IN/VALID COURT ORDERS, ACCOUNTABILITY & THE AUTHORITY OF THE JUDICIARY

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An order or decision issued by a court binds all persons to whom and organs of state to which it applies.[[1]](#footnote-1)

[I]t is right and proper that … [Judges] should be publicly accountable.[[2]](#footnote-2)

The judiciary as an organ of state it is bound by the rule of law and the principle of legality.[[3]](#footnote-3) A court can only make a decision or issue an order where it has the authority in law or ‘jurisdiction’ to so act. To be clear ‘jurisdiction’ in this sense does not refer to: (i) whether a dispute falls within a court’s geographical jurisdiction; or (ii) whether – where the court has the power in law to make said order – the necessary facts needed to support have adequately been proved. Rather ‘jurisdiction’ as used here concerns the *narrow* *legal question* of whether the court has subject matter jurisdiction over a dispute, or the authorityin law to make the decision or issue the order. If a court lacks the requisite jurisdiction or authority to make an order, it will be *ultra vires*; invalid; void *ab initio*; and ought not be binding. Upfront I must emphasise that in this paper, the term ‘invalid court order’ refers only to this sense of invalidity, and not where an order is invalid for being improperly issued for any other reason.

# I The problem

The question however arises: how are we to respond to an invalid order if it has not been taken on appeal? Can a party cited choose to ignore it and raise its invalidity as a defence in contempt or execution proceedings? Or can a subsequent court compel compliance with said order despite it lacking a legal basis? Until very recently, the Supreme Court of Appeal held that invalid court orders are not capable of enforcement, even where they had not been taken on appeal, and are nullities thus favouring the former view.[[4]](#footnote-4) One cannot be in contempt of a nullity and ought not face gaol as a result. I shall refer to this as the ‘exception’ to court orders being binding.[[5]](#footnote-5)

But this might open up a can of worms. Doesn’t the Constitution provide that a court order is *supposed* to be binding?[[6]](#footnote-6) And who decides on whether or not it was made with the proper authority? Should we allow anyone simply to ignore orders emanating from the courts, especially in a context where countless valid orders (made with legal authority) are already ignored – particularly by government actors? What about legal certainty? And wouldn’t this undermine the judiciary’s authority and the administration of justice. What will happen do the courts’ ability to play their role in holding other organs of state accountable? What will happen to the rule of law?

This is a dilemma the Constitutional Court has had to confront in a number of recent cases all dealing with court orders.[[7]](#footnote-7) But its response to the problem has not been coherent. In *Tsoga Developers*, the Court discussed the Supreme Court of Appeal’s approach somewhat favourably and without overruling it.[[8]](#footnote-8) But the majority in the *Tasima* held that invalid court orders are binding and are still be capable of founding contempt where they are ignored. [[9]](#footnote-9)

How did it come to this conclusion? By referring to the provisions of the Constitution which specify that court orders are binding,[[10]](#footnote-10) discussing the rationale behind contempt (upholding the dignity of the courts) and pertinently also by placing reliance on the *Oudekraal*[[11]](#footnote-11)principle.[[12]](#footnote-12) The latter provides: once an administrative or executive decision has been made, it generally cannot be ignored unless it is set aside in the proper forum; judicial review proceedings.[[13]](#footnote-13) That is, even where the decision was made without legal authority[[14]](#footnote-14) or in the parlance of administrative law, the decision-maker committed a jurisdictional error of law when deciding.[[15]](#footnote-15) The *Oudekraal* principle is premised on similar concerns regarding certainty and the rule of law as I highlighted above. First, invalid administrative decisions exist in fact and may spawn consequences in fact. Members of the public may arrange their affairs according to expectations built on such decisions. Second, the courts, and not other organs of state, are the ‘arbiters of legality’.[[16]](#footnote-16) Allowing organs of state to ignore decisions, especially those made by themselves, would be a licence to self-help.[[17]](#footnote-17) So, decisions cannot be ignored unless set aside. They are effectual, even if they are invalid. The opposite would encourage disorder and irrationality.

By analogy, the majority in *Tasima* held the same in respect of court orders: where an order has been issued by a court even without legal authority it is binding and cannot be ignored, unless set aside in the appropriate forum; by an appellate court.

Yet the principled and pragmatic reasons underpinning *Oudekraal* are not easily applicable in the context of court orders made in the absence of authority. While it is vital and necessary that the judiciary can enforce allegedly invalid administrative decisions to uphold legal certainty and hold other organs of state to their conduct, enforcing invalid conduct coming from its own quarters may undermine its authority and the rule of law in the long run.

I suspect that the *Tasima* majority decision may be founded in a concern about the repeated non-compliance with many valid orders – those made within the courts’ powers – by government actors. The ongoing *SASSA* debacle is a prime example.[[18]](#footnote-18) An exception, as carved out by the Supreme Court of Appeal, might encourage further bad behaviour, and undermine the judiciary’s effectiveness in holding other state organs accountable. This the Court understandably wants to avoid. But its approach in solving the problem isn’t entirely convincing.

This paper’s central theme concerns court orders, their in/validity and bindingness, and the authority of our courts to make and enforce them. Balancing the need for acting lawfully while ensuring the judiciary’s continued authority to enable it to hold the State accountable is tricky business. *Tasima* has muddied these waters. *ACSA*, a recent decision of the Supreme Court of Appeal currently before the Constitutional Court, illustrates this point.[[19]](#footnote-19) In this contribution, I hope to clear a way forward.

Parts II and III survey the cases where this problem has come up: those decided by the Supreme Court of Appeal that articulated the exception; and the judgments of the Constitutional Court handed down over the past three years dealing with what can be included in court orders and instances where they must be enforced focusing particularly on the majority decision in the *Tasima.* In Part IV, I critically analyse the reasoning in *Tasima* against the backdrop of the principles emanating from the rule of law. We should be mindful that court orders can lead to contempt and committal to prison; a violation of certain fundamental human rights in our Constitution. This and some other factors give them a different normative basis than administrative or executive decisions. This means that court orders are not analogous to them and so *Oudekraal* ought not to have been applied in this context, as tempting as it may have been. In Part V, I articulate a solution to the problem and way forward away from *Tasima*, taking particular account of the concerns I raised in Part IV and the *stare decisis* doctrine. The Supreme Court of Appeal’s *ACSA* decision is briefly considered in Part VI, which I believe highlights the difficulty in the Constitutional Court’s jurisprudence, and I show how my theory could assist in resolving the dispute. In Part VII, I offer a conclusion.

# II The Supreme Court of Appeal’s approach

In at least two cases, the Supreme Court of Appeal developed the exception. Its most clear articulation was in the *Motala* matter. The case concerned an order issued by a High Court (Kruger AJ) purporting to appoint a judicial manager under the old Companies Act[[20]](#footnote-20) (Kruger AJ order). The Master of the High Court, who oversees these matters, refused to issue a certificate of appointment pursuant to the order, and appointed other persons as provisional judicial managers.[[21]](#footnote-21) In subsequent proceedings pertaining to an interdict issued on the back of the Kruger AJ order, the court (Legodi J) of its own accord, found the Master to be in contempt of the appointment order (Legodi J order).[[22]](#footnote-22)

On appeal, Ponnan JA held that the Legodi J order should not have issued. In coming to this conclusion, he surveyed jurisprudence developed over the course of the previous century.[[23]](#footnote-23) He held that the High Court had no power to make an order appointing a judicial manager in the first place.[[24]](#footnote-24) That power vested in the Master under South Africa’s statutorily created insolvency processes, which the High Court had impermissibly attempted to usurp.[[25]](#footnote-25) What’s more another Judge in the same division (Bertelsmann J) had already handed down a judgment making this exact finding in law and declaring so.[[26]](#footnote-26) The Kruger J order was therefore a nullity, and no finding of contempt could be made. Ponnan JA made held that the order was a nullity even though no proceedings to rescind or appeal it had been brought:

It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect … . Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing.[[27]](#footnote-27)

The other is the matter of *City of Johannesburg v Changing Tides 74 (Pty) Ltd*.[[28]](#footnote-28) In the case, a High Court hearing an eviction matter made an order compelling the Sheriff of the Court to compile a list of occupants in the building concerned.[[29]](#footnote-29) However, Wallis JA writing for the Supreme Court of Appeal declared those paragraphs of the order a nullity, as the Sheriffs Act[[30]](#footnote-30) did not confer such a power on the Sheriff – a creature of statute:[[31]](#footnote-31)

That part of the order was accordingly improvidently sought and erroneously granted. It is therefore a nullity.[[32]](#footnote-32)

The case has an important difference from *Motala.* The High Court can be understood not to have taken a power assigned to another actor in legislation, but to have been *legislating* from the bench by purporting to grant powers to the Sheriff that went beyond those provided in the empowering Act.

# III The Constitutional Court’s decisions

So, the Supreme Court of Appeal had carved out a very narrow exception to court orders being binding. Here, I consider how the Constitutional Court has dealt with this issue: a brief discussion of Madlanga J’s decisions in *Eke* and *Tsoga* *Developers*; an extended analysis of Khampepe J’s majority decision in *Tasima*; and a brief consideration of the recent decision of the Court in *Tasima 2*[[33]](#footnote-33)– which pertains to issues arising from the order granted by the Court in *Tasima.*

## A Eke

*Eke v Parsons* dealt the questions whether: (i) the terms of a settlement agreement made an order of court are enforceable as an order; and (ii) what terms may be contained in such agreements.[[34]](#footnote-34) Madlanga J answered the first question in the affirmative: ‘Once a settlement agreement has been made an order of court, it is an order like any other.’[[35]](#footnote-35) The answer to the second question is more relevant for my purposes. The Court held that not every settlement agreement, or every term of one, should automatically be made an order by a court for three reasons.[[36]](#footnote-36) First, the settlement agreement must relate to the issue between the parties that is before the court. Second, it must have some kind of ‘practical and legitimate advantage’ for the parties.[[37]](#footnote-37) And third, most importantly for this discussion,

the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order”. *That means, its terms must accord with both the Constitution and the law.* Also, they must not be at odds with public policy.[[38]](#footnote-38) (My emphasis.)

While not going further to consider whether terms that fall outside of the scope of these factors are enforceable where they appear in settlement agreements made orders of court for whatever reason, the Court recognised the principle that an order of court can only be made where it has a basis in law.

## B Tsoga Developers

A settlement agreement also played a central role in *Tsoga Developers*. The applicants in the case, officials from the North West Province, sought the stay of a writ of execution before the Constitutional Court pending the resolution of proceedings attacking the validity of the settlement agreement. The agreement was alleged to have been made pursuant to an unlawful administrative decision, for want of compliance with s 217 of the Constitution.[[39]](#footnote-39) This notwithstanding, the High Court had refused to grant relief. In considering whether the prospects of success in the pending review supported the grant of interim relief, the Constitutional Court discussed *Motala* and *Changing Tides*. Madlanga J held as follows:

I read both judgments to say that, if on the face of the order, one is able to conclude that what the court has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded. These cases are distinguishable from the instant scenario… On its face, [the settlement agreement] order is perfectly valid and competent. If there be a need to explain this, the so-called nullity of the settlement order does not – so to speak – *jump out of the page*, as was the case with the nullity of the orders in *Changing Tides* and *Motala*. There has to be an antecedent step: proof of the grounds of review.[[40]](#footnote-40) (My emphasis.)

The applicants had argued that because the settlement agreement had been made without complying with s 217, it did not ‘accord with both the Constitution and the law’ as required by *Tsoga*.[[41]](#footnote-41) But the Court brushed this aside.[[42]](#footnote-42)

Therefore, in at least two recent cases the Constitutional Court has recognised, first that a court’s power to issue orders is circumscribed by the Constitution and the law, and second, clarified how the Supreme Court of Appeal dealt with the exception in its jurisprudence. Next, I consider the *Tasima* matter which complicates things.

## C Tasima

The matter has convoluted facts and so it is necessary to set out its narrative at length to properly discuss the issues that came before the Court. The central dispute in the ongoing saga[[43]](#footnote-43) is the legality and constitutionality of a turnkey agreement between the Department of Transport and a private company to create and operate a centralised modern electronic road traffic management system, specifically an extension of the contract.[[44]](#footnote-44) The company was paid generously by the state to provide these services. An acrimonious dispute regarding the validity of the extension of the agreement arose, which was referred to arbitration. Pending the outcome of that process, the company sought and was granted an interim High Court order in October 2012 which: (a) kept the contractual obligations of each party alive; and (b) prohibited a breach of the agreement by the Department.[[45]](#footnote-45) This order (Interim Order) was granted without enquiring into the validity of the extension, which the arbitration was ostensibly for.[[46]](#footnote-46)

When the Department attempted to take over the system, despite the existence of the Interim Order and ongoing arbitration proceedings, the company contended that this could only happen in terms of a convoluted take over schedule to the agreement. Any premature succession, the company argued, would amount to a breach of the agreement and therefore the Interim Order. If the Department breached the agreement in any way, contempt of court proceedings were – in the colourful words of Jafta J – used as the ‘the stick with which [the company] whipped the Department’s officials to submission.’[[47]](#footnote-47) A total of five contempt orders were granted between March 2013 and January 2014,[[48]](#footnote-48) entrenching the company’s position: each contempt order ruled that there had been contempt of the Interim Order and of the other contempt orders that had preceded it.

During the last iteration of contempt proceedings brought by the company in March 2015, seeking the committal to prison of the Department’s officials – and those of the Road Traffic Management Corporation which had been joined to the proceedings along the way – the Department raised a defence impugning the validity of the agreement.[[49]](#footnote-49) The extension, on which the Interim Order was premised, came about in an unconstitutional manner for non-compliance with s 217 of the Constitution according to the Department.[[50]](#footnote-50) The Interim Order was therefore invalid.

The Department: (i) raised a collateral challenge on this basis; and (ii) also launched a formal counter‑application seeking the extension be set aside. Hughes J hearing this chapter of the story in the High Court upheld the Department’s counter‑attack,[[51]](#footnote-51) and the contempt application was dismissed. The Supreme Court of Appeal was however unconvinced.[[52]](#footnote-52) The Department’s application to set aside the extension was unreasonably late by many years, and the court in exercising its discretion refused to entertain the review. The extension stood. It followed that the state actors were in contempt of the Interim Order, and of the contempt orders that followed after it.[[53]](#footnote-53)

On appeal, the Constitutional Court unanimously held that the extension was unconstitutional and set it aside.[[54]](#footnote-54) That left the question of contempt. On the one hand, a court had made the Interim Order preserving an agreement, and courts following that had made findings of contempt for breaches of the order. On the other, the very agreement underpinning the Interim Order had now been declared unconstitutional – and was void *ab initio*. Should the Department be found to be in contempt of the orders? Jafta J for the minority held that on the facts of the case, the details of which are not pertinent for this paper, the Department and its officials had not acted with contempt.[[55]](#footnote-55)

Not so held Khampepe J. Such inference could not be drawn.[[56]](#footnote-56) In her view, certain conduct of the Department and its officials in preparing to take over the system and transfer it to the Road Traffic Management Corporation was contemptuous of the Interim Order.[[57]](#footnote-57) Khampepe J reasoned that up until Hughes J set aside the extension, the order was effectual and valid, and that ‘the legal consequence that flows from non‑compliance with a court order is contempt.’[[58]](#footnote-58) Khampepe J held that not complying with the Interim Order from the time it was made until the time the High Court set aside the extension of the agreement was contemptuous, but that committal was not appropriate on the facts.

In support of these conclusions, Khampepe J drew on s 165(5)[[59]](#footnote-59) and reasoned that although the Constitution entrenches its supremacy in s 2, it expressly provides only *one* exception to a court order’s immediate binding force – confirmation of an order of constitutional invalidity by the Constitutional Court.[[60]](#footnote-60) This ‘tipped’ the balance in favour of holding that an ‘order is binding, irrespective of whether or not it is valid, until set aside.’[[61]](#footnote-61) The majority also buttressed this proposition by making reference to pre‑constitutional jurisprudence.[[62]](#footnote-62) And as adumbrated in the introduction, the majority applied *Oudekraal* by analogy to invalid orders:

This reading of section 165(5) accepts the Judiciary’s fallibilities. As explained in the context of administrative decisions, “administrators may err, and even … err grossly.” Surely the authors of the Constitution viewed Judges as equally human. The creation of a judicial hierarchy that provides for appeals attests to this understanding. Like administrators, Judges are capable of serious error. Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences.[[63]](#footnote-63)

This conclusion, the majority held, ‘vindicates the constitutionally-prescribed authority of the courts’ and it cautioned that ‘[a]llowing parties to ignore court orders would shake the foundations of the law’.[[64]](#footnote-64) Khampepe J continued: ‘The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built.’[[65]](#footnote-65) Failure to comply with a court order results in contempt.[[66]](#footnote-66)

I should pause to note that I entirely agree with the Court’s reasoning until this point. An order issued by a court where it has the power in law to do so, can only ever be overturned on appeal (or perhaps in an application for rescission). Even if the extension was invalid in this matter, the High Court always had the power in law to issue the Interim Order. A party that argues that such order was erroneously granted would be making factual arguments. The Interim Order could never be considered a nullity.

Nevertheless, it is within this context that the Court takes issue with Ponnan JA’s reasoning in *Motala*.[[67]](#footnote-67) Khampepe J analyses and rejects the Supreme Court of Appeal’s reliance on its century of jurisprudence[[68]](#footnote-68) and for failing to make mention s 165(5) in its judgment. The Court’s approach departs from Ponnan JA by focusing on the ‘essence’ of contempt; ‘violating the dignity, repute or authority of the court.’[[69]](#footnote-69) It points out that

while a court may, in the correct circumstances, find an underlying court order null and void and set it aside, this finding does not undermine the principle that damage is done to courts and the rule of law when an order is disobeyed. A conclusion that an order is invalid does not prevent a court from redressing the injury wrought by disobeying that order, and deterring future litigants from doing the same, by holding the disobedient party in contempt.[[70]](#footnote-70)

Khampepe J in the end endorses a modified exception to the binding nature of an order: a court ‘may refuse to enforce’ an order made without authority (my emphasis underlined).[[71]](#footnote-71) Accordingly, a latter court has *discretion* to enforce a previous invalid court order. That means that such order cannot be ignored by a party: ‘it is the court that is entitled to act, not the party.’[[72]](#footnote-72)

The majority held that the case was in any event distinguishablefrom *Motala*.[[73]](#footnote-73) The question was whether Mabuse J, who issued the Interim Order, ‘had the authority to make the decision that he did at the moment that he made it.’ Had the extension of the agreement been set aside before the order was made, it would have no legal basis – after all it was interim in nature and was issued to maintain a status quo pending the determination of the agreement’s validity. But, as pointed out above, the extension was only set aside much later.

In the remedial stage the Court ordered: the company to hand over the road traffic management system to the state parties within 30 days; and upheld the Supreme Court of Appeal’s finding of contempt up until the date that Hughes J had set aside the extension.[[74]](#footnote-74)

## D Tasima 2

The Constitutional Court’s decision however did not bring an end to the acrimony between the parties in the dispute.[[75]](#footnote-75) While the matter was pending before the Constitutional Court, yet more orders had been issued by the High Court (Basson J) in early 2016 which were premised on the Interim Order.[[76]](#footnote-76) These orders (which amongst other things required payment of certain amounts by the State to the company) had still not be complied with after the Constitutional Court handed down its judgment in November 2016. Aggrieved, the company approach the High Court contending that the orders issued in 2016, while premised on the Interim Order, were still capable of enforcement as they had been issued *before* the Constitutional Court’s decision. The High Court agreed.[[77]](#footnote-77)

On appeal, Petse AJ writing unanimously for the Constitutional Court rejected this finding. He held as follows:

Although the declaration of invalidity made by the High Court [by Hughes J] was confirmed by this Court in *Tasima I* on 9 November 2016, this confirmation, as indicated earlier, had retrospective effect from 23 June 2015. …

Thus, once the extension agreement was declared invalid with effect from 23 June 2015, the [Interim Order] – whose sole purpose was to preserve the status quo pending the conclusion of the dispute resolution proceedings – fell away as did all the subsequent orders made to enforce the [Interim Order].[[78]](#footnote-78)

# IV No power without law

To sum up the jurisprudence: the Supreme Court Appeal previously held that an order made beyond the face of a court’s powers is a nullity and cannot be enforced through execution or contempt proceedings. This appears to have been endorsed (sort of) by the Constitutional Court in the *Tsoga* matter. However, in *Tasima* the Constitutional Court held that an invalid order is still binding and can even give rise to contempt proceedings as a court retains a discretion to enforce it.

## A Judicial authority

A central tenet of the Constitution is the rule of law[[79]](#footnote-79) with the Constitution being the supreme law.[[80]](#footnote-80) As a minimum, the principle of legality provides that conduct of any organ of state can only be lawful where it is authorised to act in that manner.[[81]](#footnote-81) Khampepe J describes this well in the *Welkom* case:

State 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.[[82]](#footnote-82)

Since the early days of our constitutional democracy, the Constitutional Court has followed the doctrine of objective constitutional invalidity.[[83]](#footnote-83) That specifies that law or conduct which violates the Constitution is invalid – whether or not a court has made such declaration. In *Fose,* Kriegler J explained that ‘it is not the declaration [of invalidity that a court must make] itself that renders the conduct unconstitutional. The declaration is merely descriptive of a pre-existing state of affairs.’[[84]](#footnote-84)

Section 165(2) of the Constitution provides that ‘[t]he courts are independent and *subject only to the Constitution and the law*, which they must apply impartially and without fear, favour or prejudice.’ This express annunciation of the principle of legality in respect of judicial conduct emphasises the unique role the courts play in our democracy. In *S v Mamabolo*, the Court explained the role as follows:

 In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. *Having no constituency, no purse and no sword, the judiciary must rely on moral authority.* Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state.[[85]](#footnote-85) (My emphasis.)

For the judiciary, as the guardian of the Constitution and the bastion of the rule of law, to claim the necessary moral authority needed to play its part, it cannot be seen: (i) making decisions or issuing orders where it has no lawful authority to do so; or (ii) enforcing these kinds of mistakes.

The question however arises, when can it be said that a court doesn’t have the authority to make a certain order? As set out above, there are two instances. First, where the court has no subject matter jurisdiction to decide a despite. Second, even if a court has subject matter jurisdiction, where it lacks the power in law to make the order concerned.

### (i) Subject matter jurisdiction

The types of matters that may be decided by all courts within the judicial hierarchy are delineated either in the Constitution or legislation.[[86]](#footnote-86) The Constitutional Court may only decide constitutional matters and arguable points of law of general public import and has exclusive jurisdiction over certain matters;[[87]](#footnote-87) the Supreme Court of Appeal may only decide appeals from the High Court, and no competition or labour matters;[[88]](#footnote-88) and the High Court may decide, (i) constitutional matters unless the Constitutional Court has agreed to hear the matter directly or which has been assigned to another court of similar status by legislation,[[89]](#footnote-89) and (ii) any other matter not assigned in an Act to another court.[[90]](#footnote-90) Right off the bat, the last two qualifiers in respect of the Supreme Court of Appeal and High Court should be emphasised: if one of these courts issues an order in a matter over which it lacks subject matter jurisdiction, that order will be invalid and ought not be binding.

Section 170 of the Constitution empowers Parliament to determine matters to be decided by other courts. The District and Regional Magistrates Courts – those famous creatures of statute in our administration of justice – can only decide matters they are empowered to in legislation, primarily the Magistrates Courts Act.[[91]](#footnote-91) And since they are of a lower status than the High Court, Magistrates may ‘not enquire into or rule on the constitutionality of any legislation or any conduct of the President.’[[92]](#footnote-92) Even within their ranks, the Regional Courts are empowered to hear a broader range of both criminal and civil matters. For example, only a Regional Court may decide matters pertaining to the dissolution of marriages.[[93]](#footnote-93)

Parliament has created many specialised judicial tribunals to decide specific matters, including the Labour Court,[[94]](#footnote-94) Labour Appeal Court,[[95]](#footnote-95) Competition Appeal Court,[[96]](#footnote-96) and Land Claims Court.[[97]](#footnote-97) As pointed out above, the authority of the High Court in these matters has in turn been denuded. And the Supreme Court of Appeal was also divested of some authority as well.[[98]](#footnote-98) If one of these specialist legal tribunals decides a matter outside of its jurisdiction, an order it issues would be invalid, and a High Court or the Supreme Court of Appeal deciding an issue reserved for a specialist tribunal would suffer the same deficiency. I cite only one example: the Land Claims Court has no power to decide matters under the PIE Act.[[99]](#footnote-99) So, an order declaring occupants of land which is the subject of a land claim dispute to be ‘illegal occupiers’ for the purpose of PIE would be invalid.[[100]](#footnote-100)

### (ii) No authority to make certain orders

There are in other limits to judicial power, that is where the law does not grant the court concern powers to make an order, even in a matter where it has subject matter jurisdiction.[[101]](#footnote-101) After all, even though the superior courts all have inherent jurisdiction, their powers to issue orders are constrained by the law.[[102]](#footnote-102)

*Motala* and *Changing Tides* are both good examples of this. Another instance, from the criminal realm, may be where a court in handing down a sentence grants a non‑parole order in excess of the prescribed maximum non‑parole period stipulated by the Criminal Procedure Act[[103]](#footnote-103) – two thirds of the sentence.[[104]](#footnote-104) In *S v Mhlakaza*,[[105]](#footnote-105) Harms JA explained that sentencing powers are derived from statute and that courts must ‘limit themselves to performing their duties within the scope of that jurisdiction.’[[106]](#footnote-106) An order fixing a non-parole period for a time greater than this would be a nullity, as it would be made outside of the authority of the court. This shows a potential consequence of the *Tasima* reasoning. An indigent person convicted of a crime who receives such a sentence may not know to challenge it on appeal, or may not have access to resources to do so.[[107]](#footnote-107) Another example comes from a recent High Court decision – reported in the same volume of the South African Law Reports as *Tasima* – where Gamble J made a declaratory order that a Magistrates Court has no power under s 87(1) of the National Credit Act[[108]](#footnote-108) to vary the agreed interest rate in a credit agreement and that any order to such effect is null and void.[[109]](#footnote-109) Note how many of the examples just set out pertain not to organs of state ignoring orders, but to ordinary people who may be affected by something should not have been ordered.

So far so good. These are all very clear examples of where the courts are not empowered to make a certain decision or issue an order. What complicates this however, are the superior courts’ powers to grant ‘appropriate relief’[[110]](#footnote-110) and any order which is ‘just and equitable’[[111]](#footnote-111) in constitutional matters – particularly those where rights are infringed or threatened. Following declarations of invalidity of legislation, the Constitutional Court has ordered a wide range of different remedies to regulate their impact[[112]](#footnote-112) including: limiting the retrospective effect of an order to avoid the consequences flowing from its objective invalidity;[[113]](#footnote-113) suspending the declaration in order to give Parliament time to rectify the defect[[114]](#footnote-114) and extending suspensions where Parliament hasn’t gotten its act together in time;[[115]](#footnote-115) severing words in provisions which offend the Constitution where possible;[[116]](#footnote-116) and reading-in words to remedy an omission that makes a provision unconstitutional.[[117]](#footnote-117) The Court has also ordered declaratory relief[[118]](#footnote-118) and issued structural interdicts particularly in socio-economic rights cases.[[119]](#footnote-119) And there is a burgeoning jurisprudence related to constitutional damages.[[120]](#footnote-120)

These types of remedial orders have been developed by the Constitutional Court over the past two decades and for the most part have become part of the standard practice of the courts dealing with constitutional matters. So, it would not be possible to argue that such orders are invalid. However, there are two recent cases of the Constitutional Court where the orders it issued pushed the boundaries of the judiciary’s remedial powers. While this is the topic of another paper entirely, it is worth mentioning them to show that there sometimes there are no easier answers to the question under discussion.

First is the *Mhlope* case[[121]](#footnote-121) which pertained to the Electoral Commission’s failure to retrieve and record the physical addresses of some 12 million people registered on the voters’ roll after it was required to do so by an amendment made to the Electoral Act.[[122]](#footnote-122) Requiring the Commission to keep the addresses of all voters is particularly important, as a every person ought to cast her vote where she lives, especially for municipal and provincial elections. The problem: municipal elections were less than six months away and it would be impossible to collect all missing addresses in that time. The alternatives were either to remove all 12 million voters from the roll or postpone the elections, both untenable situations for the proper functioning of our democracy and probably unlawful. So, the Constitutional Court fashioned an order which suspended the Commission’s valid legislative obligation to provide addresses on the voters’ roll for a period of 24 months in order for the Commission to fix its mistake. Widespread disenfranchisement would amount to a mass breach of the right to vote, inimical to democracy. This would be particularly egregious considering the country’s apartheid past. The Court premised the order it made – which suspended a valid legislative obligation imposed on Parliament – on the basis of its ‘just and equitable’ remedial powers under s 172(1)(b) and due to the exceptional factual circumstances the Court was faced with.[[123]](#footnote-123)

Second is *Black Sash Trust v Minister of Social Development*, part of ongoing social grants crisis.[[124]](#footnote-124) Here the Constitutional Court extended the operation of an agreement between an organ of state and a company to continue providing social grants on behalf of the state. This was despite the agreement having been declared invalid by the Court and which declaration of invalidity was suspended as its immediate invalidity would’ve threatened the payment of grants, and the parties themselves never agreeing to such an extension. The reason: despite an assurance to the Court that the state would take over the distribution of social grants by the end of the invalid contract’s term, no action had been taken to effect that, and no other tender process for the services had been issued. This threated the only livelihood millions of vulnerable people had. The Court used its just and equitable remedial powers to protect against a mass violation of the right to social security and the extraordinary misconduct of the state parties involved.[[125]](#footnote-125)

In both matters the Court was placed in a difficult position of having to create remedies that protected the fundamental rights of millions of people. But in doing so, it overrode other legislative obligations and legal principles. And to make things worse, the Court is still struggling to hold the problematic organs of state (and the individuals behind them) to account for the misconduct in both cases.[[126]](#footnote-126) This is a useful point of transition to the next section of this paper.

## B Accountability and contempt

It is well known that over the past two decades there have been many instances of chronic non-compliance with court orders by state functionaries. An early example is the earlier social grants crisis in the in the Eastern Cape during the first part of the previous decade, where multiple court orders were ignored by the Provincial department responsible for distributing grants. It was held in contempt of court on numerous occasions, only after which grants were paid out.[[127]](#footnote-127) Others include the late Minister Manto Tshabalala-Msimang’s initial response to the Constitutional Court’s judgment in the *TAC* matter,[[128]](#footnote-128) and matters where organs of state failed to timeously pay judgment debts.[[129]](#footnote-129) More recently, certain municipalities have failed to comply with orders requiring payment for electricity from Eskom.[[130]](#footnote-130) There has also been a trend of state organs and individuals in government ignoring decisions of Chapter 9 Institutions – notably the Public Protector.[[131]](#footnote-131)

The courts – including the Constitutional Court – have had to respond to this state of affairs which had (and continues to have) the potential to undermine the rule of law, and make it difficult to vindicate rights. Borrowing from the words of Justice Oliver Wendell Holmes Jr. of the US Supreme Court, said in a different context, the state’s non-compliance could have a severe knock-on effect:

Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. … If the Government becomes a lawbreaker [by disobeying court orders], it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[[132]](#footnote-132)

In respect of judgment debts, s 3(1) of the State Liability Act[[133]](#footnote-133) was declared unconstitutional for preventing the attachment of state assets to be used in execution of an order.[[134]](#footnote-134) In other cases where court orders could not be complied with because of an untenable factual situation in the case, the courts have required the state to act in some way in any event, to vindicate the rule of law. For example, in *Modderklip* the state was required, in substance, to expropriate land upon which tens of thousands of vulnerable individuals had built their homes without the consent of the owner – as an eviction would cost more than the property was worth and the people would have nowhere to go.[[135]](#footnote-135) Langa ACJ for the Court situated this within the rule of law, holding that the state is ‘obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.’[[136]](#footnote-136)

Perhaps the courts’ best articulation of its concerns about the non-compliance of court orders and the potential for a concomitant erosion of the rule of law, comes in the cases dealing with contempt. In *Pheko*, Nkabinde J said the following:

As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply… . It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.[[137]](#footnote-137)

While central to my discussion, the unlawful and *mala fide* refusal to obey a court order is only but one crime that comprises contempt of court.[[138]](#footnote-138) Others include scandalising the court,[[139]](#footnote-139) or even interrupting judicial proceedings.[[140]](#footnote-140) The ‘essence’ of contempt afterall, as Khampepe J explained in *Tasima*, ‘lies in violating the dignity, repute or authority of the court’.[[141]](#footnote-141)

Recently in *Matjhabeng* the Constitutional Court clarified the law in this area. First, Nkabinde ADCJ discussed the differences between criminal and civil contempt. The former concerns ‘multiplicity of conduct interfering in matters of justice pending before a court.’[[142]](#footnote-142) The latter, relates to the disobedience of a court order.[[143]](#footnote-143) Even though the latter is described as ‘civil’ (for it relates to enforcing orders issued in civil matters), the sanction is still criminal in nature.

Second, not every civil order that is disobeyed should result in contempt for there are other manners in which to induce compliance including ‘declaratory orders, mandamus, and structural interdicts.’[[144]](#footnote-144) And generally speaking only orders *ad factum praestandum* – to do something – are capable of being enforced through contempt, as orders *ad solvendam pecuniam*, those which sound in money, are enforceable through execution.[[145]](#footnote-145) Nonetheless, contempt and committal to prison may be warranted in some circumstances. Nkabinde ADCJ notes that while a party in proceedings has its own interest in seeking enforcement of an order, contempt has a broader public interest as ‘disregard sullies the authority of the courts and detracts from the rule of law.’[[146]](#footnote-146) And she favourably quotes a High Court decision explaining that the objective of contempt ‘is to vindicate the rule of law rather than to “punish the transgressor”.’[[147]](#footnote-147)

Third, the Court clarifies that committal to prison for contempt, whether in its civil or criminal iteration, requires proof beyond a reasonable doubt[[148]](#footnote-148) while other means of enforcement for civil orders require proof on the lower balance of probabilities. Furthermore, even though a person is not an accused in such proceedings, she must have analogous protections appropriate for the nature of the matter.[[149]](#footnote-149)

So, one might point out in response to my concerns about invalid court orders, that enforcement and contempt proceedings are not merely about inducing compliance with said order, but also protecting the authority and effectiveness of the judiciary. After all, if parties are allowed to ignore certain orders where their legal basis *might* be tenuous, is that not a licence to self-help? Moreover, in the context where many organs of state have shown themselves to be recalcitrant towards complying with court orders, one might argue that maintaining the authority of the courts is a weightier factor than concerns about courts acting beyond the scope of their powers. Both are ultimately rooted in the rule of law. The context just discussed appears to have been a crucial factor in the Constitutional Court’s reasoning in *Tasima.*

## C Oudekraal

This brings us to the Court’s reliance on the *Oudekraal* principle in the case. As I understand the Court, its reasoning is that just because something is invalid in law, it should not necessarily be treated as a nullity in reality because it exists in fact and may have consequences both in law and in fact. This mirrors the distinction between law and fact drawn by Christopher Forsyth in his pioneering work in the field of administrative law.[[150]](#footnote-150) In *Oudekraal*,the Supreme Court of Appeal approvingly cites Forsyth’s work in developing what I have been referring to as the *Oudekraal* principle throughout this paper.

The Constitutional Court has endorsed and built on the principle in respect of administrative and executive decisions, and rightly so.[[151]](#footnote-151) In *Kirland*, Cameron J explained that ‘[t]he 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.’[[152]](#footnote-152) The courts are the branch of state vested with the power to interpret the law. To allow administrators in effect to exercise the same powers might lead to uncertainty.

In *Tasima*, Khampepe J summarised herextension of *Oudekraal’s* reach into court orders as follows:

This reading of section 165(5) accepts the Judiciary’s fallibilities. As explained in the context of administrative decisions, “administrators may err, and even . . . err grossly.” Surely the authors of the Constitution viewed Judges as equally human. The creation of a judicial hierarchy that provides for appeals attests to this understanding. Like administrators, Judges are capable of serious error. Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences.[[153]](#footnote-153)

Yet, there are important normative and practical distinctions between court orders on the one hand, and administrative and executive decisions on the other that this explanation overlooks. First and foremost, ignoring an administrative or executive decision generally cannot result in one being committed to gaol – a very real consequence in respect of disobeying court orders.[[154]](#footnote-154) In *Matjhabeng*, Nkabinde ADCJ pointed out that being committed to prison for contempt violates the right to freedom and security of the person, specifically not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial, and impacts upon one’s fair trial rights.[[155]](#footnote-155) The stakes are therefore much higher. Requiring a party to comply with an invalid court order through the threat of contempt, is to coerce on the basis of illegality, something ‘contrary to the rule of law [and] not to mention common sense.’[[156]](#footnote-156)

Second, Judges occupy a different position from administrators and other decision-makers in our democracy. They are required to be ‘appropriately qualified’[[157]](#footnote-157) and part of that means being well versed in the *law*, a requirement which is not applicable to administrators. (I mean this as a general proposition; many people in the public administration are well qualified in the law, but that is not always a requirement for a post.) Holding a judicial officer to a higher standard, by expecting them not to make mistakes as to what their powers are, is therefore justifiable. While I accept that the appeals process acts as a failsafe for such eventualities and the fallibility of all human beings, that cannot be justification enough for coercing the compliance with an invalid court order with the threat of contempt. In any event, the type of invalidity I refer to throughout this paper does not concern the question of whether a court properly applied the law to the facts of the case, definitely something that can only be questioned on appeal. Rather, it concerns a very narrow *legal* question of whether the court concerned had subject matter jurisdiction or the power in law to make the order. Now of course, appeals often do not only concern factual questions, but this is an antecedent question as to whether a court can make such an order which need not be decided in a factual context.

Third and related to this, is challenging a court order is a far stricter process than taking an administrative or executive decision on review. **[Drafting note: to set out the time periods for appeal matters – generally around one month vs reviews which are within reasonable time and not more than 180-days for PAJA (per se reasonableness) or within reasonable time for legality review. Discuss condonation – compare *Oudekraal 2* (50 year delay condoned for review) vs *Van Wyk v Unitas* (one year delay not condoned for application for leave to appeal).**

Fourth, as set out above the Courts have no army or sword to enforce their orders, but must rely on moral authority in society for their continued effectiveness. For the judiciary to be seen to uphold invalid decisions made by another organ of state to maintain certainty, finality and stability (using the *Oudekraal* principle) maintains its moral authority. But to enforce invalid decisions emanating from itself may undermine its legitimacy in the long run.

In *Kirland* – a case which unequivocally accepts and constitutionalises[[158]](#footnote-158) *Oudekraal* in respect of administrative decisions – Cameron J actually sets out a crucial difference between invalid court orders and administrative or executive decisions. In footnote 78 he explains the following:

[*Motala* provides] that judicial decisions issued without jurisdiction … 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 fount 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.

This gives a strong explanation for why we should treat these government actions differently. And it is also something to take heed of as a lawyer advising a party regarding the validity of a court order. Ultimately, it is the courts that can determine whether an order was invalid or not – it is probably better to challenge an order on appeal rather than advising a client to wait and see.

Over 50 years ago in *Crookes NO v Watson*,[[159]](#footnote-159) Schreiner JA cautioned against applying principles by analogy to interpret the law. He said:

It is natural, when one is considering a branch of the law on which there is relatively little direct authority, to seek assistance from other portions of the law that seem to present useful analogies; but analogies are only useful if they provide, not merely some solution of the problem under inquiry, but a solution which is satisfactory, i.e., in the present context, which is convenient and just in relation to the intentions and expectations of the parties affected. This is even more clearly the position when the proposal goes further than an argument by analogy and seeks to bring the branch of the law under investigation wholly within the framework of another portion of the law. Care must be exercised not to force a legal instrument of great potential efficiency and usefulness into a mould that is not properly shaped for it.[[160]](#footnote-160)

To my mind the various factors listed above show that *Oudekraal* is not ‘properly shaped’ for use in determining how courts should treated invalid court orders. The conclusion might solve the problem, but it is not satisfactory for courts as a rule to enforce invalid conduct coming from themselves. After all, rights are threatened if that is done.

## D Discretion?

But, one might argue that while Khampepe J held that invalid orders are not nullities and by extension may found contempt, she carved out a discretion for Judges to exercise in deciding whether to enforce such orders. A Judge might exercise said discretion against enforcing such an order in instances like those where private individuals might be prejudiced.

Forsyth in a later article published partially in response to *Oudekraal* raised concerns about how his theory had been received into our law through the Supreme Court of Appeal. He was particularly concerned about the fact that the general rule set by the court is that administrative decisions cannot be ignored unless set aside, and that Judges have a *discretion* not to enforce them in certain circumstances, particularly those where a party raises a collateral challenge against said decision.[[161]](#footnote-161) He explains:

Administrative law exists primarily in order to control and check the exercise of administrative discretion. But unfettered administrative discretion must not be replaced by unfettered judicial discretion; therefore, the inevitable judicial discretion in the application of administrative law and in the tailoring of the appropriate remedies must itself be structured and controlled. The judges too are subject to the law, hence the necessity to cleave to these fundamental concepts.[[162]](#footnote-162)

While not wanting simply to apply his concern by analogy to court orders and suffer the same criticism I have just levied at the Constitutional Court, I still want to point out that the Court has given no indication as to when, on its approach, a court ought not enforce an invalid order. That’s left to a very wide discretion. This is particularly problematic in that invalid orders can lead to contempt. Such cannot be in the interests of justice and the rule of law without more.

# V A solution

My goal now is to try and clear a way forward from *Tasima* that considers both aspects of the rule of law highlighted throughout this paper that are in tension.

## A First principles

An order made by a court in the absence of authority is invalid; that is what the rule of law requires. Authority here refers to either: (i) where a court lacks subject matter to decide a dispute; or (ii) where a court lacks the power in law to make an order. The judiciary must be seen to only act lawfully, for the opposite would undermine its moral authority in society and erode the rule of law. Even if an invalid order is not appealed, it is not binding and cannot be enforced through execution or contempt proceedings. ‘Authority’ used here is an objective *legal* question not contingent on the subjective facts of a particular case. Thus, one must ask objectively whether the court possess the authority to make the order? Another court will be competent to decide whether an order and thus enforceable.[[163]](#footnote-163) In this sense the invalidity *must* ‘jump out of the page’[[164]](#footnote-164) for the order to be considered invalid for these purposes.

The question of whether the law was applied correctly or not in the case after an order was issued where the court has authority to make such order, can never be considered invalid for these purposes and must be complied with. The same applies to the question of whether or not a certain factual situation existed on which the order was premised. Both require a proper consideration of whether the facts presented before the court, in light of the rules of evidence, were sufficiently proved to support the order being granted. The questions pertaining to geographical jurisdiction over a matter also contains factual elements. Disputing such determinations is the realm of an appeal (or perhaps an application for rescission).

A useful way of considering whether my theory is applicable is to ask the question ‘Could the court objectively have ever granted the order it did?’ and not ‘Should the court have granted the order it did?’ Put another way the question is whether the court *can* ever issue this order, and not whether it may have been entitled to. The former is purely a legal question. If its answer is Yes then the order is binding. If the answer is No then it cannot be binding, because the court *could never* grant such an order. And so, it cannot found enforcement proceedings.

Importantly, any other order issued by a court that does not fit into this category will be binding. If a party disputes the factual basis for an order, it must be taken on appeal.

This applies neatly to the *Tasima* matter. A latter court deciding whether to enforce the Interim Order would need to have asked: ‘Can a High Court grant an interim order preserving the terms of a contract, pending the outcome of dispute resolution proceedings into the validity of the contract?’ The answer is of course ‘Yes’. Therefore, the order was binding, unless overturned on appeal, or as it was only of an interim nature, until the contractual dispute was resolved. Therefore, the conclusion reached by the majority is consistent with the theory: factually the Interim Order was disregarded time and time again by the Department, and any non-compliance – before it fell away after the extension was declared unlawful and invalid – resulted in contempt.

## B Stare decisis

The basic tenets of the theory are shaped in certain ways by other principles. The doctrine of *stare decisis* or precedent requires a court to follow the decisions of courts higher on the judicial hierarchy or the same level.[[165]](#footnote-165) And this stems from wanting to ensure certainty, stability and predictability in the legal system; ‘without [it,] deciding legal issues would be directionless and hazardous.’[[166]](#footnote-166) Only the *ratio decidendi* of a decision are binding – ie the ‘[r]ationale or basis of deciding’.[[167]](#footnote-167) *Obiter dicta*, ‘things said by the way or in passing by a court … are not pivotal to the determination of the issue or issues at hand and are not binding precedent.’[[168]](#footnote-168) Even so, the latter are persuasive, especially those which emanate from courts above in the hierarchy.[[169]](#footnote-169) Precedent may only be departed from where a court on the same level considers it not just wrong, but clearly wrong.[[170]](#footnote-170) So, a High Court for example, could not depart from a precedent set by the Supreme Court of Appeal even if the High Court regards it as clearly wrong. In a similar manner, the Supreme Court of Appeal cannot depart from a precedent set by the Constitutional Court.

Precedent affects the theory as follows. If a Judge is faced with an application to enforce an order previously issued by the same court, and a party cited in the order argues that it is invalid as it was made without authority, or the Judge herself has her own reservations, she will have to consider the following. First, is there a precedent set by a higher court that holds that the court concerned has such power in law? If so, then the Judge has no option but to enforce said order, because she is bound by precedent. Second, if there is no higher precedent, but a court on the same level has set such precedent then the Judge will have to consider whether the judgment was decided correctly. If it was clearly wrongly decided, then our Judge will be able to depart from said precedent and rule that the prior court did not have the power in law to issue the order. This works the other way around as well: where a court issues an order that it or a higher court previously ruled the court did not have the power to, a later Judge of that court would be bound by precedent *not to enforce the order*.

## C Is there still space to enforce invalid orders?

One might however be concerned that my theory goes too far and might encourage bad behaviour. An order issued by a court might simply be ignored by organs of state which may wait until contempt proceedings are brought and only then challenge the order collaterally. My theory might open a floodgate of this kind of behaviour – even for valid orders. And the state’s bad example might encourage society to follow suit. So, can the theory not account for these concerns?

I am cautious to accept that there may be certain limited instances where an invalid order might still be capable of founding contempt. However, this cannot become the default rule for all the reasons I have pointed out throughout this paper. Something more needs to happen first. The most obvious situation would pertain to where an organ of state refuses to comply with an invalid order. Section 165(4) of the Constitution specifies:

Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the court.

This is an additional duty that requires state functionaries either to comply with a court order or if its validity is questioned, follow the proper channels and appeal it.[[171]](#footnote-171) The state has the resources to do so after all.[[172]](#footnote-172) One can imagine a state functionary who has outright contempt for a court’s processes and decides to ignore an order and not participate any further in the proceedings.

That might be one such limited circumstance where an invalid order might lead contempt proceedings. The reason: the conduct of the functionary is not only directed at the order itself, but at the judiciary as an institution. The ‘essence of contempt’ is therefore present here. It is not the order itself that is being coerced, but rather it is to ensure respect for the courts. This might allay any concerns about compromising the effectiveness of the judiciary to hold other organs of state accountable for their conduct. But it protects ordinary people from being coerced into illegal conduct with the threat of contempt and prison. This approach also constrains the discretion of a court considering whether a party has acted in contempt of a previous order.

However, it becomes more difficult considering whether an invalid order can be enforced through execution proceedings or through a mandamus requiring certain conduct. In both instances, enforcement will be coercing illegality which is not countenanced by the theory. And little else justifies the opposite. So, the theory does not allow for an invalid court order to be enforced, but it does allow a court to hold certain parties in certain circumstances in contempt of such order.

We should also note that even organs of state might ignore invalid orders for good reason. The facts in *Motala* are instructive in this regard. The Master’s Office had previously approached the High Court for a declaratory order that it alone is the institution vested with the powers in law to appoint judicial managers. This was done in response to an emerging trend of this practice occurring which undermined its ability to carry out its legislative duties properly.[[173]](#footnote-173) Despite the declaratory order and a detailed judgment setting out the basis for such conclusions and thus *precedent*, Judges in the same Division of the High Court continued to purport to exercise such powers by issuing orders appointing judicial managers – presumably *ex tempore* and in busy motion court after receiving draft orders from counsel, with no reasons given. Now the Master is cited in every insolvency proceeding instituted in court. But can we realistically expect the Master to appear in *every* matter to ensure that such invalid orders are not granted by the courts, or to appeal the orders if they are issued? Does the Master have access to those resources? Furthermore, in an ideal world one would expect that Judges would strike out paragraphs in draft orders that they are not capable of making in law,[[174]](#footnote-174) but from experience we know that sometimes mistakes are made. The Master cannot be said to be ignoring such orders in contempt of the judiciary. Quite the opposite, as it was proactive in approaching the court earlier in seeking clarity on the issue. Coercing the Master to comply with said invalid orders through the threat of contempt would not be appropriate in the circumstances.

# VI *ACSA*

This brings me to the Supreme Court of Appeal’s decision in *Big Five Duty Free (Pty) Limited v Airports Company South Africa* (*ACSA*).[[175]](#footnote-175) The *Tasima* approach makes the case difficult to resolve. It has the hallmarks of the many public law cases discussed throughout this paper. An irregular tender process. A review challenge. A settlement agreement. And a paragraph in said agreement no one is sure should’ve been made, and some argue should not be considered binding. Here I want to briefly consider how my theory might assist in resolving the case.

## A Background and decisions of the courts

ACSA awarded a contract to Big Five Duty Free to operate duty-free stores at some of its airports for a 10-year period back in 2009 following a tender process. The unsuccessful and aggrieved bidder, DSF Flemingo SA (Pty) Ltd (DSF), took the decision on review and it was set aside on the basis that the tender processes had been tainted by irregularity (Phatudi J order).[[176]](#footnote-176) Big Five took the matter on appeal to the Full Bench. ACSA elected not to participate in the proceedings and abided by the decision of the court. After full argument by the parties, but before judgment in the appeal was handed down, DSF and Big Five settled their dispute: DSF abandoned the Phatudi J order and the review was withdrawn. This was incorporated into an order of the Full Bench.[[177]](#footnote-177)

ACSA however contended that it was not bound by DSF’s abandonment of the Phatudi J order and was entitled to start the tender processes afresh.[[178]](#footnote-178) Big Five launched proceedings for a declaratory order that ACSA was bound by its previous decision, as the order setting it aside had been abandoned and that the settlement agreement bound ACSA. Hughes J in the High Court dismissed Big Five’s application, however. Lewis JA, who wrote the Supreme Court of Appeal decision under discussion here, summarises Hughes J’s reasoning as follows:

[T]he order of Phatudi J was a ‘public remedy’ [ie an order *in rem* that affects not just the parties to the dispute but the whole world] and could not be set aside by private parties; and that even though the full court had made the agreement between Big Five and Flemingo an order of court, she was not bound by that order because it was wrong, being ‘at odds with the Constitution, the law and public policy’.[[179]](#footnote-179)

Lewis JA however rejected this approach. While assuming that an order setting aside an administrative decision is a ‘public remedy’,[[180]](#footnote-180) she focused on interpreting the settlement agreement in light of its purpose. The decisive paragraph in the judgment states:

What was the purpose of the withdrawal and abandonment, coupled with the agreement of settlement, if not to set aside the order of Phatudi J? It could be none other than to agree that the award to Big Five by ACSA was to stand. There is no other purpose that the parties could have intended to achieve.[[181]](#footnote-181)

## B Discussion

In light of the Constitutional Court’s approach in *Tasima*,Lewis JA’s reasoning seems to make a lot of sense. Even though she assumed that the Phatudi J order was a public law remedy and affected not only the parties to the dispute but everybody, because court orders – including settlement agreements – are always necessarily binding, unless set aside that did not seem to matter. But this result seems to be very unfortunate, even absurd: the factual findings of a court that a decision was made unlawfully have not been properly confronted or overturned. After all, ACSA is doing the right thing in the case: it does not want to implement a decision it made that was declared unlawful by Phatudi J in the proper forum and set aside! It is not simply ignoring its previous decision. Can my theory about invalid court orders assist ACSA?

Let us, for the sake of argument (and for lack of space), assume two things: (i) an order setting aside an administrative decision is an order *in rem*; and (ii) because of that, private parties cannot simply abandon them or have them set aside by agreement – for that cannot bind the whole world. If that is so, the order incorporated in the settlement agreement by the Full Bench was invalid – because it did not have the authority in law to issue it.[[182]](#footnote-182)

We know from *Eke* that courts should not rubber stamp settlement agreements and make every one of their terms an order of court, but rather should consider whether each provision is competent. Nonetheless, for whatever reason, this still happens. Because the Full Bench order abandoning the Phatudi J order cannot have the effect of setting the latter aside – that would take a judgment from the Full Bench – the former will be incapable of enforcement. Thus, the Phatudi J order stands, the decision to award the tender to Big Five is set aside, and ACSA can reinstitute tender processes. If DSF and Big Five were convinced that the High Court was incorrect in coming to that conclusion, they might have asked the Full Bench to make further submissions to that effect and waited for a judgment. My theory helps resolve the central issue in the case in a neat and convincing manner.

# VII Conclusion

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 Section 165(5) of the Constitution of the Republic of South Africa, 1996. [↑](#footnote-ref-1)
2. *S v Mamabolo* 2001 (3) SA 409 (CC) para 1 (Kriegler J) citing *Ambard v Attorney-General of Trinidad and Tobago* [1936] 1 All ER 704 (PC) at 709 (Lord Atkin), quoted in *Argus Printing and Publishing Co Ltd* *v Esselen’s Estate* 1994 (2) SA 1 (A) at 25G-H (Corbett CJ). [↑](#footnote-ref-2)
3. Sections 1(c) and 2 of the Constitution provide:

	1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:…

(c) Supremacy of the constitution and the rule of law;

…

2. This 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.

See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 56–8 and *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC). See further *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 15. [↑](#footnote-ref-3)
4. *Motala* *v Master of the High Court* 2012 (3) SA 325 (SCA) and *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA). More recently see *Moraitis Investments (Pty) Ltd* *v Montic Diary (Pty) Ltd* 2017 (5) SA 508 (SCA). [↑](#footnote-ref-4)
5. As a short aside there is another exception to a court order being binding: the non-citation of a party (*MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) (*Kirland*) footnote 78). A fundamental principle of our law is that parties must be given an opportunity to defend themselves in impartial judicial proceedings before an adverse order is made against them (s 34 of the Constitution and the *audi alterum parterm* rule). A party that has not been given this opportunity cannot be bound by an adverse order. In the words of s 165(5) Constitution, a party not cited before a court is not a ‘person to whom [or] organ of state to which it applies.’ [↑](#footnote-ref-5)
6. Section 165(5). [↑](#footnote-ref-6)
7. *Eke v Parsons* 2016 (3) SA 37 (CC); *Provincial Government North West* *v Tsoga Developers CC* 2016 (5) BCLR 687 (CC) (*Tsoga Developers*); and *Department of Transport* *v Tasima (Pty) Limited* 2017 (2) SA 622 (CC) (*Tasima*). [↑](#footnote-ref-7)
8. *Tsoga Developers* (note X above) paras 48-50. [↑](#footnote-ref-8)
9. *Tasima* (note X above). See paras 181-182. [↑](#footnote-ref-9)
10. Section 165(4) and (5). [↑](#footnote-ref-10)
11. *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) (*Oudekraal*). [↑](#footnote-ref-11)
12. *Tasima* (note X above) paras 188-196, but see para 197 and footnote 156*.* [↑](#footnote-ref-12)
13. This is subject to some flexibility: certain parties (even organs of state) may raise the invalidity of a decision as a collateral challenge (ie as a defence, not a frontal challenge) in proceedings where another seeks its enforcement (*Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) (*Merafong*) para 55 and *Tasima* (note X above) paras 138–40 and 143). [↑](#footnote-ref-13)
14. *Merafong* (note X above) paras 50-2. [↑](#footnote-ref-14)
15. See Cora Hoexter *Administrative Law in South Africa* (2012) at 282-290 and Lawrence Baxter *Administrative Law* (1984) at 468-472. [↑](#footnote-ref-15)
16. *Kirland* (note X above) para 103. [↑](#footnote-ref-16)
17. Ibid. [↑](#footnote-ref-17)
18. *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) (*AllPay 1*); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC) (*AllPay 2*); *Black Sash Trust v Minister of Social Development* *(Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC) (*Black Sash*); and *Black Sash Trust v Minister of Social Development* *(Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC) (*Black Sash 2*). [↑](#footnote-ref-18)
19. *Big Five Duty Free (Pty) Limited v Airports Company South Africa Limited* [2017] 4 All SA 295 (SCA) (*ACSA*). In the Constitutional Court the matter was lodged under Case 257/17 and argued on 22 May 2018. [↑](#footnote-ref-19)
20. Act 61 of 1973. [↑](#footnote-ref-20)
21. *Motala* (note X above) para 2 [↑](#footnote-ref-21)
22. Ibid para 4. [↑](#footnote-ref-22)
23. *G W Willis v L B Cauvin* 4 NLR 97; *Lewis & Marks v Middel* 1904 TS 291; *Sliom v Wallach's Printing and Publishing Company Ltd* 1925 TPD 650; *Schierhout v Minister of Justice* 1926 AD 99; *State v Mkize* 1962 (2) SA 457 (N); *Suid-Afrikaanse Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren* *and the Taxing Master* 1964 (1) SA 162 (O); *Trade Fairs and Promotions (Pty) Ltd v Thomson* 1984 (4) SA 177 (W); *S v Absalom* 1989 (3) SA 154 (A); and *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA). [↑](#footnote-ref-23)
24. Ibid paras 5-6 citing s 429 of the Old Companies Act. [↑](#footnote-ref-24)
25. *Motala* (note X above) para 14. [↑](#footnote-ref-25)
26. *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP). [↑](#footnote-ref-26)
27. Ibid. [↑](#footnote-ref-27)
28. Note X above. [↑](#footnote-ref-28)
29. Ibid para 8. [↑](#footnote-ref-29)
30. Act 90 of 1986. [↑](#footnote-ref-30)
31. Section 3(1) of the Act sets out the functions of the Sheriff. [↑](#footnote-ref-31)
32. *Changing Tides* (note X above) para 9, citing *Motala* (note X above). [↑](#footnote-ref-32)
33. *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others* (CCT 182/17; CCT 240/17) [2018] ZACC 21 (17 July 2018). [↑](#footnote-ref-33)
34. *Eke* (note X above) para 1. [↑](#footnote-ref-34)
35. Ibid para 29. The reasoning was summarised by the Court in para 36 as follows:

First, the original underlying dispute is settled and becomes res judicata. Second, what litigation there may be after the settlement order will relate to non-compliance with this order, and not the original underlying dispute. Third, matters that culminate in litigation that precedes enforcement are fewer than those that don’t. [↑](#footnote-ref-35)
36. Ibid para 29. [↑](#footnote-ref-36)
37. Ibid para 26. [↑](#footnote-ref-37)
38. Ibid. [↑](#footnote-ref-38)
39. The provision relates to procurement. Section 217(1) provides:

When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. [↑](#footnote-ref-39)
40. *Tsoga Developers* (note X above) para 50. [↑](#footnote-ref-40)
41. Ibid para 52. [↑](#footnote-ref-41)
42. In footnote 64, the Court expressly states that it takes no view on the decisions in *Motala* and *Changing Tides*. [↑](#footnote-ref-42)
43. The parties in the matter have been involved in litigation across most of South Africa’s judicial hierarchy, including the High Court, the Supreme Court of Appeal, the Constitutional Court, and even the Labour Court. The last count was 14 separate cases before the High Court (*Tasima 2* (note X above footnote 2). [↑](#footnote-ref-43)
44. *Tasima* (note X above) para 6. [↑](#footnote-ref-44)
45. Ibid para 32. [↑](#footnote-ref-45)
46. Ibid para 33. [↑](#footnote-ref-46)
47. Para 43. [↑](#footnote-ref-47)
48. Issued by Strijdom J, Ebersohn AJ, Fabricius J, Nkosi J and Rabie J (see ibid paras 174-5). [↑](#footnote-ref-48)
49. Ibid para 48. [↑](#footnote-ref-49)
50. Ibid para 49. [↑](#footnote-ref-50)
51. *Tasima (Pty) Ltd v Department of Transport* [2015] ZAGPPHC 421. [↑](#footnote-ref-51)
52. *Tasima (Pty) Ltd v Department of Transport* [2016] 1 All SA 465 (SCA). [↑](#footnote-ref-52)
53. Ibid para 20. [↑](#footnote-ref-53)
54. Although unanimous in this conclusion, the Court was bitterly divided in its reasoning, with a primary disagreement about the *Oudekraal* principle. Khampepe J for the majority (Froneman J, Madlanga J, Mhlantla J and Nkabinde J concurring in her decision) clarified that in principle a reactive challenge – either a formal counterapplication or a collateral defence – is open to an organ of state. But, this does not detract from the reasoning in *Oudekraal* and *Kirland* that a state organ or administrator: (i) should not be allowed to ignore administrative decisions, even if they believe a decision to be unlawful, as that would be a licence to self-help and undermine the rule of law; and (ii) has an obligation to timeously challenge unlawful decisions before the competent constitutional authority – the courts. Furthermore, the majority judgment pointed out that because of these obligations, a court may refuse to grant relief if there has been undue and unjustifiable delay in challenging the decision. It applied the well-developed test that condonation should be sought for late challenges, and that lateness may be overlooked where just and equitable (see *Khumalo* *v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC)). Khampepe J also reaffirmed the distinction between a finding of invalidity and the remedy that may flow from that ruling, ie in some instances invalid decisions should not be set aside (see further Geo Quinot & P J H Maree ‘The Puzzle of Pronouncing on the Validity of Administrative Action on Review’ (2015) 7 *CCR* 27).

In addition to this, the majority held that the judiciary has the exclusive power to determine the constitutional validity of agreements. An arbitrator thus does not have such power. Applying this all to the matter, the majority held that deciding the counterapplication was just and equitable in the peculiar circumstances of the case. The extension was found to be invalid and set aside.

Jafta J for the minority (Mogoeng CJ, Bosielo AJ and Zondo J with him) held that a Court is *always* obliged to set aside unconstitutional government decisions no matter if they were formally challenged on review or if raised collaterally in enforcement proceedings. He reasoned that even the Interim Order should never have been granted, and that a Judge has no power to extend an unconstitutional contract. In doing so he criticised the *Oudekraal* principle and the majority decision in *Kirland*.

Froneman J in a concurring majority judgment criticised Jafta J for ignoring precedent in his reasoning.

Zondo J in turn wrote a concurring minority judgment which criticised Froneman J for *inter alia* doing the same thing in previous cases.

The Court also included a unanimous single paragraph *Per Curiam* judgment relating to a concern raised by one of the parties in the case that Jafta J had prejudged the matter for having referred to the factual situation in *Tasima* as an example in his minority judgment in *Merafong* (note X above) which was handed down a few weeks prior. [↑](#footnote-ref-54)
55. *Tasima* (note X above) para 114-5. [↑](#footnote-ref-55)
56. Ibid para 184. [↑](#footnote-ref-56)
57. Ibid para 185. [↑](#footnote-ref-57)
58. Ibid para 186. [↑](#footnote-ref-58)
59. Cited above at the top. [↑](#footnote-ref-59)
60. Section 172(2)(a) of the Constitution provides:

The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court. [↑](#footnote-ref-60)
61. *Tasima* (note X above) para 180, Khampepe J elaborates in footnote 118: ‘Even though courts do not have the purse or sword to enforce their orders, the effect of their decision is binding in law.’ [↑](#footnote-ref-61)
62. *In re Honeyborne* (1876) 7 Buch 145 and *S v Zungo* 1966 (1) SA 268 (N). [↑](#footnote-ref-62)
63. *Tasima* (note X above) para 182 citing *Kirland* (note X above) para 90. [↑](#footnote-ref-63)
64. *Tasima* (note X above) para 183. [↑](#footnote-ref-64)
65. Ibid. [↑](#footnote-ref-65)
66. Ibid paras 184-187. [↑](#footnote-ref-66)
67. Ibid para 190. [↑](#footnote-ref-67)
68. Ibid paras 188-196. [↑](#footnote-ref-68)
69. Ibid para 186 citing *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 6. [↑](#footnote-ref-69)
70. *Tasima* (note X above) para 186. [↑](#footnote-ref-70)
71. Ibid footnote 156. [↑](#footnote-ref-71)
72. Ibid footnote 156. [↑](#footnote-ref-72)
73. Ibid para 198. [↑](#footnote-ref-73)
74. Ibid para 208. [↑](#footnote-ref-74)
75. *Tasima 2* (note X above). [↑](#footnote-ref-75)
76. There was a second dispute relating to an eviction application of the company from premises where the electronic road traffic system was situated, which is not relevant for my purposes. [↑](#footnote-ref-76)
77. *Tasima (Pty) Ltd v Department of Transport* [2017] ZAGPPHC 46 (Potterill J judgment). [↑](#footnote-ref-77)
78. *Tasima 2* (note X above) paras 59-60. [↑](#footnote-ref-78)
79. Section 1(c). [↑](#footnote-ref-79)
80. Section 2. [↑](#footnote-ref-80)
81. *Fedsure Life Assurance Ltd* (note X above) paras 56–8 [↑](#footnote-ref-81)
82. *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* 2014 (2) SA 228 (CC) para 1. [↑](#footnote-ref-82)
83. *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) paras 27-8; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94; *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* 2015 (5) SA 370 (CC) paras 13-20; and *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC) para 56. [↑](#footnote-ref-83)
84. *Fose* (note X above) para 94 footnote 4. [↑](#footnote-ref-84)
85. *S v Mamabolo* (note X above) para 16. [↑](#footnote-ref-85)
86. Pursuant to s 170 of the Constitution provides: ‘All courts other than those referred to in s 167, 168 and 169 may decide any matter determined by an Act of Parliament’. [↑](#footnote-ref-86)
87. Section 167(3) and (4) of the Constitution. [↑](#footnote-ref-87)
88. Section 168(3) of the Constitution. [↑](#footnote-ref-88)
89. Section 169(1)(a) of the Constitution. [↑](#footnote-ref-89)
90. Section 169(1)(b) of the Constitution. [↑](#footnote-ref-90)
91. Act 32 of 1944. [↑](#footnote-ref-91)
92. Section 170 of the Constitution. [↑](#footnote-ref-92)
93. Section 29(1B) of the Magistrates Courts Act. [↑](#footnote-ref-93)
94. Sections 151, 157 and 158 of the Labour Relations Act 66 of 1995 [↑](#footnote-ref-94)
95. Sections 167, 173-175 and 182-183 of the Labour Relations Act. [↑](#footnote-ref-95)
96. Sections 36 and 37 of the Competition Act 89 of 1998. [↑](#footnote-ref-96)
97. Section 22 of the Restitution of Land Rights Act 22 of 1994. See further, s 20 of the Extension of Security of Tenure Act 62 of 1997 [↑](#footnote-ref-97)
98. This after much consternation over whether the court had authority to hear appeals in labour matters before the Constitution Seventeenth Amendment Act, 2012 which specifies that the court would not have such authority. For the position prior to the amendment see the decision in *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) and Vuyani Ngalwana ‘The Supreme Court of Appeal is Not the Apex Court in All Non-Constitutional Appeals’ (2006) 27 *ILJ* 2000. [↑](#footnote-ref-98)
99. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. [↑](#footnote-ref-99)
100. *Mamahule Communal Property Association* *v Minister of Rural Development and Land Reform* 2017 (7) BCLR 830 (CC). [↑](#footnote-ref-100)
101. [↑](#footnote-ref-101)
102. Section 173 of the Constitution provides:

The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

In *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) para 90, Moseneke DCJ described one crucial substantive limitation on the inherent jurisdiction of the superior courts, the Bill of Rights:

[T]he power conferred on the High Courts, Supreme Court of Appeal and this Court in s 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in s 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction. However, the inherent power to regulate and control process and to preserve what is in the interests of justice does not translate into judicial authority to impinge on a right that has otherwise vested or has been conferred by the Constitution. [↑](#footnote-ref-102)
103. Act 51 of 1977. [↑](#footnote-ref-103)
104. Section 276B(1) of the Act, which provides:

	1. If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.
	2. Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.” [↑](#footnote-ref-104)
105. [1997] 2 All SA 185 (A). [↑](#footnote-ref-105)
106. Ibid at 521D-I. [↑](#footnote-ref-106)
107. This isn’t completely impossible, see *Jimmale and Another v S* 2016 (11) BCLR 1389 (CC), but my point still stands. [↑](#footnote-ref-107)
108. Act 34 of 2005. [↑](#footnote-ref-108)
109. *Nedbank Ltd v Jones* 2017 (2) SA 473 (WCC). [↑](#footnote-ref-109)
110. Section 38 of the Constitution. [↑](#footnote-ref-110)
111. Section 172(1)(b) of the Constitution. [↑](#footnote-ref-111)
112. *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) para 107. This has also sometimes required a more nuanced approached, where matters already finalised under the invalid legislation are immunised from the declaration of invalidity, while pending matters are decided under a new regime (a recent example is *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC)). [↑](#footnote-ref-112)
113. Pursuant to s 172(1)(b)(i) of the Constitution. See for example, *Masiya v Director of Public Prosecutions, Pretoria* 2007 (5) SA 30 (CC) para 50. The Court has also on occasion limited the retrospective effect of new interpretations of legislative provisions where it read them down to conform with the Constitution (*Stratford and Others v Investec Bank Limited and Others* 2015 (3) SA 1 (CC)). [↑](#footnote-ref-113)
114. Pursuant to s 172(1)(b)(ii) of the Constitution. *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC). [↑](#footnote-ref-114)
115. *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children and Another* 2015 (10) BCLR 1129 (CC). [↑](#footnote-ref-115)
116. *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC). [↑](#footnote-ref-116)
117. For a recent example see *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* 2016 (6) SA 596 (CC). [↑](#footnote-ref-117)
118. *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC). [↑](#footnote-ref-118)
119. *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC); and *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC). [↑](#footnote-ref-119)
120. See the award of Retired Deputy Chief Justice Moseneke in the Life Esidimeni arbitration: *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project v National Minister of Health of the Republic of South Africa & Others* (19 March 2018); and *Komape and Others v Minister of Basic Education* (1416/2015) [2018] ZALMPPHC 18 (23 April 2018). [↑](#footnote-ref-120)
121. *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC). [↑](#footnote-ref-121)
122. Act 73 of 1998. Section 5 of the Electoral Laws Amendment Act 34 of 2003 inserted s 16(3) which provides:

[T]he chief electoral officer must, on payment of the prescribed fee, provide copies of the voters’ roll, or a segment thereof, which includes the addresses of voters, where such addresses are available, to all registered political parties contesting the elections. [↑](#footnote-ref-122)
123. *Mhlope* (note X above) paras 83-91 and 128-134. [↑](#footnote-ref-123)
124. *Black Sash* (note X above). [↑](#footnote-ref-124)
125. Ibid paras 42-44. [↑](#footnote-ref-125)
126. The Electoral Commission recently requested an extension of the period in which its obligation is suspended because it hasn’t been able to collect all missing addresses within the original 24-month period. The Court issued an order extending the suspension for a further four and a half months and set the matter down for hearing in the Fourth Term of 2018 (see Constitutional Court Order and Directions dated 28 June 2018 issued under *Electoral Commission v Speaker of the National Assembly & Others* Case CCT 55/16).

In respect of the SASSA case, the Court referred to an inquiry before a referee the question as to whether former Minster of Social Development Bathabile Dlamini should be liable for costs in her personal capacity for her conduct in the case (*Black Sash 2* (note X above)). That has yet to be finally resolved. [↑](#footnote-ref-126)
127. Clive Plasket ‘The Exhaustion of Internal Remedies and Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000’ (2002) 119 *SALJ* 50 at 55-6 and *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA). For similar recent issues in respect of compensation legislation see the *Mkhonto* facts in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* 2018 (1) SA 1 (CC) paras 21-40. [↑](#footnote-ref-127)
128. Mark Heywood ‘Contempt or Compliance? The TAC Case after the Constitutional Court’ (2003) 4(1) *ESR Review* 7. [↑](#footnote-ref-128)
129. See for example the facts in *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (5) SA 94 (CC). [↑](#footnote-ref-129)
130. *Matjhabeng* (note X above) paras 6-13. [↑](#footnote-ref-130)
131. The most notorious two instances must be former President Jacob Zuma’s and Parliament’s response to the *Secure in Comfort Report* and the SABC and Hlaudi Motsoeneng’s response to the *When Governance and Ethics Fail Report*, bothby former Public Protector Thuli Madonsela. [↑](#footnote-ref-131)
132. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Holmes, J., dissenting). [↑](#footnote-ref-132)
133. Act 20 of 1957. [↑](#footnote-ref-133)
134. *Nyathi* (note X above). [↑](#footnote-ref-134)
135. *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC). [↑](#footnote-ref-135)
136. Ibid para 42. [↑](#footnote-ref-136)
137. *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (5) SA 600 (CC) para 1 [↑](#footnote-ref-137)
138. *Fakie NO* (note X above) para 6. [↑](#footnote-ref-138)
139. *S v Mamabolo* (note X above). Over a century ago Bristowe J explained the following in *Attorney-General v Crockett* 1911 TPD 893 at 925-6:

Probably in the last resort all cases of contempt, whether consisting of disobedience to a decree of the Court or of the publication of matter tending to prejudice the hearing of a pending suit or of disrespectful conduct or insulting attacks, are to be referred to the necessity for protecting the fount of justice in maintaining the efficiency of the courts and enforcing the supremacy of the law. [↑](#footnote-ref-139)
140. For a quirky case about a rouge cell phone, see *S v Lewis* [2007] 3 All SA 477 (SCA), where a man was ‘was convicted in the Witwatersrand Local Division of contempt of court and sentenced to one month’s imprisonment for having allowed his cell phone to go off in court while the court was in session and for answering it as he was leaving the court’ (para 1). Luckily for him, the conviction was overturned on appeal. [↑](#footnote-ref-140)
141. *Tasima* (note X above) para 186, citing *Fakie NO* (note X above) para 6. [↑](#footnote-ref-141)
142. *Matjahbeng* (note X above) para 52. [↑](#footnote-ref-142)
143. Ibid para 53. [↑](#footnote-ref-143)
144. Ibid para 54. [↑](#footnote-ref-144)
145. Ibid paras 56-7. There appears to be one exception, refusal to pay maintenance pursuant to a court order can result in contempt and committal to prison (see *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC)). [↑](#footnote-ref-145)
146. Ibid para 54 citing *Fakie NO* (note X above) para 8. [↑](#footnote-ref-146)
147. *Matjahbeng* (note X above) para 57 citing *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) 456B-C. [↑](#footnote-ref-147)
148. *Matjahbeng* (note X above) para 67. [↑](#footnote-ref-148)
149. Ibid para 58. [↑](#footnote-ref-149)
150. Christopher Forsyth ‘‘The Metaphysic of Nullity’ Invalidity, Conceptual Reasoning and the Rule of Law’ in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (1998)). Forsyth draws on Hans Kelsen’s Pure Theory of Law to found the theoretical foundation for the distinction (at 147):

This theory, it will be recalled, is built on the distinction between the *Sein* (the Is) and the *Sollen* (the Ought), between the realm of things that are, i.e. facts or natural phenomena, and the realms of norms, included therein the law. [↑](#footnote-ref-150)
151. See note X above for a summary of how Khampepe J does so in the *Tasima* case. [↑](#footnote-ref-151)
152. *Kirland* (note X above) para 103. [↑](#footnote-ref-152)
153. *Tasima* (note X above) para 182. [↑](#footnote-ref-153)
154. **[Drafting note: Can look at municipal bylaws and Boddington here briefly. But must consider whether in South Africa Regulations that create crimes are legislative or administrative action – consider *New Clicks, Mostert, Fedsure* re ]** [↑](#footnote-ref-154)
155. *Matjhabeng* (note X above) para 1, citing s 12(1) and 35(3) of the Constitution. [↑](#footnote-ref-155)
156. Christopher Forsyth ‘The Theory of the Second Actor Revisited’ 2006 *Acta Juridica* 209 (Forsyth Revisited) at 217-8. Note that this is also different than requiring a party to comply with a court order after a court refused to set aside some administrative decision (on the basis on an alleged irregularity) because it that instance the court is enforcing something which the law treats as effectual. [↑](#footnote-ref-156)
157. Section 174(1) of the Constitution specifies:

Any *appropriately qualified* woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen. [↑](#footnote-ref-157)
158. I say constitutionalises because in *Oudekraal* the Supreme Court of Appeal didn’t even mention the Constitution. [↑](#footnote-ref-158)
159. 1956 (1) SA 277 (A). [↑](#footnote-ref-159)
160. Ibid at 290H-291A. [↑](#footnote-ref-160)
161. Forsyth Revisited (note X above) at 226. [↑](#footnote-ref-161)
162. Ibid at 226-227. [↑](#footnote-ref-162)
163. This is subject to the *stare decisis* doctrine. See the discussion below at XXX. [↑](#footnote-ref-163)
164. *Tsgoa Developers CC* (note X above) para 50. [↑](#footnote-ref-164)
165. See *Turnbull-Jackson v Hibiscus Court Municipality and Others* 2014 (6) SA 592 (CC) paras 53-56; and *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) para 100. Important for the High Courts as well is that a Full Bench decision of the court will bind all single Judges. I have not discussed the nuances that concern decisions of other Divisions of the High Court. Justice Malcolm Wallis of the Supreme Court of Appeal recently pointed out in non-judicial writing that the Seventeenth Amendment to the Constitution together with the Superior Courts Act 10 of 2013 may have inadvertently modified the ‘traditional approach’ where a decision in one of the Divisions would only be persuasive (ie not binding) on a Judge of another Divisions. See Malcolm Wallis ‘Whose decisis must we stare?’ (2018) 135 *SALJ* 1. [↑](#footnote-ref-165)
166. *Turnbull-Jackson* ibid para 53. [↑](#footnote-ref-166)
167. *Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 30. [↑](#footnote-ref-167)
168. *Turnbull-Jackson* (note X above) para 61. [↑](#footnote-ref-168)
169. Ibid para 57. [↑](#footnote-ref-169)
170. Ibid. [↑](#footnote-ref-170)
171. Admittedly, Khampepe J makes this point in *Tasima* (note X above) para 187. [↑](#footnote-ref-171)
172. See ibid and *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 (2) SA 413 (SCA) at para 8. [↑](#footnote-ref-172)
173. *Ex Parte Master of the High Court* (note X above) para 39. [↑](#footnote-ref-173)
174. The same should also apply in settlement agreements parties seek to be made orders of court (see *Eke* and the discussion regarding *ACSA* below). [↑](#footnote-ref-174)
175. Note X above [↑](#footnote-ref-175)
176. Ibid para 1. [↑](#footnote-ref-176)
177. Ibid para 2. [↑](#footnote-ref-177)
178. Ibid para 3. [↑](#footnote-ref-178)
179. Ibid para 4. [↑](#footnote-ref-179)
180. Ibid para 14. [↑](#footnote-ref-180)
181. Ibid para 26. [↑](#footnote-ref-181)
182. As a short aside, nowhere in the settlement agreement does a provision appear that states ‘the Phatudi J order is set aside’ or something to that effect. Clause 3.1 merely provided that ‘[DSF] abandons the order of Phatudi J granted on 17 May 2012 in the review application.’ (This was quoted in *ACSA* (note X above) para 7.) One could interpret the settlement agreement as only operating *inter partes* between DSF and Big Five, and not as affecting any other person – the result would be that the Phatudi J order was not set aside. It is trite that an interpreter ought to prefer a meaning of an order which accords with the law, rather than one that does not. [↑](#footnote-ref-182)