

OUDEKRAAL AFTER FIFTEEN YEARS: THE SECOND ACT (OR, A REASSESSMENT OF THE STATUS AND FORCE OF DEFECTIVE ADMINISTRATIVE DECISIONS PENDING JUDICIAL REVIEW)

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1 Introduction

“Although the basic principles of *Meyer* and *Pierce* appear to constitute settled law, the Court’s opinions are the most delphic in the Court’s history. They have meant many different things to different persons at different times.”¹

Thus did a commentator assess the legacy of two landmark decisions of the Supreme Court of the United States of America. If one were to substitute the word “*Oudekraal*” for the words “*Meyer* and *Pierce*” in the above quotation, that assessment would not be wholly inapposite in respect of the decision of the Supreme Court of Appeal (SCA) in *Oudekraal Estates (Pty) Ltd v City of Cape Town*.²

The *Oudekraal* judgment has reverberated through the decade and a half that has elapsed since it was handed down. In the field of administrative law, it is probably the most annotated SCA judgment of recent times. References to “the *Oudekraal* principle” abound in the law reports and law journals, and “the *Oudekraal* principle” is frequently invoked as authority to settle questions of administrative law. Yet, many lawyers would struggle to state succinctly what principle was established by the *Oudekraal* judgment (written by Howie P and Nugent JA, with Cameron JA, Brand JA and Southwood AJA concurring). This is partly attributable to the plethora of ensuing judgments that have sought to explain and apply “the *Oudekraal* principle” – not always in pellucid terms.

In general terms, *Oudekraal* addressed 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.”³ As subsequent experience has demonstrated, though, that delineation of the question under consideration was deceptive in its simplicity, concealing the fact that (as

¹ WG Ross “*Pierce* After Seventy-Five Years: Reasons to Celebrate” (2001) 78 *U Det Mercy LR* 443 458-459.

² 2004 6 SA 222 (SCA).

³ Para 1.

Howie P and Nugent JA hastened to point out) it gave rise to “terminological and conceptual problems of excruciating complexity”.⁴

A decade ago, I endeavoured to explicate *Oudekraal* and some of its subsidiary issues. I argued (*pace* some readings of *Oudekraal*) that one should not elevate the notion that apparently invalid administrative decisions stand, unless set aside on judicial review, to an absolute rule:

“There is no unqualified obligation to comply with an administrative decision even if it is *prima facie* invalid. Such a broadly-defined principle would be inconsistent with judicial precedent, and is not supported by *Oudekraal*.”⁵

This article revisits *Oudekraal* and explores recent case law with a view to understanding its ramifications more clearly. In particular, the question is whether *Oudekraal* is authority for one or more of the following propositions:

- (i) that a private party affected by administrative action which is *prima facie* unlawful is bound by that action, and is required to treat it as valid and binding, unless and until it is declared invalid and set aside on judicial review;
- (ii) that an organ of state that has performed an administrative action which is *prima facie* unlawful is bound by that action, and must give effect to it as though it were lawful and valid, unless and until it is declared invalid and set aside on judicial review; and/or
- (iii) that organs of state other than the author of the impugned action are bound by that action and may not disregard it unless and until it is formally declared invalid and set aside.

The article draws the following conclusions:

- (i) *Oudekraal* confirms that there are circumstances in which a subject is entitled to disregard *prima facie* unlawful administrative action and, if it were to be enforced against that subject, to challenge its validity reactively;
- (ii) as a general proposition, and absent statutory indications to the contrary, the author of seemingly unlawful administrative action may not disregard that action despite its apparent legal infirmities; and
- (iii) other organs of state are, unless otherwise authorised by law, generally also bound by that defective administrative action unless and until it is set aside on review.

Furthermore, it is erroneous to speak of “the *Oudekraal* principle” in the singular. The SCA enunciated several principles in *Oudekraal*. However, post-*Oudekraal* jurisprudence has not always distinguished between these principles, which causes confusion about the import of *Oudekraal*. Finally, it is recommended that, instead of attempting to answer questions (ii) and (iii) above with reference to elusive principles of uncertain provenance and

⁴ Para 29, quoting SA de Smith, H Woolf & JL Jowell *Judicial Review of Administrative Action* 5 ed (1995) para 5-044.

⁵ DM Pretorius “The Status and Force of Defective Administrative Decisions Pending Judicial Pronouncement” (2009) 126 *SALJ* 537.

import, those questions should, in the first place, be answered with reference to the provisions of the enabling legislation of the organs of state concerned.

2 Policy reasons why state organs should not disregard defective decisions

There are compelling policy reasons why, in the second and third categories of cases outlined above, organs of state should not be allowed to disregard prior administrative decisions, even if such decisions are evidently defective. The proper functioning of the state would be impaired if an administrative act could be implemented or ignored depending upon the view taken of its validity.⁶ To permit organs of state to disregard administrative decisions would create uncertainty and open the door to abuses of power.⁷ However, this article does not focus on these policy matters. Arguably, these policy matters also did not provide the primary foundation for the *Oudekraal* judgment. That is not to say that these matters are not important considerations in arriving at legally sound solutions to the difficult problems arising in an *Oudekraal* context.

Another reason why organs of state should not be allowed to countermand seemingly flawed administrative acts arises from the fact that an unlawful act will not inevitably be set aside on judicial review. The discretionary nature of the courts' remedial review powers was highlighted in *Oudekraal*.⁸ This discretion militates against permitting state organs to disregard defective administrative decisions and requires them to bring the matter on review for formal determination. It would be a violation of the *trias politica* to allow the administration to decide whether or not a defective decision should stand, and so to usurp a judicial function. Not only the fact (or the legal conclusion) of unlawfulness, but also its consequence (that is, the remedy for such unlawfulness) should remain the domain of the judiciary. Again, however, this aspect of the matter is not explored in this article. Instead, this article endeavours to demonstrate that, in addition to these cogent constitutional and policy reasons for maintaining a general rule that administrative actors may not annul seemingly invalid administrative action, there are sound doctrinal reasons, based on the powers of such actors, for recognising such a general

⁶ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 26. As I have written elsewhere, if compliance with administrative decisions were optional, we would be in jeopardy of descending down the slippery slope of lawlessness towards anarchy and chaos. See Pretorius (2009) *SALJ* 537 565. Also see The Rt Hon the Lord Woolf, Sir Jeffrey Jowell, A Le Sueur, C Donnelly & I Hare *De Smith's Judicial Review* 7 ed (2013) 227-228.

⁷ In *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) para 103, Cameron J, in his customary eloquent turn of phrase, highlighted the perils inherent in permitting state organs to ignore defective decisions. Also see L Boonzaier "Good Reviews, Bad Actors: The Constitutional Court's Procedural Drama" (2015) 7 *CCR* 1 10-11:

"Even when a decision is unlawful there are ... deep-rooted reasons not to allow the government to undo it. This is ... because government actors can, in seeking to have the decision undone, exhibit the very same self-interest, partisanship, arbitrariness and other vices that made the decision reviewable in the first place."

⁸ 2004 6 SA 222 (SCA) para 36:

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

rule. However, it must be emphasised that this is not an immutable rule, to be enforced dogmatically and indiscriminately. Like most rules of administrative law, it is subject to qualification.

3 The facts of the *Oudekraal* case

Oudekraal must be understood in the context of its specific facts. For present purposes, the following synopsis is important:

In 1957, the erstwhile Administrator of the Cape Province approved the establishment of a township on certain land in the Cape Peninsula. Pursuant to that approval, a general plan of the proposed township was submitted to the Surveyor-General in 1960 and was approved in 1961. The plan was then lodged with the Registrar of Deeds for endorsement on the title deed. Notification of the township as approved was published in the *Provincial Gazette* in 1962. However, only in 1996 did the landowner, Oudekraal Estates (Pty) Ltd (“OEPL”), apply to the Cape Metropolitan Council (“Council”) for approval of an engineering services plan for the township. The Council refused to approve that plan, averring that the earlier general plan had not been lodged with the Surveyor-General and the Registrar of Deeds within the statutorily prescribed time periods, and that the development rights had consequently lapsed.

OEPL applied to the High Court for relief, including a *declaratur* that its development rights over the township remained of full force and effect. The High Court declined to grant such relief, accepting that the Administrator’s permission had lapsed when the general plan had not been submitted timeously, that the Surveyor-General’s resultant approval was a nullity and that, consequently, no rights could have been obtained by OEPL. Although township rights had been endorsed on the title deed, it was held that the registration of the township was *ultra vires*, and that the formal act of registration could not be immune from being set aside. To grant OEPL relief and effectively proclaim that an illegal action had transmogrified into a legal decision would, it was held, undermine the principle of legality. Consequently, OEPL could not rely on the registered township rights to justify the relief which it sought.⁹ OEPL appealed to the SCA against this judgment.

4 The SCA’s decision in *Oudekraal*

The SCA introduced its judgment by observing that the appeal raised important questions for the rule of law, *viz* “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.” To answer these questions, the SCA found it unnecessary to determine whether the general plan had been lodged timeously. There was a prior and more fundamental defect in the approval process: the Administrator’s permission had been invalid *ab initio* as it had been granted in ignorance or in disregard of the existence of burial sites on

⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2002 6 SA 573 (C). The Oudekraal property has featured in case law for a very long time: see *Breda’s Executors v Mills* 1883-1884 2 SC 189; *Van Breda v Cape Town Town Council* 1891-1892 9 SC 415.

the property, which would have been desecrated unlawfully by the township development. Nevertheless, the general plan had, as a matter of fact, been approved by the Surveyor-General and acted upon by the Registrar.¹⁰ Against this background, the SCA formulated the specific question that required consideration:

“[T]he question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the ... Council entitled to disregard the Administrator’s approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. *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.* [emphasis added] ... [E]ven an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”¹¹

The SCA held that the distinction between “what exists in law and what exists in fact” explains the “apparent anomaly” (that an unlawful act can produce legal consequences). According to that analysis, a void administrative act is not an act in law but is an act in fact, and its factual existence may provide the foundation for the legal validity of later acts. An invalid administrative act may, despite its non-existence in law, serve as the basis for another perfectly valid decision: its *factual* existence, rather than its validity, is the cause of the subsequent act, which is valid since the *legal* existence of the first act is not a precondition for the second.

“[T]he validity of these later acts depends upon the legal powers of the second actor. The crucial issue ... is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act.”¹²

Therefore, the enquiry, when dealing with the implications of the invalidity of an initial act for later acts, is not whether the initial act was valid but whether its substantive validity was a prerequisite for the validity of subsequent acts. If the validity of later acts was dependent only on the factual existence of the initial act, then the subsequent act will have legal effect for so long as the initial act is not set aside on review.¹³

The SCA then stated:

“When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases – where the subject is

¹⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) paras 5, 13, 20, 22 and 25.

¹¹ Para 26.

¹² Paras 27 and 29. The “apparent anomaly” later came to be described by Cameron J as “the *Oudekraal* paradox” or “the *Oudekraal* conundrum” in *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 34 and 36. See, generally, D Freund & A Price “On the Legal Effects of Unlawful Administrative Action” (2017) 134 *SALJ* 184.

¹³ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 31; Pretorius (2009) *SALJ* 541. See *Camps Bay Ratepayers’ and Residents’ Association v Harrison* 2011 4 SA 42 (CC) para 62:

“As was explained in *Oudekraal Estates* ... administrative decisions are often built on the supposition that previous decisions were validly taken and unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence.”

sought to be coerced by a public authority into compliance with an unlawful administrative act – that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising ... a ‘defensive’ or a ‘collateral’ challenge to the validity of the administrative act.”¹⁴

The SCA said that it will generally avail a person who is threatened by a public authority with coercive action (aimed at ensuring compliance with a prior administrative act) to mount a collateral challenge to the validity of the initial act because the legal force of the coercive (second) action will usually depend on the validity of the earlier act. While legal consequences may follow from the mere fact of an administrative act, the rule of law dictates that the state’s coercive power generally cannot be used against the subject unless the initiating act is valid. However, a public authority (as distinct from a subject) may not refuse “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.”¹⁵

Accordingly, the SCA held that the Council’s collateral challenge to the validity of the Administrator’s decision was misplaced. The approval of the township had taken effect once it had been granted, various officials had performed their functions, and the approval had been promulgated in the *Gazette*. On the SCA’s interpretation of the relevant provincial ordinance, the validity of each of those steps was not dependent on the validity of the Administrator’s approval but merely upon its factual existence. The legislature, said the SCA, could not have expected the Surveyor-General and the Registrar of Deeds to satisfy themselves that the approval was valid before they acted on it, nor could the landowner have been expected to enquire into its validity before relying upon the notification in the *Gazette* that the township had been approved. Furthermore, the invalid act was not being applied coercively by a public body, or to provide the basis for coercive action against the subject.¹⁶

Consequently, the SCA held that, for as long as the Administrator’s approval existed in fact, OEPL was permitted to develop the township and the Council was not entitled to ignore that when deciding whether or not to carry out its public functions.¹⁷ However, the SCA declined to grant the declaratory relief sought by OEPL, partly because review proceedings might still be instituted in respect of the Administrator’s approval.¹⁸

¹⁴ Para 32. “Collateral challenges” have lately become known as “reactive challenges”. See *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 26; *Department of Transport v Tasima (Pty) Ltd* 2017 2 SA 622 (CC) para 135.

¹⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) 245G-H, 246G-247A; Pretorius (2009) *SALJ* 543.

¹⁶ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 39; Pretorius (2009) *SALJ* 543.

¹⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 40; Pretorius (2009) *SALJ* 543-544.

¹⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) paras 41-49. When these review proceedings materialised, the High Court set aside the Administrator’s approval, despite the effluxion of half a century since it had been granted. See *City of Cape Town v Oudekraal Estates (Pty) Ltd* CPD 09-10-2007 case no 8112/04. The SCA upheld that decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2010 1 SA 333 (SCA).

5 My original analysis of the *Oudekraal* judgment

My original analysis of *Oudekraal* highlighted that the SCA's judgment had been construed, in subsequent High Court decisions, as authority for a proposition that apparently invalid administrative decisions stand, and must be regarded as operative, until set aside on judicial review. I expressed reservations in that regard, stating that such a broad proposition was not supported by *Oudekraal*, and that there was precedent for the view that an administrative act characterised by manifest invalidity may be ignored without having it set aside on review.¹⁹

I observed that, in *Oudekraal*, the SCA had stated that it was impermissible for the Council to disregard the Administrator's approval of the township application merely because it believed the approval was invalid. It could not be ignored until formally set aside. But, I also argued, *Oudekraal* did not provide authority for a universal rule that every administrative act, even if palpably flawed, remains binding until set aside.²⁰

I noted that the question considered in *Oudekraal* had arisen in a particular factual context: after the Administrator had approved the township development (unlawfully, as it transpired), the general plan had been approved by the Surveyor-General and acted upon by the Registrar.

“What the SCA was concerned with was the implications of the invalidity of an initial administrative act for the validity of subsequent acts performed on the basis of the earlier act. Having regard to the facts (further acts had been performed by ‘second actors’ – the Surveyor-General and the Registrar – on the assumption that the Administrator’s initial act had been valid), the question that required the SCA’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.*” [emphasis added]²¹

In that context, one had to distinguish between two questions: (i) whether a decision which is *prima facie* invalid, but which has not been set aside on review, may be ignored by affected persons, and (ii) whether such a decision might sometimes be given legal recognition and provide the foundation for further acts, which might have legal force despite the invalidity of the initial decision, which can, therefore, not be ignored. I argued that *Oudekraal* was concerned with the latter question, and indicated that the SCA had afterwards confirmed that *Oudekraal* dealt with the case where a “second actor” has made further decisions on the basis of an initial decision.²² I pointed out that the question as to the legal status of a decision which is *prima facie* invalid, and whether such a decision may be ignored, can also arise in a context where no “second actor” has performed acts on the basis of that initial decision. *Oudekraal* was distinguishable from that class of cases by the fact that the

¹⁹ Pretorius (2009) *SALJ* 537-538.

²⁰ 544.

²¹ 544. See *Gardner v Central University of Technology*, Free State ZALC 25-07-2012 case no JA 65/10 paras 54-57; *Taung Local Municipality v Mofokeng* 2011 32 *ILJ* 2259 (LC).

²² *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* 2008 4 SA 43 (SCA) para 13 and *Shunmugam v National Democratic Convention* 2009 2 All SA 285 (SCA) para 15. Also see *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* 2013 4 All SA 639 (SCA) para 38; *Shanduka Resources (Pty) Ltd v Western Cape Nickel Mining (Pty) Ltd* 2017 2 All SA 279 (WCC) paras 56-60; *Corruption Watch NPC v President of the Republic of South Africa* 2018 2 SACR 442 (CC) para 32.

Surveyor-General and the Registrar had, in fact, performed further acts pursuant to the Administrator's initial act. It was partly for that reason that the SCA had found that the Council had not been entitled to ignore the Administrator's approval, despite its invalidity.²³

I argued that there was another reason why the SCA had found that the Council could not ignore the Administrator's approval: the fact that such approval was not being applied coercively by a public body against the Council. The SCA had said that it was in cases where *the subject* is sought to be "coerced" by a public authority into compliance with an unlawful administrative act that the subject may ignore the unlawful act and raise a collateral challenge to its validity. Thus, the SCA had explained that the rule that an unlawful act can produce legal consequences for so long as it is not set aside was not an absolute principle. Instead, the "settled law", as set out in *Oudekraal*, was that "the target of such compulsion is entitled to await events and resist only when the unlawful condition is invoked to coerce it into compliance."²⁴

I proceeded to explore two questions: first, whether a *public body* that has made an administrative decision is itself entitled to ignore that decision if it believes it to be invalid; and, secondly, whether a *subject* affected by an administrative decision may ignore it if he believes it to be invalid. Both questions were considered with reference to cases where a "second actor" had *not* performed later acts on the basis of the initial act which was believed to be invalid. Thus, these questions were concerned with situations that, on my construction of *Oudekraal*, had not arisen for consideration in that case.²⁵

On the first question (whether the author of an invalid decision may ignore it where a "second actor" has not made a further decision based on the initial decision), I adopted the view (contrary to that taken in several cases, supposedly on the basis of *Oudekraal*) that it is not an absolute rule that an apparently invalid administrative act may never be ignored by its author. However, I emphasised that public bodies do not have *carte blanche* to disregard their own decisions on account of perceived invalidity: unlawful decisions produce practical consequences and are *generally* considered valid until set aside by a court. I outlined exceptional instances in which, despite this general principle, such decisions may be ignored by their authors.²⁶ As authority, reference was made to numerous cases, including decisions of the

²³ Pretorius (2009) *SALJ* 544-545.

²⁴ *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 6 SA 12 (SCA) paras 49 and 50, cited with approval in *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 44 n 73. I also referred to *Nature's Choice Properties (Alrode) (Pty) Limited v Ekurhuleni Municipality* 2010 3 SA 581 (SCA) para 13: Pretorius (2009) *SALJ* 545.

²⁵ One can readily see why, in "second actor" instances, the initial act should not summarily be ignored: that would dismantle the substructure on which the later act was founded. This would create uncertainty. See *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 23. But that was not the question with which I was concerned previously.

²⁶ Pretorius (2009) *SALJ* 547-557.

Appellate Division of the Supreme Court, the SCA, the Constitutional Court and, for good measure, the House of Lords.²⁷

Likewise, with reference to the second question (whether an invalid decision may be ignored by affected persons in the absence of a further “second actor” decision), it was explained that there are indeed circumstances where such conduct may be permissible. Again, this proposition was substantiated with reference to high judicial authority.²⁸

Ultimately, a number of conclusions were proffered. First, I said it was a misconception to regard *Oudekraal* as authority for a comprehensive proposition that administrative action must be regarded as valid and binding until reviewed and set aside. *Oudekraal* was concerned with a narrower question: the effect of an invalid prior administrative act upon a further act performed pursuant to the initial act. In this regard, the SCA had 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 second act, the latter act could be regarded as valid until the initial act was set aside.²⁹

To the extent that *Oudekraal* addressed the broader question whether administrative action must be treated as valid until set aside, it confirmed a different principle: where a public body requires a person to do, or refrain from doing, something, and that person doubts the lawfulness of that requirement, he may ignore it and, if enforcement proceedings are instituted against him by that body, defend himself by way of a collateral challenge to the validity of the underlying act. In this regard, I said that the courts have accepted that administrative acts that are conspicuously invalid (for example, where the act was manifestly beyond the decision-maker’s jurisdiction, or where a complete failure of natural justice occurred) may be ignored by the decision-maker or affected individuals without having the administrative act set aside. However, I cautioned that such a robust approach would frequently be imprudent. To avoid risk, it would be advisable to seek judicial intervention and to obtain a definitive pronouncement on the validity or otherwise of the impugned act. It was only in instances of flagrant invalidity that a person could disregard an administrative decision applicable to him if he believes it to be invalid, and take the risk that it might transpire that his belief was wrong.³⁰

²⁷ *Sachs v Dönges NO* 1950 2 SA 265 (A) 284; *Garment Workers’ Union (Western Province) v Industrial Tribunal and Minister of Labour* 1963 4 SA 775 (A); *Suid-Afrikaanse Spoorweë & Hawens v Mentz* 1965 1 SA 888 (A) 895; *Sekretaris van Binnelandse Inkomste v Florisfontein Boerdery (Edms) Bpk* 1969 1 SA 260 (A) 265-266; *R v Secretary of State for the Home Department, Ex parte Zamir* 1980 AC 930 (HL); *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 44; *Premier of the Free State v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA) para 36; *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 1 SA 356 (SCA) para 23. Also see *Gokal v Moti* 1941 AD 304 and especially the instructive discussion of that case by E Mureinik “Discretion and Commitment: The Stock Exchange Case” (1985) 102 *SALJ* 434 443-444.

²⁸ See, eg, *Esterhuizen v Brandfort Munisipaliteit* 1957 3 SA 768 (A) 771; *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 3 SA 589 (SCA) para 13; *London & Clydeside Estates Ltd v Aberdeen District Council* 1979 3 All ER 876 (HL) 883; *Boddington v British Transport Police* 1998 2 All ER 203 (HL) 213, 223-227. See Pretorius (2009) *SALJ* 557-563.

²⁹ Pretorius (2009) *SALJ* 564.

³⁰ 564-565.

6 A plurality of *Oudekraal* principles

What exactly is the vaunted “*Oudekraal* principle”?

Several judgments³¹ and publications³² refer to “the *Oudekraal* principle” in the singular, postulating that the SCA’s judgment can be reduced to one solitary legal principle. This perception is attributable to a simplistic reading of *Oudekraal*, although it must immediately be conceded that “comprehension of the *Oudekraal* doctrine is no easy task.”³³ This is partly because the judgment deals with complicated legal issues, partly because the judgment itself does not always say exactly what it means with exemplary precision, and partly because subsequent commentaries on the matter have not always been without muddle.

Careful scrutiny of *Oudekraal* reveals that it is authority for several discrete propositions:

First, where one organ of state has performed an administrative act, and another organ of state, assuming that act to be valid, subsequently performed a further administrative act based on the initial act, and where the factual existence rather than the substantive validity of the initial act was a precondition for the validity of the second act, and it later transpires that the initial act may have been invalid, the *initial act* must be deemed effective until it is formally set aside, and cannot be ignored. On its facts, this was the real issue addressed by *Oudekraal*.³⁴ As such, one might refer to it as “the first *Oudekraal* principle”.

³¹ See, eg, *Roodezandt Ko-operatiewe Wynmakery Ltd v Robertson Winery (Pty) Ltd* SCA 19-11-2014 case no 503/2013 para 14; *Maluti-a-Phofung Local Municipality v Rural Maintenance (Pty) Ltd* 2016 37 ILJ 128 (LAC) para 23; *Minister of Home Affairs v Public Protector* 2018 3 SA 380 (SCA) para 5; *Democratic Alliance v Minister of International Relations and Co-operation* 2018 6 SA 109 (GP) para 41; *Trudon (Pty) Ltd (formerly TDS Directory Operations) v National Prosecuting Authority ZAGPPHC 23-11-2018 case no 43247/2014 para 10*; *Kalisa v Chairperson of the Refugee Appeal Board ZAWCHC 19-11-2011 case no 17413/2017 para 13*; *Pareto Limited v City of Johannesburg Metropolitan Municipality ZAGPJHC 13-09-2018 case no 39314/2015 para 6*; *Coal Transporters Forum v Eskom Holdings Ltd ZAGPPHC 26-03-2019 case no 42887/2017 para 16, 21*; *King Phahlo Royal Family v Molosi ZAECMHC 14-01-2020 case no 3501/2019 para 41*.

³² See, eg, Y van Leeve “Executive Heavy Handedness and the Right to Basic Education. A Reply to Sandra Fredman” (2014) 6 *CCR* 199 205; PJ Badenhorst & N Olivier “Conversion of Jointly-Held Old-Order Mining Rights. You Can’t Always Get What You Want – Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd” (2015) 78 *THRHR* 498 502; Serjeant at the Bar “Justices disagree: is this the beginning of the end of a divide in the ConCourt” *Mail & Guardian* (28-11-2016); NI Moleya “The Effect of the *Oudekraal* Principle on the Rule of Law” *De Rebus* (01-08-2018) 28; MN de Beer “A New Role for the Principle of Legality in Administrative Law” (2018) 135 *SALJ* 613 628-630.

³³ *Karoo Hoogland Municipality v Nothnagel* 2015 36 ILJ 2021 (LAC) para 21.

³⁴ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 26. See *Northern Free State District Municipality v Matshai* ZASCA 30-03-2005 case no 090/2004 para 15; *Shanduka Resources (Pty) Ltd v Western Cape Nickel Mining (Pty) Ltd* 2017 2 All SA 279 (WCC) paras 56-60; *National Energy Regulator of South Africa v PG Group (Pty) Ltd* 2020 1 SA 450 (CC) para 36; D Feldman “Error of Law and Flawed Administrative Acts” (2014) 73 *Cambridge LJ* 275 281-282. The fact that the act is deemed effective indicates that it is accorded a quality it does not actually possess. (“[W]hen you talk of a thing being deemed to be something, ... [it is] an admission that it is not what it is to be deemed to be.” *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 4 SA 738 (A) 744F-G). That is why Howie P and Nugent JA did not say that the impugned initial act is “valid”; they said it “exists in fact and has legal consequences” (para 26). The invalid act does not transmogrify into a valid one; it must merely be treated as such. *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* 2015 2 All SA 657 (SCA) para 12. Its deemed “validity” is a legal fiction. Thus, the rule of law is, paradoxically, maintained rather than subverted by giving practical effect to an act which is legally invalid.

Second, where an organ of state has performed a second administrative act based on an initial administrative act, and it afterwards appears that the initial act may have been invalid, the validity or otherwise of the *second act* depends on whether: (i) the mere factual existence of the initial act sufficed for the validity of the second act, or the legal validity of the initial act was a prerequisite for the validity of the second act, and (ii) the second actor had legal power to act validly in performing the second act despite the invalidity of the initial act.³⁵ If the validity of the second act was (having regard to the applicable legislation) dependent only on the factual existence of the initial act, then the *second act* will have legal effect for so long as the initial act is not set aside on judicial review.³⁶ This one might call “the second *Oudekraal* principle”.

Third, an organ of state that is empowered by law to act in certain circumstances (for example, where a prior act has been performed) may not evade the performance of its public duties by hiding behind the alleged invalidity of the originating act. It may not simply ignore that act but, instead, must take steps to have it reviewed.³⁷

Finally, there is the more general question whether private parties affected by administrative action must treat such action as valid, even if it is suspected to be invalid, unless it is set aside on judicial review. In this regard, *Oudekraal* states that if an organ of state requires a person to do, or refrain from doing, something and that person doubts the lawfulness of that requirement, she may ignore it, await events and, if enforcement proceedings are instituted against her by the organ of state, she may defend herself by raising a reactive challenge to the validity of the administrative act concerned.³⁸

Thus, the *Oudekraal* doctrine encompasses several discernible principles. Much of the prevailing confusion in the *Oudekraal* realm is attributable to a failure to distinguish between these different dimensions of the doctrine.

7 Post-*Oudekraal* decisions

Officialdom frequently perpetrates administrative blunders. As such, it was only a matter of time before the *Oudekraal* paradox came to the fore again, and, unsurprisingly, the courts have had to return to *Oudekraal* repeatedly. Again and again, *Oudekraal* has been construed as authority for a blanket

³⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 29. These questions must be answered with reference to the enabling legislation of the relevant organs of state (para 39). The difficulty is that the legislation will seldom state expressly whether the legal validity (or merely the factual existence) of the initial act is required to render the second act valid. It will usually be necessary to answer these questions on the basis of the implied powers of the organs of state concerned, which is hardly a satisfactory way of proceeding (although organs of state can and do have implied powers). This is probably why the *Oudekraal* court’s analysis of the provincial ordinance (para 39) has a slightly surreal air. It concludes that the Surveyor-General and the Registrar of Deeds could not have been expected to satisfy themselves of the validity of the Administrator’s approval. But that would almost always be the case. However, if the second actor had (or ought to have had) reason to suspect that the initial act was invalid, then he cannot rush headlong into the second act and later seek to preserve its validity by claiming to have been ignorant of the invalidity of the initial act.

³⁶ Para 31.

³⁷ Paras 37 and 40.

³⁸ Paras 32 and 35. I return to this aspect of the matter in section 8 below.

proposition that ostensibly invalid administrative decisions stand, and must be regarded as valid or effective, until set aside on judicial review.³⁹ Having regard to the analysis provided above, this seems a somewhat facile interpretation of *Oudekraal*.

The Constitutional Court has repeatedly grappled with issues arising from the *Oudekraal* paradox. In doing so, the Court has adopted an interpretation of *Oudekraal* broader than, if not incompatible with, the analysis propounded in my 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.”⁴⁰

In what follows, this article explores recent relevant case law with reference to the three categories of cases outlined in the introduction above. Two of those categories (where administrative action is disregarded by either the administrator concerned or by the affected person) were addressed in my initial article. I did not initially distinguish between the situations where, on the one hand, an administrative decision is disregarded by the author of that decision and, on the other hand, it is disregarded by another organ of state. (The courts have not generally drawn that distinction either.) It is a material distinction because objections (for example, those based on the *functus officio* doctrine) to the author of a decision retracting or ignoring her own decision do not necessarily apply to another official or body doing so.

Oudekraal, its implications and the relevant case law should be viewed against the background of Krieglner J’s oft-quoted statement in *Fose v Minister of Safety and Security*⁴¹ that unconstitutional conduct is a nullity, even before the courts pronounce it so:

“[T]he declaration of nullity is merely descriptive of a pre-existing state of affairs.”

In the discussion that follows, the expression “facially invalid decision” is a short-hand term referring to administrative action which, *prima facie*, is afflicted by some irregularity that renders it legally defective (in the sense that it does not comply with some requirement for lawfulness) and likely to be declared unlawful and invalid on review.⁴² Of course, assessments as to the regularity or lawfulness of administrative action are frequently not

³⁹ See, eg, *City of Johannesburg v Ad Outpost (Pty) Ltd* 2012 4 SA 325 (SCA) para 19; *Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Ltd* 2013 4 SA 461 (SCA) para 51; *Road Accident Fund v Duma* 2013 6 SA 9 (SCA) para 24; *Kitshoff v Fedsure Staff Pension Fund* SCA 28-03-2017 case no 597/16 para 10; *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 4 SA 71 (SCA) para 43; *Democratic Alliance v Minister of International Relations and Co-operation* 2018 6 SA 109 (GP) para 41; *Moyane v Ramaphosa* 2019 1 All SA 718 (GP) para 35; *Coal Transporters Forum v Eskom Holdings Ltd ZAGPPHC* 26-03-2019 case no 42887/2017 para 21; *Langa v Premier, Limpopo Province* MPPHC 03-05-2019 case 4561/2017 para 51; *Deltatex Holdings Limited v Exxaro Coal (Pty) Ltd ZAGPPHC* 06-06-2019 case no 166/2012 para 32; *MEC: Police, Roads and Transport (Free State Provincial Government) v SMEC South Africa (Pty) Ltd ZAFSHC* 30-05-2019 case no A46/2018 para 37.

⁴⁰ Boonzaier (2015) 7 CCR 12 n 72. Also see MN de Beer “Invalid Court Orders” (2019) 11 CCR 283 298. As will be seen below, the Constitutional Court has lately intimated, albeit obliquely, that the *Oudekraal* doctrine may not be as boundless and unqualified as it initially suggested.

⁴¹ 1997 3 SA 786 (CC) para 94. See G Quinot & PJH Maree “The Puzzle of Pronouncing on the Validity of Administrative Action on Review” (2015) 7 CCR 27 32.

⁴² Jafta J used the term “facially unlawful” in *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 128.

clear-cut matters. There is usually scope for argument. That is partly why the *Oudekraal* conundrum arises in the first place. If administrative lawfulness or otherwise were an exact science, we might have less compunction about allowing people to disregard “clearly” unlawful decisions.

8 Are citizens required to comply with facially invalid administrative decisions?

Oudekraal was not concerned with the question whether a private party affected by a facially invalid decision is required to comply with that decision, despite its legal debilities, unless and until it is set aside on review. Nevertheless, *Oudekraal* has been construed as authority for the view that such a decision remains binding on a private person affected by it unless and until it is formally set aside.⁴³ However, this is a fallacy. There is no tenet of universal application to that effect; to the extent that there ever was, it was qualified and subject to exceptions. There is judicial precedent – not insubstantial – indicating that there are circumstances in which a private party may be entitled to ignore an administrative decision.⁴⁴ If the courts now hold a contrary opinion, they must explain why those decisions were wrong, or no longer constitute good law, or are distinguishable. But those cases cannot simply be ignored.

Moreover, the notion that *Oudekraal* posits that a private person must comply with a facially invalid decision is a fallacy because *Oudekraal* actually states the opposite:

“[A] statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. ... [W]here the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act ... the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising ... a ‘collateral’ challenge to the validity of the administrative act.”⁴⁵

Thus, at the very least the hypothesis that private persons may not disregard unlawful administrative acts is qualified in the sense that they clearly may do so if an organ of state seeks to coerce them into compliance. (Needless to say, such a recalcitrant person will have to bear the consequences should his reactive challenge to the impugned administrative act fail.)

⁴³ See, eg, *Alberts v Prokureursorde, Vrystaat ZAFSHC* 06-09-2004 case no 1996/2004 para 13; *Khabisi NO v Aquarella Investment 83 (Pty) Ltd* 2008 4 SA 195 (T) paras 21 and 22; *Club Mykonos Langebaan Ltd v Langebaan Country Estate Joint Venture* 2009 3 SA 546 (C) para 38; *Loghdey v Advanced Parking Solutions CC* 2009 5 SA 595 (C) para 34; *Minister of Mineral Resources v Mawaise (SA) Mining Corporation (Pty) Ltd* 2016 1 SA 306 (SCA) para 20.

⁴⁴ See the cases cited in n 28 above; Pretorius (2009) *SALJ* 557-563 and the authorities cited there; *Central Road Board v Meintjes* 1853-1856 2 Searle 165; *Leith v ‘T Gouvernement OVS* 1879 ORC 66; *Bruwer v Ellis* 1887-1888 5 SC 188, (1887) 4 *Cape LJ* 284; *Short v Town Council of Cape Town* 1898 15 SC 190; *Claremont Municipality v Hudson* 1899 16 SC 380; *R v Malan & Bruyns* 1902 19 SC 187; *Stanton v Johannesburg Municipality* 1910 TPD 742 757; *Majola v Ibhayi City Council* 1990 3 SA 540 (E) 542H-543E.

⁴⁵ 2004 6 SA 222 (SCA) paras 32, 34, 35 and 37. See *Nature’s Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Municipality* 2010 3 SA 581 (SCA) para 13:

“There is nothing in [*Oudekraal*] which holds that a subject may not raise the defence that the underlying administrative decision is unlawful and, instead, has to comply with it while seeking to set it aside in collateral proceedings; the case in fact holds the contrary.”

If *Oudekraal* established any rule restricting the right of private persons to disregard administrative decisions, then it is limited to the “second actor” scenario, that is the situation where, after the impugned decision was made, further official acts were performed on the basis of that decision on the supposition that it was valid. And even then the impugned initial decision will be regarded as having legal consequences only if its mere factual existence (as opposed to its substantive legal validity) was required for the validity of the subsequent acts.⁴⁶ What is more, the parts of the *Oudekraal* judgment that dealt with the position of private persons were probably *obiter*, as the case was not concerned with that issue but with whether the Council (a public body and a third actor) was entitled to disregard the Administrator’s approval. As such, these aspects of the judgment were not necessary for, or pivotal to, the decision of the case and so did not form part of the *ratio decidendi*, and thus do not constitute binding judicial precedent.⁴⁷

In *V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd*⁴⁸ the Civil Aviation Authority had issued an order grounding a helicopter owned by the respondents. When the respondents intimated that they intended to ignore that order, the appellant (which owned the site from which the helicopter was being flown) applied in the High Court for an interdict prohibiting the respondents from operating the helicopter from that site pending “upliftment” of the grounding order. The respondents argued that the order was unlawful and that they were entitled to ignore it. When the matter came before the SCA, Howie P (a co-author of the *Oudekraal* judgment) stated, with reference to *Oudekraal*, that a collateral challenge

“is applicable in proceedings where a public authority seeks to coerce a subject into compliance with an unlawful administrative act. If these proceedings are not of that nature then the grounding order will have legal effect until set aside by a reviewing Court.”⁴⁹

Therefore, a private person who suspects that an administrative act applicable to her is unlawful may disregard it and resist its enforcement by way of a collateral challenge. This precept was reiterated in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*.⁵⁰ The SCA, citing *Oudekraal*, said that a citizen

⁴⁶ 2004 6 SA 222 (SCA) paras 29 and 31.

⁴⁷ See S Kovalsky “Judicial Precedent in South Africa” (1935) 4 *SA Law Times* 97; GW Paton & G Sawyer “Ratio Decidendi and Obiter Dictum in Appellate Courts” (1947) 63 *LQR* 461; HR Hahlo & E Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 32-33; HR Hahlo & E Kahn *The South African Legal System and its Background* (1968) 260 *et seq*; WJ Hosten, AB Edwards, C Nathan & F Bosman *Introduction to South African Law and Legal Theory* (1983) 232-236; *Turnbull-Jackson v Hibiscus Court Municipality* 2014 6 SA 592 (CC) paras 61 and 62.

⁴⁸ 2006 1 SA 252 (SCA).

⁴⁹ Para 10. Nugent JA, the other co-author of *Oudekraal*, was one of the concurring judges in this matter. The respondents’ application for leave to appeal to the Constitutional Court was rejected. *Helicopter and Marine Service (Pty) Ltd v V&A Waterfront Properties (Pty) Ltd* 2006 3 BCLR 351 (CC).

⁵⁰ 2010 3 SA 589 (SCA) para 13.

“is not required to comply with an administrative act which is bad on its face as it is unlawful and of no effect. He or she is entitled to ignore it if so satisfied and justify that conduct by raising a ‘defensive’ or ‘collateral’ challenge to its validity.”⁵¹

9 Is the author of a facially invalid decision bound by it?

Oudekraal has been construed as authority for a general principle to the effect that the author of a facially invalid administrative decision is precluded from disregarding or revoking it.⁵²

The case of *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute (“Kirland”)*⁵³ is the key precedent here. Kirland had applied to the Superintendent-General of Health in the Eastern Cape, Mr Boya, for permission to establish two hospitals. Pursuant to an advisory committee’s recommendation not to approve the applications, Mr Boya had written a letter to Kirland to notify them of his decision to reject the applications. However, before the letter was signed and dispatched, Mr Boya was injured in a car crash and went on sick leave. In his absence, the acting Superintendent-General, Dr Diliza, was improperly induced by the Member of the Executive Council (“MEC”) for Health to approve Kirland’s applications, which she did. Upon returning to work and discovering this state of affairs, Mr Boya informed Kirland that the approvals were being withdrawn. Kirland sought relief in the High Court, arguing that the Superintendent-General was *functus officio* and unable to withdraw the approvals and that the withdrawal was, in any event, unlawful. The High Court set aside the purported approval as well as its withdrawal. The SCA construed *Oudekraal* as authority for the proposition that the holder for the time being of a particular public office may not disregard a decision taken by a previous incumbent of that same office.⁵⁴

⁵¹ This rule – that there are circumstances in which citizens may treat defective administrative action as invalid even if they have not brought proceedings to have it set aside – is confirmed in *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 44 (see below). See Lord Woolf et al *De Smith’s Judicial Review* 228 n 193:

“[A]n individual in the case in which ‘a fundamental obligation may have been so outrageously and flagrantly ignored or defied’, may ‘safely ignore what has been done and treat it as having no legal consequences [and] use the defect ... as a shield or defence without having taken any action of his own’” (quoting from the speech of Lord Hailsham of St Marylebone in *London & Clydeside Estates Ltd v Aberdeen District Council* 1979 3 All ER 876 (HL) 883).

Also see *R v Immigration Appeal Tribunal, ex parte Jeyeanthan; Ravichandran v Secretary of State for the Home Department* 1999 3 All ER 231 237-238; C Forsyth “Showing the Fly the Way Out of the Fly Bottle: The Value of Formalism and Conceptual Reasoning in Administrative Law” (2007) 66 *Cambridge LJ* 325 337-339.

⁵² See, eg, *Syntell (Pty) Ltd v City of Cape Town* ZAWCHC 13-03-2008 para 60; *Vivabet (Pty) Ltd v Gauteng Gambling Board* ZAGPJHC 06-03-2019 case no 14863/17 para 28 (“[*Oudekraal*] held that once an administrator has taken a decision, that is the end of its power unless, as a matter of express or implied statutory provision, it is specifically granted the power of revocation”); *Rochville Properties (Pty) Ltd v City of Tshwane Metropolitan Municipality* ZAGPPHC 15-06-2018 case no 82807/2016 para 30 (“[I]t is trite that it is not open to the first respondent to argue that a decision of one of its own decision-making structures is void or invalid and may on that basis be ignored.”); *UMSO Construction (Pty) Ltd v City of Johannesburg* 2018 4 All SA 507 (GJ) para 100 (“[I]f the City wished to set aside its own decision, it could not do so ... and would have to apply to court to have its decision set aside.”).

⁵³ 2014 3 SA 481 (CC). See Quinot & Maree (2015) *CCR* 37-40; Boonzaier (2015) *CCR* 8-12, 23.

⁵⁴ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 3 SA 219 (SCA) para 21.

When the matter came before the Constitutional Court, the justices divided on the question whether the state parties had properly raised the validity or otherwise of the impugned approval. The majority (*per* Cameron J, with Moseneke ACJ, Skweyiya ADCJ, Froneman and Nkabinde JJ and Dambuza and Mhlantla AJJ concurring) held that, in instances such as these, the state parties are required to apply formally for a court to set aside the defective decision.⁵⁵ It was accepted that it is permissible, in principle, for an organ of state to institute judicial review proceedings in respect of its own defective decision.⁵⁶

As the state parties could not “take a shortcut” (that is, avoid the need to have the impugned approval set aside on review), the question arose whether the provincial authorities were entitled to ignore that approval as a “non-decision”. In that context, the state parties invited the Court to reconsider the correctness of *Oudekraal*. Cameron J said that administrators cannot, without recourse to legal proceedings, disregard administrative actions by their peers, subordinates, or superiors if they consider them mistaken. This would be a licence to “self-help”, would invite officials to take the law into their own hands by ignoring administrative conduct they consider incorrect, would spawn confusion and conflict, and would undermine the courts’ supervision of the administration. As such, Mr Boya was not entitled to withdraw Dr Diliza’s purported approval, but merely to approach a court to set it aside.⁵⁷

Against this background, Cameron J turned to *Oudekraal*. He stated that the question before the SCA in *Oudekraal* “was wide” (“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”), but the “narrow dispute” requiring decision was

“whether the invalidity of a preceding administrative act (the administrator’s grant of township development rights) entitled a local authority to refuse to do something (approve an engineering services plan for the township) it would have been obliged to do if the administrator’s preceding act had been valid.”

This question, said Cameron J, the *Oudekraal* court had answered in the negative:

“The local authority could not simply treat the administrator’s act as though it did not exist. Until it was properly set aside by a court of law, it engendered legal consequences.”⁵⁸

⁵⁵ 2014 3 SA 481 (CC) page 64. By contrast, Jafta and Zondo JJ said that, even though the state parties had not formally taken the approval on review, the validity or otherwise of the approval was sufficiently in dispute between the parties to give the High Court jurisdiction to deal with the matter (paras 39, 124 and 129-131).

⁵⁶ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 3 SA 481 (CC) paras 83 and 113, relying on *Khumalo v MEC for Education: KwaZulu-Natal* 2014 5 SA 579 (CC) (although, technically, *Khumalo* was a case of one functionary bringing an act of another functionary on review). The principle that an organ of state may bring review proceedings in respect of its own defective action has since been confirmed in *Department of Transport v Tasima (Pty) Ltd* 2017 2 SA 622 (CC); *Cape Town City v Aurecon SA (Pty) Ltd* 2017 4 SA 223 (CC); *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 2 SA 23 (CC); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 4 SA 331 (CC).

⁵⁷ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 3 SA 481 (CC) paras 89 and 99.

⁵⁸ Para 100. That this “narrow dispute” was indeed what was really in issue in *Oudekraal* appears from *Northern Free State District Municipality v Matshai* ZASCA 30-03-2005 case no 090/2004 para 15.

Cameron J proceeded to state that the “essential basis” of *Oudekraal* was 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.”⁵⁹

He was of the view that the SCA in *Kirland* had correctly relied on this approach in deciding that the provincial health department had not been entitled simply to ignore Dr Diliza’s purported approval. “The underlying principle,” he said, was that “public officials may not take the law into their own hands when seeking to override conduct with which they disagree.”⁶⁰ Cameron J then explained the policy rationale for this approach. He said that the “fundamental notion” that “official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside” arises from the rule of law:

“The courts alone, and not public officials, are the arbiters of legality. ... For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular ... administrative acts could be ignored because officials consider them invalid.”⁶¹

On this basis, Cameron J proceeded to state that Dr Diliza’s purported approval was,

“despite its vulnerability to challenge, a decision taken by the incumbent of the office empowered to take it, and remained effectual until properly set aside. It could not be ignored or withdrawn by internal administrative fiat.”

This approach, he said, requires government to set about undoing unlawful administrative action “in the proper way”.⁶² The provincial authorities needed to launch formal review proceedings to challenge the approval granted to *Kirland*, which remained valid until set aside.⁶³

⁵⁹ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 3 SA 481 (CC) para 101. This was an element of the SCA’s decision in *Oudekraal*, but I would hesitate to define the essence of *Oudekraal* in these terms, especially as it held that there are instances in which invalid administrative action may be ignored, and as *Oudekraal* was concerned (as Cameron J correctly said) with the “narrow dispute” whether a third actor (the Council) could disregard the Administrator’s initial decision in circumstances where second actors (the Surveyor-General and the Registrar) had taken further action on the basis of that initial decision. *Kirland* was not *in pari materia* with that kind of a scenario.

⁶⁰ Para 102. *Oudekraal* did not deal with public officials who merely “disagreed” with prior administrative conduct. More fundamentally, *Oudekraal* (para 39) specifically explored the question, with reference to the relevant legislation, whether the mere factual existence of the Administrator’s initial act sufficed to produce legally valid consequences for as long as the unlawful act was not set aside (para 26), whether the second actors (the Surveyor-General and the Registrar) had legal power to act validly despite the invalidity of the initial act (para 29), or whether the substantive validity of the initial act was a prerequisite for the validity of later acts (para 31). One sees none of that analysis in *Kirland*, presumably precisely because *Kirland* was not (and was not seen by the Court as) a “second actor” situation.

⁶¹ Para 103.

⁶² Para 105. All of this may be so, but *Oudekraal* is, at best, the indirect authority for these propositions.

⁶³ Para 106. At the risk of engaging in semantics, it seems artificial to describe the approval (which was quite obviously invalid) as “valid until set aside”. It might have been more accurate to say it existed in fact and had legal consequences or legal effect until set aside on review. See *South African Broadcasting Corporation SOC Ltd v Democratic Alliance* 2016 2 SA 522 (SCA) para 45. For early explorations of some of this terminology, albeit in a different context, see TB Horwood “Voidness and Illegality” (1932) 1 *SA Law Times* 12; CC Turpin “Void and Voidable Acts” (1955) 72 *SALJ* 58; AM Honoré “Degrees of

Arguably, Cameron J did not have to traverse *Oudekraal* ground (presumably he only did so because the “correctness” of *Oudekraal* had been raised squarely by the state parties). Quite possibly, the same conclusion could have been reached by applying common-law principles. Dr Diliza’s purported decision to approve Kirland’s applications was vitiated by the MEC’s improper interference. Both the SCA and the Constitutional Court found (correctly so) that the approval was invalid because it was influenced by the MEC’s unauthorised dictation.⁶⁴ The effect is that the approval was unlawful. That notwithstanding, the Superintendent-General was *functus officio* because he was not authorised by the applicable legislation to withdraw the approval.⁶⁵ As such, Mr Boya, upon returning to the office, could not “undo” the unlawful conduct of Dr Diliza. Furthermore, the provincial authorities, all the way up to the MEC and the Premier, had no statutory power to interfere and to reverse the unlawful approval. However, a possible counter-argument in this regard is that the approval was revocable to the extent that it was a result of corrupt conduct (as Jafta J found)⁶⁶ because, in Lord Denning’s immortal words, “fraud unravels everything”.⁶⁷

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.⁶⁸

10 Is one state organ bound by the facially invalid decision of another state organ?

Oudekraal was concerned with a situation where one organ of state (the City Council) sought to disregard the facially invalid action of another organ of state (the Administrator). Whereas the Administrator would not have been able to withdraw his own invalid approval because, in the absence of statutory authorisation to do so, he was *functus officio*, the same principle did not apply to the Council. Likewise, in *Kirland*, the Superintendent-General could not

Invalidity” (1958) 75 SALJ 32.

⁶⁴ See the Constitutional Court’s judgment, paras 26, 32, 92 and 96. Conversely, it could probably have been said that the Superintendent-General had unlawfully abdicated her power.

⁶⁵ See DM Pretorius “The *Functus Officio* Doctrine and Statutory Authorisation to Vary or Revoke Administrative Acts or Decisions” (2006) 69 THRHR 396 399: “[I]f the functionary is not empowered to withdraw or alter his earlier act, he is (as a general rule) *functus officio*.” Also see *Tshivhulana Royal Family v Netshivhulana* 2017 6 BCLR 800 (CC) paras 41 and 42.

⁶⁶ Para 45.

⁶⁷ *Lazarus Estates Ltd v Beasley* 1956 1 All ER 341 (CA) 345c. See also C Hoexter *Administrative Law in South Africa* 2 ed (2012) 280; Pretorius (2009) SALJ 553.

⁶⁸ See Pretorius (2009) SALJ 547-557. *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) (see below) has important implications in this regard. Also see *Wichura v Powrie* 1888-1889 6 SC 132; *Ntshangase v MEC for Finance, KwaZulu-Natal* 2010 3 SA 201 (SCA) paras 17 and 18; *Manana v King Sabata Dalindyebo Municipality* 2011 32 ILJ 581 (SCA) paras 21 and 22.

withdraw the impugned approval that had emanated from his own office. Nevertheless, that did not necessarily mean that the MEC or the Premier, if authorised by their enabling legislation, could not have cancelled the approval. That is why one needs to distinguish between these two categories of cases.

Despite perceptions to the contrary, *Oudekraal* does not establish any principle that one organ of state is bound to comply with a facially invalid decision of another organ of state. This much appears from the SCA's judgment in *Northern Free State District Municipality v Matshai*.⁶⁹ The respondent (the speaker of the appellant's council) had adjourned a council meeting on the agenda of which was a motion for the removal of the respondent from the office of speaker. The councillors, taking the view that the respondent was not entitled to adjourn the meeting, had proceeded with the meeting in her absence and had unanimously voted to remove her from office. The court *a quo* held that the respondent's action in adjourning the meeting, even if *ultra vires*, could not simply be ignored and that the councillors had not been entitled to take the law into their own hands, as the adjournment stood as an official act until set aside by a court on review. The SCA rejected this line of reasoning (*per* Farlam JA, with Scott, Cloete and Lewis JJA and Maya AJA concurring):

"I cannot agree that in acting as they did after the respondent purported to adjourn the meeting the members of the council took the law into their own hands. They did nothing of the kind. In ignoring the ruling and adjournment by the respondent and proceeding with the meeting ... they undoubtedly acted at their peril, as it were, in that if it were subsequently held that the ruling and adjournment were valid then the decision they took would *ex hypothesi* be invalid."⁷⁰

The respondent, relying on *Oudekraal*, argued that her ruling in adjourning the meeting stood and had legal consequences until set aside. The SCA rejected this argument, explaining that the two cases were distinguishable from each other. Unlike *Oudekraal*, this case did not concern an attempt to justify a refusal to take action which depended for its validity on the validity of an earlier act which was now said to be invalid. This was really a converse case.⁷¹ So *Oudekraal* did not preclude the councillors from disregarding the speaker's decision.

Likewise, in *Premier of the Free State v Firechem Free State (Pty) Ltd*⁷² the Premier and certain provincial functionaries sought to avoid liability for the province under a contract concluded, in violation of tender legislation, by officials in its bureaucracy. Finding that the contract had indeed been concluded unlawfully, the SCA stated the following:

"The province was under a duty not to submit itself to an unlawful contract and entitled, indeed obliged, to ignore the delivery contract and to resist Firechem's attempts at enforcement."⁷³

The SCA confirmed this statement in *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC*.⁷⁴ These cases are authority for the

⁶⁹ ZASCA 30-03-2005 case no 090/2004.

⁷⁰ Para 13.

⁷¹ Paras 15 and 16.

⁷² 2000 4 SA 413 (SCA).

⁷³ Para 36. Among the *dramatis personae* involved in the irregular conclusion of the contract was Mr Ace Magashule (then MEC for Economic Affairs in the Free State): see paras 4, 5, 23 and 31.

⁷⁴ 2010 1 SA 356 (SCA) para 23.

principle that an organ of state may (indeed, *must*) ignore an unlawful act performed by an official within its bureaucracy. So, there is no absolute rule that invalid decisions stand unless they are set aside on review – even though *Oudekraal* is sometimes construed as establishing such a “rule”.

The idea that an invalid decision somehow acquires a life of its own (or is animated by *Oudekraal*), and that, consequently, it is binding on all and sundry, including other state organs, was also rejected in *South African Local Authorities Pension Fund v Msunduzi Municipality*.⁷⁵ Here, a pension fund sought to compel a municipality to pay certain contributions allegedly owing by the municipality to the fund pursuant to amendments to the fund rules. The municipality disputed the validity of the rule amendments. The fund argued that the Registrar of Pension Funds had approved the amendments. It argued, further, with reference to *Oudekraal*, that, even if the Registrar’s approval were invalid, as an administrative act it stood and had legal consequences until set aside on review. Lewis JA rejected this argument:

“I do not consider that the registrar’s act in purportedly approving a rule amendment must stand until it is set aside on review.”⁷⁶

Economic Freedom Fighters v Speaker of the National Assembly (“EFF”)⁷⁷ was not an instance of one organ of state disregarding an *invalid* decision of another organ of state. However, it enunciated principles relevant to this enquiry and acquired significance in subsequent cases. The case was concerned with the Nkandla scandal. The Public Protector, having investigated the matter, had directed President Zuma (as he then was) to take certain remedial steps. However, he had ignored her directions (partly because the National Assembly inexplicably contrived to “absolve” him of liability).⁷⁸ In this context, Mogoeng CJ stated the following:

“No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would ‘amount to a licence to self-help’. ... No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.”⁷⁹

Mogoeng CJ quoted, with approbation, from Cameron J’s judgment in *Kirland*. He then continued as follows:

“It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.”⁸⁰

⁷⁵ 2016 4 SA 403 (SCA).

⁷⁶ Para 39. This was so, Lewis JA held, even though no collateral challenge had arisen.

⁷⁷ 2016 3 SA 580 (CC).

⁷⁸ Para 12.

⁷⁹ Para 74. Footnotes omitted. There is little doubt that a decision “grounded on the Constitution or law” or one that is “constitutionally or statutorily sourced” may not be disregarded and must be complied with. The difficulty arises in the case of decisions that *purport* to be so grounded or sourced but that are not.

⁸⁰ Para 75.

Merafong City v AngloGold Ashanti Ltd (“Merafong”)⁸¹ is the most significant judgment in the *Oudekraal* realm since *Oudekraal* itself. In 2004, Merafong City Local Municipality had notified mining enterprises in its area of jurisdiction of a substantial increase in tariffs for water supplies. In response, AngloGold appealed to the Minister of Water Affairs and Forestry against these water tariff increases. In 2005, the Minister issued a ruling overturning the surcharge levied by Merafong on water used for industrial purposes. Merafong obtained a legal opinion that the Minister’s ruling was void in law and continued to apply the surcharge. Negotiations to reach a compromise came to naught. In 2011, AngloGold instituted proceedings in the High Court to compel Merafong’s compliance with the Minister’s ruling. Merafong brought a counter-application in which it attacked the validity of the Minister’s ruling, and sought *declaraturus* to the effect that the setting of water tariffs fell within its exclusive area of competence as a municipality, and that the Minister had no authority to interfere in the tariff.

The High Court granted AngloGold’s application and dismissed Merafong’s counterapplication. It found that the Minister was vested with statutory appellate power. Relying on *Oudekraal*, it also found that the Minister’s ruling, even if impugnable, was binding on Merafong until set aside. The SCA endorsed the High Court’s judgment, holding that Merafong was obliged to approach the court to set aside the Minister’s ruling.⁸²

In the Constitutional Court, Cameron J delivered the majority judgment, in which Moseneke DCJ and Froneman, Khampepe, Madlanga, Mhlantla and Nkabinde JJ concurred. Cameron J said that the principal question was whether the SCA had been right to enforce the Minister’s ruling. Behind that question was the broader issue of when a public authority may reactively challenge an administrative act, like the Minister’s ruling, that is sought to be enforced against it, outside proceedings brought to review it. The SCA had held that Merafong could not invoke a challenge to the validity of the Minister’s ruling in reaction to AngloGold’s application because that remedy, it said, is available only to a person whom a public authority threatens with coercive action. Cameron J said that this “category-approach” squeezed collateral challenge into a rigid format that neither doctrine nor practical reason warranted.⁸³

Turning to “the *Oudekraal* paradox” (that an unlawful act can produce legally effective consequences), Cameron J referred to Froneman J’s judgment in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*,⁸⁴ where he had highlighted the distinction between “the constitutional invalidity of administrative action” and “the just and equitable remedy that may follow from it”. (It is here, in the penumbra between being begotten illicitly and the uncertain future that awaits it, that facially invalid administrative action leads its spectral existence.) This

⁸¹ 2017 2 SA 211 (CC).

⁸² *Merafong City v AngloGold Ashanti Ltd* 2016 2 SA 176 (SCA). See the Constitutional Court’s judgment, paras 14 and 15.

⁸³ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 22, 24 and 25.

⁸⁴ 2014 1 SA 604 (CC).

explained, said Cameron J, why “the central conundrum of *Oudekraal*” is constitutionally sustainable and necessary: “unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exists as a fact and may provide the basis for lawful acts pursuant to it.”⁸⁵ Against this background, Cameron J turned to *Oudekraal* and *Kirland*:

“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.”⁸⁶

The underlying principle is that the courts have exclusive power to determine legality: government officials, or anyone else, may not usurp that role by pronouncing on whether decisions are unlawful, and then ignoring them. Unless set aside, a decision erroneously taken “may well continue to have lawful consequences”.⁸⁷ However, said Cameron J, *Kirland* did not “fossilise” possibly unlawful administrative action as indefinitely effective; rather, it recognised that the *Oudekraal* doctrine puts a “provisional brake” on determining invalidity. Until allegedly unlawful action is challenged by the right actor in the right proceedings, the impugned decision stands.⁸⁸ Cameron J then made the following statements (perhaps the most instructive clarification yet of *Oudekraal*):

“*Oudekraal* and *Kirland* did not impose an absolute obligation on *private citizens* to take the initiative to strike down invalid administrative decisions affecting them. Both decisions 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.”⁸⁹

In an important footnote, Cameron J expatiated:

“*Oudekraal* ... 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’ *Oudekraal* ... expressly noted that “[w]hile the legislature might often ... 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*.”⁹⁰

⁸⁵ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 35 and 36, footnotes omitted.

⁸⁶ Para 41. Cameron J added (n 63):

“Where *Kirland* ... says that a decision not properly set aside ‘remains *valid*’, it means that it remains *legally effective*. Absence of challenge by the right litigant in the right forum at the right time doesn’t magically heal the administrative law flaws in the decision. It means that the decision continues to have *effect in law* until properly set aside.”

⁸⁷ Para 42. In this regard, Cameron J referred to Mogoeng CJ’s statement in *EFF* para 74, quoted above.

⁸⁸ Para 43. Read in isolation, this précis of *Oudekraal* (and the statement in para 41 that the import of *Oudekraal* was “that government cannot simply ignore an apparently binding ... decision on the basis that it is invalid ...”) seems imprecise and not quite congruent with the subtleties of *Oudekraal*. However, Cameron J proceeds, in the following paragraphs, to explain that these are not absolute rules.

⁸⁹ Para 44, footnotes omitted, emphasis added. Cameron J referred with approval to *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 6 SA 12 (SCA) and *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 3 SA 589 (SCA) (see above).

⁹⁰ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 44 n 68. See De Beer (2018) *SALJ* 613 629.

Consequently, there is no general rule – let alone an absolute principle – that facially invalid decisions inevitably stand unless and until set aside by way of judicial review. Although such a decision has factual existence and may have legal consequences, and in that sense “stands”, this does not mean that private parties may not in appropriate circumstances treat such a decision as invalid even if no steps have been taken to have it set aside. It also does not mean that one public authority is necessarily obliged, unless it has formally challenged the validity of another public authority’s defective action, to accept that action as valid.

Against this background, said Cameron J, the question was whether, when AngloGold sought an order enforcing the Minister’s ruling, Merafong was entitled to react by defensively challenging the validity of her ruling (which had, by then, stood for six years). Merafong contended that a reactive challenge to the ruling should be permitted because, so it was argued, there is a distinction between decisions that fall within the scope of powers with which a public official is clothed, but are wrongly taken, and those that are palpably beyond the decision-maker’s powers. Decisions in the latter category (so the argument proceeded) “have no validity and should be treated as such even though they have yet to be set aside on review.”⁹¹ Cameron J rejected this argument as being “not sound”. He said that even decisions “purportedly taken” under a statute, but which in fact lack authorisation, are subject to review under the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).⁹² He explained that Merafong’s argument entailed that an official would be entitled to ignore a decision taken under statutory power that is tainted by patently improper influence or corruption. “But that is precisely what happened in *Kirland* – and the self-help argument was not countenanced.” Moreover, not only would what is or is not “patently unlawful” be decided extra-judicially, but “there would be no rules on who gets to decide and how”. This would have adverse consequences for the rule of law.⁹³

Nevertheless, Cameron J stated that, although reactive challenges are primarily intended to protect private citizens from state power, there is no justification for “strait-jacketing” them to private citizens. A reactive challenge should be available to a state organ where justice requires it to be.⁹⁴ As a good constitutional citizen, Merafong should either have accepted the Minister’s ruling or gone to court to challenge it head-on. In ignoring the ruling, Merafong was resorting to self-help, which was out of kilter with its duty as a state organ.⁹⁵ Ultimately, though, the majority held that Merafong

⁹¹ 2017 2 SA 211 (CC) paras 45 and 50.

⁹² Paras 51 and 52:

“The plain premise of PAJA is that remedies are available to all who are affected by unlawful administrative action, whether the unlawfulness resides in a process-defect or in the absence of authority.”

But does availability of remedies imply an obligation to use them or forever hold one’s peace?

⁹³ Para 54.

⁹⁴ Para 55. “The permissibility of a reactive challenge by an organ of state must depend on a variety of factors, invoked with a ‘pragmatic blend of logic and experience’. And ... it would be imprudent to pronounce any inflexible rule” (para 56).

⁹⁵ Paras 60 and 61.

was entitled to raise a reactive challenge to the Minister's ruling, but had to explain its delay in challenging that ruling.⁹⁶

The minority (*per* Jafta J, with Bosielo AJ and Zondo J concurring) agreed that a state organ should be allowed to raise a reactive challenge when required to comply with an illegal decision.⁹⁷ However, Jafta J disagreed with the majority on the implications of *Oudekraal* and *Kirland*. Their interpretation, he said, suggests that an unlawful act that exists in fact has legal force and is binding for as long as it is not set aside, which “pays no regard to the supremacy of the Constitution which expressly declares that conduct that is inconsistent with it is invalid.”⁹⁸ *Oudekraal*, he said, “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.”⁹⁹ He proceeded as follows:

“*Oudekraal* lays down the principle that in the limited situation of consecutive administrative decisions and if the empowering provision requires, as a pre-decision condition, that the first act be in existence for the second act to be made, the mere factual existence of the first act would be enough for the validity of the second act. Depending on the terms of the empowering provision, the validity of the second act may not be challenged on the ground that the first act was substantively invalid even though it was not set aside.”¹⁰⁰

According to Jafta J it all comes down to what the empowering provision permits. “[T]he *Oudekraal* principle is limited to the situation of consecutive acts and even then to the first act.” An invalid act does not exist in law and an unlawful act is void. “A plain consequence of this is that such administrative act is not binding because it has no legal force.”¹⁰¹ In Jafta J's view, the *Kirland* majority extended the reach of *Oudekraal* beyond its scope when it declared that the “essential basis of *Oudekraal* was 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.”¹⁰² Instead, he said, an illegal act is invalid, regardless of the fact that it is not set aside, because an unlawful act is void *ab initio* and can have no legal force and effect. On this basis, Jafta J questioned the correctness of *Kirland*, stating that it is at odds with the constitutional rule of objective invalidity.¹⁰³

⁹⁶ Para 83.

⁹⁷ Paras 101 and 106. For an argument in support of aspects of the minority judgment, see O Fuo “Intrusion into the autonomy of South African local government: Advancing the minority judgment in the *Merafong City* case” 2017 *De Jure* 324.

⁹⁸ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 89 and 114.

⁹⁹ Para 116. This is true. However, in *Merafong*, Cameron J had not construed *Oudekraal* as suggesting that “an invalid administrative act is binding [if] it is not set aside by a competent court.” See para 44.

¹⁰⁰ Para 119. This is a correct assessment of one of the *Oudekraal* principles.

¹⁰¹ Paras 126 and 127. Also see para 140, where Jafta J stated that, properly construed, *Oudekraal* acknowledges that even in the case of consecutive administrative acts, the first invalid act is not enforceable but may result in a valid second act if the empowering provision requires mere factual existence of the first act when the decision on the second act is made.

¹⁰² Para 128. One is inclined to agree with Jafta J in this regard.

¹⁰³ Paras 130 and 134. Regardless of the merits of the minority's views (and they are not at all without merit), they were probably bound by the majority judgment in *Kirland*. See Hahlo & Kahn *The South African Legal System* 281-282:

“Persistent, or as it is sometimes called, ‘educational’, dissent is not the South African way. In the immediately following cases the one-time minority judges join the majority, and it is left to a future day for the legal ruling to be questioned once more.”

Jafta J referred to the *EFF* case as authority for his views on *Kirland* – giving rise to a situation where the majority and the minority relied on *EFF* to reach opposite conclusions. In Jafta J’s view, *EFF* was the “antithesis of the proposition that illegal administrative decisions are valid and binding if not set aside” (as he paraphrased the majority position).¹⁰⁴

Sixteen days after the *Merafong* decision had been handed down, the Court delivered its judgment in *Department of Transport v Tasima (Pty) Ltd.*¹⁰⁵ Again the bench split. Some of the conflicting contentions that had been advanced in the various judgments in the *Merafong* decision were reprised in the *Tasima* judgments in a state of affairs that raised questions about the relationship between majority and minority decisions and their implications for the *stare decisis* rule.¹⁰⁶ Khampepe J, writing for the majority (being herself, Froneman, Madlanga, Mhlantla and Nkabinde JJ), observed that Jafta J’s minority judgment in *Tasima* (in which Mogoeng CJ, Zondo J and Bosielo AJ concurred) “resuscitates an argument advanced by the minority in *Kirland*, and extended by the minority in *Merafong*” although the sentiments embodied in that argument “did not prevail in those cases”.¹⁰⁷ She stated that, contrary to what was being argued by the minority, the majority’s approach did not allow an unlawful act to “morph into a valid act”. However, the Constitution confers on the courts the role of arbiter of legality. Therefore, until a court is approached, and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect because of its factual existence. This approach, she said, “preserves the fascia of legal authority until the decision is set aside by a court: the administrative act remains legally *effective*, despite the fact that it may be objectively invalid.” On the majority’s analysis, a unanimous Court in *EFF* had endorsed this approach.¹⁰⁸

Jafta J, proceeding from the premise that an invalid administrative act that does not exist in law cannot have legal force and effect,¹⁰⁹ took issue with all of this:

Also see E McWhinney “Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunals” (1953) 31 *Canadian Bar Review* 595 606; Hosten et al *Introduction to South African Law* 237; E Kahn “The Rules of Precedent Applied in South African Courts” (1967) 84 *SALJ* 175; A Lynch “Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia” (2003) 27 *Melbourne Univ LR* 724 765ff; A Lynch “‘The Intelligence of a Future Day’: The Vindication of Constitutional Dissent in the High Court Australia” (2007) 29 *Sydney LR* 195; M Kirby “Judicial Dissent – Common Law and Civil Law Traditions” (2007) 123 *LQR* 379 394; JD Heydon “Threats to Judicial Independence: The Enemy Within” (2013) 129 *LQR* 205 210. The root of the problem was the majority’s “valid” phraseology in *Kirland*, which Cameron J rectified in *Merafong* para 41 n 63 (quoted in n 86 above). In a similar context it has been said that we should “abandon those terms which ‘lead to confusion’”: Lord Woolf et al *De Smith’s Judicial Review* 227, quoting from *Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade & Industry* 1975 AC 295.

¹⁰⁴ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 151-152.

¹⁰⁵ 2017 2 SA 622 (CC).

¹⁰⁶ See the judgments of Zondo J (paras 221-223) and Froneman J (paras 224-231). Also see *Genesis Medical Aid Scheme v Registrar of Medical Schemes* 2017 6 SA 1 (CC) paras 126 and 127. On *stare decisis* generally, see PC Anders “Judges and Judgments” (1910) 27 *SALJ* 362 372-375; Sir John Kotzé “Judicial Precedent” (1917) 34 *SALJ* 280 311 *et seq*; AJ McGregor “Judicial precedent” (1946) 63 *SALJ* 12 20 *et seq*; J Brickhill “Precedent and the Constitutional Court” (2010) 3 *CCR* 79 92.

¹⁰⁷ *Department of Transport v Tasima (Pty) Ltd* 2017 2 SA 622 (CC) paras 145 and 146.

¹⁰⁸ Paras 147-150.

¹⁰⁹ Paras 87-88.

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

However, if the empowering provision requires that the first act be legally valid, its mere existence in fact will not validate the second act if the first act was invalid in law. In that case the second act may be challenged on the basis that the first act was legally invalid.

Pivotal to the enquiry aimed at determining whether an invalid administrative act has legal consequences in the context contemplated in *Oudekraal*, is the language of the empowering provision.”¹¹⁰

Much of Zondo J’s judgment (in which Mogoeng CJ, Jafta J and Bosielo AJ concurred) was devoted to explaining why, in his view, *EFF* did not have the effect contended for by the majority.¹¹¹ To which Froneman J replied that *EFF* did have that effect.¹¹²

The terminological and jurisprudential tangle that bedevilled *Kirland* and *Merafong* has been clarified somewhat by *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources*.¹¹³ Aquila and ZiZa Limited had submitted competing applications to the Department of Mineral Resources (“DMR”) for prospecting and mining rights in respect of the same land. The DMR had granted such rights in respect of the same land to both ZiZa and Aquila – an untenable outcome. Cameron J delivered an “erudite judgment”¹¹⁴ in which he described the DMR’s handling of the applications as “egregiously botched”.¹¹⁵ It had accepted and granted ZiZa’s applications despite the fact that those applications were “amateurish”, “grossly defective” and “woefully deficient”.¹¹⁶ As such, the DMR’s decision to grant ZiZa’s applications was “flawed” and “invalid”.¹¹⁷ However, ZiZa invoked *Kirland* as a basis for arguing that the DMR could not ignore its own invalid decision (to grant ZiZa’s application) as a nullity. That decision (so it was argued) was valid and binding until set aside on review, and so ZiZa’s prospecting right, so long as it was in existence, had barred Aquila from acquiring mining rights relating to the same land. Cameron J stated:

“This is not right. *Kirland*, and *Oudekraal*, ... do not make invalid administrative action legally valid. ... They recognise that administrative action, even though invalid, may give rise to consequences that must be held lawful. ... [G]overnment cannot simply ignore its own seemingly binding decisions on the basis that they are invalid. The validity or invalidity of a decision has to be tested in appropriate proceedings. And the sole power to pronounce that decision defective, and therefore invalid, lies with the courts. ... Government officials may not usurp that role by themselves pronouncing on whether

¹¹⁰ Paras 90-92. Jafta J’s analysis of *Oudekraal* cannot be faulted.

¹¹¹ Paras 210-220.

¹¹² Paras 228-230.

¹¹³ 2019 3 SA 621 (CC). Like *Kirland* and *Merafong*, this was not a “second actor” case in the *Oudekraal* paradigm.

¹¹⁴ The words of Theron J, para 122.

¹¹⁵ Para 3.

¹¹⁶ Paras 44, 53 and 58.

¹¹⁷ Paras 50 and 91.

decisions are unlawful, and then ignoring them. And, unless set aside, a decision erroneously taken may well continue to have lawful consequences.”¹¹⁸

Cameron J explained that the *Kirland/Oudekraal* doctrine does not “fossilise” invalid administrative action as indefinitely effective. The doctrine contemplates that, until allegedly unlawful action is duly challenged, it stands. However, he emphasised, “the principle does not entail that, unless public authorities ... bring court proceedings to challenge an administrative decision, they are inevitably obliged to treat it as valid.”¹¹⁹ The doctrine’s “key point” is that bureaucratic self-help is prohibited and so “no official is entitled to pronounce a decision a nullity without going to court.”¹²⁰ On the facts, the *Kirland/Oudekraal* doctrine found no application, and did not “breathe life” into the DMR’s invalid decisions.¹²¹

Accordingly, state functionaries may not arrogate to themselves the power to pronounce defective administrative action invalid, and on that basis disregard the impugned action. Power to do so is vested in the judiciary alone. However, there are instances in which public authorities may be entitled to treat defective administrative action as invalid even if they have not brought judicial review proceedings to have such action set aside. As Cameron J stated enigmatically in *Merafong*: “It all depends on the circumstances.” The challenge is, therefore, to determine in what circumstances state organs may treat flawed administrative action as invalid even if review proceedings have not been instituted. No doubt, there cannot be fixed rules in this regard. Perhaps the instances previously identified¹²² may provide some guidance.

11 *Melius est petere fontes quam sectari rivulos*

In endeavouring to answer the question whether facially invalid administrative acts may be disregarded (and, if so, by whom and in what circumstances), the courts and academic analysts have overcomplicated things – especially in relation to state actors. The question whether an organ of state may countermand administrative action should, in the first place, be answered by examining the relevant statutory instruments. As one is dealing

¹¹⁸ Para 94. Also see *Grace v McCulloch* 1908 TH 165 175:

“[W]hen once the council has taken a resolution it is not competent for the chairman, any more than for any other councillor, to declare it invalid and of no effect; ... If the chairman or any councillor is dissatisfied with a resolution, his course is to give notice of motion to rescind or reconsider the resolution as provided by the standing orders. ... [A]nother course is to come to Court, and ask to have such resolution declared illegal.”

¹¹⁹ Para 95. Cameron J quoted from *Merafong* para 44:

“*Oudekraal* and *Kirland* ... recognised that there may be occasions where an administrative decision ... should be treated as invalid even though no action has been taken to strike it down. ... [T]hey 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.”

This qualification seems to have been overlooked by Jafta J in *Genesis Medical Aid Scheme v Registrar of Medical Schemes* 2017 6 SA 1 (CC) paras 106-118, where he invokes *Kirland*, *Merafong* and *Tasima* as authority for unqualified statements that invalid administrative action remains binding until set aside on review.

¹²⁰ Para 96.

¹²¹ Para 98. “The legally null award of the prospecting right to ZiZa does not enjoy a zombie afterlife to thwart the legal conclusion that a mining right could validly be granted to Aquila.”

¹²² Pretorius (2009) *SALJ* 547 *et seq.*

with creatures of statute, their powers should be determined with reference to their enabling legislation.¹²³ This approach (a corollary of the rule of law doctrine), obviates the need to answer difficult questions by resorting to arcane principles that defy clear definition and consistent application. The starting point in every instance must be an enquiry as to whether the relevant organ of state is empowered by its enabling legislation to abrogate an earlier administrative decision, regardless of whether it was made by the same or a different organ of state.¹²⁴ This was the approach adopted by the SCA in *Oudekraal*.¹²⁵ However, one has seldom since seen courts adopt the same approach by actually enquiring, in this context, into the powers, if any, conferred by the relevant legislation.

If the applicable legislation does not in express terms confer power on the relevant state organ to negate the impugned administrative act, then it must be asked whether the power to do so can be implied as being incidental to the powers conferred expressly.¹²⁶ Here *Oudekraal* and its progeny, *Kirland* and *Merafong*, can perhaps provide some guidance. To assist us in answering this question we also have an array of principles of statutory interpretation. More often than not, these principles will suggest that an administrative decision cannot be “undone” by government, especially if, rightly or wrongly, it conferred some right or benefit on the subject concerned. The courts will not readily infer implied power to revoke rights or benefits once conferred.¹²⁷ Of course, here one will find oneself confronted again by the conundrum of whether an unlawful decision can actually confer rights or benefits. In this

¹²³ *Red Coral Investments (Pty) Ltd v Cape Peninsula University of Technology* ZASCA 22-11-2017 case no 498/2017 para 7; *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC* 2019 2 SA 221 (SCA) para 25; *GCC Engineering (Pty) Ltd v Maroos* 2019 2 SA 379 (SCA) para 23.

¹²⁴ “[T]he theory of the second actor turns the focus away from the unlawful act and on to the powers of the person who acts believing that the first act is valid. ... A major object of the second actor theory is not to find a rule of thumb that allows easy escape from the void/voidable conundrum. It is to shift the focus away from such rules of thumb ... so that attention can fall not on the first (invalid) act, but on the legal powers of the second actor.” C Forsyth “The Theory of the Second Actor Revisited” (2006) *Acta Juridica* 209 215, 221. In a different context, E Mureinik “Administrative Law in South Africa” (1986) 103 *SALJ* 615 643-644 has made the same point as follows:

“The major difficulties ... that confront counsel and judge in a typical case are not the large conceptual questions ... but, rather, the detailed questions of construction [of legislation] These questions of construction recur, of course, from case to case, and they yield, to some extent, to analysis at a level of some generality. But, ultimately, what is significant is the particular construction”. [My addition]

Ellison Kahn made much the same point 60 years ago. In answering the question whether a flawed administrative act is “void” or “voidable”, it must be remembered that “everything depends ultimately on the governing enactment, which in the nature of things must be unique.” E Kahn “Quasi-judicial and purely administrative functions and discretions” (1958) 75 *SALJ* 266 268-269. Also see Forsyth (2007) *Cambridge LJ* 325 340-341; HWR Wade & CF Forsyth *Administrative Law* 11 ed (2014) 252.

¹²⁵ 2004 6 SA 222 (SCA) para 39. See Pretorius (2005) *SALJ* 863. In *Oudekraal*, the SCA “did not analyse in sufficient depth the question whether the second actor ... had legal power to act”: Forsyth (2006) *Acta Juridica* 209 223-224. Jafta J has correctly emphasised the importance of the relevant empowering provisions in this regard: see *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 119, 126 and 140 and *Department of Transport v Tasima (Pty) Ltd* 2017 2 SA 622 (CC) para 92. Also see *Manok Family Trust v Blue Horizon Investments 10 (Pty) Ltd* 2014 5 SA 503 (SCA) paras 11-14.

¹²⁶ See Pretorius (2005) *SALJ* 864; Pretorius (2006) *THRHR* 396-399.

¹²⁷ Pretorius (2006) *THRHR* 405-406 and 411, and the authorities cited there.

context there may be scope, in appropriate circumstances, for applying the maxim *omnia praesumuntur rite esse acta*.¹²⁸

If the state organ is empowered by law to “undo” the earlier act or decision, this power would have had to be exercised in a procedurally fair manner¹²⁹ because its use would constitute administrative action (in the broad sense of the term, if not in the narrow PAJA sense).

If the enabling statute of the relevant organ of state does not confer power on it to “undo” the impugned act, then *cadit quaestio*. In that instance, the act must inevitably stand for as long as it is not set aside on review. In the interim, the act will provisionally have factual existence and legal consequences, and will tentatively be deemed effective (in the sense outlined above), even though it may ultimately be found to have been unlawful and invalid.

12 Conclusion

Oudekraal should not be construed as authority for one nebulous “principle” of indeterminate scope. Properly read, *Oudekraal* is a textured judgment that establishes a number of discrete, albeit related, principles, which can be formulated with reasonable precision. The temptation to invoke *Oudekraal* as authority for hypotheses that fall beyond the scope of these principles must be resisted. It must be remembered that *Oudekraal* was concerned with a “second actor” scenario. Indeed, it was concerned with a “second actor” scenario of a special type: one organ of state (a third actor) declined to exercise its statutory powers because it believed that the initial act performed by the first actor was invalid, in circumstances where second actors had in the interim performed consecutive acts based on the erroneous (but justifiable) supposition that the initial act was valid. It was in these specific circumstances that the SCA held that the third actor was not entitled to use the suspected invalidity of the initial act as a pretext for declining to exercise its powers. It was in this context that the SCA held that, until the initial act and its consequences were set aside on review, they could not simply be disregarded or overlooked.¹³⁰ This was because, having regard to the applicable legislation, the validity of the acts performed by the second actors depended not on the legal validity of the initial act but merely on its factual existence.¹³¹ *Oudekraal* primarily provides authority applicable to situations of this nature, and not more generally for situations vaguely concerned with the status and effect of defective decisions that have not been taken on review.

¹²⁸ In other words, in appropriate instances (apropos of which, see Pretorius (2009) *SALJ* 563-564), it will be presumed provisionally that the impugned act did indeed confer the rights sought to be taken away by the act of “undoing”. Because courts will not readily countenance interference with accrued rights, the enabling legislation will not readily be construed as conferring implied power to revoke those rights.

¹²⁹ *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 2001 3 SA 210 (W) 225E-J; Pretorius (2006) *THRHR* 415; Pretorius (2009) *SALJ* 557.

¹³⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) paras 26 and 40.

¹³¹ Para 39 read with paras 29-31.

It is now established, by *Oudekraal*¹³² and its sequels,¹³³ that a private party may disregard a facially invalid administrative decision and, if a public authority were to take coercive steps against the private party to exact compliance with that decision, the private party may raise a reactive challenge to the validity of that decision. (Naturally, a private party who does so assumes the risk of the decision's validity being vindicated on review.) *Oudekraal* probably intended this principle to operate only in "second actor" scenarios,¹³⁴ but its sequels have not equally restricted the application of the principle. In any event, there potentially are circumstances outside the "second actor" category – and even outside the "coercive action" category – in which private persons may be entitled to disregard defective acts.¹³⁵

According to *Kirland*, an organ of state that has made a facially defective decision cannot ignore or withdraw that decision, which remains effectual until set aside on review.¹³⁶ This approach is formulated in rather categorical terms in *Kirland*, although it seems to have been moderated by *Merafong*. It remains to be seen whether this approach has supplanted earlier authority to the effect that there are limited instances in which the author of a defective decision may be entitled to disregard it.¹³⁷ This enquiry will often overlap or coincide with the question whether the organ of state is *functus officio*. Application of *functus officio* principles (which entail enquiring whether the state organ has the statutory power to rescind or vary its own decision) may yield clearer answers than would application of the *Kirland* doctrine. In any event, even if the state organ may not countermand its own flawed decision (whether because it is *functus officio* or for *Kirland* reasons), it may institute review proceedings to have it set aside.

On the question whether one organ of state may disregard the defective act of another organ of state, *Oudekraal* postulates that an organ of state empowered by law to perform a second (or subsequent) act pursuant to a prior act performed by another organ of state, may not evade performance of its public duty (that is, may not refuse to perform the further act) by asserting the invalidity of the initial act. It may not ignore that act but must take action to have it set aside, failing which it will remain effective.¹³⁸ Outside this kind of "second actor" scenario, however, the SCA has decided that an organ of state may (and must) ignore an unlawful act performed by an official within

¹³² Paras 32-37, probably *obiter*.

¹³³ *Helicopter and Marine Service (Pty) Ltd v V&A Waterfront Properties (Pty) Ltd* 2006 3 BCLR 351 (CC) para 10; *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 6 SA 12 (SCA) para 50; *Nature's Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Municipality* 2010 3 SA 581 (SCA) para 13; *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 3 SA 589 (SCA) para 13; *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 30 and 93.

¹³⁴ See *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 32 and 37.

¹³⁵ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 44. Also see the authorities cited at Pretorius (2009) *SALJ* 557 *et seq*.

¹³⁶ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 3 SA 481 (CC) paras 105 and 106. *Oudekraal* provides only oblique authority for this view.

¹³⁷ See the authorities cited at Pretorius (2009) *SALJ* 547-557.

¹³⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) paras 37 and 40.

its bureaucracy, and need not have it set aside on review.¹³⁹ Superficially, this approach seems irreconcilable with *Merafong*, where the Court emphasised that public authorities may not encroach on the courts' judicial functions by engaging in bureaucratic self-help. As such, defective decisions may (and often will) have legal consequences until formally set aside on review. But *Merafong* is a nuanced judgment that recognises that this is not an absolute principle. It recognises that there may be circumstances in which an organ of state will not be obliged to accept an administrative decision as valid, even if review proceedings have not been brought to challenge the validity of that decision.¹⁴⁰ In any event, an organ of state does not have its hands tied by another organ of state's defective administrative action. The former may challenge the latter's action "head-on" by instituting review proceedings and may, where justice requires it, raise a reactive challenge to the validity of such action.¹⁴¹

Ultimately, it must be remembered that organs of state are creatures of statute. They derive their power to perform administrative action from their enabling legislation. They cannot legally perform any action not authorised by their empowering provisions. As such, the question whether an organ of state can retract or vary its own prior act or decision, or whether one organ of state can override or disregard the prior act or decision of another organ of state must, in the first place, be answered with reference to the applicable legislation properly construed. We have many common-law principles, crafted through decades of careful judicial deliberation, to guide this process of statutory interpretation. These principles, viewed through the prism of the Constitution, should provide the starting point in enquiries about the status and force of defective administrative decisions pending judicial review, and about whether and when such decisions may be disregarded by organs of state and by persons affected by such decisions.

Postscript

Since this article was written, the Supreme Court of the United Kingdom ("UKSC") has delivered its judgment in the well-publicised Brexit prorogation case, *R (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland*.¹⁴² The UKSC held unanimously that the British Prime

¹³⁹ *Premier of the Free State v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA) para 36; *Municipal Manager: Qaukeni Local Municipality v FV General Trading* CC 2010 1 SA 356 (SCA) para 23; *South African Local Authorities Pension Fund v Msunduzi Municipality* 2016 4 SA 403 (SCA).

¹⁴⁰ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 44; *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources* 2019 3 SA 621 (CC) para 95.

¹⁴¹ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 55, 56, 60, 61 and 83; *Department of Transport v Tasima (Pty) Ltd* 2017 2 SA 622 (CC) paras 138-140, 143 and 150.

¹⁴² 2019 4 All ER 299. See A McHarg "The Supreme Court's Prorogation Judgment: Guardian of the Constitution or Architect of the Constitution?" (2020) 24 *Edinburgh LR* 88 89; S Shirazi "The U.K.'s *Marbury v. Madison*: The Prorogation Case and how Courts can Protect Democracy" (2019) *Univ Illinois LR* 108.

Minister's advice to the Queen that Parliament be prorogued had been unlawful.¹⁴³ On that basis, the Court concluded as follows:

"That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect: see, if authority were needed, *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 4 All ER 903, [2017] 3 WLR 409 (para [119]). It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.

It follows that Parliament has not been prorogued and that this court should make declarations to that effect."¹⁴⁴

Of course, the facts and the legal context of the prorogation case differ *toto caelo* from those of the cases considered in this article. For one thing, that case was not concerned with administrative action but with the exercise of prerogative power by the Crown on the advice of the Privy Council. Nevertheless, there are parallels between the prorogation case and cases such as *Oudekraal Estates (Pty) Ltd v City of Cape Town* ("*Oudekraal*") and its progeny, in the sense that the prorogation case also involved second (and, indeed, third) actors. What is significant for present purposes is that the UKSC was of the view that the initial act (the Prime Minister's advice to the Privy Council) having been *ultra vires*, the second act (the Privy Council's decision to adopt that advice and to make an Order in Council that Parliament be prorogued) and the third act (the Royal Commissioners' conduct in giving effect to that Order by actually proroguing Parliament) were also unlawful and null and void. Thus, these consecutive acts tumbled in domino fashion. The upshot was that Parliament had not actually been prorogued. The Court made a declaration to that effect.

The fact that the second and third actors had acted in the belief that the initial act had been valid was not considered at all in the prorogation case; nor was there any consideration of whether the validity of the second and third acts depended on the factual existence, rather than the legal validity, of the initial act. Instead, the unlawfulness of the initial act inexorably led to the nullity of the subsequent acts. Perhaps all of this was so because this was not an instance in which an attempt was made to enforce a decision of an administrative nature against a subject, thus giving rise to questions of collateral review of preceding administrative action.

Paul Craig has sought to explain why *Oudekraal* thinking was neither relevant to, nor applied in, the prorogation case.¹⁴⁵ He commences the explanation by acknowledging that there may be circumstances in which a court will conclude that a later act based on an earlier act, which appeared to be factually valid, will not be rendered void by the infirmity of the earlier act. In this regard, Craig refers to the work of Christopher Forsyth, who pioneered the development of the "second actor" theory, which underpinned much of the

¹⁴³ *R (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland* 2019 4 All ER 299 para 61.

¹⁴⁴ Paras 69 and 70.

¹⁴⁵ PP Craig "The Supreme Court, Prorogation and Constitutional Principle" (2020) *Public Law* 248.

SCA's reasoning in *Oudekraal*.¹⁴⁶ The central issue in such cases, explains Craig, is whether the second actor has legal power to act validly despite the invalidity of the first act. In some circumstances, the nullity of the initial act will not render unlawful everything that flows from it. In other circumstances, the nullity of the initial act will have more far-reaching consequences for acts performed prior to the nullity being found to exist.¹⁴⁷ However, according to Craig, these considerations were irrelevant to the prorogation case:

"They are salient where there really are two separate acts, and the court determines the effect of invalidity of the earlier act on later action. Thus, a paradigm is whether invalidity of a byelaw renders unlawful an arrest made on the assumption that the byelaw was valid. The case before the Supreme Court involved no such situation. The Order in Council that put the prorogation into effect flowed directly from the advice given by the Prime Minister to the Queen. It had no other purpose. The illegality of the advice necessarily entailed that the measure designed to put it into legal effect was also unlawful, and thus that Parliament had never been prorogued. This conclusion would, moreover, follow even if the Order in Council were conceptualized as an act separate from the advice, in a manner analogous to the byelaw scenario adumbrated above. This is because the nullity of the advice should still be regarded as tainting the Order in Council, given the proximate connection between the two acts, and given also the fact that the contrary conclusion would undermine the finding that the advice was unlawful."¹⁴⁸

One might take issue with aspects of Craig's line of reasoning. For instance, it is not immediately apparent that the Prime Minister's advice to Her Majesty and the Order in Council were not two separate acts. It is also not manifestly obvious why a conclusion that the Order in Council was not tainted by the nullity of the advice would undermine the finding that the advice was unlawful. Nevertheless, one cannot disagree with the conclusion that the prorogation case does not fit into the conventional "second actor" or *Oudekraal* paradigm, and that there was a particularly "proximate connection" between the two acts, which must be a significant factor in determining whether the Order in Council could be valid despite the nullity of the advice on which it was based (and in the absence of some other lawful and justifiable basis for the Order). As a general proposition, the question whether a second act can be valid despite the nullity of the initial act on which it was based should be answered with reference to the relevant legislation, especially the statutory scope of the second actor's powers. Of course, in the prorogation scenario, which was not concerned with the exercise of statutory powers recorded in a legislative text, the enquiry perforce had to be a different one. At heart, though, the enquiry remains whether the Privy Council had the power to make the Order in Council. At the level of principle, the fact that the decision to prorogue Parliament was made in the exercise of prerogative, not statutory, power makes no difference because, like statutory power, "every prerogative power has its limits".¹⁴⁹ Arguably, the Privy Council could not possibly have power to make an Order in Council on the basis of advice which, if adopted and

¹⁴⁶ See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) paras 29 and 34.

¹⁴⁷ Craig (2020) *Public Law* 274.

¹⁴⁸ 274.

¹⁴⁹ *R (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland* 2019 4 All ER 299 para 38.

implemented, would (as here) have deleterious constitutional consequences without reasonable justification.

Be that as it may, the fact that the “second actor” theory played no part in the adjudication of the prorogation case, and Craig’s analysis of why this was so, reminds us to be circumspect about applying *Oudekraal* principles in instances where those principles may be inapposite. *Oudekraal* thinking should properly be confined to *Oudekraal* contexts,¹⁵⁰ and should be utilised having due regard to the relevant statutory framework, and not as general propositions applied haphazardly to any act purported to be performed by pseudo-mandarins or their flunkies. Otherwise we might extend *Oudekraal* thinking to situations where it is not germane. We might end up in situations where the legal effect of the Tennis Court Oath, adopted by the French National Assembly on 20 June 1789, is made contingent upon the status of the (possibly apocryphal) prior decision by Louis XVI (possibly made on some spurious pretext) to suspend the sessions of the *États-Généraux*.¹⁵¹

SUMMARY

This article revisits the decision of the Supreme Court of Appeal (“SCA”) in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) (“*Oudekraal*”) with reference to subsequent case law in an endeavour to clarify the ramifications of the *Oudekraal* decision. In particular, this article assesses the status and effect of ostensibly defective administrative action pending the outcome of judicial review proceedings aimed at ascertaining the validity or otherwise of such action. The article explores whether the impact of *Oudekraal* is that a person affected by administrative action which is *prima facie* unlawful is nevertheless bound by it unless and until it is declared invalid and set aside on judicial review. It also explores whether organs of state are bound by apparently flawed administrative action and must give effect to it as though it were lawful and valid, unless and until it is formally declared invalid and set aside by a court of law. The conclusion is that *Oudekraal* confirms that a person may disregard *prima facie* unlawful administrative action and, if it were to be enforced against him, challenge its validity reactively. However, absent statutory indications to the contrary, the author of seemingly unlawful administrative action may not disregard it despite its apparent legal infirmities. Likewise other organs of state are, unless otherwise authorised by law, generally bound by that defective administrative action unless and until it is set aside on review. The SCA enunciated several discrete principles in *Oudekraal* but subsequent case law has tended to conflate these principles, with resultant confusion about the import of *Oudekraal*. This article recommends that the questions posed above should not be answered with reference to elusive general principles sought to be inferred from *Oudekraal*, but rather with reference to the specific provisions of the relevant legislation.

¹⁵⁰ Here reference should be made to *Magnificent Mile Trading 30 (Pty) Ltd v Celliers* 2020 1 BCLR 41 (CC), which was also decided after this article was written. The Constitutional Court held (correctly, it seems) that the *Oudekraal* approach was not applicable in the factual context of that matter. However, the Court also stated (para 45) that “the *Oudekraal* rule is not only about instances where there is a consequent act whose existence depends on an earlier unlawful act. It applies to any situation where – for whatever reason – an extant administrative act is being disregarded without first being set aside.” As explained above, it is doubtful whether “the *Oudekraal* rule” (an expression which, for the reasons given above, is apt to mislead) does extend to any such a situation. It may well be prudent to expand the scope of “the *Oudekraal* rule” to cover such situations (subject to the qualifications outlined above), but one should be cautious about reading more into the *Oudekraal* case than it actually decided, and about applying *Oudekraal* thinking in circumstances where it is not actually applicable – as the Court recognised in *Magnificent Mile*. Appropriate parameters must be set and applied in this regard.

¹⁵¹ See J Harvey Robinson “The Tennis Court Oath” (1895) 10 *Political Science Quarterly* 460; RB Day & D Gaido (eds) *Witnesses to Permanent Revolution: The Documentary Record* (2009) 1-2.