



The *Functus Officio* Doctrine and Invalid Administrative Action in South African Administrative Law: A Flexible Approach

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Abstract

In South African administrative law, the issue of invalid administrative action in relation to the application of the doctrine of *functus officio* has brooked a fair amount of debate. Whilst the courts have attempted to articulate an appropriate approach to be adopted regarding the variation or revocation of invalid administrative action, the issue remains one that is often fraught with a degree of uncertainty. A decision once made by an administrator, which is final, cannot be revisited in the absence of statutory authority. The invalidity of an administrative act does not detract from the legal consequences thereof which are binding until varied or set aside by a court of law. This tension between legality and finality is compounded when considering issues of fairness and administrative efficiency. It has been suggested that it is the task of the legislature to resolve this tension. This paper argues that despite the degree of uncertainty, the courts have in fact adopted a more flexible approach regarding the *functus officio* doctrine with reference to relevant constitutional and legislative imperatives. As such, there is no need for the legislature to resolve the tension. In so doing, the courts have effectively given effect to the essence of administrative justice.

Keywords: *functus officio*; invalid administrative action; legality; certainty; administrative efficiency

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1 INTRODUCTION

The *functus officio* doctrine as it pertains to invalid administrative action gives rise to contentious issues. Attempts by the South African courts to clarify the matter by defining an appropriate approach to be adopted regarding the variation or revocation of administrative actions has apparently failed to establish any appreciable degree of certainty. A decision once made by an administrator, which is final, cannot be revisited in the absence of statutory authority, save in instances of fraud. Having exhausted his powers under the enabling legislation he cannot lawfully re-visit such powers unless statutorily permitted to do so. He could however, approach a court of law to set aside his own decision. In this sense the principle of legality is maintained in ensuring that functionaries do not exercise more power than they have. Final decisions, how erroneously flawed they may be, have legal consequences binding in law until set aside by a court of law. Knowing a decision to be final and binding until set aside gives expression to certainty (finality). Principles of legality and finality are both inexorable aspects of the rule of law. The existence of an invalid administrative act – which will be binding until set aside by a court or revoked by the administrator acting in terms of enabling legislative authority creates an obvious tension. This is exacerbated by considerations of fairness and administrative efficiency. Determining whether an administrator is *functus officio* is highly significant since it is dispositive of the question as to whether the decision can be varied or revoked. It is important to keep in mind that since one is dealing with invalid administrative actions, the setting aside of an invalid act by a court or tribunal and the suitable remedy to be applied arises ordinarily from the provisions of section 6 (lawfulness), and section 3 (procedural fairness) as read with section 8 (remedies) of the Promotion of Administrative Justice Act¹ (PAJA). The focal point of this paper is the *functus officio* doctrine as it pertains to invalid administrative action. A question that has often been raised in respect to invalid administrative action is whether it should be regarded as void or voidable. In the former instance the action is seen as never having taken place since it is viewed as a nullity from the beginning; in the latter, however, it remains in force until declared invalid and set aside by a court of law. It has been suggested that the courts view it as the task of the legislature to resolve the tension between legality, certainty and the need for efficient administration (hereinafter referred to as “the issues of tension”). It has also been argued that since the variation or revocation of valid (favourable) decisions and invalid (unfavourable) decisions is mired in uncertainty,² a more flexible approach with regard to various constitutional values and imperatives is required. First, this paper looks at the need for the doctrine of *functus officio* in South African administrative law in terms of general principles and whether invalid administrative action should be regarded as void or voidable. Second, it discusses whether the role played by the legislature in resolving the issues of tension is warranted. In this regard, it will be demonstrated that various constitutional and PAJA provisions currently in place are geared to resolving the issues of tension. Third, it seeks to demonstrate that despite the degree of uncertainty pertaining to the issues of tension, the courts appear to have articulated a flexible approach in this regard. Moreover, against the backdrop of the constitutional and legislative framework governing invalid administrative action – and the flexible stance taken by the courts – it is contended there is no need for the legislature to resolve the issues of tension, as this is something the courts are adequately equipped to do.

2 NECESSITY OF THE *FUNCTUS OFFICIO* DOCTRINE

2.1 General Principles

Ulpian described the doctrine of *functus officio* as follows:

[Once] a judge has articulated his judgment, he immediately ceases to be the judge ... [He] no longer has the capacity to correct the judgment because, for better or for worse, he will have discharged his duty once and for all.³

The doctrine of *functus officio* can be traced back to ancient Roman civil law and was used later in administrative law evidenced by the fact that the *princeps* was restricted from varying

1 3 of 2000.

2 De Ville *Judicial Review of Administrative Law in South Africa* (2005) 77.

3 Ulpian *Digest of Justinian* 42.1.55.

or revoking his decision.⁴ Such principles that applied to judicial matters are also applicable to decisions made by an administrative body. Whilst the *functus officio* doctrine can have application to a number of actions⁵ this paper will be focusing on the doctrine as it applies to invalid administrative acts.

The first reported case in South African administrative law dealing with the *functus officio* doctrine was *Osterloh v Civil Commissioner of Caledon*⁶ in which Bell J stated:

Having done these things, and given the notification, he has exhausted all the powers ... given him by the Act, and is entirely *functus* as to the election ... Osterloh was the member of the Council, and the Civil Commissioner's *judicial* (original emphasis) functions were at an end, and his *ministerial* (original emphasis) functions also ended, on the publication of the notifications in the *Gazette*.⁷

The power given to a commissioner in terms of an Act, once exercised means that the commissioner has discharged his functions or duties. Any attempt at exercising further powers in respect of the same matter would essentially mean the commissioner is acting unlawfully or as Pretorius contends,⁸ the *Osterloh* case:

... locates the foundation for the *functus officio* doctrine in the principle of legality and its obverse facet, the *ultra vires* doctrine in terms of which a functionary who performs an administrative act must be legally authorized to do so; in the absence of such authorization, the performance of the act would be unlawful. It is thus clear that the doctrine of *functus officio* is premised on the principle of legality.⁹

The very notion of an invalid administrative action expresses the sentiment that the necessary requirements that were lawfully required to constitute a valid decision are lacking. Lawfulness is the pith of the South African Constitution¹⁰ (the Constitution) which is expressly founded on the rule of law.¹¹

Hence, an administrator will be *functus officio* once a final decision has been made and will not be entitled to revoke the decision in the absence of statutory authority. An exception to this would be where the administrator lacked the competence to perform the act in the first place, or where the action was fraudulently performed¹² on the basis that "fraud unravels everything".¹³

4 Pretorius "The Origins of the *Functus Officio* Doctrine with Specific Reference to its Application in Administrative Law" 2005 SALJ 832–864 at 842–843.

5 Such as administrative legislative action or administrative judicial action – for further reading in this regard see Burns and Henrico *Administrative Law* 5 ed (2020) 270–271; De Ville *Administrative Law* 68–72; and Hoexter *Administrative Law in South Africa* 2 ed (2012) 276. Legislative administrative action permits the variation and revocation of legislation in accordance with s 10(3) of the Interpretation Act 33 of 1957.

6 1856 2 Searle 240.

7 at 243–244.

8 Pretorius 2005 SALJ 832 844.

9 Pretorius 2005 SALJ 832 844. The author proceeds to give a succinct discussion of cases in which the doctrine of *functus officio* was applied in the context of administrative law cases from *De Beer's Consolidated Mines v The Colonial Government* (1892) 9 SC 101 to *Cape Coast Exploration Ltd v Scholtz* 1933 AD 36. Common to the cases discussed is that the provisions of the relevant empowering statute would need to be examined to determine whether the functionary has the power to re-visit an earlier decision. If in having made such a decision the functionary has exhausted his powers, there would be no basis in law on which he could purport to vary or revoke the decision. It must be noted that reference to the principle of legality in this sense refers not to the constitutional principle of legality as introduced into administrative law with reference to the matter of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC), but rather an all-encompassing reference to actions that are lacking in lawfulness or authority to warrant interference by means of judicial review. Hoexter correctly states that: "In the pre-democratic era the principle of legality – the idea that administrators and other public actors had to act lawfully – was simply the 'obverse facet' of the *ultra vires* doctrine. As Baxter explained it, the requirements of legality were inferred from what it had been held administrators must *not* do. These requirements were then expressed negatively as the common-law grounds of review. *Ultra vires* was the negative side and legality the positive." Hoexter *Administrative Law* 122 esp. the authorities cited at fn 70 and 71.

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

11 Section 1(c).

12 See *Port Edward Town Board v Kay* 1994 1 SA 690 (D) in Burns and Henrico *Administrative Law* 5 ed (2020) 270–271 fn 204.

13 Hoexter *Administrative Law* 280.

Interests of finality demand there be certainty that administrators after having made a final decision¹⁴ will not – in the absence of express legislation permitting them to do so – vary or revoke their decisions on a whim. Certainty, finality, and lawfulness in administrative action are inseparable components of the rule of law.¹⁵

Underscoring the need for certainty, is the fact that even in the case of an invalid administrative act, such act remains valid and binding until such time that the action has been declared invalid and set aside by a court of law. It is here where the balancing of competing interests come to the fore. Whilst the principle of legality would seek to justify the withdrawal of invalid administrative acts (based on its unlawfulness), the principle of legal certainty (finality) creates a legitimate expectation that a decision once made will remain in place¹⁶ – herein exists the tension.

A decision to be regarded as final must have been passed (communicated) into the public domain in some way.¹⁷ On the other hand, where internal administrative decisions have no impact on the rights or interests of third parties, the decision may be varied or revoked.¹⁸ However, where a decision has been made which affects the rights and interests of third parties, and in the absence of express legislation permitting a variation or revocation of such decision, the administrator would have to follow a fair procedure.¹⁹

2.2 Void/Voidable versus Valid/Invalid Acts

As regards the doctrine of *functus officio*, the question is sometimes raised whether a decision is void or voidable. This lends itself to unnecessary formalism. Wade and Forsyth have pointed out that English law referred to “void” and “voidable” action as distinguishing between acts that were *ultra vires* and acts that were likely to be set aside or quashed due to an error of law. However, the House of Lords has jettisoned such terminology in favour of declaring all errors of law to be *ultra vires*.²⁰ Moreover, earmarking an administrative act as “void” or “voidable” has been criticised by reason of the fact that it is premised on distinguishing between jurisdictional errors – an administrative act would be void if performed beyond the jurisdiction and voidable when it is an error that has occurred within the jurisdiction of the administrative body.²¹ Such labelling of invalid administrative action can lead to considerable confusion given the fact that invalid administrative action, until such time that it is set aside by a court of law, has the legal consequence of being valid and binding. How does one resolve the binding nature of such an administrative act with the legal notion that it is void? The same holds true in respect of a “voidable” act.²² Abandoning terminology of “void” and “voidable” in favour of “validity” and “invalidity” aligns itself more closely with the constitutional compact in which administrative

14 Evidence of finality has been described as when a decision is published, announced or otherwise conveyed to those affected by decision – see Hoexter *Administrative Law* 278, who refers to the decision of *President of the RSA v South African Rugby Football Union* 2000 1 SA 1 (CC) in which the President’s decision to appoint a commission of inquiry took place when the President’s decision “translated into an overt act, through public notification” by way of promulgation of the notice of the appointment. Differently put, the formal and material legal force of administrative action commences on notification thereof to the subject – see Burns and Henrico *Administrative Law* 269–270. Also see De Ville *Administrative Law* 69 at fn 309 in which it is pointed out with reference to English authority that a final decision is one which is not “expressly preliminary or provisional” but final and conclusive and cannot be withdrawn in the absence of statutory authority or the consent of persons affected thereby.

15 See *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Agency and Others* (No.1) 2014 (1) SA 604 (CC); *Ex parte Minister of Safety and Security: in re S v Walters* 2002 4 SA 613 (CC) para 57; and Maxeiner “Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy” 2007 *Tulane J of Intl and Comp L* 540 546–541; and *Mulaudzi v The State* [2015] ZACC 20 para 37.

16 De Ville *Administrative Law* 79.

17 Hoexter *Administrative Law* 278; and De Ville *Judicial Review of Administrative Action in South Africa* (2005) 70 esp. the authorities cited at fn 312.

18 Burns and Henrico *Administrative Law* 271 and De Ville *Administrative Action* 79.

19 Hoexter *Administrative Law* 279; Burns and Henrico *Administrative Law* 271; and De Ville *Administrative Action* 79.

20 Wade and Forsyth *Administrative Law* 7 ed (2004) 305, referred to in Burns and Henrico *Administrative Law* 273.

21 De Ville *Administrative Action* 328 and esp. the authorities cited at fn 275.

22 In this regard see the various criticisms against employment of such terminology as succinctly pointed out by De Ville in De Ville *Administrative Action* 329–330.

law operates and functions.²³

A valid administrative action has been referred to as an unfavourable decision²⁴ or an onerous action (disposition).²⁵ An example is where the administrator grants a licence or refuses a permit. If the administrator realises that the refusal to grant the permit was incorrect, he is at liberty to change his decision on the basis that he should be afforded the opportunity of correcting his mistakes.

Notably, Wiechers was in favour of distinguishing whether the decision is void or voidable.²⁶ A void decision is one where the administrator has exceeded her power in which case the decision-maker may revoke the decision since she is not *functus officio*.²⁷ Moreover, no need exists to have such decision set aside by a court of law.²⁸ A voidable decision is one where a certain essential requirement (or jurisdictional pre-requisite) was not taken into account when arriving at a decision.²⁹ Given that the decision is lacking in a material element – for example failure to apply procedural fairness³⁰ – it is an unlawful administrative act which continues to have full force and effect until it is set aside by a court.³¹ Of particular interest is the view held by Baxter that a void decision is one where the administrator acted *ultra vires*, the effect of which is that it can simply be ignored entirely.³² Wiechers argues further that a voidable decision may be revoked by the decision-maker provided he does so within a reasonable period.³³

Baxter argues that the distinction between void and voidable acts is objectionable on the basis that one is effectively treating unlawful administrative action as lawful simply because it has either gone unchallenged or because no other remedy may be available.³⁴ In addition, earmarking administrative action as void or voidable has not escaped the criticism of various scholars.³⁵ Baxter suggests that this distinction be abandoned in favour of finding that an administrator is *functus officio* when she has made an invalid decision resulting in the administrator having to approach a court for the setting aside of the decision, unless affected parties approach a court for a suitable order or everyone would agree to its abandonment.³⁶ The reality is that whilst it is legally possible for government or a public authority to approach a court to have an invalid administrative act set aside,³⁷ in reality this rarely happens. It is the individual who is adversely affected by the act in question that is most likely to seek the setting aside of the action on judicial review in terms of PAJA.

23 De Ville *Administrative Action* 328–329 and 331.

24 De Ville *Administrative Action* 73.

25 Burns and Henrico *Administrative Law* 272.

26 Wiechers *Administrative Law* (1985) 284.

27 De Ville *Administrative Action* 327 and esp. the case authority set out in fn 262.

28 De Ville *Administrative Action* 327 and esp. the case authority set out in fn 263.

29 Such as, for example, not taking into account relevant considerations and taking into account irrelevant considerations.

30 Such as application of *audi alteram partem*.

31 Hoexter *Administrative Law* 546.

32 Wiechers *Administrative Law* 256.

33 Wiechers *Administrative Law* 168.

34 Baxter *Administrative Law* (1984) 360 and 378–379.

35 In this regard, see Baxter *Administrative Law* 356–358; Hoexter *Administrative Law* 546; De Ville *Administrative Action* 326–328; Burns and Henrico *Administrative Law* 273; *Transnet Bpk h/a Coach Express v Voorsitter*, *Nasionale Vervoerkommissie* 1995 3 SA 844 (T); and *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd* 2001 3 SA 344 (N).

36 De Ville *Administrative Action* (2005) 75–76.

37 In this regard see the cases referred to by De Ville 76 at fn 366. See also *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) in which the State President approached the court for the review and setting aside of a proclamation that would bring an Act into operation without the necessary schedules giving effect to the Act being in place. See also *President of the Republic of South Africa v South African Dental Association* 2015 4 BCLR 388 (CC) where the President had erroneously and prematurely signed into operation certain sections of the National Health Act before the regulatory infrastructure was in place.

The reference to void and voidable administrative acts has not been entirely extinguished. In this regard it is noteworthy to refer to *Spier Properties (Pty) Ltd v Chairman, Wine and Spirit Board*³⁸ wherein Davis J stated that the grounds on which it would be proper to judicially review the decision fell outside the scope of void administrative action.³⁹ In *Aquilla Steel South Africa (Pty) Ltd v Minister of Mineral Resources*⁴⁰ the Constitutional Court was called upon to decide an appeal from the Supreme Court of Appeal pertaining to the validity of prospecting rights between the applicant and a number of respondents. The court found the awarding of prospecting rights to one of the respondents, namely ZiZa (a juristic entity) by an organ of state to be invalid.⁴¹ ZiZa (with reference to *Kirland*) contended that the applicant (Aquilla Steel) was precluded from the relief it sought on the basis that the awarding of rights to it (ZiZa) by an organ of state could not simply be ignored as a *non-decision or nullity*.⁴² Cameron J held:

This is not right ... *Kirland* and *Oudekraal* are concerned with constraining misuse of the bureaucracy's power. They recognise that administrative action, even though invalid, may give rise to consequences that must be held lawful.⁴³

And further

Here it is critical to bear in mind that PAJA empowered the High Court itself to weigh the factors set out in section 8 and to determine, for itself, what remedy to afford Aquilla.⁴⁴

Paying deference to “the matter having been decided” points in the direction of the *functus officio* doctrine acting as an adjunct to the rule of law. Differently stated, this means that certainty in the sense of having to accept (and knowing) the decision to be final⁴⁵ and legal, both of which are indisputable features of the rule of law, are substantively guaranteed. What is lost in terms of notional and conceptual frustrations as they relate to invalid administrative action, reassurance is gained in terms of certainty that a factually incorrect decision or invalid administrative act must be observed and given effect to. Moreover, that the final arbiter in deciding what to do, if anything at all, with a defective decision rests with a court of law.⁴⁶

In the absence of empowering or enabling legislation authorising an administrator to vary or revoke a decision, it is only a court of law that has the necessary authority⁴⁷ to re-assess the decision and exercise its discretion in deciding how to address the invalid administrative act and whether to make an appropriate order.⁴⁸ Some factors the courts consider when doing so are:⁴⁹

- whether the decision is final since the doctrine only applies to final decisions;⁵⁰
- whether any rights or benefits have been granted – thus when it would be unfair to deprive a person of an entitlement that has already vested;⁵¹ and
- whether an administrative decision-maker may vary or revoke such a decision if the empowering legislation authorises him or her to do so (although such a decision would be subject to procedural fairness having been observed, and any other conditions).⁵²

38 1999 3 SA 832 (C). Also see *Ladychin Investments (Pty) Ltd v South African National Roads Agency* 2001 3 SA 344 (N).

39 at 846.

40 2019 3 SA 621 (CC).

41 Paragraph 91.

42 Paragraph 93. Emphasis added.

43 Paragraph 94. Footnotes omitted.

44 Paragraph 108

45 As pointed out by Pretorius, the *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality, the doctrine of finality, see Pretorius 2005 SALJ 832–864 at 832.

46 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 3 SA 481 (CC) paras 55 and 56.

47 Per Cameron J in *Merafong City Local Municipality v Anglogold Ashanti* 2017 2 SA 211 (CC) para 40.

48 By way of any one of the remedies provided for under s 8 (1)(a)–(f) of PAJA, alternatively under Rule 53, or an order in terms of s172(1)(a) of the Constitution.

49 These factors are specified by Plasket AJA in *Retail Motor Industry Organisation v Minister of Water and Environmental Affairs* 2014 3 SA 481 (CC) paras 25 to 26. The authorities contained in fns 18 to 22 of the aforesaid paras is also included including the authority contained in fns 18 to 22 of paras 25 to 26 has been included herein.

50 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 1 SA 1 (CC) para 44; Baxter *Administrative Law* 375; and Hoexter *Administrative Law* 278.

51 Baxter *Administrative Law* 373–375. See for example *Cape Coast Exploration Ltd v Scholtz & Another* 1933 AD 56 at 65.

52 Baxter *Administrative Law* 376–378; Hoexter *Administrative Law* 278–279; Rose-Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 99.

3 RELEVANT CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3.1 The Constitution

Hoexter has urged the courts to recognise the important role to be played by the legislature⁵³ in resolving the tension between legality, certainty and other values such as administrative efficiency.⁵⁴ The prevailing constitutional and legislative regime in place⁵⁵ cannot be discounted; but centre stage must be taken by the courts when they are called upon to deal with invalid administrative action. They, as demonstrated below, have an influence on the way they seek to resolve the issues of tension that beset invalid administrative action.

Section 33(1) of the Constitution enshrines the right to just administrative action that is lawful, reasonable, and procedurally fair. In *President of the Republic of South Africa & Others v South African Rugby Football Union & Others*⁵⁶ the court confirmed the primordial function of section 33 is to regulate the conduct of the public administration.⁵⁷ Each material aspect of the right to lawful, reasonable, and procedurally fair administrative action has relevance for the application of the *functus officio* doctrine and invalid administrative action.

As such, courts – when called upon – can ensure that invalid administrative acts are amended or validated (in the absence of legislation permitting the administrator to do so herself) if it is warranted. The exercise of the judicial discretion – to address the invalid administrative act – does not automatically mean that in each instance a court will validate or interfere with an invalid administrative act. It may be that there has been an extensive effluxion of time and intervening becomes impractical, alternatively disruptive, or otherwise unjust an inequitable to intervene.⁵⁸ Fraud may also be involved.

Procedural fairness demands that correct procedures be followed when making a decision (so as to be compliant with lawfulness). In relation to the *functus officio* doctrine, the *audi alteram partem* rule holds that the decision-maker must afford an affected party the opportunity to be heard before revoking or varying a decision. This appears to be the position even where revocation or variation is expressly authorised by statute.⁵⁹

Section 2 affirms the supremacy of the Constitution. Section 1(c) confirms the supremacy of the Constitution and the rule of law. It has been held that there is only one system of law, which is shaped by the supreme law, namely the Constitution.⁶⁰ The comity between the supremacy of the Constitution and the rule of law must be interpreted to mean that everyone (individuals, juristic entities and government) is subject to the law and must conduct their affairs and activities in accordance therewith.⁶¹

Basic values and principles that govern public administration are enshrined in section 195(1)(f) and (g) of the Constitution provide that:

- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

53 By way of enabling legislation which expressly provides for variation or revocation and which may also impose time limits.

54 Hoexter *Administrative Law* 278 esp. the authority cited at fn 170.

55 As discussed below.

56 2000 (1) SA 1 (CC) para 132.

57 Paragraph 132.

58 Bleazard and Budlender “Remedies in Judicial Review Proceedings” in Quinot (ed) *Administrative Law in South Africa: An Introduction* (2015) 237 at 247. In *Metal and Electrical Workers Union of SA v National Panasonic Co (Parow Factory)* 1991 2 SA 527 (C), it was held that invalid administrative action may be validated by the failure of a person entitled to challenge it to do so, by lapse of time, alternatively by the court’s refusal to enquire into its validity.

59 *Retail Motor Industry Organisation & Another v Minister of Water and Environmental Affairs & Another* 2014 (3) SA 251 (SCA) para 18.

60 *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44.

61 Henrico “Re-visiting the Rule of Law and Principle of Legality: Judicial Nuisance or Licence?” 2014 *Journal of South African Law* 742 744–745.

Section 195(1)(g) clearly addresses interests of certainty regarding the application of the *functus officio* doctrine. It provides for basic values and principles necessary for an effective governing administration. They are not rights.⁶² They are, however, capable of informing a judicial decision in terms of how to deal with the tensions pertaining to invalid administrative action and the concerns of administrative efficiency.

Section 172(1)(b) of the Constitution which permits any order that is just and equitable in terms of section 172(1)(b) and a declaration of invalidity [in terms section 172(1)(b)(i)] or suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect [in terms of section 172(1)(b)(ii)]. These remedies, specifically the term “invalidity” aligns itself notionally and conceptually with invalid administrative action, as opposed to void or voidable acts.⁶³

3.2 The Promotion of Administrative Justice Act (PAJA)

PAJA has been earmarked as legislation that prevails over earlier legislation inconsistent with the Act; in this sense it has been referred to as “‘universal’ legislation”.⁶⁴ It is the national legislation that gives effect to section 33 of the Constitution and to this end section 6 of PAJA seeks also to codify the former common-law grounds of judicial review.⁶⁵ The exercise of public power on the part of an administrator in attempting to (or actually) revisiting, amending or rescinding a decision and thereby creating potential uncertainty would ground a claim for judicial review on any one of the grounds set out in section 6 of PAJA.

Clarity regarding the above avenues that could be adopted with administrative action review applications⁶⁶ was established in *Bato Star Fishing v Minister of Environmental Affairs*⁶⁷ in which PAJA was identified as the cardinal means of review where O’Regan J stated:

The Courts’ power to review administrative action no longer flow directly from the common law but from PAJA and the Constitution itself ... The common law informs the provisions of PAJA and the Constitution and derives its force from the latter.⁶⁸

And that:

The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not the common law as in the past.⁶⁹

Various cases have stressed the importance of not bypassing PAJA and relying directly on the remedy of just administrative action as provided for in the Constitution or the principle of legality.⁷⁰ Lawfulness is at the epicenter of the constitutional principle of legality. It is also a material aspect of the right to just administrative action. It must also be recalled that lawfulness (or a breach thereof) is contained in the codified grounds of review under section 6 of PAJA⁷¹

The definition of “administrative action” as contained in section 1 of PAJA deals with what constitutes a “decision”, namely that it is:

Any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to (a) making, suspending, revoking or refusing to make an order, award or determination[...]

This aspect of PAJA offers some insight into the fact that invalid administrative action – as it

⁶² *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 44.

⁶³ Boonzaier “Good Reviews, Bad Actors: The Constitutional Court’s Procedural Drama” 2015 *Constitutional Court Review* 1 at 2–3.

⁶⁴ Per Willis J in *Sasol Oil (Pty) Ltd v Metcalfe* 2004 5 SA 161 (WLD) at 166B.

⁶⁵ See *Bato Star* para 25.

⁶⁶ Namely, under PAJA, the principle of legality, a common-law ground of review, the Superior Courts Act 10 of 2013, a specific provision of a relevant statute (For example ss 145 and 158(1)(g) of the Labour Relations Act 66 of 1995) or by relying directly on s 33 of the Constitution.

⁶⁷ 2004 4 SA 490 (CC).

⁶⁸ Paragraph 22.

⁶⁹ Paragraph 25.

⁷⁰ *S v Mlungu* 1995 3 SA 867 (CC) para 95; *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 73; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 248; *SANDU v Minister of Defence* 2007 5 SA 400 (CC) para 51; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) paras 94–6 and 437; and *De Lange v Presiding Bishop of the Methodist of Southern Africa for the time being and Another* 2016 2 SA 1 (CC) paras 53–59. An exception would be where the statute in question is constitutionally challenged.

⁷¹ See for example, sections 6(2)(a)(i)-(iii), 6(2)(e)(i-vi), 6(2)(f)(i), and 6(2)(i).

pertains to the operation of the *functus officio* doctrine – is by default dealt with under the auspices of PAJA, as opposed to the principle of legality which properly used is to judicially review the exercise of public power that does not constitute administrative action.⁷²

Section 3 of PAJA gives effect to the requirement of procedural fairness as contained in section 33 of the Constitution. Section 3(2)(a) of PAJA states that a fair administrative procedure depends on the circumstances of each case. The rationale of the aforesaid is to provide affected parties with proper notice before the variation or revocation of a right or legitimate expectation can occur.

Section 8 of PAJA makes provision for the fact that a court or tribunal may grant any order that is just and equitable, including orders “setting aside the administrative action.”⁷³ Section 6, as read with section 8, conduce to the fact that when confronted with the issues of tension arising from invalid administrative actions, a court is in an optimal position to make a decision as to the extent to which the invalidity should be addressed and rectified or set aside, which seeks to address correcting invalid administrative action. This is evidence of the extent to which the legislation (as does section 172 of the Constitution) gives impetus to flexibility.

The aforementioned constitutional and legislative provisions give considerable impetus to assisting the courts in resolving the tension issues associated with the doctrine of *functus officio* as it pertains to invalid administrative actions.

4 CASE LAW AND A FLEXIBLE APPROACH TO THE DOCTRINE OF *FUNCTUS OFFICIO*

One cannot disregard the practical and realistic factors at play. In practice, rarely would one find an administrator approaching court to have an invalid decision set aside.⁷⁴ Moreover, it is even less likely that affected parties would agree to an abandonment of a particular decision. What mechanism(s) are in place to guard against the revival of the decision and what if the decision is one which affects such a vast number of persons that procuring their consent to abandonment is unrealistic. As previously stated, when an administrator has acted in a manner that renders the action invalid, the act will always be unlawful – irrespective of whether it is void or voidable. Moreover, realistically the presence of invalid administrative action will require one to go to court to obtain an order in respect of the invalid administrative action.⁷⁵ Having considered the rationale for the *functus officio* doctrine, and the relevant constitutional and legislative provisions, it is necessary to view how the courts have approached *functus officio* in the context of invalid administrative acts.

In *Sachs v Dönges NO*⁷⁶ where the question at hand was whether a passport once granted could be revoked, the court per Van den Heever JA, answered in the negative with reference to the *functus officio* doctrine. The court went further to cite the authority of Voet:

Yet it would be the course of a wise Emperor to use his best efforts here not to bring on himself the disgrace of a shameful fickleness and lack of steadfastness in word and deed by too lightly and rashly revoking and taking away in the evening the favour which he had given in the morning.⁷⁷

In *Welgemoed and Another NNO v The Master and Another*⁷⁸ the court stated: “uncertainty should be eliminated, so that the persons concerned can safely act upon the decision, at least until such time as it is set aside on appeal or review.”⁷⁹ The *functus officio* doctrine also gives expression to the principle of finality in that a person with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.⁸⁰ Hence, an administrator will be *functus officio* once a final decision has been made and will not

⁷² See Burns and Henrico *Administrative Law* 13.

⁷³ Section 8(1)(c) of PAJA.

⁷⁴ However, case authority confirms that government is not at liberty to simply abide by an irregular decision. It must take appropriate steps to take invalid decisions on judicial review. For example, see *Khumalo v MEC for Education: Kwazulu Natal* 2014 5 SA 579 (CC) paras 29,36 and 45; and *State Information Technology Agency SOS Ltd v Gijima (Pty) Ltd* 2017 2 SA 63 (CC) paras 69–70.

⁷⁵ Hoexter *Administrative Law* 547.

⁷⁶ 1950 2 SA 265 (AD).

⁷⁷ Voet *Commentarius ad Pandectas* at 1.4.21 as translated by Gane *The Selective Voet, Being the Commentary on the Pandects* vol 1 (1955) 90 at 285 of *Sachs v Dönges NO* 1950 2 SA 265 (AD).

⁷⁸ 1976 1 SA 513 (T).

⁷⁹ At 520E-F.

⁸⁰ Pretorius 2005 SALJ 832–864 at 832.

be entitled to revoke the decision in the absence of statutory authority.

A public official purporting to vary or recall a decision in the absence of being permitted to do so will be acting in contravention of the principle of legality or particular provisions of section 6 of PAJA.⁸¹ The aforesaid legal limitations imposed upon administrators has been aptly captured in the following description:

The powers of all public authorities are subordinated to the law ... they are all subject to legal limitations; there is no such thing as absolute or unfettered administrative power ... The primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse.⁸²

For a decision to be regarded as final it must have been passed into the public domain in some way.⁸³ On the other hand, where internal administrative decisions have no effect on the rights or interests of third parties, the decision may be varied or revoked.⁸⁴ However, where a decision has been made which affects the rights and interests of third parties, and in the absence of express legislation permitting a variation or revocation of such decision, the administrator would have to follow a fair procedure.⁸⁵

It is significant to note that in *Carlson Investments Share Block (Pty) Ltd v Commissioner for the SA Revenue Services*,⁸⁶ Navsa J stated that the application of the *functus officio* doctrine in administrative law must be more flexible and less formalistic.⁸⁷ Abandoning a formalistic approach to the application of the *functus officio* doctrine in administrative law is not out of kilter with the rejection of formalism and categorisation associated with common-law judicial review of administrative action in the pre-constitutional dispensation.⁸⁸

Dealing with the issue of whether a public functionary is necessarily equipped to bring a review application to set aside or amend an administrative act that is invalid, was answered in the affirmative by the Supreme Court of Appeal in *Pepcor Retirement Fund v The Financial Services Board*.⁸⁹ Cloete JA, referred to a 1977 authority of the then Appellate Division⁹⁰ as settled law that when dealing with an invalid administrative act – as a result of an administrative error, fraud or other circumstances – then, depending on the legislation involved and the nature and functions of the public body, it may not only be entitled but obliged to raise the matter in a court of law.⁹¹ Cloete JA continues to take full account of the constitutional dispensation in which administrative law operates and expressly observes how the principle of legality should be used as a gauge by which the courts must assess powers conferred on public functionaries but also that they make decisions in the public interest.⁹²

In the case of *Merafong City Local Municipality v AngloGold Ashanti Ltd*⁹³ the Constitutional Court (per Cameron J) held that:

The validity of a decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or to ignore the decision. It remains legally effective until set aside.⁹⁴

Cameron J emphasised that:

From this it can be seen that even decisions ‘purportedly taken’ under a statute, but which lack authorisation, are subject to review under PAJA. The plain premise of PAJA is that remedies

81 Namely ss 6(2)(a)(i); 6(2)(e)(i); 6(2)(f)(i); and 6(2)(i). See also Hoexter *Administrative Law* 281.

82 Wade and Forsyth *Administrative Law* 4.

83 Hoexter *Administrative Law* 278; and De Ville *Administrative Action* 70 esp. the authorities cited at fn 312.

84 Burns and Henrico *Administrative Law* 271 and De Ville *Administrative* 79.

85 Hoexter *Administrative Law* 279; Burns and Henrico *Administrative Law* 271; and De Ville *Administrative Action* 79.

86 *Carlson Investments Share Block (Pty) Ltd. v Commissioner for the SA Revenue Services* 2001 7 JTLR.

87 At 221A-B.

88 Burns and Henrico *Administrative Law* 23–24; Devenish *Commentary on the South African Bill of Rights* (1999) 463–464.

89 2003 3 All SA 21 (SCA).

90 *Transair (Pty) Ltd v National Transport Commission* 1977 3 SA 784 (A).

91 Paragraph 10. Also see *Khumalo v Member of the Executive Council for Education: Kwa-Zulu Natal* 2013 ZACC 49 (CC) paras 46–47.

92 Paragraphs 41–47. PAJA only came into operation after commencement of the proceedings resulting in the judgment, see para 46.

93 2017 2 SA 211 (CC).

94 Paragraph 41.

are available to all who are affected by unlawful administrative action.⁹⁵

This clearly raises the issue of legality and finality. Both are axiomatic to the rule of law; however, they also give expression to the common-law rebuttable presumption that administrative acts are valid as expressed in the maxim *omnia praesumuntur rite esse acta*.⁹⁶

A somewhat unsettling anomaly arises, namely that an invalid administrative act is legally enforceable and binding until declared otherwise by a court. The fact that the administrative decision or act may be invalid is outweighed by considerations in favour of legal certainty and the effective running of a modern bureaucratic state. This much was confirmed by the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v The City of Cape Town*⁹⁷ (*Oudekraal*) the Supreme Court of Appeal confirmed:

[...] the Administrator's permission was unlawful and invalid at the outset ... Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.⁹⁸

Regard being had to flexibility – in respect of invalid administrative action, the following is apt from the dictum, namely that:

It will be apparent from that analysis that the substantive validity or invalidity of an administrative act will seldom have relevance in isolation of the consequences that it is said to have produced – the validity of the administrative act might be relevant in relation to some consequences, or even in relation to some persons, and not in relation to others – and for that reason it will generally be inappropriate for a court to pronounce by way of declaration upon the validity or invalidity of such an act in isolation of particular consequences that are said to have been produced.⁹⁹

As previously stated, the tension between legality and legal certainty is somewhat ameliorated in favour of considerations of fairness and administrative efficacy. To this end, in *Oudekraal* there is a leaning in favour of an approach adopted by Wade and Forsyth¹⁰⁰ in terms of which, while an invalid administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words:

... an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.¹⁰¹

It follows that

[t]here is no need to have any recourse to a concept of voidability or a presumption of effectiveness to explain what has happened [when legal effect is given to an invalid act]. The distinction between fact and law is enough.¹⁰²

The author concludes as follows:

[I]t has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the

95 Paragraph 52.

96 Also referred to as *omnia praesumuntur rite esse acta, donec probetur in contrarium*, as meaning "all acts are presumed to have been lawfully done (or duly performed) until proof to the contrary be adduced", see De Ville *Administrative Action* 321 and esp. fn 193.

97 2004 6 SA 222 (SCA).

98 Paragraph 26.

99 Paragraph 38.

100 Wade and Forsyth *Administrative Law* 7th ed (1994) 265.

101 Paragraph 29; and Wade and Forsyth *Administrative Law* 7th ed (1994) 147.

102 Paragraph 29; and Wade and Forsyth *Administrative Law* 7th ed (1994) 148.

invalidity of the first act.¹⁰³

Galvanising the need for finality in administrative matters is that any undue delay(s) in bringing a review may cause prejudice to a respondent and also due to the fact that undue delays in seeking to set aside invalid administrative acts are contrary to the interests of the public.¹⁰⁴

Holding that invalid administrative acts are valid until such time as set aside by a court of law may well speak to the imperative of certainty or doctrine of finality. Self-help is not countenanced.¹⁰⁵ However, aside from certainty and finality, there are other imperatives that must be taken into account. As pointed out by Plasket AJA in *Retail Motor Industry Organisation v Minister of Water and Environmental Affairs*:¹⁰⁶ "Certainty and fairness have to be balanced against the equally important practical consideration that requires the re-assessment of decisions from time to time."¹⁰⁷

Plasket AJA does mitigate the issue of tension in general and affords a more flexible approach to the application of the doctrine of *functus officio*. To this end the following dictum by Plasket AJA in *Retail Motor Industry Organisation* is apt:

The *functus officio* principle is also intended to foster certainty and fairness in the administrative process. It is not absolute in the sense that it does not apply to every type of administrative action. Certainty and fairness have to be balanced against the equally important practical consideration that requires the re-assessment of decisions from time to time in order to achieve efficient and effective public administration in the public interest. Lawrence Baxter deals with these competing factors when he explains the purpose of the principle:¹⁰⁸

'Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision¹⁰⁹ which bears directly upon an individual's interests, it is said that the decision-maker has discharged his office or is *functus officio*.'¹¹⁰

In this regard it is helpful to recall the dictum by Cameron J in *MEC, for Health, Eastern Cape v Kirland Investments (Pty) Ltd*, that:¹¹¹

For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a *vortex of uncertainty*, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid.¹¹²

Confirming the correctness of the dictum in *Oudekraal*,¹¹³ the Constitutional Court in *MEC, for Health, Eastern Cape v Kirland Investments (Pty) Ltd*¹¹⁴ (*Kirland*) per Cameron J (for the majority) held:

Pertinent to this case, PAJA provides that decisions taken because of the unauthorised or unwarranted dictates of another person or body constitute administrative action that is reviewable.¹¹⁵ If this Court were to hold that a decision taken under dictation is not a decision at all, and has no effect even before it is set aside, then there would be no need for PAJA. This provision of PAJA exists precisely because a decision taken under dictation is nevertheless a

103 Paragraph 29; and Wade and Forsyth *Administrative Law* 7th ed (1994) 159.

104 Hoexter *Administrative Law* 532 who refers in particular of the matter of *Yuan v Minister of Home Affairs* 1998 1 SA 958 (C) 968J–969A as authority for such submission.

105 *Economic Freedom Front v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC) para 74.

106 2014 3 SA 251 (SCA).

107 Paragraph 24.

108 Paragraph 24 See also Baxter *Administrative Law* 372; and Hoexter *Administrative Law* 277.

109 The decision that was made was in terms of enabling legislation, namely the Environment Conservation Act 73 of 1989, see paras 7 and 27.

110 Paragraph 24.

111 2014 3 SA 481 (CC).

112 Paragraph 103. Own emphasis.

113 *Oudekraal* has also been followed in subsequent decisions, see, for example: *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 41 and 44; *Centre for Child Law v Minister of Basic Education* 2020 1 All SA 711 (ECH) para 45; *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* 2011 3 SA 434 (WCC) para 70.

114 2014 3 SA 481 (CC).

115 Under section 6(2)(e)(iv).

decision and must be reviewed and set aside just like any other unjust administrative action.¹¹⁶

And:

The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in *Welkom*, '[t]he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.' For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid.¹¹⁷

The reference to non-decision or nullity – albeit on the part of the respondent in the matter – is evidence of the fact that the ever-looming specter of administrative action being classified as void or voidable. Fortunately, the description went no further than the respondent's submission. A reading of the judgment affirms the Constitutional Court's reference to invalid administrative action and the legal consequences that flow therefrom.

Under the constitutional dispensation, the courts have rejected former classificatory principles of judicial review or formalism.¹¹⁸ Administrative law and the judicial review of administrative action is now subject to the supremacy of the Constitution and the doctrine of legality. Chaskalson P, in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the RSA*¹¹⁹ pointed out (with reference to the interim Constitution of 1993) that:

The validity of administrative decisions [falls] within the purview of section 24 of the Constitution.¹²⁰

And that:

This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue the validity of the exercise of public power is beyond its jurisdiction.¹²¹

An abiding leitmotif between *Oudekraal* and *Kirland* is that administrators having made a decision, how incorrect or invalid it may be, cannot simply resort to self-help by revoking or recalling the decision. Having made a decision, they are *functus officio*. The invalid act is to be treated as valid until set aside by a court which is the final arbiter of legality, not the administrator herself. Thus, the legal consequence arising from a factually incorrect administrative act,¹²² is that the act itself is for all intents and purposes valid and binding in law despite the underlying factual error associated with the action. This also means that an administrator cannot simply ignore the invalid administrative act.¹²³ It also means that the invalid act (as the initial act) for as long as it is not set aside by a court remains valid and binding in law. Hence, any subsequent or second administrative act arising from the initial act will also be valid. However, as established by the Supreme Court of Appeal in *Seale v Van Rooyen NO*¹²⁴ the setting aside of the initial

116 Paragraph 96

117 Paragraph 103, footnotes omitted.

118 Burns and Henrico *Administrative Law* 22–24; Quinot *Administrative Justice in South Africa: An Introduction* (2015) 6–13; De Ville *Administrative Action* 6–9 and 79; and Hoexter "Judicial Policy Re-visited: Transformative Adjudication in Administrative Law" 2017 *SAJHR* 281–299.

119 2000 2 SA 674 (CC).

120 Paragraph 50.

121 Paragraph 51.

122 Where, for an example, an applicant applies for a liquor licence (the licence) in terms of s 23 of the Gauteng Liquor Act 2 of 2003 and the Local Committee (Local Committee) enabled in terms of the Act considers and grants the licence. This enables the applicant to open a liquor store, purchase the necessary stock and employ staff only to be informed at some later stage by the Local Committee that the licence is invalid since subsequent to it having been issued the Local Committee was alerted to certain facts which, had they considered before granting the licence – would have dissuaded them from issuing the licence.

123 In other words, active steps must be taken to have the invalid administrative action set aside or rectified. See *Kirland* paras 64–65.

124 2008 4 SA 43 (SCA).

invalid act will vitiate the validity of the second act.¹²⁵ Thus we see that the “factual existence of an act is capable of supporting subsequent acts only as long as the first act is not set aside.”¹²⁶

Account must be taken of the collateral challenge or exception. *Oudekraal* described collateral challenge or a defence to irregular or invalid administrative action. In other words, where an individual is coerced by a public authority into complying with an invalid administrative act, the subject may ignore the unlawful conduct with impunity and justify such conduct by raising what the defence now known as a collateral challenge to the validity of the administrative act.¹²⁷ As articulated in *Oudekraal*, the collateral challenge is premised on the rationale that the rule of law against which any statute is interpreted will never lend itself to an interpretation that a subject can never be coerced to perform or refrain from an act in the absence of a lawful basis for such coercion.¹²⁸

The general rule is that in the absence of an express enabling legislative provision, once an administrator has made a decision¹²⁹ it cannot be recalled, set-aside or amended by the decision maker. This is so to give effect to the principle of finality (certainty). By implication, the dictum draws on the principle of legality to the extent that it refers to a decision-making power being exercised “only once”.¹³⁰ Implicit in this aspect of the dictum is that a decision-maker who purports to exercise powers in relation to the same matter, once having already exercised powers, would be acting *ultra vires*.

It can be argued that they are conducive to the maintenance of the proper and effective running of a modern administration. If the doctrine of *functus officio* is to apply to restrain decision-makers from revisiting their decisions once having been finalised and communicated to a particular subject or subjects it may at first blush appear to be a salutary doctrine ensuring appropriate deference to legality and finality. However, the dictates of any modern administration or bureaucratic system of government does require flexibility. Such flexibility is necessary if proper effect is to be given to an efficient administration, good governance and creating a culture of accountability, openness and transparency in the public administration by giving effect to the right to just administrative action.¹³¹

Froneman J in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*¹³² referred at length¹³³ to the dictum by Moseneke DJC in *Steenkamp NO v Provincial Tender Board, Eastern Cape*¹³⁴ which provides:

It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. *The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law ... The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function ... Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.*

Examples of public remedies suited to vindicate breaches of administrative justice are to be found in s 8 of the PAJA. It is indeed so that s 8 confers on a court in proceedings for judicial

125 Paragraph 13.

126 Hoexter *Administrative Law* 550 in which reference is made to para 31 of *Oudekraal* as authority.

127 *Oudekraal* para 32.

128 *Oudekraal* para 32. For other cases in which a collateral challenge was raised see Burns and Henrico *Administrative Law* 664 and the cases cited at fn 99.

129 Such decision can be final in nature in the sense that it vests certain rights, for example the right to adopt a minor child. Alternatively, it can be of a temporary nature such as the granting of a permit for a specific period, namely a driver's licence which is valid for twelve months.

130 In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA374 (CC), Chaskalson P held at para 57: “It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.”

131 These imperatives are expressly set out in the Preamble of PAJA. For a description of PAJA as triumphal legislation giving effect to administrative justice see *Sasol Oil (Pty) Ltd v Metcalfe NO* 2004 5 SA 161 (WLD) 165F–166G.

132 2011 4 SA 113 (CC).

133 Paragraph 83.

134 2007 3 SA 121 (CC).

review a generous jurisdiction to make orders that are 'just and equitable'.¹³⁵

Notions of what is fair, just and equitable with reference to affording a person prejudiced by an invalid administrative act, yet still having regard to effective public administration are some factors the court would need to consider. Clearly one can see the inherent tension arising from competing divergent interests. But what is also apparent is a flexible approach toward the doctrine of *functus officio* in which due consideration is taken of what would be just and equitable.¹³⁶ The importance of an effective public administration has been emphasised by Baxter observing that:

[Once] an administrative official has made a decision which bears directly upon an individual's interest, it is said that the decision maker has discharged his office or is *functus officio* ... The ability of a public authority to revoke its previous decision is therefore heavily qualified.¹³⁷

The competing interests arising from an invalid administrative act (or decision) which has legal consequences¹³⁸ is *prima facie* a paradox which for many is bewildering. In seeking to address this conundrum Froneman J in *Bengwenyama Minerals (Pty) Ltd*, observed:

The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent.¹³⁹

To the extent that the dictum refers to being cautious against laying down inflexible rules and seeking just and equitable remedies and seeking to advance just administrative action, it is clear that the approach taken by the Constitutional Court is indeed one which takes cognisance of the mileage to be gained from a more flexible approach to the application of the doctrine of *functus officio*.

5 CONCLUSION

There can be no doubt that the doctrine of *functus officio* as it pertains to invalid administrative action gives rise to a tension between legality and finality. Pitted against this is the account one must take of fairness and effective administration in a modern state. What is certain, however, is that the *functus officio* doctrine is required in administrative law. This is so due to the effect it gives to legality and finality. Due account can be had of the important role played by the legislature in resolving issues of tension. However, from the cases discussed it would appear that such tension cannot be resolved by the legislature per se. It is to the courts we must look as they adopt a more flexible approach to the doctrine of *functus officio* as it pertains to invalid administrative actions. In this sense, it may be argued the courts seek to ameliorate the issues of tension and are assisted in so doing by making allowance for orders that are just and equitable in respect of invalid administrative acts, whilst not validating the act, takes account of the legal consequences that flow from such acts which consequences very often resonate with the tenets of just administrative action.

135 Paragraphs 29–30 (own emphasis) of *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC).

136 As regards invalid administrative action and a just and equitable order made pursuant thereto, see *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC).

137 Baxter *Administrative Law* 372.

138 In as much as an individual or persons of the public rely on such decision and have incurred financial costs pursuant thereto, alternatively acted on the decision in a way as to make certain decisions, such as to proceed with and finalise the adoption of a child.

139 Paragraph 85. Footnotes omitted.