CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 77/13

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE	First Applicant
SUPERINTENDENT-GENERAL OF THE EASTERN CAPE DEPARTMENT OF HEALTH	Second Applicant

and

KIRLAND INVESTMENTS (PTY) LTD t/a EYE & LAZER INSTITUTE	Respondent

Neutral citation: *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6

Coram: Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J and Zondo J

Heard on: 12 November 2013

Decided on: 25 March 2014

Summary: Administrative action – validity of administrative decision not the subject of counter-application or separate review application – beneficiary of decision prejudiced – proper process must be followed to set the decision aside – validity of decision not before the Court

Administrative action – status of administrative decision improperly taken – decision remains effectual until properly set aside and cannot be ignored – application of *Oudekraal* judgment

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Eastern Cape High Court, Grahamstown) (majority judgment of Cameron J, concurred in by Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Mhlantla AJ and Nkabinde J):

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

The order is at [107] of the judgment.

JUDGMENT

JAFTA J (Madlanga J and Zondo J concurring):

Introduction

[1] This case concerns decisions taken by various functionaries in relation to the establishment of private hospitals in the Eastern Cape. The relevant subordinate

legislation requires approval of the Head of Department of Health, Eastern Cape before a private hospital may be established.[1]

[2] Kirland Investments (Pty) Limited t/a Eye & Lazer Institute (Kirland) instituted a review application impugning some of those decisions[2] in the Eastern Cape High Court, Grahamstown (High Court). It cited, as respondents, the then Member of the Executive Council for Health, Eastern Cape (MEC); the Superintendent-General for Health, Eastern Cape; and the Director-General of Health, Eastern Cape (state parties).[3] The High Court set aside the impugned decisions. The state parties' appeal to the Supreme Court of Appeal was unsuccessful, hence this application for leave before us.

The legislative scheme

[3] Before setting out the facts, I must outline the relevant legislation for a better understanding of the case. At the relevant time, the establishment of private hospitals was governed by the Health Act[4] and the Regulations made under it.[5] Regulation 7 empowers the Superintendent-General to approve the establishment of private hospitals in the province of the Eastern Cape. But before approval, the regulation

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[1] Regulations Governing Private Hospitals and Unattached Operating-Theatre Units, GN R158, *Government Gazette* 6832, published on 1 February 1980 (Regulations).

[2] The first was the decision of the Superintendent-General refusing to approve Kirland's applications; the second was the Acting Superintendent-General's decision to approve those applications; the third was the Superintendent-General's decision to withdraw that approval; and the last was the MEC's decision to dismiss Kirland's internal appeal.

[3] The Director-General of Health, Eastern Cape did not participate in the appeal before the Supreme Court of Appeal or before this Court.

[4] 63 of 1977.

[5] Regulations above n 1.

requires that two conditions be met. First, the Superintendent-General must consult the Director responsible for hospital services in the provincial administration. Second, the Superintendent-General must satisfy himself or herself that the proposed private hospital is necessary.

[4] Regulation 7 provides:

> "1. No person shall erect, alter, equip or in any other way prepare any premises for use as a private hospital or unattached operating-theatre unit without the prior approval in writing of the Head of Department.
>
> 2. (i) Any person intending to establish a private hospital or an unattached operating-theatre unit shall first obtain permission in writing from the Head of Department, who, after consultation with the Director, shall satisfy himself as to the necessity or otherwise for such a private hospital or unattached operating-theatre unit before granting or refusing permission.
>
> (ii) Having obtained such permission, the applicant shall complete Form I (Annexure B) and submit plans for approval by the Head of Department, together with the necessary information, and shall supply any additional information which the Head of Department may require.
>
> 3. Permission and approval in terms of regulation 7 are not transferrable."

[5] This regulation forbids the establishment of a private hospital without prior approval of the Superintendent-General. Approval granted under it must be in writing. Having obtained written permission, an applicant is required to complete the relevant form and submit his or her plans, together with any information demanded by

the Superintendent-General. The establishment of a private hospital without prior approval constitutes a criminal offence in terms of regulation 59.[6]

The facts

[6] It is now convenient to set out the facts. They are largely not in dispute. In July 2006 and May 2007, Kirland applied for approvals to establish a 120-bed hospital in Port Elizabeth, two unattached operating theatres and a 20-bed hospital in Jeffreys Bay. These applications were among a number of applications received by the Superintendent-General.

[7] An Advisory Committee considered Kirland's applications and recommended that they be refused. Accepting the recommendation, the Superintendent-General declined to approve them. The decisions taken by the Superintendent-General were

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[6] Regulation 59 provides:

> "Any person who—
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> (1) establishes, extends, conducts, maintains, manages, controls or renders a service in any private hospital or unattached operating-theatre unit which is not registered in terms of the provisions of these regulations; or
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> (2) extends, demolishes or makes structural alterations to the existing buildings of a private hospital or unattached operating-theatre unit, or any portion of such buildings, or alters the purpose for which such buildings are used, without the prior approval in writing of the Head of Department;
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> . . .
>
> shall be guilty of an offence and liable—
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> (a) upon first conviction to a fine not exceeding R500 or to a term of imprisonment not exceeding six months or to both such fine and such term of imprisonment;
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> (b) upon a second conviction for a similar offence, to a fine not exceeding R1 000 or to a term of imprisonment not exceeding one year or to both such fine and such term of imprisonment; and
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> (c) upon a third or subsequent conviction for a similar offence, to a fine not exceeding R1 500 or to a term of imprisonment not exceeding two years or to both such fine and such term of imprisonment."

reduced to writing. But before he signed them, the Superintendent-General was involved in a motor-vehicle accident and as a result he took sick leave for six weeks.

[8] During his absence an Acting Superintendent-General was appointed. Meanwhile the MEC who was then in office had a meeting with officials to inform them that she was going to meet and discuss Kirland's applications with the Provincial Chairperson of the African National Congress, the ruling political party in the provincial government. This meeting occurred in September 2007, before the Superintendent-General's decision to refuse approval. The meeting convened by the MEC illustrated her willingness to be involved improperly in a matter where she had no role to play. The Superintendent-General declined the applications on 9 October 2007 and, two days later, he had the accident.

[9] Having realised that approval was refused, the MEC summoned the Acting Superintendent-General to her office on 23 October 2007. At this meeting, the MEC had in her possession a file that contained the Superintendent-General's decision in which he refused approval.

[10] In her affidavit the Acting Superintendent-General avers:

> "On 23 October 2007 Ms Jajula [the then MEC] summoned me to her office. Upon my arrival in her office Ms Jajula:
>
> 7.1. had a file in her possession;
>
> 7.2. said that she saw in the file that the applicant's applications for private hospitals in Port Elizabeth and Jeffreys Bay respectively had not been approved;

> 7.3. informed me that she was under political pressure to approve the applicant's applications because the refusal to grant the applicant's applications put her in a bad light in the political arena; and
>
> 7.4. gave me the file and instructed me to approve the applicant's aforesaid applications."

[11] According to the Acting Superintendent-General, both she and the MEC were aware of the Superintendent-General's decision to refuse approval. They were also aware that the refusal was based on a recommendation by the Advisory Committee. When this was pointed out, the MEC is reported to have said that, as the political Head of the Department, "she had authority to make the final decision on behalf of the Department". She handed the file to the Acting Superintendent-General.

[12] Apart from the letter addressed to Kirland, the Acting Superintendent-General signed all the letters which recorded the Superintendent-General's decisions and dispatched them to various applicants. With regard to Kirland, the Acting Superintendent-General states that "[i]n accordance with the verbal instruction from Ms Jajula I drafted a letter to the applicant informing it that its applications had been approved."

[13] Although Kirland attempted to dispute the facts deposed to by the Acting Superintendent-General, it failed to place on record evidence by the then MEC. It was content to base its denial of the allegations by the Acting Superintendent-General on hearsay evidence. It explained that the MEC refused to sign an affidavit but she was willing to testify in court. Despite her willingness to testify, Kirland did not ask that

the matter be referred for the hearing of oral evidence in the High Court. Instead, it chose to proceed on the basis of evidence contained in affidavits.

[14] As these are motion proceedings, the averments by the Acting Superintendent-General must, in the present circumstances, be taken to be correct. The attempt by Kirland to deny them does not rise to the level of raising a genuine dispute of fact.[7] This is the footing on which the Supreme Court of Appeal approached the matter.

[15] To continue with the narrative of the facts, having received the purported approvals, Kirland sought to increase the capacity of the proposed hospitals. To this end, it applied for further approvals. Meanwhile, the Superintendent-General had resumed duties. Again he declined to approve Kirland's applications. By that time Kirland had already submitted its plans in compliance with regulation 7.

[16] By letter dated 20 June 2008, the Superintendent-General informed Kirland that the approval by the Acting Superintendent-General was withdrawn. This letter reads:

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

[7] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 55.

> I regret to inform you that the Department has withdrawn the approval. I point out that on 9 October 2007 and after I had considered all applications, I decided to refuse the application because Port Elizabeth is over serviced with private health facilities.
>
> I advise that you have a right to appeal in writing to the MEC for Health against my decision. That appeal must be lodged with the MEC within 60 days from the date of this letter and must set out the grounds of appeal."

Litigation history

[17] In the High Court, Kirland sought orders: overturning the MEC's decision rejecting its appeal against the withdrawal of the purported approval; reinstating the approval; and setting aside the initial decision of the Superintendent-General in terms of which Kirland's applications were refused. However, the main challenge was directed at the withdrawal of the purported approval and the MEC's decision that upheld it.

[18] The withdrawal was impugned on two broad grounds. First, Kirland asserted that "the Superintendent-General was *functus officio* and could not set aside the decision of the Acting Superintendent-General". Second, it contended that, in any event: the withdrawal was irrational, arbitrary and capricious, and so unreasonable that no reasonable person could have taken such decision; the decision-maker took irrelevant considerations into account while ignoring relevant ones; the decision-maker was reasonably suspected to have been biased; the withdrawal was not authorised by the empowering legislation; and the withdrawal was effected for a reason not authorised by the empowering legislation.

[19] With regard to the initial refusal by the Superintendent-General, Kirland asserted that—

> "the purported decision of the Superintendent-General, even if made, (which is not admitted), was not published or made known either to the applicant or to anyone else (including the Acting Superintendent-General) and accordingly was wholly ineffective and did not constitute a decision properly taken alternatively that the respondents must be estopped from contending that the Acting Superintendent-General's purported decision was a proper decision, and from contesting the validity thereof".

[20] In opposing the application and in view of the initial refusal by the Superintendent-General, the state parties submitted that:

> "18.1. Dr Diliza [the Acting Superintendent-General] could not legally have taken a decision on [Kirland's] applications when a decision had already been taken in respect thereof;
>
> 18.2. the decision was of no force and effect; and
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> 18.3. there is no merit in the contention that the [Superintendent-General] was *functus officio*."

[21] The state parties also impugned the Acting Superintendent-General's purported approval on the ground that she was irregularly instructed by the MEC to approve applications in respect of which a decision had already been taken to decline them. Reliance was placed on the affidavit by the Acting Superintendent-General which set out the details on how the instruction was made.

[22] The High Court classified the issues raised into three categories. The first was the Superintendent-General's initial refusal; the second was the Acting

Superintendent-General's approval; and the third was the withdrawal. In regard to the refusal, the High Court accepted that the Superintendent-General had decided to decline Kirland's applications, relying on the recommendations from the Advisory Committee. What remained, the High Court held, was the dispatch of the letter communicating the refusal. Without giving reasons, the High Court found that the failure to communicate the refusal "flouted the provisions of regulation 7".[8] Proceeding from this premise, the Court held that the refusal was not reviewable administrative action under the Promotion of Administrative Justice Act[9] (PAJA) "because such a decision did not adversely affect applicant's rights nor had direct external legal effects on the applicant".[10] The High Court declined to set aside the refusal.

[23] In relation to the purported approval, the High Court held that it should be set aside because it was influenced by the pressure exerted by the MEC on the Acting Superintendent-General.[11] Regarding the withdrawal of the approval, the Court held that it should also be overturned on the basis that when the decision to withdraw was taken, the Superintendent-General did not comply with the requirements of procedural fairness.[12]

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[8] *Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute v MEC for Health, Province of Eastern Cape NO and Others* [2011] ZAECGHC 78 (High Court judgment) at para 21.

[9] 3 of 2000.

[10] High Court judgment above n 8 at para 21.

[11] Id at para 27.

[12] Id at para 26.

[24] Consequently, the High Court set aside the purported approval, its withdrawal by the Superintendent-General and the decision of the MEC which upheld the withdrawal. The state parties were ordered to pay the costs of the application.

In the Supreme Court of Appeal

[25] Unhappy with the order, the state parties appealed to the Supreme Court of Appeal. Kirland cross-appealed the order setting aside the approval. The Supreme Court of Appeal defined the issues before it as the validity of the withdrawal, the MEC's decision upholding it and the order setting aside the approval. With regard to the first two issues, the Supreme Court of Appeal held that both the purported withdrawal and the MEC's decision were invalid because the Superintendent-General was precluded by the principle of *functus officio* from effecting the withdrawal.[13]

[26] In relation to the cross-appeal, the Supreme Court of Appeal found that, on the evidence of the Acting Superintendent-General, the approval was invalid because it was influenced by the MEC's unauthorised dictation. However, that Court overturned the High Court's order that set the approval aside, on the basis that the validity of the approval was not an issue before the High Court. As a result the Supreme Court of Appeal dismissed the appeal but upheld the cross-appeal.

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[13] *MEC for Health, Province of Eastern Cape NO and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* [2013] ZASCA 58 (Supreme Court of Appeal judgment) at paras 22-3.

In this Court

[27] It cannot be gainsaid that this matter involves the exercise of public power and that it was instituted as a review application under PAJA. It is by now settled that the application of PAJA raises a constitutional issue.[14] This is because PAJA gives effect to section 33 of the Constitution.

[28] But the presence of a constitutional issue alone is not enough to warrant the grant of leave. It must also be in the interests of justice to allow leave. I think the interests of justice favour the granting of leave here. The matter raises an important issue relating to administrative justice. The issue is what should be the response from a court where serious maladministration and abuse of public power is established but there is no request for the review of the offending administrative action. This issue goes to the heart of the role played by our courts in ensuring that public power is properly exercised within the bounds of the Constitution. The issue must be examined in the light of the duty imposed on the courts to uphold the Constitution.

Issues

[29] The purported approval of Kirland's application by the Acting Superintendent-General lies at the centre of the issues arising from the judgment of the Supreme Court of Appeal. The first issue is whether that approval constitutes a

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[14] *Camps Bay Ratepayers' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) (*Camps Bay*); *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* [2007] ZACC 13; 2007 (6) SA 4 (CC); 2007 (10) BCLR 1059 (CC); and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

valid administrative action or, differently put, whether the approval is valid. If it is not, the next issue is whether its invalidity was an issue raised for determination in the High Court. If it was, the last issue is whether the Supreme Court of Appeal granted the right orders, following its finding on the invalidity of the approval.

[30] Both in written and oral argument before us, the state parties directed their submissions at the validity of the purported approval by the Acting Superintendent-General. They did not pursue the challenge against the orders of the High Court which dealt with other decisions that were attacked on review by Kirland. Instead, they focused on the Supreme Court of Appeal's order which upheld the cross-appeal. The subject matter of the cross-appeal was the order in terms of which the High Court had reviewed and set aside the approval. Consequently, it is not necessary to consider the other decisions which were challenged in the High Court.

Is the approval valid?

[31] The Supreme Court of Appeal enquired into the validity of the approval. Relying on *Plascon-Evans*,[15] that Court accepted as correct the version given by the Acting Superintendent-General, pertaining to the circumstances surrounding the grant of the approval by her. On its assessment of the papers, the Supreme Court of Appeal concluded that there was "no proper dispute of fact created" by Kirland. It reasoned thus:

[15] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) (*Plascon-Evans*) and *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para 26.

"In the first sentence of this judgment I spoke of maladministration and failures of moral courage. Dr Diliza stated in her affidavit that prior to her making the decisions in favour of Kirland Investments, the MEC at the time, Ms Nomsa Jajula, had informed a meeting of senior staff that she had been approached by a Mr Stone Sizani, the provincial chairperson of the African National Congress (the ruling party in the Eastern Cape) and that she was going to Port Elizabeth to meet him to discuss Kirland Investments' applications for approval and to be shown its clinic.

At a subsequent meeting, Ms Jajula informed staff members, including Dr Diliza, that she had met with Mr Sizani, she had seen Kirland Investments' clinic and that it was small and needed expansion, that it would be unfair to refuse its applications and that she was under pressure from the executive council of the provincial government 'because the Department was seen as withholding licences from BEE companies to establish private hospitals'.

On 23 October 2007, Ms Jajula summoned Dr Diliza to her office. Ms Jajula had a file in her possession and told Dr Diliza that she had seen in the file that Kirland Investments' applications had not been approved. She said that she was under political pressure to grant the applications 'because the refusal to grant the Applicant's applications put her in a bad light in the political arena' and instructed Dr Diliza to approve the applications. (Ms Jajula has not deposed to an affidavit and so, despite the denial of these allegations by Kirland Investments and competing allegations as to whether Ms Jajula made certain admissions or denials, *no proper dispute of fact is created*. Therefore, for purposes of this matter, *Dr Diliza's version must be accepted*.)

So much for the maladministration. It was followed by the first failure of moral courage: Dr Diliza simply granted the applications as she had been instructed to do, lamely stating that she was 'obliged' to give effect to Ms Jajula's instruction. She granted the applications, what is more, in the full knowledge that the advisory committee had recommended that they be refused and aware of why it had so recommended."[16] (Footnotes omitted and emphasis added.)

[16] Supreme Court of Appeal judgment above n 13 at paras 7-10.

[32] Having accepted the evidence of the state parties, the Supreme Court of Appeal held:

> "On Dr Diliza's own evidence in the papers before us, however, the decisions were invalid because they were taken as a result of the unauthorised dictation of Ms Jajula, contrary to section 6(2)(e)(iv) of [PAJA]."[17]

[33] As I see it, the approach adopted by the Supreme Court of Appeal in assessing the evidence cannot be faulted. Absent an affidavit from the MEC who allegedly gave instructions for the approval of the applications, Kirland's denial did not raise a genuine dispute of fact. But even if it did, the Court would have been entitled to prefer the state parties' version of events because Kirland did not apply for the referral of the matter for the hearing of oral evidence in the High Court. This option was available to Kirland even if a genuine dispute of fact was not raised. And Kirland was aware that the MEC declined to sign a draft affidavit prepared by it but had indicated that she was willing to testify in court. But it chose not to follow that route, something it was entitled to do. Therefore it must now live with the consequences of its choice.

[34] The *Plascon-Evans* rule is to the effect that in motion proceedings, if disputes of fact have arisen on affidavit, a final order may be granted only if the facts averred by the applicant and which are admitted by the respondent, together with the facts

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[17] Id at para 18.

alleged by the respondent, justify the granting of the order.[18] This rule was endorsed by this Court in *Thint*.[19]

[35] It will be recalled that the orders sought by Kirland in the High Court included "an order that the Acting Superintendent-General's decision of 23 October 2007 be confirmed". For the Court to confirm that decision, it had to have recourse to the version given by the state parties, especially the evidence of the Acting Superintendent-General. That evidence reveals, as the Supreme Court of Appeal found, that the decision of the Acting Superintendent-General was invalid.

Was the validity of the approval raised in the High Court?

[36] While it is true that the validity of the approval was not challenged in an application for review by the state parties in the High Court, the question whether the approval was valid was raised by Kirland when it sought that the approval be confirmed. Kirland was aware that the confirmation could not be granted unless it convinced the High Court that the Acting Superintendent-General's decision was valid. In an attempt to show that, it contended that the decision-maker was empowered to make the decision and that the approval was made "in terms of the statutory provisions, and the Regulations, and having been published and announced and conveyed" to it.

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[18] *Plascon-Evans* above n 15 at 634E-635C.

[19] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at para 8.

[37] To underscore this point the deponent to Kirland's founding affidavit stated:

> "I aver that the Acting Superintendent-General's *decision was valid, and unassailable*, and could not be withdrawn.
>
> In the premises, I aver that the Acting Superintendent-General's decision was one properly taken, and placed in the public domain, was final and could not be revoked by the same functionary as purported to do so." (Emphasis added.)

The order of the Supreme Court of Appeal

[38] Despite the finding that the approval was invalid and its scathing criticism of the MEC and the Acting Superintendent-General, the Supreme Court of Appeal left the invalid approval intact after reviewing the High Court's order that set the approval aside. The Court held that it lacked "jurisdiction to set aside Dr Diliza's decisions because they have never been taken on review". It is apparent from the record that the Supreme Court of Appeal adopted an unduly narrow approach to the matter. In doing so, it left intact an administrative decision which that Court had found to be invalid. A decision which was made under circumstances described by that Court as "a sorry tale of mishap, maladministration and at least two failures of moral courage."

[39] While it is true that the state parties failed to take the approval on review, this failure did not mean that the High Court had no jurisdiction to pronounce on the validity of the approval. Kirland, as the applicant, had sought the approval's confirmation on the ground that it was valid. The state parties had resisted that claim successfully. There was a duty on the High Court to rule on this claim.

[40] Since the Supreme Court of Appeal had found that the approval was invalid as it was unlawfully made, that Court ought to have declared it invalid. It did not require the request for review to assume jurisdiction over the matter. The Court already had jurisdiction because the validity of the approval was one of the issues pertinently raised in the pleadings and canvassed in evidence.

[41] What happened in this case is unacceptable and disgraceful. The MEC who was in office at the relevant time bullied the Acting Superintendent-General to take a decision contrary to an earlier, properly considered decision of the Superintendent-General. At that stage, the MEC was aware of the earlier decision to decline Kirland's applications. Opportunistically, she exploited the absence of the Superintendent-General to achieve the illegitimate goal through a more pliable official who aided and abetted her in the process.

[42] The MEC had no business in the reconsideration and approval of Kirland's applications because the power was reposed in the Superintendent-General. It is apparent that she was aware of this fact because instead of approving the applications herself, she forced the Acting Superintendent-General to approve them.

[43] The MEC's conduct illustrates a complete disregard for the relevant legal prescripts and the abuse of public authority to facilitate a desired outcome. The conduct is incompatible with the principles and values enshrined in the Constitution.[20]

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[20] Section 195(1) of the Constitution provides:

Furthermore, the Constitution imposes an obligation on officials to act reasonably and lawfully when exercising public power.[21] What occurred here was neither reasonable nor lawful. A decision flowing from such conduct must not be allowed to remain in existence on the technical basis that there was no application to have it reviewed and set aside. The uncontroverted evidence on record establishes that the decision to approve the applications was a contravention of the law and the Constitution. Therefore it ought to have been declared invalid and set aside.

[44] I have read the judgment prepared by my Colleague Cameron J. At the heart of our difference lies the simple fact of court process. Because the state parties failed to institute an application for review, he concludes that a decision which, on the face of uncontroverted evidence on record, was fraudulent, must be left intact for as long as there is no review application to set it aside. The motivation for this approach is that

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> "Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
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> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) Public administration must be development-oriented.
>
> (d) Services must be provided impartially, fairly, equitably and without bias.
>
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
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> (f) Public administration must be accountable.
>
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
>
> (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
>
> (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

[21] Section 33 of the Constitution guarantees the right to administrative action that is lawful and reasonable. This means that when an official makes a decision, he or she must adhere to these requirements.

Kirland has acted on the decision to its financial prejudice and that it enjoys a procedural protection under the Constitution to defend the unlawful decision. On the contrary, I hold the view that because the validity of the approval was one of the issues raised before the High Court, that Court was entitled to declare the approval invalid and set it aside.

[45] The undisputed evidence on record illustrates that the impugned approval was not based on the merits of the applications by Kirland but was influenced by the corrupt interference of the MEC. The MEC sought to advance both Kirland's interests and her own by having the initial refusal changed to an approval. On the evidence of the Acting Superintendent-General, the MEC forced her to approve the applications "because the refusal to grant [Kirland's applications] put her in a bad light in the political arena". This is corruption.

[46] Corrupt practices should not escape the reach of our courts solely on the basis that no application to have them set aside was made. If the validity of a corrupt decision was raised in the pleadings, a court is duty-bound to declare it invalid if that is established by evidence. Section 172(1)(a) of the Constitution obliges every court, when deciding a constitutional matter within its powers, to declare invalid any conduct that is inconsistent with the Constitution.[22] The section admits of no discretion.

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[22] Section 172(1) provides:

> "When deciding a constitutional matter within its power, a court—

[47] Corruption and maladministration do not only pose a serious threat to our democratic order, but are also inconsistent with the Constitution. As observed by this Court in *Shaik*,[23] corruption is "antithetical to the founding values of our constitutional order." In *Heath* this Court held:

> "Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state."[24]

[48] As Zondo J points out, Kirland asked the High Court to refer the matter back to the Superintendent-General, in the event of that Court not confirming the approval. In its founding affidavit, Kirland stated:

> "I should point out, that if the principal argument on review in this matter is successful, and that the Superintendent-General was *functus officio*, then, and in that event, it falls simply for the above Honourable Court to set aside the decision of the MEC (and insofar as is necessary that of the Superintendent-General withdrawing the earlier permission given), *and ordering that the Acting Superintendent-General's decision, already taken, stands*. In such circumstances it would be inappropriate and

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[23] *S v Shaik and Others* [2008] ZACC 7; 2008 (5) SA 354 (CC); 2008 (8) BCLR 834 (CC) at para 72.

[24] *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 4.

> unnecessary in any event for the matter to be referred back, the earlier decision properly taken remaining in position and being effective.
>
> If, on the other hand, the above Honourable Court rejects the principal argument, and *determines the review on the alternative arguments advanced above, finding that the Acting Superintendent-General's decision is no longer operative and was withdrawn, albeit wrongly, then, and in that event, it is possible that the Court could refer the matter back and not substitute its own decision for that of the MEC*." (Emphasis added.)

[49] This makes it plain that Kirland itself appreciated that the approval might not be confirmed. In that event, it asked the High Court to remit the matter to the Superintendent-General. Indeed the High Court, having set aside the approval, remitted the matter to the Superintendent-General, granting Kirland the alternative relief it sought. It is therefore inconceivable that Kirland would have asked for remittal, albeit in the alternative, if it thought that the validity of the approval was not an issue to be determined by the High Court. The averments quoted above, coupled with remittal as an alternative remedy, establish that the validity of the approval was one of the issues the High Court was called upon to determine.

[50] The invalidity of the approval was fully canvassed in the opposing papers. What is missing is a sentence to the effect that the state parties sought to have the approval reviewed. Therefore, in these circumstances, to require that there should have been an application for review before the High Court pronounced upon the validity of the approval, constitutes a narrow technical approach to the matter. It is an approach that places form way above substance and consequently insulates a clearly unconstitutional administrative action from judicial scrutiny. The main motivation for

this narrow approach is that government must follow due process and "tread respectfully when dealing with rights".[25] To underscore this point, reference is made to *Chief Lesapo*[26] and *Motswagae*.[27] Both of these cases are not on point. They dealt with self-help which is not an issue here.

[51] The issue here is whether the High Court was asked to pronounce on the validity of the approval. As shown in this judgment and in the judgment of Zondo J, Kirland had asked the High Court to do so. And in opposition, the state parties asked that the approval be declared "invalid and of no force and effect".

Just and equitable order

[52] If the coming into effect of an order invalidating an administrative action would result in an injustice, section 8 of PAJA, read with section 172 of the Constitution, empowers a court to prevent the injustice by making a just and equitable order.[28] This

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[25] Cameron J's judgment at [82].

[26] *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at paras 17-8.

[27] *Motswagae and Others v Rustenburg Local Municipality and Another* [2013] ZACC 1; 2013 (2) SA 613 (CC); 2013 (3) BCLR 271 (CC) (*Motswagae*) at para 14.

[28] Section 8(1) of PAJA provides:

> "The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—
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> (a) directing the administrator—
>
> (i) to give reasons; or
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> (ii) to act in the manner the court or tribunal requires;
>
> (b) prohibiting the administrator from acting in a particular manner;
>
> (c) setting aside the administrative action and—
>
> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
>
> (ii) in exceptional cases—

power enables our courts to regulate consequences flowing from a declaration of constitutional invalidity. This suggests that the need to exercise this power arises if there is a declaration of invalidity or an administrative action is set aside. If there is no declaration of invalidity, generally the exercise of the power may not be triggered.

[53] The principle was affirmed by this Court in *Bengwenyama Minerals*.[29] There the principle was pronounced in these terms:

> "The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case."[30] (Footnotes omitted.)

[54] It must be emphasised that the power to grant a just and equitable remedy may not be exercised to withhold the declaration of invalidity. It cannot be invoked as

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(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs."

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

[30] Id at para 85.

justification for not declaring invalid an administrative action that is inconsistent with the Constitution and PAJA. This is so because section 172(1) of the Constitution compels every court to declare invalid any conduct that is inconsistent with the Constitution. As mentioned earlier, the performance of this function is not discretionary. But the granting of a just and equitable order is discretionary.

[55] In *Bengwenyama Minerals*, Froneman J defined the discretionary power to grant a just and equitable order in these words:

> "It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality."[31] (Footnote omitted.)

[56] Just like any discretionary power, this power too must be exercised judicially. This means that there must be circumstances that convince a court to exercise it one way or the other. It is apparent from *Bengwenyama Minerals* that prejudice is one of the factors which may influence a court to grant a just and equitable order in addition

[31] Id at para 84.

to declaring an administrative decision invalid. In this matter Kirland has failed to show prejudice and I agree with the following observation made by Cameron J:

> "Kirland acted on the approval. In its founding affidavit, it says it took substantial steps to acquire land, expend money and hire professional advisors. This is all rather vague. It is not enough to conclude that Kirland's reliance irretrievably prejudiced it. . . . The reason it asserted prejudice in its founding papers was because it resisted delay."[32]

[57] The type of prejudice raised relates to the delay in deciding Kirland's applications. This sort of prejudice may be addressed by fixing the period within which the Superintendent-General must consider the applications, if they are remitted to him.

[58] Cameron J holds that, even if the approval is properly before us, we should decline to set it aside because the issue of prejudice to Kirland ought to be explored properly before the approval is set aside.[33] There are two answers to this proposition. First, there is no explanation for Kirland's failure to show the prejudice it will suffer if the approval were to be set aside. Kirland set out in great detail factors militating against remittal of the matter to the decision-maker. If it wished to show that remittal would also prejudice it, it could have easily established that. It is doubtful that Kirland would have asked for remittal if it were to suffer prejudice. The assertion that, following the approval, its shareholders purchased immovable property for R15 million does not establish prejudice at all. This is more so if the matter is

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[32] Cameron J's judgment at [75].

[33] Cameron J's judgment at [86].

remitted to the decision-maker for him to consider the application afresh. The possibility of the applications being successful cannot be discounted. But even if they are unsuccessful, the acquisition of property does not suggest that Kirland will be prejudiced. It owns the property which presumably now is worth more than R15 million. It is free to do as it pleases with that property. It may even sell it at a profit.

[59] Second, a proper explanation of the issue of prejudice in present circumstances will make no difference to the question whether the approval should be declared invalid. As stated earlier, such declaration precedes the exercise of the remedial power to grant a just and equitable order. The granting of an additional remedy under the rubric of justice and equity has no bearing on the declaration that the approval is unconstitutional and consequently invalid.

[60] Under our Constitution the courts do not have the power to make valid administrative conduct that is unconstitutional. What may be done by the courts is to regulate the consequences of their declaration of invalidity. This means that in deciding a constitutional matter, a court adopts a two-stage approach where an enquiry involves the determination of constitutional validity. During the first stage, once a court finds that the impugned conduct is inconsistent with the Constitution it must make a declaration of invalidity. This does not involve the question whether the order is just and equitable. The latter enquiry belongs to the second stage.

[61] Once a declaration of invalidity is made, the court may proceed to the second stage. At this stage the court considers the effects of the declaration of invalidity on parties or persons to whom the order applies. The interests of those parties are carefully examined for the purposes of making an order that is just and equitable in the circumstance of each case. It is only at the second stage that a court enjoys a discretionary choice. However, that choice does not include the reversal of what was done during the first stage at which there is no discretion but an obligation to make a declaration of invalidity. The two stages ought not to be conflated.

[62] In the present circumstances the proper explanation of Kirland's interest would make no difference. The approval in question is clearly unconstitutional and as a result must be declared invalid. Beyond that declaration of invalidity there is nothing to preserve because nothing tangible was done following the impugned approval except the acquisition of property for R15 million. It is not Kirland's case that as a result of the approval it has since built and is currently running the hospitals. The dispute about the validity of the approval arose before the building plans submitted by Kirland were approved. Therefore construction could not commence before the approval of the plans. Accordingly, this matter is different from cases like *JFE Sapela*[34] and *Millennium Waste Management*.[35] In *JFE Sapela*, the contracted work was almost completed at the time judgment was delivered by the court of first instance. The question that confronted the court was whether the illegal tenders

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

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

should be set aside in those circumstances. The Supreme Court of Appeal overturned the High Court's order setting aside the illegal tenders. The Supreme Court of Appeal held that our courts have a discretion not to set aside administrative action where doing so will achieve no practical purpose.

[63] In the result, I support the order proposed by Zondo J.

CAMERON J (Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Mhlantla AJ and Nkabinde J concurring):

Introduction

[64] Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials' decisions? That is the question the judgment of Jafta J (main judgment) answers. The answer it gives is Yes. I disagree. Even where the decision is defective – as the evidence here suggests – government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.

[65] The reasons spring from deep within the Constitution's scrutiny of power. The Constitution regulates all public power.[36] Perhaps the most important power it controls is the power the state exercises over its subjects. When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed.

[66] That has not happened here. Kirland instituted these proceedings to ensure that an approval communicated to it, and in reliance on which it acted, prevails. In answer, the government respondents made no move to set aside the approval. They took the attitude that they could withdraw or ignore it. They branded the approval a "non-decision". Their principal deponent resisted Kirland's application on the simple basis that the defective decision did not exist. That was a fundamental error. For the decision does exist. It continues to exist until, in due process, it is properly considered and set aside.

[36] Section 2 of the Constitution provides that the Constitution "is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[67] In the face of government's attitude, Kirland succeeded in the High Court and the Supreme Court of Appeal. The main judgment would reverse this, on the basis that all the evidence about the controversial approval is before us, and that it shows the approval was defective. This outcome, and the reasoning supporting it, would have untoward consequences for those subject to government decision-making. The evidence is not all before us. And it would be fundamentally unfair to Kirland to set aside the decision now, without requiring government to bring a proper application, in which it explains the history of the decision, its shifting attitudes towards it and its delay in dealing with it. In response, Kirland is entitled to be heard on whether it has been prejudiced and why it would be unfair to it to set the decision aside now. This is a protection the Constitution itself affords Kirland.[37] The main judgment would abrogate that protection. The Court should not do so.

[68] Once we conclude, as I respectfully suggest we must, that government cannot take a shortcut across Kirland's constitutional protections, then we have to deal with other questions the main judgment does not address. These include the Department's contention that it was entitled simply to ignore the approval as a "non-decision", and that this Court should reconsider the correctness of the decision of the Supreme Court of Appeal in *Oudekraal*.[38]

[37] Section 172(1)(b) of the Constitution provides that, when it decides a constitutional matter, a court "may make any order that is just and equitable". See also section 8(1) of PAJA, which confers the same remedial jurisdiction, and *Bengwenyama Minerals* above n 29 at paras 81-5.

[38] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (*Oudekraal*).

Should the validity of the approval be decided in these proceedings?

[69] The problem arises from two decisions on applications Kirland submitted to the Eastern Cape government in 2006 and 2007 to establish private hospitals in the province. The first said No. The second said Yes. The first, the refusal, was never signed off or communicated to Kirland. This was because Mr Boya, the Superintendent-General who took that decision, became incapacitated. The second, the approval, was taken on 23 October 2007 by an Acting Superintendent-General, Dr Diliza, while Mr Boya was away. That decision was communicated to Kirland, but Dr Diliza took it in circumstances that make it vulnerable to challenge on review.

[70] Inter-related reasons indicate that the validity of the approval cannot fairly be decided in the proceedings in their present form. The first is that the government functionaries dealing with the imbroglio dallied for seven months before doing anything. They must account for that period. They have not done so. The Court and Kirland are entitled to know what happened in that time. Then, too, if government is allowed to take a shortcut, Kirland will be deprived of important procedural protections. And Kirland's prejudice has not been adequately canvassed.

[71] To start with dilly-dallying. After being indisposed, Mr Boya returned to work in late November 2007. He then discovered that, in conflict with his uncommunicated decision, Dr Diliza had approved Kirland's application. Yet he did nothing for over seven months. Why? His affidavit invokes the political power of the MEC on whose instructions Dr Diliza apparently granted approval. He said that, for so long as she

remained in office, “it was virtually impossible to do anything about the dilemma”. That is an intriguing statement. But what does it mean? Did he have no power? Or was he too scared to exercise it? If the latter, why should Kirland be prejudiced because he stayed his hand for seven months in deference to the seemingly improper conduct of a political superior?

[72] But there is more to the seven-month period. On the strength of the approval, Kirland in November 2007 applied to the Department for an increase in the number of beds at its now-approved facilities. The Department replied, refusing the requests. It did so on the plain premise that the preceding approval was valid. The refusals, signed by Mr Boya, did not say the approval was invalid. Instead, they told Kirland that, “according to departmental norms, Nelson Mandela Metro is over serviced” by private providers, hence the refusals.

[73] This raises the question whether the Department had not in fact reconciled itself to the approval. Its correspondence to Kirland suggests that at least it was resigned to the approval. We do not know the facts, because they have not yet been put before any court. But the point is this. If Mr Boya for a time thought the approval should be accepted as valid, that may count against reversing it when a reviewing court considers how to exercise its discretion for or against the Department.

[74] Only on 16 July 2008 did Kirland for the first time receive warning that its approval was in jeopardy. Even then, it was given no glimmering of the reason. On

this date, it received a fax in which Mr Boya regretted "to inform you that the Department has withdrawn the approval". Even then, he made no mention of invalidity. His letter speaks of withdrawing a valid approval – not repudiating an invalid decision. The reason he gave Kirland had nothing to do with taint or irregularity. He said the approval was being withdrawn because it was "contrary to our view that the area is over supplied." This, too, suggests that the Department may have thought the approval was valid, but that it also thought Mr Boya could validly withdraw it. Is this so? Again, we do not know. The facts have not been put before us.

[75] Meanwhile, the clock was ticking. Kirland acted on the approval. In its founding affidavit, it says it took substantial steps to acquire land, expend money and hire professional advisors. This is all rather vague. It is not enough to conclude that Kirland's reliance irretrievably prejudiced it. To get there, a court would need to know much more. What precise steps, what land, how much money? But Kirland was not called on to say more. The reason it asserted prejudice in its founding papers was because it resisted delay. Its argument was that the court should not remit that matter, but should itself set aside the "withdrawal" of the approval in its favour. So setting aside the approval on the ground that it was tainted by improper political interference was not at all an issue. When it lodged its founding papers, Kirland had no inkling of this. All it knew is that the Department had "withdrawn" its approval because "the area is over supplied". This was the issue Kirland took to court, and the

issue it asked the court to adjudicate: whether the Department had power to "withdraw" a valid approval.

[76] The first time Kirland heard that irregularities allegedly tainted the approval was 28 months after receiving it, towards the end of February 2010, when the government respondents lodged their answering affidavits in this litigation. It was then that the Department proffered the whole unappetising account of political interference leading to the approval. There was never a suggestion that Kirland had a hand in any of the questionable dealings.

[77] It is against this background that the relief Kirland sought in its notice of motion must be assessed. The Department contended that since Kirland itself had sought the Court's confirmation of the approval, the Department was obliged to defend its withdrawal and hence to disavow the approval. It would therefore, so its argument went, be needless formalism to require it to bring a counter-application to set aside the approval.

[78] It is true that Kirland in its notice of motion sought an order that the approval "be confirmed". But in context it is clear that what it sought was not an inquiry into and vindication of the legal pedigree of the approval it received – it did not even know then that the approval was regarded as suspect. Instead, what it sought was a re-assertion of the status quo before the withdrawal of the approval. For this reason, the founding affidavit asks the Court to "reinstate" the approval by setting aside its

withdrawal.[39] The High Court, in upholding Kirland's claim to relief, mistakenly granted it an order setting aside the approval. But Kirland had never asked for that, and the Supreme Court of Appeal rightly set that order aside.[40]

[79] So Kirland did not come to court to sustain an approval impeached by political shenanigans. It sought only to sustain an approval that, according to everything it knew, had been unfairly and invalidly withdrawn because of oversupply of hospital facilities. Indeed, nearly half of its founding affidavit advances a statistical analysis of hospital-bed supply in the region, seeking to show that the Department's conclusion on oversupply was wrong.

[80] Against this background, it would be very unfair indeed to hold Kirland's feet to the fire of a dispute it did not then even realise existed. What it took to court was a baffling withdrawal, on the basis of oversupply, of a seemingly valid approval. It had no interest in defending, or any need to defend, an approval impugned on grounds it did not know existed. After the state impugned the validity of Dr Diliza's approval in its answering affidavit in the High Court, Kirland rightly took the view that that was not an issue before the Court. In its replying affidavit it stated that, if Mr Boya "wished to set aside the decision taken by Dr Diliza, he ought to have instituted

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[39] Similarly, while it is true that Kirland in its founding affidavit said that Dr Diliza's approval was "valid", "unassailable" and "lawful", this was not an invitation to the High Court to pronounce on its validity or set it aside. It was a necessary assertion that Dr Diliza's approval, rather than Mr Boya's earlier, uncommunicated refusal, was the extant decision, which, Kirland argued, could not have been validly withdrawn. That is why all of these averments appear in the section aimed at explaining why Mr Boya was *functus officio*, by reason of Dr Diliza's decision, when he purportedly withdrew the approval. And it is why emphasis should be given to Kirland's full averment. It is that Dr Diliza's approval "was valid, and unassailable, *and could not be withdrawn*." (Emphasis added.)

[40] Supreme Court of Appeal judgment above n 13 at paras 25-30.

review proceedings which would have enabled applicant to place its case before the tribunal or court dealing with the matter".

[81] The Supreme Court of Appeal stated that the approval was, on Dr Diliza's own evidence, tendered by the Department, "invalid".[41] This was incautious. The approval was not before the Court. But the Court itself said so. It pointed out that the validity of the approval "is not the subject of challenge in these proceedings".[42] So it is wrong to take its statement as a definitive finding. The Court was merely categorising Dr Diliza's conduct for the purpose of reaching the issue that was in fact before it, namely whether Mr Boya was entitled to revoke her approval. The Court was saying that, even on the Department's version, its legal argument must fail.

[82] All this indicates that this Court should not decide the validity of the approval. This would be in accordance with the principle of legality and also, if applicable,[43] the provisions of PAJA. PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application.[44] They must do the same even if PAJA does not apply.[45] To demand this of government is not to

[41] Id at para 18.

[42] Id at para 17.

[43] This Court has not decided the extent to which organs of state can or must use the provisions of PAJA in proceedings where they seek the review of their own decisions. It is not necessary to decide the issue here either.

[44] Section 6(1) of PAJA provides that "[a]ny person may institute proceedings in a court or a tribunal for the judicial review of an administrative action". Section 8(1) empowers courts to set aside an administrative action "in proceedings for judicial review in terms of section 6(1)". See the Supreme Court of Appeal judgment above n 13 at paras 27-9 and 33.

[45] Rule 53 of the Uniform Rules of Court requires proceedings for judicial review to be "by way of notice of motion directed and delivered by the party seeking to review such decision" to all affected persons and "calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside". The notice of motion must "set out the decision or proceedings sought to be reviewed" and "be

stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.[46] Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.

[83] Counsel for the Department told this Court, as he told the Supreme Court of Appeal,[47] that, if the Department had to bring a counter-application under PAJA, it would face the PAJA 180-day rule.[48] Well, precisely. An explanation for the delay is

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supported by affidavit setting out the grounds and the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected."

[46] *Motswagae* above n 27 at para 14 and *Chief Lesapo* above n 26 at para 17.

[47] Supreme Court of Appeal judgment above n 13 at para 34.

[48] Section 7 of PAJA is headed "Procedure for judicial review" and provides in relevant part:

> "(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
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> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
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> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

Section 9 is headed "Variation of time" and provides:

> "(1) The period of—
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> . . .
>
> (b) 90 days or 180 days referred to in sections 3 and 7 may be extended for a fixed period,
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> by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
>
> (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

a strong reason for requiring a counter-application. But even outside PAJA, the position is the same.[49] This Court recently confirmed in *Khumalo* that litigants, including public functionaries, are bound by statutory and common-law time limits and may not circumvent them using procedural tricks.[50] The same is true here.

[84] And Kirland may call for Mr Boya to be cross-examined, particularly in the light of his letters that make no mention of the alleged unsoundness of the approval, but proceed on the premise that the approval was regarded as valid and effective. Did Mr Boya at any point before June 2008 take the view that the approval was in fact a fait accompli that may have to be accepted? Kirland is entitled to know. Litigation involves complex choices at every point. Kirland should not be denied the options available to it should the Department apply formally and properly for the approval to be set aside. A departmental counter-application is therefore far from a needless formality. It is an essential part of confronting the subject of an administrative approval with the case it has to meet, and the options available to it in meeting that case.

[85] What is more, in the Department's counter-application, Kirland will be the respondent. This will afford it important protections. In the absence of oral evidence, its version, and not that of the Department, will be decisive.[51] This is because the

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[49] On the common-law delay bar see, for example, *Associated Institutions Pension Fund and Others v Van Zyl and Others* [2004] ZASCA 78; 2005 (2) SA 302 (SCA) at paras 46-8 and Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co Ltd, Cape Town 2012) at 532-4.

[50] *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49 (*Khumalo*) at paras 44-8, 69 and 73 (per Skweyiya J) and paras 92-5 (per Zondo J).

[51] *Luster Products Inc v Magic Style Sales CC* [1996] ZASCA 146; 1997 (3) SA 13 (A) at 21E-H.

Plascon-Evans rule[52] operates in favour of the respondent in the counter-application. The facts set out by the respondent in that application must, subject to the operation of the rule, form the basis of any findings. To decide the validity of the approval on the papers before us will thus deprive Kirland of an important procedural right.

[86] And finally, even if the setting aside of the approval is properly before us, the Department would have to convince the Court that it ought to exercise its discretion to grant that remedy. Under the "just and equitable" remedial powers this Court enjoys in constitutional adjudication and also under PAJA, a number of factors must be considered.[53] This includes the fact that Kirland relied on the lawfulness of the decision. Kirland says that, based on the approval, certain of its shareholders purchased immovable property for R15 million. Kirland is a commercial entity, whose entrepreneurial activities are directed at increasing healthcare facilities, on a profit basis, in one of our country's poorest provinces. The perilous circumstances in which entities like it increase amenities while pursuing profit should not be disregarded. They should, at least, be properly explored and considered before a decision on which the entity in good faith relied is set aside.

Was the approval an effective decision until set aside?

[87] The Department also urged that it was entitled to ignore the approval as a "non-decision". Its main deponent claimed that because Dr Diliza's decision was not

[52] See *Plascon-Evans* above n 15 at 634E-635C.

[53] See above n 37. In *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 30, Moseneke DCJ described a court's remedial powers under section 8 of PAJA as "generous". Langa CJ and O'Regan J (at paras 96-7) and Sachs J (at paras 100-2) also emphasised the breadth of the court's discretion.

taken in terms of any statute or regulation, the Department was entitled to ignore it. Counsel for the Department urged these propositions on us, and also urged this Court to reconsider the correctness of the decision in *Oudekraal*.

[88] The argument mistakes the nature of the mandate the Constitution entrusts to public officials. This does not require them to act without erring.[54] On the contrary, the Constitution anticipates imperfection, but makes it subject to the corrections and constraints of the law. The task of public officials is thus to act in accordance with the law and the Constitution, which includes being subject to correction when they err.

[89] By corollary, the Department's argument entails that administrators can, without recourse to legal proceedings, disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken. This is a licence to self-help. It invites officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public. And it would undermine the courts' supervision of the administration.

[90] The question is thus whether, despite its vulnerability to review, the approval given to Kirland constituted administrative action. To argue otherwise is at odds with both the Constitution and PAJA, which proceed on the premise that administrators may err, and even that they may err grossly. When they do, their actions are not

[54] There is no right to a perfect administration. See *Logbro Properties CC v Bedderson NO and Others* [2002] ZASCA 135; 2003 (2) SA 460 (SCA) at para 17.

nullities. They exist in fact and may have legal consequences. The solution is to challenge the decision on review.

[91] The Constitution entrenches the right to lawful, reasonable and procedurally fair administrative action. But in the same breath, it obliges Parliament to "provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal".[55] In doing so, the Constitution foresees that the administration that would answer to it would be imperfect. Those charged with state administration will inevitably on occasion fall short of the high aspiration of just administrative action. When they do, the courts are able to intervene.

[92] It is true that the word "decision" in its ordinary meaning may signify a proper decision, namely one taken lawfully after a full application of the mind. Yet in administrative law an approval granted under unlawful dictation is still a decision. Like any other, it has effect until it is reviewed and set aside. That it was granted under dictation makes it vulnerable to judicial review. It does not mean that it is a non-decision.

[93] This is clear from PAJA. The statute, which was enacted to give effect to the right to just administrative action, envisages that officials will take decisions that do not constitute just administrative action and are therefore invalid. The statute's

[55] Section 33(3)(a) of the Constitution.

definition of "administrative action"[56] is not limited only to administrative action that is just. It plainly includes unjust administrative action. Thus, it encompasses both a decision and a failure to take a decision.[57] This shows that the mere fact that an administrator failed to apply her mind properly – by failing to take a proper decision – does not mean that her conduct does not constitute administrative action.

[94] What is more, the statute's definition of "decision" embraces "any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision".[58] That a decision "required to be made" can be reviewed means that, under PAJA, a decision may exist if an administrator is required to decide but as a matter of fact has not decided.

[95] In addition, some of PAJA's grounds of review expressly target cases where an administrator has not considered a decision properly or at all. Thus, a decision

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[56] See section 1 of PAJA.

[57] Id. "Administrative action" means, subject to a list of exceptions, "any decision taken, or any failure to take a decision", by an organ of state or natural or juristic person when exercising a public or constitutional power or performing a public function.

[58] Section 1 of PAJA defines a "decision" as—

> "any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—
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> (a) making, suspending, revoking or refusing to make an order, award or determination;
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> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
>
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
>
> (d) imposing a condition or restriction;
>
> (e) making a declaration, demand or requirement;
>
> (f) retaining, or refusing to deliver up, an article; or
>
> (g) doing or refusing to do any other act or thing of an administrative nature,
>
> and a reference to a failure to take a decision must be construed accordingly".

affected by bias is administrative action that is liable to be set aside on review.[59] So is action not authorised by the empowering provision,[60] taken for a reason not authorised by the empowering provision,[61] for an ulterior purpose or motive,[62] or for irrelevant considerations or in disregard of relevant considerations.[63] The list of unjust conduct that constitutes administrative action to which PAJA applies goes on.[64]

[96] Pertinent to this case, PAJA provides that decisions taken because of the unauthorised or unwarranted dictates of another person or body constitute administrative action that is reviewable.[65] If this Court were to hold that a decision taken under dictation is not a decision at all, and has no effect even before it is set aside, then there would be no need for PAJA. This provision of PAJA exists precisely because a decision taken under dictation is nevertheless a decision, and must be reviewed and set aside just like any other unjust administrative action.

[97] The point is this. Far from unjust administrative conduct not being administrative action at all, PAJA makes clear that it falls within the definition of administrative action but is subject to review. This approach to the nature of administrative action and decisions meshes with the premise inherent in both the

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[59] Id section 6(2)(a)(iii).

[60] Id section 6(2)(a)(i).

[61] Id section 6(2)(e)(i).

[62] Id section 6(2)(e)(ii).

[63] Id section 6(2)(e)(iii).

[64] Id section 6(2)(e)(vi) goes to capriciousness or arbitrariness; section 6(2)(f)(ii)(aa) and (cc) goes to whether the action is not rationally connected to the purpose for which it was taken or the information before the administrator; and section 6(2)(g) goes to whether the action consists of a failure to take a decision.

[65] Id section 6(2)(e)(iv).

common-law rule against unreasonable delay and PAJA's requirement that proceedings for judicial review must be instituted without unreasonable delay and, subject to condonation, within 180 days.[66] Both proceed on the basis that irregular administrative actions may become insulated from review because of delay. This means they will never be declared invalid. They therefore retain lawful consequence. No other approach is practicable.

[98] The outcome does not change if we consider the approval from the perspective of whether the decision-maker acted within her jurisdiction in granting approval. Jurisdictional facts refer broadly to preconditions or conditions precedent that must exist before the exercise of power, and the procedures to be followed when exercising that power.[67] It is true that we sometimes refer to lawfulness requirements as "jurisdictional facts". But that derives from terminology used in a very different, and now defunct, context (namely where all errors, if they were to be capable of being reviewed at all, had to be construed as affecting the functionary's "jurisdiction").[68] In our post-constitutional administrative law, there is no need to find that an administrator lacks jurisdiction whenever she fails to comply with the preconditions for lawfully exercising her powers. She acts, but she acts wrongly, and her decision is capable of being set aside by proper process of law.

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[66] See above n 48.

[67] *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 78.

[68] Baxter *Administrative Law* (Juta & Co Ltd, Cape Town 1984) at 453 and 461 and Hoexter above n 49 at 290.

[99] So the absence of a jurisdictional fact does not make the action a nullity. It means only that the action is reviewable, usually on the grounds of lawfulness (but sometimes also on the grounds of reasonableness). Our courts have consistently treated the absence of a jurisdictional fact as a reason to set the action aside, rather than as rendering the action non-existent from the outset.[69] The absence of jurisdictional facts did not entitle Mr Boya to withdraw the approval, but only to approach a court to set it aside.

[100] It was on these principles that the Supreme Court of Appeal drew in *Oudekraal*. The Court explained at the outset that the question before it was wide: it was "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."[70] The narrow dispute for 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. The Court said No. 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.[71]

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[69] See, for example, *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) at para 72; *Kimberley Junior School and Another v Head, Northern Cape Education Department and Others* [2009] ZASCA 58; 2010 (1) SA 217 (SCA) at para 12; and *Paola v Jeeva NO and Others* [2003] ZASCA 100; 2004 (1) SA 396 (SCA) at para 16.

[70] *Oudekraal* above n 38 at para 1.

[71] The Court held at para 40:

> "It follows that for so long as the Administrator's approval (and the extensions) continues to exist in fact the township owner has been permitted to develop the township and the Cape

[101] 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. The Court expressed it thus:

> "For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. . . . But the 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 Cape Metropolitan 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. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."[72]

[102] In the present case, the Supreme Court of Appeal relied on this passage in concluding that the Department was not entitled simply to ignore the approval.[73] And rightly. In doing so, the Court acted in accordance with the stature *Oudekraal* has acquired over the last decade. It has been consistently applied by the Supreme Court

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Metropolitan Council was not entitled simply to ignore that when deciding whether or not to carry out its public functions."

[72] Id at para 26.

[73] Supreme Court of Appeal judgment above n 13 at para 20.

of Appeal[74] as well as by this Court.[75] The underlying principle, that public officials may not take the law into their own hands when seeking to override conduct with which they disagree, has also been given effect in three cases involving schools' policies on admission of learners.[76]

[103] The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law.[77] The courts alone, and not public officials, are the arbiters of legality.[78] As Khampepe J stated in *Welkom*, "[t]he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any

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[74] In *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* [2008] ZASCA 28; 2008 (4) SA 43 (SCA) at para 14, the Court, applying *Oudekraal*, held that acts performed on the basis of the validity of a prior act are themselves invalid if and when the first decision is set aside. At para 13 the Court rightly rejected an argument, in misconceived reliance on *Oudekraal*, that the later (second) act could remain valid despite the setting aside of the first. The decision in all its parts underscores the exposition of *Oudekraal*'s essential basis in the main text of this judgment. See also *Norgold Investments (Pty) Ltd v Minister of Minerals and Energy of the Republic of South Africa and Others* [2011] ZASCA 49; [2011] 3 All SA 610 (SCA) at para 46.

[75] *Camps Bay* above n 14 at para 62 and *Bengwenyama* above n 29 at para 85. Also see *Njongi v MEC, Department of Welfare, Eastern Cape* [2008] ZACC 4; 2008 (4) SA 237 (CC); 2008 (6) BCLR 571 (CC) at paras 44-5, where the Court held that until an act is found to be unlawful it is presumed valid, in accordance with the maxim *omnia praesumuntur rite esse acta*, and agreed that only a court of law can make the authoritative determination of whether an administrative act alleged to be "void" is lawful.

[76] *MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others* [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC); *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another (Equal Education and Another as amici curiae)* [2013] ZACC 25; 2013 (9) BCLR 989 (CC) (*Welkom*); and *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).

[77] In *Welkom* above n 76 at para 1, Khampepe J stated that "[s]tate functionaries, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law." (Footnote omitted.)

[78] In *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) the Supreme Court of Appeal, reaffirming a line of cases more than a century old, held that judicial decisions issued without jurisdiction or without the citation of a necessary party are nullities that a later court may refuse to enforce (without the need for a formal setting aside by a court of equal standing). This seems paradoxical but is not. The court, as the font of legality, has the means itself to assert the dividing line between what is lawful and not lawful. For the court itself to disclaim a preceding court order that is a nullity therefore does not risk disorder or self-help.

means. On the contrary, the rule of law obliges an organ of state to use the correct legal process."[79] 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 or invalid administrative acts could be ignored because officials consider them invalid.

[104] It does not assist the debate to point out that what happened in this case seems to have been highly unscrupulous and deplorable. This is because, in the next case, the official who seeks to ignore departmental action may not be acting with pure motives. Though the official here seems to have been on the side of the angels, the risk of vindicating the Department's approach lies in other cases where the revoker may not be acting nobly.

[105] The approval communicated to Kirland was therefore, 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 does not insulate unconstitutional administrative action from scrutiny. It merely requires government to set about undoing it in the proper way. That is still open to government.

[79] Above n 76 at para 86. (Footnote omitted.)

[106] In summary: having failed to counter-apply during these proceedings, the Department must bring a review application to challenge the approval granted to Kirland, which remains valid until set aside. In those proceedings, the Department will no doubt explain its dilly-dallying by accounting for the long months before it acted. As respondent, Kirland will in turn be entitled to defend the decision, whether on the ground of its validity, or on the ground that it should not be set aside, even if it is invalid.

Order

[107] For these reasons, leave to appeal is granted, but the appeal is dismissed with costs, including the costs of two counsel.

FRONEMAN J (Cameron J concurring):

[108] I concur in the judgment of Cameron J, but, because of contrasting assertions about the issues that arose from the papers, I feel compelled to set out additional reasons for doing so.

[109] It is a worrisome feature of this case that political interference appears to have played a role in Dr Diliza's refusal to give effect to Mr Boya's original decision to refuse Kirland's application. I too would have preferred a situation where we would have been in a position to determine the substantive merits relating to this issue.

Somewhat reluctantly, though, I have come to the conclusion that we are not in a position to do so, because the full story is not before us.

[110] First, the replying affidavit of Dr Marais, on behalf of Kirland, makes it clear that Kirland did *not* accept that a review of Dr Diliza's decision was properly before the High Court. The statement by Dr Marais that if the then Superintendent-General "wished to set aside the decision taken by Dr Diliza, he ought to have instituted review proceedings which would have enabled [Kirland] to place its case before the tribunal or court dealing with the matter", means what it says. I disagree that Cameron J quoted it out of context. There are, in fact, a number of other statements to the same unambiguous effect.[80]

[111] Second, even if we accept that in substance, if not in form, a review application is before us, we are still *obliged* to determine whether the application for review was brought in time. It is not simply a question whether the 180-day requirement under the Promotion of Administrative Justice Act[81] (PAJA) was an issue between the parties.[82]

[80] For example, at para 26 of Kirland's replying affidavit it said:

> "I deny that the respondents may simply ignore an administrative decision on the basis that it is 'a non decision'. The principle of [legality] means that the said decision stands until set aside by a court or on appeal."

[81] 3 of 2000.

[82] See n 48 above.

[112] In *Khumalo*[83] this Court reiterated that—

> "courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution".[84] (Footnotes omitted.)

After quoting section 237 of the Constitution,[85] Skweyiya J continued:

> "Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. This principle is thus a requirement of legality.
>
> This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions."[86] (Footnotes omitted.)

[113] *Khumalo* was also a case where a public official sought to review conduct of a state organ. Our Constitution allows state organs to do so in order to strengthen the rule of law and accountable government. But the rule of law entails duties:

> "In keeping with her duty to uphold the rule of law, the MEC *is* not permitted to circumvent the express provisions of the [Labour Relations Act]*:* compliance with the time limit set in section 145(1)(a) *is* a requirement of legality."[87]

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[83] Above n 50.

[84] Id at para 44.

[85] Section 237 reads: "All constitutional obligations must be performed diligently and without delay."

[86] *Khumalo* above n 50 at paras 46-7.

[87] Id at para 73. The minority judgment in *Khumalo* at paras 94-5 found that PAJA was applicable, but agreed with the obligation to comply with prescribed time periods:

> "The MEC did not bring any application for condonation nor did she provide any explanation for such an inordinate delay in bringing the application. She was obliged to have done so. It

[114] Before us counsel for the government parties candidly conceded that a separate review application was not brought because it was considered that it would run afoul of the time limit for review applications. In other words the attempt to have the issue decided on the papers was an attempt to circumvent the express provisions of PAJA. That, this Court said in *Khumalo*, cannot be done. The law does not allow us to uphold the rule of law while at the same time circumvent and undermine it. In the long run, shortcuts of this kind will erode the rule of law as one of the foundational values of our Constitution.

[115] Nothing prevented, or prevents, the applicants from rectifying a potential wrong in accordance with the proper legal prescripts.

[116] For these further reasons, I concur in Cameron J's judgment.

> is true that, in the light of the decision of this Court in *Gcaba*, the MEC's contention that the decision to promote Mr Khumalo and the decision to grant Mr Ritchie protective promotion constituted administrative action is not sustainable as those decisions do not constitute administrative action. The MEC's contention constituted the entire basis of her application in the Labour Court. However, the fact that the MEC's contention in this regard was wrong, as the main judgment correctly holds, does not mean that her application was not subject to the time-limit requirement prescribed by section 7(1) of the PAJA. The question whether or not those decisions constituted administrative action would be considered and decided on the merits after she had satisfied the Court either that she had not delayed unduly in bringing the application or that there was good cause to condone her delay. The question whether she brought her application timeously is decided before that inquiry and on the assumption that the decisions constitute administrative action as she contended. However, it is important to emphasise that the MEC's claim was not competent in law.
>
> As the MEC did not make an application for the condonation of her delay in bringing the application and did not offer any explanation for the delay, the Labour Court should have dismissed her application on this ground alone." (Footnote omitted.)

ZONDO J:

Introduction

[117] I have had the benefit of reading the judgments of my Colleagues, Jafta J, Cameron J and Froneman J. For convenience I shall refer to Jafta J's judgment as the main judgment, Cameron J's one as the second judgment and Froneman J's one as the third judgment.[88] I agree that leave should be granted. I am unable to agree with the second judgment that the appeal should be dismissed. I agree with the main judgment that it should be upheld and that the Acting Superintendent-General's (Acting S-G) decision approving Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute's (Kirland) applications for permits should be set aside. However, I take the view that Kirland's applications for permits should be referred back to the Superintendent-General for a fresh determination.

[118] The main judgment has set out the factual background. I shall, therefore, not repeat that exercise. However, I shall refer to parts of the background where to do so is necessary for a proper understanding of this judgment or where it is necessary for emphasis.

[119] On the evidence that was before all the Courts, the Acting S-G's decision to approve the applications by Kirland for permits to build two private hospitals and

[88] The reason why I refer to Cameron J and Froneman J's judgments as the second and third judgments respectively is that they were prepared in that order.

unattached operating theatres was made unlawfully and was invalid. It was made as a result of unlawful political interference by the then Member of the Executive Council for Health Eastern Cape (MEC for Health), Ms Jajula, with the performance by the Acting S-G of her duty. That was the duty of deciding applications for permits to build private hospitals. The Acting S-G, Dr Diliza, simply followed Ms Jajula's instruction when she approved Kirland's applications. She did not apply her own mind on whether the applications should be approved.

The issues

[120] The only issue before us is whether the High Court was correct in setting aside the Acting S-G's decision. Put differently, the only issue before us is whether the Supreme Court of Appeal was correct in overturning the High Court's order setting aside the decision and referring Kirland's applications for permits back to the Superintendent-General (S-G) for a fresh decision.

[121] With regard to the issue before us, it is important to bear in mind that—

(a) prior to the Acting S-G's decision, the S-G had turned Kirland's applications for permits down but that decision was not conveyed to Kirland;

(b) subsequent to the Acting S-G's decision, the S-G purported to withdraw the Acting S-G's decision; and

(c) when Kirland appealed to the new MEC against the S-G's decision to withdraw the Acting S-G's decision, the appeal was dismissed.

[122] The reason why Jafta J and Cameron J arrive at conflicting conclusions is that they differ on whether the decision of the Acting S-G approving Kirland's applications for permits should be set aside or not. In other words they differ on the same point on which the High Court and the Supreme Court of Appeal differed. Although the High Court and the Supreme Court of Appeal differed on whether the Acting S-G's decision should be set aside, they agreed that it was invalid.

[123] The main judgment holds that the Acting S-G's decision was invalid and should be set aside. The second judgment holds that that decision should not be set aside. The difference between them is based on the fact that they take different views on whether the validity or invalidity of the Acting S-G's decision was an issue before the High Court. The main judgment says it was. The second judgment says it was not.

Was the validity or invalidity of the Acting S-G's decision an issue before the High Court?

[124] I agree with the main judgment that the issue of whether the Acting S-G's decision was invalid was before the High Court and the High Court was called upon to decide it. In this judgment I refer to more proof in the affidavits filed in the High Court to show that this was, indeed, the case.

[125] The view that the validity of the Acting S-G's decision was not an issue before the High Court is not borne out by the contents of the affidavits. In support of the

view that the validity of that decision was one of the issues before the High Court for decision, reference can be made to various contentions that were made by Dr Andries Marais in Kirland's founding affidavit in the High Court. In the High Court Dr Marais contended, among other things, that—

(a) the Acting S-G's decision was taken "in terms of the statutory provisions" and was one "properly taken".

(b) "the Acting S-G's decision *was valid and unassailable and could not be withdrawn*." (Emphasis added.)

(c) "the [Acting S-G] was properly authorised in his position as Acting S-G", and "was in a position to bind the government parties acting in accordance with his statutory and regulatory authority."

(d) "the approval given by the [Acting S-G] was lawful approval." (Emphasis added.)

(e) the [Acting S-G's] decision was "effective".

[126] In case what has been quoted is not enough to show that the validity of the Acting S-G's decision was an issue before the High Court, reference to certain parts of the applicants' answering affidavit (as respondents in the High Court) should put the issue to bed. In his answering affidavit Dr Litha Matiwane said that at the hearing of the matter it would be submitted on behalf of the government parties that—

(a) "[Dr Diliza's] *decision was of no force and effect*". (Emphasis added.)

(b) given the circumstances under which Dr Diliza took the decision on 23 October 2007; "*[t]he Respondents cannot, in law, be estopped from contesting the validity of Dr Diliza's decision*". (Emphasis added.)

(c) "Dr Diliza's decision was not taken in terms of any Act or regulation. The Department denies that her decision was properly taken or that it was valid, unassailable and could not be withdrawn". (Emphasis added.)

(d) "Dr Diliza's decision was bound to be set aside. A hearing to the applicant before the withdrawal of Dr Diliza's decision would not have made a difference." (Emphasis added.)

Even in Dr Marais' replying affidavit Kirland persisted in its contention that its applications for permits had been "properly granted" by Dr Diliza. Kirland specifically said that Dr Diliza had "clearly applied her mind and did her own research".

[127] It is, therefore, clear that the validity of the Acting S-G's decision was an issue placed squarely before the High Court for decision. Kirland wanted the High Court to give its *imprimatur* to that decision so that it could enforce it. It contended that that decision was valid and unassailable and sought to have it confirmed by the High Court. Kirland specifically contended that the decision was effective in law. The MEC and the S-G (government parties) opposed the application to have that decision confirmed and upheld as valid and effective in law. The government parties *contended that the decision was invalid and of no force and effect*. It said that that

would be its case in court. In other words it said that it would ask the court to hold that the Acting S-G's decision was invalid and "of no force and effect".

Did the present applicants ask the High Court to set aside the decision of the Acting S-G?

[128] The Supreme Court of Appeal held that the High Court could not set aside the decision of the Acting S-G because the applicants did not ask the High Court to set aside that decision. Even though the Supreme Court of Appeal found that decision to be invalid, it said that, until that decision was set aside, the decision stood. It said that, if the applicants had wanted to have that decision set aside, they should have asked the High Court to set it aside but they did not do so. The Supreme Court of Appeal held that the High Court had erred in setting aside the Acting S-G's decision and in referring Kirland's applications for permits back to the S-G for a fresh decision.

[129] The second judgment is in agreement with the approach of the Supreme Court of Appeal. That is why in terms of that judgment the appeal falls to be dismissed. I take the view that the applicants did in effect ask the High Court to set aside the decision of the Acting S-G. I say this because in the main answering affidavit in the High Court, Dr Matiwane said explicitly that at the hearing of the matter it would be submitted on behalf of the Department that the "Acting Superintendant-General's decision *was of no force and effect*." (Emphasis added.) The view that the applicants did not ask the High Court to set aside the Acting S-G's decision raises the question of what the difference is between asking a court to decide

that a certain administrative decision is invalid and of no force and effect and asking it to set such an administrative decision aside. In my view there is no difference in law. If a court decides that a certain administrative decision is invalid and of no force and effect, the position is as if that administrative decision was never taken in the first place. The same applies if a court sets aside an administrative decision. Therefore, where a litigant has asked a court to set aside an administrative decision or where he or she has asked a court to find the administrative decision to be invalid and of no force and effect, the result would be the same whichever of the two the court adopted.

[130] It is because a court's decision that a certain administrative decision is invalid and of no force and effect has the same effect as a court's decision setting aside that administrative decision that, for example, in *Mokoena and Others v Administrator, Transvaal*,[89] Goldstone J was content to make an order simply declaring the dismissal of the employees as "wrongful and *unlawful and of no force or effect*" without setting aside the decision to dismiss.[90] (Emphasis added.) It is also the reason why, in *Sibiya and Another v Administrator, Natal and Another*[91] where the applicants had obtained a *rule nisi* for the Administrator of Natal to show cause why their dismissals should not be declared "*unlawful and of no force and effect*,"[92] Didcott J was content to nullify the dismissals by confirming the *rule nisi* without setting aside the decision to dismiss. (Emphasis added.) That is also why, after declaring section 8(a) of the Judges' Remuneration and Conditions of Employment

[89] 1988 (4) SA 912 (W).

[90] Id at 921D-E.

[91] 1991 (2) SA 591 (D).

[92] Id at 592E-F.

Act[93] invalid in *Justice Alliance v President of the Republic of South Africa and Others*,[94] this Court was content to declare the President's decisions [to request the then Chief Justice of South Africa to continue performing active service as Chief Justice and to extend his term of office as Chief Justice] to be "of no force and effect" without setting aside those decisions. In *Zondi and Others v Administrator, Natal and Others*[95] the then Appellate Division was also content to grant an order declaring the purported dismissals of certain employees of the then Natal Provincial Administration "to have been unlawful and null and void" without setting aside the dismissals.

[131] In the light of the above it can therefore not be said that the applicants did not ask the High Court to set the Acting S-G's decision aside. In my view the Supreme Court of Appeal erred in holding that the validity of the Acting S-G's decision was not an issue before the High Court. The government parties had asked in effect for the equivalent in law of an order setting aside the Acting S-G's decision when they asked the Court to find that the decision *was invalid and of no force and effect*. Accordingly, I am of the view that the present applicants did ask the Court to set aside the Acting S-G's decision although they did not use that term.

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[93] 47 of 2001.

[94] [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC).

[95] [1991] ZASCA 35; 1991 (3) SA 583 (A) at 592E-G.

Was Kirland given a fair opportunity to meet the applicants' case on the invalidity of the Acting S-G's decision?

[132] If the government parties placed enough evidence before the Court to enable the Court to hold that the Acting S-G's decision was invalid and of no force and effect and Kirland was given a fair opportunity to deal with that case but failed to do so persuasively or effectively, the Court was bound to find that that decision was invalid and of no force and effect or to set it aside.

[133] To strengthen their case that the Acting S-G's decision was irregular as indicated in Dr Diliza's affidavit, the government parties also relied upon an affidavit of the new S-G (who took over from the S-G who had refused Kirland's applications for permits), Dr Sivapragas Pillay. In her affidavit Dr Pillay says that on 15 February 2010 she telephoned the former MEC for Health (Ms Jajula) in Dr Diliza's presence to put to her Dr Diliza's allegations about her. Dr Pillay says that she put the phone on speaker and she informed the former MEC that the phone was on speaker and that she was with Dr Diliza in her office at the time. Dr Pillay says that, when Dr Diliza's version was put to the former MEC, the former MEC initially denied Dr Diliza's version but she later admitted it. However, Dr Pillay says Ms Jajula said that she would not be prepared to depose to an affidavit. Apparently Kirland also asked the former MEC to depose to an affidavit but she refused. However, she did furnish Kirland with a signed statement in which she dealt with Dr Diliza's version of how Kirland's applications for permits were approved. The fact that Ms Jajula furnished Kirland with an unsworn statement but refused to depose to

an affidavit means that she refused to depose to an affidavit even to refute Dr Diliza's version.

[134] It seems to me that in these circumstances the government parties did everything they were essentially required to do to obtain a decision of the High Court that the Acting S-G's decision was *invalid and of no force and effect.* Kirland was given enough opportunity to present its case on this issue but failed to secure an affidavit from Ms Jajula. It was not Kirland's case on the papers that it had not been afforded a fair opportunity to meet the applicant's case. Kirland must suffer the same consequence that every litigant suffers when its witness refuses to depose to an affidavit and there is no referral of the matter to oral evidence. All the evidence of how the decision was taken was before the High Court. All the relevant parties were before that Court. Kirland had already placed the validity of the decision squarely before the Court. The government parties placed their contention that the decision was invalid and of no force and effect before the Court. In these circumstances the High Court was correct in setting aside the decision.

Should Kirland's application for permits be referred back to the S-G for decision?

[135] The High Court referred Kirland's applications for permits back to the S-G to consider and decide afresh. This was an order that Kirland had asked for in its Notice of Motion as an alternative if the court was not prepared to confirm the Acting S-G's decision or was not prepared to leave that decision intact or to uphold its validity. Coincidentally, this is what the government parties also asked for as an alternative to

having the Court substituting its decision for that of the S-G. In support of this route Dr Matiwane said in the main answering affidavit that much had also changed since the decision of the Acting S-G. He said that there was a new S-G and a new MEC and there had been an increase in the population serviced by the Provincial Department of Health. I understand this last point to be a suggestion that, whereas in 2007 there may not have been a need for more private hospitals in the Eastern Cape Province, it could well be that, with the passage of time, a change had occurred and there could then be a need for more private hospitals in the province. All of this would be relevant if the S-G were to consider Kirland's applications for permits afresh. In such a case, implied Dr Matiwane, a proper decision would be taken either way without any unlawful political interference.

[136] The entire foundation upon which the second judgment is based is that the government parties did not apply to the High Court to have the approval of Kirland's applications for permits (that is the Acting S-G's decision) set aside. That foundation is not supported by the facts. I have referred to the fact that in their answering affidavits the government parties did ask the High Court to find that decision invalid and of no force and effect which meant the same as asking the Court to set aside that decision. That is how the government parties sought to counter Kirland's review application.

[137] I have already pointed out above that the government parties made their request for a decision that the approval was invalid and of no force and effect in

circumstances where Kirland had already brought before the Court all parties with a direct and substantial interest in an order that the approval was valid or invalid and whether the approval should stand or be set aside. Accordingly, the government parties did not need to cite any additional parties. Once the government parties, as respondents in Kirland's review application, had identified the decision they wanted the Court to declare invalid and of no force and effect and all the interested parties were before the Court, all that the government parties were required to do was to place their evidence before the Court. That is what they did.

[138] The second judgment says that the government parties should have instituted a separate counter-review application or counter-application with its own notice of motion and founding affidavit but under the same case number as Kirland's review application to which Kirland would then file its own answering affidavit. With respect, that is not required of a respondent in an application when he or she desires a certain order in the same proceedings in which he or she is a respondent. Even in proceedings instituted by way of action, a defendant who wishes to counter-claim is not required to issue a separate summons for his or her counter-claim. He simply needs to include his counter-claim in the same document that contains his plea. The position is no different in a matter brought by way of motion proceedings. In the latter case it is enough if in his answering affidavit the respondent makes it clear that he seeks a certain order and places the necessary evidence before the court and ensures that all parties with a direct and substantial interest are before the court.

[139] Unlike the second judgment, which says that it would be unfair to Kirland if the approval was set aside in these proceedings because Kirland did not have a fair opportunity to deal with a case that the approval should be set aside, Kirland did not only not raise such a complaint in its replying affidavit but, on the contrary, it sought to meet the government parties' request and case head-on. It did not take any procedural and technical points. Otherwise, how does one explain the fact that in Kirland's replying affidavit Dr Marais—

(a) disputes the government parties' contention that the approval was invalid and of no force and effect and persists in Kirland's contention that that decision was valid, had been properly taken and was binding upon the government parties?

(b) obtained Ms Jajula's side of the story on Dr Diliza's version of how the approval came about and sets it out in the replying affidavit?

(c) did not anywhere say Kirland needed more time to deal with the government parties' request to the Court to find the approval invalid and of no force and effect?

Furthermore, how does one also explain the fact that Kirland secured a detailed signed statement (not affidavit) from Ms Jajula denying Dr Diliza's version of how the approval came about?

[140] The second judgment says that the government parties should apply "formally" and "properly" for the approval to be set aside. What the government parties did here is permissible, namely, that in their answering affidavits they countered Kirland's

review application with their own request that the very decision which Kirland wanted to be confirmed or reinstated by the Court should be found to be invalid and of no force and effect. What the government parties did was a sensible and practical way to get all issues to be decided by the same Judge in the same proceedings.

[141] Almost all the points upon which the second judgment relies for its conclusion that the approval should not be set aside in these proceedings are points that Kirland did not take in its replying affidavit after it had been fully informed of what the government parties' case was. Kirland also did not adopt the attitude that the Court could not make the decision that the approval was invalid and of no force and effect as requested by the government parties because the Court did not have all the evidence required for it to make that decision or because the government parties had no right to ask that the approval be set aside in those proceedings.

[142] It is true that Kirland did refer to the fact that it had already purchased some property on the understanding that its applications for permits had been approved but it placed that before the Court as one of the factors that should be taken into account and not in support of a submission that the Court could not set aside the approval in those proceedings. In this judgment I take the view that Kirland's applications for permits should be remitted to the S-G for determination afresh. That means that,pending the S-G's decision, Kirland cannot be said to have already suffered a loss. If, ultimately, Kirland's applications for permits are refused, it would still be

open to it to sue the government for its loss. If the applications for permits are approved, the purchase of the property will not have been in vain and can still be used.

[143] The second judgment refers to a statement in Dr Marais' replying affidavit that, if Mr Boya (the then S-G) wished to set aside the decision taken by Dr Diliza, he ought to have instituted review proceedings which would have enabled Kirland to place its case before the tribunal or court dealing with the matter.[96] This statement is invoked as support for the proposition that Kirland was opposed to the determination of the validity of the Acting S-G's decision in these proceedings when the matter was in the High Court.

[144] With respect, this statement provides no support for the proposition. In my view that statement is quoted out of context. The statement is part of paragraph 37 of Dr Marais' replying affidavit where Dr Marais responds to paragraph 34 of Dr Matiwane's answering affidavit. In particular Dr Marais was responding to paragraph 34.1 of Dr Matiwane's answering affidavit. There, Dr Matiwane said that he denied that the S-G (Mr Boya) "was actuated by mala fides when he withdrew Dr Diliza's 'decision'". Dr Marais then responds in paragraph 37.

[145] When one reads the whole of paragraph 37 of Dr Marais' replying affidavit, one realises the context in which the statement was made. That context was that Kirland was saying that the S-G was wrong to have purported to withdraw the Acting S-G's

[96] See [80] above.

decision himself and should have brought a review application in court or another tribunal if he wanted that decision set aside in which event Kirland would have put its case before that court or tribunal. In that paragraph Kirland did not complain that the government parties were not entitled to ask the Court to find the Acting S-G's decision invalid and of no force and effect.

[146] In my view, the second judgment reaches the conclusion favourable to Kirland on a case that Kirland did not put up. A reading of Kirland's replying affidavit does not reveal any suggestion that Kirland was objecting to the Court dealing with the government parties' request for the approval to be declared invalid and of no force and effect because they had gone about it the wrong way or because they had no right to make that request the way that they did. In fact a reading of that affidavit reveals the opposite.

[147] The second judgment also refers to a statement by counsel for the government parties during argument that, if the government parties wanted to bring a review application, they would have had the problem of the 180-days requirement prescribed by the Promotion of Administrative Justice Act[97] (PAJA) within which a review application is required to be made. That was on the assumption that the government parties could have brought, or, would have had to bring, such a review application under PAJA. The question before us is whether the High Court could and should have set aside the approval of Kirland's applications for permits. That depends on the

[97] 3 of 2000.

issues between the parties as defined by the pleadings (affidavits in this case), the evidence and the law. In the present case Kirland did not in its papers take the point that the government parties were not entitled to ask the High Court to set aside the approval because, for example, of any delay or non-compliance with any statutory requirement. That being the case the 180-days requirement was not an issue between the parties.

[148] In the light of the above I am of the opinion that the High Court was right in referring the matter back to the S-G for a fresh decision. In my view the Supreme Court of Appeal should not have amended the order of the High Court. A referral of the matter back to the S-G also appears to be a fair route to follow after the finding that the Acting S-G's decision was invalid and of no force and effect. Such an order ensures that Kirland does not benefit from a decision tainted by unlawful political interference and the government parties and the public are not burdened with a decision tainted with illegality.

[149] Accordingly, in addition to declaring the Acting S-G's decision invalid and of no force and effect, I would grant Kirland the alternative relief that it had asked for and remit its applications for permits to the S-G with leave for it to supplement the information in those applications should it be so advised. I would order each party to pay its own costs.

For the Applicants:	Advocate R Buchanan SC and Advocate G Bloem SC instructed by the State Attorney.
For the Respondent:	Advocate L Rose-Innes SC and Advocate H Du Toit instructed by Bernadt Vukic Potash & Getz.