

UNIVERSITY OF CAPE TOWN

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**A CRITICAL ANALYSIS OF THE DELAY RULE IN SOUTH AFRICAN ADMINISTRATIVE LAW
POST STATE INFORMATION TECHNOLOGY AGENCY SOC LIMITED V GIJIMA HOLDINGS
(PTY) LIMITED**

by

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Word count: 20 792

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the for Master of Laws in course work and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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ACKNOWLEDGEMENTS

My highest gratitude goes to my family for supporting me throughout my education and career.

A special thanks to my lovely daughter Hlombe, whose support and understanding means the world to me.

I would like to thank my supervisor, Nurina Ally for her guidance, patience, and constructive contribution throughout the writing process until completion. Without you, this would not have been possible.

I would like to thank Lauren Kohn and Khatija Kapdi for their input when this mini-dissertation was just an idea.

“Our courts might in time, after adjudicating a string of cases with various permutations streamline an approach to self-review, or the legislature might intervene, in a constitutionally compliant manner, to cover all forms of review, including those that pertain to the executive and provide for how delay is to impact on such reviews. The Constitutional Court might, in time, revisit prior decisions. An aspect however, that is of immediate concern, noted at the commencement of this judgement, is that self- review is now a burgeoning and troubling phenomenon.”¹

¹ *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* 2021 (4) SA 436 (SCA).

ABSTRACT

The *State Information Technology Agency's (SOC) Limited v Gijima Holdings (Pty) Ltd* was seminal in establishing that the Promotion of Administrative Justice Act, 2000 is not available to an organ of state wishing to set aside its own decision while acting in its own interest. The case is also significant for the impact it has had on the delay rule. This paper identifies a problem presented by what will be referred to as the *Gijima* principle. The *principle* suggests that a court may be required to declare a decision unconstitutional in accordance with section 172(1)(a) of the Constitution even if there is no basis for overlooking the unreasonableness of the delay. This paper considers the impact of the *Gijima* judgement on the delay rule and the continued relevance of the delay rule in administrative law post- *Gijima*.

It will be argued that there are three major challenges this principle poses to the rule of law namely, it promotes arbitrary and opportunistic self-serving reviews by state officials. Secondly, it indirectly promotes disregard of public procurement laws by making it easy for organs of state to undo their decisions. Lastly, it undermines the finality and certainty of decisions, which have the potential to deter prospective suppliers from contracting with the state.

This paper critically assesses trends emerging from lower courts in response to the *Gijima* principle and provides recommendations as to how some of the issues raised by the judgment's approach may be rectified.

Overall, I argue that the *Gijima* principle effectively eradicates the delay rule and that there is a need for continued relevance of the rule in administrative law. The Constitutional Court

needs to strike a balance between preserving the delay rule on the one hand and exercising its prerogative to develop the common law on the other.

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INTRODUCTION

This thesis discusses the approach that the Constitutional Court employed in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd*² insofar as the delay rule is concerned. The *Gijima* principle suggests that the court may be required to declare a decision unconstitutional in accordance with section 172(1)(a) of the Constitution even if there is no basis for overlooking the unreasonableness of the delay. The problem presented by this approach is that it eradicates the relevance of the delay rule in administrative law. The purpose served by the principle is that it ensures finality of decisions and gives practical effect to section 237 of the Constitution³ that requires constitutional obligations to be carried out diligently and without delay. The Constitutional Court has failed to streamline an approach to how to apply this principle while preserving the delay rule. It will be shown that lower courts find difficulty in applying the *Gijima* principle, which at times leads to avoidance of its application, which conflicts with the doctrine of precedent.

Part 1 deals briefly with the purpose of the delay rule. Part 2 describes and provides a critique of the *Gijima* judgement, as well as the opportunity missed in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331(CC) to rectify the challenge created by *Gijima* as far as the delay rule is concerned. I consider the impact of the *Gijima* judgement on the delay rule and whether there is continued relevance of the delay rule in administrative law post-*Gijima*.

Part 3 discusses the application of the *Gijima* principle in lower courts. Three trends will be highlighted. First, confusion emerging from the differing opinions in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331(CC). Second, an avoidance of the *Gijima* principle. And third, incorrect interpretation of the principle. I argue

² *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* 2018(2) SA 23 (CC).

³ The Constitution of the Republic of South Africa 108, 1996.

that these trends indicate difficulty experienced by the lower courts in the application of *Gijima*.

Part 4 identifies challenges that the principle poses to the rule of law. First, I argue that it promotes arbitrary and opportunistic self-serving reviews by state officials. Secondly, it indirectly promotes disregard of public procurement law by making it easy for state organs to undo decisions. Lastly, it undermines the finality and certainty of decisions, which have the potential to deter prospective suppliers from contracting with the state.

Part 5 concludes by making recommendations on how the *status quo* can be remedied. I first call for the overturning of the precedent set in *Gijima*. Second, I suggest the adoption of a good-faith principle. Third, I suggest that courts actively upend the narrative of a sympathetic stance towards delayed self-review applications by state organs. Fourthly, sections 172(1)(a) and 173 of the Constitution are not to be deemed absolute. Lastly, I invite intervention by the legislature.

Part 6 contains the conclusion.

PART 1- THE DELAY RULE

In the Constitutional era, the long-standing common law principle that reviews should be brought without unreasonable delay continues to apply to reviews brought under the principle of legality⁴ and has been codified in respect of reviews brought under PAJA.⁵

The purpose of the delay rule is twofold. First, it promotes certainty and finality of decisions.⁶ Secondly, it eliminates harm to other parties who rely on and act according to that decision.⁷ At the same time, the delay rule acts as a procedural obstacle to the exercise of the right to access courts enshrined in section 34 of the Constitution⁸ and can, as Hoexter and Penfold note, serve to "insulate irregular decision-making from review."⁹ In other words, the delay rule in aiming for further certainty and finality may allow an unlawful decision to stand. In this way, the rule of law can be said to "pull in different directions when it comes to the delayrule."¹⁰ Recognising this tension, the Constitutional Court has re-iterated that:

“A court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of the exercise of public power. However, that does not imply that the Constitution has dispensed with the basic procedural requirement that review proceedings should be brought without undue delay or with a court’s discretion to overlook a delay.”¹¹

⁴*Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 44. The court held that “it is a long-standing rule that legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay.”

⁵ Promotion of Administrative Justice Act 3 of 2000.

⁶ C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 740.

⁷ *Ibid.* See also *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (3) SA 245(SCA) para 22 where it was held that failure to launch review application within a reasonable time may pose prejudice to the respondent and it is in the public interest that administrative exercises reach finality.

⁸ Section 34 of the Constitution states that: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.” In *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA (SCA) paras 28-29, the Court noted that the intention of the delay rule is not to punish a party by refusing a review, but allows a decision to stand due to the expiration of time.

⁹ See *supra* note 6 at 720 where the purpose of the delay rule is discussed in more detail.

¹⁰ *Ibid.*

¹¹ This was subsequently quoted by the Constitutional Court in *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 160; *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 311 (CC) paras 68-69; and *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2017 (40) SA (CC) paras 47-48.

Under common law, an application for review is to be made within a reasonable time.¹² Section 7(1) of the PAJA sets an upper limit on delay, requiring reviews brought under the Act to be brought no later than 180 days after becoming aware of, or reasonably expected to have become aware of the decision and its reasons.¹³ However, condonation may be granted where the interests of justice require.¹⁴ The onus lies on the applicant to provide a convincing and satisfactory explanation for the unreasonable delay.¹⁵

Therefore, when assessing delay both under PAJA and legality review the standard to be applied is reasonableness. However, it is arguable that a court has a wider discretion under legality review, which is subject to the more flexible common law delay rule and not subjected to legislated time frames. In a series of cases,¹⁶ the court appeared to strike a balance between the competing demands underpinning the delay rule. In *Khumalo*,¹⁷ the court confirmed a two-stage test of dealing with a delayed inquiry under the principle of legality. Firstly, an assessment should be conducted into whether the delay is unreasonable. And, if so, then secondly, the court should consider whether there is a basis to overlook the delay. If there is no such basis, then the application should not be entertained.

¹² There is no definitive answer as to how long a delay should be to be considered as unreasonable. Each case is judged on its own merits. For example, *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2009 (85) SA333 (SCA) para 79 held that an unprecedented delay of fifty-odd years would not be a bar to review due to the uniqueness of the circumstances of the case.

¹³ Act 3 of 2000.

¹⁴ Section 9 of the PAJA, Act 3 of 2000. Without a section 9 extension the court has no authority to entertain the review application, whether the decision was unlawful or not no longer matters as the delay is validated by the decision. See also *Opposition to Urban Tolling Alliance v The South African National Road Agency Limited* 2013 (4) SA 639 (SCA) para 26 which held that “section 7 of PAJA creates a presumption that a delay of longer than 180 days is per se unreasonable, whether the delay was unreasonable or not and the extent of that unreasonableness is still a factor to be considered in determining whether an extension should be granted or not.”

¹⁵ In *Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another* 2010 (3) SA 519 (SCA), the court suggested requirements for the extension under s9(2). It held that whether the interest of justice requires an extension depends on the facts of each case. A party seeking extension must provide a reasonable explanation that covers the entire period of the delay. The court will consider factors like the nature of relief sought, the extent of the delay, effect of the delay on the administration of justice and to other litigants, importance of issues to be raised in the proceedings and prospects of success.

¹⁶ *Khumalo and another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC) endorsed a test enunciated in *Gqwetha v Transkei Development Corporations Ltd and Others* 2006 (3) SA 245 (SCA) 51 which asks: (i) whether the delay is unreasonable, and if so, (ii) whether it is in the interest of justice to overlook it.

¹⁷ *Ibid.*

In the next part, I argue that in *Gijima* the court amended the approach adopted in its previous jurisprudence and undermined the delay rule altogether in relation to reviews brought under the principle of legality. This is because the court held that even where there is no basis to overlook an unreasonable delay, the court is obliged to declare unlawful conduct invalid in terms of section 172(1)(a).

PART 2: AN EVALUATION OF *GIJIMA* AND *BUFFALO CITY*

2.1 Introduction

This part critically assesses the impact of the *Gijima* judgement on the delay rule. That is done by considering the way the *Gijima* court dealt with the delay rule. I argue that the Constitutional Court effectively developed the common law, by rendering the long-standing *Khumalo*¹⁸ two-stage test redundant.

It also assesses how the Constitutional Court through *Buffalo City Metropolitan Municipality v Asla Construction*¹⁹ attempted to narrow *Gijima* by stating that the principle should be interpreted “narrowly and restrictively” when unlawfulness is clear and undisputed on the facts.²⁰ I argue that *Buffalo City* missed an opportunity to rectify or overrule the troublesome precedent created by *Gijima* as far as the delay rule is concerned. The overruling of previous judgements by the Constitutional Court is not novel. In *Gcaba*,²¹ it was held that a Constitutional Court's earlier decision may be overturned if it has given rise to controversy or uncertainty, leading to conflicting decisions in the lower courts. I will argue that the *Gijima* judgement is controversial, causes legal uncertainty, and will lead to conflicting decisions in lower courts.

Deciding whether to institute review proceedings under PAJA or legality review is one of the critical decisions facing litigants in administrative law. *Gijima*²² was seminal as the Constitutional Court held that PAJA²³ is not available to an organ of state wishing to review its own decision and when acting in its own interest. Both the High Court and the Supreme Court of Appeal held that decisions by organs of state to enter and renew contracts amounted

¹⁸ See note 16 above for the *Khumalo* test.

¹⁹ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 311 (CC).

²⁰ *Ibid* paras 66 and 101.

²¹ *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC).

²² *Supra* note 2 para 37.

²³ Act 3 of 2000.

to administrative action and were reviewable under PAJA.²⁴ The Constitutional Court took a different stance by interpreting that "everyone" contained in section 33 can only refer to warm-bodied individuals. It reasoned that it would be rather strange for the state to be both the "beneficiary of the rights and the bearer of the corresponding obligations, intending to give effect to those rights."²⁵

2.2 Gijima Background Facts

Gijima was a dispute about the renewal of contracts for information technology (IT) services between the State Information Technology Agency Limited (SITA) and a private contractor, Gijima Holdings (PTY) Limited. A state department requiring IT services submitted a request to SITA, which then administered the bidding, procurement, and appointment of a suitable service provider.²⁶ Gijima was one of the service providers with whom SITA had historically contracted. In 2006, a contract was entered into between SITA and Gijima, which was extended several times, until it was unilaterally terminated by SITA with immediate effect.²⁷ As a result of such termination, Gijima instituted an urgent application in the Gauteng High Court, which was settled by means of a settlement agreement. The agreement was intended to compensate Gijima for the loss that it would have incurred because of SITA's termination of the SAPS agreement.²⁸ Thereafter, a payment dispute arose between the parties. Gijima instituted arbitration proceedings, which SITA defended by claiming that the agreement and its extensions were invalid and failed to comply with procurement requirements as per section 217 of the Constitution. The arbitrator ruled that it lacked jurisdiction on the question of whether procurement processes had been duly followed.²⁹

²⁴ *State Information Technology Agency Soc Ltd v Gijima Holding (Pty) Ltd* 2015 ZAGPPHC 1079 para 19; *State Information Technology Agency Soc Ltd v Gijima Holding (Pty) Ltd* 2016 ZASCA 143 para 16.

²⁵ *Supra* note 2 para 27.

²⁶ *Ibid* para 3.

²⁷ *Ibid* para 4.

²⁸ *Ibid* para 5.

²⁹ *Ibid* para 9.

2.3 The Gijima Journey: High Court, Supreme Court of Appeal and Constitutional Court Applications

SITA approached the High Court and launched legality review proceedings to set aside the agreement.³⁰ The application had been delayed by just under 22 months before approaching the High Court for review.³¹ The court held that the decision to enter and renew the contracts amounted to administrative action in terms of PAJA.³² It further held that it had no basis to entertain the review because SITA launched the proceedings outside the 180-day period in terms of section 7 (1) of PAJA.³³ Moreover, SITA had not sought condonation in terms of section 9 of PAJA.³⁴ Consequently, the application was dismissed with costs.

SITA then approached the Supreme Court of Appeal and argued that PAJA does not apply to an organ of state wishing to review its own decision.³⁵ The majority of the Supreme Court of Appeal upheld the High Court's conclusion that a decision by an organ of the state to award an agreement for services amounted to administrative action in terms of PAJA. It held that the wording of section 6(1) of PAJA, which specifically allows "any person" to institute judicial review of administrative action, is wide enough to include state organs.³⁶

³⁰ Ibid para 10.

³¹ Ibid para 4.

³² Ibid para 10.

³³ Section 7(1) provides that:

“Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

(b) when no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reason for it or might reasonably have been expected to have become aware of the action and the reasons.”

³⁴ Section 9 provides that:

(1) “the period of -

(a) 90 days referred to in section 5 may be reduced, or

(b) 90 days or 180 days referred to in section 5 and 7 may be extended for a fixed period,

By agreement between the parties, or failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interest of justice so require.”

³⁵ *State Information Technology Agency Soc Ltd v Gijima Holding (Pty) Ltd* 2016 (4) SA 842 (SCA).

³⁶ Ibid para 16.

Although Bosielo JA in a minority judgment held that it was permissible for an organ of the state to launch review proceedings under the principle of legality, as there was no clarity on the subject.³⁷

The Supreme Court of Appeal found it unacceptable that SITA avoided compliance with PAJA's 180-day time limit by relying on the principle of legality. Furthermore, no explanation was offered for the 22-month delay. In sum, it was held that litigants cannot bypass PAJA when it applies, and even if the matter was approached as a legality review, SITA had failed to explain the unreasonable delay.³⁸ Thus, the appeal was dismissed with costs.

In the Constitutional Court, the key legal question was whether an organ of the state seeking to review and set aside its own decision "may invoke PAJA review" or whether the "appropriate route was legality review."³⁹ In answering the question, the court interpreted section 33 of the Constitution,⁴⁰ reflecting on *whom* fundamental rights in the Constitution are meant to protect. It found that fundamental rights are meant to protect "warm-bodied" humans primarily against the state.⁴¹ The court referred to the First Certification Judgement⁴² that explained "fundamental rights, freedoms, and civil liberties are what the Constitution's drafters recognized as inalienable entitlements of *human beings* in an open and democratic

³⁷ Ibid para 63.

³⁸ Ibid para 44.

³⁹ Supra note 2 para 1.

⁴⁰ Section 33 states:

(1) "Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or where appropriate, an independent and impartial tribunal.

(b) impose a duty on the state to give effect to the rights in subsection (1) and (2), and

(c) promote an efficient administration."

⁴¹ Supra note 2 para 18.

⁴² *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

society.”⁴³ The court justified its reasoning that it was rather contradictory that the State could be both a bearer and beneficiary of the corresponding obligation that gives effect to those rights.⁴⁴ Moreover, according to the court, section 33 requires any person who has been adversely affected by administrative action to be provided reasons. The court suggested that this section could not be interpreted to mandate the state to furnish reasons to itself for a decision taken by itself.⁴⁵ In conclusion, the court held that no choice was available to an organ of state wanting to have its own decision reviewed. PAJA was simply not available to it, and it must proceed under legality review when reviewing own decision. The court did, however, leave open two circumstances: first, where the review was brought in the public interest in terms of section 38 (d)⁴⁶ of the Constitution;⁴⁷ and secondly, when reviewing decisions of another state organ.⁴⁸

2.4 The *Gijima* Approach to Delay

In *Gijima*, the court was concerned about SITA's delay in launching the review proceedings. It re-iterated the importance of section 237 of the Constitution, which requires the performance of constitutional obligations to be carried out diligently and without delay. It emphasized its previous decision in *Khumalo*,⁴⁹ where the court noted that the rationale

⁴³ Supra note 2 para 22.

⁴⁴ Ibid para 27.

⁴⁵ Ibid para 28.

⁴⁶ Section 38 states:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) anyone acting in their own interest,
- (b) anyone acting on behalf of another person who cannot act in their own name,
- (c) anyone acting as a member of, or in the interest of a group or class of persons,
- (d) anyone acting in the public interest and,
- (e) an association acting in the interest of its members.”

⁴⁷ See *Compicare Wellness Medical Scheme v Registra of Medical schemes and Others* 2021 (1) SA 15 (SCA) para 16. Where the court applied the public interest exception and held that an organ of the state may review its own decision when acting in the public interest. The court found that it was in the public interest that a decision requiring the Registra of medical schemes to act unlawfully should be set aside on review.

⁴⁸ Supra note 2 para 37.

⁴⁹ Supra note 16 para 46.

behind instituting reviews without delay was to ensure certainty and promote legality. The court referred to its own jurisprudence in this regard, noting *Merafong*,⁵⁰ where it was held that the rule against delay is to curb potential prejudice that may ensue if the lawfulness of the decision remains uncertain.⁵¹ The court also quoted *Tasima*, which held that "while a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power, it is equally a feature of the rule of law that undue delay should not be tolerated."⁵² As a result, the court found no basis to a discretion to overlook the delay of 22 months.

However, despite having regard to the jurisprudence above, the court then proceeded to invoke section 172(1)(a)⁵³ of the Constitution, which requires a court to declare invalid any conduct that is inconsistent with the Constitution. As such, even though the court had held that it would not exercise its discretion to overlook the delay, it nonetheless considered itself bound to declare the award of the contract to be invalid.⁵⁴ Further to this conclusion, the court considered what would constitute a just and equitable remedy in the circumstances. In determining justice and equity considerations, the court contemplated the delay of under 22 months, Gijima's concerns with procurement compliance issues, and SITA's repeated assurances that proper procurement processes had been followed.⁵⁵ The court accordingly held that justice and equity dictated that, despite the invalidity of the award of the agreement, SITA should not benefit from misleading Gijima with false assurances and should also not

⁵⁰ *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) para 73.

⁵¹ *Ibid.*

⁵² *Supra* note 4 para 142.

⁵³ Section 172(1) states:

'When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity, and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

⁵⁴ *Supra* note 2 para 52.

⁵⁵ *Ibid* para 53.

benefit from its own undue delay in launching the proceedings.⁵⁶ The court therefore held that the declaration of invalidity should not deprive Gijima of any accrued rights in terms of the contract.⁵⁷

2.5 General *Gijima* Critiques

Gijima's suggestion that PAJA is not available to an organ of state wishing to review its own decision and the eradication of the delay rule has caused quite a stir. Freeman identifies "two descriptive inaccuracies" that were employed by the court, which led to the barring of state organs from relying on the right to just administrative action.⁵⁸ First, he argues that the court in *Gijima* misinterpreted rights contained in the Bill of Rights as dependent on the relationship between private persons and the state.⁵⁹ Secondly, it adopted an old model of understanding of the nature of the state for purposes of section 8⁶⁰ of the Constitution.⁶¹ He criticizes the *Gijima* approach as focusing on *who* brings the review application when considering limitations on the content of the right.⁶² Moreover, he argues that the *Gijima* conclusion is based on the application of the Bill of Rights rather than on the interpretation of section 33 and PAJA.⁶³ He argues that in its reasoning, the court merges the application and interpretation of rights together. He cautions that the cramming of an application finding into an interpretation analysis gives the court license to avoid taking on the full responsibility of its decision for the scope of rights in general. Because courts may encounter situations when

⁵⁶ Ibid para54.

⁵⁷ Ibid paras 53-54.

⁵⁸ R Freeman "The rights of the state, and the state of rights in State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd (2019) 9 Constitutional Court Review 521 at 523.

⁵⁹ Ibid at 522-523.

⁶⁰ Section 8 (4) of the Constitution states that: 'A juristic person is entitled to the right in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'

⁶¹ Supra note 58 at 523.

⁶² Ibid at 530.

⁶³ Ibid at 528. Freeman draws a distinction between the application and interpretation of the Bill of Rights. He describes application as setting the "scope and form of the Bill of Rights, while interpretation establishes the meaning of the rights themselves. The interpretation of a right does not define the application of a right. However, the application of rights instead sets the parameters of that right's interpretation."

the application of a right is reliant on its content, he contends that the two should not be kept strictly separate from one another.⁶⁴

De Beer criticizes *Gijima* for creating a perception that the review of government action is based on the identity of the party challenging the decision, thus creating parallel systems of reviews.⁶⁵ He argues that "unreasonable administrative decisions that do not meet the threshold may not be set aside on review when challenged by their decision-makers."⁶⁶ He argues that even though, under *Gijima*, both systems are based on the Constitution, the different requirements pose unsavory consequences for attorneys acting on behalf of state organs seeking to ensure that they rely on the correct system.⁶⁷ He argues that the court had departed from the previous two-step *Khumalo* test by using delay in the consideration of an appropriate remedy.⁶⁸ He adds that delay was used as a factor after the determination of the merits, rather than something to be considered prior to it. He cautions that this approach poses a risk of absorbing the delayed enquiry into the merits of the case. Secondly, he cautions that the two-step inquiry's role is diminished if this approach is followed.⁶⁹

According to Hoexter and Penfold the *Gijima* principle is very different from the law as stated in *Khumalo* and refer to it as an "extraordinary proposition."⁷⁰ The responsibility to declare a conduct or law invalid has never been believed to be absolute, and neither does it purport to be, they note.⁷¹ They argue that the treatment of delay in *Gijima* eliminates the rule, despite most of the Constitutional Court judges believing *Gijima* had not done so.⁷² They suggest that *Gijima* contradicts previous authority that made it clear that an unreasonable

⁶⁴ Ibid.

⁶⁵ M De Beer "A new role for the principle of legality in Administrative Law: State Information Technology Agency SOC LTD v Gijima Holdings (Pty) Ltd (2018) 4 South African Law Journal 613 at 625.

⁶⁶ Ibid.

⁶⁷ Ibid at 626.

⁶⁸ Ibid at 627.

⁶⁹ Ibid.

⁷⁰ Supra note 6 at 739.

⁷¹ Ibid.

⁷² Ibid.

delay serves as a procedural bar in the absence of condonation. This departure, they argue was made by the court without any reference to authority.⁷³ Secondly, they argue that *Gijima* undermines the second leg of the *Khumalo* test, which takes a variety of factors into consideration when assessing the interest of justice in overlooking an unreasonable delay.⁷⁴ Thirdly, they find it strange that the apex court would entertain a matter when the outcome of its own assessment found that condonation would not be in the interest of justice.⁷⁵ Moreover, they find it hard to understand how the applicability of section 172(1)(a) would depend on the identity of an applicant.⁷⁶

Boonzaier argues that the impression that one gets after reading *Gijima* is that the court's focus was exclusively on whether PAJA was applicable.⁷⁷ He describes how the court had nothing remaining in the tank when it had to decide SITA's claim. According to him, the court manages to put together a few short paragraphs in defence of its position, which he argues all that comes out of that is a string of errors. He criticises the *Gijima* judgement as "seriously muddled" reasoning.⁷⁸

2.6 *Gijima*'s Impact on the Delay Rule

Prior to *Gijima*, authority clearly stated that where an application for review was delayed, and the court refused to condone the unreasonable delay, it had no authority to entertain the review application. Similarly, under legality review, the two-step *Khumalo* test is used to enquire into the unreasonableness of the delay and whether the court should exercise a discretion to overlook it.

⁷³ Ibid at 740.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid at 743.

⁷⁷ L Boonzaier "A decision to undo" (2018) 4 South African Law Journal 642 at 666.

⁷⁸ Ibid.

The long-standing *Khumalo* test is two-pronged. First, it asks whether there is an unreasonable delay? Secondly, if there is an unreasonable delay, whether the delay can be overlooked by the court. If the court finds a basis to overlook the unreasonable delay, then the review application can be entertained. If the court finds no basis to overlook the delay, the review application cannot be entertained, and that is the end of the matter. While the Constitutional Court ostensibly applied the *Khumalo* test, it ultimately held that even if there is no basis to overlook the unreasonable delay, it must declare the unlawful conduct as invalid. It is my view that this approach renders the second leg of the *Khumalo* test redundant. This is so because, despite what the answer is to the *Khumalo* second leg, the court may nevertheless set aside the unlawful conduct. In my view, the courts' invoking of section 172 of the Constitution⁷⁹ has effectively developed the common law, even though the court does not state so specifically. Courts have the inherent power to develop the common law in terms of section 173 of the Constitution.⁸⁰ In this case, the Constitutional Court has developed the common law by requiring that a court declare conduct invalid even if a delay in bringing the review was unreasonable and could not be condoned. As I have noted, this approach fundamentally undermines the relevance of the delay rule.

Hoexter and Penfold support the view that *Gijima* undermines the *Khumalo*-test second leg, which considers a variety of factors in determining whether the interests of justice may entertain the review despite an unreasonable delay.⁸¹ One may then ask what is the continued purpose of ascertaining whether there is unreasonable delay and whether it should be overlooked since, despite any basis to overlook it, the court may entertain the review application and set aside an impugned decision?

⁷⁹ Act 108 of 1996.

⁸⁰ Section 173 states that "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice."

⁸¹ *Supra* note 6 at 740.

The main reason behind launching review proceedings is to ultimately get a court to set aside a decision. Practically speaking, an applicant in review proceedings is only concerned with setting a decision aside. How the court arrives at that destination is really of no importance to the applicant. *Gijima* suggests that an impugned decision can be set aside despite the existence of a basis to overlook an unreasonable delay. In my view, this approach is synonymous with a court overlooking an unreasonable delay and ultimately setting aside an impugned decision. The dominant factor is diverted from the unreasonableness of a delay to the unlawfulness of the decision. Hoexter & Penfold note that in *Tasima*, the court made clear that while procedural obstacles should not prevent the court from looking into the lawfulness of the exercise of public power, upholding the rule of law by not tolerating undue delay is equally important. I argue that striking a balance between the two currently remains a vacuum, with *Gijima* effectively erasing the relevance of the delay rule, even if unintentionally so. The *Gijima* principle fails, in my view to find a balance that can be struck that investigates the lawfulness of the exercise of public power while observing the delay rule. Instead, it has completely erased the relevance of the delay rule. The departure of *Gijima* from previous jurisprudence without justification does not promote the rule of law. What *Gijima* does is to cause legal uncertainty, which might lead to conflicting decisions in the lower courts. Before turning to this point in Part 3, I first discuss the Constitutional Court's treatment of *Gijima* in the case of *Buffalo City*.

2.7 Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd

Background

Buffalo City Metropolitan Municipality sought to review and set aside its decision to award a contract to Asla Construction (Pty) Limited in relation to the construction of housing units in

a certain development project.⁸² In 2014, the Municipality entered into an agreement with the respondent to serve as an implementation agent for the development.⁸³ In a separate tender process, the municipality failed to appoint a successful bidder due to budget or poor work performance reasons.⁸⁴ The Municipal Manager then advised the respondent that the failed contract ('the Reeston contract') would be considered to be part of the recent contract.⁸⁵ In 2015, the acting City Manager alleged that the Reeston contract was unlawful as it was concluded without a lawful bidding process. The municipality appointed an independent investigator to look into whether the aforementioned contract was legal or not.⁸⁶ In the interim, the respondent had performed in terms of the contract. The municipality refused to make payment for work done and a dispute arose. The Municipality initiated review proceedings in terms of PAJA in the Eastern Cape High Court to set aside the Reeston contract. The respondents in the High Court argued that the application was launched outside of the PAJA's required time limits (278 days after the contract was concluded and 456 days after it was awarded).⁸⁷ The High Court held that a proper case for condonation had been successful and declared the contract invalid.⁸⁸ The Supreme Court of Appeal held that the municipality had not made out a case for condonation in terms of section 9⁸⁹ of PAJA and that the review application could accordingly not be entertained. The court specifically declined to make any findings regarding the legality or illegality of the contracts.⁹⁰ It held that the High Court's approach of getting into the merits when considering the condonation application was incorrect.⁹¹

⁸² Supra note 19 paras 1 and 6.

⁸³ Ibid para 7.

⁸⁴ Ibid.

⁸⁵ Ibid para 8.

⁸⁶ Ibid para 9.

⁸⁷ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2016 ZAECGHC 55 para 10.

⁸⁸ Ibid para 11.

⁸⁹ *Buffalo City Metropolitan Municipality and Another* 2017(6) SA 360 (SCA) para 12.

⁹⁰ Ibid.

⁹¹ Ibid.

The Municipality then approached the Constitutional Court in 2017 seeking leave to appeal the Supreme Court of Appeal's judgement. The application was made in terms of PAJA. Shortly thereafter, 14 November 2017 the Constitutional Court handed down the *Gijima* judgement, ruling that PAJA was not available to an organ of state wishing to review its own decision.⁹² The Chief Justice invited the parties in *Buffalo City* to make submissions considering the *Gijima* judgement.⁹³

The court explained the key issues as follows:

1. Was there an unreasonable delay in bringing the review application?
2. Has there been a satisfactory explanation given for the unreasonable delay? If not, should it be overlooked?
3. If there is no basis to overlook the unreasonable delay, does *Gijima* and section 172 apply? "⁹⁴

2.8 Majority Opinion

For the majority, Theron J held that the correctness or otherwise of *Gijima* was not an issue before the court, as it was not raised on the papers or at the hearing.⁹⁵ The court referred to *City of Cape Town v Aurecon South Africa (Pty) Limited*⁹⁶ and *Albutt v Centre for the Study of Violence and Reconciliation*⁹⁷ and emphasised that it has previously cautioned that it was undesirable to consider important legal questions without these being raised or argued by litigants.⁹⁸ She further held that departure from established precedent should not be done

⁹² Supra note 19 para 13.

⁹³ Ibid.

⁹⁴ Ibid para 42.

⁹⁵ Ibid para 64.

⁹⁶ *City of Cape Town v Aurecon South Africa (Pty) Limited* 2017 (4) SA 223 (CC).

⁹⁷ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA93 (CC).

⁹⁸ Supra note 19 para 64.

lightly; it should be done only after "due and careful consideration."⁹⁹ Nonetheless, the court attempted to narrow the scope of *Gijima* by limiting its application to instances where the unlawfulness of the decision is "clear and not disputed",¹⁰⁰ the court must declare it as unlawful notwithstanding an unreasonable delay in launching the review application that could not be overlooked. The court further noted that "whether an impugned decision is so clearly and indisputable unlawful will depend on the circumstances of each case."¹⁰¹

The court held that "the *Gijima* principle should be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay is not undermined."¹⁰² On the facts of the *Buffalo City* case, it saw no reason to depart from *Gijima* even when applying a restrictive interpretation. Despite the unreasonable delay, which could not be overlooked, the contract in this case was nonetheless found to be unlawful, and its unlawfulness was undisputable on the facts. The Reeston contract was awarded without any competitive bidding process. It was awarded to the respondent because of a failed previous tender process,¹⁰³ which conflicts with the Constitution and public procurement processes promoting open and transparent bidding processes.¹⁰⁴

The court referred to *Steenkamp N.O v Provincial Board of the Eastern Cape*¹⁰⁵ where it was stated that the purpose of section 217(1) of the Constitution¹⁰⁶ is aimed at eliminating fraud and corruption in the public procurement process.¹⁰⁷ As a result, the court found clear

⁹⁹ Ibid para 65.

¹⁰⁰ Ibid para 66.

¹⁰¹ Ibid.

¹⁰² Ibid para 71.

¹⁰³ Ibid para 90.

¹⁰⁴ Ibid para 101.

¹⁰⁵ *Steenkamp N.O v Provincial Board of the Eastern Cape* 2007(3) SA 121 (CC) para 33-35.

¹⁰⁶ Section 217 states: "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable and transparent, competitive and cost-effective."

¹⁰⁷ Supra note 19 para 96.

unlawfulness that was undisputed on the facts. The contract was declared invalid in terms of section 172(1)(a) and was set aside.

2.9 Minority Opinion

The minority opinion, authored by Cameron, Froneman JJ and concurred by Khampepe J, noted that all the judges deciding the matter shared a common aim of enhancing open, responsive, and accountable government but that there were differences on how to achieve that goal.¹⁰⁸ The minority referred to a default position where there has been no delay by an organ of state in seeking to review its own decision. It suggested that a declaration of unlawfulness should be made. They pointed out that timely self-reviews generally result in a "win-win situation for the rule of law."¹⁰⁹

An explanation for the delay is key in assessing the reasonableness of the delay, especially in state self-reviews. It was held that self-reviews should not be used by state officials as means to avoid accountability for their actions but rather as a tool to foster an "open, responsive, and accountable government".¹¹⁰ The minority correctly points out that the first judgement reflects contradictory precedent emanating from the very same court.

In the circumstances of the case at hand, the minority took the view that the municipality sought to evade the consequences of its decision without any explanation for the delay, and it would not be in the interests of justice to entertain the review application as there was no evidence suggesting "any manifest deficiency in lawfulness that may outweigh the importance of insisting on the State's scrupulous adherence to legal requirements in complying with its constitutional duties."¹¹¹

¹⁰⁸ Ibid paras 113 and 114.

¹⁰⁹ Ibid para 118.

¹¹⁰ Ibid para 121.

¹¹¹ Ibid para 129.

In arriving at this conclusion, the minority weighed two different aspects of the rule of law against each other, namely: the importance of declaring unlawful decisions and the importance of expeditious and diligent compliance with the Constitution, to ensure certainty and finality for parties relying on those decisions. It further held that the nature of a decision concerns the seriousness of the illegality and has a direct connection to the importance that is attached to declaring the decision as unlawful.¹¹²

I concur with the minority that there are other factors to be taken into account in addition to the question of legality when deciding whether or not to entertain the review.¹¹³ They correctly held that when there is no basis to overlook an unreasonable delay, the court should not entertain the review application and refuse the appeal. That has been the law established by a long line of cases. However, the minority's effort to uphold the *Gijima* principle, and rather focus on the way in which the principle was formulated by the majority in the case at hand, is unfortunate. In my view, *Gijima* is the crux of the issue as it is the source of controversy, having rendered the delay rule obsolete.

2.10 The *Buffalo City* legacy – a missed opportunity

It seems that the court in *Buffalo City* made an effort to reduce the potential effects of the *Gijima* principle by ruling that the principle should be interpreted narrowly and restrictively in order not to undermine the rules on delay. This is indicative of the fact that the court is appreciative of the danger of eradicating the delay rule in South African administrative law. But even where the *Gijima* principle is applied where unlawfulness is clear and undisputed on the facts, the valuable rationale behind the rules on delay remained undermined. The attempt to narrow *Gijima* does not, therefore, seem to be practically effective. In my opinion, *Buffalo*

¹¹² Ibid para 134.

¹¹³ Ibid para 110.

City missed an opportunity to rectify or overrule the oversight created by *Gijima* as far as the delay rule is concerned. In Part 5, I will argue that *Gijima* should be overturned.

As a possible solution to the court's concern about preserving the delay rule and declaring unconstitutional conduct invalid, Hoexter and Penfold suggest that the established interests-of-justice-test for condonation is the most appropriate vehicle. This is so, they suggest, especially as it has been shown that the merits of the matter are considered in this test and it allows the court to balance the urge of addressing irregular state decisions against reasons to entertain a delayed review.¹¹⁴ Logically, a question that follows is what then remains of the rule of law as far as the delay rule is concerned in review proceedings? In my view, the relevance of the delay rule remains. It serves the legitimate purpose of giving effect to certainty and finality of decisions and to section 217 of the Constitution. I argue that the rule of law demands its existence. The *Khumalo* test may be altered as the court has inherent power to develop the common law in terms of section 173¹¹⁵. However, when doing so, it should tread carefully so as not to eradicate the delay rule in the process. In my view, the interests of justice can be best served when a balance is struck between developing the common law while preserving the delay rule, which is a win-win for the rule of law.

2.11 Conclusion

The *Gijima* judgement is subjected to many critiques from scholars, such as the misinterpretation of the relationship between private persons and the state, the combining of the application and interpretation of the Bill of Rights, the creation of legal uncertainty and the eradication of the delay rule. This part discussed the controversial approach that the Constitutional Court employed in the *Gijima* judgement. I argued how the Constitutional Court through *Gijima* dispensed with the delay rule, thus leaving a troublesome legacy. I also

¹¹⁴ Supra note 6 at 741.

¹¹⁵ Section 173 of the Constitution.

argued that *Buffalo City* missed an opportunity to rectify the damage caused by *Gijima*, and that *Gijima* should be overturned. The doctrine of precedent ensures that previous judgements are applied in subsequent cases. However, that doctrine is not absolute, especially when a precedent is likely to lead to confusion and conflicting judgements in the lower courts, as it will be discussed in the following part.

PART 3: THE *GIJIMA* PRINCIPLE IN LOWER COURTS

3.1 Introduction

This chapter will consider how the *Gijima* principle is applied in lower courts. The cases *Govan Mbeki v New Integrated Solutions*,¹¹⁶ *Valor IT v Premier Noth West Province and Others*,¹¹⁷ *Altech Radion Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality*¹¹⁸, and *Central Energy Fund Soc Ltd and Another v Venus Rays Trade (Pty) Limited and Others*¹¹⁹ will be used as examples to outline trends emanating from the Supreme Court of Appeal and High Court. A first trend is the court effectively applying both routes proposed in the differing judgements in *Buffalo City*. Secondly, there is a trend of avoiding the principle altogether. Thirdly, the incorrect interpretation of the principle.

3.2 Two Pathways - Dissenting Judgements in *Buffalo City*

The issue of dissenting opinions can be perceived in two ways. Hoexter correctly points to two schools of thought regarding split decisions. First, it may be perceived to indicate hostility, confusion, and undermine the majority opinion.¹²⁰ On the other hand, it may be valuable in that it improves the quality of decision making by allowing different opinions to be heard.¹²¹ Pretorius laments the rise in split-bench decisions that are characterised by major disagreements on the law as concerning.¹²² Of course, there is nothing wrong with differences

¹¹⁶ Supra note 1.

¹¹⁷ *Valor IT v Premier Noth West Province and Others* 2021 (1) SA 42 (SCA).

¹¹⁸ *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* 2021 (3) SA 25 (SCA).

¹¹⁹ *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* 2020 ZAWCHC 164.

¹²⁰ C Hoexter "The importance of dissent: Two judgements in administrative law" (2015) *Acta Juridica* 120 at 121.

¹²¹ *Ibid.*

¹²² D. M. Pretorius "Confusion and Delay: Self-Review, *Functus Officio* and *Oudekraal*" (2020)83 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 245 at 260.

of opinion on the approach to the issues before the court. However, seeming factionalism and hostility do nothing, as Pretorius argues, to harmonize our administrative law.¹²³

Separately, Koen argues that disagreements between judges are necessary for the development of constitutional law and promoting transparency in the judiciary, even though they may at times appear discourteous.¹²⁴ She points out that the advantages outweigh the disadvantages because they promote clarity and ultimately create growth.¹²⁵

However, against this background, the divergence of the minority and majority opinions in *Buffalo City* illustrates a broader context of sharp disagreements on administrative law cases.¹²⁶ The Supreme Court of Appeal in *Govan Mbeki v New Integrated Credit Solutions*¹²⁷ acknowledged the tension between majority and minority approaches in *Buffalo City* and refused to entangle itself in the differences emerging from the divergent opinions.¹²⁸ This judgement illustrates how the Supreme Court of Appeal opted for a more subtle approach of illustrating how the outcome was defensible on either opinion rather than being enmeshed in the differences.¹²⁹ The background to the case is, as the Supreme Court of Appeal described it, "convoluted and tortuous."¹³⁰ In brief, the case was an appeal and cross appeal against a Mpumalanga High Court order arising out of a debt management services agreement between the Govan Mbeki Municipality (the Municipality) and New Integrated Credit Solutions (NICS). The municipality launched review proceedings to set the agreement aside. This followed a report by the Auditor General taking issue with an aspect of the contract, which

¹²³ Ibid.

¹²⁴ L Koen "Dissenting judgements: Their contribution" (2020) Without Prejudice at 30.

¹²⁵ Ibid.

¹²⁶ See also the divergent opinions in paras 65 and 113 of *Buffalo City*. The minority suggested that *Gijima* may need to be "reconsidered." While the majority suggested that departure from the Court's jurisprudence is contrary to the doctrine of precedent and would "invite legal chaos", thus *Gijima* must be applied.

¹²⁷ Supra note 1 para 47.

¹²⁸ Ibid.

¹²⁹ See Ibid para 43-46, where the Supreme Court of Appeal discusses *Buffalo City's* dissenting minority and majority opinions.

¹³⁰ Supra note 1 para 1.

had not been subject to a tender process.¹³¹ After becoming aware of the Auditor General's objections, and 22 months after the conclusion of the contract, and while arbitration proceedings were pending,¹³² the Municipality sought to terminate the contract by relying on s217 of the Constitution.¹³³

On the issue of delay, the High Court as the first court of instance had not applied to *Buffalo City* at all. The Supreme Court of Appeal held that the High Court had erred by not holding the entire agreement to be invalid, not applying *Buffalo City* and not considering section 172 of the Constitution, which would have been synonymous with overlooking the delay and entertaining the review application.¹³⁴ It also noted that the same result would have been reached if it had applied the route proposed by the minority in *Buffalo City*¹³⁵. This approach by the court is an example of Mothupi's argument, in which he points out that a minority opinion may show the importance of approaching constitutional cases in a balanced and flexible way while being cognisant of the aspirations that the Constitution was designed to achieve.¹³⁶

In applying the majority opinion in *Buffalo City* (and *Gijima*), the Supreme Court of Appeal refused to overlook the unreasonable delay, but nonetheless found the variation to be invalid and inconsistent with the Constitution.¹³⁷

¹³¹ Ibid para 12.

¹³² Ibid para 17. The arbitration went in favour of NICS and the cancellation was found to have no effect.

¹³³ Section 217 of the Constitution requires that when state organs contract for goods and services, it must do so in a fair, equitable, transparent, competitive, and cost-effective way.

¹³⁴ Supra note 1 para 63.

¹³⁵ Supra note 19 para 128. The minority suggested another approach. Courts should refrain from delving into the final finding of unlawfulness unless the magnitude of the unlawfulness warrants overlooking the obvious flaws in the states' case.

¹³⁶ S Mothupi "The value of minority judgements in the development of constitutional interpretation in South Africa" (2005) Unisa Press vol.46 No.2 at 19.

¹³⁷ Supra note 1 para 63. The court held that "a just and equitable outcome would not deprive NICS of the benefits that accrued under the agreement in relation to commission earned on debts older than 60 days, but to do so in relation to all the commission in relation to debts younger than 60 days. For all practical purposes the result is the same as that reached by the High Court, save that we arrive at that result for very different reasons."

The merit of this decision lies in the fact that the offending portion of the agreement was partially saved by the court, who decided not to deny the respondent benefits that accrued under the agreement in relation to debts older than 60 days but not in relation to the commission of debts younger than 60 days.

Pretorius argues that over the years he has read Constitutional Court judgements with bewilderment, as it became challenging to extract clear principles from entangled majority and minority decisions, which he claims seem to confuse the public rather than clarify legal principles.¹³⁸ To date, there seems to be no clear direction as to how to practically apply *Gijima*'s principle to delayed self-reviews. The following section considers Supreme Court of Appeal decisions that have simply avoided applying the *Gijima* principle.

3.3 Total Avoidance of the Gijima Principle

Total avoidance of the *Gijima* principle is another trend that has emerged from the Supreme Court of Appeal. In this section, I will demonstrate *Altech Radio Holdings*¹³⁹ and *Valor IT*'s¹⁴⁰ avoidance of the *Gijima* principle. In my view, the avoidance of its application by the Supreme Court of Appeal can be reasonably attributed to its impracticability and uncertainty. Departure from precedent is contrary to the rule of law. However, on the other hand, allowing an incorrect judgement to stand is also contrary to the rule of law. In my view, the Supreme Court of Appeal has found itself in a predicament that can only be fixed by the Constitutional Court.

Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality

¹³⁸ Supra note 122 at 259.

¹³⁹ Supra note 118.

¹⁴⁰ Supra note 117.

The case of *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality*¹⁴¹ is about a tender advertisement by the Municipality for a broadband network project in 2013, which was later aborted.¹⁴² It was re-advertised in 2014. On 9 June 2015, the appellant was awarded the tender as a successful bidder. The agreement was a joint venture "special purpose vehicle" with another company, a certain Thobela Telecoms. Shortly thereafter, the African National Congress (ANC) lost control of the city to the Democratic Alliance (DA), which identified the project for review and cancellation. A year later, the City, under the DA's leadership, launched a review application to set aside the contract.¹⁴³ The tender was declared invalid and set aside by the High Court.

The appellant appealed the order, claiming the delay of two years in launching the review application was unreasonable and should not be condoned. Alternatively, the court should not invoke its section 172 discretion to grant any of the relief sought.¹⁴⁴ The City justified its delay by stating that it gained control of the city in 2006 and required time to investigate procurement irregularities under the ANC-led administration.¹⁴⁵ The court refused to accept a change in political control as an explanation for the delay. It held that the change in political administration did not make the municipality a different juristic entity, as the project was already labelled as a "dodgy-deal" in 2015 by the DA.¹⁴⁶ It was held that had the City acted with urgency and honesty about its intention to review the decision to award the tender, the majority of the costs incurred by the service providers could have been avoided.¹⁴⁷ The court went on to say that "the goal of self-review is to promote open, responsive, and accountable government," and that the City had a higher duty to follow the law than a destitute litigant

¹⁴¹ Supra note 118.

¹⁴² Ibid para 5.

¹⁴³ Ibid para 12.

¹⁴⁴ Ibid para 15.

¹⁴⁵ Ibid para 24.

¹⁴⁶ Ibid paras 25-26.

¹⁴⁷ Ibid para 52.

whom the court needed to "protect."¹⁴⁸ The court made use of the *Khumalo* two-stage test¹⁴⁹ when assessing the delay, and found the delay to be excessive and lacked a satisfactory explanation.¹⁵⁰ It found the conduct of the City to be prejudicial and the review lacking in merit. Thus, all those factors went against condoning the delay. The appeal was upheld with costs.

The only instance this judgement mentions *Gijima* and *Buffalo City*'s remedial discretion under section 172 is in reference to an argument and prayer by the respondent.¹⁵¹ In my opinion, the judgement is strangely silent about the applicability or lack thereof of the *Gijima* principle of setting aside an unlawful decision in terms of section 172 of the Constitution. It is also silent on *Buffalo City*, which suggests that section 172 can be applied when there is clear evidence of unlawfulness proven on the facts. The judgement merely mentions the cases as a fleeting reference and has no real engagement with the *Gijima* approach. Furthermore, no reasons are provided for the court's departure. Another signal of the court's disapproval of *Gijima*, and specifically its determination that PAJA is not available in state self-reviews, can be adduced from its citing of a passage from Hoexter:

“The development of the principle of legality is another illustration of the vigour and fecundity of the rule of law. The courts made the principle of legality mean whatever they wanted it to mean as they went about creating a sort of common law for the Constitutional era.”¹⁵²

The Supreme Court of Appeal appears to be suggesting that in *Gijima*, the court's reliance on the principle of legality allowed for the court to make it "mean whatever they wanted it to

¹⁴⁸ Ibid para 71.

¹⁴⁹ See footnote 16 above for the *Khumalo* test.

¹⁵⁰ Supra note 118 para 50.

¹⁵¹ See Ibid para 15, where the respondent prays the court not to overlook or condone the “egregious unreasonable delay”, that the appeal should go in their favour. Alternatively, if the delay is condoned and the City's grounds of review are upheld, it would not be “just and equitable” to set aside the agreements.

¹⁵² Supra note 118 para 17. The Supreme Court of Appeal quotes parts of this passage from C Hoexter “South African Administrative Law at a Crossroads: The PAJA and the Principle of Legality” adminlawblog.org , available at <https://adminlawblog.org/2017/04/28/cora-hoexter-south-african-administrative-law-at-a-crossroads-the-paja-and-the-principle-of-legality> , accessed on 05 May 2022.

mean", with limited regard to anything else. As argued in the previous part, in *Gijima*, the court unintentionally eradicated the delay rule under the principle of legality.

Valor IT v Premier, Northwest Province, and Others

This is the second case that avoided applying the *Gijima* principle. The appeal before the Supreme Court of Appeal was against an order from the Mahikeng High Court, which set aside contracts between Valor IT (the applicant) and the Department of Sports, Arts and Culture North West (the Department). The brief facts are that the applicant was one of SITA's¹⁵³ accredited entities, who successfully bid for a contract amounting to R498 000.¹⁵⁴ A range of further agreements were entered into relating to the value of R41.7 million and "without any bona fide attempt to comply with the public procurement processes."¹⁵⁵

Supply chain management officials expressed concerns regarding the irregular expenditure, which attracted the attention of the Auditor General.¹⁵⁶ In October 2013, the Department cancelled the agreement with the applicant, citing non-compliance with s217¹⁵⁷ of the Constitution. The applicant launched proceedings for damages amounting to R152 073 768, which was settled by means of a settlement agreement on advice from the Chief State Law Advisor citing the termination of the agreement as unlawful.¹⁵⁸ On 9 January 2015, the contract was cancelled again, which led to the applicant seeking a declaratory order for unlawful termination of the contract and damages.¹⁵⁹ In a counter-application, the Department sought to have the contracts with the applicant, as well as the settlement agreement, set aside.

¹⁵³ State Information Technology Agency. It is an agency mandated to facilitate IT services to government departments by enlisting services from its accredited suppliers.

¹⁵⁴ Supra note 117 paras 8-9.

¹⁵⁵ Ibid para 1.

¹⁵⁶ Ibid para 19.

¹⁵⁷ S217 of the Constitution requires that when state organs contracts for goods and services, it must do so in accordance with principles of fairness, equitability, transparency, competitiveness and cost-effectiveness.

¹⁵⁸ Supra note 117 paras 19-20.

¹⁵⁹ Ibid para 22.

In the High Court, the first issue was whether the government's delay in launching a counter-application was unreasonable. The court below accepted the explanation for the delay to be a reasonable one, with the absence of prejudice to the applicant and the public interest all militating in favour of the matter, involving huge public funds, to be heard.¹⁶⁰

The Supreme Court of Appeal, when assessing the unreasonableness of the delay, made use of the *Khumalo* test. It held that whether condonation should be granted "depends on a factual, multi-factor and context-sensitive enquiry, which includes length and reasons for the delay; prejudice to other parties; whether the explanation tendered covers the whole duration of the delay; and prospects of success."¹⁶¹

It was found that the provincial government took two years to cancel the contract for the first time and reversed its cancellation decision. It then took another fifteen months for another cancellation of the contract, and nine months prior to that, it applied for an order to set the contract aside. The delay to cancel the contract was found to be unreasonable because the explanation tendered did not cover the entire delay.¹⁶² The court noted that "very weak prospects of success may not offset a full and satisfactory explanation for a delay, while strong prospects of success may excuse an inadequate explanation for the delay."¹⁶³ In this case, it was held that even though the explanation for the delay was not satisfactory, the interests of justice mandated condonation to be granted due to strong prospects of success.¹⁶⁴ The award of the contracts was found to be unlawful and invalid due to a lack of an open bidding procurement process.¹⁶⁵ In respect of the settlement agreement, the court referred to *Buffalo City*, which held that an unlawful contract cannot be cured by a settlement

¹⁶⁰ Ibid para 26.

¹⁶¹ Ibid para 30.

¹⁶² Ibid paras 32-33.

¹⁶³ See Ibid para 38, where the court quoted *United plant Hire (Pty) Ltd v Hills and Others* 1976(1) SA 717 (A), *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SCA at 40 H-41E.

¹⁶⁴ Ibid para 39.

¹⁶⁵ Ibid para 44.

agreement.¹⁶⁶ Accordingly, the Supreme Court of Appeal held that the settlement agreement between the applicant and the Department was correctly rescinded by the lower court, and the appeal was dismissed with costs.¹⁶⁷

In *Valor IT*, the Supreme Court of Appeal is again silent on *Gijima*'s invocation of section 172(1)(a) approach. The only time *Gijima* is mentioned is in a footnote, where the respondent bases its setting aside decision on the legality principle.¹⁶⁸

In addition to the above Supreme Court of Appeal judgements, the Mpumalanga High Court in *Govan Mbeki* is another example where the court avoided the *Gijima* principle. When the matter was taken on appeal, the Supreme Court of Appeal found that the lower court had erred in not following the prescripts of *Buffalo City* and in not considering the application of section 172(1) (a) of the Constitution.¹⁶⁹ Could an inference be drawn from their silence? I certainly think so. The 'loud' silence of these judgements on the *Gijima* principle can be interpreted in two ways. First, the courts find it practically impossible and uncertain how to apply *Gijima*. Secondly, it could be read to signal disapproval of the principle. My view is that both these assumptions are in no way promoting the rule of law and the certainty of decisions. Perhaps in the future, the Supreme Court of Appeal should seek to distinguish cases more explicitly from *Gijima* when it is not applicable. This was done recently by the Constitutional Court in the *National Allied Workers Union*.¹⁷⁰ In that case, the court found *Gijima* not to be

¹⁶⁶ Ibid para 50.

¹⁶⁷ Ibid para 55.

¹⁶⁸ Ibid para 27.

¹⁶⁹ Ibid para 63.

¹⁷⁰ See *National Education and Allied workers Union v Minister of Public Service and Administration and Others*, *South African Democratic Teachers Union and Others v Department of Public Service and Administration and Others*; *Public Servants Association and Others v Minister of Public Service and Administration and Others*; *National Union of Public Service and Allied Workers Union v Minister of Public Service and Administration and Others* 2022(43) SA 1032 (CC) concerned a three-year salary adjustments agreement entered by the Department and union on behalf of public servants. Due to the COVID -19 pandemic the country's economy deteriorated, which led to the employer not being able to effect the last part of the 3 year agreement. The state sought setting aside of the agreement after a 2-year delay. In para 30 the court considered whether *Gijima* could be applied and section 72(1)(b) used to set aside an unlawful decision. The Constitutional Court found that the case was distinguishable from *Gijima* due to its complexity and polycentric consequences. In its

applicable as the dispute was more complex and had multi-faceted consequences not only for the contracting parties but for the public at large.¹⁷¹

3.4 Incorrect Interpretation of the *Gijima* Principle

Challenges to the precedent set by *Gijima* have not only been apparent in the judgments of the Supreme Court of Appeal. *The Central Energy Fund*¹⁷² is an example of a High Court judgment demonstrating confusion in the interpretation of the *Gijima* principle. The case was a PAJA review and quite technical. It involved the sale of South Africa's stock of crude oil. The brief facts are: The Strategic Fuel Fund (SFF), a state-owned company mandated to acquire, maintain, and manage the country's fuel supply, sold barrels of crude oil to certain entities.¹⁷³ The acting CEO of SFF issued requests for proposals to five entities for the rotation of strategic stock.¹⁷⁴ The request for proposal did not contain any specifications to which the proposals needed to comply with, no evaluation, no time limits, and no required documents to be attached.¹⁷⁵ There were no reasons forwarded before the court why the five entities were chosen.¹⁷⁶

Following a review, National Treasury concluded that the transactions were in violation of the Public Finance Management Act.¹⁷⁷ The applicants launched a review application to set the contracts aside in 2018. The delay was just over two years and one month from the date

determination whether to overlook the unreasonable delay, it considered the effect that the decision to force the state to effect salary increases to public servants, while the country was going through unprecedented time of Covid -19, and the effect of the salary adjustments on the public purse.

¹⁷¹ Ibid para 111.

¹⁷² Supra note 119.

¹⁷³ Ibid paras 1-5.

¹⁷⁴ Ibid para 3.

¹⁷⁵ Ibid para 213.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid para 156.

on which the relevant transactions were concluded and nearly eighteen months after the expiration of 180 days.¹⁷⁸

The court held that despite the gross delay not being explained satisfactorily, the *Gijima* principle mandated the court to overlook the delay and declare the decisions invalid as the illegality was clear and not disputed.¹⁷⁹ The court ruled that the lengthy delay and inadequate explanation will be considered in determining just and equitable relief.¹⁸⁰ The court went further to say that "although the *Gijima* principle necessitated this result, there were also other factors which justified condoning/overlooking the delay, at least for the limited purpose of a declaration of invalidity."¹⁸¹ These factors included the national interest in energy supply, the value concerned, serious illegalities, and disregard of corporate governance and transparency.¹⁸²

In my view, this case is a clear example of the High Court misinterpreting the *Gijima* principle completely. The judge was under the impression that he was compelled by *Gijima* to first condone the delay in order to be able to make a declaration of unlawfulness in terms of section 172(1)(a).¹⁸³ In other words, the learned judge mistakenly believed that *Gijima* makes condonation a qualification prior to invoking section 172(1)(a). This, however, is an incorrect interpretation of the *Gijima* principle, which is not concerned with condoning a delay at all.

¹⁷⁸ Ibid para 308 . The court held that a two year and one month delay in terms of PAJA is unreasonable, and condonation was required. It explained further that in terms of legality review would be "plainly" unreasonable unless the explanation tendered would cover the whole duration of the delay period. [My emphasis] PAJA reviews need to be brought without undue delay and no later than 180 days of becoming or presumed to be aware of the decision. After the expiration of the 180 days, a condonation application needs to be brought in terms of section 9.

¹⁷⁹ Ibid para 329.

¹⁸⁰ Ibid para 330.

¹⁸¹ Ibid para 331.

¹⁸² Ibid.

¹⁸³ See Ibid para 290. This was even though the court recognised that the *Gijima* principle established that "even where there is no basis to overlook an unreasonable delay, the court may be compelled , by virtue of section 172(1)(a) of the Constitution to declare the impugned decision unlawful."

Even though the case was taken on appeal, the Supreme Court of Appeal¹⁸⁴ does nothing to rectify the incorrect interpretation of the *Gijima* principle by the High Court's use of condonation as a prerequisite to invoking section 172(1)(a). The Supreme Court of Appeal mentions the irony of the High Court's finding the delay to be "unreasonable, egregious, and unsatisfactorily explained." Despite the inadequate explanation that militated against condonation, it nevertheless condoned the delay.¹⁸⁵ The appeal court engaged the point no further than that.

It seems like at the center of the appeal court's attention was section 172(1)(b) just and equitable remedy and not the High Court's approach to delay. I argue that the Supreme Court of Appeal missed an opportunity to provide guidance to lower courts on the correct interpretation of *Gijima*. While the view of this thesis is that *Gijima* should be overturned, and while it still stands, it is important for the rule of law that the principle be interpreted and applied correctly. The dismissal of the appeal does not ameliorate the incorrect High Court's approach, as the confusion remains.

3.5 Conclusion

This part outlined difficulties in the application of the *Gijima* principle by the Supreme Court of Appeal and High Courts, which either incorrectly interpret or totally avoid applying the principle. It has been shown that there is inconsistency and confusion as far as the delay rule is concerned. In fact, as noted above, in *Govan Mbeki Municipality*, the Supreme Court of Appeal unanimously endorsed the hope that the Constitutional Court might revisit its precedent, or that the legislature might intervene to address the problems of state self-

¹⁸⁴ *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* 2022 (54) SA 119 (SCA).

¹⁸⁵ *Ibid* paras 15-16.

reviews, which has become a troublesome re-occurrence.¹⁸⁶ Pretorius argues that the state of confusion experienced by lower courts on administrative judgements has led to instances where the Constitutional Court regularly reverses the Supreme Court of Appeal's administrative law judgements. According to him, this is indicative of the fact that some of the Supreme Court of Appeal's renowned judges are struggling to make sense of the apex court's judgements.¹⁸⁷ Having demonstrated this the next part discusses the negative implications the *Gijima* approach has on finality and certainty of decisions, how it promotes opportunistic self-reviews, and the perpetuation of disregard of the public procurement system in South Africa.

¹⁸⁶ Supra note 1 para 47.

¹⁸⁷ Supra note 122 at 260.

PART 4 THE IMPACT OF THE *GIJIMA* JUDGMENT

4.1 Introduction

This part seeks to identify the implications that the *Gijima* principle poses for the rule of law and the public procurement system in South Africa. First, I argue that the *Gijima* principle promotes arbitrary and opportunistic attempts by state officials to undo decisions. Secondly, it perpetuates disregard of public procurement laws by making it so easy for the state to undo decisions. Lastly, it undermines finality and certainty in decisions and thus might deter prospective suppliers from contracting with the state.

4.2 Arbitrary and Opportunistic Attempts to Undo Decisions

Lately, it has become a trend for state organs to turn to the judiciary in attempts to review and set aside irregular decisions for self-serving purposes.¹⁸⁸ In *Govan Mbeki Municipality*,¹⁸⁹ the Supreme Court of Appeal held that state self-reviews were a rapidly increasing and worrisomely frequent occurrence.¹⁹⁰ Judicial review is an important tool in promoting transparency and accountability. However, abuse by state organs poses the risk of creating uncertainty regarding the validity of state contracts.

Buffalo City held that corruption and maladministration conflict with the rule of law and undermine open, transparent, and democratic government.¹⁹¹ The Constitutional Court in *Khumalo*¹⁹² held that public servants are obliged to protect and uphold the rule of law by

¹⁸⁸ L Boonzaier “Good reviews, bad Actors” (2015) 7 Constitutional Court Review 1 at 3.

¹⁸⁹ Supra note 1.

¹⁹⁰ Ibid para 47.

¹⁹¹ Supra note 19 para 96.

¹⁹² Supra note 16 para 45.

seeking to overturn unlawful decisions taken by their departments.¹⁹³ However, as emphasized in *Kirland*:¹⁹⁴

“[P]AJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on a due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.”

Boonzaier considers when and why the government's hands should be tied when seeking to have unlawful decisions undone.¹⁹⁵ He emphasizes that while government officials have a responsibility to correct wrongdoings as guardians of the public interest, however doing so can lead to confusion when undoing a decision on which another party has relied on.¹⁹⁶ He contends that even when overturning wrongful decisions, government authorities may do so in an arbitrary, opportunistic, or unreasonable manner even when undoing unlawful decisions. According to him, a vicious cycle of unlawful decisions made and undone at the belated and self-serving insistence of state actors may not be curbed in the absence of procedural principles like the delay rule.¹⁹⁷ The question that one may ask is how can a genuine delayed state self-review be distinguished from an arbitrary one? An answer may lie in the old cliché that "each case should be judged on its own facts." In my view, the conduct of an organ of state may be an indicator of how genuine the intentions are.

The minority in *Buffalo City* cautions that courts should be vigilant that self-reviews are not brought by state officials as a means of evading consequences for previous decisions. The

¹⁹³ Ibid.

¹⁹⁴ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 841 (CC) para 82.

¹⁹⁵ Supra note 188 at 1.

¹⁹⁶ See Ibid at 2. Also, this was also decided in *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC).

¹⁹⁷ Supra note 188 at 3.

interests of justice weigh against allowing free reign by overlooking an unreasonable delay, more especially in instances where there is evidence of "arbitrariness and opportunism."¹⁹⁸ The minority judgement therefore suggests that while there is nothing wrong with state self-reviews, maladministration goes against the rule of law.¹⁹⁹ I agree with the *Buffalo City* minority that a decision to overlook an unreasonable delay, where there are concerns of maladministration, may open the floodgates to arbitrary and opportunistic self-serving reviews.²⁰⁰

Boonzaier notes that *Pepcor*²⁰¹ was the first in a series of cases to suggest that state officials may apply to a court to have their previous unlawful decisions set aside, but now there is an increased need for courts to curb arbitrary state self-review by state officials. In his view, the rule of law is ultimately served if state actors are held accountable for their decisions when the motives behind undoing those decisions are arbitrary, even if this means that an unlawful act is allowed to stand.²⁰² He cautions that courts should avoid becoming instruments of state officials acting arbitrarily even when attempting to undo unlawful decisions.²⁰³ He mentions instances of when organs of state might abuse self-review, such as: being placed under political pressure to reverse a decision; contracting for services without adherence to procurement requirements, and then seeking to nullify the contract when it is no longer wanted; making a settlement agreement on unfavorable terms, and then seeking to set the agreement aside. He cautions that if these scenarios are allowed to stand by the courts, the possibilities of flouting the rule of law are endless.²⁰⁴

¹⁹⁸ Supra note 19 para 140.

¹⁹⁹ Ibid para 96.

²⁰⁰ Ibid para 147.

²⁰¹ *Pepcor Retirement Fund and Another V Financial Services Board and Another* 2003 (6) SA 38 (SCA); *Municipal Manager: Qaukeni Local Municipality and other v FV General trading CC* 2010 (1) SA 356 (SCA); *Ntshangase v MEC for Finance, KwaZulu Natal and Another* 2010 (3) SA 201 (SCA).

²⁰² Supra note 188 at 2.

²⁰³ Ibid at 4.

²⁰⁴ Ibid.

Boonzaier's concern that self-serving state reviews may continue to be a thorny issue has proven well-placed, with cases such as *Gijima*, *Buffalo City*, *Govan Mbeki Municipality*, *Alltech Radio Holdings*, and *Central Energy Fund* continuing to confront the courts.

Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd illustrates how the *Gijima* approach to delayed self-serving reviews may encourage opportunistic reviews. What is quite clear from this case is that had the Auditor-General not threatened action against the municipality, the application to set aside the contract would not have been brought. The municipality used self-review as an opportunistic means to evade consequences. The court found the conduct of the municipality disrespectful towards its obligation towards the Constitution.²⁰⁵ The court held that just like in *Buffalo City*, there was no reason to overlook the delay of seventeen months and that the contract was clearly unlawful, and it had a duty to declare it as such.²⁰⁶ The court in *Altech Radio Holding* found the City's conduct was not concerned with absolving or promoting the rule of law but was using review to evade, rather than to assert its constitutional obligations.²⁰⁷

4.3 Perpetuating Disregard of Public Procurement Laws

When contracting for goods and services, organs of state must follow the principles of fairness, transparency, equitability, competitiveness, and cost-effectiveness, according to section 217²⁰⁸ of the Constitution. Penfold and Reyburn argue that public procurement has become a constitutional issue.²⁰⁹ The long line of cases discussed in the previous sections, including *Gijima*, *Buffalo City*, *Altech Radio Holdings*, and *Govan Mbeki*, illustrate the flouting of public procurement processes. Delay is common in these cases, as state organs

²⁰⁵ Supra note 1 para 56.

²⁰⁶ Ibid para 58.

²⁰⁷ Supra note 118 para 70.

²⁰⁸ Act 108 of 1996.

²⁰⁹ G Penfold and P Reyburn "Public Procurement" in Stu Woolman et al *Constitutional Law of South Africa* 2 ed (2013) 25-1.

approach courts to have contracts set aside after the contract has run its course. In delivering judgement in *Altech Radio Holdings*, Ponnann JA wrote that when dealing with public procurement cases, one is bound to discover compliance deficiencies. It is unrealistic to expect a flawless system, because not all flaws are fatal or lead to irregularity. Not every flaw in the procurement process warrants judicial intervention.²¹⁰ Even against Ponnann's sympathetic view, cases that have been discussed above include gross irregularities and flouting of procurement principles.

In *Govan Mbeki Municipality*, the Court described the case as forming "part of an ever growing, and frankly disturbing, long line of cases where municipalities and organs of state seek to have their own decisions, upon which contracts with service providers are predicated, reviewed, and overturned, for want of legality, more often than not after the contracts have run their course and services have been rendered thereunder."²¹¹ The court found state officials to have violated their constitutional obligations, acted improperly and with complete disdain for the rules of good governance.²¹² Moreover, the municipality was found to have disregarded fair, equitable, transparent, competitive, and cost-effective procurement processes.²¹³

The *Special Investigating Unit's* judgement²¹⁴ might differ slightly from the *Govan Mbeki Municipality's* judgement in that it was the Special Investigation Unit (SIU)²¹⁵ that brought the review application, while the Department of Correctional Services acted as the second applicant. However, the crux of the case involves the disregard of public procurement laws by state organs. The Department of Correctional Services extended a contract that had

²¹⁰ Supra note 118 para 54.

²¹¹ Supra note 1 para 1.

²¹² Ibid para 56.

²¹³ Ibid para 55.

²¹⁴ *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* 2021 (3) SA 791 (SCA).

²¹⁵ The Special Investigation Unit (SIU) is an organ of state mandated with conducting investigations on unlawful conduct, irregular expenditure of public money, and transactions by state institutions.

expired. The court referred to *Buffalo City*, stating that a state organ is expected to become aware sooner that procurement processes were flouted, even without an intervention in this case by the SIU. There should be proper oversight and internal structures in place to curb and detect abuse of the public purse. It further held that the lack of these oversight mechanisms creates a breeding ground for disregard of procurement laws and corruption.²¹⁶

In *Central Energy Fund*, the court held that Strategic Fuel Fund's acting chief executive officer's approach to negotiating privately instead of following the bidding process was irrational and created an opportunity for corruption.²¹⁷ The subsequent procedure violated the constitutional procurement transcripts, legality, and administrative justice.²¹⁸ Rogers J held that the corrective principle requires that lessons should be learnt. The case before him arose from oversight failures by the board of the state organ. He suggested that caution should be exercised when appointing directors and senior personnel to head up parastatals.²¹⁹

One school of thought in defence to *Gijima* would be that it upholds public procurement principles by ensuring that state organs are not bound by contracts entered where public procurement principles are flouted. *Gijima* clearly states that public procurement irregularity cannot be ignored.²²⁰ However, in my view, flouting of and corruption in the procurement space requires departmental specific and legislative interventions to curb the vicious cycle. The *Gijima*'s approach thus makes it easier for organs of state to have their decisions set aside, which perpetuates disregard for public procurement. The court should have used *Gijima* to change the narrative that flouting of public procurement will not be tolerated. As mentioned above, the state is not an indigent litigator who deserves a lifeline to be thrown at.

²¹⁶ Ibid para 39.

²¹⁷ Supra note 119 para 210.

²¹⁸ Ibid.

²¹⁹ Ibid para 190.

²²⁰ Supra note 2 para 41.

²²¹ It is rather those who contract with the state (suppliers) that need better protection from the state. This approach is prone to abuse by corrupt state officials flouting procurement processes. Boonzaier points out correctly that nowhere does *Gijima* suggest or signal an approach to restrict review of organs of state. He suggests that many judges believe that the state should be able to have their decisions set aside more easily than the current law allows.²²²

4.4 Undermining Legality and Finality of Decisions

Functus officio is a doctrine that implies that decisions of officials are deemed final. It guarantees certainty to both the granter and receiver of rights because once a decision has been made, it cannot be rescinded by the decision maker.²²³ There is a well-known tension between the principle of legality and the principle of certainty. Henrico notes that while the principle of legality justifies the setting aside of an invalid administrative action based on unlawfulness, the principle of certainty grants a legitimate expectation of finality of decisions.²²⁴ Exploring the full scope of this tension is beyond the scope of this paper.²²⁵ The intention of this section is merely to illustrate that the elimination of the delay rule has a negative impact on this doctrine. My argument is that if the delay rule is eradicated, that means an organ of the state can at any given time seek to set aside its own decision, thus undermining the principle of *functus officio* in the process.

The doctrine of *functus officio* deems decisions to be final and binding until they are set aside by a competent court. The delay rule requires review applications to be brought within a

²²¹ See supra note 194 para 82.

²²² Supra note 77 at 666.

²²³ Supra 122 at 246.

²²⁴ R Henrico “The *Functus Officio* Doctrine and Invalid Administrative Action in South African Administrative Law: A Flexible Approach” (2020) 34 *Speculum Juris* 115 at 117-118.

²²⁵ *Ibid.*

reasonable time both under the legality review and under PAJA. In my view, the link between *functus officio* and the delay rule is two-pronged. Firstly, these are two independent doctrines, but they complement one another by enhancing legal certainty and finality. They enhance legal certainty because a decision remains valid and binding until set aside by a competent court. In attempting to set aside a decision, one must comply with the reasonable time frame of launching review proceedings. Secondly, they improve administrative efficiency by serving as a deterrent to maladministration.

The *Gijima* principle undermines the *functus officio* doctrine and the purposes of certainty and finality that it serves by effectively eliminating the time bar on when one can launch review proceedings and successfully set aside a decision. As a result, the *status quo* is that decisions can be set aside long after they were taken and parties have performed in terms of the contract. This position compromises legal certainty and finality and, ultimately the rule of law.

In my view, the eradication of the delay rule has the potential to deter prospective suppliers of basic services from contracting with the state. It is a fact that South Africa has service delivery problems. A hesitancy on the part of service providers to conduct business with the state poses a threat to the realization of basic rights. A Public Service Commission Commissioner was quoted by Business Insider saying that departments like Public Works and Infrastructure, Department of Water and Sanitation, Home Affairs, and the Department of Mineral Resources are among a list of state departments that have little regard for the Public Finance Management Act and that accountability and consequence management in these departments do not exist.²²⁶ The Department of Public Works and Infrastructure and the Department of Water and Sanitation owe suppliers more than R400 million in the 2020–2021

²²⁶ Phumi Ramalepe “ These two government departments are the worst when it comes to paying suppliers on time” Business Insider South Africa available at <https://www.businessinsider.co.za/govt-departments-not-paying-suppliers-on-time-2021-3>, accessed on 3 May 2022.

financial year.²²⁷ The Department of Water and Sanitation has a constitutional obligation to manage the water resources of the country. It fulfils section 27, which guarantees the right to have access to sufficient food and water.²²⁸ The South African Human Rights Commission's water and sanitation research report links the right to water and sanitation to other basic rights such as the right to life, dignity, health, housing, and physical security. The report identified poor construction and maintenance, lack of monitoring of service delivery projects, and payment of external contractors for services rendered as impending on the rights of poor communities. In addition to non-payment of invoices, the string of cases I have discussed above have illustrated a trend when a state organ contracts for goods and services and a service provider delivers in terms of that contract, only for the state to backtrack on its decision by seeking to get the contract set aside by the court.

Even though a service provider may be awarded part payment of what has been performed under the contract and operational costs, as in *Gijima*, it may serve as little or no consolation at all. That may not be enough to ease contractors' sense of uncertainty around state contracting. The recovering of what has been performed under a contract differs substantially from the profits a supplier would have amassed had the contract remained in place. Rendering a service provider's fate to be at the mercy of a state organ who may or may not backtrack on its decision is not conducive to certainty in state contracting.

4.5 Conclusion

This chapter has dealt with the practical and doctrinal implications of the *Gijima* principle. The rule of law requires unlawful decisions to be rectified. It requires state self-review to be used as a means of promoting transparency and accountability. It was argued in this section

²²⁷ Ibid.

²²⁸ Section 27(1)(b) of the Constitution.

that *Gijima*'s eradication of the delay rule does not serve these aims and rather perpetuates flouting of public procurement policies in the country. It does that by promoting arbitrary and opportunistic attempts by state officials to undo decisions. Secondly, it perpetuates disregard of public procurement laws by making it so easy for the state to undo decisions. Lastly, it undermines finality and certainty in decisions and thus might deter prospective suppliers from contracting with the state. The following chapter puts forward suggestions on how to cure the status quo and curb the re-occurrence of these problems.

PART 5 RECOMMENDATIONS

5.1 Introduction

The previous part concluded that the *Gijima* principle perpetuates arbitrary and opportunistic self-serving reviews by state organs, promotes disregard for public procurement law, and undermines the finality and certainty of decisions. This part aims to provide suggestions on how the recurrence of these problems could be curbed. Boonzaier argues that there is no magic that can prevent the vicious cycle that results in unlawful decision-making.²²⁹ He suggests that a good review must be stopped by our courts if the party launching it is or has behaved badly.²³⁰

Hoexter and Penfold notes Skweyiya J's warning that the court should not allow procedural challenges to prevent it from looking into the lawfulness of the exercise of public power. On the other hand, they note that the same court had emphasized that courts should exercise caution when dealing with a delayed review as a delay is a similar feature of the rule of law.²³¹ This section does not aim to provide definitive solutions to the issues at hand but makes suggestions towards the right direction.

This section considers the following five themes:

- The doctrine of precedent and overturning erroneous judgements
- A good faith principle when dealing with delayed self-review applications
- The need for re-writing the narrative in relation to state self-reviews
- The non-absoluteness of section 172(1)(a) and the development of the common law in

²²⁹ Supra note 188 at 2.

²³⁰ Ibid.

²³¹ See supra note 6 at 722, they refer to what was argued in *Khumalo* para 45, where Skweyiya J held that 'a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of the exercise of public power. It is equally a feature of the rule of law that undue delay should not be tolerated, and the court should therefore exhibit vigilance, consideration, and propriety before overlooking a late review.'

terms of section 173.

- Intervention by the legislature

5.2 The Doctrine of Precedent and Overturning Erroneous Judgments

In his assessment of the role of precedent in the development of South African constitutional jurisprudence, Jason Brickhill considers the question of whether the Constitutional Court can overrule its own decisions.²³² As he notes, for about a decade and a half of the Constitutional Court's existence, it avoided being confronted with the question directly, with the court preferring to distinguish rather than overrule earlier decisions.²³³ He argues that the Constitutional Court should not easily and without compelling reasons, depart from its own previous judgements.²³⁴ Eventually, however, the court dealt with that question head on in 2009 in the case of *Gcaba*. As Brickhill explains:

“Van Der Weshuizen J in *Gcaba*²³⁵ wrote that precedents must be followed and respected in order to guarantee legal certainty, which is crucial for the rule of law. The Constitutional Court as the apex court must exercise extra caution with regards to compliance or deviation from its own previous judgements and should not easily and without compelling reasons depart from its own previous judgements. However, *Gcaba* held that a Constitutional Court's earlier decision may be overturned if it has given rise to controversy or uncertainty that leads to conflicting decisions in lower courts.”²³⁶

The concept of overruling troublesome judgements is not novel in our law. The Constitutional Court in *Gcaba* acknowledged the importance of the doctrine of precedent and the values underpinning it, such as legal certainty, equal treatment, and fairness before the law.²³⁷ It, however, made it clear that a Constitutional Court's previous decision may be overturned if it has given rise to controversy and uncertainty, thus leading to conflicting decisions in lower courts. My view is that the *Gijima* principle is controversial. It contradicts

²³² J Brickhill ‘Precedent and the Constitutional Court’ (2010) 3 CCR at 79.

²³³ Ibid at 80.

²³⁴ Ibid.

²³⁵ Supra note 21.

²³⁶ Ibid para 62.

²³⁷ Ibid para 61.

previous precedent and creates uncertainty. This is so because it amends the *Khumalo* test. Regardless of what the answer is to the second leg of the *Khumalo* test, the court may invoke section 172 and set the decision aside. It thus becomes very clear that the *Khumalo* test becomes redundant.

The importance of the doctrine of precedent should not be ignored. The court in *Buffalo City* correctly argued and referred to *True Motives 84 (Pty) Ltd v Mahdi*,²³⁸ which held it was bound by the doctrine of precedent, and disregarding the doctrine undermines the rule of law and invites legal chaos.²³⁹ In my view, the Constitutional Court should not easily deviate from precedent, as Brickhill advises. However, I argue that there is justification to depart when the judgement causes controversy, uncertainty, and potentially leads to conflicting decisions in the lower courts, just like *Gijima's* has done and was shown in Part 3.

The approach to a delayed review has for some time been addressed by making use of the dual-step *Khumalo* test. The consideration by the court to exercise discretion to overlook a delay involves the balancing of various factors such as, but not limited to, prejudice, public interest, conduct, and prejudice. Now, *Gijima* suggests that even if there is no basis to exercise discretion to overlook the delay, the court can nevertheless invoke section 172(1)(a)²⁴⁰ and set aside the decision. The court does that without any reference or express intention to the correctness or incorrectness of the *Khumalo* principle. Because as things stand, despite what the answer is to the second question of the *Khumalo* test, the court can nevertheless entertain the review and set the decision aside. The court makes no justification

²³⁸ *True Motives 84 (Pty) Ltd v Mahdi* [2009] ZASCA 2009 (4) SA 153(SCA) para 100.

²³⁹ *Ibid* para 65.

²⁴⁰ SECTION72 states that:

(1) “When deciding a constitutional matter within its power, a court
(a) must declare any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, and
(b) may make any order that is just and equitable, including
(i) an order limiting the retrospective effect of the declaration of invalidity, and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

for its departure from previous jurisprudence and eradication of the delay rule. Secondly, since the delay rule was eradicated, the court failed to provide reasons for its eradication. Notwithstanding the fact that a law can be set aside if it is inconsistent with the Constitution. The confusion that remains is the existence of the delay rule in our law; its relevance remains intact. Thirdly, the court makes no intention of providing a way forward on how to reconcile, on one hand, not allowing procedural obstacles to stand in the way of setting aside an unlawful decision and, on the other hand, upholding the delay rule as an essential feature of the rule of law. It seems that the two are at a crossroads with no direction on how to strike a balance. This tension was recognized in *Buffalo City*, where it was held that for the longest time, case law suggested that the state must adhere to procedural requirements of review, including adherence to timeous obstacles. In the same breath, *Gijima* suggests that procedural obstacles, while important to adhere to, can sometimes lead to an injunction under section 172(1)(a).²⁴¹ The Constitutional Court in *Buffalo City* also fails to reconcile the disjuncture by implying that the exact outline of this tension need not be drawn in the case. The court suggested that all that was required in interpreting and applying *Gijima* was to first balance the objectives of the delay rules with the objectives of declaring unlawful conduct; secondly, applying *Gijima* narrowly and restrictively so that the values underlining the delay rules are not undermined; and thirdly, where unlawfulness is undisputed on the facts, to declare the conduct inconsistent with the Constitution.²⁴² The minority in *Buffalo City* agree that the approach to delay in *Gijima* has been subjected to major criticism, and that it is accused of extending the differences between the two pathways to review, namely PAJA and legality review. They note that *Gijima* may need to be revisited, but that it was not the case to do so before, as that issue was not raised before it.²⁴³

²⁴¹ Supra note 19 at para 67.

²⁴² Ibid paras 68 and 71.

²⁴³ Ibid para 113.

I contend that it would not be appropriate for the rule of law to uphold a troublesome judgement where there is an available legal recourse (*Gcaba* criteria) for overturning *Gijima*.

Freeman argues that *Gijima* grants the court a license to decide its case as it pleases, easily disregarding its own precedent. He attributes this unsettling phenomenon to what he refers to as “disappearing doctrinal law in favour of discretionary legal principles” as the reasons behind the court’s evasion that needs to be addressed.²⁴⁴

As I have argued in Part three, the *Gijima* case has given rise to uncertainty and confusion in its application in lower courts. The judgment granting leave to appeal in *Central Energy Fund and Another v Venus Rays Trade (Pty) Ltd and Others*,²⁴⁵ illustrates well the confusion that exists in lower courts when applying *Gijima*. In granting leave to appeal, Rogers J held:

“For reasons which are apparent from my main judgment, the case is one of complexity and public importance. There are reasonable prospects that another court may find that I should not have overlooked delay or that if delay was overlooked, I should not have granted consequential orders for the setting aside of the impugned decisions and contracts. Conversely, there are reasonable prospects that another court, while upholding my decision to overlook delay and grant consequential setting-aside orders, will find that I should not have granted Vitol and CTSA compensation. The appeal warrants the attention of the Supreme Court of Appeal.”²⁴⁶

This excerpt from the leave to appeal judgement suggests that the court foresaw multiple possibilities for how the matter could have been adjudicated. From the excerpt, the judge indicates three other possibilities that another court could find. First, that another court could find that he should not have overlooked the delay and set aside the impugned decisions. Secondly, another court could find that he was correct in overlooking the delay but should not have set the decisions aside. Thirdly, he should have overlooked the delay, set the decisions

²⁴⁴ Supra note 58 at 522.

²⁴⁵ See *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* 2020 ZAWHC 184. (Leave to Appeal Judgement).

²⁴⁶ Ibid para 2.

aside, and not granted compensation to the two respondents. My view is that the fact that there are three other possibilities that another court could impose indicates nothing other than confusion and uncertainty. The judge was correct that the case indeed needed to be adjudicated by the Supreme Court of Appeal.

It will be recalled that Navsa J, in *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* 2021 (4) SA 436 (SCA), suggested that the Constitutional Court might, in time, after presiding over many cases of this nature, decide on a harmonious approach to self-review, on which the legislature might intervene in a constitutionally permissible manner to cover all forms of review. He also implied that the Constitutional Court might need to revisit prior judgements as self-review has become a troublesome re-occurrence.²⁴⁷ However, what has been proposed by Navsa ADJ does not address the willingness of the Constitutional Court to realise and admit that it has erred. Brickhill writes that *True Motives v Mahdi and Walele*²⁴⁸ highlighted that the Constitutional Court is not immune to errors of judgement. The Supreme Court of Appeal needs to equip itself with how to respond when such errors arise.²⁴⁹

Hoexter and Penfold's view is that if the court refuses condonation, then section 172(1)(a) should not apply, as hearing the matter would not be within the court's powers as required by that provision. They suggest that this would cure the irregularity in *Buffalo City's* judgement, which states that section 172(1)(a) would apply when unlawfulness is clear on the facts.²⁵⁰ Prior to *Gijima*, this suggestion would have been correct. However, post-*Gijima*, I find it hard to understand. The judgements both in *Gijima* and in *Buffalo City* found the explanation for the delay to be unsatisfactory and therefore found no basis to overlook the delay. This means that condonation was not granted, yet the court managed to invoke

²⁴⁷ Supra note 1 at para 47.

²⁴⁸ *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC).

²⁴⁹ Supra note 232 at 80.

²⁵⁰ Supra note 6 at 742.

section 172(1)(a) and set the decisions aside. The good-faith principle, like Boonzaier's clean hands doctrine, is discussed below.

5.3 Good-faith Principle

I argued elsewhere that a string of cases is indicative of a trend where the state seeks to review its own decisions, in most cases after a considerable time has lapsed. This is what Boonzaier referred to as an epidemic of cases that the court needs to mollify. To navigate the tensions arising from opportunistic state self-reviews, Boonzaier proposes the introduction of a "purpose-built doctrine" that would be similar to the "clean hands" doctrine in private law. This purpose-built doctrine would require state organs to "prove their bona fides to the court" prior to obtaining relief.²⁵¹ I find this proposal attractive. A good faith requirement would, firstly, consider the conduct of the organ of state. For example, in *Govan Mbeki Navsa*, ADJ's suggested that when courts are dealing with delayed self-review, the public authority seeking condonation should explain what corrective steps or action were taken for the misconduct of an official or service provider concerned, including but not limited to disciplinary measures and criminal proceedings.²⁵² The good-faith principle should have a qualifier being that there needs to have been corrective steps or an intention to do so. The aim is to curb re-occurrence, thereby preventing a vicious cycle.

Secondly, a court should properly scrutinise the reasons for the delay in bringing a review application. In the absence of adequate reasons for the delay, the court effectively infers bad faith on the part of the organ of state.²⁵³ My view is that a lack of reasons should be equated with bad faith. Currently, under PAJA, a delay of more than 180 days is deemed unreasonable. There is no similar obstacle to legality reviews. Placing a negative inference on

²⁵¹ Supra note 188 at 4.

²⁵² Supra note 1 para 47.

²⁵³ Supra note 188 at 14.

delayed legality reviews, like the one under PAJA, would not be a foreign or unreasonable concept. In fact, it will be a step closer to reducing the divide that currently exists between PAJA and legality reviews. Currently, a litigant under PAJA whose delay exceeds the 180-day bar has to rebut a presumption that the delay is unreasonable. Whereas a litigant employing legality review has no such obstacle. This is one step to harmonising the pathways to reviews.

The court in *Buffalo City* found the municipality's conduct to be in bad faith. Had it acted in a way that indicated an honest effort to rectify past unlawfulness, the court would have had a basis to overlook the delay.²⁵⁴ The court had done well to recognise and call out bad faith. However, that alone should not be the only dominant factor in determining the amount of relief granted. It should serve as a qualifier to the clean-hands principle I am proposing.

5.4. The Narrative must be Re-written.

As it has been noted above, there is a need for a good faith principle to be developed. In addition to that, courts should generally be perceived to have zero tolerance for scrupulous self-serving reviews. A certain narrative regarding self-reviews is driven by the attitude of the court, which has a bearing on how the court is perceived by the public. I believe a change in the narrative may be beneficial towards the development and success of the good-faith principle. That change lies in the language of the court and how the court treats these types of litigants. Currently, the impression is that decisions by the state to enter into contracts can be easily undone by launching review proceedings and getting the court to set them aside. The new narrative should be that courts will only be sympathetic to state organs launching self-serving delayed reviews when they are in the process of cleaning house. In my view, courts should make it abundantly clear that delayed mala-fide self-serving reviews are contrary to

²⁵⁴ Supra note 19 para 99.

the rule of law. They should unequivocally denounce this practice. I believe that would send a clear and strong message to state actors to tread carefully when dealing with the public purse.

Depending on the gravity of the state actors' conduct, courts may even use their broad remedial powers to impose personal cost orders on erratic state officials. Vos makes a similar suggestion of piercing the shield of the public office veil in holding public officials personally liable for costs.²⁵⁵ With this suggested approach of holding public officials personally liable, he is hopeful that public servants will tread with caution when carrying out official responsibilities.²⁵⁶ On the other hand, Bishop cautions against what he refers to as an "errant approach to cost" as it might deter prospective litigants and the consequences will be of constitutional violations going unremedied and lesser constitutional disputes adjudicated by courts.²⁵⁷ Bishop writes that the Constitutional Court has shifted away from its traditional approach to costs.²⁵⁸

In *Black Sash Trust and Another v Minister of Social Development and Others*,²⁵⁹ the court made a very bold and scathing attack on the Minister of Social Development. It found the social assistance programme was one of the signature achievements of democracy, and the Minister had placed that achievement in jeopardy.²⁶⁰ The court held that SASSA²⁶¹ and the Minister were liable in their official capacity for the costs. However, the court found a

²⁵⁵ W Vos "Personal cost orders: Protecting the Public Purse" (2020) 31 Stellenbosch Law Review 138 at 140.

²⁵⁶ Ibid.

²⁵⁷ M Bishop "Costs" in Stu Woolman et al *The Constitutional Law of South Africa* 2 ed 6 – 1.

²⁵⁸ See Ibid 6 - 1 & chapter 6 - page 2. Bishop explains the traditional approach as when a private person is called upon to defend a frivolous claim, she could not be expected to bear the legal costs of defending the action. He suggests that even though the Constitutional Court has abandoned this approach, it however remains as a basis towards imposing costs awards. He adds that the Constitutional Court has also abandoned the 'loser pays' principle as often it is outweighed by other factors.

Also see pages 6 - 4 to 6 - 6 for the Constitutional Court's approach to costs in a classified manner.

²⁵⁹ *Black Sash Trust v Minister of Social Development and Others* (Freedom Under Law Intervening) 2018 (12) BCLR 1472 (CC).

²⁶⁰ Ibid para 1.

²⁶¹ South African Social Security Agency. This department gives effect to s 27 of The Constitution by ensuring the provision of social security services to the vulnerable.

possibility that an individual's conduct may have played a role in the matter.²⁶² The court explained that the Minister had the primary responsibility and constitutional obligation to ensure that SASSA delivered on its constitutional mandate. It found that there was very little that could have been done by the CEO in the Minister's direction.²⁶³

The court in *Buffalo City* scrutinised the conduct of the municipality. It held that while a court may be lenient in overlooking a delay where a state organ attempts to put its house in order, the opposite cannot be said when it continues to act unconstitutionally by settling an agreement unlawfully. The municipality was found to have disregarded its constitutional obligations. Its conduct was marred by dishonesty and could be tolerated. The municipality was acting in bad faith and in breach of its constitutional obligations.²⁶⁴ I agree that this is the type of message that the courts should convey in relation to state actors acting in bad faith.

The new narrative should be that the courts have zero sympathy for maladministration and corruption. That should send a stern warning to those dealing with the public purse. Boonzaier argues that better safeguards are required rather than relying on the possibility that the epidemic of these cases may fail on the merits. Arbitrary and self-seeking governance cannot be given a "free pass by overlooking an unreasonable delay."²⁶⁵

5.5 Non-absoluteness of section 172 and Exercising Caution when Developing the Common Law in terms of section 173 of the Constitution

It is my view that the Constitutional Court in *Gijima* has effectively developed the common law on the basis of section 172 of the Constitution. As I have argued, the court altered the

²⁶² Supra note 259 para 72.

²⁶³ Ibid para 73.

²⁶⁴ Supra note 19 paras 98-99.

²⁶⁵ See supra note 188 at 4. Boonzaier quoted Cameron J and Froneman J's dissenting judgement in *Buffalo City* para 147 that to overlook an unreasonable delay in the case before them was tantamount to granting the Municipality a "free pass by overlooking an unreasonable delay."

Khamalo test and, as a result, eradicated the delay rule. There has been no declaration of the delay rule to be inconsistent with the Constitution. I maintain that there is a legitimate purpose served by the rules in administrative law. Its eradication was an unintended consequence of the court's invoking of section 172(1)(a). Hoexter and Penfold argue that the duty to declare law or conduct invalid under section 172(1)(a) has never been understood or perceived to be absolute.²⁶⁶ In *Buffalo City*, Cameron J and Froneman J for the minority, in my view, correctly suggested that it is not necessary to invoke section 172(1)(a) to arrive at a just outcome.²⁶⁷ They argued that the public interest would not be served if the respondent is deprived of its contractual gains and only gets awarded incurred expenses; that the procedural limitations to overlooking the unreasonable delay achieve the same just and equitable outcome.²⁶⁸

Section 173²⁶⁹ grants the Constitutional Court, Supreme Court of Appeal and High Courts inherent power to protect and regulate their own process and to develop the common law, considering the interest of justice. The court in *Gijima* does not rely on section 173. It is my view that court should exercise caution when developing the common law. Previously in Part 2, I argued the development of the common law lies in the court's inherent power, however when doing so, it should be mindful as not to eradicate important procedural rules such as the delay rule in the process. I place an emphasis that the court is within its power to alter the *Khumalo* test if it sees fit, however the unintended eradication of the delay rule has far reaching consequences as pointed out previously. I have argued that the interest of justice can be best served when a balance is struck between developing the common law and preserving the delay rule. It is my view that just like every other provision in the Constitution, section 173 is not

²⁶⁶ Supra note 6 at 740.

²⁶⁷ Supra note 19 para 150.

²⁶⁸ Ibid para 149.

²⁶⁹ S 173 of the Constitution.

intended to be absolute, even though not expressly indicated so in the Constitution.²⁷⁰ I am of view that the Constitutional Court should exercise a measure of caution when developing the common law, more specially when a lawful common law principle whose existence remains relevant and serves a legitimate purpose is at stake of eradication. Unlimited judicial discretion is undesirable for any democracy and the rule of law. Moreover, caution should be exercised when there is an alternative way, with less ramifications, of reaching a desired outcome. The Constitution does not value legal uncertainty or unrestricted judicial authority, as Harms properly notes in his article²⁷¹

A school of thought that Harms discusses is that the Bill of Rights seems to have granted the judiciary a hunting license on the common law and that unlimited judicial discretion allows precedents to be ignored.²⁷² He argues that the Constitution brightens up the legal landscape but is not blinding. It does not create an opportunity for the common law to be attacked, but instead it creates rights. He correctly points out that the Constitution does not place a "machete" in judges' hands to behead but harmonises the law.²⁷³ Some disputes can be addressed by the intervention of the law, and some need the intervention of the legislature. For the country to function properly, all three spheres need to work together while observing the separation of powers.

5.6 Intervention by the Legislature

Navsa ADJ, writing a unanimous judgement in *National Education Health and Allied Workers Union*, suggested that the legislature may need to intervene in a constitutionally

²⁷⁰ The Constitutional Court in *Gijima* did not expressly invoke section 173. However, I previously argued that while developing the common law in terms of s 173, the court eradicated the delay rule.

²⁷¹ LTC Harms "Development of the common law in view of sections 39(2) and 173 of the Constitution" (2004) 7 PELJ at 2. The initial journal is written in Afrikaans, referenced sections are sourced from a summarised English version of the document.

²⁷² *ibid* at 1.

²⁷³ *Ibid*.

permissible manner to shed light on how delay should impact all judicial reviews (including state self-reviews brought under the principle of legality).²⁷⁴ I welcome Navsa's suggestion of legislature intervention. Currently, the law is that all judicial reviews must be brought within a reasonable time. PAJA is precise that within 180 days or the delay is deemed to be reasonable. What needs more focus, I suggest, is the criteria used to determine condonation. I suggest that delayed reviews should only be condoned in exceptional circumstances, and there should be a set criterion to satisfy.

Moreover, there are broader procurement law reforms needed. ²⁷⁵A recent Auditor-General report detailed the key issues with supply chain management systems. First, the absence of written quotations was first noted, which the report found the deviation to be unreasonable and unjustified. The second was procuring from suppliers without SARS tax clearance. Thirdly, competitive bids are not invited, and lastly, the preference point system is not applied. The report states that little action has been taken to address these concerns, which have been raised year after year.²⁷⁶ The fact that these findings are a recurring phenomenon, one can reasonably assume clear unwillingness from officials that might be motivated by corruption or sheer ignorance. A recent judgement of the *Central Energy Fund* that was decided as recently as 2020 dealt with the private negotiation of contracts for selling state crude oil to three international companies, with no tender binding process. The court held that the absence of a public tendering process was a breeding ground for corruption.²⁷⁷ The fact that these findings are picked up annually reveals that existing

²⁷⁴ See supra note 170 para 47.

²⁷⁵ Procurement law reforms do not strictly go to delayed self-reviews, however more stricter controls will reduce the number of delayed self-serving reviews requiring judicial intervention. See Part 4 where it was argued that courts have been confronted with a concerning string of cases where state organs attempts to set aside procurement decisions previously taken.

²⁷⁶ Auditor General of South Africa PFMA General Report 2021-2021 "Increased relevance in a changing world" available at <https://www.agsa.co.za/Portals/0/Reports/PFMA/202021/Consolidated%20PFMA%20General%20Report%202020-21%20-%20FINAL%208%20December.pdf?ver=2021-12-08-114517-993> (accessed : 22 April 2022).

²⁷⁷ Supra para 119 para 210.

measurers are clearly not that effective, thus reforms are needed.²⁷⁸ An example would be reforms to the current Public Finance Management Act²⁷⁹ to contain stricter controls of state finances and more punitive powers granted to the Auditor General. State organs must have effective oversight and early-detection mechanisms to prevent fraud and corruption and eradicate loopholes within the system. Having in-house control mechanisms will result in fewer unlawful contracting and flouted procurement processes, which may lead to fewer review cases reaching the court to get the contracts set aside. *Buffalo City* suggests that effective oversight of service delivery projects should be one of the core responsibilities within a procurement process.²⁸⁰ Judicial intervention is not the only solution because it does not get to the crux of the problem. Without state-organ level intervention, courts will be inundated with delayed self-review cases. Proper procurement processes will ensure the finality of state decisions because things would have been done correctly the first time around. As noted previously, public procurement is not expected to be flawless, but those mistakes should not warrant setting aside decisions.²⁸¹ Service providers contracting with the state can also be re-assured and can take the state into their confidence. There will also be little room for opportunistic reviews as things will have been done according to the book. The courts should be sympathetic to self-reviews where the intention is to clean house other than for self-serving reasons. All those things will be a win-win for the rule of law and service delivery.

5.7 Conclusion

This section has put forward suggestions aimed at minimising the implications of the *Gijima* judgement. There is no single solution, but a consolidated approach is suggested. Boonzaier

²⁷⁸ See supra note 255 at 139, where Vos sets out legislative interventions that has been adopted by South Africa, aimed at curing corruption in the public procurement space.

²⁷⁹ Public Finance Management Act 1 of 1999.

²⁸⁰ Supra note 19 para 81.

²⁸¹ See note 210 above, where *Altech Radio Holdings*' principle that does not expect public procurement to be flawless, and not every flaw requires the contract to be set aside was discussed.

contends that, while delayed self-serving cases are bound to fail on the merits, better safeguards are required to stem the epidemic.²⁸² The first step is to overturn *Gijima*. The second suggestion is to develop a good-faith principle like the clean-hands doctrine suggested by Boonzaier. The third suggestion is that the narrative should be replaced by the refusal of courts to be used as vehicles to flouting of public procurement principles, and courts being sympathetic only to attempts toward good and clean governance. Courts must be perceived to have zero tolerance for mala fide self-serving reviews. Fourthly, for courts to exercise a measure of restraint when developing the common law in terms of section 172 and to not perceive section 173 as absolute. Lastly, legislative intervention at the state department level might be the cure for the root cause of the disregard of public procurement principles, which might lead to fewer delayed self-serving cases confronting courts. Part 2 discussed the need for continued relevance of the delay rule in administrative law. I argued that the delay rule serves a legitimate purpose of giving effect to certainty and finality of decisions and section 217 of the Constitution. Less opportunistic self-reviews will be a win-win for the rule of law and those contracting with the state might be granted a level of comfort, which in turn can contribute to clean governance and improved service delivery.

²⁸² Supra note 188 at 4.

PART 6 CONCLUSION

South Africa's administrative law is a hybrid of common law and PAJA.²⁸³ Since 1994, South Africa became a democratic state and all that conflicts with the Constitution must be set aside. Section 237²⁸⁴ of the Constitution requires all constitutional obligations to be carried out without diligence and without delay. This paper has argued that the delay rule is not only a procedural bar but also ensures finality of decisions, which is a principle of the rule of law.

While developing the common law, the Constitutional Court in *Gijima*, when faced with a delayed self-review application, held that the court may nonetheless be forced to declare a decision unlawful in accordance with section 172(1)(a) of the Constitution even if there is no basis for overlooking the unreasonableness of the delay. This ran counter to the *Khumalo* test, which was endorsed by the Constitutional Court. In *Khumalo*, the court held that if a court refuses to overlook an unreasonable delay, it cannot entertain the review application. The delay validated the decision.

The main problem with the *Gijima* judgement is its eradication of the delay rule. This observation is commonly shared by De Beer, Hoexter, and Penfold. *Gijima* renders the second leg of the *Khumalo* test redundant because, despite what the answer is to the second leg, a court may nevertheless set the decision aside by invoking section 172. The *Gijima* approach to delay is synonymous with the court overlooking an unreasonable delay and entertaining the review application, ultimately setting aside an impugned decision. This thus eradicates the relevance of the delay rule. I have argued that *Gijima's* eradication of the delay rule is three-fold first, it promotes arbitrary and opportunistic attempts by state officials to undo decisions. This is illustrated by a disturbing string of cases where state officials seek to review and set

²⁸³ Act 3 of 2000.

²⁸⁴ Act 108 of 1996.

aside contracts in which a considerable period has lapsed, and the contract has run its course. Secondly, it perpetuates disregard for procurement policies by state officials. The *Gijima* judgement makes it easier for state organs to set aside their decisions when, in most cases, they have run their course. Lastly, it undermines the finality and certainty of decisions. It has been argued that the implications of this point have the possibility of deterring suppliers from contracting with the state, which ultimately might negatively affect service delivery.

The Constitutional Court has failed to streamline an approach to delayed self-review while maintaining the rules underlying delay and developing the common law. This lacunae has been shown to cause confusion in the lower courts, as illustrated by incorrect interpretation or avoidance of the *Gijima* principle.

I have argued that the delay rule continues to be relevant and necessary in administrative law as it complements section 217 and section 237 of the Constitution and ensures finality of decisions, which is a principle of the rule of law.

While acknowledging that there is no magic all-in-one solution for these problems, several suggestions have been put forward to curb the counter effects. The first is to overturn *Gijima*, as it has been the source of controversy and continues to cause confusion in lower courts. A good-faith principle has been suggested to be part of an assessment the court embarks on to determine the real intention behind launching the self-reviews by organs of state. Courts should also be intentional about developing a narrative where courts refuse to be used as vehicles by scrupulous state officials. The fourth suggestion is for the courts to exercise caution in their application of sections 172 and 173 respectively. Finally, intervention by the legislature was also invited to streamline laws, policies, and consequence management to curb flouting of public procurement policies. That collectively, should see a reduction in opportunistic delayed self-serving reviews confronting courts.

BIBLIOGRAPHY

Primary Sources

Legislation

Public Finance Management Act 1 of 1999

Promotion of Administrative Justice Act 3 of 2000

Constitution of the Republic of South Africa, 1996.

Case law

Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA93 (CC).

Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality 2021 (3) SA 25 (SCA).

Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening) 2018 (12) BCLR 1472 (CC).

Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2016 ZAECGHC 55.

Buffalo City Metropolitan Municipality and Another 2017(6) 360 (SCA).

Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC).

Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another 2010 (3) SA 519 (SCA).

Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others 2020 ZAWCHC 164.

Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others 2020 ZAWHC 184.

Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others 2022 (54) SA 119 (SCA).

Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA (SCA).

Chirwa v Transnet Limited and Others 2008 (4) SA 367 (CC).

City of Cape Town v Aurecon South Africa (Pty) Limited 2017 (4) SA 223 (CC).

Compcare Wellness Medical Scheme v Registra of Medical schemes and Others 2021 (1) SA 15 (SCA).

Department of Transport v Tasima (Pty) Ltd 2017 (2) SA 622 (CC).

Darries v Sheriff, Magistrate's Court, Wynberg and Another 1998 (3) SCA at 40 H-41E.

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC).

Gcaba v Minister for Safety and Security and Others 2010 (1) SA 238 (CC).

Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd 2021 (4) SA 436 (SCA).

Gqwetha v Transkei Development Corporation Ltd and Others 2006 (3) SA 245(SCA).

Khumalo v Member of the Executive Council for Education: KwaZulu Natal 2014 (5) SA 579 (CC).

Madikizela-Mandela v Executors, Estate Late Mandela 2018 (4) SA 86 (SCA).

MEC for Health, Eastern Cape, and Another v Kirland Investments (Pty) Ltd 2014 (3) SA 841 (CC).

Merafong City Local Municipality v AngloGold Ashanti Limited 2017 (2) SA 211 (CC).

Municipal Manager: Qaukeni Local Municipality and other v FV General Trading CC 2010 (1) SA 356 (SCA).

National Education and Allied workers Union v Minister of Public Service and Administration and Others, South African Democratic Teachers Union and Others v Department of Public Service and Administration and Others; Public Servants Association and Others v Minister of Public Service and Administration and Others; National Union of Public Service and Allied Workers Union v Minister of Public Service and Administration and Others 2022 (43) SA 1032 (CC).

Ntshangase v MEC for Finance, KwaZulu Natal and Another 2010 (3) SA 201 (SCA).

Opposition to Urban Tooling Alliance v The South African National Road Agency Limited 2013 (4) SA 639 (SCA).

Oudekraal Estates (Pty) Ltd v The City of Cape Town 2009 (85) SA 333 (SCA).

Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA).

Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd 2021 (3) SA 791 (SCA).

State Information Technology Agency Soc Ltd v Gijima Holding (Pty) Ltd 2015 ZAGPPHC 1079.

State Information Technology Agency Soc Ltd v Gijima Holding (Pty) Ltd 2016 (4) SA 842 (SCA).

State Information Technology Agency SOC limited v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC).

Steenkamp N.O v Provincial Board of the Eastern Cape 2007(3) SA 121 (CC).

True Motives 84 (Pty) Ltd v Mahdi 2009 (4) SA 153 (SCA).

United Plant Hire (Pty) Ltd v Hills and Others 1976(1) SA 717 (A).

Valor IT v Premier Noth West Province and Others 2021 (1) SA 42 (SCA).

Walele v City of Cape Town and Others 2008 (6) SA 129 (CC).

Secondary Sources

Books and Journal Articles

Cora Hoexter and Glenn Penfold *Administrative Law in South Africa* 3rded (2021) Juta.

Stu Woolman and Michael Bishop *Constitutional Law of South Africa* 2ed (2013) Revision Service 5 LexisNexis.

Boonzaier, L "A decision to undo" (2018) South African Law Journal 642.

Boonzaier, L "Good Reviews, Bad Actors: The Constitutional Court's Procedural Drama" (2015) 7 Constitutional Court Review 1.

Brickhill, J "Precedent and the Constitutional Court" (2010) Constitutional Court Review 79.

De Beer, M "A new role for the principle of legality in Administrative Law: State Information Technology Agency SOC LTD v Gijima Holdings (Pty) Ltd "2018 4 South African Law Journal 613.

Freeman, R "The rights of the state, and the state of rights in State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd "(2019) Constitutional Court Review 521.

Harms, LTC "Development of the common law in view of sections 39(2) and 173 of the Constitution" (2004) 7 Potchefstroom Electronic Law Journal 22, available at <https://www.ajol.info/index.php/pelj/article/view/43466>, accessed on 21 March 2022.

Henrico, R "The Functus Officio Doctrine and Invalid Administrative Action in South African Administrative Law: A Flexible Approach" (2020) Speculum Juris 115.

Hoexter, C" The importance of dissent: Two judgements in administrative law" (2015) JUTA & CO 120.

Hoexter, C "South African Administrative Law at a Crossroads: The PAJA and the Principle of Legality" available at <https://adminlawblog.org/2017/04/28/cora-hoexter-south-african-administrative-law-at-a-crossroads-the-paja-and-the-principle-of-legality/> (accessed: 06 April 2022)

Koen, L “Dissenting judgements: Their contribution” (2020) Without Prejudice 30 available at <https://www.withoutprejudice.co.za/free/article/7124/view>, accessed on 20 March 2022.

Mothupi, S “The value of minority judgements in the development of constitutional interpretation in South Africa” Unisa Press v46 no.2 (2005)13 available at <https://journals.co.za/doi/pdf/10.10520/EJC27478>, accessed on 20 March 2022.

Pretorius D.M “Confusion and Delay: Self-Review, Functus Officio and Oudekraal” (2020)83 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 245

Other Sources

Phumi Ramalepe “ These two government departments are the worst when it comes to paying suppliers on time” Business Insider South Africa available at <https://www.businessinsider.co.za/govt-departments-not-paying-suppliers-on-time-2021-3>, (accessed : 3 May 2022).

Auditor General of South Africa PFMA General Report 2021-2021 “Increased relevance in a changing world” available at <https://www.agsa.co.za/Portals/0/Reports/PFMA/202021/Consolidated%20PFMA%20General%20Report%202020-21%20-%20FINAL%208%20December.pdf?ver=2021-12-08-114517-993> (accessed : 22 April 2022).