CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 91/17

In the matter between:

BUFFALO CITY METROPOLITAN MUNICIPALITY Applicant

and

ASLA CONSTRUCTION (PTY) LIMITED Respondent

Neutral citation:	*Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15
Coram:	Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J
Judgments:	Theron J (majority): [1] to [107] Cameron J and Froneman J (dissenting): [108] to [154]
Heard on:	4 September 2018
Decided on:	16 April 2019
Summary:	Legality review — unreasonable delay — overlooking delay — section 172 of the Constitution — *Gijima*

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Eastern Cape Division, Grahamstown):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside, and replaced with the following:

   "The applicant's decision to award contract number BCC/DES/PIU/HOUS/1122/2010 for Reeston Phase 3, Stage 2 (953 erven) to the respondent is declared constitutionally invalid."
4. There is no order as to costs.

JUDGMENT

THERON J (Basson AJ, Dlodlo AJ, Goliath AJ, Mhlantla J and Petse AJ concurring):

Introduction

[1] The applicant, Buffalo City Metropolitan Municipality (Municipality), seeks the review and setting aside of its own decision. It seeks leave to appeal against a decision of the Supreme Court of Appeal that held that the Municipality had not made out a case for condonation in terms of section 9 of the Promotion of Administrative Justice Act[1] (PAJA) and, as a result, the review application could not be entertained.[2] In this Court, the Municipality originally relied on a review in terms of PAJA, but following this Court's decision in *Gijima*, the review must be dealt with in terms of the principle of legality.[3]

[1] 3 of 2000.

[2] *Asla Construction (Pty) Limited v Buffalo City Metropolitan Municipality* [2017] ZASCA 23; 2017 (6) SA 360 (SCA) (Supreme Court of Appeal judgment).

[3] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) (*Gijima*).

Background

[2] The applicant is a municipality established in terms of the Local Government: Municipal Structures Act,[4] which manages, among others, the area of East London. The respondent is Asla Construction (Pty) Limited, a company with limited liability duly registered and incorporated as such according to the laws of the Republic of South Africa.

[3] The Greater Duncan Village area in East London is home to between 70 000 to 100 000 people. Most of the residents reside in approximately 18 000 shacks. The residential density in the area ranges from 55 to 193 dwellings per hectare. Since 2003, the Greater Duncan Village area has been targeted for housing upgrading and development through the Duncan Village Redevelopment Initiative of 2003 – Local Spatial Development Framework (Redevelopment Initiative). After numerous drafts and public consultations the Redevelopment Initiative was approved by the Municipal Council in 2009.

[4] The key legislative instrument for implementing state-funded housing projects is the National Housing Code (Code), which was promulgated by the Minister of Human Settlements in terms of section 4 of the Housing Act.[5] Section 4(6) of the Code provides that it is binding on provincial and local spheres of government. One of the contracting strategies that the Code authorises is turnkey contracting, which involves appointing a contractor through a public tender for all work related to the completion of a project.[6] The Municipality used a turnkey contract for the Greater Duncan Village development. It decided to appoint an implementing agent that would be responsible for the design processes, construction and handling of services and top structures for the development.

[4] 117 of 1998.

[5] 107 of 1997.

[6] This includes the planning of the approved land, the township establishment process and the design and installation of internal reticulation services to the construction of houses.

[5] The Municipality issued a public invitation for tenders for the turnkey contract on 5 November 2013. The respondent tendered for the contract and the Municipality awarded this contract to it. On 2 May 2014, the City Manager advised the respondent that the Municipality had accepted its tender. On 30 May 2014, the Municipality and the respondent concluded an agreement (Turnkey contract). Thereafter the Minister acknowledged the appointment of the respondent.

[6] In terms of the Turnkey contract the respondent was to provide between 3 000 and 5 000 housing units for the Greater Duncan Village development. Under this contract, the respondent was appointed as an implementation agent for the development. The consideration for the contract was not a defined amount but instead consisted of the approved housing subsidy amount, grants and funds allocated to this project and bridge funding. The scope of the work was described in the contract as—

> "3 000 to 5 000 housing units with services subject to land availability and other factors in the fully subsidised, social and affordable bonded market, on portions of land in and around Duncan Village in the . . . Municipality."

[7] The Redevelopment Initiative was intended to permit a broader framework by extending geographically into areas located north and north-west of Duncan Village itself, including the new township of Reeston East. Reeston East comprised an area earmarked to provide 2 500 erven for housing development. During the period between 2011 and 2014, the Municipality went out on tender three times for initial engineering services and the subsequent construction of housing top structures within the area identified for development of 2 500 erven in Reeston East. Each of these tenders ultimately failed, either for budgetary reasons or poor work performance. The matter was ultimately referred back to the Municipality's Department of Housing.

[8] On 7 August 2014, Mr Andile Fani, the then City Manager, wrote to the respondent indicating that the implementation of certain services, the 953 units originally encompassed under the Reeston contract, were now considered to be part of

the Turnkey contract's scope of work. In terms of a letter dated 7 September 2014, Mr Vincent Pillay, the Municipality's Chief Financial Officer, "awarded" the Reeston contract to the respondent:

> "Subsequent to an abortive procurement process due to budget challenges for this project the metro has cancelled the tender and in this regard would advise ASLA to continue with the implementation of 550 top structures on their appointment of 953 erven, of upgrading from level B services to level A services. Also to take over the management of Brayelen Extension 10 under their turnkey approach."

[9] On 4 August 2015, Mr Pillay (then Acting City Manager) alleged that the Reeston contract was unlawful as it had been concluded without a lawful tender process. The Municipality then appointed an independent investigator, Ms York, to conduct an enquiry about the validity of the Reeston contract.

[10] In the interim, the respondent carried out its obligations in terms of the Reeston contract. The Municipality's engineers issued a number of certificates certifying that the respondent had performed in terms of the contract and stating the value of the work performed. A payment dispute arose when the Municipality refused to make payment on the certificates.

[11] The respondent instituted provisional sentence proceedings in the High Court of South Africa, Eastern Cape Division, Grahamstown (High Court) based upon payment certificates issued by the Municipality's agents. The Municipality opposed the provisional sentence proceedings on the ground, among others, that the Reeston contract was unlawful for not complying with the constitutional and statutory prescripts applicable to the procurement of goods and services. It launched review proceedings, in terms of PAJA, in which it sought to set aside the Reeston contract. It was common cause that these review proceedings were initiated out of time. The High Court held that a proper case for condonation had been made out.[7] In doing so,

[7] See *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2016] ZAECGHC 55; [2016] 4 All SA 60 (ECG) (High Court judgment) at para 74.

the High Court had regard not only to the explanation given for the delay, but also to the extent of the deviation from the required constitutional and statutory prescripts.[8] The High Court found that the Reeston contract was patently unlawful.[9] The High Court declared the award of the Reeston contract invalid and dismissed the contractual claims which formed the basis of the provisional sentence proceedings.[10]

[12] The respondent was successful in its approach to the Supreme Court of Appeal. That Court held that a proper case for condonation in terms of section 9 of PAJA had not been made out.[11] It deliberately declined to make any definitive findings with regard to the underlying legality or illegality of the contracts.[12] It held that the approach of the High Court, in having regard to the merits, in its consideration of whether or not to condone the delay, was incorrect.[13]

[13] The Municipality approached this Court on 11 March 2017 with an application for leave to appeal against the Supreme Court of Appeal's judgment. That application was brought in terms of PAJA. On 14 November 2017, this Court handed down judgment in *Gijima*, which held that where an organ of state seeks to review its own decision, the review *must* be brought under the principle of legality. The Chief Justice issued directions on 15 November 2017 inviting the parties to file written submissions in light of the *Gijima* decision.[14]

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[8] Id.

[9] Id at paras 62-3.

[10] Id at para 77.

[11] Supreme Court of Appeal judgment above n 2 at para 24.

[12] Id at para 25.

[13] Id at para 13.

[14] The directions read:

> "The parties are invited to file written submissions of no more than ten pages on the following, in the light of this Court's recent decision in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40 (14 November 2017):
>
> (a) Was provisional sentence the appropriate procedure, and should the Supreme Court of Appeal have granted it?
>
> (b) Does this Court have jurisdiction, and is it in the interests of justice for this Court to hear the matter?"

[14] The Municipality submitted that the approach to undue delay must be reconsidered as a result of *Gijima*, more specifically that the 180-day PAJA time limit within which to initiate a review must be revisited in the context of a legality review. The Municipality submitted that the delay was not undue because it had acted expeditiously once it became aware of the unlawfulness of the procurement process and requested that the delay be overlooked.

[15] As for the merits of its review, the Municipality submitted that the Reeston contract was invalid by reason of non-compliance with the provisions of section 217 of the Constitution because no competitive procurement processes were followed.

[16] The respondent supported the reasoning and conclusion of the Supreme Court of Appeal. It submitted that the Municipality's review should not be entertained because it brought the review application in terms of PAJA rather than as a legality review. It further submitted that the review must fail because the Municipality unreasonably delayed in bringing the application and had not proffered an explanation for the delay. The respondent submitted that even if the delay is condoned, the application for leave to appeal must fail because the review application is without merit. This is because the Reeston contract was concluded on the basis of an earlier, valid contract between the parties – the Turnkey contract. The respondent thus submitted that there is nothing in our law that prevents the state and the successful tenderer from entering into sub-contracts that fall within the scope of an overarching and valid framework contract.

[17] In the event that the review is upheld, the respondent submitted that a just and equitable remedy is to order that the invalidity of the contract will not have the effect of divesting the respondent of rights which, but for the declaration of invalidity, it is entitled to.

Application for withdrawal

[18] On 16 November 2018, after the matter was heard on 4 September 2018, the Municipality filed an application in which it sought to have its application for leave to appeal withdrawn and a settlement agreement entered into between the parties made an order of this Court. The procedure for withdrawal is governed by rule 27 of the Rules of this Court, which states:

> "Whenever all parties, at any stage of the proceedings, lodge with the Registrar an agreement in writing that a case be withdrawn, specifying the terms relating to the payment of costs and payment to the Registrar of any fees that may be due, the Registrar shall, if the Chief Justice so directs, enter such withdrawal, whereupon the Court shall no longer be seized of the matter."

[19] On occasion, litigants in this Court have withdrawn matters, even after the matter has been set down for hearing. In the past 10 years, there have been no applications for withdrawal following the hearing of a matter. This does not mean that such an application will not be granted, only that it is highly unusual. Though there was no tender of costs contained in the Municipality's application, this is not fatal and could have been rectified following directions from this Court. Were this solely an application for withdrawal, I may have been inclined to allow the matter to be withdrawn.

[20] The Municipality, in its withdrawal application, seeks not merely to have the matter withdrawn, but asks this Court to make the settlement agreement an order of this Court. It is clear from the terms of the settlement agreement as well as the relief sought in the withdrawal application that the application and the settlement agreement are integrally linked. The Municipality's founding affidavit in the withdrawal application states:

> "That settlement agreement has been approved by the applicant (through its Municipal Manager) and by the respondent (being represented by an authorised official) and is subject to it being made an order of the Constitutional Court *and* to the

> leave of the Honourable Chief Justice that the respondent withdraws its application for leave to appeal to the Constitutional Court." (Emphasis added.)

[21] Of relevance is paragraph (K) of the preamble to the settlement agreement, which reads:

> "[The settlement agreement] is subject to:
>
> (i) leave being granted to [the Municipality] by the Chief Justice for the withdrawal of [the Municipality's] application for leave to appeal in the Constitutional Court under case number CCT 91/17; and
>
> (ii) the Constitutional Court issuing an order that the agreement incorporated herein being made an order of the Constitutional Court."

[22] The request for withdrawal of the application for leave to appeal is contingent upon the settlement agreement being made an order of this Court. I must first consider the terms of the settlement agreement. The effect of a settlement order is to vest the terms of the settlement agreement with the status of an order of court.[15]

[23] This Court, in *Eke*, cautioned that a court should not be mechanical in its approach to making a settlement agreement an order of court. A court can only make an order that is "competent and proper" and in accordance with the Constitution and the law.[16] Madlanga J, writing for the majority, stated:

> "This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place 'relate directly or indirectly to an issue or *lis* between the parties'.
>
> . . .

[15] The practice of making settlement agreements orders of court is well established. See *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 8. Madlanga J referred with approval to *Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O) at 95, where the Court said that "[t]he tradition of such orders is very strong in our legal system".

[16] *Eke* id at para 25.

> Secondly, 'the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order'. That means, its terms must accord with both the Constitution and the law."[17]

[24] Froneman J, on behalf of the majority in *ACSA*, confirmed the principles emanating from *Eke*, and in particular that "a settlement agreement between litigating parties can only be made an order of court if it conforms to the Constitution and the law".[18]

[25] There are sound reasons why a court should carefully scrutinise a settlement agreement before making it an order of court. Once a settlement agreement is made an order of court, it is interpreted in the same way as any judgment or order and affects parties' rights in the same way.[19] Madlanga J in *Eke* put the matter thus:

> "The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order."[20]

In addition, an order from this Court is not appealable to any other court, so this Court's pronouncement truly becomes final on the issue.

[26] The settlement agreement purports to regulate the provision of 5 000 housing units in Greater Duncan Village and the surrounding areas. Significantly, the settlement agreement imposes additional duties and obligations on the respondent in respect of the units and contemplates construction of additional units. This goes beyond the 953 erven contemplated in the Reeston contract.

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[17] Id at paras 25-6.

[18] *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (2) BCLR 165 (CC) (*ACSA*) at para 13.

[19] *Eke* above n 15 at paras 29-30.

[20] Id at para 31.

[27] The settlement agreement further seeks to settle not only the litigation between the parties in this Court, but two other matters before the High Court under case numbers 1158/2017 and 313/2018. This Court is not privy to the details of these cases, save for the fact that they were stayed pending the outcome of this matter and emanate from the Turnkey contract. The settlement agreement traverses litigation unrelated to the proceedings in this Court. In the settlement agreement, the parties are contracting on matters outside the context of the litigation in this Court. They seek to have their agreement, which in part relates to matters to which this Court has no knowledge, made an order of court. This the Court cannot do. *Eke* explains why:

> "For an order to be competent and proper, it must, in the first place 'relate directly or indirectly to an issue or *lis* between the parties'. Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court. On this Hodd says:
>
> > '[I]f two merchants were to make an ordinary commercial agreement in writing, and then were to join an application to Court to have that agreement made an order, merely on the ground that they preferred the agreement to be in the form of a judgment or order because in that form it provided more expeditious or effective remedies against possible breaches, it seems clear that the Court would not grant the application.'
>
> That is so because the agreement would be unrelated to litigation."[21] (Footnotes omitted.)

[28] This Court is not in a position to consider whether the order in respect of cases 1158/2017 and 313/2018 would be competent and in accordance with the Constitution and the law.

[29] The basis for the Municipality's application for leave to appeal in this Court concerned the legality of two agreements, the Reeston contract and the

[21] Id at para 25.

Turnkey contract. In respect of the Reeston contract, the Municipality contended that it was concluded without a competitive bidding process and thus fell afoul of section 217 of the Constitution. The Municipality's explanation as to why this contention may be resolved by the settlement agreement is scant. In the affidavit filed in support of the withdrawal application, it states briefly:

> "8.2 [The respondent] indicated its willingness to continue to perform in terms of the disputed contract or contracts.
>
> 8.3 The Municipality was however concerned as to the legality of the underlying contract or contracts.
>
> . . .
>
> 8.5 Without wishing to re-enter the merits of the written and oral arguments which have been submitted before the Constitutional Court, I respectfully submit that the settlement agreement enclosed herewith now adequately deals with the concerns of the Municipality."

[30] There is no explanation in the withdrawal application as to how this settlement agreement cures the alleged defects in the Reeston contract. For reasons that will be detailed in this judgment, the Reeston contract was awarded to the respondent in breach of section 217 of the Constitution and is unlawful. This inconsistency with the Constitution cannot be cured by a settlement agreement. For this reason alone, the settlement agreement does not meet the *Eke* requirements for making it an order of court and is unlikely to be a lawful agreement that accords with the Constitution. The resultant order, if made by this Court, will be inconsistent with the Constitution.

[31] The parties have not explained why the settlement agreement is in accordance with the law and the Constitution. In addition, the scope of the agreement goes beyond the subject matter of this case and asks this Court to settle litigation and sanction the lawfulness of agreements of which it has little to no knowledge. The Court is being asked to sanction an agreement without being in a position to pronounce on its legality.

[32] I make a final point on this aspect that may be an additional indication of underlying maladministration within the Municipality. Paragraph 3 of a resolution adopted by the Municipality (attached to the withdrawal application) reads:

> "That, in addition to implementing the option of entering into a Settlement Agreement with ASLA Construction (Pty) Ltd . . . the matter of the implication(s) thereof to the Council insofar as Messrs A. Fani and T. Matiwane, the then City Manager and Acting Chief Operating Officer, are concerned, also be addressed."

[33] It will be recalled that it was Mr Fani who, on 7 August 2014, penned a letter to the respondent indicating that the implementation of an additional 953 units was now part of the Turnkey contract's scope of work.[22] Paragraph 3 of the resolution appears to be reflective of knowledge on the part of the Municipality that the two named senior officials were involved in the improper and invalid award of the tender. Despite this knowledge, the Municipality still concludes a settlement agreement that seeks to endorse this invalidity. This is inexplicable behaviour which is contrary to its public accountability duty. Even more surprising is its attempt to persuade this Court to endorse this settlement agreement and issue an incompetent order.

[34] For these reasons, I cannot make the settlement agreement an order of court nor accede to the parties' request to withdraw the application for leave to appeal. I now deal with the main application.

Jurisdiction and leave to appeal

[35] There is a clear basis for jurisdiction as the matter concerns section 217 of the Constitution. It deals with procurement by an organ of state, judicial review of a decision by an organ of state and the question of a just and equitable remedy in terms of section 172(1)(b) of the Constitution. Lawful procurement is patently a constitutional issue.[23]

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[22] See [8] above.

[23] *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (*Steenkamp*) at para 20.

[36] In this Court, the Municipality relies on a legality review. By its nature, legality review raises a constitutional question. It is founded upon the rule of law, which is a founding value of our Constitution.

[37] The issues raised in this matter have a broader impact beyond the immediate parties. This is so given the current political context where many municipalities are changing administrations and undertaking to "clean house". This case not only raises legal questions of import, but also affords this Court the opportunity to provide guidance to organs of state who may wish to bring similar applications in the future and to lower courts dealing with these cases.

[38] The terrain of "self-review", where a body seeks to review its own decision, has been dealt with in the decisions of this Court in *Tasima I*,[24] *Khumalo*,[25] *Kirland*,[26] *Aurecon*[27] and *Gijima*.[28] However, because these cases – save for *Khumalo* and *Gijima* – dealt with PAJA reviews, it is necessary that we consider the principles emerging from these decisions and the extent of their application, if any, to legality reviews.

[39] There is a further basis for interfering with the Supreme Court of Appeal judgment, one that would ordinarily be sufficient to demonstrate that it is in the interests of justice for this Court to entertain the appeal. The Supreme Court of Appeal interfered with the High Court's finding, among others, on the ground that it

[24] *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima I*).

[25] *Khumalo v Member of the Executive Council for Education, KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC).

[26] *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*).

[27] *City of Cape Town v Aurecon South Africa (Pty) Limited* [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC) (*Aurecon*).

[28] *Gijima* above n 3.

was improper for the High Court to have had regard to the merits before determining whether the delay ought to be condoned.

[40] The judgment of the Supreme Court of Appeal predated, by a matter of some months, the judgment of this Court in *Gijima*. However, it was made clear in *Tasima I* (a PAJA review where this Court found that the explanation for the delay was not satisfactory) that regard must still be had to the merits in deciding whether the delay should be condoned.[29] The Supreme Court of Appeal's decision in this matter does not align with the jurisprudence of this Court on this aspect and warrants interference.

[41] Prospects of success are not determinative, albeit important.[30] The prospects of success in this matter have been enhanced by the judgment in *Gijima*. For these reasons, it is in the interests of justice to grant leave to appeal.

Issues

[42] The issues that arise are:

(a) Did the Municipality unreasonably delay in bringing the review application?

(b) Has the Municipality provided a satisfactory explanation for the delay? If not, should the delay be overlooked?

(c) If the delay is unreasonable, and should not be overlooked, does *Gijima* and section 172 impel this Court nonetheless to declare that the Turnkey contract is unlawful and grant a just and equitable remedy?

[43] It is necessary, before addressing these issues directly, to consider the assessment of delay in a legality review vis-à-vis a PAJA review and offer guidance

[29] *Tasima I* above n 24 at paras 163-4.

[30] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 29.

on the factors to be considered by a court in determining whether to exercise its discretion to overlook a delay.

Assessing delay under PAJA and legality

[44] For a considerable time, it was accepted that organs of state that seek to set aside their own decisions were entitled, and indeed obliged, to do so under PAJA.[31] This inevitably involved a consideration and application of section 9 of PAJA with regard to any contentions of unreasonable delay.

[45] Following this Court's decision in *Gijima*, it is now settled that an organ of state seeking to review its own decision must do so under the principle of legality and cannot rely on PAJA. What implications, if any, does this have for assessing the delay?

[46] There are four principles that answer this question. First, assessing delay under PAJA and legality differs in two respects, even though both hinge on reasonableness. The first difference is the role of the 180-day bar in section 7(1) of PAJA. Section 7(1) of PAJA stipulates:

> "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) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

[47] However, this time period is not absolute. Section 9 of PAJA provides a mechanism for extensions:

[31] *Kirland* above n 26 at para 82.

> "(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 sections 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 interests of justice so require."

When the delay is longer than 180 days, a court is required to consider whether it is in the interests of justice for the time period to be extended.[32]

[48] Legality review, on the other hand, has no similar fixed period. This Court in *Khumalo* endorsed the test enunciated by the Supreme Court of Appeal in *Gqwetha* for assessing undue delay in bringing a legality review application (*Khumalo* test).[33] Firstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter. Secondly, if the delay is unreasonable, the question becomes whether the Court's discretion should nevertheless be exercised to overlook the delay to entertain the application.[34]

[49] The standard to be applied in assessing delay under both PAJA and legality is thus whether the delay was unreasonable.[35] Moreover, in both assessments the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken.[36] However, it is important to note that the assessment is not the same. A distinction between the

[32] Section 9(2) of PAJA.

[33] *Khumalo* above n 25 at para 49 referring to *Gqwetha v Transkei Development Corporation Ltd* [2005] ZASCA 51; 2006 (2) SA 603 at para 33. *Gqwetha* was also cited with approval in *Tasima I* above n 24.

[34] *Khumalo* id.

[35] *Aurecon* above n 27 at para 37.

[36] *Aurecon* above n 27 at para 41, which relates to PAJA. There is no reason why this rule should not apply to legality reviews.

assessments of the delay under PAJA versus the principle of legality turns on the prescribed time period of 180 days. This distinction was succinctly described by the Supreme Court of Appeal in *Opposition to Urban Tolling Alliance*,[37] which found that section 7 creates a presumption that a delay of longer than 180 days is "*per se* unreasonable":

> "At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned. . . . Up to a point, I think, section 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay."[38]

[50] The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to section 7 of PAJA. The 180-day bar in PAJA does not play a pronounced role in the context of legality. Rather, the question is first one of reasonableness, and then (if the delay is found to be unreasonable) whether the interests of justice require an overlooking of that unreasonable delay.

[51] The second difference between PAJA and legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required.[39] A court can simply consider the delay, and then

[37] *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA).

[38] Id at para 26.

[39] *Khumalo* above n 25 at para 44.

apply the two-step *Khumalo* test to ascertain whether the delay is undue and, if so, whether it should be overlooked.

[52] The second principle relating to delay under legality is that the first step in the *Khumalo* test, the reasonableness of the delay, must be assessed on, among others, the explanation offered for the delay.[40] Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay.[41] But, as was held in *Gijima*, where there is no explanation for the delay, the delay will necessarily be unreasonable.[42]

[53] Even if the unreasonableness of the delay has been established, it cannot be "evaluated in a vacuum" and the next leg of the test is whether the delay ought to be overlooked.[43] This is the third principle applicable to assessing delay under legality. Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay.[44] There must however be a basis for a court to exercise its discretion to overlook the delay.[45] That basis must be gleaned from the facts made available or objectively available factors.[46]

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[40] Id at paras 49-51. This applies equally to assessing the delay of PAJA reviews.

[41] *Tasima I* above n 24 at para 153.

[42] Id, where it was noted that for the purposes of condoning delay under section 9 of PAJA, "a full explanation that covers the 'entire period' must be provided" and the Court absorbed this requirement into the first leg of the *Khumalo* test, stating that "[t]he first part of the *Khumalo* inquiry must follow these guidelines". See further *Gijima* above n 3 at para 45.

[43] *Khumalo* above n 25 at para 49. See also *Tasima I* above n 24 at paras 158-9 where the obligatory nature of dealing with both legs is outlined as follows:

> "In respect of the delay itself, I am therefore persuaded that the approach taken by the Supreme Court of Appeal was correct. The explanation provided by the Department was both porous and lacked the markings of good constitutional citizenship. But this is not the end of the inquiry. The delay cannot be 'evaluated in a vacuum'. It must now be determined whether there are sound reasons for overlooking the delay."

[44] *Khumalo* above n 25 at para 44.

[45] *Gijima* above n 3 at para 52.

[46] Id.

[54] The approach to overlooking a delay in a legality review is flexible. In *Tasima I*, Khampepe J made reference to the "factual, multi-factor, context-sensitive framework" expounded in *Khumalo*.[47] This entails a legal evaluation taking into account a number of factors. The first of these factors is potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision.[48] The potential prejudice to affected parties and the consequences of declaring conduct unlawful may in certain circumstances be ameliorated by this Court's power to grant a just and equitable remedy and this ought to be taken into account.[49] The interrelationship between prejudice and delay was explained by Khampepe J in *Tasima I*:

> "But what is the prejudice suffered by Tasima in overlooking the delay? Condoning the delay does not prevent them from enforcing the court orders that have been granted in their favour. In addition, the contract extension itself has already expired. Setting aside the extension at this point should not, therefore, impact negatively on Tasima going forward. It is also a factor that this Court may rely on its section 172(1)(b) powers to ameliorate the prejudice suffered. It bears repeating that Tasima has, in addition, benefitted greatly from the extension. In my view, the prejudice suffered is minimal, particularly in comparison to the prejudice to be suffered by the Department and the Corporation if the counter-application is not condoned. This is consonant with the dicta in *Khumalo* that, 'consequences and potential prejudice . . . ought not in general, favour the Court non-suiting an applicant in the face of the delay'."[50]

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[47] *Tasima I* above n 24 at para 144.

[48] Id at para 52.

[49] *Khumalo* above n 25 at paras 53 and 56, which read:

> "Under the Constitution, however, the requirement to consider the consequences of declaring the decision unlawful is mediated by a court's remedial powers to grant a 'just and equitable' order in terms of section 172(1)(b) of the Constitution. A court has greater powers under the Constitution to regulate any possible unjust consequences by granting an appropriate order. While a court must declare conduct that it finds to be unconstitutional invalid, it need not set the conduct aside.
>
> . . .
>
> The application of this aspect of the test set in *Gqwetha* must be contextualised in the courts' discretion to grant a just and equitable remedy." (Footnotes omitted.)

[50] *Tasima I* above n 24 at para 170.

[55] A second factor relevant to overlooking delay is the nature of the impugned decision. This, in essence, requires a consideration of the merits of the legal challenge against that decision.[51] In considering whether there had been an undue delay, albeit within the context of PAJA, the Supreme Court of Appeal, expressly, did not consider the merits. It held that a "full and proper determination of the merits of the review application was accordingly dependent upon a finding that the respondent's failure had to be condoned".[52] In reaching this conclusion, it relied on *Christelik-Volskeie Onderwys*, which rejected the proposition that a court is required to consider the merits before deciding whether to condone an undue delay in bringing a review application.[53] It also relied on *Opposition to Urban Tolling Alliance* where it was decided that a court is compelled to deal with the question of condonation before examining the merits of the review application, because, in the absence of an extension, the Court had no authority to entertain the review application.[54] It was on this basis that the Supreme Court of Appeal concluded that "[i]t was thus impermissible for the [High Court] to have entered into and decided the merits of the review application without having first decided the merits of the condonation application".[55] This conclusion is not in accordance with the jurisprudence of this Court.

[56] This Court has made plain that even within the context of PAJA, the extent and nature of the deviation from constitutional prescripts directly impacts upon an application for condonation in terms of section 7 of PAJA.[56] In the context of a legality review, in *Khumalo*, Skweyiya J writing for the majority explained that "an

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[51] *Khumalo* above n 25 at para 57, which states:

> "An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view, this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge."

[52] Supreme Court of Appeal judgment above n 2 at para 13.

[53] *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* [2012] ZASCA 45; [2012] 2 All SA 462 (SCA) (*Christelik-Volkseie Onderwys*) at paras 42-4.

[54] *Opposition to Urban Tolling Alliance* above n 37 at paras 22, 26 and 43.

[55] Supreme Court of Appeal judgment above n 2 at para 13.

[56] *Khumalo* above n 25 at para 57; *South African National Roads Agency v Cape Town City* [2016] ZASCA 122; 2017 (1) SA 468 (SCA) (*SANRAL*) at para 81; *Aurecon* above n 27 at para 49.

additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision".[57] Skweyiya J added that this entails analysing the impugned decision and considering the merits of the legal challenge made against that decision.[58] In *SANRAL*, Navsa JA rejected a suggestion that the question of delay must be dealt with before the merits of the review can be entertained:

> "It is true that in [the Supreme Court of Appeal's judgment in *Opposition to Urban Tolling Alliance*] this Court considered it important to settle the court's jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious."[59]

[57] This approach was confirmed by this Court in *Aurecon* where the explanation for the delay was found to be unsatisfactory:

> "Nonetheless, due regard must also be given to the importance of the issue that is raised and the prospects of success. In this case that means considering the significance of the alleged procedural irregularities that were raised in the Ernst & Young report. It should be borne in mind that, when carrying out a legal evaluation a court must, where appropriate, 'take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision'."[60]

[58] Furthermore, it is implicit from this Court's judgment in *Gijima* that the extent and nature of the illegality may be a crucial factor in determining the relief to be granted when faced with a delayed review.[61] Therefore, this Court may consider, as

[57] *Khumalo* id.

[58] Id.

[59] *SANRAL* above n 56 at para 81.

[60] *Aurecon* above n 27 at para 49.

[61] *Gijima* above n 3 at para 52.

part of assessing the delay, the lawfulness of the contract under the principle of legality.

[59] A third factor to consider when deciding to overlook delay is the conduct of an applicant. This is particularly true for state litigants seeking to review their own decisions for the simple reason that often they are best placed to explain the delay. This was recognised by Skweyiya J in *Khumalo*:

> "The fact that the MEC has elected not to account for the delay, despite having had the opportunity to do so at multiple stages in the litigation, can only lead one to infer that she either had no reason at all or that she was not able to be honest as to her real reasons. *Had the matter been brought by a private litigant, this aspect of the test might weigh less heavily. However, given that the MEC is responsible for the decision, that she is obliged to act expeditiously in fulfilling her constitutional obligations, and that she should have within her control the relevant resources to establish the unlawfulness of the decision she impugns,* the unreasonableness of the unexplained delay is serious."[62] (Emphasis added.)

[60] This Court has repeatedly stated that the state or an organ of state is subject to a higher duty to respect the law. As Cameron J put it in *Kirland*:

> "[T]here 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."[63]

[61] In *Khumalo*, it was explained that the standard against which a state litigant's conduct is measured is high and ought to accord with the prescripts of the law.[64] In

[62] *Khumalo* above n 25 at para 51.

[63] *Kirland* above n 26 at para 82.

[64] *Khumalo* above n 25 at para 45.

Merafong, Skweyiya J stated that it is the duty of state litigants to rectify unlawful decisions:

> "This Court has affirmed as a fundamental principle that the state 'should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help'. *What is more, in Khumalo, this Court held that state functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness.* The courts have a duty to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. Public functionaries 'must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it'."[65]

[62] Even where the functionary has not acted as a model litigant or "constitutional citizen",[66] there may be a basis to overlook the delay if the functionary acted in good faith or with the intent to ensure clean governance. In *Tasima I*, Khampepe J affirmed this principle:

> "*Merafong* also holds that whether the failure to challenge the decision timeously was made in good faith may be a reason for overlooking the delay. The Department in this case, by its own admission, is plagued by poor management. The director-general who deposed to the counter-application admits that it was brought as a means to get the Department's house in order. Nevertheless, the Department has not acted in bad faith in respect of the administrative decision. Its behaviour has been muddled, but not malicious.
>
> This is borne out by the Department's vigorous attempt to have the extension reviewed before the High Court. Not only is the decision-maker who made the decision now opposed to its enforcement, but this also forms part of a conscious effort by the Department to break with its dilatory past."[67]

[65] *Merafong City Local Municipality v Anglogold Ashanti Limited* [2016] ZACC 35; 2016 JDR 1943 (CC); 2017 (2) BCLR 182 (CC) at para 61.

[66] *Tasima I* above n 24 at para 159.

[67] Id at paras 168-9.

[63] The fourth principle stems directly from *Gijima*. Even where there is no basis for a court to overlook an unreasonable delay, the Court may nevertheless be constitutionally compelled to declare the state's conduct unlawful. This is so because "[s]ection 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution".[68]

[64] This principle is dealt with tersely in the judgment of my colleagues Cameron J and Froneman J (second judgment), which I have had the pleasure of reading.[69] They agree with me that the delay was unreasonable and that it should not be overlooked. Yet they do not address the *Gijima* principle. They note that *Gijima* has not attracted universal favour among commentators.[70] But the correctness or otherwise of *Gijima* was not at issue before us. It was not raised on the papers or ventilated at the hearing. This Court has on numerous occasions cautioned that it is undesirable to consider important legal questions without the benefit of legal argument from the litigants.[71]

[65] The second judgment goes on to hold that this is not the case to consider overruling *Gijima*.[72] This Court is bound by its own decisions by virtue of the doctrine of precedent.[73] Not following previous decisions would undermine the rule of law[74] and "invite legal chaos".[75] Departing from established precedent of this

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[68] *Gijima* above n 3 at para 52. See also section 172 of the Constitution which states:

> "When deciding a constitutional matter within its power, a court—
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> (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."

[69] Second judgment at [150].

[70] Id at [113].

[71] *Aurecon* above n 27 at para 35; *Albutt* above n 30 at para 82.

[72] See second judgment at [113].

[73] *Turnbull-Jackson v Hibiscus Court Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 58.

[74] As Moseneke J (as he then was) explained in *Daniels v Campbell* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at para 94:

Court should not be done lightly, but only after due and careful consideration. Consequently, and this is where our judgments diverge, we are bound to apply the rule in *Gijima*, should it be applicable.

[66] When would the *Gijima* rule apply? *Gijima* dictates that where the unlawfulness of the impugned decision is clear and not disputed,[76] then this Court must declare it as unlawful.[77] This is notwithstanding an unreasonable delay in bringing the application for review for which there is no basis for overlooking. Whether an impugned decision is so clearly and indisputably unlawful will depend on the circumstances of each case.

[67] As the second judgment aptly remarks, this creates a certain tension in our law.[78] On the one hand, there is a long line of cases explaining that the state must adhere to the procedural requirements of review, including timeous approaches to courts.[79] On the other hand, *Gijima* implies that these procedural hurdles, while important, can sometimes yield to the injunction under section 172(1)(a) to declare invalid that which is inconsistent with the Constitution.

[68] The precise contours of this tension need not be drawn here. All that needs to be said is that interpreting and applying the *Gijima* principle, and the initial three principles detailed in this judgment, must be done with their purpose in mind. That is, to balance the objectives of the rules on delay with those objectives of declaring

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> "The doctrine of precedent is an incident of the rule of law. Its primary purpose is to advance justice by ensuring certainty of the law, equality and equal treatment and fairness before it. To that end, the doctrine imposes a general obligation on a court to follow legal rulings in previous judicial decisions."

This was said in a minority judgment, although the majority did not disagree on this point of the nature and role of stare decisis.

[75] *True Motives 84 (Pty) Ltd v Mahdi* [2009] ZASCA 4; 2009 (4) SA 153 (SCA) (*True Motives*) at para 100, cited with approval in *Turnbull-Jackson* above n 73 at para 55.

[76] *Gijima* above n 3 at para 41.

[77] Id at para 52.

[78] Second judgment at [126] to [127].

[79] These all stem from the seminal judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA).

unlawful conduct as such. In *Khumalo*, this Court cautioned against allowing procedural obstacles from preventing a court from looking into a challenge to the lawfulness of an exercise of public power. Skweyiya J stated:

> "In the previous section it was explained that the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, inter alia, by seeking the redress of their departments' unlawful decisions. Because of these fundamental commitments, 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."[80]

[69] However, the Court went on to note that the procedural requirement to bring review applications without undue delay serves a substantive purpose. It is based on sound judicial policy and in the public interest that there be finality and certainty in matters.[81]

[70] In *Tasima I*, this Court reaffirmed the principle that a court should be slow to allow procedural obstacles to prevent scrutiny of a challenge to the exercise of public power,[82] but went on to emphasise that it is a feature of the rule of law that undue delay should not be tolerated:

> "Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality

[80] *Khumalo* above n 25 at para 45.

[81] Id at paras 47-8, which read:

> "This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision, and the undoing of the decision threatens a myriad of consequent actions.
>
> In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired." (Footnotes omitted.)

[82] *Tasima I* above n 24 at para 160.

> to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise."[83]

[71] The *Gijima* principle should thus be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay are not undermined. At the same time, this is not a matter in which the *Gijima* principle can be ignored and thus impliedly overruled. So the injunction it creates – to declare invalid that which is indisputably and clearly inconsistent with the Constitution – must be followed where applicable.

[72] I now apply these established principles to the facts of this matter. In turn, I consider the reasonableness of the delay, whether it should be overlooked and the applicability of the *Gijima* principle to this case.

Was the delay unreasonable?

[73] In this matter, the clock started running on 4 September 2014 when the decision to award the Reeston contract to the respondent was made. The review application, brought in November 2015, was initiated 14 months after the decision was taken. The Municipality's explanation is that it only became aware of the unlawful administrative action during October 2015. The Municipality immediately appointed Ms York to conduct a forensic investigation and her report became available on 21 October 2015. What followed on the part of the Municipality was the suspension of certain senior officials, including Mr Fani, and Mr Matiwane, who had been directly involved in the award and conclusion of the contract with the respondent.

[74] According to the Municipality it is quite clear that prior to August 2015, whilst it was aware of the award of the contract to the respondent in the general sense, it was not aware that the award had occurred unlawfully and without compliance with relevant constitutional and statutory prescripts. It further alleges that once it became

[83] Id.

aware of the underlying unlawfulness and irregularities, it became obliged to institute proceedings to set aside the relevant contracts. The Municipality maintains that it acted with appropriate expedition in doing so.

[75] A central actor on behalf of the Municipality in these events was Mr Pillay, who was the Municipality's Chief Financial Officer, at the time the Reeston contract was awarded to the respondent and later became the Acting City Manager. On 4 September 2014, in his capacity as Acting City Manager, he instructed the respondent to undertake the work in respect of Reeston East as a result of failed procurement processes. Eleven months later, on 4 August 2015, having reverted to his position as Chief Financial Officer, Mr Pillay reported alleged irregularities on the part of the Municipal Manager to the Executive Mayor. He alleged that Mr Fani had signed an offer and acceptance form in respect of the Reeston contract when that contract was invalid.

[76] That remarkable and belated about-turn plainly required an explanation in order to be condoned under section 9 of PAJA, as found by the Supreme Court of Appeal.[84] This explanation never came from the Municipality.[85] As the Supreme Court of Appeal put it:

> "[Mr Pillay] would have been able to explain why the contract was awarded to the [respondent], why the contract was signed and why the [respondent] was thereafter instructed to proceed with the work. In addition, he would have been able to explain why the first payment was made, how he discovered that the award of the contract was irregular and why it took twelve months from the time the contract was awarded to discover this."[86]

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[84] Supreme Court of Appeal judgment above n 2 at para 17.

[85] Its founding affidavit at para 41 states:

> "Of course Mr Pillay was a party to the extension of the Turnkey contract. Precisely why he subsequently changed his mind with regard to the legality of the underlying contract or contracts is not clear. Frankly however, whatever his explanation, it is difficult to understand how such an affidavit could have provided any direct assistance with regard to, the essential issue to be determined i.e. whether it was in the interests of justice for the time period provided for in section 7 of PAJA to be extended."

[86] Supreme Court of Appeal judgment above n 2 at para 17.

[77] In addition, Mr Pillay's silence is not explained by the Municipality. The result is that although the Court is given an explanation as to what transpired from August to November 2015, there is no explanation whatsoever for the delay of a year between the time of the award, in August 2014, and when Mr Pillay reported the alleged irregularities in August 2015.

[78] Where there is no explanation for the delay, the delay will be undue.[87] In this matter, the Municipality's explanation is that it was unaware of the irregularity until Mr Pillay came forward – in the fashion of a whistle-blower – and disclosed the irregularity. The Municipality has not provided a sufficient explanation for the delay. At the very least, it should have explained why it was not possible for Mr Pillay to disclose the facts within his knowledge. In *Tasima I* it was confirmed that the onus lies squarely on the Municipality to explain why the delay was not undue.[88] This requires that the Municipality put forward all facts at its disposal.

[79] Though the threshold for such an explanation would not require proving the allegation, the Municipality ought to be held to a rigorous standard. As an organ of state, it bears constitutional obligations and thus, where an explanation may be obtained or is available the Municipality should provide it or take the Court into its confidence and explain its failure to provide an explanation. It is trite that the Municipality, as an organ of state, is subject to a higher duty to respect the law.[89]

[80] A party applying for condonation must give a full and honest explanation for the whole period of the delay.[90] The only explanation offered by the Municipality for the delay from August 2014 to August 2015 is that it was not aware at an earlier stage of the alleged unlawfulness of its conduct. The Supreme Court of Appeal correctly

[87] *Khumalo* above n 25 at paras 49-51.

[88] *Tasima I* above n 24 at para 153.

[89] *Kirland* above n 26 at para 82.

[90] *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZASCA 3; [2010] 2 All SA 519 (SCA) at para 54.

found that the Municipality had failed to furnish a full and reasonable explanation for the delay.

[81] I agree with the High Court that the Municipality "ought to have become aware much sooner than it did, (even prior to, and without the benefit of an independent investigation), that its employees awarded the Reeston contract without going through a procurement process".[91] Municipalities must have effective structures and mechanisms in place to ensure proper oversight for its service delivery projects. This is one of its core responsibilities. It must detect and prevent the abuse of taxpayer's monies. A lack of effective oversight leads to dysfunctionality within municipalities by creating loopholes for fraud and corruption.[92]

Should the delay be overlooked?

[82] In deciding whether to overlook the Municipality's unreasonable delay, I first consider the nature of the impugned decision and then the conduct of the Municipality in approaching this Court. The latter alone is sufficient to refuse to overlook the delay.

[83] Regarding the nature of the impugned decision, the Municipality's attack on the validity of the payment certificates upon which the provisional sentence claim was based was two-fold. First, that the Reeston contract was an unlawful extension of the Turnkey contract and awarded to the respondent without proper procurement procedures being complied with and thus invalid. Second, that the Turnkey contract was inchoate as it was subject to a funding agreement being concluded. I leave the question of the validity of the Turnkey contract explicitly open as the High Court did.[93] It is not necessary for this Court to pronounce on that issue.

[91] High Court judgment above n 7 at para 72.

[92] Department of Cooperative Governance and Traditional Affairs *State of Local Government in South Africa: Overview Report* (October 2009).

[93] High Court judgment above n 7 at para 56 states:

[84] Reeston East did not form part of the bidding specifications under the Turnkey contract. Specifically, the scope of work for the Turnkey contract is stated as "[the applicant] intends to develop roughly 3 000 to 5 000 housing units with services subject to land availability and other factors in the fully subsidised and affordable bonded market on portions of land in and around Greater Duncan Village in the Municipality". The locality map attached to the Turnkey contract did not include Reeston East as part of the housing project area. In fact, it appears that Reeston East never formed part of the bidding process in relation to the Turnkey contract.

[85] The applicant advertised a tender for the appointment of an Implementing Agent on a turnkey basis for an urban housing project to address the housing needs of Greater Duncan Village in October 2013. In particular, it is worth noting that the Municipality advertised the tender for the Reeston contract both before and after the conclusion of the Turnkey contract.

[86] On 7 August 2014, Mr Fani wrote to the respondent indicating that the implementation of certain services[94] were now considered to be part of the Turnkey contract's scope of work. Specifically, the letter stated that "[the Municipality] recognise[s] that the layouts for this project were done some time ago and would therefore prefer the layout of this stage to be revisited. This is to ensure that an optimal number of opportunities are created". As mentioned, on 4 September 2014, Mr Pillay wrote to the respondent explicitly advising it to take over the Reeston contract due to "an abortive procurement process".

[87] These letters demonstrate that both parties were aware of two significant factors. First, that the Turnkey contract's layouts did not originally encompass

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> "I do not believe that it is necessary for present purposes and in these proceedings to make any determination whether the Turnkey contract was invalid or not. More evidence would be required to make a proper decision in that regard."

[94] These services related to the 953 units originally encompassed under the Reeston contract.

Reeston East. Second, that the Reeston contract's scope of work had previously been the subject of failed tender processes.

[88] The respondent placed great emphasis on the fact that the wording of the Turnkey contract was broad enough to encompass the scope of work of the Reeston contract. The High Court neatly put paid to this assertion:

> "If the Yurnkey contract made provision for the work covered by the Reeston contract to be executed by the respondent in no uncertain terms, as the respondent would have it, the question arises why the second Reeston contract was formally concluded at all. Also why the same bid number of the first Reeston contract was allocated to it."[95]

[89] However, even if we were to assume that the respondent was correct, it is clearly not sufficient to bring the award of the Reeston contract within the prescripts of section 217 of the Constitution. Section 217 of the Constitution lays down the threshold requirements for a valid procurement process as one which is "fair, equitable, transparent, competitive and cost effective". The Supreme Court of Appeal elaborated on these requirements in *Firechem*:

> "One of the requirements of such a procedure is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competiveness is not served by only one or some of the tenderers knowing what is the true subject of tender."[96]

[90] Given that the Reeston contract had been put to tender both before the Turnkey contract tender was advertised and after the Turnkey contract was concluded,

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[95] High Court judgment above n 7 at para 58.

[96] *Premier of the Free State Provincial Government v Firechem Free State (Pty) Ltd* [2000] ZASCA 28; 2000 (4) SA 413 (SCA) (*Firechem*) at para 30.

and that bid specifications did not encompass Reeston East, it is curious how the respondent, or anyone else, could envision that the Turnkey contract would encompass the area covered by the Reeston contract as part of Duncan Village and its surrounds.[97] It is also apparent that none of the parties originally envisioned the Turnkey contract to encompass the Reeston contract. The letter "awarding" the Reeston contract to the respondent acknowledges that the contract was only being "awarded" to the respondent as a result of failed tender processes.

[91] This is at odds with the most fundamental requirement of a constitutional procurement process: that the bidding process be open and transparent.[98] The fact that

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[97] The High Court judgment above n 7 noted the particular difficulties that would arise if the respondent's interpretation of the Turnkey contract were to be accepted as according with section 217 of the Constitution and at paras 62-3 stated:

> "The procurement in respect of the Reeston contract was not 'legal and regular' as the respondent submits, nor was the award of the Reeston contract a legitimate consequence of the respondent's appointment as turnkey implementing agent for the housing needs of Duncan Village. The 'turnkey contracting strategy' cannot mean that an entire procurement process for different work projects can be dealt with in one contract, excluding all competition from other contractors. The argument that the provision for 'emerging needs' in the turnkey contract would encompass work (550 and 452 top structures) in Reeston previously procured (under contracts 1122 and 1337) is with respect, unsustainable.
>
> The aforesaid considerations, compel me to conclude that the award of the Reeston contract was invalid and falls to be set aside."

[98] See *Firechem* above n 96 at para 30 which states:

> "One of the results of the adoption of a procedure such as Mr McNaught argues was followed is that one simply cannot say what tenders may or may not have been submitted, if it had been known generally that a fixed quantities contract for ten years for the original list of products, and some more, was on offer. That would deprive the public of the benefit of an open competitive process."

See also the discussion in *Municipal Manager: Qaukeni Local Municipality v F V General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA) (*Qaukeni*) which speaks to the impact of not following a transparent procurement process at para 21:

> "The refuse collection service the respondent undertook to provide was clearly a municipal service as envisaged by the Systems Act and the Financial Management Act, and the second appellant was therefore obliged to follow the procurement processes they prescribed. It did not do so in awarding the contract to the respondent. Instead the appellants decided on the terms of the contract, including payment of the amount the respondent had quoted to provide the required services, and then made an offer to the respondent to contract with it on those terms. All this was done without any transparent, competitive, cost-effective or bidding process taking place and without any programme involving community consultation or information dissemination being followed. Clearly as this infringed the prescribed procedures I have mentioned, the contract was invalid: with the concomitant result that it could not be validly extended and the second appellant was not bound thereby beyond the end of June 2007."

See furthermore *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para 43 and

the Reeston contract was awarded to the respondent without any competitive bidding process also violates the requirement that procurement processes be competitive.[99]

[92] To hold otherwise would overlook overwhelming evidence on record reflecting the violation of section 217 of the Constitution and other statutory prescripts[100] and endorse the view that the work in contracts like the Reeston agreement, which were previously concluded in pursuance of a proper procurement process, could simply be "awarded" to a different contractor purportedly on the basis of a previously concluded open-ended Turnkey contract. All this leads to one conclusion: there were blatant irregularities in the award of the Reeston contract to the respondent that render that contract unlawful and invalid.

[93] I reach this conclusion without relying on the controversial York Report and pronouncing on its admissibility. A careful reading of its judgment reveals that the High Court did not solely rely on the report, but also had regard to the documentary evidence attached to report, like meeting minutes, project plans, maps and tender documents. The validity and authenticity of these documents were not disputed by the parties and they now form part of the record in this matter. In addition, the timeline of the procurement processes in respect of the Reeston contract is common cause between the parties and this alone, as explained above, is a sufficient basis upon which to conclude that the Reeston contract failed to comply with section 217 of the Constitution.

[94] In the High Court, Revelas J found that the documents "speak for themselves".[101] This is clearly correct. There is no dispute with regard to the authenticity of the documents. To a large extent, both parties relied on these

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Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd [2010] ZASCA 13; 2010 (4) SA 359 (SCA).

[99] *Firechem* above n 96 at para 30.

[100] For municipal supply chain management, these include the Municipal Finance Management Act 56 of 2003, the Preferential Procurement Policy Framework Act 5 of 2000 and the Municipal Supply Chain Management Regulations, GN 868 *GG* 40553, 30 May 2005.

[101] High Court judgment above n 7 at para 12.

documents. The circumstances under which both the Turnkey and other contracts were concluded were common cause and not disputed.

[95] In my view, it is clear and undisputed that the Reeston contract was unlawful and based on admissible evidence and on documents accepted and relied upon by both parties. This finding is supported by the common cause and undisputed facts of this case.

[96] In awarding the Reeston contract to the respondent, the Municipality violated the provisions of section 217 of the Constitution. This section obliges every organ of state, regardless of the sphere under which it falls, to procure goods or services "in accordance with a system which is fair, equitable, transparent, competitive and cost effective". Corruption and maladministration are inconsistent with the rule of law and are the "antithesis of the open, accountable, democratic government required by the Constitution".[102] In *Steenkamp* it was stated that the purpose of section 217(1) is to eliminate fraud and corruption in the public tender process and enable the state to secure goods and services at competitive prices.[103]

[97] On the other hand, the conduct of the Municipality in bringing this application proscribes this Court from overlooking the delay. The goodwill emanating from this application being brought is undone by the Municipality's about-turn in filing the withdrawal application.

[98] Suddenly, the Municipality's concerns about compliance with section 217, the prescripts of the law and the Constitution more generally, are disposed of by way of private negotiations behind closed doors with the respondent. The Municipality's case, its odd silence in respect of Mr Pillay and its flippant attitude toward its obligations under the Constitution reek of impropriety. While a court may be lenient

[102] *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 4.

[103] *Steenkamp* above n 23 at paras 33-5.

in overlooking a delay where an organ of state attempts to put its house in order, the opposite is true where that organ seeks to perpetuate constitutionally invalid conduct by way of an unlawful settlement agreement.

[99] At no point did the Municipality take the Court into its confidence and explain its conduct. It simply presented the Court with whatever view it felt suited to at the time, vacillating between positions when convenient to it. This is outrageous behaviour from a state litigant, which must be robust in upholding its constitutional duties and is to be held publicly accountable. The Municipality's conduct in this matter, particularly following the hearing, verges on bad faith. Had the Municipality acted in a manner that indicated a sincere effort to clean house and rectify past wrongs and unlawfulness, this Court may have had a basis to overlook the delay. The important principle at play in this matter is how this Court manages complex institutional settings of corruption and maladministration, particularly at local government level and where the organ of state has not taken the Court into its confidence.

[100] In conclusion, this matter is on the same footing as *Gijima* where the decision maker had failed to provide a satisfactory explanation for the delay and, for the reasons outlined, I am unable to find any basis upon which this delay may be overlooked.

Does the Gijima principle apply?

[101] However, this is not the end of the enquiry. On the authority of *Gijima*, this Court must, having established that the Reeston contract was clearly unlawful on undisputed facts, declare it invalid in terms of the provisions of section 172(1)(a) and set it aside. The unlawfulness of the Reeston contract cannot be ignored and this Court is obliged, as it did in *Gijima*, to set aside a contract it knows to be unlawful. Even on a restrictive interpretation of the *Gijima* principle, bearing in mind the need to hold the state to the procedural requirements of review, as explained above, I can see no reason to depart from it in this matter.

Relief

[102] I would adopt the same approach as that of the Supreme Court of Appeal in respect of the provisional sentence claim:

> "The enquiry was rendered moot because we were informed by both Counsel that the respondent had in the interim made a without prejudice payment to the appellant in respect of the Reeston contract, in an amount in excess of R40 million. This payment was based upon the extent to which the respondent calculated that it had been unduly enriched by the appellant's performance. It was agreed between Counsel that it would no longer be permissible to grant provisional sentence against the respondent, as the payment excused these earlier claims."[104]

[103] At the hearing there was some debate between the parties as to whether the amounts owed under the payment certificates had been fully paid. As it is unclear whether there are still amounts owing under the existing payment certificates, the parties' previous concessions in respect of the provisional sentence claim stand. It is open to the parties to determine the further course regarding any outstanding disputes.

[104] When the Municipality took the view that the Reeston contract was invalid, the implementation of the contract had commenced and was continuing. The Municipality was content for the respondent to complete the contract (building low-cost houses) to the benefit of the Municipality and residents of Reeston. It was common cause that the work has been practically completed.

[105] In these circumstances, justice and equity dictate that the Municipality should not benefit from its own undue delay and in allowing the respondent to proceed to perform in terms of the contract. I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to that the respondent might have been entitled. It should be noted that such an award preserves

[104] Supreme Court of Appeal judgment above n 2 at para 27.

rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement.

Costs

[106] Ordinarily in a commercial matter like this, even though there are broad issues of public interest at stake, costs would follow the result. Both parties have been partially successful in that the Reeston contract was declared unlawful but the payment obligations have been preserved. For this reason, there should be no order as to costs.

[107] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   "The applicant's decision to award contract number BCC/DES/PIU/HOUS/1122/2010 for Reeston Phase 3, Stage 2 (953 erven) to the respondent is declared constitutionally invalid."
4. There is no order as to costs.

CAMERON J AND FRONEMAN J (Khampepe J concurring):

[108] We have read the deft and comprehensive judgment by Theron J (first judgment). Although our reasoning reaches the same eventual practical outcome [109] (namely that the respondent is entitled to the money it claims under the Reeston contract), our reasoning takes us along a different route.

[110] The contours of our divergent lines of reasoning are significant for this Court's developing legality jurisprudence on judicial review applications brought by organs of state. We disagree with the first judgment that in delay cases the interests of justice

require this Court to make a final and definitive finding on the lawfulness of the Municipality's actions in concluding that contract. We agree that the issue of lawfulness plays a part in weighing up whether the review should be entertained, but it is not the sole determining factor. Here there are no compelling reasons to entertain the review given the Municipality's unreasonable delay in bringing its application. Accordingly, it is our view that leave to appeal should be refused.

[111] In coming to this conclusion, we show that this Court's jurisprudence, and the deep constitutional imperatives that underlie it, provide for instances where a public authority's delay in bringing "self-review"[105] – legal proceedings to set aside its own decision – is so prodigiously and lamentably inexcusable that there is no public interest or constitutional necessity for pronouncing on its legality. Those cases will be rare, for, as this Court's decisions show, there is a constitutional imperative to locate and declare unconstitutional conduct invalid under the Constitution. However, our precedents envisage those cases; and this is one of them.

Self-review under the principle of legality

[112] The Municipality seeks judicial review of its own decision in concluding the Reeston contract with the respondent. State self-review is a novel, but burgeoning, species of judicial review that has claimed the attention of this Court in a number of recent decisions.[106] In *Gijima*, this Court, over a split decision in the Supreme Court of Appeal, opted for legality review – rather than PAJA review – as the pathway for dealing with a narrowly construed category of self-review applications.[107] The first judgment correctly notes that this matter falls within this category of state self-review identified in *Gijima* and should accordingly be dealt with under the principle of

[105] We gratefully adopt the first judgment's pithy term. See [38].

[106] *Gijima* above n 3; *Aurecon* above n 27; *Tasima I* above n 24; *Kirland* above n 26 and *Khumalo* above n 25.

[107] In carving out the scope of their decision in *Gijima*, Madlanga J and Pretorius AJ specified that the judgment was not concerned with either (1) the scenario where an organ of state seeks to review the decision of another organ of state; or (2) the scenario of state self-review where the organ of state purports to act in the public interest under section 38 of the Constitution. See *Gijima* above n 3 at para 2.

legality.[108] In doing so, *Gijima*, understood in the light of the preceding decisions of this Court in *Khumalo*, *Kirland* and *Tasima I*, governs.

[113] The reasoning this Court advanced in *Gijima* for choosing legality as the appropriate pathway for state institutions' self-review has not found universal favour.[109] While its treatment of standing and delay has been the immediate target of this criticism, *Gijima* is also accused of aggravating the bifurcation or "parallelism" in our administrative law between PAJA review as opposed to legality review. This has been a persisting source of academic concern.[110] It may in due course become necessary to reconsider whether the legality review pathway chosen in *Gijima* withstands the test of time. Now is not that time. This is because the issue was not argued before us and also because this case may help show that the adverse consequences predicted of *Gijima* – which would be necessary to justify any fundamental change of course – may not necessarily eventuate.

[114] This judgment converges with the first judgment in seeking approaches that best promote open, responsive and accountable government. This is the lodestar guiding the development of legality jurisprudence in respect of state self-review. We acknowledge that there may be reasonable disagreement on how best to achieve this

[108] See [1].

[109] See, for example, Boonzaier "A Decision to Undo" 135 (2018) *SALJ* 642 at 677 in which the author points to *Gijima* as evidence that this Court "not only reasons badly, but no longer cares to reason well". The author's substantive analysis of *Gijima* has much force, though whether the general remarks about the quality of this Court's current membership (see, for example, at 675) were either apposite or warranted may be a matter for history to determine. The Court and its critics have a shared interest in reasoned debate on the substance of its errors and its victories.

[110] See academic discussions on this issue, among others, Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484; Kohn "The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?" (2013) 130 *SALJ* 810; Du Plessis and Scott "The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence" (2013) 130 *SALJ* 597; Freund and Price "On the Legal Effects of Unlawful Administrative Action" (2017) 134 *SALJ* 184; Boonzaier "Good Reviews, Bad Actors: The Constitutional Court's Procedural Drama" (2015) 7 *Constitutional Court Review* 1; Konstant "Administrative Action, the Principle of Legality and Deference – The Case of *Minister of Defence and Military Veterans v Motau*" (2015) 7 *Constitutional Court Review* 68; Henrico "Subverting the Promotion of Administrative Justice Act in Judicial Review: The Cause of Much Uncertainty in South African Administrative Law" (2018) *TSAR* 288; Woolman "Language, Power and the Margin: Eliot's Philosophy of Language, Wittgenstein on Following a Rule, and Statutory Construction in *Mankayi v Anglogold Ashanti Ltd*" (2012) 129 *SALJ* 434; and Quinot and Maree "The Puzzle of Pronouncing on the Validity of Administrative Action on Review" (2015) 7 *Constitutional Court Review* 27.

goal. Both the first judgment and ours seek to achieve the same goal, although we differ, in this instance, on how to get there. That is to be expected, debated and celebrated in a developing democracy like ours. There is no permanent harm in acknowledging that we are still feeling our way to a better future, rather than relying on the so-called, but ephemeral, certainties of the past.

[115] Common law judicial review – the predecessor and part-ancestor of constitutional legality review – did not provide for self-review by state organs.[111] The constitutional era claims that capacity for state organs. This is because its commitment to open, responsive and accountable government not only permits state self-review but places a duty on state officials to rectify unlawful decisions.[112]

[116] Constitutional legality review also finds rich grounding in sections 1(c), 41(1)(b), 195 and, as far as public procurement is concerned, section 217 of the Constitution.[113] In its objective, state self-review should therefore promote open, responsive and accountable government. In this, its underlying concern is consonant with that of the fundamental right to lawful, reasonable and procedurally fair administrative action that the Constitution affords to everyone.[114] What legality review does, in sketching out a distinctive path, is to recognise the distinctive roles of those entitled to exact constitutional rights and the organs of government whose duty it is to obey and fulfil those rights. It is far from the only reasonable and logical conclusion that PAJA, which seeks to give legislative content to the right to just administrative action, must necessarily afford the exclusive or indeed the most appropriate pathway for state self-review.

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[111] The common law doctrine of *functus officio*, as developed in our courts during the nineteenth century, did not allow public officials to review their own prior decisions, with the premise being that the administrative powers conferred on them by statute are exhausted by their initial exercise. The rationale for this doctrine rested on the importance of finality and certainty as desiderata of the rule of law. See Pretorius "The Origins of the Functus Officio Doctrine, With Specific Reference to its Application in Administrative Law" (2005) 122 *SALJ* 832.

[112] This principle was first developed in a series of decisions by the Supreme Court of Appeal: *Pepcor Retirement Fund v Financial Services Board* [2003] ZASCA 56; 2003 (6) SA 38 (SCA); *Qaukeni* above n 98; and *Ntshangase v MEC for Finance: KwaZulu-Natal* [2009] ZASCA 123; 2010 (3) SA 201 (SCA).

[113] See *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 45 and 51.

[114] Section 33 of the Constitution.

Purpose-driven procedure: the delay enquiry

[117] It is with this imperative objective of legality review in mind that we deal with the procedural obstacles this case presents to the Municipality's self-review application.

[118] It is important, at the outset, to clarify that we are dealing with a review where delay is a central feature. The law is clear where delay is not a feature. On that, we are on the same page as the first judgment.

[119] Where there has been no delay by an organ of state in seeking to review its own prior decision, a declaration of unlawfulness should invariably be made.[115] In *AllPay II*, we affirmed that this "default position" reflects the most basic imperative of the principle of legality in "requir[ing] the consequences of invalidity to be corrected or reversed where they can no longer be prevented".[116] In bringing an application for self-review promptly, the state is also complying with its duty to correct suspected unlawful decisions expeditiously and diligently.[117] In short, timely self-review generally results in a win-win for the rule of law.

[120] Where there is non-negligible delay by an organ of state in bringing a self-review application, the court must determine whether the delay is reasonable and should accordingly be condoned. In *Khumalo*, this Court rightly cautioned that "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".[118] Skweyiya J was quick

[115] See *AllPay Consolidated Investment Holdings (Pty) Ltd* v *Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*AllPay II*) at paras 29-30; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (*Bengwenyama*) at paras 84-5.

[116] *AllPay II* id at para 30.

[117] *Khumalo* above n 25 at para 36; section 7(2) read with section 237 of the Constitution. See also *Bengwenyama* above n 115 at paras 84-7.

[118] *Khumalo* id at para 45. This was affirmed in *Tasima I* above n 24 at para 160.

to add, however, that this does not make the procedural requirement regarding delay superfluous.[119]

[121] On the contrary, the delay bar serves an important rule of law function: it promotes the public interest in the certainty and finality of decision-making.[120] This is an imperative focus whenever a court undertakes a case-specific enquiry as to the reasonableness of the delay. The explanation proffered is a key consideration in assessing its reasonableness, particularly in state self-review.[121] It is an opportunity for the state to demonstrate that its self-review seeks to promote open, responsive and accountable government rather than the self-interest of state officials seeking to evade the consequences of their prior decisions. This is the key in deciding whether the Municipality's behaviour passes the interests of justice test for granting leave to appeal.

[122] Even where a delay is found to be unreasonable, however, our precedents establish that a court retains a discretion to overlook the delay provided it is in the interests of justice to do so.[122] This stage of the procedural enquiry should not take place in a "vacuum". It must instead involve weighing (a) the effect of the delay on the parties[123] and (b) the nature of the impugned decision.[124]

[123] It is only at this stage that we differ from the first judgment in our application of this Court's guidelines, including those in *Gijima*, for addressing an unreasonable delay when a state organ seeks to have its own decision set aside.

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[119] *Khumalo* id.

[120] Id at para 47.

[121] *Gqwetha* 33 at para 24.

[122] *Khumalo* above n 25 at para 49, affirming *Gqwetha* id at para 31.

[123] *Khumalo* id at para 52, affirming *Gqwetha* id at paras 33-4.

[124] *Khumalo* id at para 57, affirming *Gqwetha* id at para 33.

[124] The first judgment requires "a full and honest explanation for the whole period of the delay"[125] and seeks to hold it, as a constitutional organ bearing higher duties in relation to accountability, "to a rigorous standard".[126] It finds no basis to overlook the Municipality's unreasonable delay, but nevertheless concludes that the interests of justice favour pronouncing on the unlawfulness of the conduct while also affording ASLA a just and equitable remedy.[127]

[125] In this, the first judgment reflects the ambivalence that emerges from this Court's own previous decisions. These have insisted that where delay is unreasonable and unexplained, the nature of the application and its merits would not favour overlooking it (*Khumalo*),[128] and indeed that undue delay should not be overlooked (*Tasima I*).[129] These decisions have also asserted that a government actor must afford a court a basis for overlooking inordinate delay (*Gijima*),[130] in the absence of which there can be no possible basis for exercising the court's discretion to assist the actor by affording it the relief it seeks.

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[125] See the first judgment at [80].

[126] Id at [79].

[127] Id at [102] to [105].

[128] *Khumalo* above n 25 at paras 67-9:

> "[W]e are left with no means accurately to verify whether the absence of reasons to motivate the departure from the requirements reflects that there truly were no reasons or if those reasons are merely not discoverable at this late stage. A full picture of the promotion's legality is thus not reliably ascertainable on the evidence before the Court, nine years after the fact. While the MEC might not be responsible for the entire period of the delay that affects the Court's assessment of the decision's lawfulness, objectively the passage of the extended period of time since the decision was made stands in the way of this Court making a clear determination of the promotion's unlawfulness. This is a consideration rather peculiar to these facts and the particular basis of the challenge.
>
> The nature of the application and the strength of the merits do not favour overlooking the delay. The delay was unreasonable and unexplained and, although we might ameliorate the consequences of a possible finding of unlawfulness in remedy, the nature of the claim does not warrant condoning the delay.
>
> The Labour Court erred in overlooking the delay."

[129] *Tasima I* above n 24 at paras 142-4.

[130] *Gijima* above n 3 at para 49:

> "[N]o discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us to do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here. That should be the end of the matter".

[126] At the same time, in tension with these enunciations, our precedents have sought to impose a square on the circle they create by nonetheless inquiring into the legality of the state conduct at issue, and thence to afford deserving subjects dealing with the errant state body a just and equitable remedy (*Tasima I*,[131] *Gijima*[132]) in exercise of the wide remedial powers the Constitution grants a court faced with invalid conduct.[133]

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[131] In *Tasima I* above n 24, the Court ordered as follows:

> "1. The application to lead new evidence is refused.
>
> 2. Leave to appeal is granted.
>
> 3. The appeal is upheld insofar as the counter application succeeds.
>
> 4. The order of the Supreme Court of Appeal is set aside and replaced with the following:
>
> i. Within 30 days of this order, Tasima is to hand over the services and the electronic National Traffic Information System to the Road Traffic Management Corporation.
>
> ii. Unless an alternative transfer management plan is agreed to by the parties within 10 days of this order, the hand-over is to be conducted in terms of the Migration Plan set out in schedule 18 of the Turnkey Agreement.
>
> 5. The finding of contempt in part 1 of the order made by the Supreme Court of Appeal is upheld for the period before the counter application succeeded, but lapses thereafter.
>
> 6. Each party is to pay its own costs."

[132] In *Gijima* above n 3, the Court made the following order:

> "1. Leave to appeal is granted.
>
> 2. The appeal is upheld in part.
>
> 3. The order of the High Court of South Africa, Gauteng Division, Pretoria is set aside, and replaced with the following:
>
> (a) The applicant's decision to appoint the respondent as a DSS service provider under a contract which was to be effective from 1 April 2012 to 31 July 2012 and all decisions in terms of which the contract was extended from time to time are declared constitutionally invalid.
>
> (b) The order of constitutional invalidity in paragraph 3(a) does not have the effect of divesting the respondent of any rights it would have been entitled to under the contract, but for the declaration of invalidity.
>
> 4. The applicant must pay the respondent's costs, including costs of two counsel, in the High Court, the Supreme Court of Appeal and in this Court."

[133] Section 172 provides:

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

[127] The first judgment follows this approach by affording a deserving subject – the respondent here – a just and equitable remedy, but only after inquiring into and pronouncing upon the government action in issue, in defiance of the unexplained and unreasonable delay in coming to court.[134] We appreciate the judicial pragmatism in this approach, and recognise its forebears in our own jurisprudence. But equally present in that jurisprudence is the clear insistence that delay must be explained, that the court has to be fully informed, that unexplained delay impedes just adjudication and that in the absence of explanation no indulgence can be afforded.

[128] We suggest an alternative route. This is that, in the absence of adequate explanation for unreasonable delay, courts should not intervene to inquire into a final and determinative holding into unlawfulness, unless the seriousness of the unlawfulness at issue warrants overlooking the manifest deficiencies in the state actor's case.

[129] The facts here offer a good example. Yes, the Municipality complained about the Reeston contract's non-compliance with constitutional procurement requisites, but none of the deficiencies it instanced, and none of the external factors surrounding the performance of the contract, imperatively warrant the court's overlooking the public body's egregious lapse in failing to explain the delay.

[130] None of the values underlying self-review afford any virtue in pronouncing on the lawfulness of the conduct at issue here. No evidence suggests any manifest deficiency in lawfulness that may outweigh the importance of insisting on the state's

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(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."

[134] The first judgment engages extensively in the merits ([83] to [96]) in order to conclude unlawfulness, whereas the self-evident unlawfulness in *Gijima* meant there was no need for a detailed consideration of the merits, hence the jump from the delay enquiry to relief. This departure from *Gijima* in undertaking a fully-fledged merits enquiry demonstrates that, unlike *Gijima*, there is no manifest unlawfulness here.

scrupulous adherence to legal requirements in complying with its constitutional duties. All we have is a public body that seeks to evade the consequences of its prior decision without offering any explanation at all for its delay in coming to court. And – as the first judgment rightly notes – the Municipality only adds to the topsy-turviness of all this by now seeking an order pronouncing the conduct sought to be impugned as valid.[135]

[131] All this points inexorably to one pragmatic, just conclusion: that it is not in the interests of justice for this Court to entertain the Municipality's application, and that leave to appeal must be refused.

[132] Refusing to overlook the Municipality's unreasonable and unexplained delay, and refusing to countenance its illogical somersault in now seeking court sanction for the impugned conduct, does not denote slavish adherence to procedure. Rather, it recognises that the procedural rules regarding delay should be applied in pursuance of the overarching objective of legality review. The delay rule should not be viewed solely through the ancestor lens of common law review, but through our constitutional lens in which legality review serves to promote open, responsive and accountable government.

[133] This purpose-driven approach to procedure is very different to the formalistic notion that the delay rule must necessarily be assessed as a point *in limine* (preliminary point) that precludes any consideration of the merits of the review. Rather, a careful weighing up of two different aspects of the rule of law is required when considering whether it is in the interests of justice to condone or overlook a delay: the importance of declaring (and correcting) unlawful decisions, and the importance of expeditious and diligent compliance with constitutional duties so as to ensure certainty and finality for the parties relying on such decisions.

[135] See [97] to [99].

[134] In *Khumalo*, this Court held that the effects of the delay on the parties should not generally cause an applicant to be non-suited because the court's remedial powers can be exercised to mediate any potential prejudice to the parties in overlooking the delay and control the possible consequences of setting aside the impugned decision.[136] The nature of the impugned decision concerns the seriousness of the illegality, and therefore has a direct bearing on the importance that is attached to declaring the decision unlawful. The weight that should be afforded to this factor is not yet settled in our legality jurisprudence. It is therefore unsurprising that we part ways on this very point with the first judgment.

The nature of the impugned decision

[135] *Khumalo* offers an instructive point of departure for considering when the nature of the impugned decision might justify overlooking an unreasonable delay. The Court held that the enquiry "requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge".[137] The pivotal question was whether it was in the interests of justice to pronounce on the unlawfulness of the decision.

[136] Since there was scant detail to explain the Member of the Executive Council's impugned decision, the *Khumalo* Court *did not pronounce on the lawfulness or constitutional validity of the decision* at all. The lack of an explanation was an impediment, even though the Court had observed that the decision was apparently unfair and there were reasons to suspect it was unlawful.[138] The public warrant in inquiring into the decision at issue stopped exactly there. So the Court made no finding on the unlawfulness of the decision.

[136] *Khumalo* above n 25 at para 53.

[137] *Khumalo* id at para 57. See also *Aurecon* above n 27 at para 49; *SANRAL* above n 56 at para 81; and *Gqwetha* above n 33 at para 24.

[138] *Khumalo* id at paras 59-69.

[137] Just so here. There is no compelling reason for this Court to entertain the Municipality's application for leave to appeal. That was so before its settlement was placed before us with such conspicuous and contradictory illogicality. The first judgment, even though it refuses to condone the lateness of the Municipality's review application, nevertheless proceeds to consider the lawfulness of the decision.[139] We cannot go that route, and our precedents do not oblige it.

[138] The important principle here is how this Court manages complex institutional settings of corruption and maladministration, particularly at the local government level. If this Court were to allow collateral review challenges in the face of utterly unreasonable delays, without even minimal explanations, the important protections our judgments have elaborated would provide leaky cover.[140]

[139] In exercising its discretion whether to hear a review despite unreasonable delay it is not necessary that a final and definitive pronouncement always be made on the unlawfulness of an exercise of public power or an administrative action. This is especially so when the public body approaches the Court with questionably smudged hands and the possible unlawfulness is not of an obviously serious nature.

[140] The objective served by legality review must therefore be borne in mind when evaluating the importance to be attached to the seriousness of the illegality. A court should be vigilant in ensuring that state self-review is not brought by state officials with a personal interest in evading the consequences of their prior decisions. It should scrutinize the conduct of the public body and its candour in explaining that conduct to ensure, in the public interest, open, responsive and accountable government. Where there is glaring arbitrariness and opportunism – that is, where the government actor's efforts to correct the suspected unlawful decision serve the antithesis of the rule of law – the interests of justice weigh against giving it a free pass by overlooking an unreasonable delay.

[139] See first judgment at [82] to [100] and [101] to [105].

[140] See *Khumalo* above n 25; *Kirland* above n 26; *Aurecon* above n 27; and *Merafong* above n 65.

[141] This case typifies these instances. We spell out our reasons below in our assessment of the facts. Although the first judgment has dutifully set out the background to this case, the facts depict such flagrant opportunism and a bald-faced dereliction of constitutional commitment that they bear repeating.

Absent explanation and inadequate evidence

[142] In August 2014, the Municipality indicated that the Reeston contract would be part of the Turnkey contract and, in a letter from Mr Pillay, dated 4 September 2014, "awarded" the contract to the respondent. There was a change in the office of the city manager. Mr Pillay acted in that office from September 2014 until August 2015. He realised that there was something off about the award of the contract to the respondent. He suspected that the award was unlawful because the Municipality did not adhere to the precepts in section 217 of the Constitution nor did it carry out a procurement process in accordance with the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA). In a letter to the municipal council dated 4 August 2015, Mr Pillay mentioned irregularities in the process. Although no evidence has been offered as to what the response to his letter was (if indeed there was one), Mr Pillay did not make much of his suspicions in the following year. No further explanation as to the events or reasons for the lack of any further action during this period has been offered.

[143] Twelve months later, Mr Pillay's concerns resurfaced when he reported alleged irregularities on the part of the municipal manager to the Executive Mayor. This time the municipal council commissioned an investigation into the lawfulness of the Reeston contract. The investigator, Ms York, confirmed Mr Pillay's suspicions: the contract was unlawful. She found that Mr Pillay's award of the Reeston contract to the respondent contravened the MFMA. Ms York reported this to the Municipality on 21 October 2015.

[144] But even with this report, the Municipality seems to have done nothing. It neither initiated legal proceedings to challenge the lawfulness of the Reeston contract nor informed the respondent that the contract was found to be unlawful and thus should not be implemented. Instead, the Municipality allowed the respondent to continue performing in accordance with the terms of the contract. The only suggestion that the Municipality did not regard the contract as enforceable was its refusal to pay when the respondent submitted invoices for the work it had completed. This was, at best, a weak indication from which to expect the respondent to realise the unlawfulness at issue. The respondent approached the High Court on 15 October 2015. The Municipality had last paid the respondent on 20 May 2015, following a payment certificate issued by the respondent on 28 April 2015. Further payment certificates issued on 3 June 2015, 7 July 2015 and 4 August 2015 remained unpaid. The Municipality raised the unlawfulness of the contract (a collateral challenge of its decision to award the contract) only *after* the respondent dragged it to court for payment in November 2015. This was a month after Ms York's report confirming that the contract was unlawful had been considered by the Municipality. This does not suggest good faith in undoing Mr Pillay's conduct.

[145] The Municipality's hands are thoroughly smudged and grimy. It wanted the High Court and this Court to uphold its defence to a private actor's claim for moneys due on the premise that the claim sprang from an unlawful contract. Yet it did not tell the Court what it knew or knows now, or ought to have known, about precisely that unlawfulness. More specifically, there are significant remaining questions relating to Mr Fani and Mr Pillay's knowledge and roles and we are left wondering why neither of them testified, when at all crucial points in this litigation these persons were still the Municipality's employees. This is a distinctive factual difference from *Gijima*. In that case, the entire governance and management teams had been replaced since the conclusion of the impugned contract. For the Municipality to seek to invoke judicial sanction for unexplained shenanigans while shielding persons from the duty to testify was to treat the duty of full explanation this Court propounded in *Khumalo*, *Kirland* and *Tasima* with near insolence.

[146] In these circumstances, for the Municipality to ask the courts to be party to its assertion of a defence of unlawfulness is untenable. As the first judgment notes, its play, now, to have its resolution of its dispute with the respondent clothed with judicial authority in a settlement agreement is even more conspicuously gross. It expressly concedes that the respondent implemented the Reeston contract in good faith. Nothing here remotely warrants our busying ourselves with the Municipality's claim that the contract is unlawful. The public interest in open and accountable government is not furthered by overlooking the Municipality's failure to comply with its constitutional duties to act swiftly and proactively.

[147] In the absence of explanation, it is opportunistic and arbitrary for the very person who made the decision to shrink back when the review of the decision pans out. And in these proceedings, all this falls right into the Municipality's lap. The Municipality claims to assert legality yet its actions are antithetical to it. To overlook the unreasonable delay in this context is to give the Municipality a free pass. To do so would be counter to the purpose of legality review. Thus we do not consider a definitive pronouncement on the lawfulness of the action under review essential to the determination of the matter.

Conclusion

[148] We agree with the first judgment that the Supreme Court of Appeal erred in not considering, at all, whether the Reeston contract was lawfully awarded. When determining the unreasonableness of the delay and exercising its discretion whether to allow consideration of the review, the court must balance the seriousness of the possible illegality with the extent and unreasonableness of the delay. In the circumstances of this case, the delay is sufficiently more inexcusable than the possible illegality is egregious, and the balance tips against this Court's intervention. The possible breach of legality in this case, while relevant, does not outweigh a delay which, by way of its length and lack of explanation, is among the most serious of its kind. It is instead more than enough to note that the respondent acted in the

reasonable and good faith belief that the contract was regularly and properly awarded. Nothing in the Municipality's case suggests the opposite. So there is no manifestly serious irregularity or illegality demanding intervention.

[149] On the contrary, public interest factors indicate that it would be grossly unjust to deprive the respondent of its contractual bargain and to leave it to the enrichment claim that the Municipality says must suffice for it.[141] In exercising a court's discretion to decide, notwithstanding unreasonable delay, whether the review should be heard, we hold that in these particular circumstances, there is little if any ground for exercising that discretion in favour of the Municipality. There is no need for us to find that equitable refuge in our remedial powers under section 172 as the first judgment does – the procedural obstacles to overlooking the Municipality's unreasonable delay reach the same just and equitable outcome.

[150] The important point is that there is no reason to intervene to vindicate any public principle of contract or section 217 transparency or fairness. There is no public purpose that would be served here by getting to the Municipality's antecedent challenge at all. In *Gijima*, this Court correctly pronounced the principle founded in section 172(1)(a) of the Constitution that this Court is mandated "to declare invalid any law or conduct that it finds inconsistent with the Constitution".[142] However in this instance we find that there was no proper ground for exercising a discretion in favour of the Municipality to hear the review. Resorting to section 172(1)(a) is not necessary to arrive at a just outcome.

[151] For these reasons, which are quite distinct from the Supreme Court of Appeal's pre-*Gijima*, PAJA approach, there was sufficient further justification for not exercising the discretion to allow the review to be considered, despite unreasonable

[141] See *SANRAL* above n 56 at para 79.

[142] *Gijima* above n 3 at para 52. Section 172(1)(a) provides:

> "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."

delay. As stated earlier, the point is not the formal one of common law review, that delay necessarily precludes consideration of the merits, but one of weighing up different aspects of the rule of law: on the one hand upholding the rule of law by a formal declaration of invalidity, as against another vital component of it, the expeditious and diligent compliance with constitutional duties.

[152] What remains is to deal with the effect of the proposed settlement agreement and the application to make it an order of court. For the reasons given in the first judgment we agree that the agreement cannot be made an order of court. Because of that condition in the agreement, an ordinary withdrawal is also not open for us to confirm. But the fact of the agreement, even without court sanction, appears to us to strengthen our conclusion that it is not appropriate for this Court to make a final pronouncement on legality at this late stage.

[153] The mere fact of the proposed settlement agreement supports the conclusion that we have come to: that there was good faith in the Reeston contract, no manifestly illegal conduct involved, and no necessity in these particular circumstances for setting it aside. This is an additional reason why leave to appeal against the Supreme Court of Appeal judgment must be refused. The issue of whether it is in the interests of justice to grant leave to appeal extends beyond the legal requirements for condonation of delay in state self-review legality reviews. Even if we had agreed with the first judgment that determination of the lawfulness of the Reeston contract would ordinarily have been called for, the Municipality's conduct in entering into a settlement agreement that fundamentally undermines that contention, shows that it is in the interests of justice not to go that route.

[154] We would thus refuse leave to appeal, with costs.

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