapters that this position was not only for reasons of the rule of law but to avoid self-help.[52] In Jafta J’s minority judgment in *Kirland*, he argued that Cameron J’s reliance on court decisions on self-help was misplaced because he was of the view that in *Kirland*, self-help was not an issue.[53] This study disagrees. I am of the view that it was appropriate for the majority in *Kirland* to point out that self-help was relevant in that matter because the right to access courts was at play.[54] The right to access to courts is central to enforcing the rule of law and the principle against self-help.[55] In the previous chapter,[56] this study argued that obstacles that bar people from vindicating their right to access courts should be eliminated.[57] If more people are able to access to courts, self-help will be averted. This simply means “that everyone who has a dispute must be able to bring a dispute to a court or tribunal to seek redress”.[58] Right now, it cannot be said with any conviction that our system allows for this. Therefore measures should be put in place to ensure that those aggrieved by admin-

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50 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 219 (SCA) at para 1.

51 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 101. In *Merafong*, Cameron J said that “[w]hat [the presumption of valid] requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.” *Merafong City Local Municipality v AngloGold Ashanti Ltd* at para 43.

52 See chapter 2 at para 2.5.2 and chapter 3 at para 3.4. Also see *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* 2020 (4) SA 375 (CC); 2020 (1) BCLR 41 (CC) at paras 51- 52.

53 See *MEC Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* at para 50.

54 See *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* at para 51.

55 *Chief Lesapo v North West Agricultural Bank and Another* at para 22.

56 See the discussion in chapter 3 at para 3.4.

57 Nyenti 2016:3.

58 Nyenti 2016:3.

istrative decisions that adversely affect them are not prohibited from challenging them before an appropriate forum. Currently, the high costs associated with instituting judicial review proceedings compel people aggrieved by administrative decisions they believe to be defective, to either accept them or resort to self-help. As was pointed out above, the Court in *Kirland* was against parties resorting to self-help.[59] All this points us in the direction of a need to establish an appropriate and independent administrative tribunal to cater to the needs of the majority of South Africans.

In my opinion, now is the opportune time to introduce administrative tribunals as an appropriate alternative avenue to judicial review.[60] The Courts devised the *Biowatch*-principle[61] , which ensures that unsuccessful litigants vindicating their constitutional rights are not burdened with cost orders which would discourage them and other litigants from going to court to vindicate their rights. Analogous to this, this moment calls to the Legislature and the Executive to introduce an administrative tribunal that will enable more people to have access to an efficient forum that could ensure that injustice is limited. This moment requires the Minister to act in accordance to section 10(2)(a)(iii) of PAJA and start the process of establishing independent tribunals as another forum that can be utilised to review administrative action.[62] Finally, I believe that the expeditious manner in which tribunals resolve disputes[63] points encouragingly towards ensuring that such a body will properly manage the tension between legality and legal certainty.

4.3 Conclusion

In trying to determine why invalid administrative decisions are capable of giving rise to legally binding consequences, I evaluated the *Oudekraal* and *Kirland* decisions. We learned that the reason administrative decisions are capable, despite their invalidity, of giving rise to legally binding consequences is that generally speaking such

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59 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* at para 103.

60 This option was already included in sections 33 and 34 of the Constitution.

61 *Biowatch Trust v Registrar Genetic Resources and Others* at para 23; Woolman and Bishop 2013:6-1-6-3.

62 Section 10(2)(a)(iii) of PAJA provides:
The Minister may make regulations relating to-
(iii) the appropriateness of establishing independent and impartial tribunals, in addition to the courts, to review administrative action and of specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action.

63 Armstrong 2011:56-61 and Baboolal-Frank 2019:61-70.

acts are treated as valid. We also learned that this was due to the operation of the presumption of validity, aimed at ensuring certainty in administrative decisions. It also ensures that such decisions are not ignored or acted upon based on the administrator's impulses. This study also dealt with collateral challenges which can be described as the exception to the legal position. I also examined the *Oudekraal* and *Kirland* decisions to determine whether those decisions still permit administrators, in certain circumstances, to revoke or vary their earlier decisions without approaching a court first, to set the decision aside. After interpreting relevant passages from those two decisions, this study concluded that administrators are still allowed, in some instances, to correct certain defective administrative decisions without having to approach the courts.

From the discussion of the *Kirland* decision and the criticism levelled against the *Oudekraal* decision, it became clear that the Courts in both those decisions failed to adequately balance the rule of law principles of certainty and legality. This study used the Life Esidimeni-matter to examine how the collision of legality and certainty plays out at a practical level. The obvious need for balance between the principle of legality and legal certainty brought about a shift in this study. This study explored ways in which the collision between certainty and legality could be mitigated without relinquishing legality. Since the Bill of Rights binds our courts, the Legislature and all organs of state, this study explored ways in which those bodies can assist in managing the tension between legality and legal certainty. This study recommended roles that the courts, the Legislature and some organs of state can play in ensuring that the tension between the principle of legality and legal certainty is balanced or properly managed.

Finally, the study explored the possible introduction of administrative tribunals into our law to enable more people to have access to an efficient forum that could ensure that injustice is limited. In instances where administrators fail to adhere to that standard, there ought to be appropriate mechanisms in place to ensure that such decisions are expeditiously reconsidered by an impartial body and set aside.

This study highlighted some of the fundamental issues or uncertainties in our administrative law. While not professing to provide the perfect solutions, I hope that some

of the suggestions above could assist in the progressive realisation of the right to administrative justice.

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