MALFEASANCE, ADMINISTRATIVE JUSTICE AND THE RIGHT OF ACCESS TO HEALTH-CARE SERVICES: AN ASSESSMENT OF

MEC for Health v Kirkland Investment (Pty) Ltd 2014 (5) BCLR 547 (CC)

1 Introduction

It became apparent relatively soon after the advent of the democratic constitutional dispensation in South Africa that socio-economic rights are interrelated and interdependent. The non-realization of a particular right directly impacts not just on that right; associated rights and freedoms are also adversely affected or diminished. In *Khosa v Minister of Social Development* (2004 (6) SA 505) the Constitutional Court (CC) found that not extending social security benefits to permanent residents in need – purely because they were not citizens was unreasonable and amounted to a violation of the right to have access to social security (s 27(1)(c) of the Constitution of the Republic of South Africa, 1996). In addition, the Court found that the applicants were unfairly discriminated against and further that their right to human dignity had been infringed. Thus the act of unreasonable exclusion had infringed a range of associated rights and freedoms.

The interconnectedness between policy, law and effective implementation was emphasized in *Government of the Republic of South Africa v Grootboom* (2001 (1) SA 46 (CC)). In assessing whether Government had acted reasonably in the positive realization of socio-economic rights, a court will not enquire into whether the outcome could be better achieved by other measures or whether the choices made by the State are the most desirable and prudent. Rather, the test is whether the goal the State is meant to attain – such as the realization of access to health care – can reasonably be achieved through the legislative and implementation framework chosen by the State (*Government of the Republic of South Africa v Grootboom supra* par 42). If it can, then the State is acting reasonably and the fact that the end result could have been achieved more efficiently and cost-effectively through other means, is a political as opposed to a legal question falling within the remit of the courts.

The *Grootboom case* emphasized that "mere legislation is not enough" (*Government of the Republic of South Africa v Grootboom supra* par 3). The implementation process has to be coherent, effective and lawful. Implementation would for the most part have to accord with section 33 of the Constitution and with the Promotion of Administrative Justice Act (3 of 2000) (PAJA). This would require the administrators implementing the legislation to

act reasonably, lawfully and procedurally fairly. Failure to do so will ultimately amount to a violation of both the right to just administrative action, and will also retard and inhibit efforts at positively realizing the substantive right that the policy is aimed at achieving.

In about 1993, Professor Mureinik asked the fundamental question of whether we will achieve democracy in South Africa. He prophetically predicted that the answer would not lie solely in economics and constitutional law. He argued that the answer may depend "as much upon the routine relationships between government and subject – upon how officials treat people they govern in daily dealings – as it does upon the vitality of the economy or the loftier aspirations of the Bill of Rights" (Mureinik "Reconsidering Review: Participation and Accountability" 1993 *Acta Juridica* 35). The legal forces that pull or fail to pull Government towards democratic decision-making will, according to Professor Mureinik, together with the vibrancy of our economy and the depth of our Bill of Rights, ultimately determine whether we achieve democracy (Mureinik 1993 *Acta Juridica* 35). He articulated the notion of responsive governance, which requires Government to account to the people it governs. He argued that an important facet of responsive governance was accountability, which means that Government must justify its decision to the people it governs. According to Professor Mureinik, another aspect of responsive governance is the necessity to create opportunities for people – to influence decisions that impact on their lives (Mureinik 1993 *Acta Juridica* 36).

The Bill of Rights in the Constitution could not have been loftier in its aspiration of attaining an open and democratic society, and the CC has carved out an appropriate jurisprudence.

The economy in recent years has been anything but vibrant, with growth of 1.9% attained last year and further marginal growth of 1.9% predicted in 2014 (http://mg.co.za/article/2014-07-10-imf-likely-to-cut-south-africas-economic-growth-forecast (accessed 2014-08-13)). A credible, if not entirely convincing, argument can be made, that this sluggishness is due to the 2008 world recession and economic factors beyond the control of the South African Government. However, what cannot be blamed on extraneous factors beyond the control of government, is the less than satisfactory way that public power – in many cases – is being exercised. This is a self-inflicted wound. In case after case, we have seen an inability or unwillingness by Government to engage in democratic and proper decision-making when exercising public power.

This case will reflect on some of the decisions made by senior civil servants in the discharge of important statutory powers, and will argue that improper decisions retard our growth as a democracy. The *Kirkland* case demonstrates that the failure to act in a just administrative manner will also hinder the progressive realization of socio-economic rights, such as the right of access to health care. We appear to be faring poorly on two of the three factors on Mureinik's watch list and this must give cause for concern.

2 The right to have access to health-care services

Section 27(1) of the Constitution protects the rights of everyone to have access to health-care services – including reproductive health care – and states in unequivocal terms that no one shall be refused emergency medical treatment. The CC was called upon earlier on to interpret section 27 of the Constitution in *Soobramoney v Minister of Health, Kwazulu-Natal* (1997 (12) BCLR 1696 (CC)). Mr Soobramoney, an unemployed man in the final stages of chronic renal failure, challenged the policy of a provincial public hospital refusing to provide him with ongoing dialysis treatment. The hospital restricted admission to its dialysis programme to a limited number of patients – because of acute budgetary constraints and massive demand for the services. The effect of the restrictive-admission criteria was that a patient suffering from chronic renal failure would receive dialysis treatment if the patient was an eligible candidate for a kidney transplant, or if the patient's kidney could be resuscitated. Patients failing to meet these requirements would be denied access to dialysis treatment. Soobramoney argued that the refusal of the hospital to provide him with dialysis treatment free of charge, denied him the right to life, as he would die if he did not receive the treatment, and the exclusionary policy violated the constitutional obligation on the State not to refuse emergency medical treatment (s 27(3) of the Constitution). The Court recognized the absolute and urgent need to provide access to housing, food, water, employment opportunities and social security – thus enabling the disadvantaged to share in the experience of humanity. It held that there will be times when it is permissible for the State to adopt "a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society" (*Soobramoney v Minister of Health, Kwazulu-Natal supra* par 31). The Court held that the right not to be refused emergency medical treatment applies in instances of a sudden catastrophe. Thus, according to the court, this right did not apply to ongoing treatment necessitated by an incurable condition such as that suffered by Mr Soobramoney. The restricted-admission policy which was adopted because of severe budgetary constraints was not irrational, and hence the decision that the policy and its application was not in violation of section 27 of the Constitution.

The *Soobramoney* case came very early on and the Court was fully cognisant of the challenges facing the new Government in attempting to create a more egalitarian and just society. The Court could not have tied Government's hands by prioritizing those that were terminally ill, at the expense of the different categories of persons that needed urgent Government assistance. Much more flexibility had to be afforded to the State as it set about re-ordering its priorities within the constraints existing at the time.

Subsequently, the National Health Act (61 of 2003) (NHA) was passed to give greater content and effect to the right of access to health care. One of the objectives of the NHA is to provide the best possible national health services to the population of South Africa – that available resources can provide (s 2 of the NHA). The Act also commits to the promotion and realization of the right of access to health care. The Minister of Health – in consultation with the Minister of Finance – is empowered to determine the

categories of persons who are eligible for free health-care services at public facilities (s 4). A health-care provider, private or public, may not refuse emergency-medical treatment to any person (s 5). There are thus direct constitutional and statutory duties to take reasonable measures to progressively realize the right to have access to health-care services. The NHA recognizes that there is an absolute necessity for the optimal and most effective use of resources, so that the most impoverished and marginalized in society will have access to health care at public facilities, without charge.

The NHA acknowledges the seriousness of the problem, the need to deliver to those most dependent on the State, and the obligation to do so in a fiscally responsible manner. Importantly, as provided for in *Government of the Republic of South Africa v Grootboom* (*supra*) and *Minister of Health v Treatment Action Campaign (2)* (2002 (5) SA 721 (CC)), the policy must make provision for those most in need, and who are living in intolerable conditions.

Each department of State has a core mandate which it needs to carry out. However, the State, quite correctly, is assessed and appraised as a collective whole. The failure to deliver textbooks to learners in Limpopo, in 2012, was a failure of Government to provide basic education to learners – as required by section 29 of the Constitution. While the direct cause of this lamentable failure was the corruption and ineptitude of the Limpopo Department of Education, the various constitutional checks and balances – including the power to intervene in provincial administration (s 100 of the Constitution) and the principles of co-operative governance (Chapter 3 of the Constitution) – were designed to ensure that there is proper oversight and supervision. The most marginalized in society and those who depend most on the state for effective education, in order to break out of the cycle of poverty and hopelessness, were most let down by the inability to supply textbooks. As this occurred in a constitutional system replete with oversight and supervision mechanisms, Government as a whole must be held accountable. The delay in national intervention resulted in learners' rights to basic education being infringed. It appeared that Section 27, an NGO, was subjecting the non-performance to a greater degree of oversight and scrutiny than the National Department of Education and Training – in circumstances where the latter had a constitutional obligation and the legal tools at its disposal to ensure proper and effective oversight and supervision.

Currie and De Waal (*The Bill of Rights Handbook* 6ed (2013) 575) correctly point out that in order to ensure that the State is acting reasonably when delivering on socio-economic rights, it is necessary for the State to provide an explanation of the measures that it has taken in order to progressively realize the right in question. In effect, the State is required to explain its policy choices to the public and to the court – so that a proper assessment and appraisal can be made. In *Mazibuko v City of Johannesburg* (2010 (4) SA 1 (CC)), the Court held that the City's policy of providing 6 kilolitres of free water per month per household was reasonable. The fact that the City had fully explained the problem, identified the various choices that it considered, articulated the reasons for making the policy choices that it did after consulting with the affected residents – contributed to the finding that it acted reasonably in the circumstances. Not being fully

transparent had the opposite effect in *City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd* (2012 (2) SA 104 (CC)), the City, in order to demonstrate that it was financially constrained, provided information that related specifically to its housing budget, but failed to provide adequate information relating to its budget in general. This meant that the Court was not placed in a position to assess the City's overall financial position (*City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd supra* par 74), and thus insufficient information was placed before the Court to justify the finding that the City has acted reasonably.

The responsibility for explaining policy choices rests directly on the department whose core responsibility is delivering on the rights concerned. But the responsibility should not be restricted to the department – but should extend to the other departments and organs of State having supervisory and oversight jurisdiction. In the Limpopo textbook case, the National Department of Education and Training should indicate why processes set up by the Intergovernmental Regulation Framework Act (13 of 2005) did not provide the necessary early warning of a potential failure to deliver textbooks, and why it was not aware earlier of the impending crisis. In the *South African Association of Personal Injury Lawyers v Heath* (2001 (1) SA 883) (CC)) case, the CC held that corruption and maladministration is not just inconsistent with the rule of law, but is also the antithesis of open, accountable and democratic governance.

The organs of State entrusted with preventing maladministration and prosecuting corruption, must understand that their decisions also impact on the progressive realization of socio-economic rights.

In Kwazulu-Natal (KZN), two senior politicians, Ms Peggy Nkonyeni and Mr Mike Mabuyakhulu – together with a number of senior civil servants – were charged together with a businessmen Mr Gaston Savoi. The State alleged that all the accused were involved in racketeering which resulted in a potential loss of some R144 million to the province (Politicians off hook in Amigos Trial 2 October 2012 *Daily* News/News/IOL.co.za (accessed 2014-07-23). The allegations were that "sweeteners" were given to the politicians by Savoi when Savoi secured contracts to provide water-purification plants and oxygen generators for two KZN hospitals. The charges against Nkonyeni and Mabuyakhulu were subsequently withdrawn after the Acting Director of Public Prosecutions formed the opinion that there was no prospect of a successful prosecution against them. However, the case against Savoi continues. It is imperative that full information and proper reasons are provided by the State for the decision not to prosecute. The National Prosecuting Authority (NPA) is mired in controversy and some of its important decisions – such as the decision not to prosecute Richard Nduli – have been overturned by the courts as being inconsistent with the principle of legality.

The gravamen of the charges against the KZN politicians is that these persons acted criminally to the detriment of the State. However, in addition, the allegations amount to an assertion that they acted in violation of direct constitutional and statutory duties to ensure that State resources are optimally, efficiently, and properly used to benefit the poorest in our society.

In *Soobramoney*, the State indicated to the applicant that it had to exclude him from the dialysis programme because it simply did not have the funds to treat him. Similar decisions are made on a daily basis in the public health-care sector. In the *Savoi* case, it was initially alleged that the same health budget was being denuded by corrupt officials, before charges were subsequently withdrawn against the senior politicians. There is a constitutional imperative for a comprehensive explanation and reasons for withdrawing charges in these circumstances. Firstly, there is a responsibility on the Director of Public Prosecutions (DPP) in terms of the principle of legality to act rationally. This would require an explanation as to why there was a change of mind as to the prospects of success in securing a conviction.

It is necessary that the DPP provide an explanation that meets the standards of legality and rationality for the decision not to prosecute the senior politicians. Conclusionary remarks such as "there is no reasonable prospect of a successful prosecution" are simply not sufficient. Much more has to be provided to assuage the concerns that the decision is being taken because of political pressure or for some other irrational reason. The NDPP (National Director of Public Prosecutions) is obliged to hold those exercising public power accountable – should they act contrary to the law. Part of the checks and balances is that criminal prosecutions are to be brought if public funds are unlawfully diverted away from meeting the needs of the most marginalized in society. The NDPP should justify its decision by providing reasons whenever requested, and should not simply attempt to provide an explanation when compelled to do so when legal proceedings are instituted. Ultimately, the NDPP must act in a manner which advances the right of everyone to have access to health care services. Charging senior politicians with improper use of funds that are meant to assist the most marginalized in society and then withdrawing the charges without a comprehensive justification to demonstrate that the decision to withdraw is rational, does not contribute to an environment which advances the right of access to health-care services and transparent and accountable governance. It may well be that the decision to withdraw charges is entirely rational and justified. However, in the absence of a coherent explanation and reasons, the perception that a confused and floundering NPA is doing the bidding of political-power brokers – as opposed to carrying out their statutory and constitutional mandates – will continue to gain momentum to the detriment of our constitutional order. Not providing a full justification is the antithesis of democratic administration, it undermines trust in oversight institutions and does not serve as a deterrent to unlawful activity. This is particularly so given the internecine conflicts that are plaguing the NPA. (In July 2014, Justice Z Yacoob, retired judge of the Constitutional Court, was appointed to investigate leaks by NPA officials to the media and other parties http://www.news.24.com SouthAfrica/news/NPA-delay-probe-into-leaks-judge-2014814 (accessed 2014-08-14).)

3 The virtues of openness, transparency and accountability

In *NDPP v Freedom Under Law* (SCA 67/2014), decisions not to prosecute in a high-profile matter were set aside. The Supreme Court of Appeal (SCA) confirmed that both the decision to institute criminal proceedings and the decision to terminate criminal proceedings were not reviewable under PAJA, but that these decisions could be reviewed under the principle of legality and the rule of law. Those exercising public power must act in accordance with the Constitution, must act rationally, and must act in accordance with the powers conferred upon them by the enabling legislation (*Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) par 49). The Court emphasized that the power to review prosecutorial decisions must be sparingly exercised because of the need to respect prosecutorial independence, and the policy considerations that often have to be taken into account in making these decisions. Richard Mduli, the former head of crime intelligence, was charged with a number of counts of murder, kidnapping, assault, and fraud. These charges – together with the internal disciplinary charges instituted by the South African Police Services (SAPS) – were subsequently withdrawn and Mduli was reinstated. Freedom under Law, an NGO committed to the advancement of democracy and the rule of law, challenged the setting-aside of the criminal charges and disciplinary proceedings. The NPA was required to subject its decision to proper scrutiny in order to determine whether it acted rationally in withdrawing the charges. It had to explain its behaviour as is required in a constitutional democracy. Given the importance of prosecutorial independence and competence in our democracy, the seniority of those making these judgment calls, the impact, nature and consequence of these decisions, and the public interest in the matter – it could have been expected that these decisions would be made judiciously, thoughtfully and rationally. Our Constitution requires that those exercising this discretion do so with an earnestness of purpose and commitment to advancing the values of the Constitution and the enabling legislation.

After an analysis of the explanations provided by the NPA, the Court held that the decision to withdraw the fraud and corruption charges was not taken in accordance with the empowering provision, and hence it set aside that decision. In respect of the murder and related charges, the Court confirmed that the NPA would have to determine within 2 months which of the charges were to be re-instated – and had to provide reasons if it decided not to proceed with any of the charges. Requiring the NDPP to provide reasons for its decisions reaffirms the determination in the *Judicial Service Commission v Cape Bar Council* ([2012] ZA SCA 115) case, that the principle of legality requires those exercising public power to provide reasons in support of their decisions. Quite damningly, the Court in the *FUL* case concluded that the decision to withdraw disciplinary proceedings was a result of the acting national commissioner acting at the dictates of some other person, or for no reason at all. As this decision was subject to review under PAJA, the Court set aside the decision to stop the disciplinary proceedings, on the basis that it was unlawful. As a consequence of the judgment, charges of intimidation, kidnapping, assault with intent to do grievous bodily harm, and defeating and

obstructing the course of justice – were subsequently reinstituted against Mduli and another person (12 August 2014 *The Mercury* 4). In short, when asked to explain its reasons for withdrawing charges against Mduli, the NPA and SAPS fell woefully short of establishing that the decisions were in accordance with legality and with PAJA. The worrying aspect is that decisions having far-reaching consequences were made in a manner which appeared to have scant regard to the enabling legal framework in terms of which the functionaries were meant to act. When asked to justify the decision, the NPA – which exercises critical constitutional and statutory responsibilities – failed to establish that its decisions were rational. The suspicion that extraneous and irrelevant factors played a role in these decisions appears to be fortified by the rulings of the Court. Critically, it was the constitutional necessity to provide reasons and an explanation, and also courts committed to upholding the values of the Constitution, that resulted in very flawed decisions being exposed as such. The NPA simply cannot continue to make woeful decisions of this nature and lose cases on review as it did in this instance – without fundamentally undermining its constitutional importance and integrity.

4 *Kirkland* unpacked

In *MEC for Health v Kirkland Investment* (*supra*) we have yet another illustration of undemocratic and unlawful administrative action at high levels of Government. Kirkland applied for approval to establish two private hospitals and two unattached operating theatres in the Eastern Cape. The Health Act (63 of 1977) and regulations promulgated in terms of the Act, required the Superintendent-General (S-G) to consult with the director responsible for hospital services and to satisfy himself or herself that the proposed private hospitals were necessary for the region. The enabling legislation required the functionary to make a proper determination as to the necessity or otherwise of the private hospitals(s).

The S-G, acting on the advice of an advisory committee, declined to approve the request – but the decision was not communicated to the applicant. The S-G was subsequently involved in an accident and was away from work for a number of weeks. Ms Jajula, the MEC for Health, being fully aware of the decision not to approve the application, told the acting S-G that she (the MEC) was under political pressure to approve the application. She then instructed the acting S-G to approve the application – as the non-approval would put her in a "bad light in the political arena" (*MEC for Health v Kirkland Investment supra* par 10). The acting S-G then informed the applicants that the application has been approved. As the MEC failed to provide an affidavit refuting the allegations of the acting S-G, and as these were motion proceedings, the Court accepted the version of the acting S-G as being correct.

The discretion as to whether the application should be granted was meant to be exercised judiciously – having regard, amongst other factors, to the demand for private hospital facilities in the areas concerned, the adequacy or otherwise of services provided at existing private hospitals, economic sustainability, and the necessity for additional services. An ill-considered decision could result either in a hospital being established when it should not

have been, or permission being denied when it should have been granted. Having more hospitals than was sustainable was clearly something which the legislature intended to avoid – because it would adversely affect the existing hospitals and could ultimately prejudice the provision of private health-care facilities. This could then ultimately impact on the capacity of the public health-care facilities.

The MEC decided not just to ignore the legal framework that was meant to guide the exercise of this discretion, but also to pressurize the acting S-G to approve the application so that her (the MEC's) political standing and aspirations could be enhanced. The Court correctly described the conduct of the MEC as "unacceptable and disgraceful" (*MEC for Health v Kirkland Investment supra* par 41 – this is the description used by Jafta J, writing for the minority) and "a sorry tale of mishap, maladministration and at least two failures of moral courage" (*MEC for Health v Kirkland Investment supra* par 38 – this is how the SCA described the conduct). There was no evidence before the Court that Kirkland was involved in this maladministration and impropriety, even though it ultimately benefitted from the decision.

The political shenanigans were further compounded when the S-G returned to office and became aware of the decision of the acting S-G, that was taken in his absence. Kirkland had, after receiving the approval, purchased property and submitted its plans as required by the regulations. Kirkland subsequently sought to increase the capacity of the hospitals and applied for further approvals. Some eight months after the original approval by the acting S-G, the Department then informed the applicants that it was withdrawing the approval, as the area was over supplied with hospitals. A subsequent appeal to a new MEC was unsuccessful and Kirkland sought to review the decisions which effectively withdrew the approvals granted by the acting S-G. Importantly, the Department did not bring a counter-application to set aside the decision of the acting S-G to approve the application.

Entities like Kirkland have a right to expect proper, consistent and lawful behaviour from organs of State – to enable them to invest confidently in the construction of private hospitals after following the processes prescribed by law. They should not be forced to seek judicial intervention simply to get Government to act lawfully and properly. Respect for the rule of law should not only be the concern of the judiciary. Democracy is advanced if the organs of State make proper decisions at source, and consciously act in a manner that advances the values of transparent, open, proper and respectful governance.

The main issue which divided the Constitutional Court was whether the approval – which was communicated to Kirkland and on which it acted – could be set aside even though Government had not applied for the decision to be reviewed and set aside. Stated differently, the issue is whether a decision as unlawful and as defective as that of the acting S-G, could simply be ignored.

Cameron J, writing (*MEC for Health v Kirkland Investment supra* par 65) for the majority, reaffirmed the principle that once an applicant has relied on a decision, Government cannot in the absence of statutory authorization, simply ignore a defective decision that it has taken. Government must formally apply to set aside the defective decision, and the persons affected

by the decision must be given the opportunity to be heard on whether the decision should be set aside. Even defective decisions have consequences that must be considered. The Court held that it was fundamentally erroneous of Government to view the defective decision of the acting S-G as being a non-decision. Even though she acted at the dictates of the MEC, the acting S-G had taken a decision which was administrative action, and which had to be set aside in accordance with PAJA. The unlawfulness and illegality of the decision does not make the decision a nullity, but simply means that the decision may be reviewed and set aside (*MEC for Health v Kirkland Investment supra* par 99). The majority affirmed that the decision continues to exist – until it is set aside by a duly authorized body. The Constitution provides applicants with safeguards that need to be respected. If Government brought formal review proceedings, it would have to explain its action in not timeously bringing review proceedings to set aside the approval. Further, it would have to supply plausible reasons for repudiating the approval after seemingly having accepted it. Much was still unexplained on the papers.

The majority reaffirmed the reasoning in *Oudekraal Estates v City of Cape Town* (2004 (6) SA 222 (SCA)) – that invalid administrative action may not simply be ignored and may continue to have legal and factual consequences until set aside on review. Cameron J, was of the view that the rule of law requires the courts – and not organs of State – to be the arbiters of legality. Even if the court of law would come to the same decision as the organ of state, the latter is not permitted simply to deem the administrative action a nullity and then ignore it. This, according to the Court, would amount to self-help and "invite a vortex of uncertainty, unpredictability and irrationality" (*MEC for Health v Kirkland Investment supra* par 103). The purpose of the rule is to prevent officials who disagree with earlier decisions for whatever reasons, noble or otherwise, from simply ignoring them. The majority concluded that despite the seemingly defective decision of the acting S-G, the Department was obliged to bring formal review proceedings to set aside the decision, and, as it had not done so, the decision remains valid. In a concurring judgment, Froneman J, concluded that the full story was not before the Court. He was of the view that the review application was neither in form nor substance before the Court. However, even if the review application was in substance before the Court, the Court was still obliged to determine whether the application should be entertained, given that it was brought later than 180 days after the respondent became aware of the decision (s 7 of PAJA, to the extent relevant, requires that proceedings for judicial review must be instituted without unreasonable delays and not later than 180 days after the date that the person concerned became aware of the administrative action). The respondent conceded that a separate review action was not brought because it would run afoul of the time limits prescribed, and hence the decision to seek a review on the papers. This, the Court refused to countenance. To allow this would circumvent the express provisions of PAJA with regard to prescribed time limits by which review applications were to be brought. To allow the respondent to circumvent the prescribed time limit without formally seeking condonation and variation of the limits in terms of section 9 of PAJA, would undermine the rule of law (*MEC for Health v Kirkland Investment supra* par 114). The law required the

Department to set aside the decision by acting in accordance with the law – and not to take short-cuts.

Jafta J, for the minority, was of the view that the review application was in substance – even if not in form – before the Court, as the invalidity of the approval was fully canvassed in the opposing papers. It described the MEC's conduct as being a "complete disregard for the relevant legal prescripts and the abuse of public authority to facilitate a desired outcome" (*MEC for Health v Kirkland Investment supra* par 43). Such a decision should not be allowed to remain valid, purely because no formal application had been made to set it aside. The minority described the MEC's conduct as being fraudulent and corrupt and was of the view that such conduct should not be beyond the reach of the courts solely on the basis that no application has been made to set it aside. The minority reasoned (*MEC for Health v Kirkland Investment supra* par 52 and 55) that section 8 of PAJA – read with section 171 of the Constitution – enabled the Court to ameliorate the plight of affected parties if an order invalidating administrative action resulted in injustice. Section 171 enabled the Court to regulate the consequences following from a declaration of invalidity. However, in terms of section 8 of PAJA and section 171 of the Constitution, the courts can only make an order that is just and equitable, after making a declaration of invalidity.

Once a declaration is made that the conduct is inconsistent with the Constitution, the Court is obliged to make a declaration of invalidity. After having made the declaration of invalidity, the Court is then required to determine an order that is just and equitable. This enables the Court to decide whether to grant relief that "does not fully effect to a finding of invalidity" (*Bengwenyama Minerals v Genorah Resources* 2011 (4) SA 13 (CC) par 84 – quoted in *MEC for Health v Kirkland Investment supra* par 55). There are thus two distinct stages in the process. According to the minority, the Court cannot – in determining an order that is just and equitable – reverse the earlier determination invalidating the administrative action. Having found that the MEC engaged in egregious conduct, the minority formed the view that, on the papers, the applicant failed to show that it would suffer prejudice if the approval was set aside.

The issue is whether a party acting in the belief that the administrative action was valid, has altered their position and would suffer prejudice as a consequence of a declaration of invalidity. This required the Court to assess the need for certainty against the obligation to protect the principle of legality (*Bengwenyama Minerals v Genorah Resources supra* par 84). The minority reasoned that as it was beyond the powers of the Court to validate unconstitutional conduct, and that they were restricted to regulating the consequences of the declaration of invalidity once a determination was made that the conduct was unconstitutional. In these circumstances, the minority declared the acting S-G's decision to be invalid and remitted the matter to the S-G to reconsider the application. There was thus a fairly significant difference of opinion between the minority and majority in this case.

5 Analysis

The conundrum that faced the Court in this case was whether to allow an obviously flawed decision made dishonestly to remain in full force and effect and preserve a broader principle or to set it aside and perhaps undermine the principle. The principle in this matter was the imperative for Government to act in terms of the law, to provide an explanation for its behaviour, and abide by the norms of transparency and openness. The majority was correct in not sacrificing principle in favour of setting aside the decision of the acting S-G. It is apparent from the cases discussed in this paper, that we need more explanation from Government rather than less – particularly in an environment where a Department has blatantly acted unlawfully. The principle of legality which requires Government to demonstrate that its actions are rational and not arbitrary or capricious, is critical in ensuring proper and democratic administration. If Government is absolved from explaining its behaviour, this important principle is undermined.

In the *Kirkland* case, the Department was required – in terms of the law – to apply for condonation in terms of section 9 of PAJA, and to convince the Court that its reasons for not bringing review application within 180 days justified the granting of the condonation application. Setting the decision aside – as the minority suggested – without a proper application in terms of PAJA, would have made it unnecessary for the Department to have to place reasons for its failure to act within the 180 days before the Court. In *Joseph v City of Johannesburg* (2010 (1) BCLR 212 (CC) par 42) the CC held that the "Preamble of PAJA gives expression to the role of administrative justice and provides that the objectives of PAJA are, *inter alia*, to 'promote efficient administration and good governance' and to 'create a culture of accountability, openness and transparency' in the public administration or in the exercise of a public power or the performance of a public function". Excusing Government from explaining and justifying material decisions and omissions in this environment, significantly detracts from the constitutional necessity for transparent, efficient and good governance. Transparent governance represents one of the major bulwarks against corrupt practices and maladministration – and the reasoning of the majority advances this concept more than that of the minority.

The acting S-G knew that she was acting unlawfully when she issued the approval, and nevertheless went ahead. She must have calculated that appeasing her political principals was more beneficial to her than acting in accordance with the law. It is vital that the legal principles that have been included in PAJA to hold such persons accountable – not be undermined. PAJA requires Government or any other applicant to directly challenge decisions that it deems unlawful, unreasonable and procedurally unfair, and not to do so by sleight of hand as appears to have been the intent of the Department in this case. The Department could not or chose not to meet the requirements of PAJA, and therefore should not be allowed to get the benefit of having the decision set aside as if they had met the requirements of PAJA. Playing fast and loose with the rules or taking short-cuts should not be countenanced. In *Bato Star*, the CC confirmed that "the cause of action for judicial review of administrative action now ordinarily arises from the PAJA, not from the common law as in the past" (*Bato Star v Minister of*

Environmental Affairs 2004 (4) SA 490 (CC) par 25). If the respondent was seeking to set aside administrative action which could only be done under PAJA, then they are obliged to meet the preliminary statutory obligations that must be satisfied before a court can successfully set aside a decision. The benefit of setting aside the unlawful decision of the acting S-G, does not outweigh the cost of damaging important constitutional and procedural principles which directly advance transparent and accountable governance.

6 Recommendations to dissuade senior civil servants from acting unlawfully

The lesson from *Kirkland* is that we must make it less attractive for senior civil servants to act unlawfully – than to act lawfully. As affirmed in *Joseph*, any application and interpretation of PAJA must be guided by the objective of promoting transparent, efficient and good governance. It is vital that the administration provide adequate reasons to justify its decisions. A culture of secrecy and unresponsiveness is the antithesis of transparent and open governance. It is most important that the spirit and letter of the Promotion of Access to Information Act (2 of 2000) is respected and enforced.

The Minister of Justice and Constitutional Development is empowered by PAJA (s 10(2)(a)) to establish an advisory committee to assist in a range of matters regarding the application of the Act. Successive ministers have chosen not to establish such a council – despite decisions like *Kirkland* and others indicating the need for such an advisory body. Such a body, like the Australian Administrative Review Council (ARC), could provide the necessary supervision that will assist in better decisions being made at source. One of the main functions (http://www.arc.ag.gov.au/pages/default.aspx (accessed 2014-08-20)) of the ARC is to provide advice to the attorney-general which is aimed at improving the quality, efficiency and effectiveness of Government decision making. The ARC seeks to advance the values of fairness, honesty and transparency, and seeks to ensure that correct decisions are made. Similar values are articulated in section 195(1) of the South African Constitution. The ARC also plays an important role in educating the public and raising awareness of administrative review. The ARC does not assist individuals – nor does it review decisions of Government.

The Public Service Commission (PSC) in South Africa is empowered to promote the values and principles set out in section 195 of the Constitution (s 196(4) of the Constitution) – to investigate and monitor practices of the public service and to propose measures to ensure effective and efficient performance within the public service. The PSC has a similar mandate to that of the ARC. When a judgment like *Kirkland* is handed down, it is incumbent on the PSC to reflect on the judgment and determine whether those who have participated in the malfeasance or irregularity are either disciplined or mentored. It should also provide advice aimed at preventing repetition of the same sort of behaviour. It is suggested that a similar process be followed whenever a court finds that Government has failed to act lawfully, reasonably and procedurally fairly – as required by PAJA. One cannot simply let persons such as the acting S-G in *Kirkland* make such

decisions with impunity. It may be necessary for the PSC to have a dedicated subcommittee seeking to ensure proper compliance with the requirements of PAJA. It is vital that there is a specialist body reflecting on the various judgments, learning lessons, and informing, educating and advising decision-makers of emerging norms of administrative law – so that mistakes are not repeated. We cannot assume that doctors who administer and make decisions have either the inclination or capacity to read judgments and apply the lessons learned. If we do not properly disseminate the lessons and wisdom from decided cases, then we are doomed to repeat the errors and irregularities.

Furthermore, it is vital that institutions which are constitutionally empowered to support democracy – like the Public Protector and those that carry out vital constitutional responsibilities like the PSC – are strengthened and supported. There is a direct constitutional obligation on all organs of State to assist and protect these bodies to ensure their independence, impartiality, dignity and effectiveness (s 181(3) and s 196(3) of the Constitution). In one of the most high-profile matters, and after an exhaustive enquiry, Advocate Thuli Madonsela – the present Public Protector – found that the President and his family had improperly benefitted from the security upgrades to their family homestead at Nkandla in KwaZulu-Natal. President Zuma was required to repay part of the R246 million spent on the upgrades. The President's response has been somewhat tepid and non-committal. In a letter to the President – which has been made public (24 August 2014 *Sunday Times* 1) – the Public Protector finds that there was no indication in the response of the President that he had taken or proposed taking action to implement the remedial measures suggested in the report. President Zuma, in his reply, indicated that he had required the Minister of Police to decide whether the President is liable to repay any of the money. There are a number of fundamental objections to this. The Minister of Police serves at the pleasure of the President and can be fired at his discretion. This is an instance of a person investigating his boss. Furthermore, there is no constitutional or statutory basis for the President to assign the responsibility of reviewing a finding of the Public Protector to one of his ministers. The Public Protector is quite correct when she states that her reports are not subject to review by an individual minister or by the cabinet.

The lesson from *Kirkland* resonates. It is constitutionally unfeasible or impermissible for either the President or his ministers to decide on the lawfulness of the Public Protector's findings and then decide whether to respect them or not, or to abide by those recommendations that meet their approval. They are bound by the findings, and it is for the Public Protector to decide whether there has been compliance with the remedial measures recommended. The recommendations of bodies empowered by the Constitution – such as the Public Protector and the PSC – have legal consequences and implications. In *Simelane* (*Democratic Alliance v President of the Republic of South Africa* 2012 (12) BCLR 1297 (CC)), the CC had to determine whether the President acted rationally in appointing Mr Simelane to the position of NDPP. The Constitution and section 9(1)(b) of the NPA Act required that a fit and proper person of integrity be appointed to the position. The Ginwala Commission of Enquiry in a report directly impugned the integrity of Mr Simelane, and the PSC recommended that

disciplinary action be instituted against him. The CC held that the President was, in terms of the principle of legality, obliged to act rationally. He had to demonstrate that the appointment of Mr Simelane was rationally related to the objectives of the empowering provisions – that a fit and proper person of integrity be appointed. The failure of the President to consider, deal with, and explain his reason for appointing Mr Simelane in the light of the adverse findings of these bodies, contributed to the decision being deemed to be irrational and consequently the appointment of Mr Simelane being set aside.

Unless the finding of the Public Protector in the Nkandla report is disturbed, or the remedial action it recommends is taken, it will be recorded that the President improperly benefitted from the upgrades. This would, at the very least, be incongruent with the oath that every president takes to maintain the Constitution and all other laws of the Republic (Item 1 of Schedule 2 of the Constitution).

President Zuma has to act in accordance with the report or needs to review the findings in a court of law. Any other approach would not be consistent with the broad constitutional responsibilities to protect the independence, impartiality, dignity and effectiveness of the Public Protector. It is critical that those holding executive positions interact with these bodies in a manner that displays fidelity to this constitutional obligation. Direct or indirect undermining of these institutions is not only unconstitutional, but will also send the worst possible message to subordinate administrators. Respecting the recommendations may result is short-term embarrassment and inconvenience, but will have the effect of advancing the basic principles of the Constitution.

The final substantive suggestion is that the various administrative appeal tribunals that hear merit-based appeals from decisions of administrators, should follow international best practices. These include:

- The appeal tribunal must be independent of the administration against whose decision the appeal has been lodged.
- The hearings, as a general rule, must be open to the public.
- The adjudicative process adopted should be analogous, but less formal than a court of law.
- Legal representation should be permitted.
- Proceedings should be recorded.
- The applicant must be aware of the reasons for the original decision to enable effective representations to be made on appeal.
- The appeal tribunal must be empowered by the enabling act to make legally binding decisions on the merits.
- The appeal tribunal must provide reasons for its decisions within a reasonable period of time.
- The findings and reasons must be accessible to the public.
- The tribunal must carry out its functions efficiently, inexpensively, expeditiously, and competently.

Given the more transparent functioning of quasi-judicial bodies, they are less likely to be as supine to the will of political masters – as the acting S-G proved to be in the *Kirkland* case. Rationality and cogency of argument and a correct application of the law and facts, are more likely to prevail in quasi-judicial proceedings and political considerations are less likely to be determinative factors. Public officials, knowing that their decisions will be scrutinized in objective proceedings, are more likely to be cautious and more considered. One of the big advantages that an administrative-appeal tribunal has over a court, is that the former is inexpensive to access. This means that a disgruntled applicant can have his or her case considered by an objective second-decision maker – without incurring prohibitive costs.

Returning to Professor Mureinik's test, the decisions considered in this paper suggest that we are not, as a norm, making democratic decisions – even at the highest levels – and that reactive judicial decisions, even with indignant and trenchant comments, are unlikely to turn the tide. There is a discernible chasm between what is happening and what the Constitution requires. We need to act urgently to bridge this chasm and to arrest this decay. Francis Fukuyama (Runciman "Unsafe for Democracy" (Book Review) Saturday 27 September 2014 *Financial Times Weekend*) argues in his book, *Political Order and Political Decay*, that three building blocks are required to exist simultaneously – for there to be an ordered society. It is necessary for there to be a strong state, respect for the rule of law and democratic accountability. Public servants – by making the sort of decision made in Kirkland – are undermining one of the founding pillars of our democracy, and this, if not arrested, could become corrosive of efforts to establish a proper constitutional state.

Karthy Govender
University of KwaZulu-Natal, Durban