The Test for 'Exceptional Circumstances' Where an Order of Substitution is Sought: An Analysis of *Trencon* Against the Backdrop of the Separation of Powers

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I Introduction

There is perhaps some irony in the fact that a doctrine not mentioned by name in our Constitution[1] – the separation of powers – has been, and continues to be, a hot talking point. One of the areas in which it generates debate is that of the courts' remedial powers, particularly in constitutional matters. Section 172(1)(b) of the Constitution vests the courts with a generous discretionary power to make 'any order that is just and equitable' in constitutional matters. Acting under the rubric of these somewhat amorphous guiding tenets of justice and equity, our courts are required to do some careful balancing: balancing of the need to ensure both a degree of certainty and a degree of flexibility when carving out the requisites of an appropriate remedy; balancing of the need to ensure they fulfil their role as guardians of the Constitution by awarding effective relief where rights need to be vindicated, while at the same time remaining conscious of the need not to overstep into the 'boggy terrain'[2] of policy which belongs in the legislative, executive and, to a degree, administrative heartlands. This balancing act is not an easy one. It is particularly tricky where 'exceptional circumstances' call for exceptional relief.

Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the constitutionally mandated legislation that seeks to give effect to the s 33 rights to 'just administrative action', empowers courts in judicial review proceedings to make a 'just and equitable' order 'substituting or varying the administrative action or correcting a defect resulting from the administrative

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[1] Constitution of the Republic of South Africa, 1996.

[2] *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5, 2015 (3) SA 479 (CC) at para 58.

action' in 'exceptional cases'. The PAJA, however, fails to provide legislative guidance as to what exceptional circumstances might call for this exceptional remedy. This is thus an area where '[t]he common law informs the provisions of PAJA'.[3] Out of the common law, several fairly loosely conceived factors in this exceptional circumstances test have crystallised. However, their substantive content, interplay and pecking order in the enquiry have been fairly unclear. The recent judgment of the Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* aims to 'clarify the test for exceptional circumstances where a substitution order is sought'[4] and seems to go some way in doing so. In particular, the Court picks up where Plasket J left off in *Intertrade Two (Pty) Ltd v MEC, Roads & Public Works, Eastern Cape*, where he stated that '[t]he availability of proper and adequate information and the *institutional competence* of the court to take the decision for the administrative decision-maker are *necessary prerequisites* that *must* be present, *apart from* "exceptional circumstances", before a court can legitimately assume an administrative decision-making function'.[5]

Informed by the degree of deference required by the separation of powers in awarding appropriate relief, the *Trencon* Court puts centre-stage those factors that go to the institutional competence of the courts and, at the same time, emphasises the vital overarching role of the notion of fairness in the enquiry. In doing so, the judgment – although rather unclear in parts – goes some way to achieving that sensitive balance between the need for a degree of both certainty and flexibility, and the need to avoid both judicial timidity and judicial excess in the granting of remedies. On the whole, it is both a principled and pragmatic judgment showing mindfulness of the vital role public procurement plays in our society and concomitantly recognising the dangers of the abuse, or merely the poor exercise, of public power in this context.

In this comment I discuss *Trencon* against the backdrop of the separation of powers and the 'formal and flexible rules of restraint'[6] that flow from it and ought to guide the courts in exercising their remedial powers, particularly those of an exceptional nature such as substitution. In doing so I aim, in particular, to interpret the Court's formulation of the exceptional circumstances test in a constructive and accessible manner, for this formulation will no doubt serve as the litmus test for the courts in future and will play a significant practical role when an aggrieved party is deciding whether to litigate, particularly in the procurement context.

[3] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC)('*Bato Star*') at para 22. On the relationship between the common law, the PAJA and s 33 of the Constitution, see L Kohn 'Our Curious Administrative Law Love Triangle: The Complex Interplay Between the PAJA, the Constitution and the Common Law' (2013) 28 *South African Public Law* 22.

[4] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22, 2015 (5) SA 245 (CC), 2015 (10) BCLR 1199 (CC)('*Trencon*') at para 32.

[5] *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape, and Another* [2007] ZAECHC 149, 2007 (6) SA 442 (Ck), [2008] 1 All SA 142 (Ck)('*Intertrade*') at para 43 (emphasis added).

[6] L Kohn 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?' (2013) 130 *South African Law Journal* 810, 820 ('Rationality Review').

II The Separation of Powers as a Guide to the Courts in the Exercise of their Remedial Powers

Although not mentioned by name, it is axiomatic that by its design our Constitution implicitly entrenches the doctrine of the separation of powers.[7] In theory the doctrine comprises two fairly straightforward propositions.[8] The first is that to prevent the abuse of public power, it must not be concentrated in any one arm of state but must rather be divided amongst them.[9] The second proposition qualifies this first one: it is the principle of checks and balances pursuant to which the separation is not absolute insofar as each of the three branches exercises some form of 'check' over the power of the others.[10] As I have noted elsewhere, '[t]he judiciary provides the most crucial check against abuses of state power, and this is most obviously done through the "potentially awesome power" of judicial review'.[11] Within the separation of powers, the judiciary is thus both player and referee and therefore has the role of policing compliance with the Constitution by the other arms of state (as well as the administration),[12] while determining for itself just how far to go in exercising this policing function. Given this sensitive dual role demanded by the separation of powers, a 'delicate balancing'[13] is required in the discharge of the judicial function. Thus, in *ITAC v SCAW South Africa (Pty) Ltd,* Moseneke DCJ noted the following:

> Where 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

[7] See *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22, 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 19. On the doctrine generally see, eg, K O'Regan 'Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' (2005) 8 *Potchefstroom Electronic Law Journal* 120; P Labuschagne 'The Doctrine of Separation of Powers and its Application in South Africa' (2004) 23 *Politeia* 84; PN Langa 'The Separation of Powers in the South African Constitution' (2006) 22 *South African Journal on Human Rights* 2; S Ngcobo 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' (2011) 22 *Stellenbosch Law Review* 37; and GE Devenish 'The Doctrine of Separation of Powers with Special Reference to Events in South Africa and Zimbabwe' (2003) 66 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 84.

[8] On the two propositions, see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 109: 'The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another.'

[9] Thus, s 43 of the Constitution entrusts legislative authority to the legislatures at national, provincial and local government level, s 85 vests the executive authority of the Republic at national level in the President and his cabinet, and s 165(1) vests the judicial authority in the courts.

[10] An example of an operational provision that epitomises a 'check' within the system of checks and balances is s 172 of the Constitution.

[11] Kohn 'Rationality Review' (note 6 above) at 816.

[12] See *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19, 2009 (1) SA 287 (CC), 2009 (2) BCLR 136 (CC) at para 33, where the Court notes that '[i]t is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.'

[13] *De Lange v Smuts NO and Others* [1998] ZACC 6, 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 60.

> making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.[14]

This warning rings equally true when it comes to the functions of administrative agencies which 'the court[s] should take care not to usurp'.[15] To achieve this delicate balancing demanded by the separation of powers, and thereby ensure that the 'defensible limits of judicial review'[16] are observed, what I have explained to be 'formal and flexible rules of restraint'[17] serve to guide the courts in exercising their review function and awarding appropriate relief. A 'significant'[18] formal limit is the review / appeal dichotomy pursuant to which a court exercising review jurisdiction over the legality of a decision-making process should be mindful of the need not to slip into an appeal-style assessment of the correctness or otherwise of the outcome in a given case.[19] Thus, in the recent case of *City of Cape Town v South African National Roads Agency Ltd*, Binns-Ward and Boqwana JJ noted that:

> [a]ppeals entail reconsidering the merits of an impugned decision (a rehearing in effect), with the appellate tribunal being empowered to substitute its decision for that of the first instance decision-maker. Reviews, on the other hand, are not concerned, other than sometimes incidentally, with the merits … and only exceptionally will they give rise to a substitutive decision.[20]

Section 8(1)(c)(ii)(aa) of the PAJA contemplates such an exceptional situation. The power to substitute must therefore be exercised judiciously and in accordance with the requisite degree of deference or 'respect'[21] (the flexible self-imposed rule of restraint)[22] called for by the facts of a given case. In *Bato Star* our Constitutional Court endorsed Hoexter's account of judicial deference as:

> [A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues, to accord their interpretations of facts and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. *It ought to be shaped … by a careful weighing up of the need for*

[14] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6, 2012 (4) SA 618 (CC), 2010 (5) BCLR 457 (CC) at para 95.

[15] *Bato Star* (note 3 above) at para 45.

[16] P Lenta 'Judicial Restraint and Overreach' (2004) 20 *South African Journal of Human Rights* 544.

[17] Kohn 'Rationality Review' (note 6 above) at 820.

[18] *Bato Star* (note 3 above) at para 45.

[19] See Kohn 'Rationality Review' (note 6 above) at 820.

[20] *City of Cape Town v South African National Roads Agency Ltd and Others* [2015] ZAWCHC 135, 2015 (6) SA 535 (WCC), 2016 (1) BCLR 49 (WCC) at para 8.

[21] *Bato Star* (note 3 above) at para 46.

[22] See my discussion of this notion of deference in Kohn 'Rationality Review' (note 6 above) at 822–824.

> – *and the consequences of – judicial intervention*. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.[23]

This form of deference thus requires an honest assessment by a court of its institutional competence in a particular case. Context matters greatly, for '[d]etermining the boundaries of the courts' proper role … cannot be reduced to a simple test or formula; it will vary according to … the context of each case'.[24] Implicit in this recognition of the need for a degree of flexibility is a concomitant recognition of the flipside to the coin of deference: certain circumstances may call for less deference, more searching review and/or a more robust approach to remedy – such as substitution. This is consonant with the principle of checks and balances demanded by the separation of powers which must be understood as '"o*perationally defined*" by the Constitution'.[25]

Section 172 of the Constitution is an apt example of a vital 'operational check' within the separation of powers: it grants the courts a wide discretion to 'make any order that is just and equitable' in fulfilling their mandate to declare invalid law or conduct that is inconsistent with the Constitution.[26] This phrase is mirrored in s 8(1) of the PAJA – legislation that enjoys a special dual status insofar as it is constitutionally mandated *and* a product of the exercise of the democratic will as expressed by the legislature – which, in an open list of possible remedies, expressly contemplates substitution as a just and equitable remedy where the circumstances are 'exceptional' and thus demand as much. This remedy must therefore be understood as a manifestation of what the separation of powers may in fact require in a particular context. Thus in *Allpay 2* Froneman J noted that

> [t]here can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court *must* provide effective relief for infringements of constitutional rights.[27]

Substitution, although the exception rather than the norm, may be the effective and thus 'appropriate'[28] relief required by the particular facts and thus what justice

[23] *Bato Star* (note 3 above) at para 46, citing C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *South African Law Journal* 484, 501–502 (emphasis added).

[24] McLachlin J in *RJR-MacDonald Inc v Canada (Attorney-General)* (1995) 31 CRR (2nd) 189, [1995] 3 SCR 199 at para 136.

[25] *Dodo v S* [2001] ZACC 16, 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC*)* at para 17, citing Tribe's remarks in relation to the US Constitution.

[26] Thus Froneman J stated in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12, 2014 (4) SA 179 (CC), 2014 (6) BCLR 641 (CC)('*AllPay 2*') at para 45: '[T]he answer to the separation-of-powers argument lies in the express provisions of s 172(1) of the Constitution. The corrective principle embodied there allows correction to the extent of the constitutional inconsistency.'

[27] Ibid at para 42 (emphasis added).

[28] In *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 at para 69 the Court held that 'an appropriate remedy must mean an effective remedy'.

and equity in a given case necessitate.[29] Accordingly, the test for exceptional circumstances must be understood against the backdrop of the first principles that the Court has elucidated when it comes to the question of remedy. These were crisply summarised by Moseneke DCJ in *Steenkamp NO v Provincial Tender Board, Eastern Cape*:

> It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy *must be fair* to those affected by it and yet vindicate effectively the right violated. It must be *just and equitable in the light of the facts, the implicated constitutional principles*, if any, and the controlling law… . The purpose of a public law remedy is to pre-empt or *correct* or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision …. Ultimately the purpose of a public law remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.
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> …
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> Examples of public remedies suited to vindicate breaches of administrative justice are to be found in s 8 of the PAJA … [which] confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are 'just and equitable'.[30]

The overarching question when it comes to the remedy of substitution is thus whether justice and equity – code for simple fairness – demand as much on the distinctive facts. This is nothing novel: the guiding consideration of fairness was emphasised even in the pre-PAJA common-law jurisprudence.[31] However, given the extraordinary nature of the remedy in the context of the separation of powers and the courts' *sui generis* institutional competence, unfettered flexibility is both unhelpful and unwarranted. For this reason, the courts have carved out factors to guide the exercise of their discretion and thereby assist in ensuring equilibrium between the need for a degree of both clarity *and* flexibility. Before illustrating how the *Trencon* judgment purports to clarify this exceptional circumstances test and to ensure this equilibrium, I turn briefly to consider this test's jurisprudential roots and the legal principles it entails.

III When to Substitute: The Common-law Guidelines

Given that the PAJA fails to provide any legislative guidance as to when a case will be 'exceptional' and thus call for substitution, the common-law principles continue to be instructive. It is a well-established principle of our common law 'that the courts will be reluctant to substitute their decision for that of the original

[29] See K Roach & G Budlender 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?' (2005) 122 *South African Law Journal* 325, 351, where the authors highlight that '[d]ifferent remedial routes may be appropriate in different circumstances, but the ultimate destination that the courts should insist upon is compliance with the constitution. In the final analysis, the test is one of effectiveness. Court orders that are not effective undermine respect for the courts, for the rule of law, and for the constitution itself.'

[30] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16, 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) at paras 29–30 (emphasis added).

[31] See the discussion at III below.

decision maker'.[32] This necessary reluctance to intervene and substitute flows directly from the separation of powers, which requires the courts to recognise their institutional limitations and respect the comparative institutional competence of administrative agencies, particularly in polycentric matters. Thus, in *Gauteng Gambling Board v Silverstar Development Ltd* Heher JA noted that '[a]n administrative functionary … is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations.'[33] Remittal is thus the general rule and 'almost always the prudent and proper course'.[34] However, sometimes rules need to be broken, and our courts have long since recognised that there may be unusual instances in which substitution is the appropriate remedy. On a big-picture level, this determination has essentially always required the courts to ask the question whether 'a decision to exercise a power should not be left to the designated functionary'.[35]

Established principles have emerged from the common law to guide the courts in answering this question. In particular, certain factors have crystallised out of the cases so as to afford the enquiry (and thus prospective litigants) a degree of certainty.[36] However, these factors have never been considered in the abstract: the cases show that '[f]airness to both sides has always been and will almost certainly remain an important consideration',[37] which may be decisive in tipping the scales. Thus, in the early case of *Livestock and Meat Industries Control Board v Garda*, the court emphasised that it 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*'.[38] This principle permeates the post-PAJA jurisprudence too, an arguably unsurprising fact given the constitutional imprimatur of the need to ensure 'just and equitable' relief. For example, in *Commissioner, Competition Commission v General Council of the Bar of South Africa* Hefer AP held that '[a]ll that can be said is that considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so'.[39] When might a court be able to do so? The following open list of considerations, or factors, has emerged from the pre- and post-PAJA case law and may, on the facts of a given case, prompt a decision to substitute:[40]

[32] *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20, 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at para 50.

[33] *Gauteng Gambling Board v Silverstar Development Ltd and Others* [2005] ZASCA 19, 2005 (4) SA 67 (SCA)('*Silverstar*') at para 29.

[34] Ibid.

[35] Ibid at para 28.

[36] On these factors, see the discussion in section IV.A below.

[37] C Hoexter *Administrative Law in South Africa* (2nd Edition, 2012) 553.

[38] *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G (emphasis added).

[39] *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* [2002] ZASCA 101, 2002 (6) SA 606 (SCA)('*Competition Commission*') at para 15.

[40] For a helpful summary, see L Baxter *Administrative Law* (1984) 681 et seq; *University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C) ('*UWC*') at 131D–J; and *Ruyobeza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C), 2003 (8) BCLR 920 (C)('*Ruyobeza*') at 64G.

(a) where the court is 'in as good a position' and thus as well qualified as the original authority to make the decision;[41]
(b) 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';[42]
(c) where additional delay would cause unjustifiable prejudice;[43] and
(d) where 'the functionary or tribunal 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'.[44]

The latter two factors are essentially equitable considerations, while the first two necessitate an assessment of the comparative institutional competence of the court vis-à-vis that of the administrator in the future, should the matter be remitted. While the Court in *Trencon* notes that both pre- and post-PAJA case law seems to suggest that 'if any factor is established on its own, it would be sufficient to justify an order of substitution',[45] it appears to me that those factors that go to institutional competence have in fact previously been considered (even if merely impliedly so) more significant in the enquiry. For example, in the early benchmark case of *JCC*, despite recognising the issue of delay and the fact that 'a few weeks [could] be saved if the Court assume[d] the Administrator's function', Hiemstra J nonetheless went on to note that '*in addition*, the result *must* be a foregone conclusion'.[46] Plasket J put it even more explicitly in *Intertrade*: 'The availability of proper and adequate information and the *institutional competence* of the court to take the decision for the administrative decision-maker are *necessary prerequisites* that must be present, *apart from* "exceptional circumstances", before a court can legitimately assume an administrative decision-making function.'[47] More recently, in *M v Minister of Home Affairs,* the court canvassed the various factors and concluded by remarking that '[o]f course, the court *should* be in a *position*

[41] This consideration was explicitly added by the SCA in *Silverstar* (note 33 above) at para 39 and had also been decisive in earlier cases such as *Theron en Andere v Ring van Wellington van die NG Sendingskerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A)('*Theron*') where, given the judicial nature of the decision in question, the court felt it was fully qualified to substitute. See also *M v Minister of Home Affairs* [2014] ZAGPPHC 649 ('*M*') at para 177, *UWC* (note 40 above) at 131G–H and *Competition Commission* (note 39 above) at para 15.

[42] This common-law principle was stated by Hiemstra J in *Johannesburg City Council v Administrator, Transvaal and Another* 1969 (2) SA 72 (T)('*JCC*') at 76E–F. See also, eg, *Hangklip Environmental Action Group v Minister for Agriculture, Environmental Affairs and Development Planning, Western Cape and Others* [2007] ZAWCHC 41, 2007 (6) SA 65 (C) and *Silverstar* (note 33 above) at paras 38–39.

[43] Hoexter (note 37 above) notes at 553 fn 278 that 'this factor, while it was treated as adding weight to the "foregone conclusion" factor in the *Johannesburg City Council* case, … has since been regarded as an independent consideration'. See, eg, *Ruyobeza* (note 40 above) at para 49; *M* (note 41 above) at para 175; *ICS Pension Fund v Sithole and Others NNO* [2009] ZAGPHC 6, 2010 (3) SA 419 (T) at para 97; and *Head, Western Cape Education Department and Others v Governing Body, Point High School and Others* [2008] ZASCA 48, 2008 (5) SA 18 (SCA) at para 17.

[44] *UWC* (note 40 above) at 131D–E. See also, eg, *Mlokoti v Amathole District Municipality and Another* [2008] ZAECHC 184, 2009 (6) SA 354 (ECD) at 380I–381B; *Oskil Properties (Pty) Ltd v Chairman of the Rent Control Board and Others* 1985 (2) SA 234 (SE) at 247E; *Tantoush v Refugee Appeal Board and Others* [2007] ZAGPHC 191, 2008 (1) SA 232 (T) at para 127; and *M* (note 41 above) at paras 170–174.

[45] *Trencon* (note 4 above) at para 39, and see the cases cited in fn 33.

[46] *JCC* (note 42 above) at 179 (emphasis added).

[47] *Intertrade* (note 5 above) (emphasis added).

practically to make the decision';[48] and in *Justice Alliance of South Africa v Mncube NO* Bozalek J was emphatic in saying that '*[m]ost importantly … ,* I do not consider that this is a case where the end result is a foregone conclusion'.[49]

The 'clarification' provided by *Trencon* thus seems to be the inevitable outcome of a trend emerging in the case law with its roots in the early pre-PAJA jurisprudence. This trend has, however, not been a clear and uniform one: as the Court notes, '[some of the] earlier case law seemed to suggest that each factor … may be sufficient on its own to justify substitution. However, it is unclear from more recent case law whether these considerations are cumulative or discrete.'[50] The Court goes on to cite several recent cases in support of this observation.[51] For example, in *Reizis* the court appears to consider each of the four factors cumulatively in a kind of mechanical tick-box exercise.[52] The *Trencon* Court thus considers it to be 'of great import that the test for exceptional circumstances be revisited'.[53] There is indeed value in the highest court's laying down the tracks of this test and providing greater structure to the enquiry; especially given the inevitable separation-of-powers tensions it creates. I turn now to consider how the *Trencon* judgment seeks to achieve this.

IV *Trencon*: An Attempt to Balance Certainty and Flexibility in the Test for Exceptional Circumstances

The facts of *Trencon* emerge out of a procurement dispute, and it is through the prism of both fairness broadly and the regulatory framework governing public procurement that the Court views the issues in this case.[54] Thus in the introductory paragraph Khampepe J, writing for a unanimous Court, highlights the following:

> [T]endering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and government wields massive public power when choosing to award a tender. It is for this reason that the Constitution obliges organs of state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective. *Where the procurement process is shown not to be so, courts have the power to intervene.*[55]

The Court thus sets the tone for what is to come in the judgment: an implicit highlighting of the vital role that the courts play as watchdogs to address

[48] *M* (note 41 above) at para 166 (emphasis added).

[49] *Justice Alliance of South Africa v Mncube NO and Others; In re: Cause for Justice and Another v Independent Communications Authority of South Africa and Others; In re: Doctors for Life International WC v Independent Communications Authority of South Africa and Others* [2014] ZAWCHC 162, 2015 (1) All SA 181 (WCC) at para 187 (emphasis added).

[50] *Trencon* (note 4 above) at para 46.

[51] Ibid, referring to *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others* [2014] ZAWCHC 134, 2015 (1) All SA 100 (WCC) at paras 33–39; *Media 24 Holdings (Pty) Ltd v Chairman of the Appeals Board of the Press Council of South Africa and Another* [2014] ZAGPJHC 194 at para 25; *Nucon Roads and Civils (Pty) Ltd v MEC for Department of Public Works, Roads and Transport: NW Province and Others* [2014] ZANWHC 19 at paras 32, 41 and 44; and *Reizis NO v MEC for the Department of Sport, Arts, Culture and Recreation and Others* [2013] ZAFSHC 20 ('*Reizis*') at paras 35–39.

[52] *Reizis* (note 51 above) at paras 35–39.

[53] *Trencon* (note 4 above) at para 41.

[54] Ibid: see, eg, at paras 75 and 78.

[55] Ibid at para 1 (emphasis added).

maladministration and the abuse of public power, and an explicit acknowledgement that the separation-of-powers concerns can in fact be 'adequately provided for within the exceptional circumstances test itself'.[56]

The facts of this case can be summarised as follows. In May 2012 the Industrial Development Corporation of South Africa (IDC) issued a request for proposals (RFP) to building contractors for the purposes of prequalifying for a principal building contract to upgrade the IDC head office in Sandton, Johannesburg. The RFP stipulated that late applications would not be evaluated. Seven shortlisted candidates – including Trencon Construction (Pty) Ltd (Trencon, the applicant) and, notwithstanding its late submission, Basil Read (Pty) Ltd (Basil Read, the second respondent) – prequalified pursuant to an assessment of their profiles based on various factors such as technical capability and environmental management.

Already at this prequalification stage, the IDC's Support Services highlighted to the Procurement Committee that Trencon 'demonstrated extensive capacity'.[57] The IDC then commenced the second phase in the tendering process by issuing a formal tender invitation to each of the seven contractors. The tender invitation stated that the site handover date would be 6 September 2012. This second phase was governed by the strict regulatory framework and involved the evaluation of the tenders on the basis of price and broad-based black economic empowerment points in accordance with the 90/10 preference point method. Trencon was awarded 90 points for price given that it submitted the lowest bid price and, pursuant to its empowerment verification certificate, it was also awarded the most points for empowerment. Despite Trencon's being the clear forerunner at this juncture, clarification was sought by the quantity surveyors on various matters including the question of bid price should the site handover be delayed. Trencon indicated that it would charge an additional monthly escalation amount of 0,6 per cent, whereas Basil Read indicated that its bid would remain fixed regardless. Significantly, despite this price escalation, 'Trencon's bid price was still the lowest'[58] and it was thus recommended (albeit subject to certain conditions) by the quantity surveyors, the IDC's principal agent for the evaluation of the tender (Snow Consultants Incorporated), the Support Services and in turn the Procurement Committee, which ultimately recommended Trencon for the award of the tender.[59]

Notwithstanding the unanimous endorsement of Trencon's bid, the IDC's Executive Committee (Exco, the final decision-maker) declared Trencon's bid to be non-responsive and awarded the tender to Basil Read.[60] It reached this decision on the basis that 'by adding the price escalation, Trencon failed to keep its price fixed for the 120 days of the tender evaluation period'[61] – something the Exco thought was required by the relevant tender documents.

[56] Ibid at para 94.
[57] Ibid at para 7.
[58] Ibid at para 19.
[59] Ibid at paras 13–20.
[60] Ibid at para 22.
[61] Ibid.

Trencon challenged this decision in the High Court [62] and won, essentially on two bases. First, the court held that Basil Read's late proposal should not have been considered insofar as it was a mandatory and material condition of the IDC's RFP that proposals be submitted timeously and that a failure to do so would be a bar to their consideration.[63] Secondly, and more importantly, the court held that the final decision was unlawful in that it had been based on a material error of law pursuant to a 'misreading and misunderstanding of … provisions of the Contract Data … with cross reference to the JBCC 2000 on price adjustments' in terms of which 'adjustment[s] of the bid price consequent to … delays in site handover are *not* prohibited'.[64] This error was conceded by the IDC in argument, and thus it was common cause that Trencon's bid was in fact responsive.[65] The court therefore set aside the IDC's decision to award the tender to Basil Read.

The High Court then turned to the question of remedy, in particular, whether a substitution order would be just and equitable. It held that a case had indeed been made out to substitute.[66] In reaching this conclusion, the court seems to have considered the common-law factors cumulatively:

> This Court is *qualified* to [take the decision itself]… . [T]he decision was, barring the material error of law, a *foregone conclusion* …. This tender involves quite a substantial amount of public funds and any further *delay* of the project would cause unjustifiable *prejudice* to Trencon, the IDC and National Treasury… . [I]t will be just and equitable to award the tender to Trencon.[67]

The IDC appealed to the Supreme Court of Appeal (SCA), conceding the material error of law but arguing that 'the court below erred in finding that Basil Read's tender was disqualified because the degree of its submission's lateness was immaterial, caused no prejudice and ought to have been condoned'.[68] The IDC further contended that the remedy of substitution was inappropriate on the facts.[69] This latter argument was decisive for the court: having tersely canvassed the principles governing this remedy, Maya JA sweepingly, and without meaningful justification, concluded for a unanimous court that:

> [i]t is clear that the court below erred in substituting its own decision… . It overlooked the fact that IDC was *not obliged to award the tender to the lowest bidder or at all*. The award of the tender could not be a forgone conclusion in the circumstances. Furthermore, the court

[62] *Trencon (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2013] ZAGPPHC 147.

[63] Ibid at para 39.

[64] Ibid at para 29 (emphasis added).

[65] Ibid at paras 31–32.

[66] Ibid at para 53.

[67] Ibid (emphasis added).

[68] *Industrial Development Corporation of South Africa Ltd v Trencon Construction (Pty) Ltd and Another* [2014] ZASCA 163, 2014 (4) All SA 561 (SCA)('*Trencon* SCA') at para 11.

[69] Ibid.

> does not appear to have balanced the substitution remedy against the *requirements of the separation of powers* and failed to exercise judicial deference.[70]

The court then went on to highlight an 'additional practical difficulty' with substitution: 'Over two years have elapsed since the beginning of the tender process. The information upon which the tenders were evaluated is obviously dated. The order does not accommodate unavoidable supervening circumstances such as price increases that have to be taken into account.'[71] Maya JA thus held that no exceptional circumstances existed to justify substitution and that the appeal therefore succeeded.[72] In a rigorous, albeit somewhat confusing, unpacking and application of the exceptional circumstances test, the Constitutional Court unanimously reached the contrary conclusion, upholding the appeal by Trencon and reinstating the High Court's order.[73] It is noteworthy that the two highest courts in our land can differ so starkly in their reasoning, and this in turn highlights the value of the appeal process as a 'check' on the exercise of judicial power within the separation of powers.

I turn now to explain how the Constitutional Court reaches the conclusion it does and thereby goes some way to clarifying the test for exceptional circumstances where a substitution order is sought. While the Court identifies five particular issues,[74] for the purposes of this comment I focus on the first three only.

A The Exceptional Circumstances Test

As Lord Steyn put it in the House of Lords decision in *R (on the application of Daly) v Secretary of State for the Home Department*, '[i]n law context is everything'.[75] In unpacking the exceptional circumstances test in *Trencon*, the Court's analysis is quite evidently informed by both the big-picture context of the need to respect the separation of powers and, more specifically, the context of the wording of s 8(1) of the PAJA.[76] Thus, against the backdrop of the common-law principles governing the test,[77] Khampepe J's starting point is an acknowledgement that '[t]he administrative review *context* of s 8(1) of the PAJA and the wording under subs (1)(c)(ii)(aa) make it perspicuous that substitution remains an extraordinary remedy. Remittal is still almost always the prudent and proper course.'[78] The Court goes on to elucidate why this is so with reference to the role of the courts within the separation of powers and the concomitant deference required of them

[70] Ibid at para 18 (emphasis added). Note that Maya JA fails to illustrate how exactly this is 'clear'. The Court's analysis on this score is thus extremely thin and the judgment can be criticised on this basis. It should be remembered that judicial officers have a duty to justify their decisions through sound judicial reason-giving. This is an important mechanism by which judges are held accountable within the separation of powers: see M Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *South African Journal of Human Rights* 383, 391.

[71] *Trencon* SCA (note 68 above) at para 19.

[72] Ibid at para 21.

[73] *Trencon* (note 4 above) at para 101.

[74] Ibid at at para 33.

[75] *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 (HL).

[76] See *Trencon* (note 4 above) at paras 35 and 42.

[77] Ibid at paras 36–41.

[78] Ibid at para 42 (emphasis added).

in reviewing decisions of administrative agencies, given that 'courts are ordinarily not vested with the skills and expertise required of an administrator'.[79]

Importantly, the Court highlights that '[j]udicial deference, within the doctrine of separation of powers' cuts another way too, insofar as it 'must also be understood in light of the *powers* vested in the courts by the Constitution'.[80] And when it comes to the courts' remedial powers in constitutional matters, the Constitution is clear: s 172(1) embodies a 'corrective principle' that 'allows correction to the extent of the constitutional inconsistency'.[81] The Court thus notes that '[a] case implicating an order of substitution accordingly requires courts to be mindful of the need for judicial deference *and* their obligations under the Constitution'.[82] A sensitive balancing is required given a court's dual role of policing constitutional compliance and determining for itself the extent of this policing function in a given case. In the context of awarding substitution orders, Khampepe J proposes the following high-level formulation of the test for exceptional circumstances in an attempt to achieve this balance:

> 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.[83]

I turn now to interpret constructively each of these components of the test as formulated by Khampepe J in the abstract, based on her application of them to the facts.

1 *Separation-of-Powers Factors*

The first thing a court is required to ask in every case is whether it is in 'as good a position', and therefore as well qualified or equipped as the original decision-maker was (and would be again if the matter were to be remitted to him or her). This determination depends on the facts of each case and will thus be informed by various considerations such as (i) *Timing:* Khampepe J states that 'a court ought to evaluate the *stage* at which the administrator's process was situated when the impugned administrative action was taken … [for] the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances, a court may very well be in the same position as the administrator to make a decision';[84] (ii) *Information:* the Court

[79] Ibid at para 43.
[80] Ibid at para 45 (emphasis added).
[81] Ibid, citing *AllPay 2* (note 26 above) at paras 42 and 45.
[82] *Trencon* (note 4 above) at para 46 (emphasis added).
[83] Ibid at para 47 (emphasis added).
[84] Ibid at para 48 (emphasis added).

seems to emphasise the value of having 'all relevant information before it'[85] as an indicator that it may indeed be as well qualified as the administrator and thus able to substitute; and (iii) *The nature of the decision:* at this stage of the overarching enquiry, the Court seems to suggest a theoretical consideration of the type of decision in issue. Thus, in classification- of-functions parlance, a judicial or quasi-judicial-type decision may, provided all relevant information is before the court, place it in as good a position as the administrator to decide the matter.[86] Then, '[o]nce a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion'.[87]

Establishment of the first factor ('in as good a position') is thus a necessary prerequisite for proceeding to the second leg of the test and determining whether the outcome is a 'foregone conclusion'. On the face of it, this makes sense: how can a court determine whether a particular outcome is inevitable on the facts unless it is in a position, and thus well equipped, to do so? This second mandatory factor in the enquiry necessitates a consideration of whether 'there is only one proper outcome of the exercise of an administrator's discretion',[88] in other words only one decision that could properly (ie lawfully, reasonably and procedurally fairly) be made, 'and "it would merely be a waste of time to order the [administrator] to reconsider the matter"'.[89] This second leg of the test thus essentially requires a determination of whether, given the facts and applicable legislative framework, the administrator has any discretion left to exercise should the matter be remitted, such that a range of possible decisions could properly be made. As Khampepe J puts it, '[a] finding that the IDC's decision is a foregone conclusion depends on whether there was only one proper outcome of the exercise of its discretion and remittal would serve no purpose. In other words, if the matter were to be remitted, the IDC *would not have any discretion left to exercise.*'[90]

The Court goes on to note a practical difficulty that may arise in determining whether an outcome is a foregone conclusion: '[I]ndubitably, where the administrator has not adequately applied its unique expertise and experience to the matter, it may be difficult for a court to find that an administrator would have reached a particular decision and that the decision is a foregone conclusion.'[91] However, Khampepe J emphasises that this practical difficulty need not be an insuperable obstacle to this second determination, for 'where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion'.[92] The second factor thus appears also to turn on a consideration of the

[85] Ibid. See also at para 58, where the Court places emphasis on the fact that it 'has the benefit of the record, with all the pertinent information and recommendations' as an indicator that it was as well-placed as the IDC to make the decision.
[86] Ibid at para 48, citing *Theron* (note 41 above) at 157B–E.
[87] Ibid at para 49.
[88] Ibid.
[89] Ibid, quoting Hiemstra J in *JCC* (note 42 above) at 76D–H.
[90] *Trencon* (note 4 above) at para 59 (emphasis added).
[91] Ibid at para 49.
[92] Ibid.

nature of the decision and the related assessment of whether it raises polycentric and/or policy-laden concerns. Khampepe J herself acknowledges this apparent redundancy in the test: 'The distinction between the considerations in as good a position and foregone conclusion seems opaque', in other words, unclear, 'as they are interrelated and inter-dependent'.[93]

The Court seems somewhat muddled in attempting to explain this interrelationship and distinctness between the two factors but it seems to me, based on the Court's application of this test to the facts, that at the second stage, rather than taking a broad theoretical approach to the assessment of the nature of the decision, the Court takes a more incisive and practical approach guided by an overarching consideration of whether to defer or not. This second stage of the enquiry appears to turn more on 'the role of policy in the court' rather than on 'a neat list of discrete considerations as is the case at stage one',[94] and where the nature of the decision is such that policy and/or polycentric concerns necessitate wide-discretionary powers on the part of the decision-maker, a court would be ill-placed and unwise to determine a decision to be a forgone conclusion.

Regarding these first two factors, which go to the institutional competence of the court within the separation of powers, Khampepe J is emphatic in stating that they 'should inevitably hold greater weight'[95] in the overall enquiry. However, an unfortunate shortcoming of the judgment is that it is not entirely clear on a literal interpretation whether this means that they must simply weigh more in the balance when considering the other factors, or whether they are strict requirements that must be met in each case for substitution to be ordered: in other words, that establishing one of the other factors (such as bias) on its own will no longer be sufficient to justify substitution. It seems to me that the latter position is intended to be the case. This conclusion is supported by a purposive understanding of the test as set out by the Court against the backdrop of Khampepe J's analysis of the need for '[j]udicial deference, within the doctrine of separation of powers'.[96] This assessment is, in turn, bolstered by the judge's emphatic insistence that 'the separation of powers is adequately provided for within the exceptional circumstances test itself',[97] and it accords with the foundations laid by Plasket J in *Intertrade*, where he indicated that the institutional expertise and competence of the court are 'necessary prerequisites'[98] in the overarching exceptional circumstances enquiry.

The recent SCA judgment in *Westinghouse* also appears to endorse this interpretation of the *Trencon* formulation: 'The [Constitutional Court] said … that the first enquiry is whether it is in as good a position to make the decision as the administrator was. Second, it *must* determine whether a substituted award is a foregone conclusion.'[99] On this interpretation, *Trencon* presents a noteworthy

[93] Ibid at para 50.
[94] Professor Hugh Corder's comments to me in a discussion about this case.
[95] *Trencon* (note 4 above) at para 47.
[96] Ibid at para 45.
[97] Ibid at para 94.
[98] *Intertrade* (note 5 above) at para 43.
[99] *Westinghouse Electric Belgium SA v Eskom Holdings (Soc) Ltd and Another* [2015] ZASCA 208, 2016 (3) SA 1 (SCA), 2016 (1) All SA 483 (SCA) at para 74 (emphasis added).

development in our law: notwithstanding the existence of other factors such as bias, a court must engage in a cumulative consideration of the separation-of-powers factors and find itself well equipped and thus competent to decide a matter before an order of substitution can be made. While this certainly provides greater structure to the enquiry, it should be noted that this kind of cumulative assessment is not a one-size-fits-all solution. Thus, in seeking to accommodate the separation-of-powers concerns within the test, Khampepe J has arguably made it harder for litigants to meet the case for substitution in certain instances, namely where the separation-of-powers requirements cannot be met but the facts, which evidence for example glaring incompetence or bias, nonetheless cry out for substitution.

2 *Other Factors such as Bias, Gross Incompetence, Delay and Good Faith*

Although a consideration of the separation-of-powers factors appears to be mandatory and their presence would seem to be a *sine qua non* for substitution, this is not the end of the enquiry: '[a] court *must* consider other relevant factors'[100] which may carry some weight in the balance. These essentially equitable considerations include the established grounds of bias and incompetence[101] – although in relation to the latter, Khampepe J seems to set a higher standard than that required at common law by the addition of the qualifier 'gross' – as well as delay. In her application of the test under the heading 'other considerations', she also adds a new consideration, that of good faith on the part of the decision-maker.[102] This may weigh in favour of remittal, and conversely it would seem that evidence of bad faith may strengthen the case for substitution.

On the subject of delay, the Court makes some important remarks. First, it is highlighted that given the contextual nature of the exceptional circumstances test, '[d]elay can cut both ways'[103] as a factor. Sometimes the facts may show that the result of delay is, for example, 'a drastic change of circumstances [such that] a party is no longer in a position to meet the obligations arising from an order of substitution'; or perhaps they indicate that 'the needs of the administrator have fundamentally changed'.[104] In such scenarios, the practical realities occasioned as a result of the delay would render a determination as to 'foregone conclusion' highly unlikely and so support remittal over substitution. Conversely, the facts may be indicative of delay warranting substitution, for example 'where a party is prepared to perform in terms of that order and has already suffered prejudice by reason of delay'.[105] In such instances, the Court emphasises that delay occasioned by remittal 'may very well result in further prejudice to that party', and importantly, it 'may also negatively impact the public purse'.[106] This latter remark is a subtle example of the Court's being guided in its unpacking of

[100] *Trencon* (note 4 above) at para 51.

[101] Ibid at paras 53–54, where Khampepe J couples a consideration of these factors with the notion of fairness.

[102] Ibid at para 78.

[103] Ibid at para 51.

[104] Ibid.

[105] Ibid.

[106] Ibid.

the test by the constitutional prescripts of public procurement (fairness, equity, transparency, competitiveness and cost-effectiveness),[107] and indeed by the public interest more generally.

The second important point the Court makes about the delay factor is that 'delay occasioned by the litigation process should not easily cloud a court's decision in reaching a just and equitable remedy'.[108] The reasons for this are both principled and pragmatic. First, as a matter of principle, Khampepe J notes that 'an appeal should ordinarily be decided on the facts that existed when the original decision was made'.[109] In other words, '[d]elay must be understood in the context of the facts that would have been laid in the court of first instance as that is the court that would have been tasked with deciding whether a substitution order constitutes a just and equitable remedy in the circumstances'.[110] The related pragmatic reason for this approach is that delay is an inevitable outcome of the appeal process, and thus 'assessing delay with particular reference to the time between the original decision and when the appeal is heard could encourage parties to appeal cases … with the hope that the time that has lapsed in the litigation process would be a basis for *not* granting a substitution order'.[111] The Court seems loath to adopt such an approach on the implicit basis that it would handicap the courts in exercising their wide discretionary powers to grant just and equitable relief, including, where appropriate, orders of substitution. Thus Khampepe J emphasises that where a litigant wishes to raise concerns flowing from the delay occasioned by the appeal process, any such 'new evidence … must be adduced and admitted in accordance with legal principles applicable to the introduction of new evidence on appeal'.[112]

3 *The Role of Fairness in the Enquiry*

The final step in the exceptional circumstances test involves an assessment of which way fairness tips the substitution scales. Thus, the Court confirms that '*[u]ltimately*, the appropriateness of a substitution order must depend on the consideration of fairness to the implicated parties'.[113] In other words, what Khampepe J seems to suggest is that the specific factors delineated above cannot be considered in the abstract, given the context-sensitive nature of the remedy and the overarching dictates of justice and equity. In this way the Court attempts to strike the requisite balance between ensuring a degree of both certainty and flexibility in the exceptional circumstances test, for neither extreme (hard-and-fast rules versus utter vagueness) is a good thing. Khampepe J then provides an example of how fairness might tip the scales: where an administrator 'is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction… . However, having regard to the notion of fairness, a court may still substitute even where there is no instance

[107] These procurement principles are encapsulated in s 217 of the Constitution (emphasis added).
[108] *Trencon* (note 4 above) at para 52.
[109] Ibid.
[110] Ibid.
[111] Ibid at para 53 (emphasis added).
[112] Ibid.
[113] Ibid (emphasis added).

of bias or incompetence'.[114] It is significant to note that this position does not appear to hold in relation to the separation-of-powers factors. In other words, it seems that it will never be just and equitable (or simply, fair) to substitute in the absence of their establishment,[115] a development that may prove to be troublesome for litigants in certain instances. Given the significance of this development, it is a pity that Khampepe J was not clearer and more explicit regarding the interplay between the overarching consideration of fairness and the other factors in the enquiry.

Although the Court seemingly places particular emphasis on the role of fairness, I do not think this is especially novel. As Hoexter has remarked, '[f]airness to both sides has always been and will almost certainly remain an important consideration'.[116] Its role in the enquiry is necessitated by 'the flexibility embedded in the notion of what is just and equitable'.[117]

In conclusion, having sought to clarify the test, Khampepe J remarks that the version of it presented is 'consonant with the Constitution while at the same time giving proper deference and consideration to an administrator'.[118] For what it is worth, my view is that despite the lack of clarity in parts, the Court indeed manages to strike this delicate balance. I turn now to elucidate how the Court applies the test to the facts of the case.

B Application of the Test to the Facts in *Trencon*

The key issue before the *Trencon* Court was whether the circumstances of the case were exceptional and thus warranted a substitution order.[119] Through a rigorous application of the test to the unique factual matrix of the case, the Court indeed finds this to be so.

1 *In as Good a Position*

First, the Court establishes that it 'is in *as good a position* as the IDC to award the tender to Trencon'.[120] This conclusion is reached on the following basis. In terms of the timing consideration, Khampepe J notes that '[t]he material error of law occurred when the procurement process was in the stages of finalisation' and all the relevant bodies 'had considered the bids and undertaken all the technical components of the process'.[121] All that remained was for Exco to approve the recommendation of the Procurement Committee and, significantly, '[t]he IDC itself stated that Exco had fully considered Trencon's bid'.[122] Then, regarding the consideration of requisite information, Khampepe J notes that the Court 'has the benefit of the record, with all the pertinent information and recommendations

[114] Ibid at para 54.
[115] See *Trencon* (note 4 above) at para 47.
[116] Hoexter (note 37 above) at 553.
[117] *Trencon* (note 4 above) at para 55.
[118] Ibid.
[119] See ibid at para 56.
[120] Ibid at para 57 (emphasis added).
[121] Ibid.
[122] Ibid at para 58.

that would have been before Exco'.[123] Finally – and here is where we see the interrelationship and arguable overlap between the two separation-of-powers factors play out practically – in considering the nature of decision and whether polycentricity may still come into the equation, Khampepe J notes that 'the IDC does not explain how its administrative expertise could come into play at this point or on what basis it could decide differently'.[124] Having established that it is in as good a position, and thus as well qualified as the IDC to decide, the Court moves on to a determination of whether the award of the tender to Trencon is a foregone conclusion.

2 *Foregone Conclusion*

This second mandatory requirement of the test is also found to be met, essentially because on remittal, the IDC would have no discretion left to exercise.[125] This conclusion is informed by the accepted facts that Trencon was the clear forerunner at both stages of the procurement process and that all relevant internal and external expert bodies had recommended that it be awarded the tender.[126] Furthermore, Khampepe J highlights that 'but for an error of law regarding Trencon's price escalation for the delayed site handover, Trencon's bid would not have been declared non-responsive'.[127] There could therefore be only one proper outcome of the exercise of the IDC's discretion. It is on this score that the Court differs starkly with the SCA which, 'despite finding that the IDC could not have lawfully awarded the tender to any other bidder',[128] found that remittal was the proper course 'on the basis that the IDC still had a discretion not to award the tender to the highest points earner or not to proceed with the tender at all'.[129] The IDC persisted with this 'discretion' argument before the Constitutional Court, advancing three particular contentions – each of which is strongly refuted in a manner suggesting abhorrence to unconstrained and/or unlawful exercises of discretionary power.

First, the IDC claimed it had a discretion not to award the tender to the highest points-earner.[130] The Court found this argument to be misplaced. This was essentially because this broad discretion is curtailed by the relevant provisions of the regulatory framework read with the Standard Conditions of Tender. In particular, s 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000, read with clause F.3.11.3(d) of the Standard Conditions of Tender, mandate the IDC to award the tender to the highest points-earner save where there exist 'objective criteria' or 'justifiable reasons' for not doing so.[131] The various concerns pertaining to Trencon's bid price did not qualify as such objective criteria for, their existence notwithstanding, Trencon's bid was still lower than all the other bids

123 Ibid.
124 Ibid.
125 Ibid at para 59.
126 Ibid.
127 Ibid.
128 Ibid at para 60.
129 Ibid.
130 Ibid at para 62.
131 Ibid.

and any disputes regarding these pricing matters could be dealt with contractually under the JBCC Agreement.[132] This conclusion was fortified by Exco's own admission that the only reason given by the IDC for refusing Trencon the award was the material error of law.[133] Given the peremptory language of the regulatory framework, in the absence of objective criteria the IDC could not possibly be justified in not awarding the tender to the highest points-earner, Trencon.[134]

Secondly, the IDC claimed that it did not have a proper opportunity to evaluate all the bids as its evaluation was tainted by the error of law.[135] The Court does not hesitate to dismiss this 'disingenuous'[136] argument that was so patently undercut by contradictions in the IDC's own version of events. In this regard, Khampepe J points out that the IDC itself 'proclaimed that "the decision of Exco was arrived at [by] taking into account the totality of facts before Exco"' which, by its own admission, '"applied its mind to issues which were relevant in relation to its decision [to award the tender]"', and furthermore, the IDC definitively asserted in its affidavit that there was 'no evidence that Trencon's tender was "not properly evaluated"'.[137] The remarkable attempt to claim that Exco had not had a proper opportunity to apply its mind to the bid therefore had to fail.

Lastly, in attempting to show that the award to Trencon was not a foregone conclusion, the IDC asserted that it had a discretion not to award the tender at all.[138] Again, it was forced to concede on appeal that this discretion was not uncurtailed. In particular, reg 8(4) of the Procurement Framework Regulations (2011) empowers an organ of state to cancel a tender prior to its award only in three circumscribed instances: (i) where due to changed circumstances there is no longer a need for the services, works or goods in question; or (ii) where there are no longer sufficient funds to cover the envisaged total expenditure; or (iii) where no acceptable tenders are received.[139] The evidence patently showed that none of these grounds was present. The IDC clearly intended to continue with the tender and had sufficient funds to do so – as Khampepe J so poignantly points out, '[t]he fact that the IDC ultimately awarded the tender to Basil Read provides sufficient credence for this'[140] – and there was simply 'no basis for the IDC to argue that no acceptable tenders were received'.[141] Furthermore, the wording of the regulations is clear: cancellation can happen only *prior* to the actual award of a tender. Thus the IDC, having already awarded the tender to Basil Read, could not belatedly attempt to exercise this power to cancel.[142] In this respect, the Court finds that the SCA erred 'in conceiving that the contractual power not to award the tender at all could in these circumstances have been lawfully exercised'.[143] Finally, in

[132] See ibid at paras 63–64.
[133] Ibid at para 65.
[134] See ibid.
[135] See ibid at para 66.
[136] Ibid.
[137] Ibid.
[138] See ibid at para 68.
[139] See ibid.
[140] Ibid at para 69.
[141] Ibid.
[142] See ibid at para 71.
[143] Ibid.

refuting this last leg of the IDC's discretion argument, Khampepe J makes a noteworthy observation clearly underpinned by a need to protect the courts' wide remedial powers and, in turn, their policing function within the separation of powers:

> If, when arguing that remittal is the proper remedy, an organ of state is able to raise the fact that it has this discretion *without more*, a court would virtually never have the power to grant a remedy of substitution. The organ of state would always be able to argue that it still had a discretion not to award the tender, *thereby constraining the power of the courts to grant just and equitable remedies*. It is a fundamental principle of the rule of law that organs of state, like the IDC, can only exercise power that has been conferred onto them. They cannot, on their own volition, confer power unto themselves that was never there.[144]

In light of all of the aforegoing reasons, the Court concludes that 'the award of the tender to Trencon is a foregone conclusion'.[145] Having established the separation-of-powers factors, the Court goes on to consider other relevant factors that might weigh in the balance in determining whether substitution would be just and equitable.

3 *Delay and Supervening Circumstances*

As a result of the litigation, two years had elapsed since the commencement of the tender process. The SCA found substitution to be inappropriate given that prices might have increased during this period.[146] Rather robustly, Khampepe J holds that '[o]n this point, the Supreme Court of Appeal erred'.[147] The principled reasons propounded for this finding are twofold. First, the SCA should have determined the matter on the basis of the facts that were before the court of first instance instead of 'on the basis of the delay incurred as a result of the appeal itself';[148] and insofar as this delay did indeed lead to supervening circumstances, no new evidence had been adduced to show as much.[149] A related point, which flows from the fact that the delay factor cuts two ways, is that account must be taken of any adverse impact on the public purse that would be caused by 'the further delay occasioned by remittal'.[150] This consideration flows from a principle formulated thus by Khampepe J: 'Procurement disputes, especially those involving organs of state, must be resolved expediently.'[151]

The second reason the Court finds the SCA to have erred in its application of the delay factor is that it 'did not value the distinction between public and private law'[152] insofar as the decision to award a tender is a public-law matter strictly regulated by the legislative framework and, in comparison, matters such as contract price adjustment which are subject to negotiation post-award, 'ought to

144 Ibid at para 70 (emphasis added).
145 Ibid at para 71.
146 See ibid at para 72.
147 Ibid.
148 Ibid at para 73.
149 See ibid.
150 Ibid at para 74.
151 Ibid.
152 Ibid at para 75.

fall *squarely* within the domain of private law'.[153] Given that the JBCC Agreement provides for such price adjustments, this option would be 'viable to account for the delay in these circumstances'[154] and so, especially given that both parties conceded that negotiations post-award are subject to private law, '[t]he Supreme Court of Appeal erred in revoking the High Court's order of substitution on this ground'.[155]

A further argument raised by the IDC relating to the matter of delay was 'that substitution is never appropriate where the tender validity period has expired'.[156] Two cases were referred to in support of this contention.[157] However, in both of them the relevant organ of state had not yet awarded the tender, and in the present instance the IDC had clearly done so. Consequently, remarks Khampepe J, 'a substitution order here would not require the tender validity period to be extended because this period is held in abeyance pending the finalisation of the matter'.[158] The judge proceeds to provide a principled and pragmatic, foundation for this conclusion informed by a purposive understanding of the objects of the PAJA:

> Once an award has been challenged, the litigation process will inevitably run longer than the 120-day tender validity period. If [this] period, in itself, were to be treated as a bar to an order of substitution, there may be no incentive for an aggrieved party like Trencon to lodge review proceedings. This is because its desired remedy – that of substitution – would not be available to it. This approach would not accord with the objectives of PAJA as the tender validity period would, in most instances, be deemed to have expired. Courts would almost always be deprived of their powers of substitution.[159]

Again, this dictum serves as a captivating example of the Court affirming the constitutional imperative that it not be hampered in exercising its powers to award appropriate relief. Khampepe J's approach here seems motivated by the need to ensure aggrieved bidders are not disincentivised from challenging apparently unlawful tender awards, and the related need to protect the judicial space required to scrutinise public procurement through the lens of the constitutional and regulatory prescripts.

[153] Ibid (emphasis added). This is quite a remarkable statement and seems to me to be an over-simplification of matters: surely one cannot insulate post-award negotiation from the public-law constraints of, for example, the constitutional procurement principles? In light of these principles, Bolton has remarked that '[post-award] [n]egotiations are only allowed if the preferred tenderer will remain the most favoured tenderer in accordance with the tender criteria, and the contract will not be significantly different from the contract initially advertised. More or less similar rules also apply to the variation of a contract after its conclusion – changes made may not result in a contract that is materially different from the contract initially advertised.' This is because of public-law considerations such as fairness: P Bolton 'The Scope for Negotiating and/or Varying the Terms of Government Contracts Awarded by way of a Tender Process' (2006) 12 *Stellenbosch Law Review* 266, 287.

[154] *Trencon* (note 4 above) at para 76.

[155] Ibid at para 77.

[156] Ibid at para 79.

[157] *Telkom SA Ltd v Merid Training (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd and Others* [2011] ZAGPHC 1 and *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* [2014] ZAECPEHC 19, 2014 (4) SA 148 (ECP).

[158] *Trencon* (note 4 above) at para 80.

[159] Ibid at para 81.

4 *Other Considerations and the Role of Fairness*

Finally, the Court takes note of the fact that 'the IDC acted in good faith when it was moved by a material error of law', which 'should be a strong consideration for the Court when considering whether to grant a substitution order'.[160] Ultimately, however, given the findings in relation to the other relevant factors and 'viewed through the lens of fairness to both parties', Khampepe J holds that 'it would be unfair for this Court to remit the matter to the IDC'.[161] She concludes that '[t]he unique circumstances of this case present a good example, in administrative law, of an instance where the Court is not usurping the functions of the administrative body by making a substitution order'.[162] The Court thus finds that such an order was indeed just and equitable in the circumstances.[163]

V Conclusion

The Court in *Trencon* had to confront head-on, for the very first time, the appropriate calibration of the exceptional circumstances test where an order of substitution is sought. This was done against the backdrop of the separation of powers and the related degree of deference required of courts given the review / appeal divide. Substitutive decisions epitomise the disintegration of this divide, and thus it is only exceptionally that judicial review will give rise to such decisions. As the oft-quoted 'Mureinikism' goes, our Constitution has necessitated a move from a 'culture of authority' to a 'culture of justification' pursuant to which '*every* exercise of power is expected to be justified'.[164] This includes the potentially expansive power of judicial review. Courts must thus be justified in substituting their decisions for those of administrators skilled in managing the complexities of polycentric matters.

The Court in *Trencon* seeks to clarify exactly when the courts will indeed be justified in doing so. There is immense value in the highest court addressing this issue, and with such rigour. For this reason, the judgment is noteworthy for the principles it espouses and, more than this, it will no doubt have important practical spillover effects. In providing, for the most part, a greater degree of clarity and detail in the formulation of the test, the Court has empowered potential litigants better to determine whether to challenge apparently unlawful tender awards given that the prospect of substitution, and the tangible relief it presents, may be a strong incentive for doing so. In this respect the Court pays homage to the constitutional procurement principles and seems to have at heart the public interest in ensuring their fulfilment. The judgment is thus illustrative of the significant role that the courts play as a 'check' within the separation of powers, as guardians of the Constitution, and as watchdogs to deter and address maladministration, which, as was so poignantly shown by the IDC's Exco, remains an unfortunately commonplace occurrence in South Africa. At the same

[160] Ibid at para 78.
[161] Ibid.
[162] Ibid at para 98.
[163] See ibid.
[164] E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* 31, 32 (emphasis added).

time, in putting centre-stage those factors that go to the institutional expertise and competence of a court in the formulation of the test, Khampepe J ensures respect for the degree of separation required by the doctrine of separation of powers.

For these reasons, in constructively interpreting the principles set out in this judgment I have sought to illustrate that it goes some way to achieving that ever delicate balance between ensuring neither complete judicial reserve nor excessive boldness; neither inflexible rules, nor utterly unguided discretion. When it comes to the question of remedy, this much is demanded by the constitutional dictates of justice and equity.