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AN ASSESSMENT OF THE DELAY RULE IN JUDICIAL REVIEWS BY ORGANS OF STATE SEEKING TO REVIEW THEIR OWN ADMINISTRATIVE ACTS

by

MAKGATI MAKGATHO

Submitted in partial fulfilment of the requirements for the degree Master of Laws (LLM) in Constitutional and Administrative law

In the Faculty of Law,

University of Pretoria

July 2021

Supervisor: Dr Melanie Murcott

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Summary

This dissertation argues that applying a flexible delay rule to self-reviews of administrative acts under the principle of legality facilitates enhanced state accountability and contributes to upholding the rule of law. This flexibility is particularly important amidst allegations of widespread corruption and maladministration in South Africa that necessitate strong accountability mechanisms.

Public functionaries are granted express power to participate in commercial transactions in the public interest. When this power is exercised unlawfully, the state has an opportunity to remedy its unlawful administrative acts through the court process of judicial review. The delay rule requires judicial reviews to be instituted without unreasonable delay. Courts must pronounce on the issue of delay prior to considering the unlawfulness of a public act.

After defining the delay rule in the context of self-reviews, this study compares the delay rule set out in the Promotion of Administrative Justice Act (PAJA) with the delay rule under the principle of legality. Through case law, this research establishes that the PAJA delay rule is applied rigidly by courts. This rigidity has led to courts dismissing self-reviews after finding that a public functionary's review application was instituted unreasonably late and the delay could not be overlooked in terms of PAJA. The dismissal has meant that the impugned public act was neither declared unlawful nor set aside, undermining accountability and the rule of law. This study finds that the application of a less strict delay rule under legality in self-reviews enables courts to declare public acts in contravention with the Constitution unlawful notwithstanding an unreasonable delay in pursuit of accountability and the rule of law.

Annexure G

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Declaration of originality

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Declaration

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To my creator, my God, for never failing me.

I dedicate this dissertation to my late father Mr Samuel Ntsugi Makgatho.

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CHAPTER 1

Introduction

This dissertation offers a critical analysis of the approach to and application of the delay rule under the constitutional principle of legality in the context of self-reviews by organs of state. The term 'self-review', discussed further below, refers to public entities approaching courts to review and set aside their own exercises of public power.[1] With reference to case law, and recognising that self-reviews are adjudicated in terms of the principle of legality, this study evaluates whether and to what extent courts have applied the delay rule to self-reviews under the constitutional principle of legality differently from the delay rule in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Further, this study evaluates whether and to what extent the application of the delay rule in terms of the principle of legality to self-reviews has facilitated enhanced accountability and upheld the rule of law. As explicated in this chapter, the delay rule prescribes that judicial review proceedings seeking to impugn the validity of public power must be instituted without unreasonable delay.[2]

This chapter introduces the issues to be addressed in this study, mainly how the courts' strict application of the delay rule under PAJA has hindered organs of state from redressing their own corrupt activities at the expense of the rule of law.[3] This chapter introduces the delay rule and establishes that it is aimed at preserving certainty and finality and preventing prejudice to persons who have conducted themselves in accordance with specific public acts.[4] The chapter also provides motivation for the study with reference to the need to ensure effective means to hold the state accountable specifically through self-reviews, in a time when corruption is rampant in South Africa. Finally, this chapter sets out the structure of the dissertation.

Introducing the delay rule in judicial review proceedings

The delay rule prescribes that judicial review proceedings to challenge the validity of exercises of public power, whether in terms of PAJA or the principle of legality, must

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1 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (6) BCLR 661 (CC) (hereafter *Buffalo City*) para 38.

2 Section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). *Gqwetha v Transkei Development Corporations Ltd and others* 2006 (3) ALL SA 245 (SCA) (hereafter *Gqwetha*) para 22.

3 *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (3) BCLR 333 (CC) (hereafter *Khumalo*) para 46 – 48. JR de Ville *Judicial Review of Administrative Action in South Africa* revised first ed (2005) 68. K Malan 'The rule of law versus *decisionism* in the South African constitutional discourse' (2012) 45 *De Jure* 272 272. C Hoexter *Administrative Law in South Africa* 2 ed (2012) 532.

4 *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2004 (4) ALL SA 133 (SCA) (hereafter *Van Zyl*) para 46. De Ville (note 3 above) 436. M Nold de Beer 'Invalid Court Orders' (2019) 9 *Constitutional Court Review* 283 295.

be instituted without unreasonable delay.[5] In terms of section 7(1) of PAJA, judicial reviews must be launched without unreasonable delay, and within 180 days from the date on which internal remedies have been exhausted or where no such internal remedies exist, 180 days from the date on which the relevant person became aware of the administrative action.[6] In contrast with PAJA, legality does not provide for a fixed 180 day time period within which review applications ought to be instituted.[7] In legality reviews, the proverbial clock begins to run from the date on which the applicant became or ought to have reasonably become aware of the impugned public act.[8]

In terms of section 9(2) of PAJA, elucidated in chapter 2, the prescribed 180-day period may only be extended for a fixed period by agreement between the parties or on application by the person or administrator concerned and in the interests of justice, a question which turns on the facts and circumstances of each case, as well as the reasons for the delay.[9] By imposing a rigid 180-day time period that can only be extended under limited circumstances, the delay rule under PAJA is potentially onerous. Among other things, it creates a presumption that a delay longer than 180 days is *per se* unreasonable.[10] As analysed in chapter 2, the delay rule under legality creates no such presumption.

Often, applications for the review and setting aside of public power, particularly self-reviews, are plagued with delays in instituting the relevant application proceedings.[11] The issue of delay may be raised by either party to the judicial review proceedings or by the court *mero motu*, on condition that such a court provides the applicant with an opportunity to formally address the delay in its court papers.[12] Judicial reviews may be dismissed on the ground of delay alone. Thus, by virtue of a strict or rigid

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5 Section 7(1) PAJA. *Gqwetha* (note 2 above) para 22.

6 Section 7(1) PAJA. *Beweging vir Christelik-Volkseie Onderwys and others v Minister of Education and others 2012 (2) All SA 462 (SCA)* (hereafter *Beweging*) para 34.

7 *Khumalo* (note 3 above) para 44. *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2009 JOL 24157 (SCA) (hereafter *Oudekraal* 2).

8 *Buffalo City* (note 1 above) para 49.

9 *Buffalo City* (note 1 above) para 47. *Camps Bay Ratepayers' and Residents' Association v Harrison* 2010 2 All SA 519 (SCA) (hereafter *Camps Bay Ratepayers'*) para 54.

10 *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* 2013 (4) All SA 639 (SCA) (hereafter *OUTA*) para 26.

11 *Moseme Road Construction CC and Others V King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) (hereafter *Moseme*) para 1. See *Khumalo* (note 3 above); *Merafong City Local Municipality v Anglogold Ashanti Limited* 12016 JOL 36772 (CC) (hereafter *Merafong*); *Swifambo Rail Leasing (Pty) Ltd Limited v Passenger Rail Agency of South Africa* 2018 JOL 40651 (SCA) (hereafter *Swifambo* SCA); *City of Cape Town v South African National Roads Agency Ltd and others* 2016 (1) All SA 99 (WCC) (hereafter *SANRAL*); *Commission for Conciliation, Mediation and Arbitration v Milestone Property Group (Pty) Limited and others* 2019 (219) JOL 45194 (GJ) (hereafter *CCMA*); *City of Cape Town v Aurecon South Africa (Pty) Ltd (Consulting Engineers South Africa as amicus curiae)* 2017 (6) BCLR 730 (CC) (hereafter *Aurecon*).

12 *Mamabolo v Rustenburg Regional Local Council* 2000 (4) All SA 433 (A) para 9. C Hoexter *Administrative Law in South Africa* 2 ed (2012) 532.

application thereof, the delay rule may on the one hand, prevent the redress of unlawful and irregular public power and have adverse effects on constitutional principles, including the rule of law which requires that all public power must be lawful, and that no one is above the law.[13] On the other hand, since administrative decisions create rights and impose obligations that persons are, in terms of the rule of law, entitled to rely on, the delay rule, both under PAJA and the principle of legality, constitutes a mechanism through which, amongst others, certainty and finality are preserved.[14] Moreover, the delay rule encourages the timeous institution of judicial review proceedings in order to prevent prejudice to those who have arranged their affairs in accordance with specific administrative acts.[15] In the context of self-reviews, the delay rule encourages public functionaries to adhere to principles of certainty, finality, fairness and legality, to carry out their statutory functions with due care and skill, expeditiously ensuring that such functions are lawfully executed, and to swiftly take steps to rectify unlawful conduct, by instituting self-reviews within a reasonable time.[16] Thus, the delay rule also serves to uphold the rule of law to the extent that the rule of law requires certainty and finality in the exercise of public power.

The Supreme Court of Appeal in *Buffalo City* SCA emphasised the delay rule's goal of avoiding prejudice to parties with an interest in the public act that an organ of state seeks to set aside in a self-review after an unreasonable delay.[17] In *Buffalo City Metropolitan Municipality* (Buffalo Municipality) *v Asla Construction (Pty) Ltd* (*Buffalo City* HC), the Buffalo Municipality applied to the high court in terms of section 6 of PAJA to have a contract it concluded with Asla Construction (Pty) Ltd (Asla) reviewed and set aside on the basis that the contract was procured in contravention with section 217(1) of the Constitution.[18] The self-review application was lodged 456 days after the contract was awarded and 278 days after the contract was concluded.[19] The high court found Buffalo's delay in instituting its self-review unreasonable.[20] It further found that the impugned contract was in breach of statutory prescripts that regulate public procurement.[21] The court proceeded to set aside the contract.[22] On appeal, the Supreme Court of Appeal found that Asla had completed work amounting to

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13 *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) (hereafter *Gijima* SCA) para 55. Malan (note 3 above) 272.

14 *Khumalo* (note 3 above) para 46 – 48. De Ville (note 3 above) 68. Hoexter (note 3 above) 277. Malan (note 3 above) 272.

15 *Van Zyl* (note 4 above) para 46. De Ville (note 3 above) 436. Nold de Beer (note 4 above) 295.

16 Hoexter (note 3 above) 277.

17 *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (23) JOL 37586 (SCA) (hereafter *Buffalo City* SCA) para 19.

18 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2016 (4) ALL SA 60 (ECG) (hereafter *Buffalo City* HC) paras 1 & 5.

19 *Buffalo City* HC (note 18 above) para 10.

20 *Buffalo City* HC (note 18 above) para 72.

21 *Buffalo City* HC (note 18 above) para 74.

22 *Buffalo City* HC (note 18 above) paras 67 & 77.

R30 863 832,70 and thus the extent of its prejudice was far greater than determined by the high court.[23] The Supreme Court of Appeal held that in light of Buffalo's failure to furnish full and adequate reasons for the entire duration of its unreasonable delay and the severe prejudice to Asla, the high court should not have set aside the contract.[24] The court recognised that people, including private entities appointed to fulfil institutional functions and obligations, may rely and base their conduct on the assumption of the lawfulness of a particular state act.[25] The court acknowledged that Asla would arguably not have performed under the contract and incurred costs had it not placed reliance on the finality of the decision to award the contract to it.[26]

It has also been acknowledged that a delay in the institution of review proceedings can also impact on the courts' ability to adjudicate the matter effectively and thus on the administration of justice.[27] In *Department of Transport and others v Tasima (Pty) Limited and others v Road Traffic Management Corporation and others*, a self-review by the Department of Transport and other department officials (Department) lodged in terms of PAJA, the Constitutional Court expanded on prejudice arising from an unreasonable delay in instituting a self-review.[28] The Department instituted its review five years after it became aware of the impugned extension of a contract it had with the respondent.[29] In considering whether to overlook the Department's unreasonable delay, the Constitutional Court held that an unreasonable delay may hamper its ability to consider the merits of the application and undermine public interest in bringing certainty and finality to administrative acts.[30] However, the court found that the merits were compelling enough to overlook the delay and ruled that the extension was void.[31] In *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal* (*Khumalo*), also a belated self-review, the Constitutional Court held that the clarity and accuracy of the relevant administrator's memory is bound to decline with the lapse of time.[32] Furthermore, documents and other evidence may be lost or destroyed.[33] The Constitutional Court held that as a result, the information submitted

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23 *Buffalo City* SCA (note 17 above) para 19.
24 *Buffalo City* SCA (note 17 above) para 24.
25 *Khumalo* (note 3 above) para 47. *Van Zyl* (note 4 above) para 46.
26 *Buffalo City* SCA (note 17 above) para 10.
27 *Gqwetha* (note 2 above) para 22. *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd* 2005 JOL 15567 (SCA) (hereafter *Standing Tender Committee*) para 28.
28 *Department of Transport and others v Tasima (Pty) Limited and others v Road Traffic Management Corporation and others* 2018 (9) BCLR 1067 (CC) (hereafter *Tasima*) para 160. *Tasima (Pty) Ltd v Department of Transport and others* 2016 (1) All SA 465 (SCA) para 24.
29 *Tasima* (note 28 above) paras 3 & 153.
30 *Tasima* (note 28 above) paras 158 & 160. R Summers 'When certainty and legality collide: The efficiency of interdictory relief for the cession of building works pending review proceedings' (2010) 13 *Potchefstroom Electronic Law Journal* 160 183.
31 *Tasima* (note 28 above) paras 131 & 171.
32 *Khumalo* (note 3 above) paras 48 & 50.
33 As above.

is likely to be incomplete and hamper the court's ability to duly consider all the relevant facts of a matter and make a proper finding on alleged illegalities.[34]

Having outlined the delay rule under PAJA and legality, and described the rationale for the delay rule, this dissertation turns now to discuss self-reviews and the basis upon which self-reviews are instituted in South Africa.

Self-reviews and the principle of legality

The value of the rule of law provided for in section 1(c) of the Constitution, and the constitutional duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights, entail that state organs have a legal duty to, within the bounds of the law, in the interest of justice and in the public interest, rectify the unlawfulness of their public acts.[35] It is against these constitutional prescripts that self-reviews have provided organs of state with an opportunity to remedy their own irregular and unlawful administrative acts through the court process.[36] Self-reviews have been utilised as a mechanism to curb corruption in a number of matters including the appointment of public officials, the transfer of real rights and the award of public contracts to private sector parties.[37]

The principle of legality, which is an incident of the rule of law, is one of the many pathways to take exercises of public power on review to courts.[38] Legality competes with PAJA as a pathway to review public power, as PAJA is intended to be the primary pathway to judicially review a particular species of public power namely, 'administrative action'.[39] In November 2017 the application of the principle of legality was expanded to apply to self-reviews of administrative action that would be

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34 As above.

35 Section 7(2) of the Constitution. *Pepcor Retirement Fund and another v Financial Services Board and another* 2003 (3) All SA 21 (SCA) para 10. *Khumalo* (note 3 above) para 35 & 36. *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) (hereafter *Transnet*) paras 7 & 26. G Quinot *State Commercial Activity: A Legal Framework* (2009) 98-102.

36 *Khumalo* (note 3 above) para 35.

37 *Khumalo* (note 3 above). *Swifambo* SCA (note 11 above). *Sakhisizwe Local Municipality v Tshefu and others* 2020 (2) All SA 299 (ECG) (hereafter *Sakhisizwe*). Quinot (note 35 above) 9 – 11.

38 M Du Plessis 'The variable standard of rationality review: Suggestions for improved legality jurisprudence' (2013) 130 *South African Law Journal* 597 598. *Speaker of National Assembly v De Lille MP and Another* 1999 (11) BCLR 1339 (SCA) para 14.

39 Section 1 of PAJA defines 'administrative action' as a decision of an administrative nature by an organ of state exercising public power or performing a public function in terms of legislation or an empowering provision, that adversely affects rights, has a direct external legal effect and that does not fall under the exclusions listed in section 1 of PAJA. *Telkom SA Ltd v Merid Trading (Pty) Ltd & others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd & others* 2011 (1) ZAGPPHC (GNP) (hereafter *Telkom*) para 10. See also *Minister of Defence and Military Veterans v Motau and Others* 2014 (8) BCLR 930 (CC) para 33 and *Superintendent-General: North West Department of Education and Another v African Paper Products (Pty) Ltd and Others* unreported case no. M282/14 24 October 2014 http://www.saflii.org/za/cases/ZANWHC/2014/29.pdf (accessed 18 February 2021).

reviewable in terms of PAJA if brought as ordinary reviews and not self-reviews.[40] In *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* (*Gijima*) the Constitutional Court held that the intended beneficiaries of the right to just administrative action enshrined in section 33(1) of the Constitution are private (natural and juristic) persons and that the state is the bearer of any obligations brought by this right.[41] The Constitutional Court found it inconsonant that the state can be both the beneficiary and bearer of the corresponding obligation intended to give effect to the right to just administrative action.[42] Therefore, legality was found to be the proper pathway to review in the context of self-reviews, even where the conduct of an organ of state constitutes administrative action as defined by PAJA.[43]

Since the court's finding in *Gijima*, the courts have been confronted with a number of self-reviews instituted in terms of the principle of legality. Many of these self-reviews have been brought after a lengthy delay. As discussed in this dissertation, the courts have thus had to make sense of the delay-rule in the context of self-reviews, and navigate the rule of law's competing interests in the certainty and finality on the one hand, and legality of public power on the other.[44] Next, this dissertation engages with the importance of effective means to hold organs of state accountable by ensuring that public power is performed in a manner consistent with the requirements of legality, and identifies the flexible delay rule under legality as a potential mechanism to facilitate accountability in self-reviews.

Self-reviews and accountability

In recent years, large scale corruption and maladministration has emerged in the context of state commercial activity, especially public procurement.[45] This phenomenon is an aspect of the widely publicised idea of 'state capture', which refers to unethical conduct by state functionaries relating to improper relationships and the corrupt and unlawful award of state contracts to private sector companies.[46] In

40 *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) BCLR 240 (CC) (hereafter *Gijima*) paras 37 & 41.

41 *Gijima (*note 40 above) paras 26 & 38.

42 *Gijima (*note 40 above) paras 37 & 41.

43 *Gijima (*note 40 above) para 27

44 C Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132 *South African Law Journal* 207 218.

45 *Moseme* (note 11 above) para 1. P Sewpersadh & JC Mubangizi 'Using the Law to Combat Public Procurement Corruption in South Africa: Lessons from Hong Kong' (2017) 20 *Potchefstroom Electronic Law Journal* 1 2.

46 PH Munzhedzi 'South African public sector procurement and corruption: Inseparable twins?' (2016) 10 *Journal of Transport and Supply Chain Management* 1 1. Public Protector of the Republic of *South* Africa 'State of Capture: Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministries and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses' 14 October 2016.

response to state capture that is alleged to have occurred during former President Jacob Zuma's term of office, the Judicial Commission of Inquiry into State Capture, chaired by Honourable Justice Raymond Zondo (Zondo Commission), has been mandated by President Cyril Ramaphosa to investigate the affairs, including the unlawful conclusion of contracts of 20 national offices, 80 provincial departments, 20 state-owned entities and 200 municipalities.[47] Judicial review is another prominent mechanism for curbing corruption and controlling maladministration and other abuses of public power.[48] A widely publicised matter, and one that was addressed in both the Zondo Commission and the North Gauteng High Court,[49] concerns the purported procurement of services from McKinsey & Company Africa (Pty) Ltd (McKinsey) and Gupta linked Trillian Management Consulting (Pty) Ltd (Trillian) by Eskom Holdings SOC Limited (Eskom) under its now disgraced former leadership during 2015 and 2016.[50] In *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others*, some two years after the decisions to procure services from McKinsey and Trillan were taken, Eskom's new leadership launched an application in the high court for the review and setting aside of alleged unlawful decisions taken by former leadership.[51] The decisions resulted in payments from Eskom (of public money) in excess of R1,7 billion to McKinsey and Trillian.[52] The self-review was instituted in terms of the constitutional principle of legality prior to the Constitutional Court's finding in *Gijima*.[53] Without making a finding on whether the principle of legality or PAJA was the proper pathway to judicial review the high court overlooked Eskom's delay in launching the review on the basis that procedural challenges should not prevent it from looking into the lawfulness of the impugned decisions.[54] The high court found that the new Eskom board investigated the unlawful conduct of the previous board immediately

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47 *Chairperson of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State v President of the Republic of South Africa and others* 2020 JOL 47002 (GP) para 9. South Africa (2018) Judicial Commission of Inquiry to Inquire into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (Proclamation No. 3, 2018) *Government Gazette* 41403 25 January 2018.

48 L Kohn & H Corder 'Administrative Justice in South Africa: An Overview of Our Curious Hybrid' in H Corder & J Mavedzenge (eds) *Pursuing Good Governance: Administrative Justice in Common-law Africa* (2019) 120 123.

49 *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* 2019 JDR 1256 (GP) (hereafter *Eskom*) para 8.

50 P Burkhardt 'McKinsey apologises for overcharging Eskom' 9 July 2018 https://www.news24.com/fin24/companies/financial-services/mckinsey-apologises-for-overcharging-eskom-20180709 (accessed 14 October 2020). The Gupta brother Ajay, Aril and Rajesh are businessmen who relocated to South Africa in 1993 and control a vast business empire. They have become notorious for the "capture" of former President Jacob Zuma, some of his cabinet ministers and important elements of government. J Pauw *The President's Keepers: Those keeping Zuma in power and out of prison* (2017) 18.

51 *Eskom* (note 49 above) para 1 - 2.

52 *Eskom* (note 49 above) paras 1 & 2. S Smit 'Trillian payments were illegal – Eskom counsel' 18 March 2019 https://mg.co.za/article/2019-03-18-trillian-payments-were-illegal-eskom-counsel/ (accessed 14 October 2020).

53 *Eskom* (note 49 above) para 4.

54 *Eskom* (note 49 above) para 6.

after it took office.[55] Further, the new Eskom board launched the review application in spite of deliberate efforts made by former Eskom officials concealing the dealings with McKinsey and Trillian.[56] The high court went to hold that the interference by individuals within Eskom, the lack of good faith and fidelity towards the interests of Eskom, the interests of justice and the protection of the rule of law as well as constitutionalism demanded a condonation for Eskom's delay.[57] Having condoned Eskom's delay, the high court held that the contracts concluded between Eskom and McKinsey and the payments flowing therefrom were unlawful and invalid and stood to be set aside.[58] In condoning the delay and holding Eskom's former leadership accountable, the court declined to engage in the technical differences between the delay rule under PAJA and the delay rule in terms of the principle of legality. The court arguably intentionally avoided the issue of whether PAJA's rigid delay rule ought to have been applied.

The court's avoidance of PAJA in *Eskom* arguably illustrates a judicial concern that PAJA's delay rule could prevent courts from considering a challenge to the lawfulness of an exercise of public power, and undermine the rule of law in the face of corrupt state behaviour.[59] A rigid application of the delay rule countenanced by PAJA could further discourage public functionaries from ferreting out and prosecuting state lawlessness, even where delay is caused by interferences and resistance from officials within a particular organ of state.

Although the delay rule is intended to promote certainty and avoid prejudice to parties affected by the relevant administrative act,[60] the application of the delay rule to self-reviews under PAJA was potentially problematic because organs of state would often only be in a position to take their own decisions on review following a change in personnel after elections or external investigations by watchdog institutions such as the Auditor-General.[61] In other words, by the time an organ of state institutes a self-review, there would often have been a significant delay (beyond 180 days) since the taking of the impugned decision, and such delay could inhibit the potential to invoke judicial review as a means to hold organs of state accountable, particularly if organs of state were unable to explain the delay. For instance, in *Passenger Rail Agency of South Africa* (PRASA) *v Siyagena Technologies (Pty) Ltd* (*Siyagena 1*) the self-review

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55 As above.
56 *Eskom* (note 49 above) para 7.
57 *Eskom* (note 49 above) para 10.
58 *Eskom* (note 49 above) para 52.
59 *Khumalo* (note 3 above) para 45.
60 *Buffalo City* (note 1 above) para 69. *Khumalo* (note 3 above) para 47.
61 M Merten 'The worst SOE audits ever: 'Act now on accountability,' Auditor General Makwetu tells government' 21 November 2019 https://www.dailymaverick.co.za/article/2019-11-21-the-worst-soe-audits-ever-act-now-on-accountability-auditor-general-makwetu-tells-government/#gsc.tab=0 (accessed 28 July 2020). *Eskom* (note 49 above). *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (3) All SA 971 (GJ) (hereafter *Swifambo* HC).

of a procurement process marred with corruption was dismissed because the high court found that applicant state's review application was unreasonably delayed and the provisions of section 9 of PAJA for extension of the stipulated 180-day period were not satisfied.[62]

As indicated by the Constitutional Court in *South African Association of Personal Injury Lawyers v Heath and Others*, corruption and maladministration are inconsistent with the rule of law and the foundational values of the Constitution.[63] They undermine commitment to the fundamental values of the Constitution and pose a threat to the democratic state.[64] Based on this assertion, the central hypothesis of this dissertation is that notwithstanding the interests of certainty and finality, applying a more flexible delay rule under the principle of legality in self-reviews, as countenanced by *Gijima*, could facilitate enhanced state accountability and contribute towards upholding the rule of law, particularly when allegations of widespread state corruption and maladministration emerge only long after the fact.

Structure of the dissertation

Having introduced the study in this chapter, chapter 2 addresses, in detail, the importance, content and scope of the delay rule under PAJA and how it compares with the more flexible delay rule under the constitutional principle of legality. Chapter 2 will also illustrate how the delay rule under PAJA is applied, in general, differently from the delay rule under legality in the context of self-reviews. Chapter 3 discusses the inconsistent application of PAJA and legality to self-reviews prior to *Gijima*. The chapter elaborates on how the delay rule under the principle of legality came to be applicable to self-reviews (of public power that amounts to administrative action under PAJA). It provides an assessment on how the Constitutional Court in *Gijima* fundamentally changed the application of the procedural hurdles stipulated in PAJA pertaining to delay and the implications of this change on self-reviews. Based on the findings in chapters 2 and 3, chapter 4 critically evaluates the motivation for and criticisms of applying the delay rule in self-reviews under the constitutional principle of legality. Chapter 4 considers the potential abuse of a flexible delay rule by organs of state wishing to belatedly set aside their own unlawful acts and how certainty as an aspect of the rule of law may be undermined by such abuse. Finally, chapter 5 presents conclusions and recommendations on whether the delay rule as applied

62 *Passenger Rail Agency of South Africa v Siyagena Technologies (Pty) Ltd* 2017 JDR 0776 (GP) (hereafter *Siyagena 1*) paras 11,14 & 22 (discussed further in chapter 2).

63 *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) (hereafter *South African Association of Personal Injury Lawyers*) para 4.

64 *South African Association of Personal Injury Lawyers* (note 63 above) para 4.

under the principle of legality does indeed provide a better opportunity for the judiciary and organs of state to redress corruption and maladministration in self-reviews.

Conclusion

This chapter has established that self-reviews exist to promote the open, responsive and accountable exercise of public powers.[65] Open, responsive and accountable exercises of public power are particularly important in the context of the participation of the state in commercial transactions which necessarily involves the use of public money that ought to be incurred in the public interest.[66] Therefore, as a form of corrective action, self-reviews are a means for the state to act in the public interest to rectify and eliminate illegalities in administrative acts by public functionaries.[67] However, the stringent requirements of the delay rule under PAJA potentially acted as a barrier and possibly a deterrent for organs of state who sought belatedly to set aside their irregular administrative acts through judicial review. Against the backdrop of promoting state accountability through judicial review, the next chapter, assesses the scope and application of the delay rule stipulated in PAJA in contrast with the delay rule under the constitutional principle of legality.

65 *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality 2020* (1104/2019) 122 (SCA) para 71.

66 *Transnet* (note 35 above) para 7. G Quinot (note 35 above) 99, with reference to *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en andere* 1992 (2) All SA 548 (A).

67 *Khumalo* (note 3 above) para 33.

CHAPTER 2

The scope and application of the delay rule under PAJA and how it compares with the delay rule under the constitutional principle of legality

Introduction

In illustrating that the delay rule contemplated under the principle of legality imposes less cumbersome procedures, this chapter 2 compares the delay rule as it applies to judicial review proceedings instituted in terms of section 7(1) and 9(2) of PAJA, with the delay rule under the constitutional principle of legality. Further, this chapter considers how courts have applied the delay rule in the context of self-reviews under PAJA and under legality respectively. First, this chapter examines the scope of the delay rule under PAJA, by considering the requirements of section 7(1). Next, it assesses how the prescribed period for the institution of judicial review proceedings may be extended in terms of section 9(2) of PAJA, and how PAJA thus provides courts with a discretion to grant a just and equitable order in the circumstance of an unreasonable delay. Lastly, in contrast with the application of the delay rule in terms of PAJA, this chapter examines the scope of the delay rule under the principle of legality. It discusses the two-step enquiry applied to assess delay under legality, setting out the requirements that applicants, including the state in self-reviews, must comply with for purposes of the delay rule. The last part of this chapter considers first, what constitutes an unreasonable or undue delay under legality, and secondly, the circumstances in which courts may exercise a discretion to overlook a delay in the institution of judicial review proceedings.

The delay rule in terms of PAJA

The delay rule provided for in section 7(1) of PAJA finds its origin in the common law delay rule, which requires that judicial review proceedings must be instituted within a reasonable time.[68] However, the delay rule provided for in PAJA departs from the flexible common law, in that it introduces strict requirements for applicants who seek to institute judicial review proceedings in terms of PAJA to set aside administrative action.[69] First, section 7(1) of PAJA requires judicial review proceedings to be instituted without unreasonable delay and within a 180-day time period.[70] Secondly, section 7(1) prescribes that such judicial review proceedings only be instituted once internal remedies have been concluded or where no such remedies exist, 180 days

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68 *Beweging* (note 6 above) para 41. *OUTA* (note 10 above) para 23. De Ville (note 3 above) 436.

69 *Beweging* (note 6 above) para 41. L Kohn & H Corder ' Administrative Justice in South Africa: An Overview of Our Curious Hybrid' in H Corder & J Mavedzenge (eds) (note 48 above) 128.

70 Section 7(1) PAJA. *Beweging* (note 6 above) para 41. Hoexter (note 12 above) 534. L Kohn & H Corder ' Administrative Justice in South Africa: An Overview of Our Curious Hybrid' in H Corder & J Mavedzenge (eds) (note 48 above) 128.

after the date on which the person concerned was informed of the relevant administrative action, became aware of the administrative action and the reasons therefor or might have reasonably have been expected to have become aware of the action and reasons therefor.[71] The discussion below unpacks what an unreasonable delay is for purposes of PAJA and how the requirement of reasonableness in section 7(1) of PAJA is influenced by the inclusion of the 180-day time period. Thereafter, consideration will be given to the circumstances in which the 180-day period may be extended, as per section 9 of PAJA and where a court may exercise its discretion to decline to set aside an invalid administrative act. The case law reveals that although PAJA's delay rule is not always rigidly applied, it lends itself to rigidity, and is potentially a procedural barrier to accountability.

Unreasonable delay

The institution of judicial review proceedings in terms of PAJA must occur without unreasonable delay. The 180-day time period prescribed by section 7(1) of PAJA is not dispositive of whether a delay in instituting review proceedings is reasonable. Prior to the effluxion of the 180-day period stipulated in section 7(1) of PAJA a delay may be unreasonable.[72] Crucially, however, after 180 days, unreasonableness is pre-determined by PAJA, which creates the presumption that a delay longer than 180 days is unreasonable, and permits the court to review only if it is in the interests of justice to do so.[73]

Accordingly, prior to *Gijima*, PAJA's delay rule could pose a difficulty where an organ of state instituted a self-review outside of the 180-day period from the date on which the organ of state became aware of the administrative act or the reasons for it. For instance, in *Siyagena 1*, PRASA was barred from pursuing a self-review due to its unreasonable delay in launching review proceedings. PRASA instituted a review application in the high court in terms of PAJA to set aside its own decision in awarding tenders to Siyagena Technologies (Pty) Ltd.[74] PRASA lodged its application two years later, after receiving a report from the Public Protector alleging findings of improprieties

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71 Section 7(1)(b) PAJA. The high court in *New Adventure Shelf 122 (Pty) Ltd v Commissioner for the South African Revenue Service 2016 (2) All SA 179 (WCC)*, para 26 held that internal remedies within the meaning of section 7 of PAJA refers to defined and identifiable remedies that were available to the applicant for review when the basis for the complaint about the relevant administrative act, including the administrator's reasons therefor, first arose or reasonable should have become known to the applicant for review.

72 *OUTA* (note 10 above) para 26. *Thabo Mogudi Security Services CC v Randfontein Local Municipality and another* 2010 (4) All SA 314 (GSJ) (hereafter *Thabo Mogudi Security Services*) para 59. *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and others* 2014 (2) All SA 559 (GP).

73 *OUTA* (note 10 above) para 26.

74 *Siyagena* 1 (note 62 above) para 1. *Siyagena* 1 was heard on 2 May 2017 and decided on 3 May 2017. *Gijima* was heard on 9 May 2019 and judgement was handed down on 14 November 2017.

by its former CEO, Mr Lucky Montana in amongst others, awarding Siyagena tenders in return for financial benefits.[75] PRASA did not initially apply for an extension of the 180-day period in terms of section 9 of PAJA.[76] The high court ruled that the argument that the self-review was launched after PRASA's new board learnt of corruption was irrelevant. In the court's view, the awareness of the decisions to award the relevant tenders and their reasons, as per PAJA, occurred when the decisions were made, at which time the 180-day period prescribed by section 7(1) of PAJA began to run.[77]

PRASA belatedly sought condonation for its delay in instituting the review proceedings, but the high court found that PRASA's condonation application did not meet the requirements of section 9 of PAJA, in that PRASA had not made out a case as to why it was in the interests of justice that the delay in bringing the application should be excused.[78] Although the high court did not expressly discuss the reasonableness of PRASA's delay before considering PRASA's section 9 application, the high court undoubtedly followed a strict application of the delay rule contemplated in PAJA and adopted the approach that an application brought after 180 days will be regarded as *per se* unreasonable.

Extension of the 180-day period

Section 9 of PAJA stipulates that the 180-day period prescribed by section 7(1) of PAJA may be extended for a fixed period by agreement between the parties to the judicial review proceedings or by a court, on application by the person or administrator concerned.[79] As highlighted in *Siyagena*, a party applying to the court for an extension must motivate that the extension is in the interests of justice.[80] The application for extension of the 180 days must be substantive and contain an explanation that is reasonable and covers the entire duration of the period of delay.[81] Where no condonation application and/or motivation for extension is made, the review application bears the risk of not being heard, with the result that the challenged decision continues to have effect in law.[82]

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75 *Siyagena* 1 (note 62 above) para 5.
76 *Siyagena* 1 (note 62 above) para 26.
77 *Siyagena* 1 (note 62 above) para 17.
78 *Siyagena* 1 (note 62 above) para 22.
79 Section 9(1)(b) PAJA.
80 Section 9(2) PAJA. *Siyagena* 1 (note 62 above) para 20. *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* 2014 (10) BCLR 1195 (CC) (hereafter *SAPS*) para 60. S Budlender & E Webber 'Standing and procedure for judicial review' in Quinot (ed) *Administrative Justice in South Africa: An introduction* (2019) 229.
81 *Swifambo* HC (note 61 above) para 30. *SANRAL* (note 10 above) para 30.
82 *Siyagena* 1 (note 62 above) para 21. *City of Johannesburg and Another v AS Outpost (Pty) Ltd* 2012 (4) SA 325 (SCA) paras 19-20.

However, where circumstances allow, courts have been willing to grant an extension without being furnished with an adequate explanation that satisfies the requirements of section 9 of PAJA. In *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* (*Swifambo*), in terms of PAJA, and 793 days late, PRASA instituted a self-review application to set aside its decision to award a contract to Swifambo.[83] The high court found the delay unreasonable and held that whether or not the review was in terms of legality or PAJA, good cause for the delay must be shown.[84] Departing from the approach in *Siyagena*, where the court refused to take this factor into account, the high court held that in hearing an application for an extension, the date when the applicant became aware of the irregularity would be a factor that must be taken into account.[85] PRASA submitted that its delay should be condoned given a number of compelling factors. These factors included that: management misled its board of directors about the nature and gravity of the impugned irregularity; the reconstituted board encountered attempts to obstruct the unearthing of the facts; staff members who had resigned were reluctant to cooperate and in some cases actively frustrated the new board's investigations and the new board required time to understand the nature of PRASA's business, its deficient areas and the investigations by the Public Protector and Auditor-General into PRASA.[86] The high court reasoned that although not all the delays in launching the application were explained, the importance of the matter and its prospects of success made up for that.[87] The court further reasoned that in the context of a self-review state institutions should not be discouraged from ferreting out and prosecuting corruption because of delay, particularly where there has been obfuscation and interreference by individuals within the public institution.[88] The high court extended the 180-day time limit contained in section 7(1) of PAJA and held that impugned agreement was unlawful and declared it invalid.[89]

Determining the interests of justice for extending the 180-day period in terms of section 9 of PAJA depends on the circumstances of each case and may include an assessment of the full and reasonableness of the explanation given for the delay.[90] In considering an explanation for the delay, a court must examine relevant factors, including the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the importance of the issue to be raised in the review application and the prospects of success of the review application.[91] Applying these factors to self-reviews, courts have been willing to hold

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83 Swifambo HC (note 61 above) paras 1 & 36.
84 *Swifambo* HC (note 61 above) paras 29 – 30 & 38.
85 *Swifambo* HC (note 61 above) para 33. *Siyagena* 1 (note 62 above) para 17.
86 *Swifambo* HC (note 61 above) paras 19, 27 & 36-37.
87 *Swifambo* HC (note 61 above) para 39.
88 *Swifambo* HC (note 61 above) para 74.
89 *Swifambo* HC (note 61 above) para 80 – 82.
90 *SANRAL* (note 11 above) paras 29 & 30. Hoexter (note 3 above) 535.
91 *Camps Bay Ratepayers* (note 9 above) para 54.

that it is in the interests of justice to condone delay where the challenged administrative act constitutes corruption or fraud on the part of the state, and the state seeks to set aside its own conduct.[92]

Joburg Market SOC Ltd (Joburg Market) *v Aurecon South Africa (Pty) Limited (*Aurecon*)* (*Joburg Market*), a pre-*Gijima* case, provides an illustration of when a delay by an organ of state in a self-review may be condoned in the interests of justice in terms of section 9 of PAJA, alternatively applying the delay rule under the principle of legality. Joburg Market applied to the high court to review and set aside its own decision to award a tender to Aurecon.[93] Joburg Market contended that there were irregularities in its procurement process that led to the incorrect bidder, Aurecon, being awarded the tender.[94] The review application was instituted more than a year subsequent to the tender award.[95] Joburg Market applied for condonation for its failure to bring its application within a reasonable period and raised the question whether its application should be adjudicated within the framework of PAJA or legality.[96] Deciding to overlook the unreasonable delay, the high court reasoned that regardless of whether PAJA or legality applied, it was important to have regard to the nature and effect of the impugned irregularities, as condonation may be granted even where the sufficiency of the explanation for delay, when viewed in isolation, may not be strong, but where the merits of the application have strong prospects of success.[97] The high court reasoned that whilst there is a public interest in the finality of administrative decisions, on the framework of section 217 of the Constitution, there is an equally deserving public interest in ensuring that a tender is awarded in a fair and transparent manner.[98] The high court then ruled that that it was in the interests of justice to condone Joburg Market's delay and that the irregularities in the tender award fell to be set aside.[99]

Joburg Market demonstrates that in considering the nature of the relief sought and the importance of state commercial activity, courts may be swayed by the constitutional obligation bestowed on organs of state to, for example, procure goods and services in a manner that is fair, equitable, transparent, competitive and cost-effective.[100] The acknowledgement of public interest in *Joburg Market*, also reveals that under PAJA, self-reviewing organs of state could still succeed in setting aside their unlawful

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92 *SANRAL* (note 10 above) para 30 – 31.
93 *Joburg Market SOC Ltd v Aurecon South Africa (Pty) Limited* 2017 1036 (GJ) (hereafter *Joburg Market*) paras 1 & 3.
94 *Joburg Market* (note 93 above) paras 21 & 27-28.
95 *Joburg Market* (note 93 above) para 3.
96 *Joburg Market* (note 93 above) para 4.
97 *Joburg Market* (note 93 above) paras 13 & 27.
98 *Joburg Market* (note 93 above) para 39.
99 *Joburg Market* (note 93 above) para 39 – 40.
100 Section 217(1) of the Constitution.

administrative acts, even after a finding that the delay in instituting the self-review was unreasonable for purposes of section 7(1). The decision in *Joburg Market* appears to align with the reasoning that an incomplete explanation for delay will not necessarily bar a court's consideration of a review application.[101]

In contrast with the approach adopted in *Joburg Market,* the City of Cape Town (the City) in *Aurecon* was found to be time-barred from instituting a self-review in terms of sections 7(1) and 9 of PAJA. The City sought to review and set aside its decision to award a tender to Aurecon.[102] Relying on PAJA, the City contended that its decision was to be set aside on the basis of procedural irregularities in the award to Aurecon.[103] The review application was lodged 532 days after the City's decision to award the tender to Aurecon, a *per se* unreasonable delay.[104] Confirming that at the time of the review, the legal position on whether PAJA or legality applied was uncertain, the Constitutional Court proceeded to adjudicate the matter in terms of PAJA, based on the parties' position that PAJA was applicable.[105]

After finding that the City's delay in instituting its review application was unreasonable, the Constitutional Court proceeded to consider whether the delay could be extended in terms of section 9 of PAJA.[106] The court considered the City's explanation for delay, namely bureaucratic governmental processes, and held that this explanation was unsatisfactory.[107] The Constitutional Court confirmed that it had to give due regard to the significance of the impugned procedural irregularities and held that, if the irregularities unearthed manifestations of corruption, collusion or fraud in the procurement process, the Constitutional Court may condone the City's delay, as the interests of clean governance require judicial intervention.[108] However, the Constitutional Court found that the City's review did not fit into the aforesaid consideration.[109] The Constitutional Court held that the City failed to advance persuasive motivation that satisfied the requirements of section 9 of PAJA.[110] Thus, the City's application was dismissed.[111]

Comparing *Aurecon* and *Joburg Market* reveals that each case will be decided on its own merits. Although the facts in *Aurecon* and *Joburg Market* both concerned irregularities in public procurement processes, the Constitutional Court in *Aurecon*

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101 *SANRAL* (note 11 above) para 31.
102 *Aurecon* (note 11 above) para 1. *Aurecon* is also a pre-*Gijima* case.
103 *Aurecon* (note 11 above) para 1.
104 *Aurecon* (note 11 above) para 24.
105 *Aurecon* (note 11 above) paras 34 & 36.
106 *Aurecon* (note 11 above) paras 44 – 45 & 51.
107 *Aurecon* (note 11 above) para 48.
108 *Aurecon* (note 11 above) paras 49 & 50.
109 *Aurecon* (note 11 above) para 50.
110 *Aurecon* (note 11 above) para 51 – 53.
111 *Aurecon* (note 11 above) paras 55 & 57.

adopted a more stringent approach to the PAJA delay rule given that there was neither manifest irregularities nor evidence of corruption. The Constitutional Court did not consider external factors such as public interest in ensuring lawful public procurement. The court focused on its discretion to extend the 180-day period with reference to the motivation, or lack thereof, provided by the City for its delay, as is expressly required in section 9 of PAJA. This resulted in the City being held to the impugned agreement with Aurecon.[112]

In addition, the decision of the Constitutional Court in *Aurecon* illustrates how the PAJA delay rule in theory and on strict application, could be a barrier to the judicial review of invalid administrative action. However, *Swifambo* and *Joburg Market* demonstrate what appear to be exceptional cases where courts, specifically in the context of state corruption and maladministration, interpret section 9 of PAJA to enable a less strict and practical application the PAJA delay rule, in view of upholding the rule of law and good governance.[113]

Courts' discretion to grant a just and equitable order

Section 8 of PAJA stipulates that a court in judicial review proceedings instituted in terms of section 6 of PAJA may grant any order that is just an equitable.[114] This includes an order declaring the rights of the parties, directing a party to the review proceedings to do or refrain from doing something or an order as to costs.[115] Section 8 of PAJA does not limit what constitutes a just and equitable order. The Constitutional Court has provided that it is not wise to set out inflexible rules in determining a just and equitable remedy. A just and equitable remedy requires that in each case appropriate relief must be fair and just.[116]

On interpretation, section 8 of PAJA confers courts with the power to grant a just and equitable order, notwithstanding an unreasonable delay in instituting judicial review proceedings, with the view of addressing unlawfulness and deterring future violations of the law.[117] However, case law demonstrates that in practice, courts do not invoke section 8 of PAJA in circumstances where a review is found to be time-barred. As demonstrated by *Siyagena* and *Aurecon* once courts find that a delay is unreasonable and cannot be overlooked, in terms of section 9 of PAJA, they tend to dismiss review

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112 *Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 (1) All SA 313 (SCA) para 45.

113 *Swifambo* HC (note 61 above) para 74. *Joburg Market* (note 93 above) para 39. *Aurecon* (note 11 above) paras 49 & 50. *Tasima* (note 28 above) paras 166 & 171.

114 Section 8(1) and section 8(2) of PAJA.

115 As above.

116 *Hoffmann v South African Airways* 2000 (12) BLLR 1365 (CC) (hereafter *Hoffmann*) para 42. *Bengenyama Minerals (Pty) Ltd & another v Genorah Resources (Pty) Ltd & others* 2010 JOL 26501 (CC) para 85.

117 *Hoffman* (note 116 above) para 45.

application outright. One implication of failing to invoke section 8 in circumstances where there has been a delay in instituting a review of administrative action is that certainty and finality are prioritised over lawfulness and accountability, as unlawful acts are permitted to stand as a result of the delay in instituting the review to challenge those acts. The court's refusal to grant a just and equitable order in circumstances where a review is time-barred is one of the key differences in the application of the delay rule in terms of PAJA and legality respectively. The delay rule in terms of legality is discussed next.

Delay in terms of legality

The principle of legality one of the core manifestations of the rule of law.[118] The principle emerges from the Constitution, and prescribes that all spheres of government exercise power and perform functions within the confines conferred to them by the law.[119] In interpreting and applying the delay rule under legality, there are judgments that erroneously make reference to the common law delay rule.[120] As per the Constitutional Court's finding in *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others*, since the adoption of the Constitution, the common law principles that previously provided for the judicial review of public power to uphold the rule of law have been subsumed under the Constitution and gain force from the Constitution.[121] The Constitutional Court further stated that in relation to the judicial review of public power, the common law and the Constitution are intertwined and thus do not constitute separate systems of law.[122] The discussion of the delay rule under the principle of legality will in this study, include post-Constitution case law that inappropriately refers to the common law delay rule, but will view such case law as intending to refer to the delay rule applicable in the context of reviews, in terms of the constitutional principle of legality.[123]

When the courts assess delay under legality, they engage in a two-step enquiry namely, whether the delay is unreasonable or undue and if so, whether the court adjudicating the judicial review proceedings may exercise its discretion to overlook the delay and proceed to make a determination on the review application.[124] These steps

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118 Malan (note 3 above) 275.

119 As above.

120 *Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (5) BCLR 547 (CC) (hereafter *Kirland*). *Buffalo City* (note 1 above). *Sakhisizwe* (note 37 above). *Beweging* (note 6 above). *OUTA* (note 10 above). *Telkom* (note 39 above).

121 *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC) (hereafter *Pharmaceutical Manufacturers*) para 33.

122 *Pharmaceutical Manufacturers* (note 121 above) para 33.

123 *SANRAL* (note 11 above) para 79.

124 *Khumalo* (note 3 above) para 49.

were confirmed by the Constitutional Court in *Khumalo*, and have since formed the basis on which many courts have assessed and applied the delay rule under the principle of legality.[125]

In *Khumalo* the MEC for Education, KwaZulu-Natal (KZN) sought to set aside a decision by the KZN Department of Education to promote two of its employees.[126] The MEC only instituted the review proceedings in the Labour Court 20 months after it received a report which found that the appointment and promotions of the employees were irregular.[127] Both the Labour Court and the Labour Appeal Court (LAC) declared the promotions unlawful and unfair and set them aside.[128] The employees sought to appeal the LAC decision in the Constitutional Court.[129] Considering the MEC's 20-month delay, the Constitutional Court stated that despite the MEC's attempt to fulfil her constitutional and statutory obligations through ensuring lawfulness, accountability and transparency in her department, her delay in instituting the review application was reprehensible.[130] Noting that there is no express time limit for the institution of review applications under legality, the Constitutional Court explained that due to the rule of law and the constitutional obligations on state functionaries to uphold and protect the rule of law, by amongst others seeking to redress their unlawful decisions, courts should be slow to allow procedural obstacles to prevent state functionaries from challenging the lawfulness of an exercise of public power.[131]

In the first leg of the two-step enquiry, namely whether the delay is unreasonable or undue, the Constitutional Court held that despite having had the opportunity to do so, the MEC made no attempt to explain the delay.[132] As a result, the Constitutional Court deemed the delay unreasonable.[133] In the second leg of the enquiry, whether it should nevertheless overlook the unreasonable delay, the Constitutional Court highlighted that the delay must not be evaluated in a vacuum, but must be assessed with reference to its potential prejudice to affected third parties and having regard to the possible consequences of setting aside the impugned decision.[134] The Constitutional Court held that this assessment is mediated by its powers to grant a just and equitable order in terms of section 172(1)(b) of the Constitution.[135] The Constitutional Court, added to the second leg of the enquiry and found that the nature of the impugned decision must

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125 *Beweging* (note 6 above) para 34. *Gqwetha* (note 2 above) para 47.
126 *Khumalo* (note 3 above) para 1.
127 *Khumalo* (note 3 above) paras 8 & 10.
128 *Khumalo* (note 3 above) paras 15 & 40. *Khumalo and another v MEC for Education, KwaZulu-Natal* 2013 (34) ILJ 296 (LAC) (hereafter *Khumalo* LAC) para 59.
129 *Khumalo* (note 3 above) para 20.
130 *Khumalo* (note 3 above) para 39.
131 *Khumalo* (note 3 above) para 39.
132 *Khumalo* (note 3 above) para 50 - 51.
133 *Khumalo* (note 3 above) para 50.
134 *Khumalo* (note 3 above) para 53. *Gqwetha* (note 2 above) para 34.
135 *Khumalo* (note 3 above) para 53.

be considered.[136] This consideration required an analysis of the impugned decision and a consideration of the merits of the legal challenge.[137] The Constitutional Court found that the nature of the review application and the strength of the merits did not favour overlooking or condoning the delay.[138] Thus the employees successfully appealed the LAC's decision.[139]

Based on the two-step enquiry set out in *Khumalo*, next this chapter sets out the circumstances in which delay in the institution of judicial review proceedings, particularly in self-reviews brought in terms of the principle of legality, will be considered unreasonable. Thereafter, a consideration of the circumstances in which courts have exercised a discretion to overlook the delay will follow.

Undue or unreasonable delay

Under legality, the unreasonableness of a delay in the institution of judicial review proceedings depends on the circumstances and entails a factual enquiry that calls for a value judgement to be made in light of all the relevant circumstances, including a full explanation covering the entire period of the delay.[140] Furthermore, the applicant seeking to set aside public power bears the onus of explaining why the delay in bringing the review application is not unreasonable or undue.[141]

The ascertainment of the unreasonableness of a delay in a legality review lends more focus on the reasons before a court for such delay, the prejudice caused to other affected parties as well as the public interest in the finality of public decisions and acts.[142] Unlike PAJA, the reasonableness of a delay in launching a legality review is not influenced by a specified time period or a determination on whether internal remedies have been exhausted.[143] Further, under legality, no explicit application for condonation is required.[144] Thus, a court may consider whether there has in fact been a delay and thereafter apply the two-step to ascertain whether a delay is unreasonable and if so, whether the unreasonable delay should be overlooked.[145]

The reasonableness of a delay must be assessed with reference to the explanation for the delay in instituting a review application.[146] As was the case when there was a

136 *Khumalo* (note 3 above) para 57.
137 As above.
138 *Khumalo* (note 3 above) para 68.
139 *Khumalo* (note 3 above) para 74.
140 *Gqwetha* (note 2 above) paras 5 & 22. *Tasima* (note 28 above) para 153.
141 *Tasima* (note 28 above) para 153.
142 *Oudekraal* 2 (note 7 above) para 33.
143 *Gqwetha* (note 2 above) para 48. *Buffalo City* (note 1 above) para 50.
144 *Buffalo City* (note 1 above) para 51.
145 As above.
146 *Buffalo City* (note 1 above) para 52.

delay in bringing a self-review under PAJA, in the event that there has been a delay in a self-review brought under legality, the applicant organ of state must ensure that it is meticulous in providing an account of the events that led to the delay in lodging its review application.[147] In addition, the organ of state must demonstrate that its efforts to rectify its irregular acts were informed by applicable constitutional prescripts.[148] This requirement may be compared with the requirement in section 9 of PAJA. The difference being that an applicant's detailed explanation for the period of delay in a legality review is required from the onset, when determining the reasonableness of a delay in instituting a self-review. In terms of section 9 of PAJA, which is an enquiry that follows a determination of the reasonableness of a delay, detail on the period of delay is expressly required when the court considers whether to extend the 180-day period.[149]

In *Tasima*, a pre-*Gijima* decision detailed in chapter 1, the Department's reasons for its five year delay were that its director-general refused to give the requisite instruction to institute a review application, its chief financial officer took numerous steps to challenge the extension through other mechanisms, and that other Department officials prevented the review of the extension.[150] Applying the delay rule under the principle of legality, the Constitutional Court found that the reasons proffered by the Department did not warrant a five year delay and that the entire period of delay was not adequately explained.[151] Amongst others, the Constitutional Court reasoned that the Department was required to do more than assert unsubstantiated allegations of obstreperous behaviour by its employees.[152] The Constitutional Court thus held that they delay was unreasonable.[153] However, finding that the merits of the Department's challenge were compelling, the Constitutional Court overlooked the delay and held that the collateral/reactive challenge should succeed.[154] The extension of the agreement was declared unlawful.[155]

The reasoning in *Tasima* illustrates that in belated self-reviews instituted under the principle of legality, in order to establish that its delay was not unreasonable, the state-applicant must be able to demonstrate to a court, that it was not idle during the period of delay in question and that it actively sought to align itself with constitutional

147 *Tasima* (note 28 above) para 153. *Bufallo City* (note 1 above) fn 42.
148 *Merafong* (note 11 above) para 76. *Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 (1) All SA 313 (SCA) (hereafter *Aurecon* SCA) para 18.
149 *Swifambo* HC (note 61 above) para 30. *SANRAL* (note 10 above) para 30.
150 *Tasima* (note 28 above) para 157.
151 *Tasima* (note 28 above) para 158.
152 As above.
153 As above.
154 *Tasima* (note 28 above) paras 166 & 171. The Constitutional Court found that the web of maladministration surrounding the granting of the extension was compelling.
155 *Tasima* (note 28 above) paras 200 & 206.

prescripts.[156] In *Tasima* the applicant was not able to do so, and had to rely on the Constitutional Court's discretion to overlook its unreasonable delay, discussed next.

Courts' discretion to overlook an undue or unreasonable delay

Once the unreasonableness of a delay in instituting review proceedings in terms of the principle of legality has been established, the next step is for a court to consider whether such delay may nevertheless be overlooked, taking into account all of the relevant circumstances.[157] Though flexible, this discretion given to courts under legality is not open-ended and must be informed by constitutional values, including the rule of law.[158] It is used to strike a balance between legality and certainty.[159] The first factor that a court will consider in exercising its discretion is the potential prejudice to affected parties and to the efficient functioning of the public body that may be caused by overlooking the delay and the possible consequences of setting aside the challenged decision.[160] The prejudice that may be suffered as a result of overlooking a delay includes the effect on state resources such as unplanned expenditure and the inability to enforce any vested right that may have accrued to a party.[161]

The second factor in overlooking delay under legality is the nature of the impugned decision, as not all decisions have the same potential for prejudice resulting from their being set aside.[162] This factor requires a consideration into the merits of the challenged public act.[163] The court will consider the potential prejudice that may result in the decision being set aside and the *de facto* and *de iure* complexity of the challenged decision.[164] For example, where a challenged decision is based on legislation that has been amended, a delay in instituting the review proceedings may have been caused by the applicant seeking the review having to acquaint itself with such legislation and considering its position.[165]

The third factor in overlooking delay under legality pertains to a consideration of the applicant's conduct.[166] For instance, in *Tasima*, in overlooking the Department's

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156 *Khumalo* (note 3 above) para 50.
157 *Buffalo City* (note 1 above) para 53. De Ville (note 3 above) 437.
158 *Khumalo* (note 3 above) para 44 – 45. *Buffalo City* (note 1 above) para 53 – 54.
159 *Taung Local Municipality v Mofokeng* 2011 (12) BLLR 1243 (LC) para 14. *Merafong* (note 11 above) para 73.
160 *Buffalo City* (note 1 above) para 54. *Kwa Sani Municipality v Underberg/Himeville Community Watch Association and another* 2015 (2) All SA 657 (SCA) (hereafter *Kwa Sani* SCA) para 41. *Tasima* (note 28 above) para 170.
161 *Tasima* (note 28 above) para 166. *Buffalo City* (note 1 above) para 62.
162 *Gqwetha* (note 2 above) para 24.
163 *Buffalo City* (note 1 above) para 55.
164 *Gqwetha* (note 2 above) para 24. S Budlender & E Webber 'Standing and procedure for judicial review' in Quinot (note 85 above) 228.
165 *Sasol Oil (Pty) Ltd and Another v Metcalfe NO* 2004 (5) SA 161 (W).
166 *Tasima* (note 28 above) para 168.

unreasonable delay the Constitutional Court recognised the Department's endeavour to get its house in order.[167]

The fourth factor in overlooking delay under legality pertains to the courts' constitutional obligation to declare any law or conduct that is inconsistent with the Constitution invalid and grant any order that is just and equitable.[168] On fulfilling this obligation, a court may make a declaration of invalidity and refuse to grant the remedy of setting aside the relevant act on the grounds of justice and equity.[169] This is because sometimes the denial of the remedy of setting aside serves the public interest by, for example, the avoidance of administrative chaos or harm to innocent third parties.[170] Therefore, even in instances where there may be no basis for a court to overlook an unreasonable delay, it may find that it is nevertheless constitutionally compelled to declare an applicant state's public act unlawful.[171] This point will be illustrated by the discussion of *Gijima* and the case law that followed *Gijima* in chapter 3.

Conclusion

In comparing the delay rule applied in terms PAJA and applied in terms of the principle of legality, this chapter 2 has established that the delay rule in terms of the principle of legality entails a flexible two-step enquiry that first looks into whether a delay in instituting judicial review proceedings was undue or unreasonable.[172] The first stage of the delay rule enquiry under legality does not contain an express time period as with section 7(1) of PAJA.[173] This first leg considers the applicant's explanation for its delay in instituting judicial review proceedings.[174] Second, the two-step enquiry, requires a court to consider whether it may overlook an unreasonable delay.[175] In applying this second leg of the enquiry in a legality review, a court will assess the nature of the impugned decision, the prejudice that may be caused to the affected parties if the unreasonable delay is overlooked, the delaying party's conduct and the court's discretion to grant a just and equitable order as per section 172 of the Constitution.[176]

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167 As above.

168 Section 172(1) of the Constitution. *Khumalo* (note 3 above) para 53. *Gijim*a (note 40 above) para 53. Freund & A Price 'On the legal effects of unlawful administrative action' (2017) 134 South African Law Journal 184 193-194.

169 Freund & Price (note 168 above) 194.

170 *Khumalo* (note 3 above) para 56. Freund & Price (note 168 above) 194.

171 *Buffalo City* (note 1 above) para 63. *Ethekwini Municipality v Mantengu Investments CC* 2020 JDR 034 (KZD) (hereafter *Mantengu Investments*) para 55.

172 *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (3) All SA 1 (SCA) (hereafter *Oudekraal* 1) para 46.

173 *Khumalo* (note 3 above) para 49.

174 *Khumalo* (note 3 above) para 50.

175 *Khumalo* (note 3 above) para 49.

176 *Gqwetha* (note 2 above) para 22. *Kwa Sani* SCA (note 160 above) para 41. *Khumalo* (note 3 above) para 53.

The delay rule under PAJA is regulated in sections 7, 9 and 8 thereof. Section 7(1) of PAJA adds two stricter requirements to the delay rule.[177] In addition to requiring that judicial review proceedings be instituted without unreasonable delay, section 7(1) of PAJA adds the requirement that judicial review proceedings must be instituted within 180-days from the date on which the person concerned was informed of the impugned administrative act and the reasons therefor, or could reasonably be expected to have been expected to have become aware of the impugned administrative act and the reasons therefor.[178] The result of including an express time period in PAJA is that a delay of longer that 180 days is *per se* unreasonable.[179]

Departing from a presumption of unreasonableness, section 9 of PAJA allows for an extension of the 180-day period, either by agreement between the parties to the judicial review proceedings or in the absence of such an agreement, through a substantive application made by the applicant seeking the extension, motivating that the interests of justice require an extension.[180] A determination of the interests of justice entails the exercise of a discretion by the court and will depend on the nature of each case.[181] Therefore, to some degree, the application of the delay rule under PAJA narrows the discretionary powers that courts have in contrast with those exercised in considering a delay in a review in terms of the principle of legality. Further, although section 8 of PAJA empowers courts to make a just and equitable remedy notwithstanding the time-bar imposed by section 7(1) of PAJA, courts tend not to exercise their remedial discretion in PAJA reviews in circumstances where there has been an unreasonable delay in launching a review.[182]

Having described the scope and application of the delay rule under PAJA and legality respectively, next chapter 3 will consider how *Gijima* has changed the application of the delay rule to self-reviews and how courts have applied the delay rule to self-reviews post *Gijima*. Chapter 3 does so to determine whether the application of the delay rule under the principle of legality provides a less rigid pathway for organs of state to self-review irregular administrative action than PAJA, having differentiated between the delay rule under PAJA and the delay rule under legality.

177 *Beweging* (note 6 above) para 41. L Kohn & H Corder 'Administrative Justice in South Africa: An overview of or curious hybrid' in H Corder & J Mavedzenge (eds) (note 48 above) 128.
178 Section 7(1)(b) of PAJA.
179 *OUTA* (note 10 above) para 26.
180 Section 9 PAJA. *Siyagena* 1 (note 62 above) para 20.
181 *Joburg Market* (note 93 above) para 17 – 18.
182 *Oudekraal* 2 (note 7 above) para 36. Hoexter (note 12 above) 550.

Chapter 3

The effect of *Gijima* on the application of the delay rule and how courts have applied the delay rule to self-reviews post *Gijima*

Introduction

This chapter assesses the body of law applied by courts and state-litigants in self-reviews prior and subsequent to the Constitutional Court's ruling in *Gijima*. The aim of this assessment is to illustrate how the application of different legal regimes, namely PAJA and the constitutional principle of legality, have influenced the application of the delay rule to self-reviews. This chapter begins by discussing how courts approached and applied the delay rule to self-reviews before *Gijima*. It then discusses *Gijima* and how the Constitutional Court's decision changed this approach and application. The chapter lastly considers how courts are applying the delay rule to self-reviews subsequent to *Gijima*. Overall, the purpose of this chapter is to illustrate the implication of the finding in *Gijima* that legality, as opposed to PAJA, is the proper basis upon which to engage in self-reviews, particularly in the context of delays in launching such reviews.

The approach to the delay rule in self-reviews prior to *Gijima*

As confirmed in *Aurecon*, prior to *Gijima* there was uncertainty regarding the legal position on whether public institutions' right to review their own administrative acts was sourced in PAJA or the constitutional principle of legality.[183] The significance of this uncertainty for purposes of this study is that different procedural rules (i.e. those outlined in chapter 2) were applied to the consideration of delay in self-reviews, either under PAJA or legality.[184] The discussion below illustrates that this uncertainty led to two approaches to the application of the delay rule in self-reviews.[185] First, a free alternative approach was adopted, where PAJA and legality are applied by courts and state litigants at will.[186] Second, courts avoided making a definitive pronouncement on the uncertainty without meaningful engagement on which set of rules should apply or why.[187]

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183 *Aurecon* (note 11 above) para 24. *Joburg Market* (note 93 above) para 5. G Quinot & E van der Sijde 'Opening the close: clarity from the constitutional court on the legal cause of action and regulatory framework for an organ of state seeking to review its own decisions?' (2019) *Journal of South African Law* 324 324 – 325. R Freeman 'The rights of the State, and the State of Rights in *State Information Technology Agency Soc Limited v Gijima Holdings (Pty) Limited*' (2019) 9 *Constitutional Court Review* 521 523.

184 *Minister of Home Affairs and another v Public Protector of the Republic of South Africa* 2018 (2) All SA 311(SCA) para 38.

185 D Brand & M Murcott 'Administrative Law' (2013) *Annual Survey of South African Law* 61 61.

186 Hoexter (note 3 above) 131.

187 D Bilchitz 'Avoidance remains avoidance: Is it desirable in socio-economic rights cases?' (2015) 5 *Constitutional Court Review* 297 299. K Young 'The avoidance of substance in constitutional

Free alternative approach

The uncertainty regarding whether PAJA or legality applied to self-reviews encouraged state litigants and courts to sidestep PAJA in favour of the more flexible delay rule under the principle of legality.[188] This 'free alternative' approach to the review of administrative action led to cases where PAJA would have been expected to be applied, but instead legality was engaged.[189] In *Khumalo*, where it may have been expected that PAJA would be applied given that the conduct under scrutiny fell within PAJA's definition of 'administrative action', the majority held that the principle of legality was applicable to all exercises of public power, including administrative action as defined in PAJA, and thus applied the delay rule under legality to the dispute.[190] The Constitutional Court held that the application was instituted in terms of the Labour Relations Act 66 of 1995, which according to the court is a generic provision that does not establish grounds of review.[191] The application of the flexible delay rule under legality meant that the court could look past the time frame set out in PAJA and consider the delay with reference to the merits of the self-review application.[192]

In the *Khumalo* dissenting judgment, Zondo J held that the majority ought to have accepted that the impugned promotions were administrative acts pursuant to PAJA.[193] Therefore, section 7(1) of PAJA was applicable.[194] On application of section 7(1) of PAJA Zondo J, found that the MEC lodged the review application more than a year and two months after the prescribed 180-day period and that the MEC did not bring an application for condonation or explain the delay in instituting the review proceedings.[195] Applying PAJA, Zondo J held that he would have set aside the decisions of the Labour Court and the LAC and replaced the decision with an order dismissing the application, given the delay in bringing the review.[196] The minority found that the MEC did not make a proper application for the condonation of her delay in

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rights' (2015) 5 *Constitutional Court Review* 233 233, defines judicial avoidance as referring to where the Constitutional Court would avoid deciding matters on constitutional grounds if non-constitutional grounds were available.

188 *Beweging* (note 6 above) para 41. C Hoexter 'South African Administrative Law at a Crossroads: The PAJA and the Principle of Legality' 28 April 2017 https://adminlawblog.org/2017/04/28/cora-hoexter-south-african-administrative-law-at-a-crossroads-the-paja-and-the-principle-of-leg (accessed 3 June 2020). L Boonzaeir 'A decision to undo' (2018) 4 *South African Law Journal* 642 655 where he argues that because the principle of legality is available to all exercises of public power, sometimes courts leap straight to the principle of legality without properly considering whether PAJA applies.

189 Hoexter (note 12 above) 132 – 135.

190 *Khumalo* (note 3 above) para 28.

191 As above.

192 *Khumalo* (note 3 above) paras 57 & 68.

193 *Khumalo* (note 3 above) para 92.

194 *Khumalo* (note 3 above) para 93 – 94.

195 *Khumalo* (note 3 above) para 93 – 94.

196 *Khumalo* (note 3 above) para 95.

bringing the self-review application and she did not offer any explanation for the delay.[197]

The majority in *Khumalo* arguably erroneously regarded the principle of legality as a parallel and alternative basis to review the challenged administrative acts.[198] In doing so, the majority disregarded the subsidiarity principle of constitutional adjudication that directs PAJA, a lower order norm, be applied where the relevant act accords with the definition of administrative action, and that legality, a higher order norm, only be resorted to once it has been established that PAJA is not applicable.[199]

In contrast with the approach illustrated by *Khumalo* and notwithstanding the absence of a pronouncement on the applicability of PAJA or legality to self-reviews, some state litigants instituted self-reviews in terms of PAJA and courts adjudicated them, particularly their delays, in terms of section 7(1) of PAJA.[200] PAJA may have been applied due to the fact that most state commercial activity has been found to constitute administrative action under section 1 of PAJA.[201] Furthermore, the application of PAJA to self-reviews was premised on the principle that PAJA was enacted pursuant to section 33(3) of the Constitution, giving effect to the right to just administrative action in section 33(1).[202] Therefore, the cause of action for the judicial review of administrative action arose from PAJA.[203] The propriety of this position was confirmed in the precursor to *Gijima*, by the Supreme Court of Appeal in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* (*Gijima* SCA), discussed below.[204] As a result, state litigants seeking to review their own administrative acts were given the impression that they could not go behind PAJA by directly relying on legality.[205]

Minimalist/avoidance approach

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197 As above.

198 Brand & Murcott (note 185 above) 61.

199 Brand & Murcott (note 185 above) 62.

200 Freeman (note 183 above) 525.

201 These state commercial activities include the leasing of state land, the promotion of state employees and decisions relating to public procurement. *Standing Tender Committee* (note 27 above) para 19. *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300 (CC) (hereafter *Steenkamp*) para 21. *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (10) BCLR 931 (SCA) para 28. Quinot (note 35 above) 217 – 220. L Kohn 'Time to go back to first principles: A critical analysis of the 2017 procurement regulations reveals them to be short of the legality-cum-rationality mark' (2019) 6 *African Public Procurement Law Journal* 1 4. R Roos & S de la Harpe 'Good governance in public procurement: A South African case study' (2008) 11 *Potchefstroom Electronic Law Journal* 126 126.

202 Hoexter (note 3 above) 525.

203 *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae) (No 2)* 2014 (1) BCLR 1 (CC) (hereafter *AllPay* 2) para 41.

204 *Gijima* SCA (note 13 above) para 33.

205 *Gijima* SCA (note 13 above) para 33. *Kwa Sani* SCA (note 160 above) para 32.

Another consequence of the uncertainty to whether PAJA or legality applied to self-reviews, was that state applicants expressly left the determination to the adjudicating court.[206] However, instead of making a definitive pronouncement on the question, courts adopted a minimalist/avoidance approach, allowing the uncertainty to remain.[207] In *Aurecon*, for instance, the Constitutional Court held that though it was tempting to decide on the uncertainty as to the proper basis for judicial review, it was important for it not to be required to deal with abstract or hypothetical issues.[208] The Constitutional Court held that whether PAJA or legality is applicable to self-reviews was an important question in administrative law but at the time, it would have been undesirable for it to attempt to answer the question without argument from the litigants before it.[209] The Constitutional Court found that sound judicial policy required courts to decide only what is demanded by the facts of the cases before them, especially in constitutional matters where jurisprudence must be allowed to develop incrementally.[210] The Constitutional Court further reasoned that had it proceeded with making a definitive pronouncement on the question, the pronouncement would have likely given rise to unpredictable and unintended consequences.[211] The Constitutional Court held that the issue must be left open until a proper opportunity to decide on the question presented itself.[212] Considering related case law, it may be inferred that the Constitutional Court sought to align itself with its long-standing principle that it should be astute not to lay down sweeping interpretations, but should allow an impugned constitutional doctrine to develop slowly.[213] Moreover, the development of doctrines must be capable of finding certain, generalised application beyond the particular matrix of the case in which a court is called upon to develop the law.[214] In *Aurecon* the parties had agreed to the application of PAJA, so the court felt it could avoid the issue. Problematically, however, this minimalist approach enabled the Constitutional Court to apply section 7 read with section 9 of PAJA to the delay without much thought, and the review was found to be time-barred. Had the litigants agreed to apply legality

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206 *Aurecon* (note 11 above) para 34. *Joburg Market* (note 93 above) para 4. Quinot & van der Sijde (note 183 above) 324 & 330. Cliffe Dekker Hofmeyr 'Clarity in sight: PAJA review or legality review' in 'Dispute Resolution Alert' 6 September 2017 https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2017/dispute/downloads/Dispute-Resolution-Alert-6-September-2017.pdf (accessed 21 November 2020).

207 Bilchitz (note 187 above) 299, states that a court can avoid constitutional adjudication on a particular issue by requiring the parties in court proceedings to resort to meaningful engagement. K Young (note 187above) 233, defines avoidance by the judiciary as where the Constitutional Court would avoid deciding matters on constitutional grounds if non-constitutional grounds were available.

208 *Aurecon* (note 11 above) para 35. Also see *Tasima* (note 28 above) fn 78.

209 As above.

210 *Aurecon* (note 11 above) para 35. *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 (50) BCLR 391 (CC) (hereafter *Albutt*) para 82.

211 *Aurecon* (note 11 above) para 35. *Albutt* (note 210 above) para 82.

212 *Aurecon* (note 11 above) para 36.

213 *Prinsloo v van der Linde and another* 1997 (6) BCLR 759 (CC) para 20.

214 *Beadica 231 CC and others v Trustees for the Time Being of the Oregon Trust and others* 2020 (9) BCLR 1098 (CC) (hereafter *Beadica*).

instead, the Constitutional Court could have applied the flexible delay rule under legality, and granted a just and equitable remedy in pursuit of accountability. *Aurecon* thus represents a problematic instance of judicial minimalism or avoidance.

The uncertainty as to whether PAJA or legality was applicable to self-reviews led some courts to avoid the strict procedural requirements stipulated in section 7 read with section 9 of PAJA, in favour of the more flexible principle of legality.[215] In *Telkom SA Ltd* (Telkom) *v Merid Trading (Pty) Ltd & others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd & others,* for instance, Telkom instituted a review application to set aside its own decision to award a tender, 18 months after the decision was made.[216] Telkom instituted its application in terms of PAJA, but seeking to avoid the cumbersome PAJA delay rule, Telkom argued that section 7(1) of PAJA did not apply to self-reviews as the date of the decision-maker's decision was not covered by the section.[217] Agreeing with Telkom, the high court found that section 7(1) of PAJA did not provide for a date where a decision-maker wished to review its own decision and that it could not read in something that was overlooked by the legislature.[218] Applying the delay rule under legality the high court found Telkom's delay to be unreasonable, but since Telkom was avoiding an unlawful tender process, the high court overlooked the delay and set the award aside.[219]

The discussion above has demonstrated that the uncertainty regarding whether PAJA or legality applies to self-reviews of administrative acts led to an inconsistent approach to the application of the delay rule in self-reviews. Either courts expressly declined to definitively decide on the applicability of PAJA or legality to self-reviews, or state applicants like Telkom to avoided the delay requirements in PAJA.

The determination on whether legality or PAJA applied to self-reviews was required in view of the arguments raised by the litigants before the Constitutional Court in *Gijima*. Therefore, the uncertainty as to the proper basis on which to conduct a self-review has now been addressed in *Gijima*. The next part of this dissertation elaborates on how the Constitutional Court in *Gijima* addressed the uncertainty and how this finding has influenced the application of the delay rule to self-reviews.

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215 Quinot & van der Sijde (note 183 above) 331. L Kohn 'Our curious administrative law love triangle: The complex interplay between the PAJA, the Constitution and the common law' (2013) 28 *SA Public Law* 22 31.

216 *Telkom* (note 39 above) para 9.

217 As above.

218 *Telkom* (note 39 above) para 10.

219 *Telkom* (note 39 above) para 22 – 23.

The effect of *Gijima* to self-reviews and the delay rule

To understand and compare how *Gijima* has influenced the application of the delay rule in self-reviews, in the next part of this dissertation I discuss the factual background of *Gijima*, as well as how the different courts, leading up to the Constitutional Court, dealt with the basis upon which to institute a self-review.

Salient facts of Gijima

Gijima was a self-review instituted by the State Information Technology Agency SOC Ltd (SITA), for the review and setting aside a contract it awarded to the respondent, Gijima.[220] The application was, in the first instance, belatedly instituted in the high court in terms of the principle of legality. SITA argued that the contract was concluded with the respondent in contravention with applicable procurement laws.[221] The high court held that as the conclusion of the contract constituted administrative action, PAJA applied.[222] It found that SITA failed to comply with section 7(1) and 9 of PAJA.[223] The high court thus dismissed SITA's application.[224] As highlighted above, on applying PAJA, the Supreme Court upheld the decision of the high court.[225]

The *Gijima* SCA minority judgment appears to support the application of legality to the self-reviews of administrative acts. Bosielo JA held that procedural formalities should not prevent state litigants from setting aside their unlawful acts.[226] He further reasoned that public entities must be encouraged to act on purported irregularities.[227] Bosielo JA further held that notwithstanding the delay, the contract should have been set aside in pursuit of accountable use of state resources.[228]

The Constitutional Court in *Gijima* held that as PAJA did not apply, SITA's application stood to be reviewed in terms of legality.[229] Considering that 22 months had elapsed since awarding a contract to the respondent, the Constitutional Court found that SITA's delay in launching the review was unreasonable.[230] The court further found no basis to condone SITA's delay.[231] However, it held that section 172 of the Constitution enjoined the court to declare conduct inconsistent with the Constitution unlawful and

220 *Gijima* (note 40 above) para 10.
221 As above.
222 As above.
223 As above.
224 As above.
225 *Gijima* SCA (note 13 above) para 44 - 45.
226 *Gijima* SCA (note 13 above) 69.
227 *Khumalo* (note 3 above) para 12.
228 *Gijima* SCA (note 13 above) para 70.
229 *Gijima* (note 40 above) para 40.
230 *Gijima* (note 40 above) para 45.
231 *Gijima* (note 40 above) para 47 – 49.

to make a just and equitable order.[232] On this basis, the Constitutional Court declared the contract invalid, with a rider that the declaration of invalidity must not divest the respondent its rights thereunder.[233]

Conclusion on Gijima

Gijima now creates parallel systems of review for the same government administrative act, depending on the identity of the challenger of the act.[234] *Gijima* has also introduced an approach to delay in self-reviews which has been termed the '*Gijima principle*'; in terms of which even where there is no basis for a court to overlook an unreasonable delay, courts may nevertheless be constitutionally compelled by section 172(1)(a) of the Constitution to declare the challenged state's conduct unlawful, where such unlawfulness has been established, and proceed to grant a just and equitable remedy other than or in addition to setting aside the impugned conduct.[235]

The approach to the delay rule in self-reviews after *Gijima*

In this part I demonstrate that *Gijima* has definitively augmented the enquiry into delay in self-reviews in terms of the principle of legality, and perhaps even changed the enquiry into delay from a two-step enquiry to a three-step enquiry. First, a court considering a state applicant's delay must consider whether the relevant delay is unreasonable, second, whether the court adjudicating the self-review proceedings may exercise its discretion to overlook the delay and third, whether such a court is constitutionally compelled to declare an impugned administrative act or other exercise of public power invalid.[236]

The court in *Buffalo City* had occasion to apply the '*Gijima principle*'.[237] When the Buffalo Municipality pursued the matter in the Constitutional Court on appeal the court held that legality must be applied to the self-review.[238] Applying the flexible delay rule, the Constitutional Court found that it was implicit from *Gijima* that the extent and nature of the illegality may be a crucial factor in determining the relief to be granted.[239] The court also found that it was bound by the '*Gijima principle*', which requires that even in the absence of any basis for a court to overlook an unreasonable delay, courts are constitutionally compelled by section 172(1)(a) of the Constitution, to declare the

232 *Gijima* (note 40 above) para 52.
233 *Gijima* (note 40 above) paras 52 & 54.
234 Nold de Beer (note 4 above) 613. Quinot & van der Sijde (note 183 above) 324.
235 *Buffalo City* (note 1 above) para 63 - 66.
236 *Khumalo* (note 3 above) para 49. *Gijima* (note 40 above) paras 49 & 52.
237 The facts of *Buffalo City* are set out in the discussion of *Buffalo City* HC, in chapter 1.
238 *Buffalo City* (note 1 above) para 1.
239 *Buffalo City* (note 1 above) para 58.

challenged conduct unlawful.[240] As with the high court and Supreme Court of Appeal, the Constitutional Court found that Buffalo Municipality's delay was unreasonable, and could not be overlooked.[241] However, in keeping with *Gijima*, the Constitutional Court declared the contract unlawful.[242] The court further held that a just and equitable order dictated that Buffalo Municipality not benefit from its own undue delay.[243] Thus the court did not set the challenged contract aside, but instead preserved the rights of Asla thereunder.[244] *Buffalo City* thus provides an illustration of how *Gijima* has changed the pathway to review self-reviews and specifically, how the delay rule may now be applied in self-reviews. In essence, *Buffalo City* illustrates the application of what may now be described a three-step enquiry into delay under legality, with the inclusion of the '*Gijima principle*'.

Another important case to consider is *PRASA v Siyagena and others* case (*Siyagena* 2).[245] Subsequent to *Gijima*, PRASA launched a self-review in the high court, this time in terms of legality. PRASA submitted that two of its tender awards deliberately contravened its procurement processes and thus sought to set the resultant contracts aside.[246] The self-review was lodged 10 months after the decisions to award the tenders were taken.[247] The high court reasoned that the self-review raised issues of fundamental public importance and thus condoned PRASA's unreasonable delay.[248] Applying the '*Gijima principle*', the high court held that the impugned contracts contravened applicable procurement processes and declared them unlawful.[249] However, in contrast with *Gijima*, the high court found that Siyagena Technologies (Pty) Ltd, who was awarded the tenders, was complicit to the corruption, impropriety and maladministration pertaining to the contracts.[250] The high therefore set the contracts aside without adding any riders.[251]

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240 *Buffalo City* (note 1 above) para 63 – 65.
241 *Buffalo City* (note 1 above) paras 81 & 97.
242 *Buffalo City* (note 1 above) para 95.
243 *Buffalo City* (note 1 above) paras 95 & 105.
244 *Buffalo City* (note 1 above) para 105.
245 *Passenger Rail Agency of South Africa v Siyagena Technologies (Pty) Ltd and others* unreported case no. 2016/7839 8 October 2020 https://www.groundup.org.za/media/uploads/documents/siyangena_judgment.pdf (accessed 9 January 2021) (hereafter *Siyagena* 2) para 2. *Siyagena* 2 is linked to *Siyagena* 1 discussed in chapter 2 and illustrates how *Gijima*'s development of the law has enabled a positive outcome in a delayed self-review.
246 *Siyagena* 2 (note 245245 above) para 1.
247 *Siyagena* 2 (note 245 above) paras 126 & 140.
248 *Siyagena* 2 (note 245 above) para 139.
249 *Siyagena* 2 (note 245 above) paras 98 & 149.
250 *Siyagena* 2 (note 245 above) para 163.
251 *Siyagena* 2 (note 245 above) para 170.

Conclusion

This chapter has illustrated that before *Gijima* there was inconsistency on body of law applied in considering delays by public entities in instituting self-reviews.[252] However, the Constitutional Court in *Gijima* pronounced that the two-step enquiry to delay under legality is applicable to self-reviews.[253] *Gijima* also established an additional step to the enquiry, namely what has been referred to as the '*Gijima principle*'.[254] The third step allows courts, in granting a remedy, to make a finding on the merits, notwithstanding an unreasonable delay in the institution of the relevant judicial review proceedings.[255]

Subsequent to *Gijima*, it appears that courts have espoused the application of legality to self-reviews of administrative action. As illustrated by *Buffalo City* and *Siyagena* 2, application of legality to the delay rule in self-reviews has allowed courts to explicitly endorse and follow the stance that delay is not necessarily decisive, because whilst the certainty and finality of administrative action is a good thing, justice is better.[256]

Chapter 4 will, through case law, consider the motivation and criticisms of applying the delay rule in terms of the principle of legality to self-reviews.

252 Brand & Murcott (note 185 above) 61.
253 *Gijima* (note 40 above) para 35.
254 *Gijima* (note 40 above) para 52. *Buffalo* City (note 1 above) para 63.
255 *Buffalo* City (note 1 above) para 101.
256 *Siyagena* 2 (note 245 above) para 111.

Chapter 4

Motivation and criticisms of applying the delay rule to self-reviews under the principle of legality

Introduction

Having discussed the importance of the delay rule to judicial reviews and identified the differences between the delay rule under PAJA and legality in self-reviews, as well as the impact of *Gijima* on the implication of the delay rule under legality in self-reviews, this chapter addresses the motivation and criticisms to the legal development brought by *Gijima*.

This chapter discusses three criticisms to applying the legality to self-reviews of administrative acts, as directed by *Gijima*. The criticisms of applying the delay rule in self-reviews, in terms of legality are interlinked and threefold. The first was introduced in chapter 3, and relates to the principle of subsidiarity in constitutional adjudication, which directs that PAJA ought to be applied where a public act accords with the definition of administrative action section 1 of PAJA and that legality should only be resorted to once it has been established that PAJA is not applicable.[257] This criticism explicates the argument that applying the principle of legality to self-reviews flouts the principle of subsidiarity.[258] The second criticism is that the flexibility of the legality delay rule, specifically given that it does not have a fixed time period, potentially serves to undermine certainty and finality and could give rise to prejudice. Third, applying legality to self-reviews has a likely negative impact on the high standard placed on the state to act fairly, justly and honestly in litigation, by allowing state litigants to escape the strict requirements under PAJA.[259]

This chapter will then discuss the motivation for applying the principle of legality to self-reviews, namely the pursuit of accountability and upholding legality as an aspect of the rule of law. Lastly this chapter weighs the criticisms of the application of the delay rule under the principle of legality against the motivation for its application, and argues for a flexible approach to the delay rule in the judicial reviews of administrative acts.

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257 M Murcott & W van der Westhuizen 'The ebb and flow of the application of the principle of subsidiarity – critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* 43 44.

258 Murcott & van der Westhuizen (note 257 above) 44 & 48 – 49.

259 Section 195 of the Constitution. A Klaasen 'The duty on the state to act fairly in litigation' (2017) *South African Law Journal* 616 616.

Criticisms to applying the delay rule under legality in self-reviews

Flouting subsidiarity

Subsidiarity requires, in the context of constitutional adjudication, that where a lower order norm is applicable to a dispute, courts should invoke that norm, and only refer to higher order norms to guide the interpretation of lower order norms, or where the lower order norm does not find application.[260] The principle is aimed at ensuring that due regard is shown to the legislature's enactment of statutes giving effect to constitutional rights.[261] It is also aimed at avoiding the development of parallel systems of law dealing with the same subject matter.[262] In the context of administrative law, subsidiarity ensures that PAJA, as subsidiary legislation, is applied to the review of administrative action and the constitutional principle of legality, a higher order norm, is only applied to the review of public acts that do not constitute administrative action defined in section 1 of PAJA.[263] Thus, the pronouncement in *Gijima* seemingly goes against the principle of subsidiarity. As alluded to in chapter 3, the misalignment between the application of PAJA and legality in judicial reviews of administrative acts arises from allowing litigants to avoid the exacting requirements of PAJA, including its delay rule, and relying on legality.[264] The pronouncement in *Gijima* that legality should apply to self-reviews of state administrative action aggravates the bifurcation of administrative law and stifles the development of PAJA as the body of law that must be used in the judicial review of administrative acts.[265]

Undermining certainty and finality

The procedural requirements contained in amongst others, section 7 read with section 9 of PAJA are instrumentally justified because they enable the achievement of a particular goal or end.[266] As discussed in chapter 1, the goals of PAJA's delay rule are certainty and finality and to prevent prejudice, ultimately promoting the rule of law.[267] The rule of law defines boundaries for state conduct, in order to ensure certainty and to afford the public guaranteed legal protection, without fear of unpredictable decision making beyond the bounds of predetermined law.[268] Therefore, the delay rule in PAJA pursues a critical component of the rule of law and its commitment to the equal

260 Murcott & van der Westhuizen (note 257 above) 46 – 49.
261 Brand & Murcott (note 185 above) 61.
262 As above.
263 Kohn (note 215 above) 24 – 25. Murcott & van der Westhuizen (note 257 above) 47 – 52.
264 Boonzaier (note 188 above) 647.
265 Boonzaier (note 188 above) 647. Brand & Murcott (note 185 above) 61.
266 Bilchitz (note 188 above) 300.
267 *Khumalo* (note 3 above) paras 1 & 28.
268 Malan (note 3 above) 275.

treatment of the governed, the governors and litigants.[269] The flexible delay rule under the principle of legality applicable in self-reviews may, in contrast, be seen as ultimately undermining the rule of law.[270]

Higher duty placed on state litigants to act fairly and honestly in litigation

The delay rule contemplated under the principle of legality may enable state litigants to opportunistically avoid the procedural requirements pertaining to instituting self-reviews timeously. Section 195 read with section 7(2) of the Constitution places an obligation on state litigants to act honestly and ethically when engaging in litigation.[271] Section 195 of the Constitution requires administrative action to be governed by democratic values enshrined in the Constitution, including state accountability and the higher duty to respect procedural requirements.[272] Referring to the latter duty, Boonzaier asserts that in the case of self-reviews, the stringency of PAJA is its strength.[273] He elucidates that the procedural hurdles contained in PAJA's delay rule prevent opportunistic behaviour by state litigants to evade their obligations by invoking their own bungling.[274] In motivating for the importance of procedure in the judicial review of administrative acts, Boonzaier makes reference to *Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* (*Kirland*), where in adjudicating a self-review, the Constitutional Court held that the state parties ought to have instituted the challenge in terms of the applicable procedural requirements stipulated in PAJA.[275] The Constitutional Court found that to demand government to adhere to process was not to force upon it senseless formality, but to insist on due process and to insist that the state as the primary agent of the Constitution, respect the law, fulfil procedural requirements and tread carefully when dealing with rights.[276]

Having highlighted the criticisms of applying the legality delay rule in self reviews, next this chapter turns to consider the motivation therefor.

Motivation for applying the delay rule under legality in self-reviews

The benefit of applying the delay rule under the principle of legality in self-reviews is that its flexibility provides courts with a wider discretion to set aside unlawful

269 Bilchitz (note 187 above) 300. JC Froneman 'Legal reasoning and legal culture: Our "vision" of law' 3 (2005) Stellenbosch Law Review 3 6.
270 *Khumalo* (note 3 above) paras 1 & 28.
271 Klaasen (note 259 above) 624.
272 Section 195(1)(a), (b), (d) & (f) of the Constitution. *Kirland* (note 120 above) para 82.
273 Boonzaier (note 188 above) 658.
274 As above.
275 *Kirland* (note 120 above) para 82.
276 As above.

administrative acts in self-reviews, in pursuit of accountability and the rule of law.[277] I argue that the approach to delay in self-reviews under legality and as supplemented by *Gijima* moves away from the rigid approach to self-reviews and focuses more on substantive justice. The nub of the argument is that the principle of legality provides for looser procedural requirements to review and set aside unlawful public acts muddied with unlawfulness and irregularities, which is particularly important at a time when state capture and corruption are being belatedly uncovered.[278]

With reference to the assertion that the PAJA delay rule ensures certainty, finality and the prevention of prejudice, it is equally important to recognise that the rule of law is a multi-faceted concept which is not only aimed at guaranteeing certainty and finality.[279] The rule of law also prohibits arbitrary decision-making and has been described as an arch-enemy of invalid exercises of public power.[280] The rule of law forms part of the value base of public administration, informed by South Africa's need to effectively curb corruption and maladministration through the available and appropriate legislative framework.[281] In applying the legality delay rule the Constitutional Court in *Khumalo* recognised that the legality delay rule also ensures certainty and finality, through pursuing an understanding of public interest and sound judicial policy.[282]

Courts have stressed that the seriousness of corruption in South Africa cannot be overemphasised.[283] In *Kirland*, Jafta J delivered a dissenting judgment and held that the stance that government must follow due process (set out in PAJA) was an adoption of a narrow approach.[284] Jafta J held that if the validity of a corrupt decision was raised in the pleadings, a court is duty-bound to declare it invalid if the invalidity is established by evidence.[285] The argument by Jafta J in *Kirland* is pivotal for the rationale and recognition that procedural requirements stipulated in legislation ought not to serve as straitjackets in the judicial review of unlawful administrative acts, preventing courts from setting aside unlawful public acts, especially in South Africa's prevailing climate of corruption. The climate of corruption is exemplified by the finding of the Auditor-General, in 2020, the that municipal irregular expenditure amounted to R32 billion.[286]

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277 *Siyagena* 2 (note 245 above) para 139.

278 Boonzaier (note 187 above) 659. C Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132 *South African Law Journal* 207 217.

279 Hoexter (note 278 above) 218.

280 Malan (note 3 above) 275.

281 D Brand 'South African Governance: The Constitution' in E Schwella (ed) South African Governance (2015) 180.

282 *Khumalo* (note 3 above) para 47.

283 *Siyagena* 2 (note 245above) para 97. *S v Shaik and Others* 2007 (1) SA 240 (SCA) (hereafter *Shaik*) para 223.

284 *Kirland* (note 120 above) para 50.

285 *Kirland* (note 120 above) para 46.

286 M&G Data Desk 'AG's report reveals the municipalities where money goes to waste' 2 July 2020 https://mg.co.za/news/2020-07-02-auditor-generals-report-reveals-the-municipalities-where-the-money-goes-to-waste/ (accessed 13 January 2021).

Therefore, given the climate of corruption, the rule of law's requirement of lawfulness should be prioritised over its requirement for certainty.

Corruption amongst others, lowers the moral tone of the nation and threatens the nation's constitutional order.[287] Courts must send out an unequivocal message that corruption will not be tolerated and that the appropriate punishment will be given.[288] Therefore, the criticisms to applying the delay rule under legality to self-reviews ought not to be prioritised at the expense of substantive justice in response to corruption.[289] While acknowledging that the delay rule seeks to promote certainty and finality in the exercise of public power and prevents prejudice to parties who have an interest in the relevant public act sought to be set aside in a self-review, it is argued that these issues may be militated by the courts' discretion to grant a just and equitable remedy under section 172(1)(b) of the Constitution.[290] Through crafting a just and equitable order as in *Gijima*, courts can both uphold the rule of law and prevent prejudice.

Conclusion

This chapter has engaged with three criticisms of applying the delay rule under legality to self-reviews. The first is that applying the delay rule in terms of legality undermines the principle of subsidiarity, prescribing that PAJA and thus the delay rule contemplated therein, rather than legality, ought to be applied in the judicial review of administrative acts.[291] The second criticism of applying the principle of legality to self-reviews also relates to the fact that the delay procedures in PAJA constitute a critical component of the rule of law.[292] Thus applying the legality delay rule may be viewed as undermining the value of amongst others certainty and preventing prejudice. Third, the application of the delay rule contemplated under the principle of legality opens the door for state litigants to opportunistically evade the strict requirements contained in section 7 of PAJA read with section 9 thereof.[293]

This chapter also engaged with the advantage to applying the delay rule under legality in self-reviews. It established that the enquiry into delay under legality provides wider discretionary powers for courts to address corrupt state commercial activity. The next chapter will provide a summary on the findings of the previous chapters and provide conclusions and recommendations on the application of the delay rule in terms of the principle of legality to self-reviews. It will provide these conclusions and

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287 *Shaik* (note 283 above) para 223.
288 *Shaik* (note 283 above) para 223. *Gijima* SCA (note 13 above) para 55.
289 *Gijima* SCA (note 13 above) para 55.
290 *Khumalo* (note 3 above) paras 1, 28 & 53.
291 *Merafong* (note 11 above) para 51 – 52.
292 *Kirland* (note 120 above) para 82. Froneman (note 269 above) 6.
293 As above.

recommendations in light of how judicial reviews of administrative acts can play a role in curbing corruption in South Africa.

Chapter 5

Conclusions and recommendations

Through juxtaposing the delay rule as set out in PAJA and the constitutional principle of legality, this research has argued that holding the state to the strict procedural requirements of the PAJA delay rule may result in egregious state conduct not being redressed and may compromise the attainment of an ethical, accountable and transparent government.[294]

This study has established that the delay rule, both under PAJA and the principle of legality, requires courts in judicial review proceedings to set aside unlawful exercises of public power, provided that they are instituted without unreasonable delay.[295] PAJA goes further and requires judicial reviews to be launched within 180-days from the date on which internal remedies have been exhausted or from the date on which the applicant state became aware of the impugned administrative action.[296] The inclusion of this fixed period means that reasonableness under PAJA is predetermined by the legislature.[297] Thus a delay exceeding 180 days is *per se* unreasonable.[298] Section 9 of PAJA provides for an extension of the 180-day period, through agreement by the parties or on application by the person or administrator concerned.[299] A party making a section 9 application must motivate that the extension is in the interests of justice.[300] The motivation must be substantive and must account for the entire period of the delay.[301]

In contrast, the delay rule under the principle of legality provides no fixed period within which judicial review proceedings must be launched.[302] The proverbial clock commences from the date on which the applicant became or ought to have become aware of the challenged act.[303] Further, legality provides for a more indulgent two-step enquiry into delay.[304] First, a court must consider whether a delay is unreasonable.[305] This is a factual enquiry involving a value judgment to be made on the circumstances of each case, including a complete explanation for the delay.[306] Second, if the delay is found to be unreasonable, a court must consider whether such unreasonable delay

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294 *Swifambo* HC (note 61 above) para 79. D Brand 'South African Governance: The Constitution' in E Schwella (ed) (note 281 above) 180.
295 Section 7(1) PAJA. *Gqwetha* (note 2 above) para 22.
296 Section 7(1) PAJA. *Beweging* (note 6 above) para 34. *Buffalo City* (note 1 above) para 49.
297 *OUTA* (note 10above) para 26.
298 As above.
299 Section 9(1)(b) PAJA.
300 Section 9(2) PAJA.
301 *Steenkamp* (note 201 above) para 21.
302 *Khumalo* (note 3 above) para 44.
303 *Buffalo City* (note 1 above) para 49.
304 *Buffalo City* (note 1 above) para 54.
305 *Khumalo* (note 3 above) para 49.
306 *Gqwetha* (note 2 above) paras 5 & 22.

should nevertheless be overlooked.[307] This second step considers the potential prejudice to affected parties and, importantly, the potential prejudice to the efficient functioning of the relevant public entity.[308]

Before *Gijima*, it was uncertain whether PAJA or legality applied to self-reviews.[309] Thus PAJA was applied where the public act being challenged fell within the definition of 'administrative action' under section 1 of PAJA.[310] As illustrated through case law such as *Siyagena* 1, applying PAJA to self-reviews proved to be problematic as self-reviews would often be instituted belatedly, only after a change in elected officials or after receipt of a report on unlawful activities within the public entity.[311] As a result, in *Siyagena* 1, notwithstanding PRASA's *bona fides* to get its house in order, a strict application of the PAJA delay rule resulted in a finding that PRASA failed to satisfy the requirements in section 7 and section 9 of PAJA and a blatantly unlawful corrupt tender not being set aside.[312]

The Constitutional Court in *Gijima* pronounced that legality and not PAJA is the body of law to be invoked as the basis to institute self-reviews.[313] Thus, the less stringent delay rule consisting of the two-step enquiry was found to be applicable to self-reviews. *Gijima*, however, added a third step to the enquiry termed the '*Gijima principle*'.[314] The '*Gijima principle*' entails that courts are in terms of section 172(1)(a) of the Constitution, compelled to declare conduct unlawful, even where there is no basis for a court to overlook an unreasonable delay in the institution of a self-review.[315] Furthermore, courts are empowered by section 172(1)(b) of the Constitution to make any order that is just and equitable in the circumstance.[316]

Therefore *Gijima*, enables courts adjudicating self-reviews to move away from a strict application of the delay rule, contemplated in PAJA, to a more flexible delay rule which is informed by considerations of justice.[317] *Gijima* expressly directs courts to, notwithstanding unreasonable delay and any basis to overlook such delay, declare any state conduct inconsistent with the Constitution unlawful.[318] *Siyagena* 2 illustrated how *Gijima*'s development of administrative law has enabled the redress of government conduct muddied in corruption, through the application of the legality

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307 *Khumalo* (note 3 above) para 49.
308 *Kwa Sani* SCA (note 160 above) para 41.
309 *Aurecon* (note 11 above) para 24.
310 *Steenkamp* (note 201above) para 21.
311 *Siyagena* 1 (note 62 above) para 22.
312 As above.
313 *Gijima* (note 40 above) para 40.
314 *Buffalo City* (note 1 above) para 63 -64.
315 *Gijima* (note 40 above) para 52.
316 *Gijima* (note 40 above) para 53.
317 As above.
318 *Gijima* (note 40 above) para 52.

delay rule in self-reviews.[319] On application of legality, PRASA was able to have an unlawful tender set aside, notwithstanding its delay in the institution of its self-review.[320] Section 8 of PAJA also allows courts in judicial reviews to grant just and equitable orders. However, the case law considered in this study demonstrated that in practice, section 8 has not been invoked to grant a just and equitable order where organs of state failed to comply with section 7 and 9 of PAJA.[321]

Although it was established that applying the delay rule in terms of legality in self-reviews of administrative acts arguably flouts the principle of subsidiarity, in my view overall substantive justice in response to corruption ought to be prioritised. The *Gijima principle* promotes the pursuit of substantive justice in self-reviews, including by balancing the rule of law's requirements of certainty and finality with its requirements of ensuring that all public power is consistent with the rule of law. Thus, applying a more flexible delay rule under the principle of legality in self-reviews, as countenanced by *Gijima*, facilitates enhanced state accountability and contributes towards upholding the rule of law, which is particularly important in a time when allegations of widespread state corruption and maladministration are emerging long after the fact.

The case law succeeding *Gijima* has demonstrated that the three step approach applied therein has enabled courts to set aside unlawful public acts and prevent prejudice to third parties. This is notwithstanding unreasonable delays in bringing the self-reviews. Self-reviews must now be exclusively adjudicated in terms of the constitutional principle of legality and the three step approach which includes the *Gijima principle*, must be consistently applied in the adjudication of self-reviews. Adopting the flexible delay rule under legality will enable courts to fully assess objective considerations such as the public interest when deciding on the reasonableness of a public entity's delay in bringing a self-review and deciding whether to overlook an unreasonable delay. As indicated, the flexible delay rule will ultimately enable courts to set aside unlawful administrative acts even where there is an unreasonable delay and no ground to overlook such an unreasonable delay.[322]

Moreover, considering the finding that courts do not invoke section 8 of PAJA where an unreasonable delay has been established, it is also recommended that the judiciary apply *Gijima principle*-type reasoning in judicial reviews adjudicated in terms of PAJA. Instead of dismissing applications due to an unreasonable delay, courts could declare the conduct of the applicant unlawful, where appropriate, and instead of simply setting it aside, grant a suitable just and equitable remedy, taking into consideration the

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319 *Siyagena* 2 (note 246 above) para 98 – 155. This discussion of *Siyagena* 2 is provided in comparison to *Siyagena* 1 discussed in chapter 3.

320 *Siyagena* 2 (note 245 above) para 170.

321 *Aurecon* (note 11 above) para 44 – 57. *Siyagena* 1 (note 62 above) paras 11, 14 & 22.

322 *Gijima* (note 40 above) para 52 – 54. *Buffalo City* (note 1 above) para 66.

interests of accountability and protecting the interests of third parties. Such an approach to section 8 of PAJA would enable courts to set aside (with riders) unlawful administrative acts even where section 7 and section 9 of PAJA have not been satisfied and promote certainty, finality and accountability.

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