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Acting in Reliance upon the Wrong Empowering Provision: Reconsidering the Principle in *Harris*

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ABSTRACT: Under South African law, if an administrator makes a decision citing an empowering provision that does not grant her the power to make that decision, and another provision exists which does, then whether the decision is lawful depends on whether she cited the incorrect provision *deliberately* or *inadvertently*. If the former, her mistake renders the decision unlawful. If the latter, the decision survives. This article examines the development of the rule and argues that it should not be retained for the following reasons: the line between inadvertent and deliberate misreliance is not clearly drawn; the rule does not fit comfortably with orthodox administrative-law principles; the rule creates the perverse incentive for administrators not to cite the source of their powers; and the application of the rule can result in the courts not grappling with what may be substantively wrong with an administrative decision. The rule should be replaced with what this article describes as a first-principles approach: one that treats an administrator's reliance upon an incorrect empowering provision like any other potential administrative irregularity and applies orthodox administrative-law principles to it. To this end, a court must ask whether the misreliance constitutes a reviewable irregularity under PAJA, if it is applicable, or otherwise the principle of legality. Did the misreliance, for example, cause the administrator to consider irrelevant factors or fail to consider relevant ones, or to misconstrue the nature of her powers? Did it render the decision procedurally unfair? Did the administrator fail to comply with peremptory requirements attaching to the correct provision? Did the misreliance render the decision irrational? If the misreliance is a reviewable irregularity, the court must then consider whether it should use its remedial discretion to set aside the decision.

KEYWORDS: administrative law, *Howick*, incorrect empowering provision, *Latib*, *Quid Pro Quo*

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I INTRODUCTION

An administrator makes an administrative decision. In the public notice of it, she specifies an empowering provision (section X of statute Y) as the source of her power to have made the decision. The decision is taken on review. It turns out that the provision on which she relied is no good – it does not empower her to make the decision she purports to have made. A different provision exists, however, that does empower her to make the decision, but to which she did not refer.

Is the decision lawful? Under South African law, it depends on whether she invoked the incorrect empowering provision *inadvertently* or *deliberately*. While the line between the two concepts is not clear (as set out in part IV) for present purposes it is sufficient to say that an administrator invokes an incorrect empowering provision inadvertently if the invocation is the result of an administrative error. She does so deliberately, however, if she intends to invoke the incorrect provision because she (incorrectly) thinks it empowers her to act. If the administrator invoked the incorrect provision inadvertently, her mistake would not render the decision unlawful. If she did so deliberately, however, the decision would be unlawful and invalid. Part II of this article explains the distinction in more detail.

Part III outlines the development of the distinction. First articulated in the 1977 Appellate Division decision of *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk*,[1] it constituted a departure from the more forgiving approach that had prevailed before. The distinction was first approved by the Constitutional Court in *Minister of Education v Harris*.[2] It has since hardened into an inflexible rule: in recent years, the Constitutional Court and the Supreme Court of Appeal have both reasoned that if an administrative decision is made in deliberate reliance upon the wrong empowering provision, it will be unlawful *for that reason alone*, even if another empowering provision exists.

In part IV, I argue that this inflexible rule is not a good one. The line between deliberate and inadvertent misreliance is not clear and different courts understand these concepts differently. The distinction does not fit comfortably with orthodox administrative-law principles under the Constitution. It can set up unnecessary tripwires in the way of otherwise unobjectionable decisions and creates a perverse incentive for an administrator not to state any authority for her decision at all so as to avoid the risk of that decision later being invalidated for deliberate misreliance.

A better approach, outlined in part V, is a first-principles approach: one that treats an administrator's reliance upon an incorrect empowering provision like any other potential administrative irregularity and applies orthodox administrative-law principles to it. To this end, a court must ask whether the misreliance constitutes a reviewable irregularity under PAJA, if it is applicable; or otherwise whether it is reviewable under the principle of legality. Did the misreliance, for example, cause the administrator to consider irrelevant factors or fail to consider relevant ones, or to misconstrue the nature of her powers? Did it render the decision procedurally unfair? Did the administrator fail to comply with peremptory requirements attaching to the correct provision? Did the misreliance render the decision irrational? If the misreliance is a reviewable irregularity, the court must then consider whether it should use its remedial discretion to set the decision aside.

[1] *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk* 1977 (4) SA 829 (A).

[2] *Minister of Education v Harris* [2001] ZACC 25, 2001 (4) SA 1297 (CC).

As we shall see, a first-principles approach would often reach the same outcome as the current approach. However, the advantage of a first-principles approach is that it requires a court to grapple with whether an administrative decision suffers from substantive flaws – rather than setting the decision aside on the basis of an issue which may be a technicality.

II THE LAW TODAY

The current state of the law can be summarised as follows. When an administrator acts, she might choose to state the provision that empowers her to act, or she might not. If she chooses to state an empowering provision, she might make a mistake and state a provision that does not grant her the power to act as she did. Whether this visits her act with invalidity depends on the circumstances. If no law exists, anywhere, that empowers her to so act, then her decision is invalid.[3] If, however, she is empowered by a provision other than the one stated, whether the act is invalid depends on whether she invoked the incorrect provision *inadvertently* or *deliberately*. If inadvertently, the act is not invalid. If, on the other hand, she relied on the incorrect provision deliberately, the act is invalid for this reason alone.[4] If the empowering legislation does not require the correct empowering provision to be stated, the administrator can escape the risk of misreliance by not stating the empowering provision at all. In such a situation, her act is not invalid.

III THE DEVELOPMENT OF THE PRINCIPLE

The development of the treatment of misreliance can be divided into three periods. The first is the period prior to *Quid Pro Quo* in 1977 – prior to the articulation of the distinction between deliberate and inadvertent misreliance. During this period, the courts followed a permissive approach: if an administrator relied upon an incorrect empowering provision, the courts would ask only whether another provision granted her the power, and whether the requirements for the exercise of that power had been met. If so, the decision was valid. The courts did not consider whether the misreliance was deliberate or inadvertent.

The second period began with *Quid Pro Quo*. From that decision onwards, the courts considered the primary question to be whether the misreliance was deliberate or inadvertent. If the former, the decision would generally be invalid and, if the latter, it generally would not be. Nevertheless, the cases sometimes intimated that this might not be the end of the enquiry.

The third period is the hardening of the distinction into an absolute rule: if misreliance is deliberate, the decision is invalid without exception. The beginning of this period is marked by the 2008 SCA decision in *Shaikh v Standard Bank*,[5] and exemplified by Jafta J's treatment of the principle in the Constitutional Court in *Tulip Diamonds*[6] and *Liebenberg*,[7] as well as by the Supreme Court of Appeal in the 2018 decision of *Zuma v Democratic Alliance*.[8]

[3] *Head of Department, Department of Education, Free State Province v Welkom High School & Another* [2013] ZACC 25, 2014 (2) SA 228 (CC) at para 1.

[4] Harris (note 2 above) at para 17.

[5] *Shaikh v Standard Bank of SA Ltd & Another* [2007] ZASCA 168, 2008 (2) SA 622 (SCA).

[6] *Tulip Diamonds FZE v Minister for Justice and Constitutional Development & Others* [2013] ZACC 19, 2013 (10) BCLR 1180 (CC).

[7] *Liebenberg NO &Others v Bergrivier Municipality* [2013] ZACC 16, 2013 (5) SA 246 (CC).

[8] *Zuma v Democratic Alliance & Others; Acting National Director of Public Prosecutions & Another v Democratic Alliance & Another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA).

A The first period: *Macrobert* to *Latib* and the permissive approach

The permissive approach began with the decision of De Villiers JP in 1910 in the TPD in *Macrobert v Pretoria Municipal Council*,[9] the first in a series of cases in which municipal authorities passed bylaws under incorrect empowering provisions. The appellant, a solicitor, had been charged with riding a bicycle without a licence in contravention of s 151 of the Pretoria traffic bylaws. One of the appellant's arguments was that the council had enacted s 151 in reliance upon the wrong empowering provision: it had relied on s 19 of Proclamation 7 of 1902, which did not give the council the power to enact a provision like s 151, when instead it should have relied upon s 42 of Ordinance 58 of 1903, which did. De Villiers JP held that, even if the municipality had deliberately relied upon the wrong provision, this did not visit s 151 with invalidity, because (a) 'there was no obligation on the part of the town council to state by virtue of what section of the statute they framed the bylaws', (b) s 42 of Ordinance 58 contained the necessary authority, and (c) the council had complied with the procedural requirements for passing bylaws.[10]

Three points deserve emphasis. First, the approach of De Villiers JP was solely one of *vires*. He asked simply whether an empowering provision existed and whether all of the requirements for its exercise were met. Given that they were, and because the correct empowering provision did not require it to be expressly cited, the decision was lawful. Secondly, De Villiers JP reasoned on the assumption that the misreliance was deliberate – and, even though it was, the decision was lawful because the requirements for the invocation of the correct empowering provision had been met. Thirdly, he noted that it is generally a good thing for a public functionary to state the source of a power when purporting to exercise it: it is 'a matter of convenience to know under what statutory provision a municipality purports to act in framing bylaws'.

Four years later, De Villiers JP followed his own decision in *Macrobert* in *Rex v Milman*.[11] As in *Macrobert*, the accused had been charged with contravening a bylaw (this time with selling 'sixteen loaves of bread not being fancy bread, which was deficient in weight'). The bylaw had been approved by the administrator in reliance upon his powers under Ordinance 9 of 1912, which did not give him the power to approve bylaws on the subject-matter in question, namely, assize matters. The accused argued that this rendered the bylaws invalid. De Villiers JP rejected this argument and held, with reference to *Macrobert*, that because the power to legislate assize matters existed under an earlier ordinance (Ordinance 2 of 1906) 'an error of the nature contemplated does not invalidate bylaws otherwise valid'.[12]

Farah v Johannesburg Municipality[13] is the third in the series of TPD cases dealing with bylaws promulgated under an incorrect empowering provision. The appellant had been convicted of criminal loitering under the Johannesburg Hawkers and Pedlars Bylaws. On appeal, the appellant claimed that the bylaws were enacted *ultra vires*. In the notice under which the bylaws were promulgated, the local authority had relied on s 41(19) of the Johannesburg Municipal Ordinance of 1906, which enabled the council to make bylaws 'for regulating and licensing pedlars and hawkers'. Citing *Macrobert*, Feetham J held that:

[9] *Macrobert v Pretoria Municipal Council* TS 931.
[10] Ibid at 940–941.
[11] *Rex v Milman* 1914 TPD 632.
[12] Ibid at 634.
[13] *Farah v Johannesburg Municipality* 1928 TPD 169.

> powers granted to the council under the same Ordinance to make bylaws for 'regulating and controlling traffic' (s 41[59]) and 'for preventing persons from congregating with others and thus causing an obstruction in any thoroughfare' (s 41[62]) can also be relied on if necessary as powers enabling the council to make these bylaws, though they are not referred to in the Government Notice, and were not expressly relied upon by the local authority when making the bylaws.

This is because, as long as the power exists somewhere, it does not matter that the decision-maker relied upon a different power, nor whether it did so deliberately or inadvertently.

Similarly, in *Rex v Standard Tea and Coffee*,[14] the accused had been charged with supplying too much tea to dealers in contravention of wartime measures. The regulation containing the relevant prohibition had been made by the Director of Food Supplies and Distribution relying upon s 3(1)(e) of War Measure 55 of 1946. The accused argued that s 3(1)(e) did not contain the necessary power. Again relying on *Macrobert*, Murray J held that the existence of the necessary power elsewhere could save the prohibition: '[f]or even though the Director purported to rely on s 3(1)(e) for his power to make Reg. (a), and even if s 3(1)(e) did not authorise the making of the Regulation, the Regulation would still be valid if the Director did possess power elsewhere, under s 3(1)(i) to make the Regulation'.[15]

It is also worth noting that Murray J held that the similarity of the language used in s 3(1)(i) to that used in s 3(1)(e) 'inevitably shows that the Director when deciding to make Reg. (a) must have had in contemplation the considerations which should have been in his mind when making a regulation on the lines contemplated by s 3(1)(i)'. The Director had not, in other words, failed to take into account relevant circumstances.

In *R v Foley*,[16] the respondents were convicted of contravening the regulations relating to streets in Grahamstown. In the notice in which the regulations were promulgated, the administrator sourced his authority explicitly in s 245 of Ordinance 19 of 1951. The respondents argued that the administrator had relied upon the wrong provision – his power of approval lay in s 243(2) and not s 245 – and that the regulations were therefore invalid. Jennet J rejected this argument. Because there was 'no provision which requires such notice to contain a reference to the section under which the administrator has given his approval … the reasoning in the case of *Macrobert* … applies to a case like the present and the reference to the administrator's approval, empowered under s 243(2), as having been given in terms of s 245 does not affect the validity of the promulgation'.[17]

The last case of the first period is the 1969 decision of *Latib v Administrator, Transvaal*[18] – the seminal decision which replaced *Macrobert* as the *locus classicus* of the permissive approach. In *Latib*, the administrator had declared a public main road through the applicant's farm in reliance upon s 5(3)(b) of the Roads Ordinance 22 of 1957. Section 5(3)(b) empowered the administrator to declare a public road, but only over farmland. Because a portion of the applicant's farm over which the road had been declared had been incorporated into the Pretoria Municipality, the applicant contended that the declaration was invalid. The administrator argued in response that he had the power to declare a public road over municipal land under

[14] *Rex v Standard Tea and Coffee Co (Pty) Ltd* 1951 (1) SA 641 (T).
[15] Ibid at 644A.
[16] *R v Foley* 1953 (3) SA 496 (E).
[17] Ibid at 488F–G.
[18] *Latib v Administrator, Transvaal* 1969 (3) SA 186 (T).

s 5(3)(c) of the Roads Ordinance, and that the failure to refer to that subsection had been an 'oversight'.[19]

Galgut J agreed with the administrator. Citing *Macrobert*, *R v Foley* and 'other authorities to the same effect', he held as follows:

> It seems clear, therefore, that, where there is no direction in the statute requiring that the section in terms of which a proclamation is made should be mentioned, then, even though it is desirable, nevertheless there is no need to mention the section and, further, that, provided that the enabling statute grants the power to make the proclamation, the fact that it is said to be made under the wrong section will not invalidate the notice.

The Administrator here had the power in terms of ss 3 of s 5 to do what he did in Administrator's Notice 616; he acted in terms of the enabling section. The fact that he inadvertently omitted to mention paragraph (c) of ss 3 does not invalidate the Notice.[20]

The permissive approach of the first period can thus be summarised as follows. If an administrative decision is made in reliance upon the incorrect empowering provision, that decision will not be invalid because of this misreliance if an empowering provision exists elsewhere and if the requirements of that provision have been satisfied. That the wrong empowering provision may have been deliberately relied on does not on its own invalidate the decision. In all these cases, it is either clear that the decision-maker deliberately relied on the wrong provision, or the court did not consider the issue important.

B The second period: *Quid Pro Quo*, *Harris,* and the deliberate/inadvertent distinction

The permissive approach ended with the Appellate Division's decision in *Quid Pro Quo*.[21] Like *Latib*, it concerned a dispute over roads. The administrator had relied on s 3 of the Roads Ordinance to widen a road reserve around an existing bypass. It was common cause that he had done so to obtain additional space to build new roads; namely approach – and exit-roads to link the bypass with another road. The widened road reserve encroached on Quid Pro Quo's property, and so Quid Pro Quo took the administrator's decision on review.

On appeal, Wessels JA held that s 3 of the Roads Ordinance did not grant the administrator the power to widen a road reserve to obtain space to build new roads. Relying on *Latib*, the administrator argued that s 5 granted him the power to declare new roads and thus clothed his decision with authority. Wessels JA was not convinced:

> In my opinion, however, *Latib*'s case offers no support for the alternative argument [that the administrator could rely on s 5]. In the present case, the respondent did not in the impugned Notice claim that a public road existed on the applicant's property and by mistake neglect to name the source of his power. According to *Latib*'s case, such a failure to refer to the relevant empowering provision would not affect the validity of a notice. The question is solely whether the Administrator is empowered to do what he did. In this case the papers show most clearly that the respondent did not wish to declare a public road (namely, the on- and-off-ramp). He takes the stance that he deliberately exercised the power granted by section 3 of the Ordinance in order to widen the existing road reserve of the bypass. According to his approach, it was unnecessary to make any declaration in terms of the provisions of section 5(2)(b) of the Ordinance in order to authorise the

[19] Ibid at 189.

[20] Ibid at 190H–191A.

[21] *Quid Pro Quo* (note 1 above).

> construction of the relevant on- and off-ramps. The alternative argument thus cannot be accepted. … The appeal thus cannot succeed.[22]

In subsequent cases, this (somewhat cryptic) passage has been interpreted to mean that if a decision-maker deliberately cites an empowering provision that does not empower her to do what she did, the decision will be invalid even if a different provision exists which does in fact give her such a power.

In the 1999 case of *Pinnacle Point Casino*,[23] the Western Cape High Court for the first time expressly recognised the distinction between inadvertent and deliberate misreliance:

> There is on the one hand a line of cases in which it was held that it does not matter that the functionary referred to an incorrect enabling provision provided there is in fact an enabling provision which granted the power in question to him. See, for example, [*Macrobert*]; [*Latib*]. The situation is different, however, where the functionary deliberately acted in terms of a particular enabling provision. If that provision is found to be invalid then the validity of the action cannot be saved by the existence of a valid enabling provision elsewhere. This proposition is supported by the decisions in [*Quid Pro Quo*, among others].[24]

In *Pinnacle Point*, the administrator had rejected an application for a gambling licence on the basis of a requirement in a policy determination that turned out to be invalid. Because the administrator had acted in deliberate reliance upon the invalid policy determination, the fact that he might have been able to impose the requirement using a different power was irrelevant.[25]

What is notable about the quoted passage is that it is unequivocal. If the administrator inadvertently relied on the wrong empowering provision, there is no issue. If she did so *deliberately*, however, then the decision is invalid. On appeal,[26] Harms JA held that he had 'some reservations' regarding 'the formulation and scope' of this principle but was not required to decide the issue because he held that no provision existed anywhere which contained the power to impose the relevant requirement.[27] These reservations have never been cited by another court.

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[22] Ibid at 841D–G. This is my translation of the original Afrikaans: 'Na my mening, egter, bied Latib se saak geen steun vir die alternatiewe betoog nie. In die onderhawige geval het respondent nie in die gewraakte Kennisgewing voorgegee nie dat 'n openbare pad bestaan op applikant se eiendom en per abuis nagelaat het om die bron van sy bevoegdheid om so 'n verklaring te doen te noem. Volgens Latib se saak sou 'n versuim om te verwys na die betrokke wetsbepaling wat die bevoegdheid skep, nie die regsgeldigheid van 'n kennisgewing affekteer nie. Die vraag is slegs of aan die Administrateur die bevoegdheid verleen is om te doen wat hy gedoen het by die publikasie daarvan. In die onderhawige geval blyk dit ten duidelikste uit die stukke dat die respondent nie die bestaan van 'n openbare pad (nl., die op-en afrit) wou verklaar nie. Hy stel hom op die standpunt dat hy bewustelik die bevoegdheid wat by art. 3 van die Ordonnansie verleen word uitgeoefen het ten einde die breedte van die bestaande padreserwe van die verbypad te vermeerder. Volgens sy benadering was dit onnodig om enige verklaring kragtens die bepalings van art. 5(2)(b) van die Ordonnansie te doen ten einde die aanlê van die betrokke op- en afrit te magtig. Die alternatiewe betoog kan dus nie gehandhaaf word nie. … Die appèl kan derhalwe nie slaag nie.'

[23] *Pinnacle Point Casino (Pty) Ltd v Auret NO* 1999 (4) SA 763 (C).

[24] Ibid at para 16.

[25] Ibid at paras 17–18.

[26] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* [2001] ZASCA 59, 2001 (4) SA 501 (SCA).

[27] Ibid at para 8. The passage in full: 'It then becomes unnecessary to deal with that part of its judgment … dealing with the principle – the formulation and scope about which I have some reservations – that, where a functionary deliberately acted in terms of a particular enabling provision and that provision is found to be invalid, then the validity of the action cannot be saved by the existence of a valid enabling provision elsewhere.'

The Constitutional Court first endorsed the distinction between inadvertent and deliberate misreliance in *Minister of Education v Harris*.[28] In this case, the Minister purported to enact a rule prohibiting children under the age of seven from beginning Grade 1 at private schools. This was done in express reliance on s 3(4)(i) of the National Education Policy Act 27 of 1996. Sachs J, writing for the Court, held that s 3(4)(i) did not permit the Minister to impose binding age requirements on independent schools. Relying on *Latib*, the Minister argued that the rule was saved from invalidity because s 5(4) of the South African Schools Act 84 of 1996 granted him the power to 'determine age requirements for the admission of learners to a school'.[29] Sachs J rejected this argument. Referring to *Quid Pro Quo* and *Pinnacle Point Casino*, he held that 'the applicability of this line of reasoning must depend on the particular facts of each case, especially whether the functionary consciously elected to rely on the statutory provision subsequently found to be wanting'.[30] In the case before the Court, there was 'no suggestion in the affidavits filed by the Minister of an administrative error' and there could 'be little question then that the provision [s 3(4)(i)] was deliberately chosen'. As such, '[t]he otherwise invalid notice issued under the National Policy Act [could] not be rescued by reference to powers which the Minister might possibly have had but failed to exercise under the Schools Act'.[31] This was, again, an inflexible application of the rule in *Quid Pro Quo*, and while Sachs J stated that the result 'must depend on the particular facts of each case', the outcome made it clear that he considered that the Minister's deliberate misreliance to be fatal without more.

A more nuanced approach to these issues appears in the judgment of Cameron JA (as he then was) in *Howick District Landowners' Association v uMngeni Municipality*.[32] The appellant ratepayers challenged a rates assessment for their land – rural land that had not previously been rated. The municipality had resolved to levy rates in reliance on s 75A of the then-new Local Government: Municipal Systems Act 32 of 2000 ('Systems Act'), but later discovered that s 75A had not yet been in effect at the time of the resolution. The municipality then purported to amend the suite of resolutions and notices to refer to the correct provision – s 10G(7) of the Local Government Transition Act 209 of 1993 ('LGTA') – but by mistake failed to amend the initial resolution and its incorrect reference to s 75A of the Systems Act. The appellant ratepayers argued that this failure rendered the rating decision invalid. They argued further that the permissive approach had been overturned by the Constitutional Court in *Harris*, and thus, notwithstanding the referral to s 75A of the Systems Act being clearly inadvertent, the ratings resolution was invalid. Cameron JA disagreed. He endorsed both *Latib* and *Harris*, describing the former's import thus: '*Latib* does not license unauthorised legislative or administrative acts. It licenses acts when authority for them exists, and when the failure expressly or accurately to invoke their source is immaterial to their due exercise.'[33] Later in the judgment, he described the relationship between *Latib*, on the one hand, and *Quid Pro Quo* and *Harris*, on the other, as follows:

[28] *Minister of Education v Harris* (note 2 above). The Constitutional Court had, in *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8, 1995 (4) SA 877 (CC) at paras 22 & 68, left open 'the question of applicability of the rule in *Latib*'.

[29] Ibid at paras 14–16.

[30] Ibid at para 17.

[31] Ibid at para 18.

[32] *Howick District Landowners' Association v uMngeni Municipality* [2006] ZASCA 153, 2007 (1) SA 206 (SCA).

[33] Ibid at para 20.

> The doctrine does not validate action taken in deliberate reliance on a provision that does not authorise it, even where another provision exists that may warrant it: [*Quid Pro Quo*] … In *Harris*, as in *Quid Pro Quo*, there was no question of a mere administrative error or oversight: the decision-maker deliberately chose to act in terms of a provision that did not authorise what was sought to be done. In dealing with an argument based on *Latib*, the CC pointed out that its applicability 'must depend on the particular facts of each case, especially whether the functionary consciously elected to rely on the statutory provision subsequently found to be wanting'. Applying *Quid Pro Quo*, the CC held that it was not open to the decision-maker now to rely on a different provision to validate what had been invalidly done under the provision invoked: the otherwise invalid notice could not be rescued by reference to powers the decision-maker might possibly have had but failed to exercise. I do not read *Harris* as putting *Latib* in doubt, but as confirming the proper scope of its application.[34]

Because the remaining reference to s 75A of the Systems Act was 'the result of a simple slip-up' – in that the municipality had intended to invoke s 10G(7) of the LGTA but had failed to amend the resolution properly – the reference to s 75A did not render the resolution invalid.

Two things are notable about Cameron JA's approach. The first is that his description of the import of *Latib* implies that what matters is materiality – whether the misreliance is 'immaterial' to the 'due exercise' of the correct power. But the second is that he thereafter falls back on *Harris*'s unequivocal dichotomy between validity in inadvertent-misreliance cases and invalidity in deliberate-misreliance cases. This tension can be resolved by concluding that the deliberate reliance on an incorrect empowering provision always visits the relevant decision with invalidity because deliberate misreliance is always material to the due exercise of the correct power, but it is not entirely clear whether this is what Cameron JA meant.

C The third period: the deliberate-misreliance principle hardens

In the Supreme Court of Appeal and the Constitutional Court judgments following *Howick*, the unequivocal dichotomy between deliberate-misreliance and inadvertent-misreliance cases has hardened. If misreliance is inadvertent, misreliance does not render the decision invalid. If misreliance is deliberate, the decision is invalid without more.

In *Shaikh v Standard Bank*,[35] the South African Revenue Service (SARS) had instructed Standard Bank to pay customs duty and VAT that Mr Shaikh owed SARS out of his bank account. In the relevant two notices, SARS relied solely on s 114A of the Customs and Excise Act 91 of 1964 ('Customs Act'), which permitted SARS to order a bank to hand over a taxpayer's outstanding customs duty, and did not rely on s 47 of the Value-Added Tax Act 89 of 1991 ('VAT Act'), which permitted SARS to do the same in relation to outstanding VAT. It is important to note that the two provisions were identical in all material respects save that they referred to different taxes: s 114A of the Customs Act referred to 'any amount of duty, interest, fine, penalty or forfeiture payable by such other person under this Act [i.e., the Customs Act]' and s 47 of the VAT Act referred to 'any amount of tax, additional tax, penalty or interest payable by such other person under this Act [i.e., the VAT Act]'.[36]

[34] Ibid at para 22.

[35] *Shaikh* (note 5 above).

[36] Section 114A of the Customs Act (referred to in para 3 of *Shaikh* (note 5 above)) reads as follows: 'The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent – (a) shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of duty, interest, fine, penalty or forfeiture payable by such other person under

The sole issue before the Supreme Court of Appeal was whether SARS could use notices which only referred to s 114A of the Customs Act to extract VAT from a taxpayer's bank. Mhlantla AJA (as she then was) held that SARS could. Without enquiring into why SARS had referred to s 114A only, she held that SARS had 'erroneously' omitted to refer to s 47 of the VAT Act. She did not explain what she meant by 'erroneously'. With reference to *Howick* and *Quid Pro Quo*, Mhlantla AJA held that the omissions 'did not affect the validity of the notices insofar as they related to the collection of VAT' and '[t]o conclude otherwise would be to elevate form above substance'.[37]

In two subsequent judgments of the Constitutional Court, Jafta J (for the minority) cast the distinction between inadvertent-misreliance and deliberate-misreliance cases in stark terms (neither majority considered the issue). In *Tulip Diamonds*,[38] Jafta J wrote:

> If a functionary consciously chooses a particular provision as authority for the function he or she performs and it turns out that the chosen provision does not authorise the performance of the function concerned, the purported exercise of power will be invalid. It cannot be rescued by the claim that the same functionary is granted the power exercised but by a different provision.[39]

Similarly, in *Liebenberg*,[40] Jafta J noted that:

> In our law, administrative functions performed in terms of incorrect provisions are invalid, even if the functionary is empowered to perform the function concerned by another provision. … This general rule admits of only one exception. This is where it is clear from the facts that the functionary had elected to rely on the correct provision but mistakenly referred to an incorrect provision.[41]

In two cases dealing with royal succession under the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) a unanimous Constitutional Court endorsed something like this relatively inflexible understanding of *Harris*. In *Sigcau*,[42] the President had stripped the applicant of the kingship of the amaMpondo aseQaukeni and awarded it to the fourth respondent. The President had done so in reliance on the TLGFA as amended in 2009 – apparently deliberately. This was a mistake. The applicable procedure at the time was in the TLGFA prior to its amendment, which differed from the post-amendment procedure. The Constitutional Court held that this rendered the President's decision invalid:

> Because of the material differences between the old Act and the new Act, some of which have been highlighted, it cannot be said that a notice issued under the new Act can be taken to have been issued under the old Act. In any event, such an argument would be inconsistent with the decision of this Court in *Harris*.[43]

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this Act; and (b) may be required to make payment of such amount from any moneys which may be held by him or her for or be due by him or her to the person whose agent he or she has been declared to be'. Section 47 of the VAT Act (referred to in para 5 of *Shaikh* (note 5 above)) reads as follows: 'The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of tax, additional tax, penalty or interest payable by such other person under this Act and may be required to make payment of such amount from any moneys which may be held by him for or be due by him to the person whose agent he has been declared to be'.

37 Ibid at paras 17–18.

38 *Tulip Diamonds* (note 6 above).

39 Ibid at para 122. Jafta J relied upon *Quid Pro Quo* and *Harris*.

40 *Liebenberg* (note 7 above).

41 Ibid at paras 93–94, relying upon *Latib*, *Quid Pro Quo*, *Howick*, & *Harris*.

42 *Sigcau v President of the Republic of South Africa & Others* [2013] ZACC 18, 2013 (9) BCLR 1091 (CC).

43 Ibid at para 27.

In *Nxumalo*,[44] the President had also made a decision under the amended TLGFA in circumstances where the unamended TLGFA was applicable. With reference to *Harris*, the Court held that '[t]he principle upon which *Sigcau* is based is that, if a functionary purports to exercise under one Act a power that that Act does not confer upon him or her, that exercise of power is unlawful even if there is another Act that confers such power on the functionary.'[45]

The last case in this line to note is *Zuma v DA*,[46] a 2017 judgment of the Supreme Court of Appeal. In April 2009, the acting National Director of Public Prosecutions (NDPP), decided to discontinue the prosecution of Mr Jacob Zuma shortly before he became President, a prosecution the NDPP had himself decided to institute. The NDPP relied upon section 179(5)(d) of the Constitution as authority for his decision to discontinue the prosecution. This was a mistake. In the earlier *National Director of Public Prosecutions v Zuma*,[47] Harms JA had held that section 179(5)(d) did not empower the NDPP to review his own decision to prosecute – it permitted him to review the decisions of provincial Directors of Public Prosecutions.

The NDPP argued that this mistake did not invalidate the decision to discontinue the prosecution because section 179(2) of the Constitution empowered him to review his own decision to institute a prosecution. Navsa ADP, relying upon *Harris* and Jafta J's minority judgment in *Liebenberg*, held that a decision made by 'a decision-maker who [has] consciously made an election to rely on a statutory provision found wanting' is 'liable to be set aside', even if an empowering provision exists elsewhere. As a result, the decision by the NDPP fell to be set aside for this reason alone.[48] While not necessary for the outcome of the case, Navsa ADP went on to hold that the decision suffered from numerous other irregularities that were unrelated to misreliance: that the decision was irrational,[49] that the NDPP had failed to consider relevant factors,[50] and that he had made a material error of law.[51]

The current state of the law is thus the following: if an administrative decision is made in express reliance upon an empowering provision that does not contain authority for that decision, and that reliance is deliberate, the administrative decision is invalid without more. In what follows, I call this the 'deliberate-reliance rule'.

IV ASSESSING THE DELIBERATE-RELIANCE RULE

In this section, it is argued that the deliberate-reliance rule is not a good one. It should be abandoned. In the following section, I describe the approach that should replace it.

A The line between deliberate and inadvertent misreliance is not clear

The first flaw in the deliberate-reliance rule is that what it means for misreliance to be deliberate or inadvertent differs between the cases – the line between the two concepts is not clear.

One potential definition of inadvertent misreliance is this: An administrator wishes to do administrative act X. Empowering provision A contains the power to do X. The decision-maker

[44] *Nxumalo v President of the Republic & Others* [2014] ZACC 27, 2014 (12) BCLR 1457 (CC).
[45] Ibid at para 14.
[46] *Zuma v DA* (note 8 above).
[47] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1, 2009 (2) SA 277 (SCA).
[48] *Zuma v DA* (note 8 above) at paras 58–59.
[49] Ibid at para 84.
[50] Ibid at paras 86–87.
[51] Ibid at para 88.

intends to invoke A to do X and intends to cite A in the notice of her decision, but through an administrative (i.e., clerical) error, she cites empowering provision B, which does not contain the power to do X. This can be called the '**strict**' definition of inadvertent misreliance. In other words, the error must be, in the words of Cameron JA in *Howick*,[52] no more than an administrative 'slip-up'.[53]

The mistake in *Howick* is an example of this type of inadvertent misreliance. The municipal council had initially (and deliberately) relied upon s 75A of the Systems Act to rate the properties at issue but discovered that it could not do so because the Systems Act had not yet come into effect. The council then attempted to amend the relevant resolution to refer instead to s 10G(7) of the LGTA, which was in effect and did contain the power to make the ratings decision. However, the council did not amend the resolution properly and it continued to refer to s 75A of the Systems Act. Put in the structure of the strict definition of inadvertent misreliance set out above: the council wished to rate the relevant properties. Section 10G(7) of the LGTA contained the power to do so. The attempted amendment showed that the council intended to invoke s 10G(7) and intended to cite it. However, because the amendment was bungled, the council cited s 75A of the Systems Act instead. It had thus made an error in the strict sense and its error did not visit the ratings decision with invalidity.

The courts do not always require strictly inadvertent misreliance for a decision to escape invalidity. An alternative definition of inadvertent misreliance is this: an administrator wishes to do administrative act X. Empowering provision A contains the power to do X but unlike with strict inadvertent misreliance, the administrator incorrectly thinks that empowering provision B contains the power to do X. The administrator intends to invoke B, intends to cite B and in fact cites B. This can be called the '**lenient**' understanding of inadvertent misreliance.

Shaikh[54] can be interpreted as an example of a case where the Supreme Court of Appeal applied a lenient understanding of inadvertent misreliance. While Mhlantla AJA did not delve into why SARS had cited only s 114A of the Customs Act to collect both outstanding customs duty and VAT, the relevant notice seemed to indicate that SARS thought that s 114A contained the power to extract outstanding VAT from a taxpayer's bank:

> The abovementioned is indebted to this department for Customs Duty, VAT, Forfeiture and Interest of R1 245 724.33. In terms of s 114A of the Customs and Excise Act 91 of 1964, as amended, the Commissioner for the South African Revenue Services is empowered to appoint an agent who may be in custody or control of income, money etc of the client, to hold such money or assets for the payment of Duty, **VAT**, Forfeiture, fine, penalty and interest upon the request of the department.
>
> In terms of this section [the] Commissioner appoint[s] you as agent and requests that you hold and not dispose of any monies or assets, whether capital or interest to the client or to any other person. You are requested to pay such money referred to above to the Commissioner by close of business tomorrow.[55]

Put in the structure of the above definition of the lenient understanding of inadvertent misreliance: SARS intended to collect Mr Shaikh's VAT liability from Standard Bank. Section 47 contained the power for SARS to do so. But SARS incorrectly thought that s 114 of the Customs Act contained this power, SARS intended to invoke and cite the section and actually cited it.

[52] *Howick* (note 32 above).

[53] Ibid at para 23.

[54] *Shaikh* (note 35 above).

[55] Ibid at para 10 (my emphasis).

In *Zuma v DA*,[56] however, the NDPP did not obtain the benefit of the lenient understanding of inadvertent misreliance. The power he intended to exercise was the power to review his own decision to institute a prosecution. He thought that section 179(5)(d) of the Constitution contained this power, so he intended to invoke and cite the section and in fact did so.[57] Under the lenient understanding of inadvertent misreliance, his decision would not have been visited with invalidity as a result of the misreliance. He would have obtained the same treatment as SARS did in *Shaikh*. Instead, Navsa JA invalidated the NDPP's decision through the application of the deliberate-reliance rule.

Whether a court adopts a strict or lenient understanding of inadvertent misreliance affects what deliberate misreliance means. If strict inadvertent misreliance is required to save a decision from invalidity, then deliberate misreliance constitutes anything from lenient inadvertent misreliance – in other words, the administrator thinking that the incorrect empowering provision contains the necessary power – to a host of more serious legal errors. If lenient inadvertent misreliance is sufficient to save a decision from invalidity, then the meaning of deliberate misreliance is narrower.

B The deliberate-reliance rule does not fit comfortably with the orthodox administrative-law principles

The second problem with the deliberate-reliance rule is that it does not fit comfortably with orthodox administrative-law principles. Section 33 of the Constitution grants everyone the right to administrative action that is lawful, reasonable and procedurally fair; a right which is particularised in PAJA.[58] As is explored below, a decision made through deliberate reliance on the wrong empowering provision can be all of these things. If another empowering provision exists and the requirements for the invocation of that provision have been met, then it is difficult to claim that the decision is not lawful, in the sense that the administrator did nothing other than exercise a power granted to her by the law.[59]

A decision that would fall afoul of the deliberate-reliance rule can also be perfectly reasonable. It can be rationally related to the purpose for which the power was given, and it can be proportionate.[60] There is also no reason that it cannot be procedurally fair. A decision-maker can hold an unbiased hearing with judicial levels of *audi* and follow it up with a decision that refers to the wrong empowering provision.

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[56] *Zuma v DA* (note 8 above).

[57] Ibid at para 55.7.

[58] The more foundational principle of legality – which applies to all public acts & not only administrative action – has evolved to require lawfulness, rationality (*Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC)) and, sometimes, a form of procedural fairness (as in *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4, 2010 (3) SA 293 (CC), discussed in *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51, 2019 (3) SA 30 (CC) at paras 61–71). For a general discussion, see C Hoexter 'The rule of law and the principle of legality in South African administrative law today' (2011) *Law, Order and Liberty: Essays in Honour of Tony Mathews* 55 and L Kohn 'The burgeoning constitutional requirement of rationality & the separation of powers: Has rationality review gone too far?' (2013) 130 *South African Law Journal* 810.

[59] *Welkom* (note 3 above) at para 1. See also *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374 (CC) at para 58.

[60] C Hoexter *Administrative Law in South Africa* (2nd Ed, 2012) at 340–350.

That the deliberate-reliance rule does not fit comfortably within the orthodox paradigm of public-law review is borne out by the fact that academic writers struggle to classify it. Hoexter tentatively classifies it as an aspect of lawfulness, writing that s 6(2)(f)(i) of PAJA, which allows for review where the action is 'not authorised by the empowering provision', 'seems capable of accommodating' the deliberate-reliance rule.[61] Baxter, on the other hand, appears to interpret *Quid Pro Quo* as a procedural-fairness case. He writes that it is an example of where 'a statement of the source of authority [was] necessary in order to alert potential objectors as to the public authority's true objectives'.[62]

Of course, and as is argued in detail below, deliberate reliance by a decision-maker on an incorrect empowering provision can be symptomatic of – or paired with – conventional grounds of review. A decision-maker could rely on an incorrect empowering provision because she has entirely misconstrued her powers, or such reliance could result in her not complying with the requirements of the correct empowering provision, or her misreliance could result in the administrative act being procedurally unfair. But this does not mean that deliberate misreliance is problematic in and of itself.

To illustrate the point, some examples are apposite. *Shaikh*[63] is a case in which it is difficult to argue that the administrator's misreliance generated an orthodox ground of review. SARS had invoked a provision of the Customs Act to extract VAT from a bank when it was questionable whether SARS could use this provision to extract VAT rather than customs duty. But statutory authority for extracting VAT from the bank clearly existed – in the corresponding provision in the VAT Act. There was no indication that SARS had failed to comply with the requirements for invoking that provision. Indeed, the two provisions were identical in all material respects. Moreover, SARS's misreliance did not result in it misconstruing its powers. SARS knew what it wanted to do – it wanted to extract the VAT Mr Shaikh owed from his bank account, and this is what it did. The misreliance also did not render the decision irrational or unreasonable, nor did it result in SARS considering irrelevant factors or failing to consider relevant ones. This is because the reasons for extracting customs duty from a taxpayer's bank account are the same as the reasons for extracting VAT; namely that the taxpayer owes the relevant tax and that it is in the public interest for SARS to collect it. The misreliance was unlikely to have rendered the decision procedurally unfair because the procedure attaching to both provisions was the same.

An example in which misreliance generated orthodox grounds of review is *Harris*.[64] There, the Minister's misreliance had resulted in him doing something that he could not do: impose a binding age requirement on Grade 1 learners at private schools *through a policy*. He had fundamentally misconstrued his powers and thus exercised a power that did not exist anywhere in law. The same occurred in *Quid Pro Quo*.[65] The administrator thought that s 3 of the Roads Ordinance empowered him to widen a road reserve to build a new road, but it did not, and no provision existed that empowered him to do such a thing.

A further reason why the deliberate-reliance rule does not fit comfortably with orthodox administrative-law principles is that, after invoking it, the courts generally ignore their

[61] Ibid at 260–261.

[62] L Baxter *Administrative Law* (1984) at 366–367 fn 166.

[63] *Shaikh* (note 5 above).

[64] *Harris* (note 2 above).

[65] *Quid Pro Quo* (note 1 above).

remedial discretion. Under the common law,[66] PAJA,[67] and the constitutional principle of legality,[68] a court may hold that an administrative decision suffers from a reviewable irregularity but nevertheless refrain from setting it aside.[69] Recent descriptions and invocations of the deliberate-reliance rule by the Supreme Court of Appeal and the Constitutional Court appear to ignore this remedial discretion: if a decision is made in deliberate reliance upon an incorrect empowering provision, it *is* invalid and *must be* set aside. Nowhere in *Harris*,[70] *Sigcau*,[71] *Nxumalo*,[72] or *Zuma v Democratic Alliance*[73] did the relevant court consider whether to exercise its remedial discretion not to set the relevant decision aside even though it was unlawful for violating the deliberate-reliance rule.

C Perverse incentives

If there is one thing the cases make clear, it is that a decision-maker can avoid the risk of falling afoul of the deliberate-reliance rule simply by not stating the statutory provision she is relying on at all, provided that the correct empowering provision does not require its citation.[74] If she is unsure about the source of her power, it is better for her not to share what she thinks it is. This is a perverse incentive. It is a good thing for an administrator to state the source of her power when making an administrative decision. As De Villiers JP held in *Macrobert*, 'it certainly is a matter of convenience to know under what statutory provision a municipality purports to act in framing bylaws'.[75] In the words of Baxter: '[the administrator] need not state the authority for the action, although this is usually done in practice and the provision of such information is a principle of sound administration.'[76] If an administrator states the source of her power, it is easier for those affected to determine whether the decision is lawful and what their remedies might be. An administrator that states the source of her power furthers the 'culture of justification' the Constitution seeks to foster.[77]

[66] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48, 2004 (6) SA 222 (SCA) at para 36 and the cases cited there.

[67] PAJA, s 8(1). See also *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 51, 2014 (1) SA 604 (CC) ('*Allpay* merits') at paras 25, 56, 96; and *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12, 2014 (4) SA 179 (CC) ('*Allpay* remedy').

[68] Constitution, s 172(1)*(b)*. See also *Corruption Watch NPC v President of the Republic of South Africa* [2018] ZACC 23, 2018 (10) BCLR 1179 (CC) at paras 68–90.

[69] For a recent account of the conceptual divide between lawfulness and remedy (in the context of public procurement), see R Cachalia and L Kohn 'The quest for "reasonable certainty": refining the justice and equity remedial framework in public procurement cases' (2020) 137 *South African Law Journal* 659.

[70] *Harris* (note 2 above)

[71] *Sigcau* (note 42 above).

[72] *Nxumalo* (note 44 above).

[73] *Zuma v Democratic Alliance* (note 8 above).

[74] *Macrobert* (note 9 above) at 940; *Latib* (note 18 above) at 190H–191A; *Shaikh* (note 35 above) at para 19.

[75] *Macrobert* (note 9 above) at 940.

[76] Baxter (note 62 above) at 366.

[77] *Pharmaceutical Manufacturers* (note 58 above) at para 85 fn 107, citing E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 32.

D The deliberate-reliance rule can ignore substantive irregularities

An inflexible application of the deliberate-reliance rule can also result in a decision being invalidated that has nothing wrong with it – other than that it violated the deliberate-reliance rule. This is especially so when paired with a strict understanding of what constitutes inadvertent misreliance.

A decision-maker can, for example, make a decision in reliance upon empowering provision A, incorrectly thinking that it provides authority for the decision. The decision can otherwise be perfectly regular – empowering provision B exists which authorises the decision; all of the requirements for the exercise of empowering provision B have been met; the decision was procedurally fair; the decision-maker considered all relevant circumstances (and only such circumstances); and the decision was rational and reasonable. The decision would nevertheless be invalid because the decision-maker deliberately relied upon the wrong empowering provision. We should be wary of this. As the Constitutional Court noted in *Joseph*,[78] administrative review should not be done in a way that erects unnecessary tripwires in the way of efficient administration:

> The spectre of administrative paralysis raised by the respondents is a legitimate concern. Administrative efficiency is an important goal in a democracy, and courts must remain vigilant not to impose unduly onerous administrative burdens on the state bureaucracy. … The practical concerns raised by the respondents thus … must inform the content of procedural fairness.[79]

By invalidating administrative decisions that are otherwise unproblematic, the inflexible application of the deliberate-reliance rule can therefore unnecessarily stymie efficient administration. A related point is that the deliberate-reliance rule can result in courts not grappling with substantive irregularities attaching to a decision under review. This is what happened in *Harris*.[80] The matter raised 'complex constitutional questions' involving the school attendance, the right to equality, children's rights and the interaction between national and provincial powers to regulate schooling.[81] The High Court considered them. The Constitutional Court, having invalidated the decision under review using the deliberate-reliance rule, refrained from considering or deciding these issues.[82] This species of constitutional avoidance imposes costs: constitutional provisions are not given meaning, undermining the clarity of the law and the rule of law.[83]

The same could have happened in *Zuma v DA*.[84] Navsa ADP could have refrained from deciding whether the decision to withdraw the prosecution of Mr Zuma was irrational or otherwise substantively unlawful, and could have invalidated the decision solely because it

[78] *Joseph & Others v City of Johannesburg & Others* [2009] ZACC 30, 2010 (4) SA 55 (CC).

[79] Ibid at para 29 (footnotes omitted). See also *Premier, Mpumalanga & Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20, 1999 (2) SA 91 (CC) at para 41: 'In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.'

[80] *Harris* (note 2 above).

[81] Ibid at paras 2, 19.

[82] Ibid at para 19.

[83] Accounts of the costs of this sort of constitutional avoidance are legion. See, for example, S Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 763–766.

[84] *Zuma v DA* (note 8 above).

violated the deliberate-reliance rule. While this might have furthered judicial economy, it would have left unresolved one of the major legal and political controversies of the Zuma era, and would have made it easier for a pliant NDPP again to withdraw the decision to prosecute Mr Zuma. Indeed, it is not inconceivable that this was why *the NPA* raised the applicability of *Harris*, in supplementary heads filed a week before the hearing in the Supreme Court of Appeal.[85] It could have been an attempt by the NPA's legal team to bait the Supreme Court of Appeal into not deciding the substantive lawfulness of the decision not to prosecute Mr Zuma.

V A BETTER APPROACH

I therefore propose that the strict deliberate-reliance rule be abandoned. What should it be replaced with? In short, the application of orthodox principles of administrative review under the Constitution – a first-principles approach. Whether a decision based on an incorrect empowering provision is lawful should not depend on whether the mistake was inadvertent or deliberate but, in the words of Cameron JA in *Howick*,[86] whether 'the failure expressly or accurately to invoke [the decision's] source is immaterial to [its] due exercise'.[87]

Such an approach would work as follows. An administrator makes a decision and cites either the incorrect empowering provision or cites no empowering provision. Whether the decision should be reviewed and set aside depends on the answers to the following questions:

(a) First, the court must determine whether an empowering provision exists at all. If not, the decision is unlawful, because '[s]tate functionaries, no matter how well-intentioned, may only do what the law empowers them to do'.[88]
(b) Secondly, if an empowering provision exists, the court must ask whether the requirements for its invocation have been met. If not, the decision is similarly unlawful.
(c) Thirdly, if the requirements for the exercise of the correct empowering provision have been met, the court must consider whether the citation of the incorrect empowering provision, or the failure to cite an empowering provision at all, gives rise to any of the other grounds of review in PAJA or under the principle of legality. Did it, for example, cause the decision-maker to consider irrelevant circumstances, or did it render the decision irrational? Did the decision-maker misconstrue her powers? If no other ground of review exists, the misreliance does not itself render the decision unlawful.
(d) Finally, if the decision is unlawful under steps (b) or (c), the court must consider whether to exercise its remedial discretion to set aside the decision.

This approach can lead to the same result as the application of the deliberate-reliance rule, but would require the court to grapple more deliberately with whether there is anything substantively wrong with the decision at issue. The deliberate-reliance rule can, in other words, reach the right destination – but along a route that obscures rather than illuminates. Applying a first-principles approach to some of the cases considered above illustrates how it works.

In *Harris*, the Minister would fail at leg (a), in that no empowering provision existed that empowered the Minister to do what he wished to do. The Minister attempted to impose a

[85] Ibid at para 54.

[86] *Howick* (note 32 above).

[87] Ibid at para 20. See L Kohn & H Corder 'Administrative Justice in South Africa: An overview of our curious hybrid', chapter 7 in Corder & Mavedzenge *Pursuing Good Governance: Administrative Justice in Common Law Africa* (2019) Siberink at 131.

[88] *Welkom* (note 3 above) at para 1.

binding age requirement on Grade 1 learners at private schools *through a policy*. Section 3(4)(i) of the Policy Act did not permit this because it did not permit the enactment of policy that was legally binding. While s 5(4) permitted the Minister to impose binding age requirements, it did not permit him to do so through a policy. No provision existed, therefore, that permitted the Minister to impose binding age requirements through a policy, and the decision was unlawful for this reason.

The administrator in *Quid Pro Quo* would also fail at leg (a) in a similar way. He attempted to widen a road reserve in order to build new roads. No provision existed that empowered him to do this. Section 3 empowered him to widen a road reserve (but not in order to build new roads) and s 5 empowered him to declare new roads (but not through widening a road reserve). The administrator fell between two stools and his decision was without any legal authority at all.

Sigcau is an example of a decision that would fail at leg (b). The President intended to recognise a new king of the amaMpondo aseQaukeni. He relied on the TLGFA as amended, but he could not do so because the amendment was not yet in force. The power to recognise a new king existed under the unamended TLGFA, but the President did not comply with the requirements for the exercise of that power because 'of the material differences between the old Act and the new Act'.[89]

In *Shaikh*, on the other hand, SARS intended to order Standard Bank to pay over the VAT Mr Shaikh owed from his bank account. A provision existed that permitted precisely this – s 47 of the VAT Act. The requirements for the exercise of s 47 were met because they were exactly the same as the requirements for the exercise of the power under s 114A in relation to customs duty – the only material difference between the two sections being that the former referred to VAT and the latter referred to customs duty. The fact that SARS incorrectly thought that s 114A contained the power to order the payment of VAT did not give rise to any other ground of review under PAJA. SARS's misreliance did not, for example, cause it to act for an ulterior purpose, take into account irrelevant circumstances, or act irrationally. Mr Shaikh owed SARS VAT and SARS was entitled to extract it from his bank.

Zuma v DA is one example of a case where a first-principles approach would lead to a different result. The NDPP's misreliance should not have invalidated the decision – although it was still unlawful for other reasons. The NDPP intended to review his own prosecutorial decision; namely to prosecute Mr Zuma. The section he cited (section 179(5)(d) of the Constitution) did not empower him to review his own decisions. But another section did – section 179(2). He thus passed hurdle (a). There is no indication that he did not comply with any requirements attaching to section 179(2), and he therefore passed hurdle (b) as well. His misreliance did not cause him to commit any other irregularity. The misreliance did not, for example, lead to him acting irrationally or considering irrelevant factors (he did do those things, but for other reasons). He therefore also crossed hurdle (c).

As such, the NDPP's decision was not unlawful because he cited section 179(5)(d) of the Constitution when he should have cited section 179(2). He intended to review his own prosecutorial decision, section 179(2) gave him the power to do so and he complied with the requirements of that section. His decision was, to be clear, unlawful – but it was unlawful for reasons unrelated to the misreliance.

[89] *Sigcau* (note 42 above) at para 27.

VI CONCLUSION

Why have the courts, including the Constitutional Court, adopted the strict deliberate-reliance rule, despite its flaws? It may be because deliberate misreliance stands as a proxy for orthodox grounds of review. An administrator who in some sense deliberately relies upon the wrong empowering provision often ends up making a decision for which no empowering provision exists as a result – as in *Quid Pro Quo* and *Harris*. Or she may take into account irrelevant circumstances, she may misconstrue the nature of her powers, or she may act procedurally unfairly – all as a result of the misreliance.

But this is not always the case. While deliberate misreliance can render a decision substantively problematic, it does not necessarily do so, as cases such as *Shaikh* and *Zuma v DA* illustrate. As such, the courts should not, as a rule, set aside decisions made in deliberate reliance upon the wrong empowering provision. It would be better for them to grapple with whether the administrator's misreliance infected the decision with any of the more orthodox grounds of review under PAJA or the principle of legality. Only if this is the case should the decision be invalidated by virtue of the administrator's misreliance.

Such an approach would relieve the courts from having to draw a line between deliberate and inadvertent misreliance, something which is not always easy to do. It would prevent otherwise unobjectionable decisions from being set aside based on what can be a technicality. It would encourage courts to consider what is substantively wrong with decisions under review. In addition, it would take away the incentive for administrators not to state the source of the power they are attempting to exercise. It would make for better law and better administration.