

SUBSTITUTION IN THE SOUTH AFRICAN CONTEXT –
CONSTITUTIONAL PRINCIPLES IN ACTION

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ABSTRACT

This dissertation analyses the role of substitution as a remedy for maladministration in the public procurement context within modern constitutionalism in South Africa. It considers the role and position of substitution from a technical and theoretical point of view. The analysis is aimed at illustrating that substitution plays an important role within the judicial review remedial framework and that the courts have applied their minds and developed a robust test for substitution. This test is an important tool and process for the ascertainment of the ideals of the democratic and constitutional project outlined in the Final Constitution (Constitution). This analysis is conducted against the backdrop of public procurement and its links to service delivery and the furtherance of the democratic project. This is particularly important in the wake of a captured state and a generally corrupted and self-serving executive. Public procurement is crucial to public service delivery and has a direct impact on members of society who are reliant on the state for some goods or services. The remedy of substitution by the courts to this end can be seen as an example of the operationalisation of constitutional principles envisaged by the Constitution in that it promotes the rule of law while protecting and promoting human rights.

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CHAPTER 1: BACKGROUND AND CONTEXT

1.1. Introduction

This dissertation is an analysis of the role of substitution as a remedy for maladministration in the public procurement context within the modern constitutional democracy in South Africa. It considers the role and position of substitution from a technical and theoretical point of view. The analysis is aimed at illustrating that substitution plays an important role within the judicial review remedial framework, that the courts have applied their minds and developed a robust test for substitution, and that this is an important tool and process for the ascertainment of the ideals of the democratic and constitutional project outline in the Constitution of the Republic of South Africa, 1996 (Constitution).¹ This analysis is conducted against the backdrop of public procurement and its links to service delivery and the furtherance of the constitutional project.

1.2. Background

The constitutional project in South Africa is concerned with transforming 'our society from one deeply divided by the legacy of racism and unequal past into one based on democracy, social justice, equality, dignity, and freedom.'² One of the goals of the Constitution is to 'improve the quality of life of all citizens and free the potential of each person.'³ Pursuant to this, the Constitution⁴ creates positive - or affirmative - state duties that inform and act as a guide for the actualisation of the constitutional project.⁵

These duties are specifically set forth in the Bill of Rights which promises several basic services⁶ as well as in the Constitutional text more generally. The service

¹ Constitution of the Republic of South Africa, 1996. ('The Constitution').

² Davis, D *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) at 44.

³ Preamble of the Constitution.

⁴ The Constitution.

⁵ Klare, K 'Legal Culture and transformative constitutionalism' (1998) vol 14(1) *SAJHR* 152. De Vos, P and Freedman, W (eds) *South African Constitutional Law in Context* at 28.

⁶ Section 7(2) of the Constitution states that '[t]he state must respect, protect, promote and fulfil the right in the Bill of Rights.'

delivery-related rights are often referred to as socio-economic rights⁷ and include the right to a safe and healthy environment,⁸ equitable land access,⁹ housing,¹⁰ health care, food, water and social security,¹¹ and education.¹² These are essential components of constitutionalism in South Africa where,

'[w]e live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom, and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.'¹³

One way in which the state attempts to fulfil the positive obligations placed on it by the Constitution¹⁴ is through the use of public procurement. Public procurement is used pursuant to the implementation of the socio-economic development policies¹⁵ as public procurement is 'a central aspect of public service delivery.'¹⁶

Public procurement has been described as being a means to address the injustices of the past that were caused by discriminatory policies, practices, and allocation of resources.¹⁷ It has also been argued that public procurement is a mechanism through which effect can be given to the socio-economic development and transformation

⁷ De Vos & Freedman op cit 5 at 667-8.

⁸ Section 24 of the Constitution.

⁹ Section 25 of the Constitution.

¹⁰ Section 26 of the Constitution.

¹¹ Section 27 read with section 28 of the Constitution stipulates that children have a right to 'basic nutrition, shelter, basic health care services and social services.'

¹² Section 28 read with section 35(2)(e) of the Constitution states that detained persons have the right to adequate nutrition, accommodation, medical care and reading materials.

¹³ *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17) para 8.

¹⁴ Section 7(2) of the Constitution states that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

¹⁵ Turley, L and Perera, O 'Implementing sustainable public procurement in South Africa: Where to start?' (2004) *The International Institute for Sustainable Development*. See also Odhiambo W, Kamau P 'Public Procurement: Lessons from Kenya, Tanzania and Uganda' (2003) Working Paper no. 208 *OECD Development Centre* 1-20 available at <https://www.oecd.org/countries/uganda/2503452.pdf> Accessed on 1 September 2021.

¹⁶ Fourie, D and Malan, C 'Public Procurement in the South African Economy: Addressing the Systemic Issues' (2020) vol 12(20): 8692 *Sustainability* at 1. Matebese-Notshulwana, K 'Weak Procurement Practices and the Challenges of Service Delivery in South Africa' (2021) *Public Procurement, Corruption and the Crisis of Governance in Africa* at 95.

¹⁷ Bolton, P 'Government procurement as a policy tool in South Africa' (2006) *Journal of Public Procurement* vol 6(3) 193-217. Kohn, L 'The National Prosecuting Authority as Part of South Africa's Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System' (2022) vol 12(1) *Constitutional Court Review* 1-58 see footnote 57.

policies of the government.¹⁸ The Organization for Economic Cooperation and Development (OECD) defines public procurement as the practice of states and state-owned enterprises buying goods, services, and works.¹⁹ Section 217 of the Constitution requires that public procurement be carried out in 'accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'²⁰

Unfortunately, the state and state-owned enterprises have not always met the standards outlined in the Constitution. A consequence of this is that the delivery of services to the public has been negatively impacted,²¹ maladministered tenders have resulted in costly and time-consuming litigation proceedings²² and the state suffers financially as well as in public opinion as allegations of corruption rise.²³

The release of the Reports of the Judicial Commission of Inquiry into State Capture, Corruption and Fraud in the Public Sector Including Organs of State (State Capture Reports)²⁴ have brought to light the depth of the decay and corruption that has plagued South Africa in the past and present administration.²⁵ Specifically, the state capture reports have revealed that many tenders that have previously been awarded do not meet the standard set in section 217 of the Constitution and have been a site for corruption. This has a knock-on effect as public procurement issues

¹⁸ Ambe, I M 'Public Procurement Trends and Developments in South Africa' (2006) Vol 3(4) *Research Journal of Business and Management* 277–290.

¹⁹ OECD 'Public Procurement' available at <https://www.oecd.org/gov/public-procurement/> Accessed on 12 November 2022.

²⁰ Section 217 of the Constitution.

²¹ Masiya, T, Davids, Y D, & Mangai, M S 'Assessing Service Delivery: Public Perception of Municipal Service Delivery in South Africa' (2019) vol 14(2), *Theoretical and Empirical Researches in Urban Management*, 20–40.

See also Development Bank of Southern Africa 'The impact of municipal infrastructure in basic service delivery in South Africa' (2023) Available at <https://www.dbsa.org/article/impact-municipal-infrastructure-basic-service-delivery-south-africa> Accessed on 21 January 2023.

²² See *Millennium Waste Management v Chairperson Tender Board* [2007] SCA 165 (RSA) and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15.

²³ Corruption Watch *Understanding corruption in tenders* (2015) at 1-3. Available at <https://www.corruptionwatch.org.za/wp-content/uploads/2015/06/Corruption-Watch-Understanding-tender-corruption.pdf> Accessed on 26 July 2022.

²⁴ Judicial Commission of Inquiry into State Capture 'Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State Report' Volume 1-6 (2022) available at <https://www.statecapture.org.za/site/information/reports> Accessed on the 18 October 2022. Chief Justice Zondo was appointed by President Cyril Ramaphosa to lead a judicial commission of inquiry into the allegations of 'state capture, corruption and fraud within the public sector' see Government Gazette Vol. 637 No. 41774, 16 July 2018 at 5.

²⁵ Desai, R (dir) *How to Steal a Country* (2019).

have been found to 'hinder[] the acceleration of service delivery'²⁶ and negatively impact the public purse as a significant portion of the national budget is allocated to the provision of social services.²⁷ Ensuring constitutional compliance is one way in which this may be remedied.

1.3. *Problem statement*

The occurrence of state capture can be seen as being indicative of a breakdown in the check and balances mechanisms that ought to be in operation to safeguard against the abuse of power. There is thus a need for robust accountability mechanisms that are capable of rectifying issues of maladministration and minimizing the damage caused as a result of the maladministration. Judicial review is one such mechanism with substitution being one of the ways in which maladministration can be rectified. This is an example of constitutionalism in action.

For the present purposes, reference is made to the Constitution and its iteration of democratic principles.²⁸ These include human dignity, equality, the advancement of other listed human rights and freedoms for all, the supremacy of the Constitution, and the rule of law.²⁹ Based on these principles, it is advanced that substitution can be seen as an example of constitutionalism in action. It is part of the judicial review process. This process promotes the rule of law and its potential positive impact within the public procurement space and advances human rights, dignity, and equality through the betterment of service delivery. This active review and rectification is what is considered constitutionalism in action for the purpose of this thesis.

1.4. *Research question*

This dissertation seeks to evaluate the test for substitution used in the remedial stages of judicial review proceedings as an example of constitutionalism in action. This will

²⁶ Manyathi, S 'The Influence Of Procurement Practices On Service Delivery: An Analysis Of Government Legislation – Service Delivery Relationships In South Africa' (2019) PhD Thesis, Stellenbosch University at 3.

²⁷ Department of National Treasury 'Budget Review 2021' (2021) at V.

²⁸ See *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 2 at annexure 2.

²⁹ Section 1 of the Constitution.

be done against the backdrop of public procurement as it relates to service delivery. Specific attention will be paid to the construction of the test and the role of the courts within the separation of powers given the current socio-political climate and their duty as 'ultimate guardians of the Constitution. [With] not only the right to intervene in order to prevent the violation of the Constitution [but] also the duty to do so.'³⁰ The aim is to show that on a balance, substitution, and the test for substitution, is an example of constitutionalism in action. It sees the courts effectively holding other branches of government accountable which is fundamental to the rule of law. It offers effective relief in situations where human rights such as the dignity of persons within South Africa are at stake as a by-product of maladministration within the public procurement context. These link directly to the core constitutional principles upon which the South African democracy is built and as such, the test operationalises constitutional principles.

Operationalising or actioning constitutional principles refers to how the principles in the Constitution are able to be brought to life through this process and how the cogs involved in making the constitutional and democratic system work are able to function as a consequence of these principles.

1.5. *Literature review on the exceptional circumstances test vis-à-vis the test for substitution*

In one of the first pieces on the exceptional circumstances test for the purposes of substitution, Kohn provides an analysis of the exceptional circumstances test where a substitution order is sought against the backdrop of the separation of powers.³¹ Kohn begins by providing an in-depth analysis of the separation of powers and the need for a balance to be struck between the need for flexibility and legal certainty. Kohn moves from the position that the 'judiciary provides the most crucial check against abuse of

³⁰ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6, para 92-3 ('*International Trade Administration Commission*').

³¹ Kohn, L 'The Test for 'Exceptional Circumstances' Where an Order of Substitution is Sought: An Analysis of Trencon Against the Backdrop of the Separation of Powers' (2015) 7 *Constitution Court Review* at 91.

state power³² and speaks on how the court is both a player and referee in matters of judicial review.³³

Kohn is concerned with the courts being left with insufficient room for movement to be able to adequately respond to the varying demands of justice and equity, given the important role played by the courts in the separation of powers doctrine. Kohn reiterates a previously stated opinion that ‘the judiciary provides the most crucial check against abuse of state power’³⁴ while highlighting the fact that in judicial review proceedings, the court is both player and referee.³⁵

Through highlighting this dual role of the court, Kohn emphasises the need for an approach with clear guidance, for courts and litigants, when applying the exceptional circumstances test in substitution matters. It is this guided approach that ensures that the courts are cognisant of their boundaries as

‘[w]here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference.’³⁶

To this end, a brief overview of the jurisprudential development of the common law principles that were relied on and are reflected in the final *Trencon*³⁷ construction of the exceptional circumstances test. Many of the common law guidelines, such as bias, incompetence, and delay, remain applicable despite being developed prior to the adoption of the Constitution due to the overarching nature of fairness, or justice and equity. This is an all-encompassing concept that has deep, and firmly planted, roots in the South African legal system that will continue to inform how the courts adjudicate. These pre-existing guidelines assist the courts in determining what is required of them such that the order granted is one that is just and equitable and in accordance with the Constitution and the Promotion of Administrative Justice Act (PAJA).³⁸

³² Kohn op cit n31 at 91.

³³ Ibid at 93 (see footnote 12).

³⁴ Ibid at 93. See also, Kohn, L ‘The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?’ (2013) 123 *South African Law Journal* at 816.

³⁵ Kohn op cit n31 at 93 (see footnote 12) and De Vos and Freedman op cit n7 at 202.

³⁶ Kohn op cit n31 at 93-4. See also, *International Trade Administration* supra n30 para 95. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15 para 45.

³⁷ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC).

³⁸ Promotion of Administration Act 3 of 2000 (“PAJA”).

Kohn concludes that the Constitutional Court in *Trencon* went ‘some way to achieving that ever delicate balance between ensuring neither complete judicial reserve nor excessive boldness; neither inflexible rule, not utterly unguided discretion.’³⁹ She further concludes that the court provided

‘both a principled and pragmatic judgment showing mindfulness of the vital role public procurement plays in our society and concomitantly recognises the dangers of the abuse, or merely the poor exercise of public power in this context.’⁴⁰

This dissertation seeks to add to this analysis and bolster the point made by Kohn by drawing on post *Trencon* case law to illustrate how the courts have been able to take the test, as constructed in *Trencon*, and apply it with little fuss in public procurement cases. It does this in light of the findings of the State Capture Report which highlights the need for effective remedies in instances where there has been maladministration. Substitution is one such remedy at the court’s disposal should the circumstances giving rise to the litigation be sufficiently exceptional as to warrant an order for substitution.

Cachalia, in her piece ‘Clarifying the Exceptional Circumstances Test in *Trencon*: An Opportunity Missed’⁴¹ levels two critiques against the exceptional circumstances test as developed by Khampepe J in the seminal *Trencon* judgment. The first is that there is a lack of clarity surrounding the ‘nature and content of (and also the relationship between) the various factors that underlie the test.’⁴² This is based on an analysis of the various elements of the exceptional circumstances test. Cachalia draws on the case law to compare and contrast how the courts have applied, and more specifically, weighed up the different factors. She concludes that in some instances there is a strict requirement for the following specific factors; (a) in as good a position, and (b) a foregone conclusion,⁴³ while in others they seem to weigh more heavily but are not peremptory. Thus, the uncertainty with this aspect is whether factors (a) and (b) are prerequisites for substitution orders or whether they hold greater weight in the

³⁹ Kohn op cit n31 at 114.

⁴⁰ Ibid at 92.

⁴¹ Cachalia, R ‘Clarifying the Exceptional Circumstances Test in *Trencon*: An Opportunity Missed’ (2015) vol 7(1) *Constitutional Court Review* at 115.

⁴² Ibid at 133.

⁴³ Cachalia op cit n41 at 126.

decision to substitute. This discrepancy is picked up by Kohn as well in her piece on *Trencon*.⁴⁴

The second critique raised relates to the use of fairness as a 'flexibility-enhancing mechanism in the overall substitution enquiry.'⁴⁵ Here Cachalia is referring to the use of the other relevant factors⁴⁶ in the exceptional circumstances test used for substitution, including but not limited to, bias, incompetence, and delay. This critique follows on from the first critique in that there is uncertainty about whether these factors are sufficient on their own to warrant substitution, whether they are to be viewed cumulatively, or generally how they are to interact with one another.⁴⁷ What is evident from the analysis of the case law presented is that the court uses these factors when trying to determine the dictates of fairness such that the order granted is just and equitable. A further issue identified by Cachalia is that it is unclear whether the test for fairness or justice and equity, is a separate test or if it is an underlying part of the exceptional circumstances test for substitution that is to assist the court in coming to a just and equitable outcome.⁴⁸

While there is merit in the critiques levelled by Cachalia, more appreciation could be given to the very nature of fairness as a changing concept that is to be determined on a case-by-case basis. What is fair, or just and equitable, is entirely dependent on the circumstances. The absence of a definition of fairness means the court cannot necessarily develop a set of factors that must be considered within a particular hierarchical order that will be universally applicable. As a result, it is difficult to crystallise an exact test and the open list of factors should be viewed as guidelines to help the court determine whether or not granting a substitution order would be just and equitable as opposed to being viewed as a box that ought to be ticked. Cachalia was thus correct in stating that, 'once the court had resolved that it was able to take the decision itself, it considered whether there were other equitable considerations that favoured or militated against substitution.'⁴⁹

⁴⁴ Kohn op cit n31 at 92.

⁴⁵ Cachalia op cit n40 at 134.

⁴⁶ Ibid at 129-131

⁴⁷ Ibid at 117-121.

⁴⁸ Ibid at 121-3.

⁴⁹ Cachalia op cit n41 at 122.

This is where the issue of whether it is a test for fairness, a test for justice and equity, or a test for exceptional circumstances, comes to the fore. It is here that Cachalia's concerns about the apparent trade-off between legal certainty and flexibility regarding fairness find their home. Litigants having had to prepare their cases according to the existing law must be able to approach the court knowing that they have followed and applied the correct legal principles. They are unable to do this if they cannot be sure of what the court is asking for when a substitution order is sought – do they require litigants to prove that substitution as a remedy is just and equitable or that the circumstances are exceptional such that a substitution order is warranted or both?

This is how Cachalia frames the issue. It is also the point of divergence in this dissertation. It appears that the factors included in the exceptional circumstances are geared toward determining if there are reasons, based on fairness that an order should or should not be awarded. Thus, in answering the concerns about the existence of an exceptional circumstance, one would also be answering the questions about fairness. Thus, it would appear that these tests are interlinked and may, to a degree, overlap. It is therefore unnecessary to try and make a sharp distinction between the tests. This is especially true when one considers that the Constitution dictates that the court may make any order as long as it is just and equitable⁵⁰ and that the empowering legislation PAJA,⁵¹ states that substitution is only available in exceptional circumstances while also requiring that the remedy that is awarded is just and equitable.⁵² Either way, before deciding whether to substitute or not, the just and equity hurdle needs to be overcome.

In their joint piece, Cachalia and Kohn,⁵³ provide two hypothetical scenarios based on the trends they observed in the case law on remedying invalid tenders. They describe these scenarios as being 'neither novel nor unfamiliar.'⁵⁴ However, unlike their separate articles, this piece is mainly concerned with the development of compensation as a remedy for unlawful tenders that have been declared invalid by the courts, and procurement remedies more generally. This is an attempt to provide a

⁵⁰ Section 172(1)(b) of the Constitution.

⁵¹ PAJA op cit n38.

⁵² Section 8 of PAJA.

⁵³ Cachalia, R and Kohn, L 'The Quest for Reasonable Certainty': Refining the Justice and Equity Remedial Framework in Public Procurement Cases' (2020) vol 137 SALJ 659.

⁵⁴ Cachalia and Kohn op cit n53 at 660.

'principled and pragmatic guide (rather than a one-size-fits-all solution) for the systemic application of the [just] & [equitable] framework to the reviews of tenders'⁵⁵ through creating 'reasonable certainty' in the development of public procurement remedies as 'necessitated by the rule of law.'⁵⁶

The authors thus propose a two-step framework to assist the courts in their adjudicating of public procurement disputes. The first step requires that the courts conduct an 'impact analysis',⁵⁷ taking into consideration the interests of the different parties. The balancing of the interests discovered in step one is relevant to the second step. They go on to provide an open list of factors for the court to consider when engaging in this balancing exercise.⁵⁸

'They include a consideration of: (a) the nature and materiality of the irregularity or breach in light of the underlying purposes of the tenets of administrative justice and public procurement; (b) matters of practicality; (c) degrees of blameworthiness on the part of the parties involved; and (d) the availability of other remedies.'⁵⁹

This proposed framework is applied to the two hypothetical scenarios presented by the authors as a means of showing the viability of this formulation. This is a significant academic contribution that has the potential to influence the way that the courts respond to future disputes arising from public procurement matters. This thesis envisages courts using the tools at their disposal in fulfilling their role as guardians of the Constitution.

While the literature on this particular area of law may not be plentiful, the existing literature makes significant strides in the development of the body of law. Cachalia and Kohn ought to be commended for their substantial contribution to this area of law. It deserves mention that the analysis presented by these authors is much needed in light of state capture and the influx of adjudication arising from tender irregularities. One hopes that the courts rise to the challenge and deliver on their mandate by taking a potentially bold stand and leading the country through this dark period into a period of light permeated by a 'culture of justification.'⁶⁰

⁵⁵ Ibid at 697.

⁵⁶ Ibid at 661.

⁵⁷ Ibid.

⁵⁸ Ibid at 697

⁵⁹ Ibid.

⁶⁰ Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) vol 10 *South African Journal of Human Rights* at 32.

1.6. *Methodology*

This dissertation draws on and examines the views expressed in administrative and constitutional law textbooks, academic journal articles, online publications, and relevant case law. The views presented in this dissertation were also informed by current affairs, namely those surrounding state capture and the resultant service delivery issues.

1.7. *Limitations*

This dissertation has two primary limitations. The first relates to the limited pool of literature on the exceptional circumstances test (referred to as the test for substitution in this thesis) from which to draw. The second is that this dissertation focuses on the public procurement context in South Africa only.

1.8. *Structure of thesis*

The first chapter provides the background and context of the research presented in this dissertation. The second chapter examines the construction of the test for substitution by tracing its jurisprudential development leading up to the seminal *Trencon* judgment. This is done to show that the so-called exceptional circumstances test has always been a substitution test and has been developed in a manner that is sensitive to the tenets of the separation of powers doctrine as well as the dictates of fairness and justice and equity given that the remedy in and of itself only becomes available in exceptional circumstances. The third chapter considers contemporary case law to deduce how the substitution test is used to operationalise constitutional principles through the way that the courts use it to referee and steer the greater state machine. The fourth chapter provides an analysis of the role of the courts and highlights their importance against the backdrop of state capture. Concluding remarks are presented in the sixth and final chapter.

CHAPTER 2: THE TEST FOR SUBSTITUTION AS AN EXCEPTIONAL REMEDY

2.1. Introduction

This chapter seeks to show that the exceptional circumstances test (hereinafter the test for substitution) has been developed in a manner that is sensitive to the tenets of the separation of powers doctrine as well as the dictates of fairness and justice and equity. This chapter will provide a brief overview of the legislative framework that houses this exceptional remedy. A brief history of the jurisprudential development of the test will be presented with an emphasis on the formulation of the test in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC).⁶¹ This serves to illustrate that the test was always a test for substitution and that it is only in recent years that the test has been expected to do the heavy lifting of being the test for the exceptional circumstances necessary to trigger the second class of remedies provided for in section 8(1) of PAJA.⁶² Furthermore, an analysis of the court's role within this jurisprudential context will be presented.

2.2. The empowering legislative framework

2.2.1. Constitutional order

It is important to draw attention to the constitutional order that exists in South Africa as it grounds the discussion of the empowering legislative provision in this chapter. Attention is primarily drawn to the supremacy of the Constitution and the separation of powers doctrine that is implicit in this constitutional order.⁶³

The Constitution⁶⁴ brought with it a fundamental shift in the legal culture in South Africa. Mureinik has described this as being a shift from a 'culture of authority to a culture of justification'⁶⁵ where parliamentary sovereignty was replaced with constitutional supremacy.⁶⁶ 'South Africa's democratic constitutional dispensation' is

⁶¹ *Trencon (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* (58961/2012, 70100/2012) [2013] ZAGPPHC 147 (3 June 2013).

⁶² Section 8 of PAJA.

⁶³ *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 2 para 54.

⁶⁴ Constitution of the Republic of South Africa, 1996.

⁶⁵ Mureinik op cit n60.

⁶⁶ Section 1(c) of the Constitution. See also Hoexter, C & Penfold, G (eds) *Administrative Law in South Africa* (2021) 3ed at 39.

based on the notion of constitutional supremacy.⁶⁷ Importantly, under constitutional supremacy any 'law or conduct inconsistent with it [the Constitution] is invalid, and the obligations imposed by it must be fulfilled.'⁶⁸

Accompanying this shift is the notion of transformative constitutionalism⁶⁹ which flows from the epilogue of the Interim Constitution stating that the Constitution provides;

'a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.⁷⁰

Chaskalson P, with reference to the Interim Constitution, described the shift to a system of constitutional supremacy as a 'legal watershed' that 'shifted constitutionalism, and with it all aspects of public law.'⁷¹ As a result,

'Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised.'⁷²

In the dicta above, Chaskalson P is alluding to the role of the courts within the separation of powers doctrine, as introduced by the Constitution. While not expressly mentioned in the text of the Constitution,⁷³ the separation of powers is a fundamental legal doctrine. This doctrine aims to ensure that power is not concentrated in the hands of a few and is informed by four key principles; the division of governmental power, separation of functions, separation of personnel, and checks and balances.⁷⁴

Added to this is the fact that,

'transformation is not the responsibility that must be borne by the courts alone - it is a task for all three arms of Government to perform in partnership. Widespread transformation of economic and social conditions is beyond the powers of the courts alone. Only when our judicial commitment is coupled with legislative reform and

⁶⁷ De Vos & Freedman op cit n5 at 54.

⁶⁸ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 38.

⁶⁹ Langa, P 'Transformative Constitutionalism' (2007) 17 *Stellenbosch L. Rev.* 351.

⁷⁰ Constitution of the Republic of South Africa, Act 200 of 1993.

⁷¹ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 at para 45 ('*Pharmaceuticals*').

⁷² *Pharmaceuticals* supra para 45.

⁷³ Kohn op cit n31 at 91. De Vos & Freedman op cit n5 at 60 (see footnote 88 which states that 'Constitutional Principle VI of Schedule 4 of the interim Constitution provided: "There shall be a separation of Powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability. Responsiveness and openness."')

⁷⁴ De Vos & Freedman ibid at 61.

appropriate executive action can the vast disparities that continue to exist in South Africa be eradicated.⁷⁵

The separation of powers doctrine is regularly accompanied by the concept of judicial deference. As Per O'Regan

'[t]he role of the courts under our Constitution is to protect the Constitution, and in particular individual fundamental rights. At times, in asserting this function, courts will have to intrude to some extent on the terrain of the legislature and the executive. In doing so, however, it is clear from the jurisprudence that is emerging that courts must remain sensitive to the legitimate constitutional interests of the other arms of government and seek to ensure that the manner of their intrusion, while protecting fundamental rights, intrudes as little as possible in the terrain of the executive and the legislature.'⁷⁶

The appropriate concept of judicial deference has been the site of much debate and no lines in the sand have been drawn around the questions surrounding when and to what extent a court should intervene in the arena of the legislature and executive.⁷⁷ This is becoming an increasingly pressing issue as expounded by Pieterse below;

'Given the executive's stranglehold over the legislature, citizens increasingly look to the judiciary to ensure accountability and for the protection of their basic interest. Today, the judiciary acts both as watchdog over the other branches' adherence to the doctrine of separation of powers and as primary protector of citizens' rights within its confines. In South Africa, as elsewhere, this reality has been underscored by the introduction of a justiciable Bill of Rights, which "fundamentally changed the place of the judiciary in South Africa's constitutional and political order."⁷⁸

The separation of powers as presented in the Constitution,⁷⁹ unlike the concept of judicial deference, however, does not take into consideration the occurrence of a

⁷⁵ Langa op cit n69 at 358.

⁷⁶ O'Regan, K 'Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' (2005) *PER/PELJ* at 132.

⁷⁷ Davis, D M 'To Defer and then When? Administrative Law and Constitutional Democracy' (2006) *Acta Juridica* 23-41; Dyzenhaus, D 'Law as Justification: Etienne Mureinik's conception of legal culture' (1998) vol 14 *SAJHR* 11; Plasket, C 'Judicial review, administrative power and deference: A view from the bench' (2018) 135 *SALJ* 502; Wallis, M 'Do We Need Deference' (2018) vol 1 *South African Judicial Education Journal* 97; Hoexter, C 'The future of judicial review in South African administrative law' (2000) vol 117 *SALJ* 484.

Klaasen, A 'Public litigation and the concept of "deference" in judicial review.' (2015) vol 18(5) *Potchefstroom Electronic Law Journal* 1901-1929.

⁷⁸ Pieterse, M 'Coming to Terms with the Judicial Enforcement of Socio-economic Rights' (2004) *SAJHR* 383-417 at 383.

⁷⁹ The separation of powers doctrine, as put forward by the Constitution, has been understood to be concerned with the strict checks and balances between branches from the realm of the branch doing the checking and balancing. Deference on the other hand appears to involve the checking of the extent of encroachment by the branch exercising the checks and balance against the branch being subjected to the check and balance mechanism. This exercise of restraint is motivated by the appreciation for the nuanced circumstances that surround the exercise of authority by the branch under scrutiny which are not always readily appreciable by the checking branch. This has been a

party dominant democracy which is when a single political party ‘succeeds in winning at least four consecutive national elections’⁸⁰ as the African National Congress (ANC) has been able to do, winning all the elections since the first democratic elections. A potential problem, which has unfortunately played out in the South African legal-political sphere, is the erosion of the proper functioning of checks and balance mechanisms. One only needs to reflect on the news and reports of state capture to find evidence of a struggling system of checks and balances.⁸¹

So, while the separation of powers doctrine is deeply engraved in the constitutional dispensation, we need to be alive to the socio-political climate within which it operates and the challenges this poses to the functioning of the doctrine. South Africa has seen the emergence of a phenomenon dubbed ‘lawfare’⁸² or the ‘judicialization of politics.’⁸³ The judicialisation of politics refers to the ‘growing reliance on adjudicative means for clarifying and settling fundamental moral controversies and highly contentious political questions.’⁸⁴ This sees the courts playing an increasingly political role, while also having to pick up the slack for the improper functioning of the checks and balances mechanisms between the legislature and the executive, which

bone of contention in the debate on the appropriate theory of deference. Thus, when stating that the separation of powers does not take into consideration the occurrence of a one-party dominant democracy in the same way deference done, what is meant is that when originally conceived the separation of powers moved from the premise that, through the doctrine, power will not be concentrated. Deference, on the other hand, appears to take cognizance of the realities of power placement and the court’s responsibility to protect the Constitution, even if that means reaching beyond the scope of the judicial branch of government.

⁸⁰ Du Toit, P & De Jager, N ‘South Africa’s Dominant-Party System in Comparative Perspective’ (2014) vol. 10 *Taiwan Journal of Democracy* at 93. See also Ellmann, SJ ‘The Struggle for the Rule of Law in South Africa (Symposium: Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence and the Transition to Democracy)’ (2016) vol. 60 *New York Law School Law Review* at 59. See also Choudhry, S ‘He Had a Mandate” The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) vol. 2 *Constitutional Court Review* at 1, 3, and 8-19.

⁸¹ Mahlangu, I ‘State capture Nulane Investments case gets under way in Bloemfontein’ *Sowetan Live* 23 January 2023 available at <https://www.sowetanlive.co.za/news/south-africa/2023-01-23-state-capture-nulane-investments-case-gets-under-way-in-bloemfontein/> accessed on 4 February 2023; Maeko, T & Bates, E ‘Trial of Molefe and Co gathers steam’ *Business Day* 29 August 2022 available at <https://www.businesslive.co.za/bd/national/2022-08-28-brian-molefe-among-high-profile-arrests-as-more-transnet-executives-join-r93m-capture-case/> accessed on 4 February 2023; Mabuza, E ‘Four charged for SA Express tender corruption’ *Business Day* 1 available at <https://www.businesslive.co.za/bd/national/2022-10-01-four-charged-for-sa-express-tender-corruption/> accessed on 4 February 2023.

⁸² Corder, H & Hoexter, C ‘Lawfare’ in South Africa and Its Effects on the Judiciary’ (2017) vol 10 *African Journal of Legal Studies* at 118-120.

⁸³ Roux, T ‘The Constitutional Court’s 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?’ (2020) vol 10 *Constitutional Court Review* at 13.

⁸⁴ Hirschl, R “The judicialization of politics” in Goodin R *The Oxford Handbook of Political Science* (2011) *Oxford University Press* at 254.

are populated by members of the same political party.⁸⁵ This is a dynamic that needs to be borne in mind when engaging with the material in this dissertation.

2.2.2. *The Constitution*

Judicial review has been described as being

‘concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power’⁸⁶

Judicial review is rooted in section 33 of the Constitution⁸⁷ which empowers the courts to intervene in matters that fall within the realm of administrative action.⁸⁸ Section 33 is also the Constitutional anchor for PAJA.⁸⁹ Furthermore, it has been portrayed as ‘the heart of [the] transition to a constitutional democracy.’⁹⁰ The inclusion of this right is a testament to the vital role played by administrative justice during the pre-democratic era – a role so vital that it needed to have its position solidified in the Constitution. Administrative justice, specifically through judicial review, was the vehicle through which the courts, under a system of parliamentary supremacy were able to curb some of the excessive abuse of state power.⁹¹

Section 172 of the Constitution⁹² strengthens section 33 and PAJA by performing two functions. First, it places an obligation on the courts to declare any law

⁸⁵ Dent, K ‘Lawfare and legitimacy: The wicked problem of judicial resilience at a time of judicialisation of politics in South Africa’ (2021) (PhD Thesis) *University of Cape Town*.

⁸⁶ *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL) at 154d.

⁸⁷ Section 33 of the Constitution states the following:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has; the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights and must-
 - (a) provide for the review of administrative action by a court or, where appropriate,, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.

⁸⁸ Hoexter & Penfold op cit n66 at 147.

⁸⁹ Preamble to PAJA which states the following:

‘To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto.’

⁹⁰ *Joseph v City of Johannesburg* 2010 (4) SA55 (CC) para 45.

⁹¹ Corder, H ‘Crowbars And Cobwebs: Executive Autocracy And The Law In South Africa’ (1998) vol 5(1) *South African Journal on Human Rights* 1-25.

⁹² Section 172 of the Constitution details the powers of courts in constitutional matters:

- (1) When deciding a constitutional matter within its power, a court –
 - a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - b) may make any order that is just and equitable, including...

or conduct that is inconsistent with the Constitution invalid, and second, it tasks the courts with crafting a remedy that is just and equitable.⁹³ Section 172(1)(b), specifically, provides constitutional support for section 8 of PAJA⁹⁴ in that it empowers the court to make ‘*any order that is just and equitable.*’⁹⁵ The Constitution thus lays a firm foundation for both an empowered judiciary and just and equitable remedies.

2.2.3. *The Promotion of Administrative Justice Act*

PAJA is the legislation enacted to give effect to the section 33 constitutional right to just administrative action. It governs the judicial review of administrative actions and provides the court with an arsenal of remedies. These remedies are contained in but are by no means constrained to, section 8 of PAJA. A brief reading of this section reveals that there are two classes of remedies. The first applies in ‘ordinary’ circumstances and includes setting aside and remittal.⁹⁶ While the second class of remedies contains remedies the use of which are reserved for exceptional circumstances only and include substitution and compensation.⁹⁷

Substitution refers to a situation whereby a court (or tribunal) substitutes the decision of the administrator for that of their own.⁹⁸ The courts, in public procurement disputes, are often called on to award this remedy to aggrieved parties but PAJA fails to provide a definition of or guidelines for what would constitute an exceptional circumstance, nor does it specify what is meant by the term ‘just and equitable.’⁹⁹ This has resulted in the courts turning to the common law to supplement the definitional deficiencies in the legislation.¹⁰⁰

The common law, despite some haphazard development,¹⁰¹ has birthed what is referred to in this thesis as the test for substitution.¹⁰² While the inner workings of

⁹³ Section 172 of the Constitution.

⁹⁴ Section 8 of PAJA.

⁹⁵ Section 172 of the Constitution. Own emphasis added.

⁹⁶ Section 8 of PAJA.

⁹⁷ Ibid.

⁹⁸ *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape* 2007 (6) SA 442 (Ck) para 43.

⁹⁹ Kohn op cit n31 at 92. Cachalia op cit n41 at 126.

¹⁰⁰ Kohn ibid at 92. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15 *Bato Star*) para 22.

¹⁰¹ Kohn ibid.

¹⁰² This test is known as the exceptional circumstances test at common law.

this test are still the subject of some debate, what is clear is that the PAJA is to be congruent with section 33 of the Constitution and the larger constitutional schema.

2.3. *The nature of public law remedies*

The legal framework outlined above exists against the backdrop of section 38 of the Constitution which states that

'anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'¹⁰³

Appropriate relief has been interpreted to mean that the remedy awarded is 'effective.'¹⁰⁴ Judicial review tends to yield remedies that are public in nature and are concerned with a broader range of interests.¹⁰⁵ Public law remedies are usually awarded in judicial review cases 'to afford the prejudiced party administrative justice whilst advancing efficient and effective public administration compelled by constitutional precepts and, at a broader level, to entrench the rule of law.'¹⁰⁶

*Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)*¹⁰⁷ highlights the tension between the 'corrective principle' which 'allows correction to the extent of the constitutional inconsistency'¹⁰⁸ and the need for an order that is just and equitable and in line with the public interest.¹⁰⁹ The court in *Allpay* considered the broader ramifications of their order when crafting a just and equitable remedy. Whether an order is just and equitable

¹⁰³ Section 38 of the Constitution.

¹⁰⁴ *Fose v Minister of Safety and Security* 1997 (3) SA 786 para 69.

¹⁰⁵ Bleazard, J, Budlender S (SC) & Finn, M 'Remedies in judicial review proceedings' in Gio Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2021) 2 ed 271-320 at 273.

¹⁰⁶ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras 29-30 ('*Steenkamp*').

¹⁰⁷ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12. ('*Allpay*')

¹⁰⁸ *Supra* paras 32 and 45.

¹⁰⁹ *Steenkamp NO* op cit n106 para 29.

will depend on the circumstances surrounding the matter and the consequences that will inevitably flow from said order. This speaks to the real-world consequences that need to be borne in mind when public law remedies are sought. *Allpay* provides insight into the type of considerations that should be borne in mind when seeking to craft a just and equitable remedy. This case differs significantly from the subject matter of this dissertation, but the lessons are transferable.

The court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* summarised this as,

'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.'¹¹⁰

2.4. *Trencon (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*

In the seminal Constitutional Court judgment of *Trencon (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*,¹¹¹ Khampepe J, writing for a unanimous bench expressly undertook the task of '[clarifying] the test for exceptional circumstances where a substitution order is sought'¹¹² which is the test for substitution by another name. In doing so, Khampepe J positioned *Trencon* as the locus classicus in establishing an exceptional circumstance such that an extraordinary remedy, such as substitution, is warranted.

2.4.1. *Facts of the case*

The facts that gave rise to litigation can be summarised as follows.¹¹³ Both Trencon and Basil Reed responded to the call for tenders issued by the Industrial Development Corporation of South Africa (IDC). After an approximately four-month-long procurement process, the tender was awarded to Basil Reed. Trencon, as the

¹¹⁰ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26 para 85.

¹¹¹ *Trencon* supra n37.

¹¹² *Supra* para 32.

¹¹³ See also Kohn op cit n31 at 100-102 and Cachalia op cit n41 at 124-5.

unsuccessful bidder, approached the court a quo seeking an order reviewing and setting aside the IDC's decision to award the tender to Basil Reed. Relying on section 8 of PAJA, Trencon further prayed for a substitution order to be granted in their favour. Trencon alleged that the IDC's decision was based on a material error of law and that procedural irregularities were stemming from the late submission of Basil Reed's initial proposal that was accepted by the IDC for consideration. It is on these grounds that the decision was subjected to judicial review.

The High Court found that there had been a material error of law and an irregularity that was material to the decision to award the tender.¹¹⁴ Both findings, individually, were sufficient to warrant an order reviewing and setting aside the decision. The application was thus successful, and the court substituted the IDC's decision and awarded the tender to Trencon as per section 8(1)(c)(ii)(aa) of PAJA. The IDC successfully appealed the order of the High Court to the Supreme Court of Appeal (SCA).¹¹⁵ The SCA found that the High Court erroneously concluded that there was a foregone conclusion when in fact the IDC was not obliged to award the tender to the lowest bidder or to award the tender at all.

Further, the High Court failed to properly consider the substitution order from a separation of powers point of view. Consequently, the SCA, in the absence of exceptional circumstances, ordered that the decision be remitted to the IDC for reconsideration as stipulated in section 8(1)(c)(l) of PAJA.¹¹⁶ This order was then taken on appeal to the Constitutional Court, where it was finally settled.

The Constitutional Court upheld the appeal and reinstated the substitution order as initially awarded by the High Court.¹¹⁷ Beyond this, Khampepe J, writing for a unanimous bench, expressly sought to clarify the exceptional circumstances test¹¹⁸ positioning *Trencon* as the authority on the question of when, and under what circumstances, an extraordinary remedy, such as substitution, is warranted.

¹¹⁴ *Trencon (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* (58961/2012, 70100/2012) [2013] ZAGPPHC 147 (3 June 2013) para 44.

¹¹⁵ *Industrial Development Corporation of South Africa Limited v Trencon Construction (Pty) Limited and Another* (642/2013) [2014] ZASCA 163; [2014] 4 All SA 561 (SCA) (1 October 2014).

¹¹⁶ *Trencon* (SCA) supra n115 para 18.

¹¹⁷ *Trencon* supra n37.

¹¹⁸ Supra para 32.

2.4.2. *The Trencon formulation*

The test as constructed by Khampepe J writing for a unanimous bench is thus,

'To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'¹¹⁹

Restated, for a substitution order to be warranted, the court needs to be in as good a position, and there needs to be a foregone conclusion. These have been described as being two interlinked requirements requiring the court to have sufficient institutional and related competence such that they can appreciate the information placed before them and confidently conclude whether there is in fact a foregone conclusion.¹²⁰ Furthermore, there needs to be at least one of the identified just and equitable considerations present.

This is a culmination of more than 70 years of jurisprudence which was ultimately guided by varying notions of fairness. The factors identified were used as a means to determine what fairness within that particular context referred to. This is an important factor to remember when applying the exceptional circumstances test, given the overarching requirement for a just and equitable outcome. This approach is supported by the broader legal framework which has also been shown to be geared toward ascertaining fairness or justice and equity.

2.5. *The jurisprudential development of the exceptional circumstances test*

As noted above, the test for substitution has been developed for more than seven decades and despite evolving under different socio-political regimes, the overarching notion of fairness that guided the development of the test we use today ultimately allows the test to retain its applicability in the constitutional era. Added to this is the

¹¹⁹ Supra para 47.

¹²⁰ Kohn op cit n31 at 98 and 104 (see footnote 85-8).

fact that many of the seminal judgments relied on in the development of the test for substitution were, to a large extent, concerned with the award of substitution orders in either procurement disputes or disputes related to the public having access to services and amenities.

This is significant as this thesis seeks to show that the test for substitution in public procurement disputes is fit for purpose and is an example of constitutionalism in operation. This narrowed view is informed by the fact that the test was developed for a particular purpose – testing when it is fair to substitute. It is unclear as to when exactly the test became the exceptional circumstances test that ought to be applied more widely.

A chronological, but succinct account of the jurisprudential development of the relevant legal principles as reflected in the final *Trencon* construction of the test for substitution will be presented to illustrate the above. Given how extensive the jurisprudence is, attention will only be paid to the seminal cases that were most often cited by the subsequent superior courts.

2.5.1. Case law from the pre-Constitutional era

This analysis will begin with the 1903 case of *Johannesburg Consolidated Investment Company v Johannesburg Town Council*.¹²¹ This developmental period spans almost 70 years and will be concluded with the 1969 case of *Johannesburg City Council v Administrator, Transvaal*.¹²² The first case is important as the description of the subject matter of the case provided by Innes CJ is similar to the definition of administrative action and the remedial powers conferred upon the courts in the constitutional dispensation. This automatically indicates that these types of disputes ought to fall within the ambit of PAJA and the court's jurisdiction. While the subject matter of this case may differ from the focus of this paper, this indication sets us on the path for further development in this realm and can be seen as being the foundation of the test for substitution through judicial review.

¹²¹ *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111 (TS) ('*Johannesburg Consolidated Investments*' 'JCI').

¹²² *Johannesburg City Council v Administrator, Transvaal* [1969] 2 All SA 173 (T) ('JCC').

The dispute in *Johannesburg Consolidated Investments* turned on the interpretation of the word ‘review’ as used in Proclamation No. 14 of 1902¹²³ where section 10 provided for the ‘right of review.’¹²⁴ Innes CJ, writing for the majority, held that there are three categories of review.¹²⁵

‘The first is the process by which, apart from appeal, the proceedings of lower courts are brought before a superior court in respect of grave irregularities or illegalities occurring in the course of the proceedings. The second category is the review at common law of the proceedings of quasi-judicial bodies; that is, where “a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty.” The third category of review is that where the “[l]egislature has from time to time conferred upon this Court or a Judge a power of review which in my opinion was meant to be far wider than the powers which it possesses under either of the review procedures to which I have alluded.”’¹²⁶

It is the second category of which is relevant for the present purposes, namely,

‘[w]henever a public [authority] has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and *set aside or correct them*. This is no special machinery created by the Legislature; it is a right inherent in the Court, which has jurisdiction to entertain all civil causes and proceedings arising within the Transvaal. The non-performance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a cause as falls within the ordinary jurisdiction of the Court.’¹²⁷

This can be construed as being an early semblance of substitution, through correction, orders being used by the courts in the remedial stages.¹²⁸ This is indicative of an empowered judiciary which is what is envisioned by the likes of Judge Dennis Davis who highlights that the courts, in the democratic era, no longer need to ‘jockey’ for space to exercise their authority in a way that impacts the administration.¹²⁹ Following from having established that the court has the requisite jurisdiction to review, set aside and correct a decision of an administrator, more specific principles have since been carved out in the common law.

*Livestock and Meat Industries Control Board v Garda*¹³⁰ is a prime example of the said developed legal principles. Here the court was approached to settle a dispute

¹²³ Justice Proclamation, No. 14 of 1902.

¹²⁴ *JCI* supra n121 para 114.

¹²⁵ Supra paras 114-6.

¹²⁶ Erasmus, HJ ‘Judicial Review of Inferior Court Proceedings’ (2015) vol 1 *TSAR* at 95.

¹²⁷ *JCI* supra n121 at 115. Own emphasis added.

¹²⁸ *Suliman Tayob and Company v Magistrate, Potchefstroom* 1920 TPD 284 (TPD).

¹²⁹ Davis op cit n77.

¹³⁰ *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) (‘*Livestock*’).

between the respondent Garda, a butcher, and the Livestock and Meat Industries Control Board from which a transfer of certification was sought. The Board declined to transfer the 'certificate of registration'¹³¹ on the basis that 'the area in question was adequately catered for by the existing butcheries.'¹³² The court found that the Board was not empowered by any provision to exercise discretion in this regard and that it seemed that

'the question of the numerical adequacy of butcheries in an area is one in which can safely be left to the licensing authorities. Furthermore, it does not seem to me that the restriction of the number of local butcheries is compatible with the broad purpose and purview of Act 26b of 1937.'¹³³

The final hurdle for the court to overcome in coming to its decision was whether it ought to interfere with an order given by the court a quo. It is in this enquiry that the court begins to flesh out what would become the factors of the test for substitution and exceptional circumstances more broadly, before deciding to dismiss the appeal with costs.

The court in *Livestock* provided a snapshot of the pertinent principles at play before concluding that,

'the Court has a discretion, to be exercised judicially upon a consideration of the facts of each 'case, and that, although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.'¹³⁴

In coming to this conclusion the court reflected on the other existing common law principles and considered: i) whether there was a foregone conclusion (*Norman Anstey & Co. v Johannesburg Municipality*),¹³⁵ ii) whether there would be a good purpose served from remitting the matter based on certain other considerations (*Maske and Gilbert v The Aberdeen Licensing Court*),¹³⁶ iii) what would be practical given the impact on the relevant person's rights (*Gildenhuis v Parys Liquor Licensing Board and Another*),¹³⁷ iv) whether the decision would be properly reconsidered with a fresh mind (*Essack v Durban City Council*),¹³⁸ and v) would it be possible for the

¹³¹ Ibid at 490.

¹³² Ibid at 491.

¹³³ Ibid at 491.

¹³⁴ *Livestock* supra n130 at 492.

¹³⁵ *Norman Anstey & Co. v Johannesburg Municipality* 1928 WLD 235 at 262.

¹³⁶ *Maske and Gilbert v The Aberdeen Licensing Court* 1930 A.D. 30 at 45.

¹³⁷ *Gildenhuis v Parys Liquor Licensing Board and Another* 1957 (4) S.A. 142 (0) at 151.

¹³⁸ *Essack v. Durban City Council* 1953 (4) S.A. 17 (N) at 23.

matter to be properly considered on its merits (*Adam's Stores (Pty.), Ltd. v Charlestown Town Board and Others*).¹³⁹

The legal position outlined in *Livestock* was reviewed and affirmed in *Vries v du Plessis*¹⁴⁰ and then confirmed in *JCC*.¹⁴¹ The court in *JCC* found that there was an emerging pattern that could be replicated and applied in similar matters to guide proceedings.¹⁴² The issue before the court in *JCC* turned on 'which source of supply [would] be more advantageous to the ratepayers and consumers-bulk supply by Escom or local generation by the Council itself.'¹⁴³ This saw Escom and the City Council of Johannesburg vying over who ought to supply power.

The relief sought from the court was effectively a substitution order as the applicants requested that the court make the decision themselves and award the tender accordingly rather than referring the matter back to the administrator for reconsideration. The court referred to *Livestock*¹⁴⁴ and relied on the case law discussed therein in coming to its conclusion.¹⁴⁵ The applicants were unsuccessful, and the matter was ultimately referred back to the administrator for reconsideration despite the administrator previously having made two procedural errors. The court found that a third error was unlikely and noted the absence of bad faith. In having due regard to the delays and the court stated that the 'erection of the power station will take years, and at most a few weeks can be saved if the Court assumes the Administrators function.'¹⁴⁶

¹³⁹ *Adam's Stores (Pty.), Ltd. v Charlestown Town Board and Others*, 1951 (2) S.A. 508 (N).

¹⁴⁰ *Vries v du Plessis*, NO 1967 (4) S.A. 469 (S.W.A.) at 842.

¹⁴¹ *JCC* supra n122.

¹⁴² *Supra* at 178 where the following was held:

'1) The ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.

2) The Court will depart from the ordinary course in these circumstances:

(i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.

(ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.'

¹⁴³ *JCC* supra n122 at 174.

¹⁴⁴ *Livestock* supra n130.

¹⁴⁵ *JCC* supra n122 at 178.

¹⁴⁶ *JCC* supra n122 at 179.

Furthermore, the court noted that the second respondent would be entitled to place a counteroffer before it if it were to step into the shoes of the decision-maker. These factors, considered cumulatively, led the court to the conclusion that it would be 'wrong'¹⁴⁷ of them to take the decision themselves. Furthermore, this decision saw the court introduce bad faith as a factor to be considered in these types of enquiries.

In a later judgment, the court in *C and Another v Commissioner of Child Welfare Wynberg*¹⁴⁸ relied on *Livestock* in finding that they were empowered to substitute a decision of an administrator with its own.¹⁴⁹ In coming to their decision not to substitute the court applied the *JCC* formulation and found that it would be 'far from proper'¹⁵⁰ for a substitution order to be granted. Steyn J was at pains to emphasise that these types of matters must be addressed on a case-by-case basis.¹⁵¹

Similarly in *Agricultural Supply Association (Pty) Ltd v Minister of Agriculture*,¹⁵² the court applied the *JCC* formulation and found that it was not adequately qualified to satisfy itself that it could determine with certainty that there was a foregone conclusion, and the matter was remitted for reconsideration. The court further found that fairness must be done to the applicants but that the rights and interests of the state must also be taken into consideration.

The *JCC* formulation was referred to with approval by the full bench in *Chairman, National Transport Commission v Safcor Forwarding (JHB) (Pty) Ltd*¹⁵³ continued to find application in subsequent cases in which a substitution order was sought. In *Traub and Others v Administrator, Transvaal*,¹⁵⁴ the court makes explicit reference to 'exceptional circumstances' wherein the court will step into the shoes of the administrator and notes that remittal is a common law remedy that should only be sought where there is a reason not to follow the remedies within the relevant statutes.¹⁵⁵ *Dawnlaan Beleggings* introduces the idea of 'gross' unfairness¹⁵⁶ that is

¹⁴⁷ Supra at 179.

¹⁴⁸ *C and Another v Commissioner of Child Welfare Wynberg* [1970] 2 All SA 299 (C).

¹⁴⁹ Supra at 309.

¹⁵⁰ Supra at 310.

¹⁵¹ Supra at 312.

¹⁵² *Agricultural Supply Association (Pty) Ltd v Minister of Agriculture* 1970 (4) SA 65 (T).

¹⁵³ *Chairman, National Transport Commission v Safcor Forwarding (JHB) (Pty) Ltd*. 1981 (3) SA 504 (T) at 508H - 509A.

¹⁵⁴ *Traub and Others v Administrator, Transvaal* 1989 (1) SA 397 (A).

¹⁵⁵ Supra at 239.

¹⁵⁶ *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W) at 95(3).

later picked up on in the post-Constitution jurisprudence where the court refers to 'gross incompetence.'¹⁵⁷

Thus, at the end of the pre-constitution period, the *JCC* formulation stands as the authority on how to proceed when determining whether the court ought to grant a substitution order. The key factors that can and have been distilled from the *JCC* formulation are;

1. A foregone conclusion to the extent that it would merely be a waste of time as there would be no purpose served by remittal
2. The presence of bias or incompetence such that it would be unfair to expect applicants to submit themselves to the administrator's jurisdiction

While South Africa was still not a constitutional democracy when these principles were developed, these core principles remain relevant and applicable in the democratic era. These principles inherently endorse the separation of powers doctrine and reflect the tenets of natural justice and fairness which were solidified in the text of the Final Constitution.

2.5.2. Case law from the post-Constitution but pre-Trencon era

Despite the common law developing in the absence of the Constitution and PAJA, the constitutional era inherited a workable set of legal principles that were able to maintain their prominence and applicability.¹⁵⁸ This compatibility can in part be attributed to the fact that the PAJA was drafted to give effect to the section 33 constitutional right to administrative justice and was an attempt to codify the common law to create one 'integrated system of administrative law.'¹⁵⁹

¹⁵⁷ *Trencon* supra n37 para 54.

¹⁵⁸ *WDR Earthmoving Enterprises CC v Joe Gqabi District Municipality* (CA298/2016) [2017] ZAECGHC 45 (13 March 2017) para 10 states that; 'The passages I have cited from *Johannesburg Consolidated Investments* case and *Shidiack* case articulated the position when the review of administrative action was a common law jurisdiction of the superior courts. The principles stated still hold good now that the power to review administrative action is sourced in the Constitution and the PAJA...'

¹⁵⁹ Hoexter, C 'The Future of Judicial Review in South African Administrative Law' (2000) vol 117 *SALJ* at 484.

The evaluation of the case law that is to ensue in this section has a narrow focus and is positioned as the basis upon which the *Trencon* judgment rests. To this end, only the core cases relied on in *Trencon* will be canvassed. Particular emphasis is placed on procurement cases in this discussion due to how rife corruption is - and has been - in these cases and the far-reaching ramifications these matters tend to have on service delivery in South Africa.

*Gauteng Gambling Board*¹⁶⁰ may not have been the first case on this subject in this era, nor is it directly linked to service delivery or corruption, but it is the case that is most heavily relied on in *Trencon*. It is concerned with the award of a gambling license and whether the court *a quo* was correct in substituting and 'assuming the decision-making function.'¹⁶¹ For the case to be deemed sufficiently exceptional such that an order for substitution would be warranted in terms of section 8(1)(c)(ii)(aa) of PAJA, the court needed to be 'persuaded that a decision to exercise a power should not be left to the designated functionary.'¹⁶²

The court held that the court *a quo* was correct in refusing to remit the decision as there was 'the inevitability of a particular outcome.'¹⁶³ This foregone conclusion element is supported by the principles laid down in *JCC*¹⁶⁴ and *Livestock*¹⁶⁵ as well as fairness considerations espoused in *Commissioner, Competition Commission v General Council of the Bar of South Africa*.¹⁶⁶ Furthermore, in this context, the fairness factors were understood to relate to the court's competence to make the decision in question itself. It was found that due to the court's institutional competence,¹⁶⁷ it would

¹⁶⁰ *Gauteng Gambling Board v Silverstar Development Ltd* [2005] ZASCA 19 ('*Gauteng Gambling Board*').

¹⁶¹ *Supra* para 1.

¹⁶² *Gauteng Gambling Board supra* n160 para 28.

¹⁶³ *Supra* para 39.

¹⁶⁴ *JCC supra* n122 at 178: 'the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.'

¹⁶⁵ *Livestock supra* n130, at 492: 'the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.'

¹⁶⁶ *Commissioner, Competition Commission v General Council of the Bar of South Africa* 2002 (6) SA 606 (SCA).

¹⁶⁷ Institutional competence in this sense refers to the courts technical knowledge of the ins and outs involved in the awarding of a gambling license which could be garnered by the supporting documents submitted by the relevant parties.

be fair for them to substitute the administrator's decision with their own as there is 'nothing to be gained by remittal.'¹⁶⁸

This dictum was followed and further developed in *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape*.¹⁶⁹ Here the court found that while an exceptional circumstance is a necessary condition for an order of substitution, it is not sufficient. The court needs to be competent and have access to all the relevant information before it would be appropriate to take over the decision-making function.¹⁷⁰ Plasket J described this as being a 'minimum requirement of rational decision-making, a fundamental requirement of the rule of law.'¹⁷¹

Another important judgment to consider when applying the test for substitution is *AllPay Consolidated Investments Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*.¹⁷² Whilst this judgment did not engage with the test for substitution, it is important for the fairness evaluation that forms part of the test. This judgment also advocates for the interests of those impacted by the court's decision – but who are not a party to the proceedings – to be taken into consideration. This is embedded in the just and equitable requirement of the test for substitution.

In *Allpay*, the court was faced with a question of the validity of one of the largest tenders to have ever been awarded in South Africa.¹⁷³ The court in the merits judgment declared that the tender for the payment of social grants to some 15 million people was invalid.¹⁷⁴ The declaration of invalidity had far-reaching ramifications that would, given the purpose of the grant, mainly affect the most vulnerable members of society as well as the parties to proceedings. The court bore this in mind when crafting a remedy.

This speaks directly to the role of fairness or justice and equity considerations when making the award. Consequently, the court confirmed the declaration of invalidity but suspended the order pending the award of a new tender.

¹⁶⁸ *Gauteng Gambling Board* supra n160 para 40.

¹⁶⁹ *Intertrade* supra n98

¹⁷⁰ Supra para 43.

¹⁷¹ Supra para 43.

¹⁷² *AllPay* supra n107.

¹⁷³ *AllPay* supra n107.

¹⁷⁴ Supra para 93.

It is this element of the *Allpay* judgment that is of particular importance for the present purposes. *Allpay* captures the essence of the duty imposed on the court when deciding matters which fall within the ambit of the administration. It also highlights the real-world consequences that may flow as a result of a decision taken by a court. As guardians of the Constitution, the courts have a greater obligation than to just resolve the dispute before them. They are to be mindful of their position and the consequences of their actions when crafting a remedy.

As illustrated from the preceding discussion on the case law, fairness has a significant role to play but the scope and content of fairness are not immediately clear. It appears that the meaning ascribed is context specific. This is the main point of contention that the court in *Trencon* sought to have clarified. Additionally, the interaction between the just and equitable factors that make up the exceptional circumstances test ought also to have been clarified as,

‘the courts have taken a varying approach to substitution, essentially oscillating between regarding factors as individually sufficient, particularly in relation to bias and incompetence; sufficient in combination with other factors; as necessary prerequisites; or simply as factors to be weighed in determining whether to grant substitution.’¹⁷⁵

The legal position leading up to *Trencon* was, to a large extent settled in law save for the just and equitable or fairness elements. This is admittedly difficult terrain to navigate as the court has to strike the correct balance between operationalising constitutional principles and stepping into the role of the administrator when justice and equity demand so that the cogs of the system continue to turn, while also respecting the separation of powers doctrine, and not acting in an unconstitutional manner.

2.6. *Analysis of the role played by the courts*

Two key observations can be made from the jurisprudential development outlined above, both of which pertain to the role of the courts. The first relates to the role played by the courts and how they appear to view themselves within the broader system of governance. The second picks up on the impact of the decisions of the courts and how

¹⁷⁵ Cachalia op cit n41 at 121.

these decisions operationalise constitutional principles and advance the constitutional project.

Each judgment, at some point, raises and addresses the issue of the separation of powers. The courts have expressed an acute awareness of their positionality and have shown a high level of respect for the separation of powers doctrine by being slow to usurp the function of the functionary. The development of the test for substitution itself pays homage to the principles of the separation of powers and the position of the courts as a separate branch of government. The components of the test for substitution developed by the courts, in part, flow directly from the separation of powers.

The courts took great care not to cross into the jurisdiction of the administrator without just cause or to do so in a manner that was surrounded by an air of entitlement. This is reflected in the test for substitution through the inclusion of the factors of a foregone conclusion and institutional competence. This is indicative of the courts treading carefully to not upset the balance while carving out the test for substitution.

Secondly, the courts considered the impact of its decision, both, on the parties to proceedings as well as on the broader community. This is particularly evident, and important for our purposes, in cases where service delivery may be impacted.¹⁷⁶ This gains expression through the fairness factors included in the test for substitution.

¹⁷⁶ It is important to consider how the court crafted the remedy in the *AllPay* (supra n172) case. This case plays an important role in critically engaging with the fairness considerations.

CHAPTER 3: CONCERNS UNDERPINNING THE TEST FOR SUBSTITUTION

3.1. *The test for substitution*

The Constitutional Court in *Trencon*¹⁷⁷ undertook the task of ‘clarify the test for exceptional circumstances where a substitution order is sought.’¹⁷⁸ To this end, Khampepe J wrote that;

‘given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.’¹⁷⁹

This test, while referred to as the exceptional circumstances test, is ultimately a test for substitution.¹⁸⁰ It was constructed against the backdrop of a dispute stemming from the award of a construction tender for building upgrades to the head office of the Industrial Development Corporation of South Africa (IDC). It could be argued that the case, having gone through the various courts, produced a comprehensive test that considered, and consolidated, the existing common law position on when and how courts ought to substitute. Furthermore, many of the seminal judgments considered in the development of the test of substitution were substitution judgments.¹⁸¹

To recap what has been stated earlier, the exceptional factors identified as part of the test for substitution all point to a different, but related, concern that flows from the theoretical framework that underpins a constitutional democracy. The need for a foregone conclusion relates to the concept of deference and the fear that a court may usurp the function of the administrator. The need for the courts to be in as good a position is also linked to the concept of judicial deference but in this regard, it centres on the court’s subject matter competence rather than the court overstepping. The fairness factors speak to the broader concept of fairness that permeates the

¹⁷⁷ *Trencon (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* supra n37.

¹⁷⁸ Supra para 32.

¹⁷⁹ Supra para 47.

¹⁸⁰ It must be noted that the exceptional circumstances enquiry is also relevant to a consideration of whether to award compensation.

¹⁸¹ See further *JCI* supra n121; *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A); *JCC* supra n122; and *Gauteng Gambling Board* supra n160.

framework. Including all of these considerations into one test thus empowers the courts to make well-informed decisions, both practically and theoretically.

3.2. *In as good a position*

The need for a court to be in as good a position as the administrator is the first question that the court must address when applying the test for substitution. This requirement speaks to the second issue that flows from the deference debate – institutional competence. Built into this idea of institutional competence is the presumption that ‘public officials occupying certain positions would be expected to behave in a certain manner because of their expertise and dedication to that position.’¹⁸² Furthermore, as Hoexter correctly points out, this requirement of the test is intrinsically linked to the court’s ability to assess whether there is in fact a foregone conclusion.¹⁸³ Kohn describes this as being a ‘prerequisite’ for determining whether there is a foregone conclusion.¹⁸⁴ This is a logical process as without having all the necessary information, the court would not be able to definitively make that determination. Khampepe J, notes this in the *Trencon* judgment stating that ‘the distinction between the considerations in as good a position and foregone conclusion seems opaque as they are interrelated and inter-dependent.’¹⁸⁵

The ability of a court to be in as good a position is thus twofold. The court requires that all necessary information be placed before them while also needing to be able to fully appreciate the information and its implications.¹⁸⁶ By taking heed of these requirements and making them a mandatory part of the test for substitution, it is difficult to take the view that the courts are not being mindful of their powers and the limitations thereof. This is indicative of a deep respect for the separation of powers doctrine and the broader democratic scheme within which they operate. This is evinced in the cases where the courts have exercised restraint where they have not been satisfied on both legs of institutional competence.¹⁸⁷

¹⁸² *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC) para 8.

¹⁸³ Hoexter & Penfold op cit n66 at 791.

¹⁸⁴ Kohn op cit n31 at 104.

¹⁸⁵ *Trencon* supra n37 para 50.

¹⁸⁶ Kohn op cit n31 at 104.

¹⁸⁷ See discussion of case law in Hoexter & Penfold op cit n66 at 791 – 3.

Courts may also consider the timing, or how far into the process the administrator is.¹⁸⁸ The further into the process the administrator is, the more likely it will be that the court will be in as good a position as the administrator who would have already had an opportunity to weigh up the relevant information before reaching a conclusion. The courts may also consider the type of decision that is required to be made.¹⁸⁹ If the decision is polycentric with policy implications,¹⁹⁰ it is unlikely to substitute as this would involve a more blatant infringement into the territory of the administrator.

The internal controls of the test for substitution, as discussed above, paired with the external checks and balances, provided by the other branches of government, on the judiciary provide a safeguard while also supporting the courts to exercise their powers to substitute where warranted. Thus, the element is also geared toward assisting the courts in their larger role in operationalising constitutional principles through service delivery.

3.3. *Foregone conclusion*

A foregone conclusion in the context of substitution in public procurement refers to a scenario where there is only one other possible outcome to the tender process. Usually, this means that once tenderer A has been ruled out, the tender will be awarded to tenderer B as there are no other tenders to consider and the administrator does not have the option to refrain from awarding the tender at all. The administrator is in such a position and ‘would not have any discretion left to exercise.’¹⁹¹

Besides saving time in situations where remittal is futile,¹⁹² some of the separation of powers burden is lifted off the shoulders of the court as there is no other

¹⁸⁸ Kohn op cit n31 at 103.

¹⁸⁹ Ibid at 104.

¹⁹⁰ *Trencon* supra n37 para 50.

¹⁹¹ Supra para 59.

¹⁹² *JCC* supra n122 at 178. *Trencon* supra held the following in para 49:

‘2) The Court will depart from the ordinary course in these circumstances:

(i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.’

option, and the decision is effectively made for them, and they are merely confirming the foregone conclusion.

This element is a necessary requirement for substitution and helps the courts navigate the differing schools of thought on judicial deference. Hoexter's conception of deference flows from what Cockrell¹⁹³ considered to be the 'articulation of rigorous and coherent principles that will guide legal intervention and non-intervention.'¹⁹⁴ Judge Dennis Davis takes a different view and proposes that judges, and the courts more generally, proceed from the premise that, as *the* guardians of the Constitution. They are inherently empowered to make decisions and more emphasis should be placed on being empowered and trusted to make decisions than to be overly concerned with democratic legitimacy and institutional competence such that they proceed from a position of restraint.¹⁹⁵ This conception of deference is crafted with reference to Dyzenhaus and Mureinik¹⁹⁶ who share the position that judges ought to acknowledge their empowerment and should approach adjudication with this in mind and then temper their involvement accordingly. Plasket¹⁹⁷ and Wallis¹⁹⁸ contribution on the topic also finds support in this approach to substitution in that they propose that deference is merely the separation of powers by another name. This is particularly persuasive when one considers the test for substitution in its entirety. The courts, should they decide to substitute, are simply fulfilling their role as guardians of the Constitution and are not overstepping negatively.¹⁹⁹ Substitution, by its nature, is the courts stepping into the shoes of the administrator, but this does not necessarily mean that the courts are overstepping *per se*.

These latter conceptions of deference seem more in tune with the notions of fairness or justice and equity. The dictates of which require a high level of fluidity. Thus, without strict rules, the courts can respond by crafting a remedy that is truly just and equitable. This is not to say that the court should act in a manner that is devoid of

¹⁹³ Hoexter & Penfold *op cit* n66 at 188.

¹⁹⁴ Cockrell, A "Can you paradigm?" – Another Perspective on the Public Law/Private Law Divide' (1993) *Act Juridica* 227 at 247.

¹⁹⁵ Davis *op cit* n77.

¹⁹⁶ Dyzenhaus *op cit* n77.

¹⁹⁷ Plasket *op cit* n77.

¹⁹⁸ Wallis *op cit* n77.

¹⁹⁹ *Ibid*.

'coherent principles.' Rather, it is highlighting the fact that these principles are just now housed in the Constitution, and the Bill of Rights more specifically.

Thus, when the courts consider whether there is a foregone conclusion, they are acknowledging deference as 'respect'²⁰⁰ in that they are constrained by the same options as those that would be available to the administrator. They are also moving from the premise that they are in fact empowered to make the necessary decisions without undermining their separation of powers doctrine while fulfilling their constitutional obligation to craft an appropriate relief²⁰¹ in the form of an effective remedy²⁰² that is just and equitable. This is further supported by the fact that the court needs to justify its decision with deference to the other considerations.

3.4. Fairness factors

The issue of fairness considerations and their link to substitution was discussed by Cachalia in the following:

'Deciding when to substitute has persistently vexed the courts. This power, has, however, been recognised in circumstances where: (i) the end result is a foregone conclusion such that remittal would be a 'mere formality' or 'waste of time' given the inevitability of the outcome, (ii) there is a delay causing unjustifiable prejudice to the affected party, (iii) bias, or incompetence on the part of the administrator is established such that 'it would be unfair to require the applicant to submit to the same jurisdiction again, or (iv) where the court finds itself in 'as good as position' as the administrator to make the decision itself.'²⁰³

Once a court has established that it is in as good a position and that there is a foregone conclusion, other just and equitable factors will be considered. Under section 172 of the Constitution, the courts are obliged to 'make any order that is just and equitable.'²⁰⁴ This phrase, and its obligation, are repeated in section 8(1) of PAJA.²⁰⁵ Despite this, the phrase is not defined nor are there any legislative guidelines for its scope and content. In, what is arguably an attempt to combat this lack of guidance, the courts have drawn on the longstanding jurisprudence on this topic and identified

²⁰⁰ Hoexter op cit n77 at 501. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 48.

²⁰¹ Section 38 of the Constitution.

²⁰² *Fose* supra n104 para 65.

²⁰³ Cachalia op cit n41 at 117. Footnotes omitted.

²⁰⁴ The Constitution of South Africa.

²⁰⁵ Section 8(1) of PAJA.

this open list of factors that can be relied on to determine the dictates of justice and equity within a particular circumstance.²⁰⁶

This can be seen as an attempt at standardising a concept that has been described as being ‘amorphous’²⁰⁷ in nature. It is precisely this amorphous nature that allows courts the requisite flexibility to respond appropriately as these matters need to be decided on a case-by-case basis.²⁰⁸ However, the fairness inquiry for substitution is made significantly simpler in the public procurement context. This is due to the black-and-white nature of the procurement process. This can be seen in that bidders have either submitted a responsive tender or not; a scoring system is used to rank bidders which make picking up on bias and incompetence by various parties easier. This makes it easier for courts to standardise their methodology and replicate it in subsequent cases. This addresses the uncertainty about the ‘substantive content, interplay and pecking order in the [just and equitable] enquiry’²⁰⁹ and dissolves the need for further clarity as justice and equity inquiries for substitution in public procurement matters are factual inquiries with definite answers and with very few grey areas. This calibration of the fairness factors creates a more stable and predictable theoretical basis upon which substitution in public procurement can rest.

3.5. *Legal certainty*

It can be argued that within the context of public procurement, the test for substitution, as showcased in case law, is fairly clear-cut. The test more generally, is the culmination of decades of progress in jurisprudential development. This resulted in a well-carved-out common law test that has been replicated and relied on consistently. The uncertainty that exists in the law around this test stems from the issues addressed in the preceding discussion. The lack of legal certainty does not flow from the construction of the test for substitution itself, but rather from the application and interpretation of the underpinning theoretical framework.

The subsequent discussion will provide evidence of this by analysing post-*Trencon* public procurement case law in which substitution orders were sought. The

²⁰⁶ See Kohn op cit n31 at 97.

²⁰⁷ Kohn op cit n31 at 91.

²⁰⁸ *Trencon* supra n37 para 47.

²⁰⁹ Kohn op cit n31 at 92.

cases reveal that the courts can apply the methodology developed at the common law consistently. The dispute is resolved and those impacted by the outcome know the way forward and are not unduly inconvenienced for a protracted period of time. This is especially important when service delivery is directly impacted. Thus, this is a sign of a functioning democratic system.

CHAPTER 4: POST TRENCON JURISPRUDENCE

4.1. Introduction

The preceding chapters have discussed and highlighted the jurisprudential positioning of the test for substitution. Borrowing the criteria used by Cachalia and Kohn in their 2020 article, it is advanced that the courts have developed a remedial framework for substitution 'with the level of rigour, consistency, and clarity required to make remedial findings more predictable and indeed, defensible.'²¹⁰ The case law presented will stand as evidence of this developed framework.

The three cases that will be assessed indicate that the courts have been able to successfully apply the test for substitution in public procurement disputes post *Trencon*. In coming to differing conclusions, with only one order for substitution being awarded, the courts showed how the much sought-after legal certainty²¹¹ can be infused with the flexibility that justice and equity demand.²¹² 'After all, certainty and legality are both aspirations in the rule of law's basket of ideals.'²¹³

Beyond this, the cases provide examples of the test for substitution being used as a means through which constitutional principles can be operationalised as it sees the checks and balances mechanisms at work while also maintaining a view of the bigger picture and the need for service delivery.

4.2. *IIAH Indiza Aviation Service (Pty) Limited v Msunduzi Municipality and Xolisiwe Trading and Project CC*²¹⁴

The case of *IIAH Indiza Aviation Service*²¹⁵ arose from a dispute over the award of a tender for the supply of 'technical and non-technical infrastructure services'²¹⁶ for the Pietermaritzburg Airport. The Bid Evaluation Committee disqualified the Applicant from the bidding process due to non-compliance with requirements that were later

²¹⁰ Cachalia & Kohn op cit n53 at 662.

²¹¹ Ibid at 661(see footnote 3).

²¹² Ibid at 661(see footnote 5).

²¹³ Ibid.

²¹⁴ *IIAH Indiza Aviation Service (Pty) Limited v Msunduzi Municipality and Xolisiwe Trading and Project CC* [2019] ZAKZPHC 51.

²¹⁵ *IIAH Indiza Aviation Service* supra n214.

²¹⁶ Supra para 1.

deemed *pro non scripto*. In challenging their disqualification, the Applicants submitted that the second respondents should be disqualified for non-compliance and that they should be awarded the tender instead as they ought not to have been disqualified in the first place.

The first respondent, as the body awarding the tender, conceded 'to the setting aside of the tender award to the second respondent, as the mandatory requirements were not complied with by the second respondent.'²¹⁷ The first respondent did not however agree to 'the order awarding the tender to the Applicant, and to the disqualification of the second respondent...'²¹⁸ Thus,

'the only outstanding issues for determination by the court were whether the court should disqualify the second respondent from the tender process, and whether to award the tender to the Applicant.'²¹⁹

These issues flow from the second element of the test for substitution, the need for a foregone conclusion. By disqualifying the second respondent, the court would effectively be creating the necessary foregone conclusion as there would be no other viable candidate to which the tender could be awarded. The court does not explicitly set this out when coming to its conclusion, rather it held that it was 'not satisfied that the Applicant has shown exceptional circumstances'²²⁰ and that it is 'not persuaded that it should bar the second respondent from participating in the bid.'²²¹

In coming to this conclusion, the court draws on the existing jurisprudence on this matter, stating that the court 'should not be 'so overzealous' [footnote omitted] as to replace the decisions of the functionary or administrator with their own decisions save in exceptional circumstances.'²²² Furthermore, the court notes that it

'does not have the necessary technical skills for evaluation of tender bids and finds that the best decision should be to refer the matter back to the first respondent. No prejudice will be suffered by the Applicant as it is currently services to the first respondent in terms of a previous contract.'²²³

An analysis of this reasoning shows that the court comes to its decision not to substitute on three, separate, but interlinked grounds. The first is that the court found

²¹⁷ *IIAH Indiza Aviation Service* supra n214 para 13.

²¹⁸ *Supra* para 14.

²¹⁹ *Supra* para 5.

²²⁰ *Supra* para 16.

²²¹ *Supra* para 16.

²²² *Supra* para 15.

²²³ *IIAH Indiza Aviation Service* supra n214 para 16.

no reason to disqualify the second respondent, thereby creating the necessary foregone conclusion. The second is that the court found that they lacked the technical expertise, often included in the 'as good a position' element of the substitution test, to properly evaluate the bids submitted. Lastly, the court notes that no prejudice will be suffered by remitting the matter to the decision maker. This accords with the need for fairness for both parties. Individually, arguments could be made in support of the court's decision not to substitute. Cumulatively, however, these arguments are overwhelmingly in support of the court not granting the order for substitution as the just and equitable outcome.

This highlights the issues identified by Kohn where she draws attention to the lack of clarity about the pecking order²²⁴ as we are not sure whether one of the reasons would be sufficient to award the substitution order or if it is only cumulatively that the threshold is met. Despite this lack of clarity, the court was able to succinctly arrive at a logical and fair conclusion. This could be used as an indication that this clarity sought by Kohn is not necessary within the context of public procurement disputes and that the courts, as guardians of the Constitution, know how to hold things in the balance in the pursuit of justice and equity and do not need a tick box style test.

Sometimes a single reason may be sufficient to warrant an order for substitution, and other times, it may not. This may not be the ideal construction or application of the test for substitution, but it is a construction that allows the court to respond to the dictates of justice, equity, and fairness. Here the court was able to properly understand what was required of them from a fairness, or just and equitable, perspective without it being spelled out in explicit detail.

This construction strikes the correct balance between giving the court the necessary freedom to retain flexibility while offering sufficient guidance for legal certainty. This is ultimately what is demanded of the courts and the test for substitution, particularly within the public procurement context. It is also this type of sharp legal instinct that one expects of a court given the role that they occupy within the separation of powers structure – it is part and parcel of the reason for their positionality.

²²⁴ Kohn op cit n31 at 92.

4.3. *C & M Fastners CC v Buffalo City Metropolitan Municipality*²²⁵

The Applicant in this matter took over from the Respondent in maintaining a logistics warehouse involved with the provision of electrical services to consumers for an extended period. During this time, the Respondent called for bids to fulfil this role.²²⁶ The Applicants responded to the call each time but never quite succeeded as the tender was withdrawn and reissued with slight changes and was ultimately never awarded. The significant aspect of the facts of this case is that the Applicant,

‘alleges a well[-]orchestrated campaign within the Respondent to ensure that the Applicant was not awarded the tender – this allegation in the circumstances has substantial merit more especially having regard to the bald denials and lack of explanation.’²²⁷

The court in this matter was required to decide whether the Applicant’s tender was responsive such that the cancellation of the call for bids should be set aside. Following this course of action would require the court to review the non-award of the tender and decide whether to substitute, such that the tender is awarded to the Applicant, or to remit.²²⁸ On this point, the court found that there was ‘an orchestrated campaign to avoid awarding [the] contract’²²⁹ to the Applicant ‘not based on any acceptable facts.’²³⁰

In coming to their conclusion, the court found that there was no statutory basis for the cancellation of the tender and that the ‘decision was a ploy in an attempt to meet the Application and one not in good faith.’²³¹ Upon this finding, the court noted that

‘the Court’s discretion is wide and it must fashion an appropriate remedy for unlawful administrative action. This gives the legislative content to the Constitution’s “just and equitable” remedy. Obviously the setting aside of administrative action may not properly remedy the matter and the Courts will usually exercise the power to remit the matter for reconsideration by the administrator. This is affirmed as a general power in Section 8(1)(c)(i) of PAJA, and it is accepted that this is almost always the prudent and proper course. Again, in general terms this will suffice unless this is not sufficient to achieve a just and equitable remedy. Section 8(1)(c)(ii) of PAJA recognizes the

²²⁵ *C & M Fastners CC v Buffalo City Metropolitan Municipality* [2019] ZAECGHC 22.

²²⁶ See supra para 28 for the full factual matrix.

²²⁷ *C & M Fastners CC supra* n225 para 25 and 28.

²²⁸ Supra paras 23-25 and 54.

²²⁹ Supra para 59.

²³⁰ Supra para 60.

²³¹ *C & M Fastners CC supra* n225 para 69.

exceptional case where the court may substitute its decision for that of the decision-maker.²³²

In addition to *Trencon*,²³³ the court, drew dicta from on *Gauteng Gambling Board*,²³⁴ *Hangklip Environmental Action Group v MEC for Agriculture and Environmental Affairs and Development Planning Western Cape*,²³⁵ *UWC v MEC for Health and Social Services*,²³⁶ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,²³⁷ and *Hoffmann v South African Airways*²³⁸ in guiding how it approached the different elements to be considered before an order for substitution could be awarded. The court concluded that the need for the court to be in ‘as good a position’ and that there is a ‘foregone conclusion’ ought to be considered cumulatively²³⁹ before other factors are considered. Importantly, the court noted that the ‘ultimate consideration is whether a substitution award is just and equitable – the question of fairness to all parties.’²⁴⁰

Following this approach, the court concluded that it was in as good a position and that there was no reason for remittal as the consulted experts had already applied their unique expertise and had expressed an opinion as to who the tender should be awarded to. To this end, the court was ‘more than satisfied that there are exceptional circumstances in this matter which justify [it] substituting the decision of this Court for that of the Respondent.’²⁴¹

4.4. *Q4 Commercial Properties (Pty) Ltd v Municipal Manager: Madibeng Local Municipality*²⁴²

²³² *C & M Fastners CC supra* n225 para 78.

²³³ *Trencon supra* n37.

²³⁴ *Gauteng Gambling Board supra* n160 paras 29 and 38.

²³⁵ *Hangklip Environmental Action Group v MEC for Agriculture and Environmental Affairs and Development Planning Western Cape* 2007 (6) SA 65(C) para 84F-J.

²³⁶ *UWC v MEC for Health and Social Services* 1998 (3) SA 124 C at 131.

²³⁷ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 65.

²³⁸ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

²³⁹ *C & M Fastners CC supra* n225 para 86.

²⁴⁰ *Supra* para 86.

²⁴¹ *Supra* para 92.

²⁴² *Q4 Commercial Properties (Pty) Ltd v Municipal Manager: Madibeng Local Municipality* [2021] ZAGPPHC 81 (11 February 2021).

This case is concerned with an application to establish two townships, 'Township Q4 City' and 'Q4 City Extension 1.' The Applicants approach the court after a series of delays seeking an order for the approval of the establishment of their proposed township which had been denied by the respondent due to its failure to take a decision²⁴³

However, the court held against the awarding of a substitution order in this matter. Its reasoning for not awarding the substitution order was threefold. First, the court held that, given that the 'merits had not been considered by the municipality's functionaries'²⁴⁴ and that the applications for the establishment of the township had not been presented before the court for its consideration, it could not conclude that it was in good a position to make the decision.²⁴⁵

This is the first requirement of the test for substitution as constructed in *Trencon*. Its absence alone is sufficient for the court to not substitute. This is one way in which the court can respect the separation of powers doctrine when called upon to grant a substitution order. It requires the court to exercise a degree of self-awareness in assessing their limitations while also acknowledging the expertise of the administrator. The court provides an example of this by noting that the 'proper planning and management of land use is complex, and primarily the domain of local authorities to consider.'²⁴⁶

Secondly, the court found that the undue delay complained of by the Applicants was, in part, due to the Applicants themselves. The fact that the Applicant failed to approach the court with 'clean hands'²⁴⁷ prevents them from relying on this as a factor for the test for substitution. This factor is meant to be relied on when the delay caused, through no fault of those seeking the order, would be prejudicial and the court's intervention would rectify the prejudice suffered as a result of the delay creating a just and equitable outcome. As this is not the case in this matter, this factor does not fall in favour of the Applicant.

²⁴³ *C & M Fastners CC* supra n225 para 2.

²⁴⁴ Supra para 31.

²⁴⁵ Supra para 31.

²⁴⁶ Supra para 31.

²⁴⁷ Supra para 32.

Lastly, the court notes that the Applicant was incorrect and misguided in their reliance on section 8(1)(c)(ii) of PAJA and that the correct section is section 8(2) of PAJA. The distinction between these sections is that section 8(2) makes provision for remedies to situations where an administrator has failed to make a decision. As such the remedies are crafted in a manner that urges administrators to take the necessary decisions.²⁴⁸ Without a decision, the court is unable to substitute as a decision is a necessary pre-requisite to trigger a review of an administrative action as per section 6(1) of PAJA.²⁴⁹ Furthermore, section 8(1) of PAJA makes direct reference to section 6(1) when setting out the remedies available in judicial review proceedings.

Despite the matter arising from a materially different set of facts to the previous case, this court applied the same legal principles in coming to their decision. The court, by refusing to grant the order for substitution, highlighted the balance between instances where substitution is relevant and instances that require deference to the administrator. The court effectively took a step back, allowing the parties to follow due administrative process. This shows respect for the administrator and its procedures when the Applicant tried to sidestep the administrator by coming to court in a situation where the administrator was better equipped at taking the decision at issue.

4.5. *A high-level overview of the state of the test for substitution post Trencon*

The preceding discussion highlights that despite academic criticism, the courts have been able to apply the test for substitution, against varying backgrounds, in a manner that is consistent and true to the fundamental essence of justice and equity. The courts thus employ sound legal reasoning drawing on the wealth of knowledge and guidance that exists within the South African jurisprudence. The three judgments discussed

²⁴⁸ Section 8(2) of PAJA states the following:

'The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders—

- (a) directing the taking of the decision;
- (b) declaring the rights of the parties in relation to the taking of the decision;
- (c) directing any of the parties to do, or to refrain from doing, any actor thing the 5 doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
- (d) as to costs'

²⁴⁹ Section 6 of PAJA states the following:

'Judicial review of administrative action

6. (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

above provide evidence of the courts taking a cautious and considered approach when called on to adjudicate matters which raise difficult practical and theoretical legal questions.

This is a nod to the effectiveness of the test for substitution. It is a test that, if properly followed, makes it highly unlikely for the courts to act in a manner that does not consider the higher-level theoretical questions relating to the separation of powers and the dictates of fairness as espoused by the Constitution. On the balance, the courts appear to be weathering the storm of the test for substitution in public procurement matters in a manner that is worthy of being trusted and respected. That is not to say that judges or the courts are beyond critique and/or operate flawlessly. They have at the very least, earned the benefit of the doubt and should be allowed to utilise their expertise when exercising their professional discretion in their adjudicative roles.

The courts, particularly in the *C&M Fastners*²⁵⁰ matter, have shown that they were alive to the extra-legal and political forces at play within the public procurement space and have been able to address this from within the bounds of their adjudicative role in the separation of powers. This is indicative of what an appropriate theory of deference would look like in a constitutional democracy – a judiciary that is responsive to the social and political needs of the public while maintaining the rule of law by acting in a manner that is fair and consistent.

This is an important quality and skill set for members of the judiciary to have in the face of state capture and the state capture-related legal challenges that will inevitably come before the courts. Thus, the test for substitution is a mere microcosm for the operationalisation of constitutional principles at the hands of our courts.

²⁵⁰ *C & M Fastners CC supra* n225.

CHAPTER 5: CONSTITUTIONAL PRINCIPLES IN ACTION

5.1. *Introduction*

This dissertation has explored the test for substitution while claiming that it is an example of constitutionalism in action. This chapter aims to expand on this claim and provide further support for the arguments expressed above. In doing this, an evaluation of the constitutional principles at play will be presented. This evaluation will consider the positionality of the courts, how the courts have been able to action the constitutional principles, and the potential impact judgments could have on the state of governance concerning accountability. Cumulatively, this will act as a yardstick to measure the impact of the courts when applying the test for substitution on the operationalising of constitutional principles.

When referring to constitutional principles in action or operationalising constitutional principles, what is effectively being referred to is how the principles in the Constitution are given effect in practice and subsequently how the various cogs involved in making the constitutional and democratic system work are able to function as a consequence of these principles. At a macro level, this necessarily involves the different branches of government, state institutions, and their roles and functions. At a micro level is the impact of the roles and functions of those operating at the macro level. The analysis presented thus considers how the test for substitution, a remedial tool in the courts' arsenal, can and, has been used to assist in making the cogs in the constitutional democratic system turn.

To this end, a discussion on the positionality of the courts within the current socio-political climate will be presented followed by a discussion on how the test for substitution could be used to advance the aims of, and realise, the constitutional project which is effectively the constitutional principles in action.

5.2. *Positionality of the courts*

The courts' positionality within the context of the test for substitution is two-fold. The first relates to the micro-level impact. The courts must provide effective relief to litigants and, within the context of public procurement that often translates into

providing relief for members of society who are reliant on the state for some goods or services. The second relates to the macro-level interplay between the courts and the other branches of government.

At a macro level,

'The supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled.' Courts are required by the Constitution to 'ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values.' Section 176(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled.' It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution.'²⁵¹

This description of the role of the courts 'potentially places the judiciary in the firing line'²⁵² in that the courts are required, by the Constitution, to act as a check and balance mechanism to ensure constitutional compliance. This role sees the courts sometimes acting in a way that has a direct impact on the other branches of government and how they function. Under normal circumstances, this can be a daunting task, but when this role is considered within the context of state capture, the stakes are undoubtedly raised. It is within this specific context that the positionality of the courts ought to be considered.

The judiciary has come under enormous pressure and heightened scrutiny in the wake of state capture and allegations made by politicians that it is also captured.²⁵³ Under the separation of powers doctrine, the burden of holding the branches of government accountable was split between three branches. The reality in South Africa is one of a one-party dominant democracy where two of the three branches are predominantly populated by members from the same political party.²⁵⁴ The state capture reports²⁵⁵ provide enough evidence to suggest that there was a breakdown in accountability mechanisms between the executive and the legislative branches, which

²⁵¹ *Doctors for Life* supra n68 para 38.

²⁵² *De Vos & Freedman* op cit n66 at 103.

²⁵³ Sibanda, O 'Is our judiciary captured? It's time for the chief justice to launch an inquiry' (2021) *News24* 16 April 2021, Available at <https://www.news24.com/news24/opinions/fridaybriefing/omphemetse-sibanda-is-our-judiciary-captured-its-time-for-the-chief-justice-to-launch-an-inquiry-20210415> Accessed on 27 December 2022.

²⁵⁴ Choudhry op cit n80. See also *Du toit et al* op cit op cit n80.

²⁵⁵ *State Capture Reports* op cit n24.

ultimately sees the judiciary shouldering the burden of accountability alone. Further evidence of this is seen in how the courts are roped in to adjudicate disputes which should arguably have remained firmly within the realm of the other branches of government.²⁵⁶

As a result, courts find themselves occupying a curious role in the greater system – there is an obligation to respect the separation of powers doctrine while also being the ultimate guardian of the Constitution. The latter position may require that, should certain circumstances arise, the courts ought to fulfil roles that ordinarily, and ideally, would be filled by members from the other branches of government.

To appreciate what the courts are doing; an understanding of the bigger picture is needed. Within the South African context, it is not uncommon for courts to take a proactive approach to protect and uphold constitutional principles. This can be seen early on in South Africa's jurisprudence where the courts would use judicial review to protect oppressed persons from the aggression of the apartheid regime.²⁵⁷ The courts have thus always acted as the last bulwark for the protection of rights even when operating in an environment of institutionalised repression, like the apartheid era, or one mired by corruption and state capture, as in the current constitutional era.

Some have argued that this more active role is what is expected of the courts within the transformative constitutionalist context where there is a greater expectation on adjudicators to 'justify their decisions not only by reference to authority but by reference to ideas and values'²⁵⁸ of the Constitution. This approach requires courts to engage with the question of law before them in a manner that is sensitive to the context and alive to the spirit and purport of the Constitution.

The formulation and development of the test for substitution shows an awareness and respect for the separation of powers doctrine whilst also appreciating the role of the court as a guardian of constitutionalism. This is reflected in the elements of the test for substitution which require the courts to consider whether there they are

²⁵⁶ *Economic Freedom Fighters and Others v Speaker of the National Assembly* [2017] ZACC 47 para 223.

²⁵⁷ *Moller v Keimoes School Committee* 1911 AD 635; *Dadoo Ltd v Krugersdorp Town Council* 1920 AD 530; *R v Detody* 1926 AD 198; *Rossouw NO v Sachs* 1964 (2) SA 551 (A).

²⁵⁸ Klare op cit n5 at 353.

in as good a position as the decision-maker and whether there is a foregone conclusion. The courts are also required to ensure fairness to all parties, which is an example of them operationalising the constitutional principles on a micro-level.

Fairness is a concept that is not firmly defined and is largely dependent on the context within which it is being used. It is within this space that judges are entrusted to exercise their discretion and in doing so, they can show an awareness and appreciation for the different interests at play.

The rule of law comes to light through the checking and balancing that happens within the judicial review part of proceedings as well as in the remedial part of proceedings whereby the court is required to determine what is fair or just and equitable. Here the court is acting per the rule of law by applying a standard of whether the administrative action had been taken in a manner consistent with PAJA and whether a remedy provided for in PAJA is appropriate.

This formulation also stands as a reminder to the courts about their positionality within the broader system by ensuring that they adjudicate with a level of consciousness that brings together the macro and micro. These are often in tension and the court then has to balance up the interests involved to come to a just and equitable decision. The test for substitution and the circumstances that give rise to the need for the test stand as a prime example of the courts' curious position of having to ensure accountability at the micro level while also ensuring that the constitutional system continues to operate in symbiosis such that the Constitution is given effect to.

The application of the test for substitution by the courts can thus be seen as them appreciating their position and the limitations thereof. The case law presented in the previous chapter stands as evidence of the courts performing this pivotal role from their unique position.

5.1. How the role of the courts can put constitutional principles into action

The application of the test for substitution is but one way in which the courts are able to put constitutional principles into action. It is an example of how the cogs within the constitutional and democratic system turn and the impact that it has on the system, society, and furthering the public interest.

The link between public procurement and service delivery has already been drawn. It has been shown that the courts are only involved when there is a shortfall in the public procurement process. It is this shortfall that threatens service delivery. Thus, when the courts intervene, they are operationalising democracy in a number of ways.

The first, and most obvious, is constitutional compliance with section 217 of the Constitution,²⁵⁹ which sets minimum standards for all public procurement as well as the national empowering legislation. Judicial review is concerned with ‘the process, and on the way in which the decision-maker came to the challenged conclusion’²⁶⁰ and ensuring that the decision that is being reviewed was done in an ‘acceptable fashion.’²⁶¹ In doing this, the courts are ensuring that due administrative process was followed which advances transparency and accountability – all core elements of the rule of law, a founding principle of the Constitution and constitutionalism.

Secondly, the courts are holding administrators and the other branches of government accountable for ensuring service delivery through the procurement of goods and services. By the time that parties end up before the courts, there has obviously been a breakdown in the relationship. The courts’ role is to find a way forward to ensure that service delivery is able to resume as soon as possible and that the negative impact on the public is limited.²⁶² It is useful to think of *Allpay*²⁶³ in this instance as it is an example of the court ensuring that services continued with as few disruptions as possible given how important the service being rendered was. Eskom occupies a similar position where its procurement practices have the capacity to leave

²⁵⁹ Section 217 of the Constitution.

²⁶⁰ *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 31.

²⁶¹ Hoexter & Penfold op cit n66 at 137.

²⁶² *Babcock Ntuthuko Engineering (Pty) Ltd v Eskom Holdings SOC Limited and Others* (64288/2021) [2022] ZAGPPHC 865 (17 November 2022).

²⁶³ *Allpay* supra n107.

the country in the dark with rolling blackouts and significantly impact on the fiscus of Eskom and the country as a whole.²⁶⁴

Lastly, active checks and balance mechanisms that can effectively hold administrators accountable through the tools at their disposal are an example of constitutional principles in action. This is an important point given the pervasiveness of state capture and corruption. Public procurement in particular is an area where corruption is rife and there is a deep need for recourse to clamp down on nefarious activities.²⁶⁵ This plays a reactive and proactive role in the constitutional project. It sets the bar for all conduct of state actors, be it in public procurement or otherwise, while providing tangible solutions when that standard is not met.

A potential by-product of all of this is that it encourages good governance by providing positive examples of how business ought to be conducted on the part of the state administrators, what is expected of parties contracting with the state, and the potential consequences of non-compliance.

It is for these reasons that the test for substitution can be considered to be an example of constitutional principles in action. It takes the ideals of the Constitution and the constitutional project and ensures that they have the opportunity to come to life. This is what makes the remedy of substitution so powerful within the public procurement context. The reach and impact are far-reaching and the courts have done well in fulfilling their role as guardians of the Constitution in taking steps to facilitate transformation and the transformative project.

5.3. *Impact on the state of governance*

²⁶⁴ Consider *Eskom Holdings SOC Limited v National Energy Regulator of South Africa* [2020] ZAGPJHC 168 para 59:

'It is not a public procurement matter, but it is a matter in which substitution was ordered as the remedy. The remedy was awarded on the basis that without this order there 'will accordingly be an increased risk of collapse of Eskom's finances with catastrophic consequences of the South African state.'

²⁶⁵ Munzhedzi, P 'South African public sector procurement and corruption: Inseparable twins?' (2016) vol 10(1) *Journal of Transport and Supply Chain Management* Available at <https://jtsm.co.za/index.php/jtsm/article/view/197/415> accessed on 15 January 2023; Mantzaris, E 'Public procurement, tendering and corruption Realities, challenges and tangible solutions' (2014) col 7(2) *African Journal of Public Affairs* 67-79; Klaaren, J., F. Belvedere, R. Brunette, N. Gray 'Public Procurement and Corruption in South Africa'(2022) Working Paper No. 2. *Public Affairs Research Institute* 1-18; Sewpersadh, P & Mubangizi, JC 'Using the Law to Combat Public Procurement Corruption in South Africa: Lessons from Hong Kong' (2017) vol 20(1) *Potchefstroom Electronic Law Journal* (PELJ) 1-31.

The courts, through the application of the test for substitution, are providing a blueprint for future public procurement matters. This is a guide to future parties to public procurement proceedings on what is expected of them and the consequences of non-compliance. It encourages the parties to make better decisions. In this way, the courts are operationalising constitutionalism by being proactive. This not only has the potential to decrease the instances of litigation, but it provides parties with the opportunity to get the decisions right from the beginning. Further, it also reduces delays and ensures that goods and services can be delivered more efficiently.

5.4. *The last frontier*

Substitution, and consequently the test for substitution, is of utmost importance. It provides the last frontier in which the Constitution has an opportunity to reign supreme when the rule of law and the constitutional principles are facing an onslaught from the executive, which has been the subject of extensive corruption allegations, and there is little to no protection against such erosion by the legislature which has also been implicated along with the executive by virtue of both branches being populated by the same political party. This dynamic is critical in understanding the role of the judiciary and the power of an exceptional remedy such as substitution in the actioning of constitutional principles.

The buck ultimately stops with the courts with the test for substitution, as well as the remedy of substitution itself. They are the ones at the reigns of a functional accountability mechanism and have the power to take matters into their own hands, should the situation require such, to make the call themselves such that the necessary processes can continue. Along with providing effective relief for aggrieved parties, the courts prevent any further sidestepping of accountability and limit the opportunity for maladministration and delay within the public procurement process which has been concluded at the hands of the court.

The impact of this is that the rule of law is upheld and given effect in practice and the constitutional principles gain expression through improved public service delivery. This is consistent with the spirit and purport of the Constitution which seeks to create an open and democratic society wherein people are free to release their full potential without undue limitations.

With the pervasiveness of state capture allegations and the state of the political arena in South Africa, the judiciary plays an important role in ensuring that the rule of law and constitutional principles have an opportunity to survive and thrive. The application of the test for substitution and, ultimately substitution itself where relevant, epitomises this.

5.5. Constitutional principles operationalised

The very nature of the remedy of substitution is what makes it so fundamentally powerful. It is a remedy, fully authorised and supported by the law that allows a court to step into the shoes of the administrator and make a decision itself. This is fundamentally important as this remedy can be considered the final frontier, as long as the independence of the judiciary remains intact. This remedy allows for the other branches of government to be sidestepped in the pursuit of justice and equity.

The discussion above sought to showcase how the test for substitution has been used as a vehicle through which the constitutional project and its informing principles can have an impact directly. It offered a pragmatic interpretation of the test and considered the role of the courts within an imperfect system.

CHAPTER 6: CONCLUSION AND FINAL REMARKS

6.1. *Introduction*

This thesis set out to analyze the role of substitution as a remedy for maladministration in the public procurement context within the modern constitutional democracy in South Africa. It considered the role and position of substitution as a remedy from a theoretical and practical perspective. This analysis was done against the backdrop of public procurement and its links to service delivery in South Africa and the furtherance of the democratic project. This chapter outlines the findings of this analysis. It also presents recommendations for furthering the operationalisation of constitutional principles through the substitution framework. Overall, it encapsulates the concluding remarks on this study.

6.2. *Findings*

This study makes three core findings. The first pertains to the development of the test for substitution, the second speaks to the role of the courts and the test within the contexts of the checks and balances mechanisms, the third and final finding highlights the cumulative impact of the test for substitution and how it can bring the constitutional principles to action.

The test for substitution developed gradually and in a duly considered manner. It is based on a long line of case law that drew on the notion of fairness, or justice and equity as a guide. The Constitutional Court drew on this line of jurisprudence in the seminal judgment of *Trencon*, where a unanimous bench sought to clarify the test for substitution (also known as the test for exceptional circumstances). The test is shown to be sufficiently clear and legally certain, as required by the rule of law. This was seen in the subsequent judgments from the high court, where the courts were called on to decide whether to award an order for substitution in public procurement disputes.

The analysis further revealed that substitution, arising from judicial review, can offer a potential solution to the gap that currently exists within the checks and balances structures. This study discussed these shortcomings in the accountability mechanisms concerning the pervasiveness of state capture and the impact of a one-party dominant

democracy. Substitution is unique in that it empowers the court to make the necessary decision, which limits the opportunity for interference and further delays. When decided appropriately, it also promotes justice and equity as that is the overarching standard that is applied by the courts when determining whether or not it would be appropriate to award an order for substitution, given its exceptional nature.

The final finding of the study was that substitution as a remedy employing exceptional circumstances has the potential to put the constitutional principles into action and to bring the ideals of a transformative democracy to life. It can do this because of its ability to hold the other branches of government to account and ensure that the rule of law and the Constitution reign supreme while also furthering service delivery efforts which is an integral part of the transformation project. Additionally, it was shown that this is the final frontier to upholding the supremacy of the Constitution and the rule of law. This is arguably the most important of the three findings.

6.3. Recommendations

Based on the aforementioned discussion, the following three recommendations are proposed. The first is that the test for substitution is viewed as such and not through the prism of a test for exceptional circumstances generally. The second is that the judiciary should continue to act in a more empowered model and should be supported accordingly. The last recommendation is that further research is needed on the reality within which the judiciary operates when considered within the context of a state encumbered with corruption and state actors not tethered to constitutional ideals. This will help in developing a stronger model that allows for the legitimacy of the judiciary to remain intact despite attacks from other spheres. These recommendations are explored in more detail below.

6.3.1. Back to the basics

First, it is proposed that the test for exceptional circumstances, as is referred to in the literature, is considered the test for substitution only, with the exceptional circumstances enquiry being an element of the test. The test is constructed in such a way that truly considers the impact of the court's decision to substitute from many angles. Viewing it through this narrowed lens allows for a more accurate

understanding and interpretation of the test, and thus the future application of the said test. As shown in this dissertation through an analysis of the case law, it is fit for this purpose and can make a significant contribution to the realisation of the constitutional principles and the democratic project.

Much of the uncertainty that surrounds the application of the test does not flow from the construction of the test itself. Rather it flows from the facts, and context, to which the test is being applied. Public procurement is unique in that there are very few grey areas. Tenderers are awarded scores for their submissions and there is a predetermined list of criteria that must be met. The facts in question can thus be answered in a very black-and-white manner. This is based on the procurement policies and frameworks relied upon in the tendering process.

The same is not true for other administrative matters such as decisions about refugee status where fairness enquiries are not conducive to simple yes-or-no answers. It is in these instances that the critiques about the lack of clarity or legal certainty find a basis. In the public procurement context, where most of the critical questions have already been considered by experts, the courts have found more success with applying the test for substitution. In that context, the test has thus proven effective and should be embraced as such.

6.3.2. Towards a more empowered judiciary

The second recommendation is that this more empowered model of the judiciary should be embraced given the difficult socio-political context within which they operate. Under the separation of powers, this is not ideal but given that the courts are the guardians of the Constitution they should continue to serve their role as dutifully as they have done so far. This is crucial in the protection and promotion of constitutional principles and the advancement of the constitutional project.

The criticisms levelled at the various elements of the test for substitution and the role of the courts ought to give due consideration to the context within which the courts are operating, such that the courts' true position is considered and reflected in the criticism. The courts have shown the ability to make difficult decisions that would see them stepping outside of the bounds of their traditionally occupied territory.

However, they do so only when justified, as seen in the case law presented on substitution in this study.

Furthermore, the court must be viewed as the last champion safeguarding the total collapse of the supremacy of the Constitution and the rule of law. Their actions should thus be viewed with this in mind within the public procurement context. The collapse will not happen all at once, but rather slowly and consistently over time through a series of small chips at the constitutional democracy. State capture is a prime example of this erosion of constitutional ideals. It is thus proposed that the courts are afforded some grace when called upon to adjudicate difficult decisions.

6.3.3. Envisioning a more effective response model

The third recommendation is no small task, but it is a first step. More research is needed on the actual functioning of the branches of government within this specific South African context to better understand the challenges to the existing separation of powers model and to discover where and why the theory and practice diverge. It is evident that the system is not functioning as it was originally envisioned. A deeper understanding of the current *modus operandi* is needed such that an effective response model to the legal-political challenges facing the constitutional dispensation can be developed and can be used to inform how the judiciary ought to navigate the challenges they face. This will go a long way in ensuring that the constitutional principles and the vision of the constitutional project are progressively realised without threatening the legitimacy of the judiciary. This could take the form of specific support structures created to support the judiciary in its role as guardian of the Constitution.

6.4. Conclusion

This thesis considered several ideas to show that through substitution, constitutional principles can be actioned. This is due to the nature and structure of the test for substitution. It requires the courts, who engage in the weighing up exercise to determine whether it would be just and equitable to grant an order for substitution, to consider a plethora of factors while ensuring the balancing of the interests of the

parties to proceedings as well as those impacted by the outcome of the litigation proceedings.

This is no easy task and it is made more difficult by the challenges brought by state capture and the breakdown in the accountability structures that exists between the branches of government. Despite these challenges, the courts appear to have their sights set on protecting and promoting the constitutional principles and the aspirations of the constitutional project. This study has shown that, in the meantime, the core principles of constitutionalism under threat from the executive's decadence and the legislature's blind eyes are well-protected by the court's utilisation of the substitution framework. A concerted implementation of substitution as a judicial tool will go a long way in ensuring that constitutionalism is operationalised.

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