Legality review as a mechanism for South African municipalities to curb corruption in their award of contracts for goods or services

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ABSTRACT

South Africa is a State Party to international and African regional instruments dedicated to combatting corruption. These instruments oblige South Africa implement legal and policy measures to address corruption in public procurement. These instruments also call on governments to strengthen the role of the judiciary in fighting corruption by guaranteeing their independence. In line with these international commitments, the *Constitution of the Republic of South Africa*, 1996, various pieces of legislation and policy are committed to promoting good fiscal management in public procurement. In addition, the Constitution guarantees the independence of the courts and puts them in an important position to ensure that constitutional and legislative principles underpinning public procurement are met. The courts execute this role by interpreting, enforcing, and developing procurement laws. They ensure compliance with the rule of law.

In South Africa, corruption in the award of contracts for goods and services threatens to derail the capacity of municipalities to advance their broad developmental role. Recently, state officials and organs of state that appear to be committed to self-correcting corruption in the award of contracts for goods and services have frequently gone to courts to help them undo such illegal contracts. In three cases (*Khumalo v Member of the Executive Council for Education: KwaZulu Natal* 2014 (3) BCLR (CC); *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty)* 2018 (2) BCLR 240 (CC); and *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd* 2019 (b) BCLR 661 (CC), the Constitutional Court laid down guidelines which organs of state must follow if they wish to use state (legality) self-review to review and set aside unlawful contracts. The principles laid down by the Court in these cases has been applied by the Supreme Court of Appeal and the High Court in procurement cases. This dissertation investigated how the legality review standard developed by courts can be used by municipalities to curb corruption in the award of contracts for goods and services. Based on a review of relevant case-law, this dissertation makes recommendations on important principles that municipalities must consider when they wish to launch a self-review application to set aside an unlawful contract for the provision of goods and services that was tainted by corruption.

Keywords

Public Procurement; contract for goods and services; legality review; state self-review; local government; municipalities; courts; South Africa.

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LIST OF ABBREVIATIONS

AG	Auditor-General
ANC	African National Congress
AUCPCC	African Union Convention on Preventing and Combating Corruption 2003
DA	Democratic Alliance
GMM	Govan Mbeki Municipality
LAC	Labour Appeal Court
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
NUPSAW	National Union of Public Servants and Allied Workers
NWP	North-West Province
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PCCAA	Prevention and Combating of Corrupt Activities Act 14 of 2004
PPPFA	Preferential Procurement Policy Framework Act 5 of 2000
SADC	Southern African Development Community
SADCPAC	Southern African Development Community Protocol Against Corruption 2002
SAJHR	South African Journal on Human Rights
UNCAC	United Nations Convention Against Corruption 2003

CHAPTER 1

INTRODUCTION

1.1 Background

The *Constitution of the Republic of South Africa*, 1996 (hereafter, the Constitution) restructured and transformed the institutions of government in South Africa. As a result of this construct, local government (made up of 257 municipalities) is established as a separate sphere of government within a system of cooperative governance.[1] Contrary to the past when local government was tightly controlled by provincial governments, municipalities now enjoy significant legislative, executive, fiscal and administrative autonomy.[2] Municipal councillors are elected every five years to represent communities in municipal councils which have legislative and executive powers.[3] Furthermore, municipalities have the powers to raise revenue by imposing property rates and surcharges on fees for services delivered.[4] Each municipality has the powers to structure and manage its administration, budgeting and planning processes in a manner that enables it to be responsive to community needs.[5] Despite the high degree of their autonomy, the exercise of the executive and legislative powers, as well as functions of municipalities are subject to regulations passed by provincial and national government.[6] This means that national and provincial government can set guidelines which will help municipalities to better exercise their powers and functions.

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1 For details, see Fuo "The courts and local government in South Africa" 103-108.

2 See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) pars 35-38; *City of Cape Town and Other v Robertson and Other* 2005 (2) SA 323 (CC) pars 55-60.

3 See sections 151, 156, 157 and 159 of the *Constitution of the Republic of South Africa*, 1996. Hereafter, the Constitution.

4 Section 229 of the Constitution. See also section 214 of the Constitution.

5 See section 153 of the Constitution.

6 Steytler and de Visser *Local Government Law of South Africa* 15-5 to 15-57; Fuo 2017 *De Jure* 329-330.

Another element of local government's reform is the wide developmental mandate of municipalities. Whereas in the past the mandate of municipalities was limited to the provision of services, municipalities are now obliged to: provide democratic and accountable government, promote socio-economic development; encourage a safe and healthy environment; provide services to communities in a sustainable manner; and encourage public involvement in local government matters.[7] In addition, municipalities are obliged to realise the fundamental rights guaranteed in the Constitution, such as the right to sufficient water, adequate housing, health care services, and the right to healthy environment for example.[8] Despite this broad mandate, the provision of services to communities remains the core function of municipalities.[9] National and provincial government are constitutionally obliged to support municipalities to realize their legal mandate.[10]

As part of transformation, municipalities are obliged to govern in line with certain constitutional values such as accountability, the rule of law, openness and responsiveness.[11] The supremacy of the Constitution is affirmed in section 2, which unequivocally indicates that any law or conduct that is inconsistent with it is invalid and the obligations imposed must be fulfilled.

An important instrument which municipalities must utilise to achieve their service delivery mandate is public procurement. Public procurement refers to the buying of goods, works and services by those who exercise public power or perform public functions to enable government to deliver on its mandate.[12] Section 217 of the Constitution mandates municipalities to procure goods and services using a procurement system that is fair, cost-effective, competitive, transparent and equitable. As chapter 2 shows, several laws have been adopted to concretise these overarching principles in the local government context.

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7 See section 152 of the Constitution. See also Rautenbach and Venter *Constitutional Law* 233.

8 See sections 7(2), 8(1) 24, 26, and 27; Section 4(2)(j) of *the Local Government: Municipal Systems Act* 32 of 2000. See also Fuo "The courts and local government in South Africa" 108-110.

9 *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC) (9 October 2009) 34–40

10 Section 154(1) of the Constitution; See also Rautenbach and Venter *Constitutional Law* 234.

11 See sections 1(c)-(d) and 195 of the Constitution; Ngcobo *The Informal economy for local economic development in South Africa: A constitutional law approach* 60-61.

12 See definition of organ of state in section 239 of the Constitution.

Despite the binding constitutional principles highlighted above and legislation adopted to concretise section 217 of the Constitution, as shown in 1.3 below, corruption in local procurement is a major challenge that limits the ability of municipalities to execute their developmental mandate.[13] As will become evident from the discussion in 1.4 below, municipalities can play an active role in curbing corruption within their structures through litigation.

1.2 Corruption in South Africa: Perception, impact and meaning

There is a growing perception that South Africa is becoming extremely corrupt. According to the international rankings of the Corruption Perception Index (CPI) over the past four years, South African was ranked position number: 174 for the year 2021,[14] 69 for the year 2020,[15] 70 for the year 2019[16] 73 for the year 2018,[17] and 71 for the year 2017.[18] The president of South Africa has acknowledged that corruption as a major threat that derails the country's democratic gains.[19]

The impact of corruption is devastating, especially in developing countries such as South Africa. Corruption threatens the values of democratic government and the rule of law, violates human rights and undermines provisions of social services.[20] Corruption disproportionately affects the poor by diverting funds meant for development.[21] Where there is widespread corruption, money that could have been used by government to implement development projects that help ordinary citizens, ends up in the pockets of a few connected people.[22] In the context of South Africa,

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13 Pooe 2015 *International Business & Economics Research Journal* 67-77; Ambe and Badenhorst Weiss *Journal of Transport and Supply Chain Management* 242-261 at 249; National Treasury 2015 Public Sector Supply Chain Management Review at 4; Ambe 2016 *Research Journal of Business and Management* 277-290 at 278.

14 Corruption Perception Index 2021 https://www.transparency.org.

15 Corruption Perception Index 2020 https://www.transparency.org.

16 Corruption Perception Index 2019 https://www.transparency.org.

17 Corruption Perception Index 2018 https://www.transparency.org

18 Corruption Perception Index 2017 https://www.transparency.org.

19 Ramaphosa 2020 https://www.businesslive.co.za/fm/opinion 6.

20 Paragraph iii of the UN Convention Against Corruption (2003)

21 Fombad and Steytler *Corruption and the crisis of constitutionalism* 26.

22 Sohail and Cavill 2008 *Journal of Construction Engineering and Management* 730; see also Masuku 2019 *African Journal of Democracy and Governance* 126.

corruption threatens the advancement of the commitment to social transformation and fundamental human rights which are protected in the *Constitution*.[23]

Despite agreement on its adverse impact, there is no generally accepted definition of corruption. This is largely because of its complex nature. According to the *Prevention and Combating of Corrupt Activities Act*,[24] a person would be charged with the offence of corruption when:

> she or he directly or indirectly accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of herself or himself or for the benefit of another person;[25] or gives or agrees or offers to any other person any gratification, whether for the benefit of herself or himself or for the benefit of another person[26] in order to act, personally or by influencing another person so to act in a manner that amounts to the illegal, dishonest, unauthorized, incomplete, or biased;[27] or misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation that amounts to the abuse of a position of authority; a breach of trust; or the violation of a legal duty or a set of rules, designed to achieve an unjustified result; that amounts to any other unauthorized or improper inducement to do or not to do anything is guilty of the offence of corruption.[28]

The above definition is very broad. Although framed from the perspective of criminal prosecution, it captures the view held by most scholars who agree that corruption takes place in the public sector when people in public office abuse their powers either for private benefit or for the benefit of a group to which they owe allegiance.[29] This position is not unconscious of the fact that people in the private sector can commit corruption by inciting public officials to receive bribes, for example.

Public procurement is one government operational function that is vulnerable to corruption.[30] The amounts of money spent by governments in procurement makes

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23 See: *Glenister v The President of the Republic of South Africa and Others* 2011 (7) BCLR 651 (CC) para 166; President Ramaphosa C 'Let this be the turning point in our fight against corruption' 23 August 2020.

24 *Prevention and Combating of Corrupt Activities Act* 12 of 2004. Hereafter, PCCAA.

25 Section 3 (a) of PCCAA.

26 Section 3 (b) of PCCAA.

27 Section 3 (b)(i) (aa) of PCCAA.

28 Section 3 (b)(iv) of PCCAA. See also Munzhedzi and Makwembere 2019 *Journal of Public Administration* 665.

29 Mubangizi 2020 *Law, Democracy and Development* 226; Camaj 2013 *The International Journal of Press/Politics* 22. See also Munzhedzi and Makwembere 2019 *Journal of Public Administration* 665.

30 Lodge "State Capture: Conceptual Considerations" 17-18.

this function particularly vulnerable to corruption.[31] According to the Organisation for Economic Cooperation and Development (OECD), corruption in procurement can take place through "embezzlement, undue influence in the needs assessment, bribery of public officials involved in the award process or fraud in bid evaluations, invoices or contract obligations".[32]

1.3 Corruption and municipal procurement in South Africa

Section 217 of the Constitution provides the overarching regulatory framework for procurement of goods and services by all organs of state and spheres of government in South Africa. According to section 217(1) of the Constitution, when a municipality procures goods or services, it must do this in terms of a system which is fair, competitive equitable, cost- effective, and transparent. Sections 217(2) and 217(3) of the Constitution respectively make provision for the advancement of historically disadvantaged people in public procurement and for a system of preferential procurement to be put in place through legislation. The courts have confirmed the mandatory wording of these constitutional requirements in many cases.[33] When a municipality procures contrary to the prescripts of section 217 of the Constitution, this is illegal, unlawful and invalid.[34] This violates the supremacy of the Constitution and the rule of law principles.[35] The principles listed in section 217(1) of the Constitution constitute the overarching principles for legislation which regulates municipal procurement in the country.[36]

Chapter 11 of the *Local Government: Municipal Finance Management Act* 56 of 2003 (MFMA) provides the overarching statutory regulatory framework for procurement in the local government context. This Chapter specifically deals with the procurement of

31 OECD Preventing Corruption in Public Procurement (2016) 6.
32 OECD Preventing Corruption in Public Procurement (2016) 6.
33 See *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T) para 6; *Airports Company South Africa SOC Ltd v Imperial Group Ltd* para 20; and *BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation* 2019 (6) SA 443 (ECG) para 66; *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works and Others* 2008 (1) SA 438 (SCA) para 8.
34 *Municipal Manager: Quakeni and Others v F V General Trading CC* 2010 (1) SA 356 (SCA) para 14
35 Section 1(c) of the Constitution.
36 *Municipal Manager: Quakeni and Others v F V General Trading* para 11.

goods and services. The main goal of the MFMA is to "secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities."[37] Section 112 of the MFMA obliges every municipality to adopt and implement its own supply-chain management policy (SCMP) which should meet the requirements in the Constitution. As will be shown in Chapter 2 of this dissertation, the MFMA also sets out some general rules to regulate the supply- chain management process. As will become evident in chapter two of the dissertation, besides the MFMA, there are other national legislation and guidelines published by National Treasury that are relevant to procurement by municipalities.[38] However, it should be noted that in 2020, the government introduced the Draft Public Procurement Bill (2020) to address some of the perceived shortcomings of the suite of procurement laws adopted to give effect to the Constitution. This study does not venture into the details of the Draft Bill for several reasons. As will become evident from the discussion in 1.5 below, this dissertation focuses on how municipalities can use litigation, based on the jurisprudence of South African courts regarding state self-review, to curb corruption manifested in the fraudulent award of procurement contracts for goods and services. Due to this, since the Bill is not yet law, it is unnecessary to venture into its details for purposes of this research.[39] In addition, although the PCCAA remains the main piece of legislation dedicated to combatting corruption in South Africa, this study does not discuss it because the Act focuses on prevention of corruption as a crime through criminal prosecution. Criminal prosecution of corruption is beyond the ambit of this study.

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[37] Section 2 of the MFMA.

[38] These include: the *Preferential Procurement Policy Framework Act* 5 of 2000 which directly gives effect to section 217(2) of the Constitution; the Preferential Procurement Policy Regulations GNR.32, GG 40553, 20 January 2017; Code of Conduct for Municipal Councilors: Schedule 1 of the *Local Government Municipal Systems Act* 32 of 2000; the Municipal Supply Chain Management Regulations, GNR. 868, GG 27636, 30 May 2005 (MSCM regulations); MFMA Circular No 83 – Advertisement of Bids and the Publication of Notices in Respect of Awarded Bids, Cancelled Bids, Variations and Extensions of Existing Contracts on the e-Tender Publication Portal (18 July 2016); the MFMA Circular No 102 - Emergency Procurement in Response to National State of Disaster (05 May 2020); and the MFMA Circular No 103 – Preventive Measures in Response to the COVID 19 Pandemic that resulted in the National State of Disaster (27 May 2020).

[39] When the Draft Public Procurement Bill (2020) becomes law, it will certainly contain provisions to minimise corruption but those will not be fatal to the focus of this research.

Despite the existence of the legal framework that is directed towards curbing corruption, there are allegations and reports indicating the prevalence of corruption in procurement across municipalities in South Africa.[40] The "best-known form of corruption is the award of tenders and other contracts to certain companies on conflictual relations such as friendships or family connections".[41] The Auditor General of South Africa[42] recently found that uncompetitive and unfair procurement processes and inadequate contract management were common across municipalities.[43] In the 2021-2022 Financial Year, the AGSA noted that 4 municipalities in the North-West Province (NWP) (Madibeng, Mamusa, Lekwa Teemane and Ramotshere Moiloa) repeatedly received disclaimed audits due to, among other reasons, poor oversight by councils, and a lack of consequences for financial misconduct.[44] In general, the AGSA concluded that the disclaimed audits for a total of 12 municipalities in the NWP for the 2021-2022 Financial Year can be attributed to lack of accountability, leadership instability, and a general state of disarray in the province.

In tabling the 2019-2020 Financial Year Report, the Auditor General stressed that "the progress and sustainable improvement required to prevent accountability failures, or deal with them appropriately when they do occur, do not exist "in the local sphere of government.[45] The Auditor General in the 2018-2019 Financial Year Report, warned that although municipalities were under severe financial pressure, the little money that was available, was badly managed.[46] Although there is a marginal improvement in the

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40 Ramaphosa 2020 https://www.businesslive.co.za/fm/opinion 6; Auditor-General of South Africa *Not too much to go around, yet not the right hands at the till: Consolidated General Report on Local Government Audit Outcomes MFMA 2018-2019* (2020) 145-190

41 Ramaphosa 2020 https://www.businesslive.co.za/fm/opinion 5.

42 The Office of the Auditor General is one of the institutions created in Chapter 9 of the Constitution to strengthen constitutional democracy. See sections 181 and 183 of the Constitutions.

43 Auditor-General of South Africa *Not too much to go around, yet not the right hands at the till: Consolidated General Report on Local Government Audit Outcomes MFMA 2018-2019* (2020) 145-190; Auditor General *Consolidated General Report on Local Government Audit Outcomes MFMA 2019-2020* (2021) 17-45.

44 Auditor General South Africa 2022 https://www.agsa.co.za.

45 https://www.agsa.co.za/Portals/0/Reports/MFMA/201920/2019%20-%2020%20MFMA%20Media%20Release%2030%20June%202021.pdf

46 Not too much to go around, yet not the right hands at the till: Consolidated General Report on Local Government Audit Outcomes 2018-19 (2020), available at https://www.agsa.co.za/Portals/0/Reports/MFMA/201819/GR/MFMA%20GR%202018-19%20Final%20View.pdf (viewed 2 July 2020)

number of municipalities in the country that comply with relevant finance legislation, there is an overall regression in audit outcomes. In the 2019-2020 financial year, only 27 municipalities in the country received clean audits; in the 2018-2019 financial year, 20 municipalities obtained clean audit outcomes; and in the 2017-2018 financial year, only 18 municipalities received clean audits.[47] The Auditor General's Office has indicated that short-term solutions are not going to bring about the desired change as they are largely costly and ineffective. The Office has proposed that, to address the problem, government must: invest in preventative controls; significantly improve monitoring, review and oversight by senior municipal officials, municipal councils and leaders; and ensure that there are clear consequences for accountability failures.[48]

As will become evident from 1.5 below, this researcher believes that municipalities can hold themselves accountable and self-correct any contracts that are tainted with corruption through litigation, by going to court to review and set aside such contracts. This route appears to be a viable option, especially for newly elected municipal councils that would like to clean up corruption in procurement contracts entered into by outgoing municipal councils.

1.4 South Africa's treaty obligations

There are treaties that oblige South Africa to tackle corruption.[49] These include the United Nations Convention Against Corruption,[50] the African Union Convention on Preventing and Combating Corruption,[51] and the Southern African Development

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47 See Not too much to go around, yet not the right hands at the till: Consolidated General Report on Local Government Audit Outcomes 2018-19 (2020) 6; 2017–2018 Consolidated General Report on the Local Government Audit Outcomes (2019) 8 available at https://www.agsa.co.za/Reporting/MFMAReports/2017-2018MFMA.aspx (viewed 2 July 2020); https://www.agsa.co.za/Portals/0/Reports/MFMA/201920/2019%20-%2020%20MFMA%20Media%20Release%2030%20June%202021.pdfhttps://www.agsa.co.za/Portals/0/Reports/MFMA/201920/2019%20-%2020%20MFMA%20Media%20Release%2030%20June%202021.pdf (viewed 12/11/2021).

48 https://www.agsa.co.za/Portals/0/Reports/MFMA/201920/2019%20-%2020%20MFMA%20Media%20Release%2030%20June%202021.pdf (viewed 12/11/2021).

49 Sewpersadh and Mubangizi 2017 *PELJ* 4.

50 United Nations Convention Against Corruption (2003) signed on 12 March 2004. Hereafter UNCAC.

51 African Union Convention on Preventing and Combating Corruption (2001) Date of Last signature 10 February 2020. Hereafter, AUCPCC.

Community Protocol Against Corruption.[52] Goal 16 of the Sustainable Development Goals requires that accountability should be strengthened at all institutional levels in order to substantially reduce corruption.[53] These instruments identify public procurement as a functional activity where corruption can be prevented. The UNCAC implores national governments to put in place suitable systems of procurement, based on competition, transparency, and clearly stated criteria that guide, decision-making, capable of in preventing corruption.[54]

According to the UNCAC, such a system should address the following: distribution of information relating to procurement procedures and award of contracts to the public; the establishment, in advance, of the conditions for participation, selection, award criteria and tendering rules; an effective system for reviewing procurement decisions, including an effective system of appeal in order to ensure legal redress where procurement rules and procedures are not followed; and where appropriate, measures to regulate personnel responsible for procurement such as declaration of interests in public procurements, training requirements and screening procedures.[55] The AUCPCC simply requires Member States to adopt legislative and other measures to create, maintain and strengthen procurement and management of public goods and services.[56] At the SADC regional level, the SADCPAC requires national governments to adopt measures which will create, maintain and strengthen systems of government procurement that ensure transparency, equity and efficiency.[57]

It is clear from the above discussion that the treaties give significant discretion to countries to establish systems that can prevent, detect and stop corruption in public procurement. The principles of public procurement captured in the three instruments vary slightly. Unlike the African regional and SADC sub-regional instrument, the UNCAC clearly identifies the need for governments to create avenues for review and

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52 Southern African Development Community Protocol Against Corruption (2001) signed on 14 August 2001. Hereafter, SADCPAC. South Africa was a signatory to the Protocol.

53 https://www.un.org/sustainabledevelopment/peace-justice/, the intention of Goal 16 of the SDG is to promote just, peaceful and inclusive societies.

54 Article 9(1) of the UNCAC.

55 Article 9(1)(a)-(e) of the UNCAC.

56 Article 5(4) of the AUCPCC.

57 Article 4(1)(b) of SADCPAC.

appeal of public procurement decisions where rules and procedures are not followed. The principles contained in these instruments provide good practices for public procurement.

It can be expected that although the duties imposed by the above instruments are primarily directed at national governments, all spheres of government in South Africa should contribute towards realising the country's international commitments due to the constitutional system of cooperative governance.[58] Besides, the duties imposed by Goal 16 of the SDGs fall on national and sub-national governments. Furthermore, scholars have generally argued that serious global problems, such as corruption, cannot be solved without the involvement of municipalities, due to urbanisation and dynamic forms of governance.[59]

1.5 The courts and legality review in procurement cases

The award of a tender by a municipality constitutes administrative action because it meets the definitional elements in the *Promotion of Administrative Justice Act* 3 of 2000.[60] In addition, procurement by municipalities is equal to the exercise of public power as well as the performance of public function, which falls within the ambit of administrative action.[61] This means that, apart from complying with the dictates of local procurement law, municipal officials must also comply with the right to just administrative action as given effect through PAJA.[62]

A bidder or aggrieved person who is not satisfied with a decision of an awarded tender, is required to follow the internal appeal mechanism provided by a municipality.[63] A

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58 See sections 40-41 of the Constitution; Fuo 2020 *Law Democracy and Development* 281-282.
59 Du Plessis 2017 *Law, Democracy and Development* 239-240; Satterthwaite and Mitlin *Reducing Urban Poverty in the Global South* 96.
60 See the meaning of "administrative action" and "decision" in section 1 of the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA).
61 *City of Tshwane Metropolitan Municipality and Others v New GX Enviro Solutions and Logistics Holdings (Pty) Ltd* (unreported) case number 53694/20 of 21 June 2021 para 11.
62 See sections 33 of the Constitution and section 3 of PAJA, see also *Khumalo and Another v Member of the Executive Council for Education, Kwa-Zulu Natal* 2015 (5) SA 57(CC).
63 See generally section 7(2)(a) and (c) of PAJA. For the meaning, purpose and advantages of internal appeal mechanisms, see: Quinot *et al Administrative Justice* 100-102; Hoexter *Administrative Law* 65-70; *Koyabe v Minister for Home Affairs* 2010 4 SA 2009 (12) BCLR 1192 (CC)para 35. Section

reading of section 62 of the *Systems Act* suggests that if someone's rights are not directly affected by the award of a tender, that person cannot challenge the decision to award the tender by following the internal appeal process. In addition, any other administrator who believes an award was erroneously or fraudulently made, cannot use the section 62 internal appeal mechanism to challenge an award.[64] As indicated below, such an administrator may approach a court to review and nullify the decision to award a tender, for example. As explained below, the Constitutional Court has held that such a review must take place through the constitutional principle of legality review.[65] The Court held that PAJA does not apply when an organ of state applies for the review of its own decision. Therefore, an organ of state seeking to review its own decisions is obliged to do so through the principle of legality entrenched in section 2 of the Constitution.[66]

The same route of judicial review may be followed where an administrator is not happy with the decision of a relevant appeal authority to vary or revoke an initial award on the ground that the decision of the appeal authority was made erroneously or fraudulently.[67] Internal appeal mechanisms do not guarantee that the legal framework will always be complied with. There could be cases where administrative officials are corrupt or where there is political interference in the award of tenders.

Given the possibility of using judicial review to set aside procurement contracts tainted with corruption, it is submitted that the judiciary may fulfil an important role in combatting corruption, especially where its independence and integrity are guaranteed.[68] As will become evident in Chapter 3 of this study, in South Africa the Constitution guarantees the independence of the courts[69] and gives them wide

62 of the *Local Government: Municipal Systems Act* 32 of 2000 (Systems Act) creates a general internal appeal mechanism.

64 See Raboshakga and Fuo 2020 *PELJ* 13-21.

65 *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) BCLR 240 (CC) para 40. Hereafter, Gijima case.

66 *Gijima* case para 40.

67 See Hoexter *Administrative Law* 511-513.

68 See Article 11 of the UNCAC; Fombad "Corruption and the Crisis of Constitutionalism in Africa" 46.

69 Section 165(2) of the *Constitution*. See also Siyo and Mubangizi 2015 *PELJ* 817.

remedial powers.[70] If courts are willing and able to rigorously enforce the law in a fair, impartial, and consistent manner, there is a likelihood that they can contribute towards minimizing corruption generally.[71]

As indicated above, where internal appeal mechanisms have been exhausted, courts can fulfill an important role in reviewing and setting aside erroneous or fraudulently awarded contracts. In South Africa, Hoexter observes that "judicial review has always been and remains the most important remedy for maladministration".[72] According Hoexter to judicial review "refers more specifically to the power of the courts to scrutinize and set aside administrative decisions on the basis of certain grounds of review."[73] Judicial review is concerned with whether an administrative decision was arrived at in an acceptable manner and the focus is on "the process, and on the way in which the decision-maker came to the challenged conclusion".[74]

With the adoption of the Constitution and coming into effect of PAJA, there are now at least five paths to administrative law review, namely: special statutory review; section 33 of the Constitution; the constitutional principle of legality; and the common law and PAJA.[75] As Hoexter points out: "Sorting out the relationship between this proliferation of pathways and working out a hierarchy amongst them have not been particularly easy tasks for courts".[76]

Informed by the precedent in the *Gijima* case, this research focuses on state self-review grounded on the constitutional principle of legality. In *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council,*[77] the court identified the principle of legality and described it as an aspect of the rule of law where it implied

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70 See s 172 of the Constitution. See also section 8 of PAJA.
71 Fombad "Corruption and the Crisis of Constitutionalism in Africa" 46.
72 Hoexter *Administrative Law in South Africa* 108.
73 Hoexter *Administrative Law in South Africa* 113 and 116.
74 Hoexter *Administrative Law in South Africa* 108.
75 Hoexter *Administrative Law in South Africa* 114-115. Hoexter points to the possibility of a sixth ground of review introduced by the Constitutional Court. See Hoexter Administrative Law in South Africa 113 and 116.
76 Hoexter *Administrative Law in South Africa* 116.
77 *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) 59.

that "the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".[78] The principle of legality is a founding value of the new constitutional order by virtue of section 1(c) of the Constitution. It provides a general basis for the review of the use of all public authority that goes beyond administrative action.[79] The fundamental idea expressed by the principle of legality is that the exercise of any public power is only legitimate where if it is lawful.[80] The content of this principle is being developed by the courts from the Constitution.[81]

As already hinted at above, the courts have indicated that where an organ of state seeks to review and nullify its own administrative act (state self-review), legality is the avenue for review and not in terms of PAJA.[82] The main reason for this approach is that the constitutional right to just and administrative action does not extend to the state. The right is to be enjoyed only by private persons.[83] In *Gijima*, the Constitutional Court held that because PAJA was specifically enacted to give effect to the rights of private persons to administrative justice under section 33 of the Constitution, PAJA cannot apply to state self-review. The Court held that PAJA must be interpreted through the lenses of the constitutional right to just administrative action.[84] Due to this exclusion of PAJA, the Court held that the principle of legality is the preferred tool for constitutional control of the exercise of public power.[85] The reasoning of the Court in the *Gijima* case is outlined in detail in chapter 4 of this study.

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[78] *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58. See Hoexter *Administrative Law in South Africa 122*-123; Govender 2015 Obiter 189.

[79] Hoexter *Administrative Law in South Africa* 121.See also Henrico 2019 TSAR 304.

[80] Hoexter *Administrative Law in South Africa* 121-122. See Snyman *Criminal Law* 36.

[81] Hoexter *Administrative Law in South Africa* 122.

[82] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) BCLR 240 (CC) para 27-40; *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Limited* 2019 (6) BCLR 661 (CC) para 45; *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* (unreported) case number 121/2020 of 7 April 2021 para 34; *MEC for Health, Eastern Cape and Another v Kirland Investment (Pty) Ltd* 2014 (3) SA 481 (CC) para 82; *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* 2014 (3) BCLR (CC) para 28 and 44.

[83] See *Gijima*, para 27-29.

[84] See *Gijima*, para 30-31.

[85] *Gijima* para 38-40.

The decision of the Court in *Gijima* regarding the appropriate route for self-review by organs of state has been applied in cases where municipalities applied to courts to review and set aside their own procurement decisions.[86] In *Buffalo City Metropolitan Municipality v ASLA Construction,* the Buffalo City Metropolitan Municipality sought to review and set aside its own procurement decision on the ground that the award of a contract did not follow constitutional and statutory prescripts. The Constitutional Court followed its earlier decision in the *Gijima* case and adjudicated the issue on the basis of the legality principle and not PAJA, as the High Court had done. The Constitutional Court observed that:

> The issues raised in this matter have a broader impact beyond the immediate parties. This is so given the current political context where many municipalities are changing administration and undertaking to 'clean house'. The case not only raises legal questions of import, but also affords this court the opportunity to provide guidance to organs of state who may wish to bring similar applications in the future and to lower courts dealing with these cases. The terrain of 'self-review', where a body seeks to review its own decision, has been dealt with in the decisions of this Court in *Tasima* I,[87] *Khumalo*,[88] *Kirland*,[89] Aurecon[90] and *Gijima*. However, because these cases – save for *Khumalo* and *Gijima* – dealt with PAJA reviews, it is necessary that we consider the principles emerging from these decisions and the extent of their application, if any, to the legality review.[91]

As evident from the above extract, one of the main concerns of the Court in the *Buffalo City* case was to develop guidelines to help organs of state (and lower courts) on how to deal with self-review cases in future. In addition, the Court had the opportunity to consider how principles emanating from *Khumalo* and *Gijima* can guide self-review by organs of state. The above statements suggest that the *Buffalo City* case represents a consolidation of the Court's jurisprudence on self-review by organs of state. This

86 *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Limited* 2019 (6) BCLR 661 (CC). Hereafter, Buffalo City case; Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd (unreported) case number 121/2020 of 7 April 2021. Hereafter, *Govan Mbeki Municipality* case.

87 *Department of Transport v Tasima (Pty) Limited* 2017 (2) SA 622 (CC).

88 *Khumalo v Member of the Executive Council for Education, KwaZulu Natal* 2014 (3) BCLR 333 (CC). Hereafter, *Khumalo* case.

89 *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute* 2014 (5) BCLR 547 (CC).

90 *City of Cape Town v Aurecon South Africa (Pty) Limited* 2017 (6) BCLR 730 (CC).

91 *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Limited* paras 37-38.

case centred on legality review in the context of procurement of goods and services by a municipality.

An important issue for the purposes of this dissertation relates to the requirements of legal standing. In the case of self-review by an organ of state, administrators may want to go to court to challenge their own decisions or those of other administrators on the basis that the decision was made erroneously or fraudulently. Any award of a procurement contract by a municipal administrator or by persons acting on behalf of a municipality, that was fraudulently made, falls within the definition of corruption in PCCAA in 1.2 above. Hoexter indicates that "an administrator exercising statutory functions in the public interest will generally be found to have the necessary standing, even if the enabling legislation says nothing about its competence to approach a court for relief".[92] Ultimately, the municipal manager, who is the chief accounting officer of a municipality,[93] has capacity and the responsibility to approach a court for self-review of procurement contracts because it is hardly in the public interest for erroneous or otherwise unlawful decisions to stand.[94]

This research focuses on how the legality review developed in the *Khumalo, Gijima, and Buffalo City* cases can help municipalities to curb corruption which is manifested in the fraudulent award of procurement contracts. State self-review through the principle of legality allows organs of state themselves to lead the charge in the promotion of an open, responsive and accountable government, values echoed in section 1 of the Constitution.[95] Many a time, anti-corruption activism has come from outside of the organs of state concerned or even outside of government. The use of the principle of legality through self-review provides an opportunity to organs of state to lead the charge against corruption in their own organisations. This dissertation is

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92 Hoexter *Administrative Law in South Africa* 511.

93 See section 55 of the *Systems Act* and sections 60-62 of the MFMA.

94 Hoexter *Administrative Law in South Africa* 511.

95 *Althech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* (unreported) Case number 1104/2019 of 5 October 2020 para 71.

not concerned about whether the approach adopted by the Constitutional Court in the *Gijima* case was the correct one. This has been debated by several scholars.[96]

1.6 Research objectives

The main objective of this study is to investigate how the legality review in constitutional law can be used by South African municipalities to curb corruption in the award of contracts for goods and services. The secondary objectives of this research are:

- To define corruption and explain how it can or tends to take place in municipal procurement.
- To discuss post-apartheid public sector procurement reform in the local government context and analyse its anti-corruption measures.
- To reflect on the role of the judiciary in combatting corruption in local procurement in South Africa.
- To reflect on how the principle of legality and state self-review as developed in three Constitutional Court cases (*Khumalo*; *Gijima*; and *Buffalo City*) can be used to curb corruption that takes place in the procurement of goods or services by municipalities.
- To review local government procurement cases that were decided on the basis of the legality review principle by lower courts after the Court ruling in *Buffalo City* case. The purpose is to determine if they lay down any principles that could enhance the ability of municipalities to curb procurement.
- To conclude and make recommendations on how the jurisprudence emanating from relevant case-law can be used by municipalities to curb procurement corruption

1.6 Framework of the dissertation

The remainder of this dissertation is structured as follows: Chapter 2 discusses the reform of post-apartheid public procurement law and their anti-corruption measures

[96] See Boonzaier 2018 *SALJ* 642; 644 -645; Henrico 2018 *TSAR* 288; Quinot 2020 *Loyola Law Review* 523, 534-535 and see Cachalia 2022 *SAJHR* 15.

from a local government perspective. Chapter 3 discusses how South African law protects the integrity of the judiciary and equips it to combat corruption in local government procurement. Chapter 4 discusses the principle of legality and state self-review through the lenses of three Constitutional Court cases (*Khumalo*; *Gijima*; and *Buffalo City*) and reflects on their contribution to curbing procurement corruption. Chapter 5 focuses on legality review in three local government procurement case-law instances post the Constitutional Court ruling in the *Buffalo City* case, and their potential contribution towards curbing procurement corruption. Chapter 6 provides concluding remarks and recommendations on how the jurisprudence emanating from relevant case-law can be used by municipalities to curb corruption in the award of contracts for goods or services through state self-review.

1.7 Research methodology

This research is essentially a desktop study that reviews in a critical and integrated manner, relevant scholarly literature together with case-law, procurement legislation and procurement policies. There is a close scrutiny of legislation that was adopted to give effect to the *Constitution of the Republic of South Africa*, 1996 from a local government perspective. Case-law is scrutinised to ascertain how legality review, as developed by the Constitutional Courts in especially the cases of: *Gijima*; *Khumalo;* and *Buffalo,* can be used to curb corruption that is manifested through the fraudulent award of procurement contracts by municipalities.

CHAPTER 2

POST-APARTHEID PUBLIC PROCUREMENT REFORM IN THE LOCAL GOVERNMENT CONTEXT

2.1 Introduction

Public procurement is a multi-layered function that concerns a string of practices that relate to the responsibility of government to deliver infrastructure and services to the inhabitants of a country.[97] For a government to succeed, it must acquire them through a system of procurement. Before 1994, public sector procurement in South Africa was controlled by the State Tender Board, which had national functions that included delegating work to other departments and entities.[98] There were also provincial tender boards that comprised political representatives, members of government and representatives of the business industry as well as other associations. These role-players had interests in how tenders were allocated and had to safeguard that the correct processes were followed.[99] The public procurement system before the transition to democracy favoured large and established companies, which made it impossible for smaller and newly established companies to obtain contracts. Smaller companies could not easily secure procurement contracts.[100] Public procurement was biased toward white people.[101] Due to the discriminatory nature of the system of apartheid, black people could not access government contracts.[102]

Despite post-apartheid legal reform discussed in 2.2 to 2.4 below, procurement corruption is a real challenge that undermines the ability of municipalities in South Africa to deliver on their broad developmental mandate. This dissertation explores how legality review can be used by municipalities that are willing to turn the tide against corruption, to reduce procurement corruption. This chapter seeks to provide

97 Fourie and Malan 2020 *Sustainability* 3.
98 See Fourie and Malan 2020 *Sustainability* 539.
99 See Fourie and Malan 2020 *Sustainability* 540.
100 Raga and Taylor 2010 http://ippa.org/images/PROCEEDINGS/IPPC4/10LegalIssueInPublicProcurement/Paper10-7.pdf
101 Brunette et al 2019 *Development Southern Africa* 538.
102 Fourie and Malan 2020 *Sustainability* 242.

context to this analysis. This chapter discusses the reform of post-apartheid public sector procurement law in the local government context and to analyse some of its anti-corruption measures. This approach helps in further contextualising the relevance of state self-review by municipalities in curbing procurement corruption.

To achieve the above objective, the discussion in the remainder of this chapter is divided into five parts. The first part discusses the nature of constitutional public procurement reform. The second part discusses the vision of post-apartheid public procurement as outlined in the Green Paper on Public Sector Procurement Reform in South Africa 1997. The third part provides an overview of legislative reform in public procurement relevant to local government. The fourth part discusses some measures contained in the current regulatory framework for public procurement at the local government level that are directed towards limiting procurement corruption in municipalities. The last part is a chapter summary.

2.2 Post-Apartheid constitutional public procurement reform

When negotiations for South Africa's transition to democracy started, there was a need to transform the public procurement system in the country. In this regard section 187 was introduced in the 1993 Constitution of South Africa to regulate public procurement.[103] Section 187(1) of the Interim Constitution required that the procurement of goods and services for any level of government should be regulated by an Act of Parliament and provincial laws. These laws were supposed to make provision for the appointment of independent and impartial tender boards to deal with such procurements. Section 187(2) of the Interim Constitution provided that such a procurement system promotes fair public competition. In addition, if there was any dissatisfaction, tender boards should be in a position to provide reasons to interested parties. Furthermore, section 187(3) of the Interim Constitution prohibited organs of state or any other person from interfering with the decisions and operations of tender boards. Section 187(4) prescribed that decisions of tender boards should be recorded.

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[103] See *Constitution of the Republic of South Africa* 200 of 1993. Hereafter, the Interim Constitution.

Section 187 of the Interim Constitution was eventually replaced by section 217 of the *Constitution of the Republic of South Africa*, 1996. In terms of Section 217(1) of the Constitution, organs of state have a responsibility when contracting for goods and services to do it in a way that complies with the principles of competitiveness, fairness, equity, cost-effectiveness and transparency.[104] To ensure cost-effectiveness and competitiveness, this constitutional provision requires that, before a municipality enters into contracts for the procurement of goods and services, a thorough evaluation is carried out to ascertain what is available and at what cost.[105] Section 217 of the Constitution further seeks to ensure procedural fairness in public procurement processes.[106] Subsection 217(2) of the Constitution also seeks to promote equity and the advancement of historically disadvantaged people by providing that municipalities may implement procurement policies that prescribe categories for preference in the allocation of contracts.[107] In terms of section 217(3) of the Constitution, the details of how preferential procurement should take place, must be given effect through national legislation.

The main goal for the enactment of section 217 of the Constitution was to promote the good governance principles and the requirements for just administrative action[108] and grounds that must be complied with when an aggrieved person seeks to have an administrative action reviewed by the courts.[109]

The courts have commented on the principles contained in section 217 of the Constitution in numerous cases. In *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd*,[110] the court dealt with a matter relating to a contractual agreement to render valuation services. In this case, the defendant challenged the validity and the lawfulness of the agreement due to the fact that there was no basis for the cause of action, and there were no procurement or even constitutional

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104 See Section 217 (1) of the Constitution.

105 *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works and Others* 2008 (1) SA 438 (SCA) para 9.

106 *Tetra Mobile Radio (Pty) Ltd* para 8.

107 *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* 2020 (4) SA 17 (SCA) para 20.

108 See Section 33 (1) of the Constitution.

109 Thobakgale and Mokgopo 2019 *Journal of Public Administration and Development Alternatives* 43.

110 *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T).

requirements to validate the existence of such a contract. The court held that the plaintiff's particulars of claim did not sustain a cause of action and reiterated that the system upon which an organ of state must contract for goods and services is one that is contemplated in section 217(1) of the Constitution.[111]

Similarly, in *BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation*[112], the court declared a lease agreement constitutionally invalid in that the respondent failed to follow a transparent procedure of public and competitive participation when concluding it and did not refer to market-related rentals. The court specifically declared that section 217 deals with the procurement of goods by way of a contract and that such procurement must be in accordance with the system as set out in section 217(1), which was not complied with by the respondent in this case.[113]

In *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works and Others*,[114] the plaintiff was the aggrieved party who had been unsuccessful in the award of a contract for the maintenance of repeater networks. The court dealt with the issue of disclosure of certain documentation pertaining to the awarding of a contract where the request was ultimately rejected by the Department of Works. The court concluded that the refusal by the Department of Works was unfair, and that fairness dictated that the documents be made available to the plaintiff to enable it to prosecute a fair hearing before the Appeals Tribunal.[115]

Lastly, in *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others,*[116] the court observed that, but for exceptions permitted under section 217(2) and 217(3) of the Constitution, all spheres of government and organs of state should contract for goods or services in accordance with a system that is equitable, fair, transparent, cost-effective and competitive.[117] The court stressed that the procurement provision sets

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[111] See *Koth Property Consultants CC* para 6.

[112] *BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation* 2019 (6) SA 443 (ECG).

[113] *BW Bright Water Way Props (Pty) Ltd* para 66.

[114] *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works and Others* 2008 (1) SA 438 (SCA) para 8.

[115] *Tetra Mobile Radio (Pty)* Ltd para 8 and 17.

[116] *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* 2020 (4) SA 17 (SCA) para 20.

[117] *Airports Company South Africa SOC Ltd* para 20.

an important general rule that should always be considered and complied with, especially in all matters relating to the procurement of goods and services.[118] Should a situation arise where one of the constitutional procurement principles is not complied with, this could lead to possible litigation by an aggrieved party who approaches the court for ~~a~~ relief to set aside or declare that decision unlawful and invalid.

Based on the above discussion, it is evident that courts continue to reiterate the position as contained in the Constitution in relation to relevant procurement principles and due processes which need to be followed when public procurement contracts are concluded and entered into. Fourie and Malan observe that the principles for public procurement provided for in the Constitution constitutes the foundation for all pieces of legislation that regulate public procurement in the country.[119] Following the coming into effect of the Constitution and the change in the political arena in 1996, public procurement reforms started gaining momentum and popularity.[120] This development led to the adoption of a policy framework to match the constitutional status of government procurement in South Africa,[121]namely, the Green Paper on Public Sector Procurement in South Africa (1997).[122]

2.3 Green Paper vision of post-apartheid public procurement reform

The African National Congress recognised the need to use state procurement powers to correct injustices of the past and to advance the social and economic objectives underlying the country's transformative Constitution. It was necessary for the government to adopt clear policy directions to further inform public procurement legislative reform in South Africa, in line with the dictates of section 217 of the Constitution. In April 1997, the government released the Green Paper on Public Sector Procurement in South Africa. The Green Paper outlined objectives of public procurement reform in South Africa.[123] A central objective of the public procurement

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118 See *Airports Company South Africa SOC Ltd* para 64.
119 Fourie and Malan *Sustainability* 6.
120 See Ambe 2009 *Educational Research and Review* 427.
121 Bolton *The Law of Government Procurement in South Africa* v.
122 Green Paper on Public Sector Procurement in South Africa (1997) General Notice 691 in GG 17928 of 14 April 1997. Hereafter, the Green Paper.
123 See 1.4.2. 'Good Governance' in Green Paper on Public Sector Procurement Reform in South Africa,1997.

reform agenda was "to make the tendering system more easily accessible to small, medium and micro enterprises".[124] However, the reform areas in the Green Paper broadly focused on advancing specific socio-economic objectives and good governance principles.

In terms of socio-economic objectives for public procurement, the Green Paper identified the need to: improve access to tendering information; develop tender advice centers; unbundle large projects into smaller projects; appoint a procurement ombudsman; classify building and engineering contracts; simplify tender submission requirements; promote early payment cycles by government and develop a preference system for SMMEs as well as broaden a participation base for small contracts.[125]

The Green Paper is very detailed on reform proposals that should be implemented by government to realise the ideals of good governance.[126] Good governance describes the ideal manner of conduct by public institutions and government officials in procurement and the management of public resources.[127] Although the areas of reform envisaged by the Green Paper cannot be exhausted in the context of this study, a few are worth highlighting. Generally, the Green Paper envisaged that government had to implement deep institutional reform that promotes effective and efficient procurement systems and practices which are capable of ensuring that adequate services are delivered to communities.[128] The Green Paper envisaged that a core part of this reform agenda entailed establishing "uniformity in procedures, policies, documentation and contract options" as well sound systems of control and accountability.[129]

The Green Paper equally stressed continuously improved public sector procurement through the implementation of sound management practices underpinned by constitutional values that are supposed to inform public administration in South

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124 Bolton *The Law of Government Procurement in South Africa* 265.
125 See '3. ACHIEVING SOCIO-ECONOMIC OBJECTIVES THROUGH PROCUREMENT' in Green Paper (1997).
126 See "ACHIEVING GOOD GOVERNANCE IN PROCUREMENT" in the Green Paper (1997).
127 Munzhedzi and Makwembere 2019 *Journal of Public Administration* 659; See also Masuku 2019 African *Journal of Democracy and Governance* 119-120.
128 See "2. ACHIEVING GOOD GOVERNANCE IN PROCUREMENT" in the Green Paper (1997).
129 See "2. ACHIEVING GOOD GOVERNANCE IN PROCUREMENT" in the Green Paper (1997).

Africa.[130] The Green Paper further envisaged that although the public must be encouraged to participate in public procurement processes, government must take responsibility and make final decisions in terms of its governing mandate. The Green Paper envisaged that government's overall strategy for public procurement should be to "achieve continuing improvement in value for money" and to "enhance the competitiveness of suppliers through the development of world-class procurement systems and practices".[131] The Green Paper requires government to ensure continuous "vigilance in the procurement system to prevent and to react to the blight of corruption."[132] The Green Paper also required the state to establish creative incentives to encourage those that are witnessing any violations of procurement processes to report those and to also ensure that there is protection for them due to their status as whistle-blowers. Whistle-blowers are susceptible to bullying and intimidation, therefore it is important that they always receive the necessary protection.

The Green Paper dictated that, in order to achieve uniformity in government in relation to socio-economic objectives, the national government should first develop clear, concise policy statements regarding its procurement reform objectives.[133] As will be seen from the discussion in 2.4 below, although the reform process of public procurement is ongoing and different legislation have been enacted to give effect to section 217 of the Constitution, there was never a White Paper to further refine the objectives and principles outlined in the 1997 Green Paper. In terms of the national law-making process in South Africa, the Green Paper was supposed to be succeeded by a White Paper on public procurement, which is a more refined discussion document developed by the relevant government department or task team.[134] After public comments, the White Paper ought to have been transformed into a Bill by the relevant government department and submitted to Parliament for debate and further transformation to legislation. There is no White Paper on public procurement in South Africa. It is suggested that the failure to develop a White Paper may have resulted in

130 See "2. ACHIEVING GOOD GOVERNANCE IN PROCUREMENT" in the Green Paper (1997); and section 195 of the Constitution.
131 See "2. ACHIEVING GOOD GOVERNANCE IN PROCUREMENT" in the Green Paper (1997).
132 See "2. ACHIEVING GOOD GOVERNANCE IN PROCUREMENT" in the Green Paper (1997).
133 See 2.2.2. 'Discussion' in Green Paper on Public Sector Procurement Reform in South Africa,1997.
134 On the general process for law-making, see: https://www.parliament.gov.za/how-law-made

an extremely fragmented regulatory framework for public procurement in South Africa with different pieces of legislation seeking to give effect to different objectives outlined in the 1997 Green Paper. A synopsis of this extremely fragmented legal framework is discussed below as it relates to local government.

2.4 Legislative reform of local government procurement

After the coming into effect of the Constitution and the release of the Green Paper, several primary and secondary pieces of legislation have been adopted at the national level to regulate public procurement in South Africa. This part of the chapter provides a chronological overview of those pieces of legislation relevant to local government procurement.

2.4.1 Preferential procurement law

In order to achieve some of the socio-economic objectives in the Green Paper, such as to assist Small, Medium and Micro Enterprises (hereafter SMMEs) and previously marginalized people, the government enacted the *Preferential Procurement Policy Framework Act* 5 of 2000 (hereafter PPPFA).[135] The objective of the PPPFA is to give effect to section 217 (2) and (3) of the Constitution by providing a legal framework for the implementation of the preferential procurement policy. The PPPFA is a very short piece of legislation with only 6 sections. Section 2 of the PPPFA makes provision for the framework to implement a preferential procurement policy. This section gives every organ of state the mandatory competence to formulate and implement its own preferential procurement policy within the set framework. The goal of such policy is to increase the number of contracts awarded to categories of persons who were historically disadvantaged and unfairly discriminated against.

The PPFA prescribed a preferential procurement framework that follows a determined point-based system which is outlined in the Preferential Procurement Policy Regulations.[136] Regulations 6 and 7 set out the details of the preference point system (the 80/20 and 90/10 points system) for the acquisition of goods and services by

[135] Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Chain Management* 256.
[136] Reg 6 and 7 in GN R32 in Government Gazette 40553 of 20 January 2017.

organs of state. A preference point system prescribes that for contracts with a rand value above the prescribed amount, a maximum of 10 points may be allocated for specific goals as contemplated in section 2(1)(d) of Act 5 of 2000, provided that the lowest acceptable tender scores 90 points for price,[137]for contracts with a rand value equal to or below a prescribed amount of a maximum of 20 points may be allocated for specific goals as contemplated in section 2(1)(d) of the PPPFA provided that the lowest acceptable tender scores 80 points for price.[138]Bidders can therefore score a 10% or 20% preference over the price offered by the competitors based on the preferential criteria.[139] The Preferential Procurement Policy Regulations (2017) also address how the functionality requirement should be used in evaluating tenders and how sub-contractors should be used for tenders above R30 million. It provides guidance on how contracts can be awarded to tenderers who do not score the highest point and remedies that should apply where a tenderer submits false information regarding BBEE status level, for example.[140]

One of the criticisms leveled against the PPPFA is that the ruling African National Congress (ANC) uses it to reward political loyalty and sustain its cadre deployment policy.[141] Therefore, the ANC's political goals are advanced through the public procurement system.[142] This dilutes the importance of meritocracy in the public procurement system.

2.4.2 Local Government: Municipal Finance Management Act

Fiscal management in South African municipalities is mainly regulated through the *Local Government: Municipal Finance Management Act* 56 of 2003 (MFMA). The MFMA establishes the supply-chain management framework for municipalities.[143] The

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[137] See Section 2(1)(a)(i) of the Act 5 of 2000.

[138] See Section 2(1)(a)(ii) of the Act 5 of 2000.

[139] Quinot 2018 *TSAR* 857.

[140] See Reg (3) and 7(3) provides that (a) the B-BBEE status level certificate issued by an authorized body or person; (b) a sworn affidavit as prescribed by the B-BBEE Codes of Good Practice; or (c) any other requirement prescribed in terms of the Broad-Based Black Economic Empowerment Act. See also Quinot 2018 *TSAR* 866.

[141] Steyn-Kotze *Delivering an Elusive Dream of Democracy: Lessons from Nelson Mandela Bay* 108.

[142] Steyn-Kotze *Delivering an Elusive Dream of Democracy: Lessons from Nelson Mandela* Bay 108.

[143] Fourie and Malan 2020 *Sustainability* 7.

objective of this Act is to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government, and to establish treasury norms and standards for local fiscal management. Following this objective, section 111[144] stipulates that each municipality and each municipal entity must develop and implement a supply-chain management policy (SCMP) which gives effect to the provisions of this Act. This should enable municipalities to follow processes that are in line with the supply-chain management policy when contracting for goods and services. In addition, the principles as set out in section 217(1) of the Constitution are echoed in section 112(1) and (2) of the MFMA, which dictates that the SCMP of a municipality must be fair, equitable, transparent, competitive, and cost-effective. The MFMA also defines the roles of mayors, municipal councillors and officials in supply chain management.[145] The MFMA also outlines specific requirements and processes that must be followed when municipalities decide to use public-private partnerships. In general terms, the MFMA seeks to ensure that finances in municipalities are well managed, and chances of corruption and fraud are minimized.

2.4.3 Code of conduct for councillors

Municipal councillors are elected for a five-year term to represent local communities in municipal councils.[146] Section 117 of the MFMA provides that no councillor of a municipality may be a member of a bid evaluation committee or any other committee in a municipality that deals with the evaluation or approval of tenders, quotations and contracts. In terms of this provision, councillors are further barred from attending any meeting dealing with these matters, even as observers. The behaviour of councillors is regulated by the Code of Conduct for Municipal Councilors: Schedule 1 of the *Local Government Municipal Systems* Act.[147] Generally, councillors are supposed to ensure that municipalities have structured mechanisms of accountability to local communities and strive to meet the priority needs of communities by ensuring that services are

[144] *Local Government: Municipal Finance Management Act* 56 of 2003.
[145] See sections 115 and 117 of the MFMA.
[146] See Section 159 (1) of the Constitution.
[147] Schedule 1 of the *Local Government Municipal Systems Act* 32 of 2000.

provided equitably, effectively and sustainably within the means of the municipality.[148] Councillors are required to declare to the municipal manager, their business interests whether direct or indirect, within 60 days of being elected into office.[149] Accordingly, councillors must not use the privileges of the office of a councillor to benefit themselves or any other person.[150] Councillors should not interfere in procurement processes and should declare their interests when partners and children tender to provide services to a municipality, so that there is transparency in the manner in which they operate.[151] At all times, councillors must perform the functions of their office in good faith, diligently, honestly and in a transparent manner.[152] It is worth noting that the Code of Conduct is enforceable, and councillors are obliged to adhere to its dictates.[153]

2.4.4 Municipal Supply Chain Management Regulations and MFMA Circular No 83

The *Municipal Supply Chain Management Regulations*[154] prescribe a framework for the establishment and the implementation of supply-chain management policies in municipalities. In terms of Regulation 2 of the MSCM Regulations, each municipality and each municipal entity must in terms of section 111 of the MFMA have and implement a supply-chain management policy that gives effect to section 217 of the Constitution and Part 1 of Chapter 11 (of the MFMA) and other applicable provisions of the MFMA.[155] These regulations also deal with logistics, disposal, risk and performance management; and prohibitions on awarding tenders to certain persons or companies.[156] Despite these, the main focus of the regulations is on demand and acquisition management.[157] The regulations prescribe different processes for formal written and verbal quotations,[158] competitive bidding or procuring from a specific

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148 Preamble of Code of Conduct for Municipal Councilors: Schedule 1 of the *Local Government Municipal Systems* Act.
149 Section 5 of the above.
150 See Section 6 of Schedule 1 of Act 32 of 2000.
151 Section 5(1) and (2) of Schedule 1 of Act 32 of 2000.
152 See Section 2(b) of Schedule 2 of Act 32 of 2000.
153 See Section 14 and 15 of Schedule 1 of Act 32 of 2000.
154 GN 868 in 27636 of 30 May 2005, hereafter the MSCM regulations.
155 *Local Government: Municipal Finance Management Act* 56 of 2003.
156 Reg 39-42 in GN R31 in GG 40533 of 20 January 2017.
157 See Part 2 of GN R31 in GG 40533 of 20 January 2017.
158 Reg 16 and 17 in GN R31 in GG 40533 of 20 January 2017.

sector such as information technology (IT) services.[159] The regulations also describe in detail matters relating to competitive bidding such as the composition of bidding committees, public invitations to bid, bid documentation, and the two-stage bidding process, for example.[160]

On 18 July 2016, the National Treasury released Circular No 83 on the Advertisement of Bids and the Publication of Notices in Respect of Awarded Bids, Cancelled Bids, and Variations and Extensions of Existing Contracts on the e-Tender Publications Portal.[161] This Circular advises municipalities on the issue of advertising bids and the publication of procurement-related notices on government's e-Tender Publication Portal. Circular 83 requires that certain mandatory information should be reflected in bid advertisements and equally prescribes certain mandatory information which must be published on the e-Tender Publication Portal involving successful bids, unsuccessful bids, cancelled bids and deviations. Advertisement of bids on the e-Tender Publication Portal must also comply with the requirement specified in Regulation 22(1)(a) of the 2005 Municipal Supply Chain Management Regulations. There should be a procedure in relation to invitation of bids that must stipulate to bidders that bids must be conducted by means of a public advertisement in a newspaper and on the e-Tender portal. The purpose of this is to ensure that municipalities comply with the supply-chain management policies and to also meet the requirements of constitutional procurement principles, in particular the principle of transparency.

2.4.5 MFMA Circular No 102 - Emergency Procurement

In 2020, after the President declared a national state of disaster under the *Disaster Management Act* 57 of 2002 (DMA),[162] National Treasury released MFMA Circular No 102 - Emergency Procurement in Response to National State of Disaster on 5 May 2020. The aim of the Circular was to advise on how municipalities could deviate from the normal public procurement rules in order to prevent and minimize the escalation of the spread of COVID-19. Municipalities and municipal entities were given powers to

159 Reg 31 of GN R31 in GG 40533 of 20 January 2017.
160 Reg 19 -29 of GN R31 in GG 40533 of 20 January 2017.
161 MFMA Circular No 83 of 18 July 2016.
162 GN 318 in GG 43107 of 18 March 2020

amend their procurement plans to reflect their available budgets to cater for COVID-19 related procurement.[163] A major hurdle that municipalities were tasked to overcome was to ensure that they used small business enterprises that fall under the designated groups in terms of the Preferential Procurement Regulations.[164]

Subsequent to the above, Circular No 103 was published on 27 May 2020.[165] The purpose of Circular No 103 was to ensure that the government reaction to the spread of the virus was responsive and flexible, and that there was value for money, thereby minimizing fraud and preventing corruption. In dealing with the Covid-19 pandemic, it was essential that internal control systems of every municipality and municipal entity considered: the change in operating activities of the existing control environment; the identification of information required to support the effectiveness and efficiency of new or already existing controls; and reassessment of internal and external communication.[166] The aim was also to ensure that there were control systems in place to curb any disruptions that might arise in relation to finance management operations in municipalities and municipal entities, and to minimize effects of the COVID-19 pandemic. In line with sections 62(1) (c) and 95 (c) of the MFMA, the Circular requires accounting officers of municipalities and municipal entities to implement financial management systems that ensure there are proper structures in respect of how finances are handled. Such measures should promote transparency, effectiveness, and efficiency.[167]

2.4.6 Broad-Based Economic Empowerment Act

The *Broad-Based Economic Empowerment Act* 53 of 2003 (B-BBEE Act) was introduced to promote economic transformation for previously disadvantaged people, give effect to the constitutional right to equality, and to increase the effective participation of black people in the economy.[168] The B-BBEE Act establishes a code of good practice to inform the development of qualification criteria for the issuing of

[163] Item 7 of the MFMA Circular 102 of Act 56 of 2003.
[164] See Item 4.7 of the MFMA Circular 102 of Act 56 of 2003.
[165] GN 851 in GG 43582 of 27 May 2020.
[166] Item 1 of the Circular 103 of Act 56 of 2003. See sections 62(1)(c) and 95(c) of the MFMA.
[167] See Item 3 of the Circular 103 of Act 56 of 2003.
[168] See the Preamble of the *Broad-Based Black Economic Empowerment Act* 53 of 2003

licenses or concessions, the sale of state-owned enterprises, and partnering with the private sector. The B-BBEE Act requires organs of state, including municipalities, to develop and implement a preferential procurement policy to promote black economic empowerment by providing opportunities for previously disadvantaged black people.[169] The Black Economic Empowerment Advisory Council was established in terms of section 4 of the Act to advise the government on black economic empowerment, to review progress in achieving black economic empowerment and to facilitate partnerships between organs of state and the private sector.[170]

A major problem associated with the B-BBEE Act in the context of public procurement is "fronting".[171] Section 1 of the B-BBEE Act defines fronting as:

> a transaction, arrangement or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of B-BBEE Act or the implementation of any of the provisions of B-BBEE Act, including but not limited to practices in connection with a B-BBEE initiative in terms of which economic benefits are received as a result of the broad based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal document.[172]

In simple terms, fronting constitutes fraud, which is a manifestation of corruption. Fronting is an offence in terms of sections 13(3) and 130(1)(d) of the B-BBEE Act and it is punishable with a fine or imprisonment that does not exceed ten years or both. The eradication of fronting is a serious challenge because despite punitive provisions in legislation, there is still non-compliance with relevant laws.[173] Another challenge that is associated with fronting is that in some circumstances, there is a lack of competition when it comes to the procurement of goods and services due to the fact that tenders are not advertised, and they are allocated to certain people without the

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[169] Standard for Infrastructure Procurement and Delivery Management 48.
[170] Section 5 (a) to (f) of the B-BBEE Act.
[171] See Du Plessis 2022 *Stellenbosch Law Review* 396-418.
[172] See Section 1 of B-BBEE Act. See also *Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa* (1030/2017) [2018] ZASCA 167 para 26.
[173] Thobakgale and Mokgopo 2018 *Journal of Public Administration and Development Alternatives* 45.

prescribed channels being followed.[174] Fronting can undermine the substantive economic empowerment of black people.[175]

2.4.7 Public Procurement Bill (2020)

The fragmented legislative framework for public procurement in South Africa may change if the Public Procurement Bill (2020) becomes law.[176] The Bill seeks to prescribe a legal framework for public procurement as envisaged in section 217 of the Constitution. Other objectives advanced in the Bill include the need to: ensure that economic opportunities are provided for previously disadvantaged people, women, the youth and people with disabilities; promote small businesses and local production of goods in South Africa; create a single regulatory framework for public procurement in order to eliminate fragmented procurement prescripts; address procurement irregularities and the associated high economic and social costs that have resulted from it; improve the public procurement regulatory framework that seems to have failed; and to address poor compliance with the law, which badly impacts the delivery of services in all spheres of government.[177] It is envisaged that the Bill will assist in the creation of strong oversight mechanisms and create integrity institutions to ensure that procurement processes are conducted with the utmost honesty and integrity. The purpose is to avoid cases where there would be regulatory violations and corruption.[178] Even if this Bill is adopted, it will not affect the focus of this study, which primarily investigates how state self-review can be used by municipalities to curb corruption in procurement.[179]

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[174] Thobakgale and Mokgopo 2018 *Journal of Public Administration and Development Alternatives* 45. See also *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 ZAGPJHC 177 para 84, 110 and 111 and *Swifambo Rail Leasing v Passenger Rail Agency of South Africa* 2020 (1) SA 76 (SCA) (30 November 2018) 167 para 29).

[175] *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 ZAGPJHC 177 para 98, 99 and 106.

[176] Draft Bill of Public Procurement 2020 (hereafter the Bill). Since the version of the Draft bill of Public Procurement was eventually published for public comment in February 2020, no further drafts have been forthcoming to date.

[177] Buthelezi 2020 https://pmg.org.za/committee-meeting. See also Section 2 of the Draft Bill of Public Procurement.

[178] Parliamentary Communication Services 2020 https://www.parliament.gov.za

[179] Parliamentary Communication Services 2020 Parliament of the Republic of South Africa https://www.parliament.gov.za/

2.5 Measures contained in the regulatory framework to limit corruption

Despite post-apartheid legal reform of public procurement, the general view seems to be that corruption has escalated in municipal procurement, thereby making it impossible for local government to realise the financial benefits that the private sector can bring to the table in terms of value for money.[180] As seen in Chapter 1, this severely affects the ability of many municipalities to deliver even basic services. From a general theoretical point of view, scholars have argued that, in order to reduce corruption in public procurement, government must ensure that there is adequate provision for monitoring and evaluating compliance with supply-chain management prescripts;[181] promoting transparency and stakeholder participation in procurement processes; and employing centralisation and decentralisation for different categories of goods and services.[182] Furthermore, it has been argued that government should make resources available for the protection of whistle-blowers so that they are shielded from victimization.[183] In an extensive study done by Wright on how to address public sector corruption in local government in South Africa, she identifies the principles of integrity, transparency and accountability as indispensable principles that must be contained in the regulatory framework.[184] She argues that if these principles are contained in local government legislation and implemented, they will contribute towards reducing corruption.[185] The discussion that follows briefly illustrates the extent to which these principles are protected in the current regulatory framework for local government procurement.

2.5.1 Principle of transparency in local government procurement law

Transparency refers to the availability of information about government activities to the public and the provision of relevant information such as public accounts, audit

180 See para 1.3 above.
181 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Chain Management* 252.
182 See Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Chain Management* 254.
183 Sugudhav-Sewpersadh and Mubangizi 2019 *Loyola Journal of Social Sciences* 75.
184 Wright *Legal perspectives on the prevention and minimization of corruption for sustainability in South African municipalities* 93-114.
185 Wright *Legal perspectives on the prevention and minimization of corruption for sustainability in South African municipalities* 93-114.

reports, government rules and other government-related services.[186] Armstrong describes transparency as the unfettered access by the public to timely and reliable information on decisions and performance in the public sector.[187] The Constitution and the *Promotion of Access to Information Act* (hereafter PAIA)[188] oblige municipalities to be transparent and promote access to information.[189] Regulation 22 of the 2005 SCM Regulations seeks to ensure transparency in terms of public invitations for competitive bids – invitations which contain bid specifications are supposed to be advertised in local newspapers, the website of a municipality and the Government Tender Bulletin.[190] Regulation 6(4)[191] also provides that the procurement reports of a municipality must be made public in accordance with section 21A of the *Local Government: Municipal Systems Act* (hereafter the Systems Act).[192] Section 21A of the *Systems Act* prescribes how communication with relevant local communities should take place. The aim is to ensure that communities understand the information and that there is a wide reach through local newspapers and radio broadcasts.[193] Regulation 23(1) of the SCM Regulations makes provision for the procedure for the handling, opening and recording of bids and for a supply-chain management policy to determine the procedure for bids and make bids open to the public.[194] The accounting officer has an obligation to record in a register all bids that are received in time, to make that register available for public inspection and to make public those entries on the website of the municipality or the municipal entity.[195] The purpose of these measures is to advance the transparency programme and to also ensure that communities can have confidence in a municipality's administration. Although a commitment is made to promote openness in municipal procurement, it has been

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186 Fourie and Malan 2020 *Sustainability* 7.
187 Armstrong 2005 *Economic & Social Affairs* 2. Also see section 5(1)(d) of the *Systems Act*.
188 *Promotion of Access to Information Act* 2 of 2000.
189 See sections 1(d), 32 and 195(1)(g) of the Constitution; and section 9(1)(e) *PAIA*.
190 Regulation 22 in GN 868 IN GG 27636 of 30 May 2005.
191 See Regulation 6(4) of the in GN 868 in GG 27636 of 30 May 2005, see also Regulation 6(3) of the SCM Regulations of 2005.
192 Act 32 of 2000.
193 Section 21 (1) (c) of the above Act.
194 Regulation 23(1)(a) in GN 868 in GG 27636 of 30 May 2005.
195 See Regulation 23(1) (c)(i) -(iii) in GN 868 in GG 27636 of 30 May 2005.

argued that the system is "extremely rigid, cumbersome and difficult to implement as a result of the many formal procedures that are contained" in law.[196]

2.5.2 Principle of integrity in local government procurement law

The principle of integrity in local government law means that local government officials ought to observe strict moral values and must lead with honesty.[197] This principle is oppositely defined as not being corrupt or fraudulent.[198] As role players in the local governance system, councillors have a pivotal role to play in setting a tone to ensure sound governance and strong oversight in the interests of communities.[199] In terms of the Code of Conduct for Councillors, councillors are required to act in the best interests of the municipality and to ensure that the integrity of the municipality is not compromised.[200] They are not allowed to interfere in the administration of any department in the municipality and should not obstruct any procurement decision of the municipality.[201] Councillors are required to act in a manner that is ethically sound and in the best interest of the community. As seen in 2.4.3 above, councillors are barred by the MFMA from participating in key procurement processes. This seeks to maintain the integrity of the system. Besides councillors, section 195(1)(a) of the Constitution generally requires municipal administrations to promote a high standard of professional ethics. This also applies to procurement. Since corruption is endemic in the local sphere of government[202] integrity and a high standard of ethics can be used to minimise corruption in local procurement.

2.5.3 Principle of accountability in local government procurement law

Accountability requires that those who are entrusted with public power to manage government resources should account to citizens or other authorities on how such

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196 Ambe and Badenhorst-Weiss 2012 *Jourrnal of Transport and Supply Chain Management* 250 – 251.
197 See Wright *Legal Perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities* 114, see also section 7 and 36 of the Constitution.
198 Hoekstra and Kaptein 2012 *Public Integrity* 8.
199 Municipal Integrity Management Framework 2015 *Local Government Anti-Corruption Strategy* 4.
200 Anon 2016 https://www.cogta.gov.za
201 Section 12 of the Code of Conduct for Councillors in Schedule 1 of the *Systems Act*.
202 Mle and Maclean 2011 *Journal of Public Administration* 1364.

resources are used.[203] In other words, they must explain and justify their actions, activities, and performance to communities and other oversight institutions.[204] Sections 152(1)(a) and 195(1)(f) of the Constitution expressly oblige municipalities to provide accountable government to communities. In the local government context, the constitutional right to access courts can be used to promote accountability.[205] Section 34 of the Constitution guarantees everyone the right to have any dispute that can be resolved by application of law, decided in a fair public hearing before a court or another independent and impartial tribunal or forum. In light of the duty to promote accountability, municipal officials must notify the community about municipal decisions such as by-laws, service delivery and other information relevant to communities at all material times.[206] The *Systems Act* requires that municipal councils must provide accountable government without favour or prejudice.[207]

Section 60(a) of the MFMA provides that the municipal manager is the accounting officer in the municipality.[208] The accounting officer of the municipality is required to act with fidelity, honesty, integrity and in the best interest of the municipality in managing its financial affairs.[209]The role of the accounting officer within a municipal structure is to manage finances of the municipality including assets and liabilities,[210] revenue and expenditure, and budget implementation of the municipality.[211] The municipal manager must also ensure that there is a system of internal control of assets and liabilities including maintaining a register where it is prescribed.[212] In addition to the latter, Regulation 4(1) (c) of the 2005 Supply Chain Management Regulations imposes a duty on accounting officers to enforce reasonable cost-effective measures

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203 Munzhedzi and Makwembere 2019 *Journal of Public Administration* 666.
204 Gilbert 2018 *University of Chicago Legal Forum* 119.
205 Section 34 of the Constitution; *Wright Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities* 125.
206 See section 17(2) (b), ss 28(3) and 78(3)(a) of the *Systems Act*; see also section 5 (1) (c) of the *Systems Act*, See also Steytler and Visser *Local Government Law in South Africa* 6-12.
207 See section 4(2)(b) of the *Systems Act*.
208 Section 60 (a) of the *Local Government: Municipal Finance Management Act* 53 of 2003.
209 Section 61(1)(a) of Act 53 of 2003. Also see Steytler and De Visser *Local Government of South Africa* 11A-3.
210 Section 63(2)(a) of the MFMA.
211 Anon 2013 http://www.makana.gov.za. See also Steytler and De Visser *Local Government Law of South Africa* page 11-10.
212 Section 63(2)(c) of the MFMA; see also section 75 (1) and (2) of the MFMA.

for the prevention of fraud, corruption, favoritism, and unfair and irregular practices in the implementation of the supply-chain management policy of a municipality.[213]

Municipal officials involved in procurement corruption can be held accountable through criminal prosecution in terms of the *Prevention and Combating of Corrupt Activities Act* 12 of 2004. However, this dissertation does not focus on criminal measures to curb corruption. Therefore, it does not discuss the details of PCCA.

The discussion in 2.5.1 to 2.5.3 above shows that local government procurement law in South Africa recognises and gives effect to the principles of transparency, integrity, and accountability. This means that, at least in theory, the legal framework contains some measures that can minimise corruption in local procurement. However, as shown in 1.3 above, the reality is different on the ground – procurement corruption thrives at the local level.

2.6 Chapter summary

The South African government spends a significant part of its Gross Domestic Product (GDP) on procuring goods and services needed to deliver services to communities. Public procurement therefore remains an important tool for providing social services to the people. Besides service delivery, public procurement is used as a tool to bring about broad socio-economic transformation for the majority of the country's population who were discriminated against and marginalized in the past. The purpose of this chapter was to discuss the reform of post-apartheid public procurement law in the local government context and to analyse its anti-corruption measures. In order to achieve the above objective, the discussion in this chapter was structured into five parts:

The first part of the chapter discussed changes introduced to public procurement in South Africa by section 217 of the Constitution against the backdrop of the features of the erstwhile apartheid system. It was shown that although section 217 of the Constitution commits municipalities to using procurement to advance persons and

[213] Reg 4 (1) (c) in GN 868 IN GG 27636 of 30 May 2005. Also see Steytler and De Visser *Local Government Law of South Africa* page 11-10.

categories of persons who were historically disadvantaged by unfair discrimination, it emphasizes the need to adhere to fundamental principles such as transparency, fairness, competition, and cost-effectiveness in contracting for goods and services. It was observed that courts have in several cases set aside contracts for goods or services that did not comply with the core principles set out in section 217(1) of the Constitution. It was further observed that constitutional reform, together with the political transition in the 1990s, increased the pace of public procurement reforms, which led to the introduction of several pieces of legislation.

The second part of the discussion above shows that, prior to the enactment of public procurement legislation, the government released the Green Paper on Public Sector Procurement Reform in South Africa in 1997. The Green Paper outlined the vision for government procurement from the perspective of socio-economic and good governance objectives. In terms of the socio-economic objectives, the main focus was to promote the participation of previously disadvantaged people by making it easier for small, macro, and medium enterprises to participate in government procurement. In terms of good governance, the Green Paper emphasized the need to put in place measures that promote accountability and transparency and minimise corruption. As the discussion in 2.3 shows, the Green Paper was not succeeded by a White Paper on public sector procurement as per the general law-making processes in South Africa. It was argued that the failure to develop a White Paper on public procurement to further refine government's policy positions may have been the cause of the extremely fragmented regulatory framework on procurement.

The third part of the chapter provided an overview of legislative reform in public procurement relevant to local government. The discussion makes it clear that there is a myriad of primary and secondary pieces of legislation that have been put in place by national government to regulate local government procurement in line with constitutional requirements. Some of these pieces of legislation set minimum standards that municipalities must comply with when they procure goods and services. The supply-chain management policies of municipalities must comply with minimum requirements set by national government. In terms of national legislation, councillors are barred from participating in important procurement processes to promote the

integrity of the system. The municipal manager remains the most important role-player who must ensure that there is compliance with national legislation and local supply-chain management policies. It was established that, despite the good intention of black economic empowerment legislation, fronting emerged as a challenge that limits substantive black economic empowerment.

The fourth part discussed some measures contained in the current regulatory framework for public procurement at the local government level that are directed towards limiting corruption in the award of contracts for goods or services in municipalities. The discussion primarily centered on how the principles of transparency, integrity, and accountability are provided for in local government procurement law. It was shown that, apart from procurement law, the constitutional framework requires municipalities to provide transparent and accountable government in South Africa. There is a duty imposed on municipal administrations to promote a high standard of professional ethics which is equally relevant to procuring goods and services.

The discussion in this chapter further helps in contextualising the relevance of state self-review by municipalities in curbing corruption in the award of contracts for goods or services in South Africa. This is so, given the fact that despite measures provided for in the regulatory framework to combat procurement corruption, corruption in local government procurement persists. State self- review provides one more tool in the hands of municipalities to overturn contracts for goods and services tainted by corruption. The next chapter reflects on the role of the judiciary in combatting corruption in South African public procurement.

CHAPTER 3

THE ROLE OF THE JUDICIARY IN COMBATTING PROCUREMENT CORRUPTION IN SOUTH AFRICA

3.1 Introduction

This dissertation explores how legality review can be used by South African municipalities to curb corruption in their award of contracts for goods and services. In the previous chapter, this researcher established that despite attempts to infuse principles that can minimise corruption in the fiscal framework for procurement in South Africa, corruption in procurement continues to thrive. This situation requires an effective process that can be used to challenge tenders that are awarded through corrupt means. This can be done through internal appeal mechanisms or review applications to a competent court. Municipalities themselves can play an important role in this regard. In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricon Africa v Hidro-Tech Systems (Pty) Ltd and Another,* [214] the court held that organs of state should not remain passive in the face of evidence of fraud; they must take appropriate steps to remedy such situations.[215] This chapter reflects on the role of the judiciary in combatting corruption in local procurement in South Africa. There is agreement that the judiciary can play an important role in combatting corruption, especially where its independence and integrity are guaranteed.[216] In this regard, it has been suggested that if courts are willing and able to rigorously enforce the law in a fair, impartial, and consistent manner, there is a likelihood that they will contribute towards minimising corruption.[217] In the context of this study, such an argument is premised on the assumption that there exists an adequate legal framework for local government procurement that seeks to prevent and minimise corruption. As seen in chapter 2, the legal framework for municipal procurement in South Africa includes some measures

[214] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricon Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC).
[215] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricon Africa v Hidro-Tech Systems* para 28.
[216] See Article 11 of the UNCAC; Fombad *Corruption and the Crisis of Constitutionalism in Africa Revisiting Control Measures* 46.
[217] Fombad *Corruption and the Crisis of Constitutionalism* 46.

that seek to prevent and minimise corruption. As shown in 1.5 above, courts can also be used to review and set aside procurement contracts tainted by corruption.

To achieve the objective of this chapter, the discussion that follows is structured into three parts. The first part of the chapter discusses the judiciary in the context of the Constitution, paying specific attention to its structure, independence and assigned role. The second part generally reflects on the role of the judiciary in combatting corruption in South Africa. Although this chapter reflects on the role of the judiciary in combatting corruption in procurement, the focus is on higher courts that enjoy constitutional jurisdiction.[218] This is important given the prominence of section 217 of the Constitution in procurement cases where courts are generally required to pronounce on whether the constitutional requirements have been met.

3.2 The Judiciary in the context of the Constitution

Judicial independence is recognised as vital to combatting procurement corruption in Article 11 (1) of the UNCAC.[219] This provision obliges State Parties to the Convention to implement measures that strengthen the independence and integrity of the judiciary. Judicial independence emphasises two ideals: firstly, judges should be empowered to interpret and enforce laws impartially and without bias; and secondly, protective measures must be put in place to ensure that judges are insulated from the influence of, and interference by, other branches of government, and from private business interests.[220] The UNCAC equally emphasises that the judiciary itself must be free from corruption and its members must act with integrity.[221] These prerequisites ensure that courts can effectively hold to account government officials and business people implicated in procurement corruption.

In line with the requirement of Article 11 of the UNCAC, the Constitution strives to guarantee the independence of the judiciary in South Africa. Chapter 8 of the Constitution is dedicated to courts and administration of justice in South Africa. In

218 For a detailed discussion on the structure of the judiciary in South Africa, and the jurisdiction of courts over constitutional matters, see De Vos and Freedman *South African Constitutional Law in Context* 229-244.

219 United Nations Convention Against Corruption (2005).

220 De Vos and Freedman *South African Constitutional Law in Context* 250.

221 Article 11 (1) of the UNCAC (2005).

terms of section 165(1) of the Constitution, the judicial authority of the Republic is vested in the courts. Section 165(2) of the Constitution provides that the courts "are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice".[222] In terms of the Constitution, no person or organ of state may interfere with the functioning of the courts. Section 165(4) of the Constitution provides that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality and dignity, accessibility and effectiveness of the courts.[223] This section emphasizes that an order or decision issued by the courts binds all persons to whom and organs of state to which it applies.[224]

The organisation of relationships between courts and the internal organisation of courts contribute to their independence.[225] The judicial system of South Africa comprises ~~of~~ the following courts: the Constitutional Court; the Supreme Court of Appeal (hereafter the SCA); the High Court of South Africa; the Magistrates' Courts; and any other courts established or recognised by an Act of Parliament.[226] The composition and mandate of the Constitutional Court is outlined in section 167 of the Constitution. In terms of this provision, the Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges. The Constitutional Court is the highest court in all constitutional matters,[227] and it may decide only on constitutional matters and issues connected with decisions regarding constitutional matters.[228] The Court makes the final decision on whether a matter is a constitutional matter or whether an issue relates to a decision on a constitutional matter.[229] Section 168 of the Constitution makes provision for the composition and mandate of the SCA. This section provides that the SCA consists of a President, a

[222] Gordon and Bruce *Transformation and the Independence of the Judiciary in South Africa* 22. See also the United Nations Basic Principles on the Independence of the Judiciary (adopted in September 1985).
[223] Section 165 of the Constitution. See also Saba 2019 *KAS African Law Study Library* 105.
[224] Section 165 (5) of the Constitution.
[225] De Vos and Freedman *South African Constitutional Law in Context* 246.
[226] Section 167 of the Constitution.
[227] Section 167(3) of the Constitution.
[228] Section 167(3)(a)-(c) of the Constitution.
[229] Section 167(3)(c) of the Constitution.

Deputy President and the number of judges of appeal as determined in terms of an Act of Parliament.[230] A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.[231] This court may decide appeals in any matter referred to it .[232] Lastly, in terms of superior courts, there are separate Divisions of the High Court in each of the country's nine provinces.[233] A High Court may decide any constitutional matter except a matter that only the Constitutional Court may decide or is assigned by an Act of Parliament to another court of a status similar to a High Court, and any other matter not assigned to another court by an Act of Parliament.[234] This research does not cover the Magistrates' Court, which is catered for in section 170 of the Constitution.

The power of (superior) courts in constitutional matters is provided for in section 172 of the Constitution, which states that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency,[235] and may make an order that is just and equitable, including an order which limits the retrospective effect of the declaration of the invalidity[236] and an order which suspends the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.[237] Justice Jafta has indicated that:

> A just and equitable order must invariably be fair to all persons affected by it. A court that contemplates issuing such an order must weigh up the interests of all parties to a litigation and where appropriate, the balancing must also take into account the interests of the public.[238]

The power of courts to make a just and equitable order is not without limits, as such an order must still be lawful and consistent with the Constitution.[239] Justice Jafta

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230 Section 168 (1) of the Constitution.
231 Section 168 (2) of the Constitution.
232 Section 168 (3)(a)-(b) of the Constitution.
233 For details, see De Vos and Freedman *South African Constitutional Law in Context* 230-231.
234 Section 169 (a)-(b) of the Constitution.
235 Section 172 (1)(a) of the Constitution.
236 Section 172(1)(a)(i) of the Constitution.
237 Section 172(1)(a)(ii) of the Constitution.
238 *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* 2018 (10) BCLR 1179 (CC) para 125.
239 *Corruption Watch NPC* Case paras 111 and 122.

explains that the reason for this is because when a court makes such an order, it exercises judicial power. [240]

Furthermore, in terms of the Constitution, the SCA, a High Court or a court of a similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.[241] In terms of section 173 of the Constitution, the Constitutional Court, the SCA and a High Court have inherent powers to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

It is important to note that the independence of the judiciary is further strengthened through the way judges are appointed.[242] Judicial officers in South Africa are appointed through the constitutional process outlined in section 174 of the Constitution. In terms of this provision, the President as head of the national executive, after consulting the Judicial Service Commission and the leaders of political parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.[243] Furthermore, other judges of the Constitutional Court are appointed by the President as head of the national executive, after consulting the Chief Justice and leaders of political parties represented in the National Assembly. In terms of procedure, the Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made and submit the list to the President.[244] The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointments remain to be made.[245] In this case, the Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the

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[240] Corruption Watch NPC case para 122.
[241] Section 168 and section 170 of the Constitution.
[242] For details, see De Vos and Freedman *South African Constitutional Law in Context* 250.
[243] Section 178 of the Constitution.
[244] Section 178 (4)(a) of the Constitution.
[245] Section 174 (4)(b) of the Constitution.

supplemented list.[246] Furthermore, the President must appoint the judges of all other courts on the advice of the Judicial Service Commission.[247] Section 174(7) of the Constitution provides that other judicial officers must be appointed in terms of an Act of Parliament, which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.

Based on a scrutiny of relevant constitutional and legislative provisions affecting the independence of the judiciary in South Africa, it has been suggested that the judiciary is the most independent branch of government in South Africa.[248] The authors argue that the Constitution has created additional mechanisms to guarantee the independence of the judiciary in South Africa and that:

> Apart from the appointment of impartial and independent judicial officers, the independence of the judiciary is formally guaranteed by requiring judges to take an oath of office, by safeguarding the security of tenure of judges, by protecting the financial security of judges and by limiting the civil liability of judges.[249]

Given the above strong protection of the independence of courts in South Africa and their role as custodians of the Constitution, it is submitted that they have an important role to play in the fight against corruption.[250] This is explored in 3.3 below.

3.3 A reflection on the role of courts in combatting corruption

As highlighted above, an independent judiciary and the judicial process are important for ensuring compliance with procurement laws. Drawing from the research of Fuo on the role of courts in interpreting local government's environmental powers in South Africa, this researcher argues that superior courts can play an important role in "the interpretation, implementation, development and enforcement" of procurement laws.[251] Against this backdrop, this researcher argues that courts can generally contribute towards combatting procurement corruption in four ways. Firstly, courts

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246 Section 174(4)(a) of the Constitution.
247 Section 174(6) of the Constitution.
248 De Vos and Freedman *South African Constitutional Law in Context* 280.
249 De Vos and Freedman *South African Constitutional Law in Context* 281.
250 Okpaluba 2015 *SAPL* 123.
251 Fuo 2015 *Commonwealth Journal of Local Governance* 19.

should uphold procurement laws in practice "by carefully considering rights and interests and then making reasonable, just, lawful and equitable findings".[252] Secondly, courts solve procurement disputes between litigants "by interpreting and applying the law - giving effect to one of the basic functions of law, maintaining order and social control."[253] Thirdly, courts contribute towards deepening the procurement and anti-corruption law discourse by performing the previous two roles. It is argued that this gives courts "an opportunity to analyse, interpret, explain and refine existing" procurement laws.[254] Lastly, in deepening the procurement and anti-corruption law discourse, "courts contribute to law-making"'.[255] The exercise of the court's role may also contribute towards clarifying the duties of relevant role-players in municipal supply-chain management processes as well as the duties of private businesses.

The discussion that follows in chapter 4 shows how courts have contributed towards law-making through the development of the principle of legality and state self-review as a tool for curbing procurement corruption.

3.4 Chapter summary

This chapter reflected on the role of the judiciary in combatting corruption in local procurement in South Africa. To achieve this objective, the discussion first focused on the structure of the judiciary in terms of the Constitution and reflected on the extent to which its independence is guaranteed vis-à-vis the other branches of government. This part of the chapter found that higher courts enjoy strong constitutional protection of their independence in South Africa, which sets them up in a position where they can contribute towards combatting corruption. For courts to assist in combatting corruption, it is important that they are independent and capable of exercising their powers in an impartial manner without fear, favour or prejudice.

As seen in chapter 2, there is a plethora of legislation regulating municipal procurement in South Africa with principles such as accountability, transparency and integrity engrained in them to prevent and minimise corruption. Courts have an

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[252] Fuo 2015 *Commonwealth Journal of Local Governance* 19.
[253] Fuo 2015 *Commonwealth Journal of Local Governance* 19.
[254] Fuo 2015 *Commonwealth Journal of Local Governance* 20.
[255] Fuo 2015 *Commonwealth Journal of Local Governance* 20.

important role to play in ensuring that there is full compliance with these prescripts. This chapter argued that courts can contribute towards combatting procurement corruption in various ways: courts can interpret and apply the law; they can uphold procurement laws when they carefully consider the rights and interests of litigants and make lawful, just and equitable findings; they can contribute towards deepening the procurement and anti-corruption law discourse through fulfilling their law interpretation and enforcement functions; and they can uphold the law through developing the law where there is a gap. In terms of the Constitution, courts enjoy wide discretionary powers in granting judicial relief in procurement cases where corruption was involved.

The chapter that follows, shows how the Constitutional Court has developed and used state self-review, as part of legality review, to set aside procurement contracts tainted by irregularities and corruption. The intention is to distil from the Court's jurisprudence, important legal principles that can guide municipalities that are willing to undo corruption in their award of procurement contracts. The next chapter focuses on three Constitutional Court cases.

CHAPTER 4

STATE SELF-REVIEW THROUGH THE LENSES OF THREE CONSTITUTIONAL COURT CASES

4.1 Introduction

As seen in chapters 1 and 2 of this dissertation, the government of South Africa has a legal duty to combat procurement corruption. This duty flows from the signing and ratification of the UNCAC and the AUCPCC as well as from the country's domestic laws. The UNCAC and the AUCPCC recognise that the judiciary can play an important role in combatting corruption. In the previous chapter, this researcher reflected on the role of superior courts in combatting corruption in South Africa. It was argued that because these courts are custodians of the Constitution and enjoy strong independence from the executive, legislatures, and private businesses, they can contribute towards combatting corruption by, *inter alia*, interpreting the law and ensuring legal compliance. As already indicated in chapter 1, the apex court in South Africa has held in three cases (*Khumalo* case, *Gijima* case, and *Buffalo City* case) that organs of state who want to review and set aside corrupt procurement contracts can do so through the principle of legality. The aim of this chapter is to reflect on how the Constitutional Court's jurisprudence on legality review in the three cases can be used by municipalities to curb corruption in the award of contracts for goods and services. Through this exercise, the researcher distils relevant lessons from the Court's jurisprudence that can guide municipalities which want to review and set aside their own procurement contracts that are tainted with corruption. Principles distilled from the Court's jurisprudence further confirm the important role that the judiciary plays in ensuring that there is compliance with constitutional prescripts relating to public procurement.

To achieve the above objective, the remainder of the chapter is structured into five parts. The first three parts are respectively dedicated to providing an overview of the three Constitutional Court cases in considering their chronological development:

Khumalo, *Gijima*, and *Buffalo City*. Each part focuses on the facts of the case, the issues in dispute, the decision, and the reasoning of the Court. The fourth part of the chapter reflects on lessons learned from the Court's jurisprudence in the three cases. Through this process, important principles are identified that can be used to guide municipalities seeking to review and set aside their own procurement contracts. The last part is the chapter summary.

4.2 Khumalo Case

4.2.1 Facts and issues in dispute

This case deals with an application to court that was brought by Mr Nkosinathi Lawrence Khumalo and Mr Krish Ritchie, who were both employed by the Department of Education. The application was heard on the 08 August 2013 and decided on 18 December 2013.[256]

In March 2004, the Department of Education advertised a post for the Chief Personnel Officer (Human Resource: Provisioning) and it was published.[257] Mr Khumalo, an employee of the Department, applied for the post, he was shortlisted, and ultimately promoted to the position with effect from April 2004.[258] On the other hand, Mr Ritchie also applied for the position but was not shortlisted; he thereafter lodged a grievance with the Department of Education through which he complained that he had not been shortlisted for the position.[259] Both Mr Ritchie and Mr Khumalo were employees of the Department of Education. Mr Ritchie was of the view that Mr Khumalo was not qualified for the position, and he referred the dispute to the Bargaining Council. The dispute was referred for sector-specific arbitration.[260] However, on 11 July 2005, before the proceedings commenced, the Department concluded a settlement agreement which granted Mr Ritchie a "protected promotion".[261] The settlement

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256 *Khumalo* case para 2.
257 *Khumalo* case para 2.
258 *Khumalo* case para 3.
259 *Khumalo* case para 3.
260 *Khumalo* case para 3.
261 *Khumalo* case para 4.

agreement was subsequently made an arbitration award of the education sector Bargaining Council.

Towards the end of 2005, the National Union of Public Servants and Allied Workers (NUPSAW), wrote a letter to the Superintendent-General on behalf of other employees that had applied for the post to complain about irregularities in the advertising and appointment process.[262] From their complaints, there was a demand that an investigation be lodged into Mr Khumalo's promotion and Mr Ritchie's protected promotion. The aggrieved employees demanded insight into the said protected promotions.[263]

The MEC thereafter set up a task team to investigate the complaint. It was investigated and the task team found that Mr Khumalo had not met the basic requirements for the supervisory role as was advertised; that Mr Khumalo was not supposed to have been shortlisted and interviewed; and that the process was generally unfair.[264] Other irregularities were found pertaining to the appointment of Mr Khumalo including the following: the Regional Manager expanded the list of shortlisted candidates; the panel refused to shortlist a specific candidate because he provided a statement of his Matric results but not the Matric certificate; and the panel had waived the right of a candidate to be interviewed because the interview proceedings were running late.[265] However, with Mr Ritchie's protected promotion there was an absence of witnesses as well as documentation during the investigation.[266]

Twenty months after the MEC received the report from the Task team, the MEC launched an application at the Labour Court to challenge Mr Khumalo's promotion and Mr Ritchie's protected promotion. The MEC did not explain to court by the MEC pertaining to the delay in launching the application.[267] The MEC in her application to court, sought an order declaring that: the promotion of Mr Khumalo to the position was unlawful, was unreasonable, was unfair and was accordingly invalid; the

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262 *Khumalo* case para 5.
263 *Khumalo* case para 5.
264 *Khumalo* case para 6.
265 *Khumalo* case para 8.
266 *Khumalo* case para 6.
267 *Khumalo* case para 10.

promotion of Mr Khumalo should be set aside; and lastly, the granting to Mr Ritchie of protective promotion should be set aside.[268] The MEC claimed that she approached the court with a view to fulfilling her oath of office which required her to comply with the rule of law and supremacy of the Constitution, as well as the PAJA, which obliged her to take action on the irregularities that were found in respect of the promotions.[269] Her aim was to promote a culture of openness, transparency, and accountability when exercising public power.[270]

The MEC's relief sought from the Labour Court was granted and the court declared the promotion of Mr Khumalo and the protected promotion of Mr Ritchie unlawful, unreasonable, and unfair and set aside both decisions.[271] Mr Khumalo and Mr Ritchie approached the Labour Appeal Court (LAC) to appeal the decision of the Labour Court and their appeal was dismissed.[272]Mr Khumalo and Mr Ritchie petitioned the SCA for special leave to appeal. The petition was dismissed[273] Mr Khumalo and Mr Ritchie approached the Constitutional Court seeking leave to appeal against the decision of the LAC. They applied for the orders of the LAC and the Labour Court to be set aside. The issues raised for determination were: whether leave to appeal should be granted; the legal nature of the MEC's challenge to the impugned decisions; whether there is a duty on a state functionary in the MEC's position to rectify unlawfulness committed under his or her authority; whether the Court should review Mr Khumalo's promotion notwithstanding the MEC's delay in bringing the application; whether Mr Khumalo's promotion was lawful; whether the Court should review Mr Ritchie's protected promotion notwithstanding the MEC's delay in bringing the application; whether Mr Ritchie's protected promotion was lawful; and finally, the appropriate remedy if the promotions were unlawful.[274] The majority judgment was penned by Justice Skweyiya while Justice Zondo wrote the minority judgment.

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268 *Khumalo* case para11.
269 *Khumalo* case para12.
270 *Khumalo* case para 12.
271 *Khumalo* case para 15.
272 *Khumalo* case para 18.
273 *Khumalo* case para 19.
274 *Khumalo* case para 21.

4.2.2 Decision and reasoning of the majority judgment

The Court granted leave to appeal on the basis that the matter before it, raised a cogent constitutional issue regarding the obligation of the state to comply with the requirements of the rule of law in terms of section 1(c) of the Constitution in the context of public-service employment. The Court reasoned that, because the state was the country's biggest employer, it was in the interest of justice that it considered the matter.[275]

In terms of the legal nature of the challenge, the majority judgment held that the true nature of the MEC's application was one for judicial review under the principle of legality.[276] The Court explained that the principle of legality is applicable to all exercises of public power and not only to "administrative action" as defined in PAJA.[277] Justice Skweyiya J explained that, at the minimum, the principle of legality requires that all exercises of public power must be lawful and rational.[278]

In relation to the duty of a state functionary to rectify unlawfulness, the Court held that the MEC had standing, and an obligation, to bring a challenge to establish the unlawfulness of her own institution's actions.[279] The Court reasoned that this duty is founded in the values of accountability, responsiveness and high professional ethics of public servants contained in sections 1(c) and 195(1)(a), (f) and (g) of the Constitution. According to the Court, these provisions, together with section 7(2) of the Constitution, provide an obligation, and standing for public functionaries to approach a court in order to review and correct any established "unlawfulness, within the boundaries of the law and the interests of justice".[280] The Court asserted that this "is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration."[281] The Court indicated that this duty was reinforced by section 5(7)(a) of the Public

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275 *Khumalo* case para 22.
276 *Khumalo* case para 28.
277 *Khumalo* case para 28.
278 *Khumalo* case para 28.
279 *Khumalo* case paras 29-38.
280 *Khumalo* case para 35.
281 *Khumalo* case para 36.

Service Act.[282] Based on these provisions, the majority observed that the MEC's actions in rectifying the irregularities that were brought to her attention should be viewed as a bold effort to discharge her constitutional and statutory duties to ensure lawfulness, transparency and accountability in her Department.[283]

Regarding the issue of delay, the majority held that despite attempting to do the correct thing, the MEC badly delayed before instituting her application at the Labour Court and without an explanation.[284] The Court noted that although the MEC hastily appointed the Task Team upon receiving the complaints from NUPSAW, she took twenty months to bring the application to the Labour Court, at which time Mr Khumalo had occupied the position for more than four years. The Court held that although there were no legislated time periods within which the MEC was mandated to bring her application, section 237 of the Constitution "elevates expeditious and diligent compliance with constitutional duties to an obligation in itself" and that this principle is therefore a requirement of legality.[285] The Court explained that this requirement is based on sound judicial policy which includes an understanding of strong public interest in certainty and finality. The Court pointed out that people may base their actions on the assumption that a particular decision was lawful and that undoing such decisions may lead to multiple consequent actions.[286] The Court further explained that the passage of a considerable length of time may affect the ability of a court to assess an instance of unlawfulness on the facts, given that the memories of decision-makers decline with time.[287] Besides, documents and evidence may be lost or destroyed when there is no longer a duty to keep them in archives. Therefore, lengthy delays can undermine the purpose of a court in undertaking a lawfulness review.[288]

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282 This section provides that: "A functionary shall correct any action or omission purportedly made in terms of this Act by the functionary, if the action or omission was based on error of fact or law or fraud and it is in the public interest to correct the action or omission".
283 *Khumalo* case para 38.
284 *Khumalo* case para 39. See Hoexter and Penfold *Administrative Law in South Africa* 735.
285 *Khumalo* case paras 42-46. Section 237 of the Constitution provides that: "All constitutional obligations must be performed diligently and without delay".
286 *Khumalo* case para 47.
287 *Khumalo* case para 48.
288 *Khumalo* case para 48. See also Hoexter and Penfold *Administrative Law in South Africa* 736

The Court restated with approval the test for assessing a plea for undue delay developed by the SCA as follows: (a) A court must determine whether the delay is unreasonable or undue – this is a factual evaluation through which the court makes a value judgment taking into consideration all relevant circumstances; and, if so, (b) whether the court should use its discretion to overlook the delay and entertain the application.[289] The Court held that in terms of the first part of the enquiry, because the MEC did not provide any reasons for the delay, the delay was unreasonable.[290] The Court concluded that because the MEC had several opportunities to explain the delay in the process of the litigation and elected not to do so, suggests that she either had no reason at all or was not being honest with her real reasons.[291] The Court remarked that if the matter had been brought by a private litigant, the first aspect of the test might weigh less heavily. On the contrary, because: (1) the MEC was responsible for the decision; (2) was obliged to act expeditiously to fulfil her constitutional duties; and (3) had control of the resources required to establish the unlawfulness of the decisions she impugned, these three factors made the unreasonableness of the unexplained delay very serious.[292]

The Court found that although it appeared that Mr Khumalo did not satisfy the requirements of the position and that his promotion was consequently unfair, it was difficult to establish the full nature of the illegality based on the evidence before the court, especially since nine years had passed since the promotion. Although the MEC was not solely responsible for the delay, the time that had passed made it difficult for the Court to make a clear determination on the unlawfulness of the promotion.[293] The Court concluded that the "nature of the application and the strength of the merits do not favour overlooking the delay. The delay was unreasonable and unexplained".[294] The Court pointed out that although it has powers to ameliorate the consequences of a possible finding of unlawfulness in granting a remedy, the nature of the claim did

289 *Khumalo* case para 49.
290 *Khumalo* case para 50.
291 *Khumalo* case para 51.
292 *Khumalo* case para 51.
293 *Khumalo* case para 67.
294 *Khumalo* case para 67.

not necessitate condoning the delay.[295] Based on the above reasoning, the Court found that the Labour Court erred in overlooking the delay.[296]

Pertaining to Mr Ritchie's promotion, the Court ruled that if the MEC wanted to challenge the protected promotion, she should have done so under section 145(1)(a) of the *Labour Relations Act* 66 of 1995 (LRA) and not under the principle of legality.[297] This means that the MEC was legally required to challenge and set aside the arbitration award (which was subsequently made a protected settlement agreement) at the Labour Court within six weeks of it being served on her in terms of the LRA. The Court ruled that it was contrary to the protection afforded public sector employees for the MEC to rely on the legality review in order to avoid the consequences of the time limits imposed by section 145(1)(a) of the LRA.[298] The MEC's duty to enforce the rule of law did not permit her to side-step the express provision of the LRA. Compliance with the six-week period prescribed by the LRA was a requirement of legality.[299]

Based on the above, the Court upheld the appeal and set aside the order of both the Labour Court and the LAC.

4.2.3 The minority judgment

The minority judgment was penned by Justice Zondo (with Justice Jafta concurring). The minority judgment agreed with the decision of the majority to grant the applicants leave to appeal against the judgment of the LAC; to uphold their appeal; to set aside the decisions of the Labour Court and the LAC; and to dismiss the MEC's application. However, the minority judgment disagreed with the reasons and approach adopted by the majority. According to Justice Zondo, a close scrutiny of the documents before the Court revealed that the MEC brought the application in terms of PAJA, on the basis that the promotions were administrative decisions within the meaning of administrative action in the legislation.[300] Justice Zondo held that in terms of section

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295 *Khumalo* case para 68.
296 *Khumalo* case para 69.
297 *Khumalo* case paras 70-73.
298 *Khumalo* case paras 70-73.
299 *Khumalo* case para 73.
300 *Khumalo* case para 77.

7(1) of PAJA, the MEC was obliged to bring a review application without any unreasonable delay and not later than 180 days after she received the Task Team report.[301] He reasoned that, the question as to whether those decisions constituted administrative action ought to have been considered and decided on the merits after the MEC had convinced the Court that she had not unduly delayed to bring the application or that there was good cause to condone the delay. He held that the Labour Court should have dismissed the application because the MEC did not apply for condonation of her delay and did not offer an explanation of the delay. According to Justice Zondo, the LAC should have upheld the appeal of the applicants on the same ground.[302]

4.3 Gijima case

4.3.1 Facts of the case and issues in dispute

The State Information Technology Agency SOC Limited (SITA) and Gijima Holdings concluded a service delivery agreement (SAPS) on 27 September 2006. In terms of the agreement, Gijima was required to provide IT services to the South African Police Service on behalf of SITA. Gijima performed its terms of the agreement, and the agreement was extended several times. On 25 January 2012, SITA terminated the agreement with Gijima with effect from 31 January 2012.[303] Following this, Gijima instituted an urgent application against SITA at the High Court on 01 February 2012. The aim of the agreement was to compensate Gijima for roughly R20 million that it would have suffered from SITA's cancellation of the SAPS agreement. The urgent application was removed from the court roll. However, the settlement agreement was never made an order of court. [304]

In terms of the settlement agreement, Gijima was appointed as a service provider for the KwaZulu-Natal Health Department from 01 March 2012 to 31 July 2012 and for the Department of Defence (DoD) from 01 April 2021 to 31 July 2012. These

[301] *Khumalo* case para 77-78.
[302] *Khumalo* case para 95.
[303] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) BCLR 240 (CC) para 3-4. (Hereafter *Gijima* case)
[304] *Gijima* case para 5.

settlement agreements were based on SITA's standard terms for agreements of this nature. Throughout, Gijima was concerned about whether SITA had complied with its procurement processes. SITA assured Gijima that it had complied with procurement laws and inserted a warranty in the DoD agreement following Gijima's insistence.[305] After entering the settlement agreements, several negotiations took place between Gijima and SITA. At a meeting where the DoD agreement was finalised, SITA's former executive officer for supply chain management assured Gijima that SITA's executive committee had authority to approve agreements of up to R50 million.[306]

The DoD agreement was extended several times by addenda. The last extension took place on 08 April 2013. On 30 May 2013, SITA informed Gijima that it had no intention of further renewing the DoD contract.[307] A payment dispute arose. As of 30 May 2013, SITA allegedly owed Gijima R 9 545 942.72. When the parties failed to resolve the dispute, Gijima instituted arbitration proceedings in September 2013. SITA resisted the claim on the ground that the DoD agreement, as well as the extending addenda that followed it, were invalid because section 217 of the Constitution was not complied with when the agreements were concluded.[308] SITA also argued that Gijima did not perform in terms of the DoD agreement and the three addenda. On 20 March 2014, the arbitrator held that he did not have jurisdiction to adjudicate the question as to whether correct procurement processes had been followed.[309]

SITA approached the High Court to set aside the DoD agreement and three addenda. The High Court held that the decision to award and renew the DoD agreement qualified as administrative action in terms of PAJA. The court also held that the review had been brought outside of the 180-day period stipulated in section 7(1) of PAJA and that SITA had not sought an extension of this period. The Court could not find any

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305 The warranty read as follows: "SITA unconditionally warrants, undertakes and guarantees that it has taken all steps necessary to ensure compliance to any relevant legislation governing the award of the Services to the Service Provider and specifically towards ensuring that this Agreement is entirely valid and enforceable, including but not limited to the Public Finance Management Act 1 of 1999. Indemnifies the Service Provider against any loss it may suffer should this warranty be infringed." See *Gijima* case para 6.

306 *Gijima* case para 7.

307 *Gijima* case para 8.

308 *Gijima* case para 9.

309 *Gijima* case para 9.

ground for extending the period and concluded that it would not be just and equitable to set aside the DoD agreement and the addenda. The Court therefore dismissed the application with costs.[310]

SITA approached the Supreme Court of Appeal (SCA) for relief. The majority of the SCA held that a decision by an organ of state to award an agreement for services constitutes administrative action in terms of PAJA. The SCA also held that the wording of section 6(1) of PAJA which allows "any person" to institute proceedings in a court or tribunal for the judicial review of administrative action was wide enough to include organs of state.[311] The SCA found that the conclusion of the settlement agreement had the potential to affect Gijima's rights because the effect of the agreement was that Gijima was to forgo any damages claim that it might have had because of the cancellation of the SAPS agreement. The SCA further held that the repeated assurances by SITA that the DoD agreement had been validly concluded would have created a legitimate expectation that the contract would be honoured. The SCA held that litigants cannot rely on section 33(1) of the Constitution or common law when reviewing unlawful administrative action. The Court therefore held that PAJA was the route to follow when reviewing unlawful administrative action. The SCA dismissed the appeal with costs.[312]

SITA approached the Constitutional Court for relief. The Court had to answer the question as to whether an organ of state can invoke PAJA when it seeks to review and set aside its own decision or if it was appropriate for an organ of state seeking to review and set aside its own administrative decision to use the route of legality review.

4.3.2 Decision and reasoning of the court

The Court held that section 33 of the Constitution, and therefore PAJA which gives effect to it, was not wide enough to apply to the state. The Court held that section 33

310 *Gijima* case para 10.
311 *Gijima* case para 11.
312 *Gijima* case para 11.

of the Constitution creates rights enjoyed only by private persons and that the bearer of obligations under that section is the state.[313]

The Court reasoned that the answer as to whether PAJA applied, turned on an interpretation of the Constitution and PAJA. However, before interpreting the relevant constitutional and legislative provisions, the Court indicated that it was necessary to consider the philosophical foundations of the very notion of who these fundamental rights are meant to protect.[314] The Court reasoned that the answer to this will help inform the interpretative exercise as to whether PAJA applies when organs of state seek the review of their own decisions. The Court reasoned that it was common knowledge that the creation of fundamental rights was meant to protect warm-bodied human beings primarily against the state.[315] Taking into account South Africa's context, and the jurisprudence of the Court in the *First Certification* judgment,[316] the Court held that the country's Bill of Rights contains fundamental rights aimed at protecting human beings against the state. The Court held that the right to just administrative action contained in section 33 of the Constitution is a fundamental right like any other right.[317] The Court indicated that the right to just administrative action has particular significance in the South African context given the fact that administrative law was used during the apartheid years to oppress the majority of people, given the wide discretionary powers that administrators enjoyed. The Court noted that due to parliamentary sovereignty, even courts could not do much to curb the administrative excesses of the apartheid government.[318] This historical context informed the need to fundamentally reform South Africa's administrative law following the transition to democracy. The Court indicated that the intended beneficiaries of this reform were private persons – natural and juristic. The Court reasoned that the State was to be the bearer of any obligations brought about by the reform of South Africa's administrative law. The Court reasoned that in "this context, we can conceive of no

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313 *Gijima* case para 26-29.
314 *Gijima* case para 18.
315 *Gijima* case para 18-24.
316 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC).
317 *Gijima* case para 24.
318 *Gijima* case para 24-26.

reason why an organ of state seeking to review its own decision could ever have been meant also to be a beneficiary" as "it was the conduct of organs of state that had necessitated the change."[319]

The Court held that although section 33 of the Constitution was primarily concerned with the right of ''everyone'' to procedurally fair, reasonable and lawful administrative action, ''everyone'' in that section was not so wide as to extend to the State. The Court pointed out that section 33(3)(b) of the Constitution imposes a duty on the state to adopt national legislation to give effect to the rights in section 33(1) and (2) of the Constitution. According to the Court, it is "inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights" in section 33 of the Constitution. The Court reasoned that this must, indeed, be an indication that only private persons enjoy rights under section 33 of the Constitution.[320] The Court concluded that a close scrutiny of the rights in section 33 of the Constitution supported its approach and reasoning.[321]

After the above constitutional interpretation, the Court turned to the question of whether the language of section 6 of PAJA extends to an organ of state seeking the review of its own administrative action.[322] The Court asserted that in answering this question, one should always be mindful of the fact that PAJA was enacted pursuant to the provisions of section 33(3) of the Constitution, to give effect to the rights in sections 33(1) and (2) of the Constitution. The Court indicated that PAJA must therefore be interpreted through the prism of section 33 of the Constitution.[323] The Court observed that:

> Section 6(1) of PAJA provides that "[a]ny person may institute proceedings in a court or tribunal for the judicial review of an administrative action". Section 6(2) then itemises the grounds on which a court or tribunal may undertake this review. When decreeing – in section 33(3) – that national legislation must be enacted to, *inter alia*, "provide for the review of administrative action", the reference to "administrative action" in this section must surely be a reference to the earlier "administrative action" referred to in section 33(1) and (2). The Constitution thus envisages that – in making provision for the review of administrative action – the national legislation must direct

319 *Gijima* case 26. See Hoexter and Penfold *Administrative Law in South Africa 739.*
320 *Gijima* case para 27.
321 For details, see *Gijima* case para 28.
322 *Gijima* case para 30.
323 *Gijima* case para 30.

> itself to the administrative action referred to in section 33(1) and (2). We have already concluded that the right to administrative action that is lawful, reasonable and procedurally fair (section 33(1)) and the right of everyone whose rights have been adversely affected to be given written reasons (section 33(2)) are enjoyed by private persons, not organs of state. Therefore, when section 33(3)(a) stipulates that national legislation which provides for the "review of administrative action" must be enacted, that can only be administrative action that relates to the rights enjoyed by private persons under section 33(1) and (2).[324]

Based on the above, the Court indicated that one cannot read section 6 of PAJA without considering the constitutional background.[325] The Court emphasised that the concept of "administrative action" as contained in PAJA cannot have a meaning wider than that envisioned by the Constitution. The Court indicated that the long title of PAJA recognises that it was passed to give effect to the constitutional right to administrative action that is reasonable, lawful, procedurally fair, and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution.[326] Informed by this, the Court indicated that the same factors that define the scope of "administrative action" in section 33 of the Constitution apply to "administrative action" as provide in PAJA.[327]

The Court rejected the argument by Gijima that SITA was bound by the time limit (180 days) in section 7 of PAJA[328] to bring review proceedings under section 6 of PAJA.

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324 *Gijima* case para 31.
325 *Gijima* case para 32.
326 *Gijima* case para 32.
327 *Gijima* case para 32.
328 Section 7 of PAJA provides that:
(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.
(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

The Court held that this time limit, as well as the possibility of applying for an extension to a court under section 9 of PAJA, does not apply to SITA since the right to bring review proceedings under section 6 of PAJA does not apply to organs of state.[329] The Court held that SITA was not required to comply with time limits as contained in section 7 of PAJA because PAJA is not applicable to the review of its own decision.[330]

The Court proceeded to differentiate the case before it and that in the *Kirland* case.[331] The Court indicated that, in *Kirland*, there was no dispute as to whether PAJA was applicable to municipality looking to have its own prior decision undone. In *Kirland* case, the municipality had taken a decision that undo its earlier decision because the earlier decision was vitiated by corruption.[332] The Court pointed out that the municipality had decided not to seek the review and setting aside of its prior decision because it had exceeded the 180-day limit making an application for review as provided for in section 7 of PAJA. The municipality had implemented this position because it was of the view that a review of the previous decision would have had to be taken under PAJA. Therefore, in the *Kirland* case, there was no dispute as to whether PAJA applies to an organ of state seeking to have its own decision reviewed. The Court concluded that, on this basis, *Kirland* could not provide a solution to the case at hand.[333] According to the Court, a municipality seeking to undo its previous decision had no choice as to whether to use PAJA or not: PAJA was simply not available to it. That conclusion was based primarily on the tenet of section 33; and secondarily on an interpretation of PAJA itself. The Court concluded that there was no basis for

(3) The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), must, before 28 February 2009, subject to the approval of the Minister, make rules of procedure for judicial review.
(4) Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or another court having jurisdiction.
(5) Any rule made under subsection (3) must, before publication in the Gazette, be approved by Parliament.

329 *Gijima* case 37.
330 *Gijima* case para 35.
331 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (5) BCLR 547 (CC).
332 *Gijima* case para 36.
333 *Gijima* case para 36.

suggesting that an organ of state seeking a review of its own decision may simply choose to avoid review under PAJA for reasons of convenience.[334]

The Court held that an organ of state can review its own decision based on the legality principle.[335] After a review and application of the principle of legality to the facts before it, the Court held that:

> What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what section 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.[336]

The Court held that it was not disputed that the agreement by SITA did not follow a bidding process that is competitive.[337] The Court explained that none of the parties produced anything of substance to suggest that despite not complying with a bidding process that is competitive, the contract complied with the requirements of the procurement provision. Accordingly, it was reasonable to infer that SITA did not follow the required due process when granting Gijima the contract. The Court held that based on its jurisprudence in the *Fedsure Life* case,[338] this was at odds with the principle of legality and liable to be reviewed and possibly set aside.[339] The Court affirmed that that the principle of legality is an avenue by which a state organ may seek the undo its own decision.[340]

The Court also addressed the issue municipality's delay in launching an application for delay. The Court held that the 22-month delay by SITA before approaching the High Court for review was unacceptable.[341] The Court rejected SITA's explanation that it only became clear to officials within the organisation that awarding of the DoD contract

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334 *Gijima* case para 36.
335 *Gijima* case paras 38-40.
336 *Gijima* case para 40. Footnote omitted.
337 Gijima case para 41.
338 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) para 58.
339 *Gijima* case para 41.
340 Gijima case para 41. See *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* 2014 (3) BCLR (CC) para 46-48.
341 *Gijima* case para 45.

to Gijima did not comply with the prescripts for procurement after the arbitration proceedings started – because it had received legal advice at that stage. The Court found this explanation to be bizarre, given that a core aspect of SITA's business includes procurement. This required SITA to know when it was deviating from procurement laws. Besides, the Court found their ignorance puzzling, given the fact that Gijima had repeatedly expressed concerns about the unlawful process followed that led to the award of the contract.[342] The Court affirmed that section 237 of the Constitution acknowledges the importance of timely compliance with constitutional prescripts. The Court explained that section 237 of the Constitution provides for a proper compliance with constitutional prescripts.[343] The Court explained that the reason for requiring reviews to be instituted timeously was to ensure legal certainty and promote legal compliance.[344] The rule against delay is important for several reasons: it is intended to reduce the potential prejudice which would follow if the lawfulness of the decision remains uncertain; long delays could give rise to disastrous effects for those who rely on the decision and for the efficient functioning of the policymaking body itself; and a lengthy delay can weaken the competence of a court to assess cases of lawfulness on the facts.[345]

The Court affirmed that, where there is a basis to do so, a court has the power to decide to excuse a delay in a review application.[346] The decision to overlook the delay may be gathered from facts placed before a court by the parties or available factors. In any case, a court should exhibit "vigilance, consideration and propriety before overlooking a late review, reactive or otherwise".[347] The Court dismissed SITA's argument and held that unwarranted delay cannot be raised as a defence for late launching of an application for review. The Court disallowed this argument and held that government respondents should apply to nullify an agreement by way of a formal counter-application. This was to ensure that there is due process – from which government should not be exempted. The Court indicated that there is a higher duty

342 *Gijima* case para 45.
343 *Gijima* case para 43.
344 *Gijima* case para 44.
345 *Gijima* case 43-44.
346 *Gijima case* paras 47-49.
347 *Gijima* case para 48.

on the government and its officials to respect the law, to tread respectfully when dealing with rights, and to fulfil procedural requirements.[348]

Having concluded that SITA acted in a manner that does not comply with the tenets of the Constitution in awarding the DoD contract, the Court declared the contract to be invalid. However, in line with its constitutional powers to make "any order that is just and equitable", the Court held that notwithstanding the unjustifiability of the award of the DoD agreement, justice and equity required that SITA should not be allowed to benefit from giving Gijima false guarantees and from its own excessive delay in launching review proceedings. The Court held that, in view of the circumstances, a just and equitable remedy was for it to declare the contract already awarded and the decisions that followed after it to extend its invalidity but with a condition that the declaration of invalidity does not "have the effect of divesting Gijima of rights to which – but for the pronouncement of invalidity – it might have been entitled".[349]

4.4 The Buffalo case

4.4.1 Facts and issues in dispute

The case arose from a dispute between Buffalo City Metropolitan Council and Asla Construction (Pty) Limited (hereafter ASLA), a registered and incorporated limited liability company.

In 2009, the Municipal Council of Buffalo City Metropolitan Municipality approved the upgrading of housing and development of the Greater Duncan Village zone in East London through its Local Spatial Development Framework (Redevelopment Initiative). The Greater Duncan Village Area is home to about 100 000 thousand people, most of whom resided in about 18 000 temporary structures. The implementation of the Redevelopment Initiative was supposed to commence in accordance with the National Housing Code of 2009 (NHC). The NHC authorises turnkey contracting as a strategy that can be used for housing development. Turnkey contracting comprises of assigning

348 *Gijima* case para 50.
349 *Gijima* case para 54.

a contractor all work and ensuring that such a contractor delivers services to completion. This includes the process for establishing the township, the planning of the approved land, the construction of houses and the design and installation of internal reticulation services. In line with this regulatory framework, Buffalo City Metro decided to use a turnkey contract for development of the Greater Duncan Village and to appoint an agent that would be responsible for implementing the design process, handling of services and top structures for the development and construction in the area.[350]

Following a public invitation for tenders on 5 November 2013, Asla Construction (Pty) Limited (ASLA), submitted a tender which was accepted by the Municipality. On 2 May 2014, the Municipal Manager informed ASLA that the Municipality had accepted its tender and an agreement was concluded between the parties on 30 May 2014.[351] In terms of the Turnkey contract, ASLA was appointed as the implementing agent and was supposed to provide between 3000 to 5000 properties for the Greater Duncan Village development. The consideration for the contract was not a defined amount. It comprised of the bridge funding, grants, funds allocated to the project and approved housing subsidy. The Minister of Human Settlements subsequently acknowledged the appointment of ASLA as the implementing agent for this project.

One of the aims of the Redevelopment Initiatives was to geographically extend to areas located in the north and north-western parts of Duncan Village, inclusive of the new township of Reeston East. The Reeston East area was earmarked to provide 2500 properties. Between 2011 and 2014, the Municipality advertised for tenders thrice for the first engineering services and construction of the roof of the houses. Each of these tenders eventually fell through the cracks for different reasons.[352] On 7 August 2014, the City Manager of Buffalo Metro, Mr Andile Fani, wrote to ASLA informing them that the implantation of some services, and the 953 units that initially formed part of the Reeston contract, were henceforth considered to be part of the Turnkey contract. On

[350] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (b) BCLR 661 (CC) 15 para 4.
[351] *Buffalo City* case para 5.
[352] *Buffalo City* case para 7.

7 September 2014, Mr. Vincent Pillay, the Chief Financial Officer of the Municipality, "awarded" the Reeston contract to ASLA.[353]

On 4 August 2015, Mr Pillay, in his capacity as Acting City Manager, made an allegation that the Reeston contract was unlawful because it entered into without following due processes. The Municipality appointed an independent investigator to make enquiries into the validity of the latter contract. Meanwhile, ASLA continued to execute its obligations in respect of the Reeston contract. The engineers of the Municipality issued a number of certificates certifying that ASLA had performed in accordance with the terms as stipulated in the contract and asserting the quality of the work completed. Eventually, a payment dispute arose when the Municipality refused to make payment on the certificates.[354] ASLA instituted provisional sentence proceedings in the High Court resulting from payment certificates issued by agents of the Municipality. The Municipality opposed the provisional sentence proceedings mainly on the basis that the Reeston contract was unlawful not complying with the statutory and constitutional requirements for the procurement of services and goods. The Municipality launched review proceedings, in terms of the *Promotion of Administrative Justice Act* (PAJA), to set aside the Reeston contract. The review proceedings were initiated outside of the time period (180-day limit) prescribed by PAJA. The High Court held that a proper case for condonation had been made out, taking into consideration the reasons advanced for the delay and the nature of the deviation from the constitutional and statutory requirements for public procurement. The High Court held that the Reeston Contract was clearly unlawful and declared the award of the Contract invalid. The High Court dismissed the contractual claims which formed the basis of the provisional sentence proceedings.[355] ASLA approached the Supreme Court of Appeal (SCA), which held that a proper case for condonation had not been made out in terms of section 9 of PAJA. The SCA overruled making any definitive findings on as to whether the contracts were legal or illegal and held that the approach of the High Court, in having

353 *Buffalo City* case para 8.
354 *Buffalo City* case para 9-10.
355 *Buffalo City* case para 11.

regard to the merits, in its consideration of whether or not to condone the delay, was incorrect.[356]

Unhappy with the above outcome, the Municipality approached the Constitutional Court on 11 March 2017 with an application for leave to appeal against the SCA judgment in terms of PAJA. However, following the handing down of the *Gijima* judgment on 14 November 2017 by the Constitutional Court, the Chief Justice issued directions inviting the parties to file written submissions pertaining to the *Gijima* judgment on 15 November 2017.[357] According to the *Gijima* judgment, the Municipality argued in the Constitutional Court that the 180-day time limit within which to start a review in terms of PAJA should be reconsidered in the light of a legality review. The Municipality argued that the delay was not unjustified because it had acted quickly upon becoming aware of the illegality of the process of procurement for the Reeston contract and requested that the delay should be disregarded. In terms of the merits of its review, the Municipality argued that the Reeston contract was invalid because it failed to comply with the prescripts of procurement clause since there was no competitive procurement processes that were followed by the bidders.[358] On the other hand, ASLA argued that the reasoning and conclusion of the SCA were correct and that the Municipality's review should not be entertained because it brought the review application in terms of PAJA, not as a legality review. ASLA argued that the legality review application should not succeed because the Municipality delayed in bringing the application unreasonably and had not provided an explanation for such delay. ASLA argued that even though the delay was condoned, the application for leave to appeal should not succeed because the review lacked merit. This, according to ASLA, was for the reason that the Reeston contract was entered into in line with the terms of an earlier valid contract (the Turnkey contract) between the parties. This notwithstanding, ASLA argued that in the event the review was upheld, a remedy that was equitable and in the interests of justice was for the Court to order that the

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356 *Buffalo City* case para 12.
357 *Buffalo City* case para 13.
358 *Buffalo City* case para 14-15.

invalidity of the contract would not have the effect of denying it of the rights which it could have been entitled to following it being declared invalid.[359]

The matter was heard by the Court on 4 September 2018. On 16 November 2018, the Municipality filed an application seeking leave to withdraw its appeal and to have a settlement agreement entered into between the parties made an order of the Court.[360] The Court refused to endorse the settlement agreement and to agree to the parties' request to withdraw the application permission to appeal based on two main reasons: the settlement agreement covered matters that the Court had no knowledge about as they were unrelated to litigation before the Court; and the Reeston contract did not conform to the Constitution and procurement law. The Court held that non-compliance with legislative prescripts could not be remedied by a settlement agreement, and therefore this agreement could not be made a lawful agreement by an order of the Court.[361] Having disposed of this application, the legal issues before the Court were: Whether the Municipality unreasonably delayed bringing an application for review? Had the Municipality explanation properly explained the reasons for the delay? If not, would it be in the interest of justice to overlook the delay? If the delay was unreasonable and did not pass the stage of being overlooked, did *Gijima* and section 172 (of the Constitution) compel the Court to, nevertheless, declare that the Turnkey contract was unlawful and grant an equitable and just remedy? [362]

4.4.2 Decision and reasoning of the Court

Writing on behalf of the majority, Justice Theron held that the delay in instituting review by the Municipality was unreasonable and that it failed to offer any sufficient reasons for the delay.[363] Justice Theron observed that the review application was

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359 *Buffalo City* case para 17.

360 The settlement agreement sought to impose additional duties and obligations on ASLA, far beyond the 953 erven envisaged in the Reeston contract. For details, see: *Buffalo City case* para 18-34.

361 *Buffalo City* case para 30-31.

362 *Buffalo City case* para 42. Although the Court referred to the Turnkey contract in this paragraph, it is specifically the legality of the Reeston contract that was in dispute. The Court may have implied the Reeston contract as an extension of the Turnkey contract here or this may simply be an error in writing the judgment.

363 *Buffalo City* case para73-81.

initiated 14 months after the decision was taken by the Municipality to award the Reeston contract to the respondents. Although the Municipality claimed that it only became aware of the unlawful administrative action a month before instituting the review, the Court held that the Municipality ought to have become aware much sooner than it did that its employees awarded the Reeston contract without following due processes that comply with the requirements for procurement.[364] The Court indicated that it was a core responsibility of every municipality to come up with efficient structures and systems to ensure proper oversight for its service delivery projects. According to the Court, these structures and mechanisms should detect and prevent fraud and corruption which lead to a waste of taxpayers' money.[365] The Court held that the Municipality bears a higher bearing when it comes to respecting the law; therefore, where an explanation for the delay is available, the Municipality should take the Court into its confidence through explaining its failure to afford the court a believable explanation. The Court found that the Municipality had failed to give a full, honest and reasonable explanation for the delay.[366] However, Justice Theron held that the delay must not be overlooked based on the Municipality's conduct in approaching the Court and the nature of the impugned decision.[367] The Court held that based on the overwhelming evidence before it, the Reeston contract failed to meet the fundamental requirements of competitiveness, transparency and openness prescribed in section 217 of the Constitution for procurement.

In order to arrive at the above decisions, Justice Theron began the judgment by looking at how delay is assessed in a legality review in relation to a review through PAJA so as to identify factors that should be considered by a court in determining whether to exercise its discretion to overlook a delay.[368] The Court observed that following its decision in *Gijima*, it is "now settled that an organ of state seeking to

364 *Buffalo City* case para 81.
365 *Buffalo City* case para 81.
366 *Buffalo City* case para 79-80.
367 *Buffalo City* case para 83-99.
368 *Buffalo City* case para 43-45. However, due to the fact that the case was decided in terms of the legality review, it is not necessary for purposes of this chapter to venture into a discussion of how delay is assessed under section 9 of PAJA.

review its own decision must do so under the principle of legality and cannot rely on PAJA".[369]

According to the Court, there are four principles that flow from the position adopted in the *Gijima* case which have implications for weighing delay in a review application through the principle of legality: The first principle is that there is no fixed time period for instituting a legality review by a municipality or municipal entity. According to the Court, a two-step test should be applied in assessing undue delay in bringing a legality review application.[370] Firstly, it has to be determined whether the delay is unreasonable or undue. According to the Court, this is a factual evaluation on which a value judgment is made, considering the matter before the court. The Court noted that in this assessment, "the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken".[371] Secondly, if the delay is unreasonable, the court has to decide whether it would condone or reject the delay when upon hearing the municipality's reasons for approaching the court for a relief late.[372] In other words, if the delay is found to be reasonable, the question to be answered is whether overlooking the unreasonable delay would be in the interests of justice.[373] This means that, when a court assesses delay under the principle of legality, an application for condonation is not required.[374] A court can simply consider the delay, apply the two-step test discussed above to establish whether the delay is excessive and, if so, whether it should be overlooked by court.

The second principle is that the reasonableness of the delay must be assessed on, among others, the explanation offered for the delay.[375] The Court observed that:

> Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation for the delay, the

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369 *Buffalo City* case para 45.

370 This two-step test was confirmed by the Constitutional Court in *Khumalo v Member of the Executive Council for Education, KwaZulu Natal* 2014 (3) BCLR 333 (CC). See *Buffalo City* case para 48.

371 *Buffalo City* case para 49.

372 *Buffalo City* case para 48.

373 *Buffalo City* case para 50.

374 *Buffalo City* case para 51.

375 *Buffalo City* case para 52.

> explanation must cover the entirety of the delay. But as it was held in Gijima, where there is no explanation for the delay, the delay will necessarily be unreasonable. [376]

The third principle is establishing whether the delay should be overlooked.[377] The Court observed that courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or use their discretion to overlook the delay. However, this evaluation cannot be done in a vacuum. A court must have a basis for exercising its prerogative to pardon the delay and this must be derived from the facts made available or on objectively available factors.[378] The Court noted that the method to be followed when considering overlooking a delay in a legality review is flexible. This requires a legal evaluation that assess a number of factors: The first factor to be considered is how would the impugned decision affect the parties interested in the dispute.[379] The Court observed that "the potential prejudice to affected parties and the consequences of declaring conduct unlawful" can in certain circumstances be mitigated by a court's power to grant a just and equitable remedy.[380]

According to the Court, the second factor that is relevant to overlooking delay is the nature of the impugned decision.[381] This requires a consideration of the merits of the legal challenge against that decision. The Court indicated that the SCA had expressly failed to consider the merits of the legal challenge contrary to its jurisprudence.[382] The Court indicated that the extent and nature of the illegality may be a crucial factor in determining the relief to be granted when faced with a delayed review. This means that a court may consider, as part of assessing the delay, the lawfulness of the contract under the principle of legality.[383]

According to the Court, the third issue for consideration when deciding to overlook delay is the attitude of the party who is making an application.[384] The Court observed

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376 *Buffalo City* case para 52. Footnotes have been omitted.
377 *Buffalo City* case para 53.
378 *Buffalo City* case para 53.
379 *Buffalo City* case 54.
380 *Buffalo City case* para 54. Footnote omitted.
381 *Buffalo City* case para 55.
382 *Buffalo City* case para 55-57.
383 *Buffalo City* case para 58.
384 *Buffalo City* case para 59.

that this "is particularly true of state litigants seeking to review their own decisions for the simple reason that often they are best placed to explain the delay".[385] There is a higher duty on organs of state to respect the law, and the standard against which a state litigant's conduct is measured is high and should be in accordance with the law.[386]

The Court indicated that the fourth principle which stems directly from *Gijima* is that, even where there is no basis for a court to overlook an unreasonable delay, the court may still be constitutionally obliged to declare the state's conduct unlawful based on section 172(1)(a) of the Constitution.[387] Informed by the doctrine of precedent, the Court indicated that it was obliged to follow *Gijima*:

> When would the *Gijima* rule apply? Gijima dictates that where the unlawfulness of the impugned decision is clear and not disputed, then this Court must declare it unlawful. This is not withstanding an unreasonable delay in bringing the application for review for which there is no basis for overlooking. Whether an impugned decision is so clearly and indisputably unlawful will depend on the circumstances of each case.[388]

The Court observed that the procedural requirement to bring review applications without delay serves a substantive purpose. According to the Court, this is based on "sound judicial policy and in the public interest that there be finality and certainty in matters".[389] The Court explained that although it is an established principle that a court should be slow to allow procedural obstacles to prevent scrutiny of a challenge to the exercise of public power, it is equally a fundamental principle of the rule of law that undue delay should not be tolerated. This is because delay can prejudice a respondent, weaken the ability of a court to consider the merits of review, and undermine the public interest in bringing certainty and finality to administrative action.[390] Against this background, the Court reasoned that:

> The Gijima principle should thus be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay are not undermined. At the same time, this is not a matter in which the Gijima principle can be ignored and thus impliedly

385 *Buffalo City* case para 59.
386 *Buffalo City* case para 59-62.
387 *Buffalo City* case 63.
388 *Buffalo City* case 66.
389 *Buffalo City* case para 69.
390 *Buffalo City* case 70.

> overruled. So, the injunction it creates – to declare that which is indisputably and clearly inconsistent with the Constitution – must be followed where applicable.[391]

As indicated above, the Court scrutinised the Municipality's conduct and held that it had failed to offer any honest and reasonable explanation for the delay in instituting review.[392] Having found that the Municipality failed to provide a reasonable explanation for the delay, the Court considered whether the delay should be overlooked. In arriving at its conclusion that the delay should be overlooked, the Court considered two factors: the nature of the impugned decision and the conduct of the Municipality in approaching the Court.[393]

In relation to the nature of the impugned decision, the Court considered the Municipality's argument that the payment certificates issued by its employees to the respondent were invalid on the ground that the Reeston contract was an unlawful extension of the Turnkey contract, awarded to the respondent without complying with proper procurement procedures. The Court established on the basis of the evidence before it that: Turnkey's contract layout did not originally include Reeston East; and that the Reeston contract's scope of work had previously been the subject of failed tender processes. The Court observed that Reeston East was not part of the bidding specifications under the Turnkey contract, and never formed part of the bidding process.[394] The Court remarked that:

> Given the Reeston contract had been put to tender both before the Turnkey contract tender was advertised and after the Turnkey contract was concluded, and that bid specifications did not encompass Reeston East, it is curious how the respondent, or anyone else, could envision that the Turnkey contract would encompass the area covered by the Reeston contract as part of Duncan Village and its surrounds. It is also apparent that none of the parties originally envisioned the Turnkey contract to encompass the Reeston contract. The letter 'awarding' the Reeston contract to the respondent acknowledges that the contract was only being 'awarded' to the respondent as a result of failed tender processes.[395]

The Court established that the process of "awarding" the Reeston contract was at odds with two fundamental constitutional requirements: that the bidding processes

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391 *Buffalo City* case para 71.
392 *Buffalo City* case 73-81.
393 *Buffalo City* case 82-100.
394 *Buffalo City* case 84-87 and 93-94.
395 *Buffalo City* case para 90.

for procurement should be competitive as well as be open and transparent.[396] The Court concluded that:

> To hold otherwise would overlook overwhelming evidence on record reflecting the violation of section 217 of the Constitution and other statutory prescripts and endorse the view that the work in contracts like the Reeston agreement, which were previously concluded in pursuance of a proper procurement process, could simply be 'awarded' to a different contractor purportedly on the basis of a previously concluded open-ended Turnkey contract. All this leads to one conclusion: there were blatant irregularities in the award of the Reeston contract to the respondent that render that contract unlawful and invalid.[397]

Justice Theron observed that:

> In awarding the Reeston contract to the respondent, the Municipality violated the provisions of section 217 of the Constitution. This section obliges every organ of state, regardless of the sphere under which it falls, to procure goods or services "in accordance with a system that is fair, equitable, transparent, competitive and cost effective". Corruption and maladministration are inconsistent with the rule of law and are the "antithesis of the open, accountable, democratic government required by the Constitution". In *Steenkamp* it was stated that the purpose of section 217(1) is to eliminate fraud and corruption in the public tender process and enable the state to secure goods and services at competitive prices.[398]

After finding that the "award" of the Reeston contract was illegal, the Court indicated that the conduct of the Municipality in bringing the application and its "about-turn" attempt to withdraw it from the Court prohibits the Court from overlooking the delay.[399] The Court remarked that: "while a court may be lenient in overlooking a delay where an organ of state attempts to put its house in order, the opposite is true where that organ seeks to perpetuate constitutionally invalid conduct by way of an unlawful settlement agreement".[400] The Court observed that:

> At no point did the Municipality take the Court into its confidence and explain its conduct. It simply presented the Court with whatever view it felt suited to at the time, vacillating between positions when convenient to it. This is outrageous behaviour from a state litigant, which must be robust in upholding its constitutional duties and is to be held publicly accountable. The Municipality's conduct in this matter, particularly following the hearing, verges on bad faith. Had the Municipality acted in a manner that indicated a sincere effort to clean house and rectify past wrongs and unlawfulness, this Court may have had a basis to overlook the delay. The important principle at play in this matter is how this Court manages complex

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[396] *Buffalo City* case para 91.
[397] See *Buffalo City case* para 92. Footnote omitted.
[398] See *Buffalo City case* para 96. Footnote omitted.
[399] See *Buffalo City* case para 97.
[400] See *Buffalo City* case par 98.

> institutional settings of corruption and maladministration, particularly at local government level and where the organ of state has not taken the Court into its confidence.[401]

The Court concluded that the case before them was similar to *Gijima* where the policymaker had failed to explain reasons for the delay in a comprehensive manner. The Court held that on the authority of *Gijima*, having established that the Reeston contract was clearly unlawful on undisputed facts, it was bound to declare it unconstitutional as it was against the provision of section 172(1)(a). Justice Theron concluded that the unlawfulness of the Reeston contract could not be ignored and that the Court was obliged, as it did in *Gijima*, to set aside a contract it knew to be unlawful.[402] Justice Theron was of the view that, even on a restrictive interpretation of the *Gijima* principle, there was no need to depart from it, taking into account the need to hold the state to the procedural requirements of review.[403]

In terms of Relief, the Court declared the Reeston Contract invalid and not nullified it to enable the respondent to exercise their rights thereto. The Court explained that the intention for making such an order was to enable the respondent to keep rights that were already in place whilst prevent any more rights being accrued by the respondent. This order ensured that payment obligations to the respondent were preserved. The Court's order was informed by the fact that when the Municipality came to the realisation that the Reeston contract was illegal, the implementation of the contract had started and was continuing. The Court observed that the Municipality was happy for the respondent to complete the contract and that the contract was practically completed when the Municipality instituted a review application. The Municipality and residents of Reeston had benefitted from the implementation of the contract. The Court held that, in the circumstances, justice and equity dictated that the Municipality did not benefit from its own undue delay and that the respondent be allowed to continue to perform in terms of the contract.[404]

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[401] See *Buffalo City* case para 99.
[402] *Buffalo City* case para 101.
[403] *Buffalo City* case 101.
[404] *Buffalo City* case pars 104-105.

4.4.3 Dissenting judgment

The minority judgment reached the same practical outcome with that of the majority judgment but dissented in terms of reasoning. The minority reasoned that:

> The contours of our divergent lines of reasoning are significant for this Court's developing legality jurisprudence on judicial review applications brought by organs of state. We disagree with the first judgment that in delay cases the interests of justice require this Court to make a final and definitive finding on the lawfulness of the Municipality's actions in concluding that contract. We agree that the issue of lawfulness plays a part in weighing up whether the review should be entertained, but it is not the sole determining factor. Here there are no compelling reasons to entertain the review given the Municipality's unreasonable delay in bringing its application. Accordingly, it is our view that leave to appeal should be refused.[405]

The dissenting judgment indicated that the legality review is grounded in the Constitution[406] and that it cannot be accepted that PAJA, which gives effect to the right to just administrative action, is the exclusive or most appropriate pathway for self-review.[407]

The minority indicated that the Court was dealing with a case where delay is a central feature. It indicated that the law was very clear for cases where delay is not a central issue – and that it was in agreement with the majority over this point. The minority indicated that, where there has been no delay by an organ of state in seeking to review its own prior decision, a declaration of unlawfulness should always be made.[408] Bringing an application for self-review timeously ensures the state complies with its duty to correct suspected unlawful decisions quickly and diligently. The minority indicated that timely self-review generally results in a win-win situation for the rule of law. On the other hand, where there is non-negligible delay by an organ of state in bringing about a self-review application, the court must determine whether the delay is reasonable and should accordingly be condoned.[409] However, this does not make

[405] *Buffalo City* case para 110.
[406] See section s 1(c), 41(1)(c), 195 and 217 of the Constitution.
[407] *Buffalo City* case para 116.
[408] *Buffalo City* case para 119.
[409] *Buffalo City* case para 12.

the procedural requirements regarding delay unnecessary. The minority observed that:

> On the contrary, the delay bar serves an important rule of law function: it promotes the public interest in the certainty and finality of decision-making. This is an imperative focus whenever a court undertakes a case-specific enquiry as to the reasonableness of the delay. The explanation proffered is a key consideration in assessing its reasonableness, particularly in state self-review. It is an opportunity for the state to demonstrate that its self-review seeks to promote open, responsive and accountable government rather than the self-interests of state officials seeking to evade the consequences of their prior decisions. This is the key in deciding whether the Municipality's behaviour passes the interests of justice test for granting leave to appeal.[410]

The minority judgment held that even when a delay is found to be unfounded and without any basis, courts are bound by the doctrine of precedent and the decision to overlook the delay rests on the court and is also dependent upon whether it will be in the interest of justice. The minority judgment indicated that this stage of the procedural enquiry should not take place in a 'vacuum but should involve weighing the effect of the delay on the parties; and the nature of the impugned decision.[411] The minority judgment indicated that it is at this stage of the enquiry that it differed from the first judgment in the application of the Court's guidelines in *Gijima* or addressing an unreasonable delay when a state organ seeks to have its own decision set aside.[412]

4.5 Reflection on lessons from Constitutional Court jurisprudence

A reading of the three constitutional judgments provides useful insights that can guide organs of state, such as municipalities, and their functionaries who want to review and set aside illegal contracts, including those concluded as a result of corruption. Firstly, it emerged from the case-law that the courts are custodians of the Constitution and enjoy strong independence from the other branches of government. They can contribute towards combatting corruption in South Africa.

Secondly, as Justice Theron pointed out in the Buffalo City case, it is "now settled that an organ of state seeking to review its own decision must do so under the principle of

410 *Buffalo City* case para 121. Footnotes omitted.
411 *Buffalo City* case para 122. Footnotes omitted.
412 *Buffalo City* case para 123.

legality and cannot rely on PAJA".[413] Although there are minority judgments in the *Khumalo* and *Buffalo City* cases which show complete lack of consensus amongst the justices of the Constitutional Court, the above position remains law and can only be overturned by a future judgment of the Court.

Thirdly, there is a legal duty on organs of state and state functionaries to approach courts to review and set aside illegal procurement contracts. This duty stems from the legal duty imposed on public servants to be responsive and accountable and demonstrate high ethical standards in terms of sections 1(c) and 195(1)(a), (f) and (g) of the Constitution. This is reinforced by the duty imposed by section 7(2) of the Constitution on the state to respect, protect, promote and fulfil the rights in the Bill of Rights.

Fourthly, in instituting self-review applications, organs of state must do so without excessive delays. Although there is no defined period in legislation within which to apply to courts for the nullification of an unlawful action in state self-review cases, section 237 of the Constitution dictates that "[A]ll constitutional obligations must be performed diligently and without delay". This requirement is important for diverse reasons: the need to promote certainty and finality in decision-making; long delays could give rise to devastating effects for those who rely on the decision and for the efficient functioning of the decision-making body itself; the passage of a long period of time may make it impossible for a court to establish unlawfulness in some contexts, thereby undermining the purpose of a court undertaking a lawfulness review. The clock for assessing delays started running when the functionary became aware or ought to have become aware of the irregular and unlawful action or conduct.

Fifthly, a court has the prerogative and may pardon a delay and entertain the application for self-review if: the delay is unreasonable or unexplained but the interests of justice dictate that the matter should be heard; there was a justifiable explanation of the delay in instituting a self-review application; the conduct of the applicant - state functionaries are honest in explaining the reasons for the delay; and the nature of the

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413 *Buffalo City* case para 45.

impugned decision and the consequences thereof for the affected parties are taken into account. Where the functionary who institutes review was responsible for the unlawful action, there is a greater responsibility to minimise delay. Where delay is justified or overlooked, the court considers the merits of the review application. Resource constraints can hardly be used to justify delays, given that organs of state are not poor litigants. The Court has indicated that where there is no justification for pardoning the delay, a court may still be constitutionally obliged to declare the state's conduct unlawful based on section 172(1)(a) of the Constitution.[414] In addition to these pointers, the facts and circumstances of each case have to be considered on a case-by-case basis.

Furthermore, organs of state should apply to court to nullify an illegal contract instead of attempting to fix it with a settlement agreement.[415] An unlawful agreement cannot be fixed with a settlement agreement.

It is important to note that, even where a court declares a contract unlawful because it was tainted by corruption, it can use its constitutional powers to make "any order that is just and equitable", which may include the preservation of certain rights that a party was entitled to, as in the *Gijima* case. In the *Buffalo City* case, the majority judgment explained that "such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement".[416] The position adopted by the majority judgment seems to create a certain tension in law on legality review. On the one hand, are cases explaining that the state must adhere to the procedural requirements of review, including timeous approaches to courts. On the other hand, *Gijima* implies that these procedural hurdles, while important, can sometimes yield to the constitutional injunction under section 172(1)(a) to declare invalid that which is inconsistent with the Constitution.[417] There seems to

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414 *Buffalo City* case 63.
415 See para 4.2 above.
416 *Buffalo City* case para 105.
417 *Buffalo City* case para 67.

be a need to balance the objectives of the rules on delay with those objectives of declaring unlawful conduct as such.[418]

4.6 Chapter Summary

This chapter reviewed three Constitutional Court cases in order to understand how legality review in South African constitutional law can be used by municipalities to procurement corruption through the use of state self-review. The intention was to identify key lessons from the Court's jurisprudence that can guide municipalities that wish to review and set aside their own procurement contracts that are tainted with corruption.

To achieve the above objective, the chapter was structured into five parts. The first three parts respectively provided an overview of the relevant Constitutional Court cases in line with their chronological development: *Khumalo*, *Gijima*, and *Buffalo City*. Each part focused on the facts of the case, the issues in dispute, the decision, and the reasoning of the Court. These need not be reproduced here. The specific lessons learned from the Court's jurisprudence emanating from the three cases are more important in terms of the discussion in subsequent chapters. In terms of these relevant lessons, the following emerged: Firstly, self-review application for by a municipality or municipal official should only be brought in terms of the principle of legality. PAJA can only be used by natural persons. There is no fixed time period for instituting a legality review by an organ of state; Secondly, that the reasonableness of the delay must be assessed; Thirdly, that there must be a comprehensive explanation for the delay; and Fourthly, that any explanation by public officials must be honest and must take the court into their confidence. Where the unreasonableness of the delay has been established, a court must determine whether the delay should be overlooked. Furthermore, where there is no sound reason for the court to do away with the delay, the court may still be constitutionally obliged to declare the organ of state's conduct illegal. Where a court declares a procurement contract unlawful, it can use its constitutional powers to make "any order that is just and equitable", which may

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418 *Khumalo* case para 68.

include the preservation of certain rights that a party was entitled to. It was established that municipalities and state functionaries have a legal obligation to institute legal proceedings to review and nullify the unlawfulness of their own actions.

The next chapter reviews local government procurement cases that were decided in accordance with the principle of legality by lower courts after the Constitutional Court ruling in *Buffalo City* case. The purpose is to determine if they lay down any further principles that could enhance the ability of municipalities to curb procurement corruption that takes place in municipalities.

CHAPTER 5

A REVIEW OF THREE MUNICIPAL PROCUREMENT CASES BY LOWER COURTS POST THE BUFFALO CITY CASE

5.1 Introduction

The UNCAC and the AUCPCC confirm that procurement corruption is a universal challenge that needs to be addressed by governments across the globe.[419] Despite commitments in the Constitution, the Green Paper on Public Sector Procurement (1997) and the MFMA to promote good financial governance in local government, procurement corruption remains one of the main challenges faced by municipalities in South Africa. As seen in Chapter 1, the Auditor General has indicated that uncompetitive and unfair procurement processes, and inadequate contract management, remain prevalent.[420] Some of these challenges lead to the situation where aggrieved parties approach courts for legal recourse, as seen in the previous chapter.

The aim of this chapter is to review local government procurement cases that were decided on the basis of the legality review principle by courts below the Constitutional Court (lower courts in this context) after the ruling in the *Buffalo City* case. The reason is to determine if they lay down any principles that could enhance the ability of municipalities to curb corruption that takes place in the procurement of goods or services by municipalities. Due to time constraints, and to manage the scope of the chapter, the researcher selected two Supreme Court of Appeal cases[421] and one High Court case.[422] The first three parts of this chapter provide an overview of the cases: the facts, issues in dispute, decisions, and reasoning of the courts in the three cases.

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419 See discussion in 1.4 above.

420 Auditor General 2022 https://www.agsa.co.za

421 *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* (1104/2019) 2021 (3) SA 25 (SCA) (5 October 2020); *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* (121/2020) 2021 (4) SA 436 (SCA) (7 April 2021).

422 *Sakhisizwe Local Municipality v Tshefu and others* (1611/2019) 2020 2 All SA 299 (ECG) (28 January 2020). Hereafter *Sakhizizwe* case. There are other procurement cases which have not been discussed in the dissertation. For example, see *Siyangena Technologies Pty Ltd v PRASA and Others* 2022 ZASCA 149.

The fourth part of the chapter focuses on the lessons learnt from the three cases reviewed. The fifth part is the chapter summary.

5.2 The Altech Radio Holdings Case

5.2.1 Facts and issues in dispute

This is a public procurement case wherein the municipality seeks to review its prior decisions.[423] There are three parties who are Appellants in this case.[424] The respondent is the City of Tshwane Metropolitan Municipality.[425]

In the *Altech Radio Holdings* Case, the City of Tshwane Metropolitan Municipality approached the High Court in order to review and nullify its own decisions because it failed to comply with its own rules, it misinterpreted legislation and badly administered a tender processes in the appointment of a service provider for a network project that will serve the municipality as a whole.[426] The Municipality embarked on the journey to procure the services of contractors to expand its communications network infrastructure with a view to establishing a "smart city", improve service delivery, and bridge the digital divide between inhabitants of the city.[427] The initial tender that was opened for the public was advertised on 27 May 2013, and it was halted a few months later. On 15 September 2014, a request for a proposal containing an invitation to those that were interested was published.[428] The Municipality ultimately awarded the contract to Altech Radio Holdings, the First Appellant, on 09 June 2015.[429] The Second and Third Appellants entered into a tripartite agreement with the City in which ABSA Bank and the Development Bank of Southern Africa (DBSA) agreed to make funds available to the Second Appellant (Thobela) to enable it to fulfil its obligations to the City.[430] The agreement was that Thobela would build, operate and maintain a 1500km

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423 *Altech Radio Holdings* case para 1.
424 The appellants are: Altech Radio Holdings (Pty) Limited, Thobela Telecoms (RF)(Pty) Limited and ABSA Bank Limited.
425 *Local Government: Municipal Structures Act* 117 of 1998 [Category A municipality by the Municipal Demarcation Board].
426 *Altech Radio Holdings* case para 2.
427 *Altech Radio Holdings* case para 3.
428 *Altech Radio Holdings* case para 4.
429 *Altech Radio Holdings* case para 5
430 *Altech Radio Holdings* case para 7.

fibre-optic cable network (Tshwane broadband network) for 18 years from 31 August 2016 and fund the capital for doing so. Thereafter the Municipality would accrue ownership of the network for R1 at the end of the 18-year agreed term.[431] It was agreed that, in case of early termination, and depending on the reason, payment might be due in line with relevant clauses in the agreement (BOT agreement).

The total cost of funding the project stood at R1,335 billion. This was to be financed through loans from lenders. ABSA Bank and DBSA committed to funding 70% of the total cost of the funding.[432] The commercial viability of the project hinged on two aspects. Firstly, the City made an undertaking to being the "anchor customer" of the network and had agreed to pay Thobela a service fee for the duration of the BOT agreement in exchange for a specified level of service.[433] The City was supposed to pay an annual fee of R244 million per monthly, upon completion of the 400 service sites that had been designated. The second important factor was the potential for generating more income for the city with the remaining capacity of the network.[434]

On day before the Tripartite agreement was signed off, dynamics changed in the City of Tshwane due the local government elections of 2016.[435] Following the elections, the governing party (the ANC) lost power in the City, thereby relinquishing it to the Democratic Alliance (DA), which became the leader of the coalition government.[436] Shortly after assuming office, the DA-led government in the City of Tshwane announced its intention to review and possibly cancel some procurement contracts, including the BOT agreement. However, a year passed before the City made an application to the High Court on 22 August 2017 to: (a) interdict the coming into effect of the BOT agreement; and (b) to assess and nullify certain procurement decisions taken by City officials from September 2014 to April 2016, including the Tripartite and BOT agreements.[437] Altech, Thobela and ABSA Bank opposed the application. In

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431 *Altech Radio Holdings* case para 8.
432 *Altech Radio Holdings* case para 10.
433 *Altech Radio Holdings* case para 10.
434 *Altech Radio Holdings* case para 10.
435 *Altech Radio Holdings* case para 11.
436 *Altech Radio Holdings* case para 11.
437 *Altech Radio Holdings* case para 12.

relation to the first issue, Brenner AJ struck the City's application from the roll, on 21 September 2017 due to lacking urgency made an order that the City to pay punitive costs on a client-attorney scale.[438] The second issue was subsequently heard by Justice Baqwa in May 2018, who found in favour of the City. The court held that the award of the tender for the provision of the municipal broadband network project and the purported amendment of the award were invalid. The court also declared the decision of the Municipal Council to endorse and sign off the BOT agreement to be invalid. The court set aside the Tripartite and BOT agreements.[439] Altech, Thobela and ABSA bank appealed to the SCA, in which they argued that the municipality's delay to launch the application for review was unreasonable and should not be condoned or overlooked.[440] They argued that if the delay was to be overlooked, the court should use its remedial discretion in section 172 of the Constitution not to set aside both agreements. The main argument of the City was that the DA only took control of the municipality after winning the 2016 elections and that it needed more time to consider alleged irregularities that happened while the ANC was in power. Although the High Court accepted this argument, it was rejected by the SCA.[441]

5.2.2 Decision and reasoning of the court

In a unanimous judgment written by Justice Ponnan, the SCA held that there was a lack of the explanation for the delay and erratic behaviour of the City resulted in serious financial difficulties to the appellants and other interested parties in this matter.[442] The Court established that some grounds on which the City relied for the review application were known to it and the new leaders several months before the BOT agreement was signed and before the payment of money for the project began in December 2016. The court held that it was wrong to simply draw a bright line between what happened before the local government elections and what happened after that.[443] The court established that although the City was aware of some of the

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[438] *Altech Radio Holdings* case para 13-14.
[439] For details, see *Altech Radio Holdings* case para 14.
[440] *Altech Radio Holdings* case para 15.
[441] *Altech Radio Holdings* case paras 24-25.
[442] *Altech Radio Holdings* case paras 50-51.
[443] *Altech Radio Holdings* case para 50.

alleged unlawful actions for more than two years, it demanded that Altech and Thobela move faster with the implementation of the project and make up for the time lost. This caused Thobela and Altech to take many steps that incurred huge expenditure.[444]

The SCA began by asserting that delay is a principle that steams from the rule of law and its requirements for certainty and finality. The Court acknowledged that although a constitutional duty was imposed on the City to bring the review application, the City equally had a duty to do so expeditiously.[445] Relying on the principle laid down by the Constitutional Court in *Gijima,*[446] the SCA held that, despite concerns about the heavy reliance "on the legality review at the expense of constitutionally mandated legislation", "it is now settled that an organ of state seeking to review its own decision must do so under the principle of legality and cannot rely on PAJA".[447] The Court explained that legality review through the principle of legality does not have time limitations like the 180-day limit of PAJA. However, an application for a review should be brought within a reasonable time. Delay must not be unduly unreasonable, and the court can decide to pardon the delay or not.[448]

The Court noted that the City did not dispute that it delayed in bringing the review application. The City suggested that the delay was reasonable because of the change in political leadership at the city level. The Court observed that the application was launched 24-months after Altech was awarded the tender sixteen months after approval of the BOT agreement by Council, and a year after the Tripartite agreement was signed.[449] The court noted that the Municipality failed to explain reasons for the delay and did not raise any allegations of fraud or corruption. The Court noted that although the City initially relied on complaints of 'serious mismanagement', it did not make out a case that any of the appellants was involved in maladministration or mismanagement. Furthermore, the court noted that many of the important staff members involved in the procurement process and procurement officials from 2014

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444 *Altech Radio Holdings* case para 51.
445 *Altech Radio Holdings* case para 16.
446 See para 4. 3 above
447 See *Altech Radio Holdings* case para 17.
448 *Altech Radio Holdings* case para 18-19.
449 *Altech Radio Holdings* case para 21.

were still employed by the City after the local government elections. The court reasoned that the City was therefore in a position to provide explanations for the delay.[450] The court lamented that although these key role-players were still in the employ of the City, the municipality did not attempt to use them to assist in their investigations into allegations of mismanagement and maladministration. The City launched its application for review more than 52 months after the contract was awarded to Altech.[451] The City claimed that the delay was not unreasonable because the change in government contributed towards the non-timeous filing of the application.[452]

The SCA held that, in terms of law, a change in political leadership of a municipality is irrelevant because a municipality is a single juristic person. Changes in political leadership is not equivalent to a municipality being a different entity altogether, it merely means a change of who will be making administrative decisions on behalf of the municipality. The court was of the view that, in the case before it, the evidence that the DA relied upon was known or ought to have been known by the DA before it took over control of the City.[453] The court established that although the DA had all the information that it relied on for its review application before it assumed power in the City, it continued the project upon assuming control of the municipality. Despite its mixed messages, the DA-led administration indicated several commitments to the contract. For example, the court indicated that the DA-appointed municipal manager on 14 October 2016 wrote to Thobela emphasising the important terms of the BOT agreement what its implications were, they also expressed concerns about how long it was taking for the equipment to be ordered for the execution of the contract.[454] In addition, in November 2016, the City wrote to Thobela and threatened to cancel the agreement if it did not "commence performance and proceed in terms of the agreement immediately". The DA-led mayor announced less than a month after the writing to the City that the City would "submit the broadband contract to a

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[450] *Altech Radio Holdings* case paras 22-23.
[451] *Altech Radio Holdings* case para 21.
[452] *Altech Radio Holdings* case 32-33.
[453] *Altech Radio Holdings* case paras 25-30.
[454] *Altech Radio Holdings* case paras 30-32.

transactional advisor to check the legality and value for money of the contract".[455] Despite this announcement, the court noted that in several engagements between the City and Thobela, Thobela was required to expedite the implementation of the project and that by 15 January 2018, Altech and Thobela had incurred costs and liability to the tune of about R610 million.[456] The court noted that by the time the review application was launched, 34% of the building phase of the project was complete, the project was frozen and could not be repurposed because it was specifically tailored according to the City's requirements. The court noted that what had been constructed was useless as it could not provide service to the City. The SCA held that the High Court completely failed to take into consideration the position of the lenders who were not involved in the award of the tender.[457] The failure of the City to communicate with the lenders denied them the opportunity to mitigate any potentially adverse consequences of the cancellation of the Tripartite or BOT agreements.[458] The court noted that the City excessively delayed in responding to several attempts by the DBSA to get reassurance from it that the BOT agreement and underlying procurement processes were valid and enforceable before effecting a second payment to Thobela. Besides, the City's conduct and communication were inconsistent. The court noted that the excessive delay and inconsistent conduct had caused extensive hardship to the appellants and other interested parties.[459] The court explained that the City knew of the alleged irregularities before ABSA and the DBSA advanced funds but did not move swiftly and candidly with its intention to review the award of the tender. Doing so would have avoided the bulk of the expenditure incurred.[460]

Despite the excessive delay, the court proceeded to weigh the scales to assess whether the prospects of success in the City's case.[461] The court indicated that the City mainly relied on two grounds of review: firstly, on the evaluation of bids, discrepancies in the tender documents and alleged irregularities; and secondly, that

455 *Altech Radio Holdings* case para 33.
456 *Altech Radio Holdings* case paras 34-42.
457 *Altech Radio Holdings* case paras 43-45.
458 *Altech Radio Holdings* case paras 45-46.
459 *Altech Radio Holdings* case paras 47-50.
460 *Altech Radio Holdings* case para 52.
461 *Altech Radio Holdings* case para 53.

the BOT agreement did not meet the requirements concerning public-private partnerships in section 33 of the MFMA.[462] The court conceded that it is not always possible that public procurement contracts are without any flaw. The court indicated that perfection is not required in the procurement process and that not all flaws amount to irregularity or material irregularity. Thus, not all flaws should lead to the invalidation of public procurement contracts.[463] The court agreed with counsel for the City that the BOT agreement could not be nullified due to irregularities in the tender process. In relation to section 33 of the MFMA, the SCA held that the High Court erred in declaring that the City failed to understand that the BOT agreement did not include *Altech/Thobela* taking responsibility for the existing network and the financial implications of this.[464] The court pointed out that the communication from the City and its consultants in 2016 confirmed that: the tender was awarded correctly; the project was budgeted for; and that "the City could not seek special funds for the project but had to leverage funds from its existing budget." [465]

The court indicated that the City did not produce sufficient factual evidence to dispute the correctness of these communications and did not also pay for the build phase of the project. The court concluded that it was therefore unclear how the City was "supposed to budget for the future in respect of the project, any more than they budget for other future items of expenditure".[466] The court was satisfied that the BOT agreement was valid and binding on the City and did not constitute a public-private partnership (PPP) in terms of the MFMA.[467] This was because the project did not involve the provision of a municipal service, the use of municipal property or, the performance of a municipal function. The court pointed out that municipalities do not have competence over telecommunications in terms of the Constitution. Therefore, the agreement by Thobela to build and operate the telecommunication network and provide services to the City did not qualify as the provision of a municipal service or

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462 *Altech Radio Holdings* case para 53.
463 *Altech Radio Holdings* case paras 54 - 55.
464 *Altech Radio Holdings* case paras 55-56.
465 *Altech Radio Holdings* case para 57.
466 *Altech Radio Holdings* case para 57.
467 *Altech Radio Holdings* case paras 57-64.

performance of a municipal function.[468] It was envisaged that the network would only be transferred to the City at the end of the operating period.

Based on the above reasoning, the SCA held that the High Court "failed to weigh up the consequences of setting aside, against not setting aside, the BOT and Tripartite agreements".[469] The court observed that the impugned contract was substantial with implications for millions of residents in the City. The court noted that after acceptance of the tender, the parties had proceeded to implement the tender and concluded several agreements. The court indicated that the High Court failed to consider "the indivisible nature of these arrangements, which renders the setting aside of the BOT agreement completely impracticable." [470] The court observed, *inter alia* that the High Court ignored the fact that 34% of the build phase of the project had been completed and that more than R610 million had already been spent on the project.[471] The High Court narrowly focused on the claimed irregularities and lost sight of the "multi-factor and context-sensitive" considerations it was supposed to consider.[472]

The SCA held that the City used the application for a review process to evade the rule of law instead of asserting its constitutional obligations,[473] and that the conduct of the City throughout litigation of this case was highly prejudicial and the application for review was without merit.[474] The Court reasoned that:

> The city had several opportunities to have alerted the appellants to its misgivings or brought review proceedings. It did neither. This inaction left the appellants financially exposed. The appellants, who were entirely removed from the tender could not second-guess the regularity of the procurement process of an organ of state. The funders and the other appellants were entitled to assume that the City would have acted in a manner that is fair in all the circumstances. They were also entitled to assume that the City would have complied with its own internal arrangements and formalities.[475]

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468 *Altech Radio Holdings* case paras 63-64.
469 *Altech Radio Holdings* case para 65.
470 *Altech Radio Holdings* case para 66.
471 For details on expenditure that was already incurred, see *Altech Radio Holdings* case para 67.
472 *Altech Radio Holdings* case para 68.
473 *Altech Radio Holdings* case para 70.
474 *Altech Radio Holdings* case para 70.
475 *Altech Radio Holdings* case para 69.

The court indicated that the City had not abandoned the idea of a broadband project but was rather only concerned about what it could gain from undergoing the agreements. Therefore, the City was trying to invoke "administrative law remedies to strike for itself what it hoped would be a better bargain for itself".[476] The court reiterated that the aim of state self-review should be to promote responsive, open, and accountable government.[477] The court concluded that:

> The conduct of the City renders the delay so unreasonable that it cannot be condoned without turning a blind eye to its duty to act in a manner that promotes reliance, accountability and rationality and that is not legally and constitutionally unconscionable. Here, the delay is stark and the egregious conduct on the part of the City, even starker. The City has a 'higher duty to respect the law'. It is not an 'indigent and bewildered litigant, adrift in a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline'. Given the excessive delay, the absence of a reasonable and satisfactory explanation for the delay, the unconscionable and highly prejudicial conduct of the City and the lack of merit in the review the court below ought not to have condoned the delay.[478]

As a result of the above, the application of the City was dismissed with costs.

5.3 The Govan Mbeki Municipality Case

5.3.1 Facts and issues in dispute

This case centered on the lawfulness of a debt management contract that was entered into between the appellant, Govan Mbeki Municipality and the respondent, New Integrated Credit Solutions (Pty) Ltd (NICS).[479] Following an order declaring only part of the agreement invalid by the High Court, the Municipality approached the SCA to declare the entire agreement with NICS invalid due to the allegations that it was marred with irregularities and non-compliance with statutory prescripts and constitutional norms.[480] On the other hand, NICS argued that the court should declare the entire agreement as valid and enforceable.

[476] *Altech Radio Holdings* case para 70.
[477] *Altech Radio Holdings* case para 71.
[478] *Altech Radio Holdings* case paras 71-72. Footnotes omitted from quote.
[479] *Govan Mbeki Municipality* case para 1.
[480] *Govan Mbeki Municipality* case para 1.

The Newcastle Municipality issued a tender notice by inviting bids from service providers for debt management services towards the end of 2014.[481] NICS submitted a bid to collect debt older than 60 days for the Municipality at a charge of 16.5%, which includes VAT at 14%, on all successfully recovered revenue. The Newcastle Municipality's bid-adjudicating committee agreed that NICS should be appointed as the service provider. NIC was informed that it was the preferred bidder on 3 February 2015, and this was confirmed by the Municipality in writing on 25 March. NICS was informed that it would be used as a service provider for a period of 3 years on a commission of 16.5% on collected debt from customers that was more than 60 days old. As a result of this, a service agreement was finalised between Newcastle Municipality and NICS on 30 April 2015. A clause was included in this agreement to the effect that NICS would be entitled to a commission of 2.5% on debts younger than 60 days.[482]

The Govan Mbeki Municipality (GMM) became aware that the Newcastle Municipality had procured the services of NICS without certainty on the details of the bid specification and bid-adjudication process. The GMM acting in terms of section 32 of the Municipal Supply Chain Management Regulations approached the Newcastle Municipality to secure their consent in order to procure debt management services from NICS. In terms of this provision, a Supply Chain Management Policy may allow an accounting officer to procure goods or services for a municipality or municipal entity under a contract that was secured by another organ of state. After obtaining the green light from the Newcastle Municipality, GMM and NICS finalised a written agreement for the provision of debt management services on 12 September 2015 for a period of three years. Essentially, GMM adopted the same type of agreement that NICS had with the Newcastle Municipality.[483] The agreement contained an obligation on the parties to submit any dispute arising therefrom to arbitration and that the decision of the arbitrator would be final, binding, and may be made an order of court.[484]

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481 *Govan Mbeki Municipality* case para 2.
482 *Govan Mbeki Municipality* case para 4.
483 *Govan Mbeki Municipality* case paras 6-9.
484 *Govan Mbeki Municipality* case para 9.

It emerged that, when the Newcastle Municipality published the call to tender for debt management services, it had the intention of creating a debt management unit to manage debts younger than 60 days. Following the finalisation of the agreement with NICS, it occurred to the Director of Finance of the Newcastle Municipality that the city had budgetary limitations which made it impossible to establish this unit. The Director then approached NICS to see if they could "help" Newcastle Municipality collect debts under 60 days. That led to negotiations with NICS which resulted in the September 2015 agreement. The Newcastle Municipality justified its deviation from the original notice to tender by placing reliance on section 116(3) of the MFMA which entitles a municipality to vary an existing contract provided that certain conditions are met.[485]

On 7 November 2016, the Auditor-General wrote to the Newcastle Municipality informing them that the provision in the written agreement concerning the 2.5% commission to NICS in respect of younger debts had not been called for in a tender notice and was not part of the bid by either the NICS or the other bidders. In addition, the Auditor-General indicated that the procurement process was unfair to other suppliers and tenderers of the same services.[486] Therefore, the Newcastle Municipality did not comply with the provisions of section 217(1) of the *Constitution* when procuring for debt management services.[487] Essentially, no due processes were followed.

In February 2017, having become aware of the details above, the GMM took a decision to terminate the agreement with NICS by relying on the provisions of section 217 of the *Constitution* in that the none of the bidders, including NICS, had been invited to tender for the collection of outstanding debts under 60 days and that the provision of the additional 2.5% commission was unlawful and void.[488] Additionally, the GMM stated that it was ignorant of the failure of the Newcastle Municipality to comply with

485 *Local Government: Municipal Management Act* 56 of 2013.
486 *Govan Mbeki Municipality* case para 12.
487 In terms of section 217 of the Constitution, where an organ of state seeks to contract for goods and services, it must do so according to a system which is fair, equitable, transparent, competitive, and cost-effective.
488 *Govan Mbeki Municipality* case para 13

the legal requirements.[489] It stated that NICS was not entitled to claim 2.5% commission on debt collected from the Municipality's customers because this was not subject to a competitive bidding process mandated by law. The GMM stated that NICS was only entitled to claim 16.5% commission on debt which it had collected from its customers and that it was further terminating the contract because NICS had failed to fulfil its contractual obligations.[490] The termination letter stated that GMM was open to arbitration if NICS found it necessary.

NICS declined the efforts of Municipality in terminating the agreement and approached the High Court for ~~a~~ relief to interdict Municipality from terminating the agreement. Both NICS and the Municipality agreed that the dispute should go for arbitration. On 23 August 2017, an award was made in favour of NICS on the basis that the GMM's purported cancellation was invalid and of no force. Ultimately the arbitrator ordered that GMM should pay NICS more than R22 million for debts older than 60 days and more than R23 million for debts younger than 60 days.[491] While the arbitration was being conducted, on 21 June 2017 the GMM instituted action in the High Court in which it sought an order to declare the entire agreement between itself and NICS unconstitutional, unlawful, and invalid *ab initio*. Alternatively, it argued that the part of the agreement dealing with the 2.5% commission be reviewed, declared unconstitutional and set aside because it had not gone through the competitive process and therefore was not in line with section 217 of the Constitution and legislation.[492] The GMM argued that the delay in seeking relief was justified and argued that the court should overlook it.[493] NICS however, insisted that the delay in seeking the relief was a legality review, that it should not be entertained, and that it should be dismissed with costs.[494] NICS denied that the agreement was in conflict with any applicable law. NICS argued that if the court was compelled to declare the contract invalid, justice and equity required that the court should preserve the rights that had

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489 *Govan Mbeki Municipality* case para 14.
490 *Govan Mbeki Municipality* case para 14.
491 For details of the award, see *Govan Mbeki Municipality* case paras 16-19.
492 *Govan Mbeki Municipality* case para 20.
493 *Govan Mbeki Municipality* case para 20.
494 *Govan Mbeki Municipality* case para 21.

already accrued to it.[495] The court concluded that there was no undue delay on the part of GMM even though it became aware of the illegality of the agreement after the AG raised the matter with the Newcastle Municipality in November 2016. The court held that the 2.5% commission was against section 217 of the Constitution and relevant regulations of the MFMA.[496] The court decided not to set aside the entire agreement but to sever the part that covered the 2.5% commission. It declared it unconstitutional, unlawful and void *ab initio* and held that NICS was not entitled to recover any compensation or commission for debts collected from the Municipality's customers under 60 days for the duration of the agreement.[497] GMM appealed against the decision of the High Court and argued that the entire agreement ought to have been set aside. GMM argued that its review application should be seen as a collateral challenge devoid of the Constitution and the principle of legality.[498] NICS cross-appealed and argued that GMM's delay in seeking relief in the High Court was unreasonable and should not have been overlooked, and that the application to review and set aside the agreement should have been dismissed on this basis. NICS argued that Regulation 32 of the MFMA did not affect the agreement between itself and GMM and that it applied only to the agreement with Newcastle Municipality. NICS argued that GMM's challenge relied on the principle of legality and therefore section 172 of the Constitution was applicable in relation to the exercise of the court's discretionary powers.[499]

5.3 2 Decision and reasoning of the court

After traversing existing jurisprudence, the SCA held that although the defence of collateral challenge was available to public authorities in practical circumstances where, for example, an organ of state "threatens consequences or coerces payment" from another,[500] it could not understand why in the case before it, the challenge by

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495 *Govan Mbeki Municipality* case para 21.
496 *Govan Mbeki Municipality* case paras 23-24.
497 *Govan Mbeki Municipality* case paras 25-26.
498 For details of arguments raised in the SCA by GMM, see *Govan Mbeki Municipality* case para 27.
499 *Govan Mbeki Municipality* case para 28.
500 *Govan Mbeki Municipality* case paras 28-32.

GMM was collateral or reactive.[501] The court expressed the view that this characterisation was a distorted exercise adopted by GMM out of convenience and that the Municipality had not been coerced by NICS.[502]

Having disposed of the collateral argument, the court proceeded to focus on the true nature of the review application by GMM. According to the court, the review application was state self-review in terms of legality review.[503] The court reiterated the established principle that in dealing with a legality review, a court has no pre-determined period during which an application for review should be brought. In this regard, the interest of justice determines how the court uses its discretion. In determining the issue of delay and the manner in which the court should use its discretion in a legality review, a court takes into account "the date that the applicant became aware or reasonably ought to have become aware of the action taken".[504] Restating the jurisprudence of the Constitutional Court, the court explained that, in assessing delay, the first question to be answered is whether the delay was reasonable. In this assessment, the entire period of the delay must be explained and if it is justified, then the delay is reasonable, and then, the merit of the review can be considered. In addition, where the delay cannot be explained and justified, it is unreasonable.[505] The court explained that if the delay is found to be unreasonable, a court has to assess whether the interest of justice requires it to overlook the unreasonable delay.[506] The court reiterated the view of the Constitutional Court that there must be a basis for any court to exercise its discretion to overlook a delay which can be gathered from the facts presented before it or from objectively available factors.[507] According to the court, these show that a legality review is flexible. It requires a consideration of multiple factors and different contexts. An important factor that is considered is the potential prejudice to affected parties and the consequences that flow from declaring a conduct unlawful – which can

[501] *Govan Mbeki Municipality* case para 33.
[502] *Govan Mbeki Municipality* case para 33.
[503] *Govan Mbeki Municipality* case para 34.
[504] *Govan Mbeki Municipality* case para 34.
[505] *Govan Mbeki Municipality* case para 35.
[506] *Govan Mbeki Municipality* case paras 35-36.
[507] *Govan Mbeki Municipality* case paras 36-37.

in some instances be cured by the power of courts to grant just and equitable relief.[508] Another factor which a court takes into account is the nature of the impugned decision.[509] The fourth factor that the court can consider is the conduct of the applicant.[510] The court reiterated that there is a higher standard placed on organs of state to respect the rule of law and government officials have a duty of ensuring that substantive and procedural legal requirements are met when dealing with rights.[511] Finally, the court restated the position that, where there is no ground to overlook an unreasonable delay, a court is required in terms of section 172(1)(a) of the Constitution to declare invalid any conduct that is unlawful and inconsistent with the Constitution. Despite a declaration of invalidity, a court may, through equitable relief, preserve rights which have already accrued from an unlawful contract.[512]

After setting out the above context, the Court established that there was unreasonable delay in instituting and completing the review proceedings and that there was no explanation of the delay.[513] The court established that if GMM had taken time to look at the documents that were sent to it in August 2015, it could have realised before it concluded the contract with NICS that the original agreement was of questionable validity and it did not meet the requirements of Regulation 32(a) to (c) of the MFMA and the requirements in section 217 of the Constitution. The court reasoned that GMM certainly ought to have known at the time it concluded the agreement in September 2015.[514] At this stage, GMM should have also realised that the Newcastle Municipality added debt younger than 60 days without inviting new tenders. A basic check by GMM should have revealed that the Newcastle Municipality had not submitted the extension of the contract to the municipal council by section 116(3) of the MFMA.[515]

The Court indicated that during the early implementation of the agreement, the GMM should have experienced challenges such as cost-inefficiency in determining whether

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508 *Govan Mbeki Municipality* case para 37.
509 *Govan Mbeki Municipality* case paras 38-39.
510 *Govan Mbeki Municipality* case para 40.
511 *Govan Mbeki Municipality* case para 40.
512 *Govan Mbeki Municipality* case paras 41-46.
513 *Govan Mbeki Municipality* case para 52.
514 *Govan Mbeki Municipality* case para 48.
515 *Govan Mbeki Municipality* case paras 29-30 and 49.

payments for debt older than 60 days were made as a result of the intervention by NICS. Such inefficiency should have spurred the GMM to investigate the validity of the agreement.[516] Despite this, GMM only raised a concern about the legality of the 2.5% commission 17 months after the effective date of the contract. GMM only instituted action to set aside the entire agreement 22 months after the effective date of the contract – leading to the case before the SCA. The court noted that by the time the trial started in the High Court, the contract period with NICS had already expired.[517]

In relation to the merits of the case and the degree of statutory non-compliance, the court indicated that it was clear that the part of the 2.5% add-on to the agreement did not comply with Regulation 32 of the MFMA and that the non-compliance was atrocious.[518] Based on the facts, the court concluded that the prescripts of both regulation 32 and regulation 51 of the MFMA "were not even close to being adhered to".[519] Justice Navsa disappointedly observed that:

> There had been no competitive bidding process in relation thereto. No thought was given to whether there were demonstrable discounts or benefits for the Newcastle Municipality. All the indications were to the contrary. It could rightly be expected that a substantial, if not the greater percentage of consumers, would pay their accounts within the first 60-day period, as noted by the arbitrator and recognised by the Auditor-General. In relation to the bid as a whole and the resultant agreement no thought appears to have been given to how recovery of revenue would or could be connected to efforts made or steps taken by the service provider. There was no cap placed on the commission to be earned. Therefore, the prescripts of both reg 32 and reg 51 were not even close to being adhered to. In respect of the tender itself it is necessary to record at this stage that there was no indication at all that NICS was remiss in any way in either not bidding in the form invited or insisting on particular contractual provisions. However, in respect of the add-on it could not have been lost on NICS that it was receiving preferential treatment, as opposed to other bidders, and it was not being asked to revisit the commission on which it had put in a bid. It was more than a windfall that it was glad to accept. That unwarranted benefit was repeated in the GMM agreement. As the computation by the arbitrator proves, the commission on the under 60-day period was especially lucrative, earning NICS approximately R1 million more than it did on the over 60 day revenue. It bears repeating that the total earned in relation to debts younger than 60 days amounted to more than R23 million based on a fraction of the commission in relation to debts older than 60 days. By any measure this is startling. To add insult to consumer injury, payments by the GMM's bulk consumers were included in the computation of what

516 *Govan Mbeki Municipality* case para 49.
517 *Govan Mbeki Municipality* case para 51.
518 *Govan Mbeki Municipality* case para 53.
519 *Govan Mbeki Municipality* case para 53.

was earned by NICS. There is eveything fundamentally wrong with all of this. This will be borne in mind when an order is made at the end of this judgment.[520]

As evident from the above extract, the complicity of NICS in the illegal conduct played an important role in crafting an appropriate order. Despite this, the court reiterated that there was a legal duty imposed on GMM officials to satisfy themselves that the bid process complied with legal prescripts and that they horribly failed in executing this duty. These officials did not show any concern for good governance or the best interests of the people and businesses that make up their customer base.[521]

The court found that there was unreasonable delay, and there was no good reason to overlook it. The court held that the agreement in the case before it was clearly unlawful and that it had a duty to declare it as such. Given that a service provider suffers prejudice when a service is rendered without remuneration, the court had to use its equitable remedial powers in section 172(1)(b) of the Constitution.[522] The court ordered that NICS should not be deprived of benefits that accrued under the agreement pertaining to commissions earned for debts older than 60 days. However, due to its complicity with the unlawful conduct of GMM, the court ordered that NICS should be deprived of all commission in relation to debts younger than 60 days.[523] The court expressed the view that: "A message should be sent to service providers that they will not be allowed to reap the benefits of such complicity".[524] The court set aside the order of the lower court.[525]

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520 *Govan Mbeki Municipality* case para 53.
521 *Govan Mbeki Municipality* case paras 54-55.
522 *Govan Mbeki Municipality* case paras 57-62.
523 *Govan Mbeki Municipality* case para 63.
524 *Govan Mbeki Municipality* case paras 62.
525 The SCA ordered that: "(a) The contract '(a) The contract for the provision of debt management services, concluded by the parties during September 2015, which is the subject of this action, is declared unconstitutional and invalid but is set aside only in relation to recovery by the defendant of the commission of 2.5% in respect of debts younger than 60 days, so as to preserve the accrued rights of the defendant as set out in (b) below. (b) The defendant is thus not precluded from recovery of the commission of 16.5% on debts older than 60 days in the amount calculated by the arbitrator, Justice Harms." See *Govan Mbeki Municipality* case para 64.

5.4 The Sakhisizwe case

5.4.1 Facts and issues in dispute

In this case, the Sakhisizwe Local Municipality sought to review and set aside its decision to appoint the First Respondent (Tshefu) in the position of Director of Integrated Development Planning and Economic Development for failing to meet the minimum job experience requirements, alleging that the appointment was null and void as it contravened the provisions of section 56 of the *Municipal Systems Act*. Furthermore, the Municipality sought an order to declare the total salary and remote allowance of Tshefu as unlawful.[526]

The Municipality advertised a job post during July 2017. Tshefu applied for the position. Interviews were conducted on 26 September 2017.[527] In 2017 (13 December), after a South African Local Government Association (SALGA) competency assessment meeting was held, she was the preferred candidate.[528] She was appointed to the position.
The basic requirements for the position as advertised were that the candidate should have: (a) a Matric Certificate; (b) a Bachelor's Degree in Local Economic Development and/or Development Studies or a relevant degree at NQF level 7; and (c) a minimum of 5 years relevant experience at senior management level, preferably in local government.[529] On the other hand, Tshefu had the following qualifications: (a) Project management diploma; (b) a certificate in Municipal Financial Management; (c) a National Diploma in Local Government Finance; (d) AB Tech Local Government Finance Diploma; and (e) a Masters in Business Administration[530] Furthermore, she was offered a remuneration package that was deemed to be equivalent to that of municipal managers with more than 10 years' experience, being R942 432 including the 4% for remote allowance, even though she did not qualify for same. Additionally,

526 *Sakhisizwe* case para 1.
527 *Sakhisizwe* case para 3.
528 *Sakhisizwe* case para 4.
529 *Sakhisizwe* case para 5.
530 *Sakhisizwe* case para 8.

her remuneration package was not even approved and authorised by the Municipal Manager.[531]

After Tshefu's appointment, the municipal council authorised an investigation into staff appointments that were legally non-compliant.[532] The investigation established that her appointment was unlawful and in violation of section 56 of the Systems Act because: she lacked the 5 years' experience required for middle management; and her salary exceeded what was legally prescribed – as she received the maximum salary package for the level of appointment as well as a remote allowance that was applicable only to senior managers who had more than 10 years' experience. Tshefu denied that this was improper because she received and accepted the offer on the basis of her qualification and experience. In addition, she argued that the applicant was a very big municipality. She did not argue about the salary scales, the relevance of the regulations or that her salary and benefits were not authorised by these.[533] Based on the findings of the investigation, the Municipal Council took a resolution on 27 February 2019 to rescind her appointment because she did not have the required five years' experience.[534] On the next day, the Municipality gave her written notice of the intention to terminate her employment. Against this background, the Municipality only launched an application for review on 23 May 2019, nearly 17 months after Tshefu was appointed.[535]

The issue for determination before court was the delay on the part of the Municipality in bringing a review application, if the delay should be condoned, and the legality of the two issues raised.[536] After traversing existing jurisprudence in a lengthy manner, the court held that there was unreasonable delay to bring the application to court.[537] The court indicated that the delay enquiry is a factual one calling for value judgement, whereas a condonation enquiry requires the exercise of a judicial discretion, taking

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531 *Sakhisizwe* case para 9.
532 *Sakhisizwe* case para 9.
533 *Sakhisizwe* case para 9.
534 Sakhisizwe case para 11.
535 *Sakhisizwe* case para 31.
536 *Sakhisizwe* case para 22.
537 *Sakhisizwe* case paras 31-38.

into account all the relevant circumstances.[538] In addressing the condonation aspect, the court held that legality review must be brought within a reasonable time.[539] The court held that circumstances to consider when addressing the aspects of delay and condonation require that there must be an explanation for the delay, a determination of whether the complainant will suffer prejudice and a consideration of the public interest in respect of the finality of administrative decisions.[540] Throughout the proceedings, the Municipality conceded to launching an application late. The courts stated that when assessing the delay under the principle of legality no explicit condonation application is required, and the court can exercise its discretion in determining whether the delay should be overlooked by applying the two steps laid down in the *Khumalo* case to ascertain whether the delay was undue.[541] Furthermore, upon establishing whether the unreasonable delay should be overlooked, courts should be satisfied by the facts presented before exercising their discretion in overlooking the delay.[542] All the other factors that relate to the discretion of the court in overlooking the delay were also addressed in detail in chapter 4 and part 5.2 to 5.3 above.

Applying the principles developed by the Constitutional Court, the court held that the lack of mid-level experience on the part of Tshefu was not atrocious and that her appointment was not her fault. The court added that it appeared that she had worked well in her position as her performance was not in dispute. The court held that there was no merit in the Municipality's allegation that Tshefu was complicit in her wrongful appointment beyond being bold enough to submit an application for a position that she qualified for from an academic perspective but "lacked a relatively limited portion of the years of experience required".[543] The court indicated that like Mr Khumalo,[544] Tshefu took the appointment, performed satisfactorily, continued in the job for more than a year and organised her life and finances accordingly. According to the court,

538 *Sakhisizwe* case para 24-26.
539 *Sakhisizwe* case para 23.
540 *Sakhisizwe* case para 27, also see extensive discussion of these principles on para 4.4 above.
541 *Sakhisizwe* case para 37-41, *Buffalo City* case para 51.
542 *Buffalo City* para 53.
543 *Sakhisizwe* case paras 42-44.
544 See para 4.2.2 above.

Tshefu "bears no direct responsibility for her appointment predicament properly viewed and is guilty of no wrongdoing".[545] The court added that if she were to be dismissed from her duties, this would prejudice her greatly and she was apparently suitable for the job.[546]

In terms of the second issue that was raised for determination, the court expressed concern about the public interest and public fiscus that was affected by the remuneration that was being paid to Tshefu.[547] The court held that she was supposed to be appointed on the minimum salary package prescribed by law. The maximum salary package that she was receiving was contrary to regulation 9(2) of the Upper Limits of Total Remuneration Packages Payable to Municipal Managers and Manages Directly Accountable to the Municipal Manager.[548] Although this was unconstitutional, the court used its discretion in section 172(1)(a) of the Constitution to make an equitable order. The court noted that she was not alleged to have committed any wrongdoing in securing the irregular package and that the irregularity could not be used as the reason to completely end her employment. At best, this irregularity gave the Municipality a basis to regularise her employment in appropriate proceedings.[549] Based on the principles set out in the *Gijima* and *Buffalo City*, the Court held that Tshefu could not continue to earn a salary that was far more than that which should apply to her level of appointment. This would be prejudicial to the Municipality, the public interests and the fiscus in a substantial manner. The court concluded that the prejudice to Tshefu was far less if her salary package was corrected. Therefore, despite the delay in instituting review, there was good merit in relation to the challenge against her salary package but not against her appointment to the position.[550] The court confirmed her appointment to the position. The court set aside her remuneration

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545 *Sakhisizwe* case paras 45-46.
546 *Sakhizwe case* para 43 -47.
547 *Sakhisizwe* case paras 49-50.
548 Sakhizwe case para 60
549 *Sakhisizwe* case para 51.
550 *Sakhisizwe* case paras 54-56.

package and replaced it with a salary at the minimum package as determined by relevant regulations, excluding the remote allowance.[551]

5.5 Reflection on lessons from decisions of lower courts

The above discussion affirms some of the lessons that already appear in 4.5 above. For example, bound by the doctrine of precedent, lower courts have confirmed that self-review by organs of state are not reviews in terms of PAJA but are rather legality reviews; and the requirements for assessing delays.[552]

A common factor across all cases is the aspect of organs of state that use state self-review as a mechanism to undo their administrative decisions and bring such applications before court after contract periods have run for a long time (*insert comma*) placing contractors in a financially exposed position. Aberrant officials of the state do not face judicial sanctions for the role that they play in procurement processes. In the *Govan Mbeki Municipality* case, Justice Navsa observed angrily that:

> This case is part of an ever growing, and frankly disturbing, long line of cases where municipalities and organs of state seek to have their own decisions, upon which contracts with service providers are predicated, reviewed and overturned, for want of legality, more often than not after the contracts have run their course and services have been rendered hereunder, after failing in the most basic fashion in their duty to ensure they comply with constitutional norms and statutory prescripts, and after compounding the initial errors and, as in this case, litigating at large scale, organs of state falsely seek to claim the moral high ground. All of this at public expense and free of sanctions against the functionaries involved.[553]

The above observation speaks to the attitude of officials in organs of state and the way they are deliberately evading accountability. Organs of state are prone to breaching contracts with the understanding that they will escape accountability.[554] It is imperative to notice how, when organs of state endeavour to approach courts for a relief to declare invalid and set aside some of their decisions and declare them

551 *Sakhisizwe* case para 60.
552 *Govan Mbeki Municipality* case para 34.
553 *Govan Mbeki Municipality* case para 1.
554 Cachalia 2022 *SAJHR* 10.

unconstitutional, they give the impression that they are doing that which is in the public interest, although that is not usually the case.[555]

Although South Africa's law on legality review through self-review is settled, different opinions expressed in majority and minority judgments traversed by Justice Navsa in the *Govan Mbeki Municipality* Case[556] show that this area of the law may be reformed in the future to bring about greater certainty. This point is eloquently captured by Justice Navsa when he remarked that:

> Appreciating that our law on self-review has become somewhat encrusted, it would nevertheless be presumptious of us to become embroiled in the differences between the majority and minority judgments in *Asla*. Our courts might, in time, after adjudicating a string of cases with various permutations streamline an approach to self-review, or the legislature might intervene, in a constitutionally compliant manner, to cover all forms of review, including those that pertain to the executive and provide for how delay is to impact on such reviews. The Constitutional Court might, in time, revisit prior decisions.[557]

Until the above legal reform comes into realisation, South Africans are bound to follow the rules of state self-review as dictated by the majority of the Constitutional Court as discussed in Chapter 4 of this dissertation. It is common cause that legality review does not have time periods during which applications for a review should be made to court; however the important thing is that such an application should be brought within a reasonable time.[558] Failure to bring such applications within a reasonable time requires a proper explanation as to why the delay occurred because the court would be placed in a position of having to decide whether to condone the delay or not to condone it. The interests of justice should be relied on to determine whether condoning or overlooking the delay can be justified.[559]

The discussion in this chapter shows that courts play a pivotal role in combatting corruption through their consistent refusal to entertain frivolous applications for self-review by organs of state and by holding organs of state to account, not only to the

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555 *Govan Mbeki Municipality* case para 47.
556 *Govan Mbeki Municipality* case paras 34-46.
557 *Govan Mbeki Municipality* case para 47.
558 *Govan Mbeki Municipality* case para 34.
559 *Govan Mbeki Municipality* case para 35.

community they serve but to the Constitution as well. In the Govan Mbeki Municipality case, Justice Navsa outlined the possibility that courts may in the near future strengthen their accountability role by expanding the requirements that must be met when an organ of state seeks to justify a delay in instituting a self-review application. According to Justice Navsa:

> However, if the maladministration or corruption is discovered late by conscientious officials seeking to take corrective and appropriate action, courts might insist in the future that public authorities seeking time indulgences set out the steps they took in relation to the misconduct by errant officials, that resulted in the need for corrective action, including, but not limited to disciplinary actions, and where appropriate, criminal proceedings. All the more so, if the corruption or maladministration was hidden from disclosure by inept or corrupt officials. If a service provider was complicit then questions might be asked about what steps were taken by the public authority in relation to such complicity. Beyond the courts, these aspects might even be catered for by legislation. We must all of us, in every branch of the State and civil society, make every effort to protect public monies and ensure that our country's necessary developmental goals as envisaged by the Constitution, in the interest of all our people are met.[560]

As seen in the *Govan Mbeki Municipality* case, although lower courts are constrained by the principle of the doctrine of judicial precedent and cannot deviate from principles derived from the decisions of the higher courts, they can set out the future direction of the law where a gap exists. The above proposal by Justice Navsa may well be the future direction of the law in relation to delay in self-review cases by organs of state. Self-review should be used as a tool to promote open, responsive, and accountable government instead of serving the interests of state officials who seek to run away from the consequences of their prior improper decisions.[561]

5.6 Chapter Summary

The objective of this chapter was to determine whether there has been a jurisprudential change since the decision of the Constitutional Court in the *Buffalo City* case that could assist lower courts in combatting corruption in the procurement of good and services. The discussion revealed that lower courts have followed the jurisprudence of the Constitutional Court as developed in the *Khumalo*, *Gijima* and

560 *Govan Mbeki Municipality* case para 47.
561 *Govan Mbeki Municipality* case para 45.

Buffalo City cases. However, the discussion identified the need for more certainty in relation to how delays should impact on state self-review. Justice Navsa suggests that this should either take place through pronouncements from either the apex court revising its earlier decisions on delays after having considered different permutations or through legislative reform by Parliament.[562] Until this reform takes place, state officials, organs of state and lower courts are bound to follow the rules of state self-review as dictated by the majority of the Constitutional Court as discussed in Chapter 4 of this dissertation.

A disturbing trend was also observed to the effect that, after blatantly failing to comply with legal prescripts, municipal officials are increasingly approaching courts to overturn their own unlawful actions only when contracts have come to an end and services have been delivered under the contracts. It was observed that, through this process, municipal officials falsely seek to claim to demonstrate an ethic of care at the expense of taxpayers.[563] It was also observed that there is lack of accountability on the part of municipal officials who deliberately ignore legal requirements in contracting for goods and services.[564] The discussion revealed that, in the near future, courts may strengthen their accountability role by expanding the requirements that must be met when an organ of state seeks to justify a delay in instituting a self-review application by demanding from state officials who seek such reviews to explain measures they have taken to discipline misconduct by errant officials.[565] The discussion in this chapter showed that courts play an important role in combatting corruption through their constant refusal to entertain frivolous applications for self-review by organs of state and by holding organs of state to account to communities and the Constitution.

The next chapter contains key findings of the dissertation and recommendations.

562 *Govan Mbeki Municipality* case para 47.
563 *Govan Mbeki Municipality* case para 1.
564 Cachalia 2022 *SAJHR* 10.
565 *Govan Mbeki Municipality* case para 47.

CHAPTER 6

CONCLUSION

6.1 Background of the study

South Africa is a State Party to the United Nations Convention Against Corruption (2003) and the African Union Convention on Preventing and Combating Corruption (2003). These instruments oblige South Africa to adopt and implement a variety of legislative and policy measures to address corruption in public procurement. These instruments also call on governments to strengthen the role of the judiciary in fighting corruption by guaranteeing their independence.[566] In line with these international commitments, the *Constitution of the Republic of South Africa*, 1996, legislation and policy are committed to promoting fairness, transparency, competition, cost-effectiveness, and integrity in public procurement.[567] In addition, the Constitution guarantees the independence of the courts and places them in an important position to ensure that the constitutional and legislative principles underpinning public procurement are met.[568] The courts execute this role by, *inter alia*, interpreting, enforcing, and developing procurement laws. Their enforcement role ensures that there is compliance with the rule of law and the legality principle.[569]

In South Africa, corruption in the award of contracts for goods and services threatens to derail the ability of municipalities to provide services to communities and to advance their broad developmental role.[570] Recently, state officials and organs of state, that appear committed to self-correct corruption in the award of contracts for goods and services have frequently gone to courts to help them undo such illegal contracts. In three cases (*Khumalo; Gijima*; and *Buffalo City* cases), the Constitutional Court indicated that organs of state who wish to undo such contracts through courts must

566 See para 1.4 above.
567 See para 2.5 above.
568 See para 3.3 above.
569 See para 4.1 above.
570 See para 1.3 above.

do so through the constitutional principle of legality and state self-review.[571] The jurisprudence of the Constitutional Court as developed in the three cases has been applied by the Supreme Court of Appeal (SCA) and the High Court in procurement cases.[572] The main objective of this study was to investigate how the legality review in South African constitutional law as developed by its courts can be used by municipalities to curb corruption in the award of contracts for goods and services [573] The intention was to identify important principles that municipalities must consider when they seek to approach a court to undo a contract for goods and services that was tainted by corruption.[574] Before this researcher ventures into the recommendations that are useful to municipalities, it suffices to be reminded of the findings of this research in the substantive chapters.

6.2 Findings of the Study

Chapter 2 of the dissertation discussed the reform of post-apartheid public procurement law in the local government context and analysed some anti-corruption measures contained in relevant statutes. The chapter established that following the democratic transition in South Africa, the government introduced constitutional, legislative and policy reform to public procurement. It was shown that although section 217 of the Constitution commits municipalities to using procurement to advance persons and categories of persons who were historically disadvantaged by unfair discrimination, it emphasizes the need to adhere to fundamental principles such as transparency, fairness, competition, and cost-effectiveness in contracting for goods and services. It was observed that courts have in several cases set aside contracts for goods or services that did not comply with the core principles set out in section 217(1) of the Constitution. It was further observed that constitutional reform, together with the political transition in the 1990s, increased the pace of public procurement reforms which led to the introduction of national policy and several fragmented pieces of legislation to regulate this area. In terms of policy, it was established that although

571 See para 4.3 and 4.4 above.
572 See para 5.2, 5.3 and 5.4 above.
573 See para 1.6 above.
574 See para 5.5 above for details.

the government released the Green Paper on Public Sector Procurement Reform in South Africa in 1997, this was not followed up by a White Paper, which is a key requirement of the law-making process in South Africa. The Green Paper centered on introducing good governance in government procurement and a range of socio-economic objectives directed mainly towards benefitting the black majority. The Green Paper strongly articulated the need for: economic empowerment of previously disadvantaged people; an enabling environment for small, macro, and medium enterprises to participate in government procurement; strengthening accountability and transparency; and implementing measures to minimise corruption. The numerous primary and secondary pieces of legislation adopted to regulate public procurement were also discussed in chapter 4. Although municipalities must comply with national legislation, they are required to develop and implement their own supply-chain management policies in their procurement of goods and services. National legislation bars councillors from participating in important procurement processes in order to promote the integrity of the system. The municipal manager remains the most important role-player who must ensure that there is compliance with national legislation and local supply-chain management law and policies. It was established that, despite the good intention of black economic empowerment legislation, fronting remains a significant challenge that limits substantive black economic empowerment. The discussion in chapter 2 also showed that there are measures contained in the current regulatory framework for public procurement at the local government level that are directed towards limiting corruption in the award of contracts for goods or services in municipalities. The discussion in the chapter primarily centered on how the principles of transparency, integrity, and accountability are provided for in local government procurement law. It was shown that, apart from procurement law, the constitutional framework requires municipalities to provide transparent and accountable government in South Africa. There is a duty imposed on municipal administrations to promote a high standard of professional ethics which is equally relevant to procuring goods and services. Despite measures provided for in the regulatory framework to combat procurement corruption, corruption in local government procurement still persists. It was argued that state self-review provides

one more tool in the hands of municipalities to overturn contracts for goods and services which were tainted by corruption.

Chapter 3 of the dissertation reflected on the role of the judiciary in combatting corruption in local procurement in South Africa. It established that the constitutional structure of the judiciary in South Africa strengthens the independence of the courts vis-à-vis the other branches of government, thereby enabling the courts to contribute towards addressing corruption in local government procurement. It was argued that higher courts with constitutional jurisdiction in South African can contribute towards combatting procurement corruption by: interpreting and applying the law; upholding procurement laws when they carefully consider the rights and interests of litigants and make lawful, just and equitable findings; contributing towards deepening the procurement and anti-corruption law discourse through fulfilling their law interpretation and enforcement functions; and through developing the law where there are gaps.

Chapter 4 reviewed three Constitutional Court cases to establish how the principle of legality and state self-review has been developed by the Court in the cases of *Khumalo*; *Gijima*; and *Buffalo City*, with the aim of identifying valuable lessons. It was established that, in the *Khumalo* case, the minority judgment penned by Justice Zondo suggested that it was possible for an organ of state seeking to review and set aside its own unlawful action to do so under PAJA. However, this avenue was closed by a unanimous Constitutional Court in the *Gijima* case which held that the legality review in terms of the values in the Constitution was the preferred option and that the section 33 constitutional rights were not vested in organs of state. As seen from the overview of case-law above, the *Gijima* approach was followed by the same Court in the *Buffalo City* Case. In the *Buffalo City* case, Justice Theron indicated that it is "now settled that an organ of state seeking to review its own decision must do so under the principle of legality and cannot rely on PAJA".[575] A look at the decisions and reasoning of the Constitutional Court in the three cases show valuable lessons:

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575 *Buffalo City* case para 45.

Organs of state and functionaries have a legal obligation to institute legal proceedings to set aside the unlawfulness of their own actions. This duty stems from the legal duty imposed on public servants to be responsive, accountable and demonstrate high ethical standards in terms of sections 1(c) and 195(1)(a), (f) and (g) of the Constitution. This is reinforced by the duty imposed by section 7(2) of the Constitution on the state to respect, protect, promote and fulfil the rights in the Bill of Rights.

Courts do not favourably entertain unreasonable or undue delays. Although there is no defined period in legislation within which to bring an application to review and set aside unlawful action in state self-review cases, section 237 of the Constitution dictates that "[A]ll constitutional obligations must be performed diligently and without delay". This requirement is important for diverse reasons: the need to promote certainty and finality in decision-making; long delays could give rise to devastating effects for those who rely on the decision and for the efficient functioning of the decision-making body itself; the passage of a long period of time may make it impossible for a court to establish unlawfulness in some contexts, thereby undermining the purpose of a court undertaking a lawfulness review. The clock for assessing delays starts running when the functionary became aware or ought to have become aware of the irregular and unlawful action or conduct.

Courts have discretion and may overlook a delay and entertain the application for self-review if: the delay is unreasonable or unexplained but the interests of justice requires that the matter should be heard; there was a justifiable explanation of the delay in instituting a self-review application; the conduct of the applicant - state functionaries are honest in explaining the reasons for the delay; and based on the nature of the challenged decision and the consequences on the affected parties. Where the functionary who institutes review was responsible for the unlawful action, there is a greater responsibility to minimise delay. Where delay is justified or overlooked, courts consider the merits of the review application. Resource constraints can hardly be used to justify delays given that organs of state are not poor litigants. The Court has indicated that although there may be no basis to overlook an unreasonable delay, a court can still be obliged in terms of the Constitution to declare the conduct of the

state unlawful based on section 172(1)(a) of the Constitution.[576] In addition to these pointers, the facts and circumstances of each case have to be considered on a case-to-case basis.

Even where a court declares a contract unlawful because it was tainted by corruption, it can use its constitutional powers to make "any order that is just and equitable", which may include the preservation of certain rights that a party was entitled to, as in the *Gijima* case. In the *Buffalo City* case, the Court explained that that such an award preserves rights which have already accrued but does not permit a party to derive further rights under the unlawful contract.[577]

Chapter 5 reviewed three local government procurement cases that were decided on the basis of the legality review principle by lower courts after the Constitutional Court ruling in *Buffalo City* case in order to determine if they lay down any principles that could enhance the ability of municipalities to curb corruption that takes place in the procurement of goods or services by municipalities. The chapter found that, informed by the doctrine of precedent, lower courts have followed the jurisprudence of the Constitutional Court as developed in the *Khumalo*, *Gijima* and *Buffalo City* cases. In the *Govan Mbeki Municipality* case, Justice Navsa observed the disturbing trend that after blatantly failing to comply with legal prescripts, municipal officials are increasingly approaching courts to overturn their own unlawful actions only when contracts have been fully implemented and services have been provided under such contracts. He observed that through this process, they falsely seek to claim to demonstrate an ethic of care at the expense of taxpayers.[578] He bemoaned the lack of accountability on the part of municipal officials after these outrageous failures.[579] Justice Navsa indicated the need for more certainty in relation to how delays should impact on state self-review pronouncements from either the apex court or through legislative reform in the *Govan Mbeki Municipality* case.[580] The Constitutional Court

576 *Buffalo City* case 63.
577 *Buffalo City* case para 105.
578 *Govan Mbeki Municipality* case para 1.
579 Cachalia 2022 *SAJHR* 10.
580 *Govan Mbeki Municipality* case para 47.

may therefore have to revisit its earlier decisions on delays.[581] The discussion in this chapter shows that courts play an important role in combatting corruption through their constant refusal to entertain frivolous applications for self-review by organs of state and by holding organs of state to account. It is possible that, in the near future, courts may strengthen their accountability role by expanding the requirements that must be met when an organ of state seeks to justify a delay in instituting a self-review application. Courts should demand from state officials who seek to review and set aside an unlawful contract, explanations on measures they have taken to discipline misconduct by errant officials.[582]

6.3 Recommendations

Based on the above findings of the study, the following general recommendations can be made:

- Courts should continue to contribute towards combatting corruption without fear or favour by executing the roles discussed in chapter 4.3 above.
- When the opportunity arises, the Constitutional Court should use the opportunity to clarify the uncertainty regarding delays in self-review cases.
- It is necessary to consolidate its jurisprudence (the Constitutional Court's) in this area and set out in a straightforward manner the requirements for delay that state officials should keep in mind.

If the Constitutional Court does not bring about the desired reform in the area of delay, parliament should consider introducing reform in legislation such as the MFMA which sets a time limit for self-review in procurement cases or factors which should be considered by courts in assessing delays.

Besides the above general recommendations, in line with the main objective of this study, the following specific lessons, as informed by the findings above, are made to municipalities which seek to review and set aside unlawful procurement contracts for goods and services:

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581 *Govan Mbeki Municipality* case para 47.

582 *Govan Mbeki Municipality* case para 47.

- There is a legal duty imposed on municipal officials and municipalities to institute self-review proceedings to set aside unlawful procurement contracts. This duty stems from section 237 of the Constitution. In terms of the MFMA, although the Municipal Manager, as the chief accounting officer and head of administration, has a higher duty to ensure legal compliance, the duty to ensure legal compliance extends to other officials and councillors too.
- When launching an application for self-review, organs of state must apply through the principle of legality and not PAJA as the latter is only available to natural persons not organs of state.
- Municipalities should ensure that they launch review applications as soon as possible. Courts generally consider the date from which a municipality or municipal official became aware or ought to have been aware of the unlawfulness action in assessing delays. In cases of a delay, municipal officials must take the court into their confidence and honestly explain to the court the reasons that prompted the delay. Delay must be explained to enable the court to decide whether to condone or not to condone the delay.
- A municipality must not wait for a contract to run its course or for obligations to be executed by the other party before it launches an application to review and set aside an illegal contract. If this is not followed, courts will likely preserve rights that have accrued from the unlawful contract.
- Municipalities should be aware that courts refuse to entertain frivolous applications for self-review by organs of state where their intentions are self-serving. Self-review must truly be used to self-correct as well as promote open, responsive, and accountable government. Municipal officials who seek to evade the consequences of their prior improper decisions should not benefit from such process by trying to serve their own interests.
- Municipal officials must be aware that resource constraints cannot be used to justify delays in launching state review applications because the courts do not consider organs of state to be poor litigants.

- Municipalities must also note that in a self-review application, a court will also be interested to know the measures which have been taken against any official who deliberately violated public procurement laws in concluding an unlawful contract.

The above recommendations are key lessons and principles distilled from the cases reviewed in chapters 4 and 5 of this dissertation than can guide municipalities when they contemplate launching a review application to set aside an unlawful contract for the provision of goods and services.

6.4 Conclusion

This study comprised ~~of~~ legal principles from constitutional law, administrative law and local government law. The focus was primarily on the local sphere of government with specific reference to municipalities. The research question that was answered throughout the study was, how can the legality review in South African constitutional law be used by municipalities to curb corruption in the award of contracts for goods and services? It was established that legality review is the most suitable pathway of review to be utilized by municipalities which seek to curb and combat corruption by reviewing and setting aside irregular and unlawful contracts for goods and services.

The study was limited in its focus and scope. It is imperative to remember that corruption hurts the marginalized groups of South Africans who are dependent on the government for the provision of basic services as it is a constitutional undertaking. Furthermore, this study is significant because officials from municipalities are armed with a legal process that enables them to lead with integrity, to be accountable to the community that they serve and to act in the interests of justice by preventing corruption and misuse of the public funds.

BIBLIOGRAPHY

Literature

Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Chain Management*

Ambe IM and Badenhorst-Weiss JA "Procurement Challenges in the South African Public Sector" 2012 *Journal of Transport and Supply Chain Management* 242-261

Ambe 2009 *Educational Research and Review*

Ambe I "An exploration of supply chain management practices in the central district municipality" 2009 *Educational Research and Review* 427-435

Armstrong 2005 *Economic & Social Affairs*

Armstrong E 2005 "Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues" *Economic & Social Affairs* 1–10

Ambe 2016 *Research Journal of Business and Management*

Ambe IM "Public procurement trends and developments in South Africa" 2016 *Research Journal of Business and Management* 277-290

Ambe 2009 *Educational Research and Review*

Ambe IM "An exploration of supply chain management practices in the central district municipality" 2009 *Educational Research and Review* 427-435

Auditor General South Africa 2022 https://www.agsa.co.za

Auditor General South Africa 2022 *Consolidated General Report on Local Government Audit Outcomes MFMA 2022-21* https://www.agsa.co.za/Portals/0/Reports/MFMA/202021/FINAL_MFMA%20202021%20GR_15%20June_2022%20tabling.pdf?ver=2022-06-15-095648-557 accessed 22 August 2022

Badenhorst-Weiss 2012 *Journal of Transport and Supply Chain Management*

Badenhorst-Weiss JA "Procurement challenges in the South African public sector" 2012 *Journal of Transport and Supply Chain Management* 242-261

Bolton 2006 *Journal of Public Procurement*

Bolton P "Government Procurement as a Policy Tool in South Africa" 2006 *Journal of Public Procurement* 193-217

Bolton *The Law of Government Procurement in South Africa*

Bolton P *The Law of Government Procurement in South Africa* 1st ed (Lexis Nexis Durban 2016)

Boonzaier 2018 *SALJ*

Boonzaier L 2018 "A decision to undo" *SALJ* 642 - 677

Brunette R *et al* 2019 *Development Southern Africa*

Brunette R *et al* "Reform in the contract state: Embedded directions in public procurement regulation in South Africa" 2019 *Development Southern Africa* 537-554

Cachalia 2022 *South African Journal Human Rights*

Cachalia R "Resuscitating the PAJA in state self-review? *Compcare Wellness Medical Scheme v Registrar of Medical Schemes*" 2022 *South African Journal Human Rights* 1-22

Camaj 2013 *The International Journal of Press/Politics*

Camaj L "The Media's Role in Fighting Corruption: Media Effects on Governmental Accountability" 2013 18(1) *The International Journal of Press/Politics* 21-42

Da Cruz *et al* 2016 *Public Management Review*

Ferreira da Cruz N et al "Measuring Local Government Transparency" 2016 *Public Management Review* 866-893

De Beer 2018 *South African Law Journal*

De Beer MN "A new role for the principle of legality in administrative law: State Information technology agency Soc Ltd v Gijima Holdings (Pty) Ltd" 2018 *South African Law Journal* 613-360

De Vos and Freedman *South African Constitutional Law in Context*

De Vos P and Freedman W (ed) *South African Constitutional Law in Context* (Oxford University Press, Cape Town 2021)

Du Plessis 2022 *Stellenbosch Law Review*

Du Plessis A "The legal combatting of B-BBEE fronting practices in South Africa – past and present" 2022 *Stellenbosch Law Review* 396-418.

Du Plessis and Nel "Introduction"

Du Plessis A and Nel JG "Introduction" in Du Plessis A (ed) *Environmental law and Local Government law in South Africa* (Juta Cape Town 2021)

Fombad C.M and Steytler N *Corruption and Constitutionalism in Africa Revisiting Control Measures and Strategies*

Fombad C.M "Corruption and the Crisis of Constitutionalism" in Fombad C.M and Steytler N (eds) *Corruption and Constitutionalism in Africa Revisiting Control Measures and Strategies* (Oxford University United Kingdom, 2020) 15

Fourie and Malan 2020 *Sustainability*

Fourie D and Malan C 2020 *Public Procurement in the South African Economy:Addressing the Systemic Issues* available at http://www.mdpi.com/journal/sustainability accessed 19 July 2021

Fuo "Funding and good financial governance as imperatives for cities' pursuit of SDG 11"

Fuo O "Funding and good financial governance as imperatives for cities' pursuit of SDG 11" in Helmut Aust H.P and Du Plessis A (eds) *The Globalisation of Urban Governance: Legal perspectives on Sustainable Development Goal 11* 1st ed (Routledge New York 2019) 87-107

Fuo "The courts and local governments in South Africa"

Fuo O "The courts and local governments in South Africa" in Fessha Y and Kossler K *Federalism and the Courts in Africa: Design and Impact in Comparative Perspective* 1st ed (Routledge London, 2020) 103-123

Fuo 2017 *De Jure*

Fuo O "Intrusion into the autonomy of South African local government: Advancing the minority judgment in the Merafong City case" 2017 *De Jure* 324-345

Fuo 2020 *Law, Democracy and Development*

Fuo O "Nativism in South African municipal indigent policies through a human rights lens" 2020 *Law, Democracy and Development* 271-317

Gilbert 2018 *University of Chicago Legal Forum*

Gilbert MD "Transparency and Corruption: A General Analysis" 2018 *University of Chicago Legal Forum* 117 - 138

Gordon and *Bruce Transformation and the Independence of the Judiciary in South Africa*

Gordon A and Bruce D *Transformation and the Independence of the Judiciary in South Africa* 2007 Centre for the Study of Violence 1- 61

Govender 2015 *Obiter*

Govender "Malfeasance, Administrative Justice and The Right of Access to Health-Care services: An Assessment of *MEC for Health v Kirkland Investment (Pty) Ltd* 2014 (5) BCLR 547 (CC)" 2015 26(2) *Obiter* 178-193

Heiman and Pieth "*Confronting corruption past concerns, present challenges and future strategies*"

Heiman F and Pieth M "*Confronting corruption past concerns, present challenges and future strategies*" 1st ed (Oxford University Press USA 2018)

Henrico 2018 *TSAR*

Henrico R "Subverting the Promotion of Administrative Justice Act in judicial review: the of much uncertainty in South African law" 2018 *TSAR* 288-307

Heydenrych 2020

Heydenrych E *The absence of a system of internal controls in South African Administrative law, in light of section 7(2) of the Promotion of Administrative Justice Act 3 of 2000* (LLM-dissertation University of Stellenbosch 2020)

Hoekstra and Kaptein 2012 *Public Integrity*

Hoekstra A and Kaptein M "The Institutionalization of Integrity in Local Government" 2012 *Public Integrity* 5-27

Hoexter 2000 *SALJ* 484

Hoexter C "The future of judicial review in South Africa administrative law" 2000 *SALJ* 484 - 519

Hoexter 2008 *Constitutional Court Review*

Hoexter C "Clearing the intersection? Administrative Law and Labour Law in the Constitutional Court" 2008 *Constitutional Court Review* 209-234

Hoexter *Administrative Law in South Africa*

Hoexter C *Administrative law in South Africa* 2nd ed (Juta Cape Town 2012)

Hoexter and Penfold *Administrative Law in South Africa*

Hoexter C and Penfold G *Administrative Law in South Africa* 3rd ed (Juta Cape Town 2021)

King IV Report on Corporate Governance in South Africa

King IV Report on Corporate Governance in South Africa (2016) available at https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf accessed 20 June 2022

Kohn and Corder 2014 https://www.laurenkohn.co.za

Kohn L and Corder H 2014 https://www.laurenkohn.co.za/wp content/uploads/2015/12/Judicial_regulation_of_administrative_ac.pdf accessed 27 August 2022

Konstant A 2015 *Constitutional Court Review*

Konstant A "*Administrative action, The principle of legality and Deference – The case of Minister of Defence and Military veterans v Motau*" 2015 *Constitutional Court Review* 68-90.

Madonsela 2018 *Insight Journals*

Madonsela S "Critical Reflections on State Capture in South Africa" 2018 *Insight Journals* 113-130

Mantzaris 2014 *African Journal of Public Affairs*

Mantzaris E "Public Procurement, tendering and corruption " 2014 *African Journal of Public Affairs* 67-79

Masuku 2019 *African Journal of Democracy and Governance*

Masuku MM "Effective governance in South Africa: reality or a myth" 2019 *African Journal of Democracy and Governance* 117-134

Meirotti M and Masterson G (ed) *State Capture in Africa*

Lodge T *'State Capture: Conceptual Considerations' in* Meirotti M and Masterson G (ed) *State Capture in Africa* (EISA Johannesburg 2018)

Mle and Maclean 2011 *Journal of Public Administration*

Mle TR and Maclean S "Ethics, integrity and good governance: the case of South Africa's local sphere of government" 2011 *Journal of Public Administration* 1364-1383

Molver and Noeth 2017 *The Government Procurement Review*

Molver A and Noeth G *The Government Procurement Review* 5th Ed (Law Business Research Ltd, London United Kingdom 2017) 212-255

Munzhedzi and Makwembere 2019 *Journal of Public Administration*

Munzhedzi PH and Makwembere S "Good Governance as a Solution to Local Economic Development Challenges in South African Municipalities" 2019 *Journal of Public Administration* 659-676

National Treasury 2020 http://www.treasury.gov.za

National Treasury Budget Review *Division of revenue and spending provinces and municipalities* (2020) available at http://www.treasury.gov.za/documents/National%20Budget/2021/review/Chapter%206.pdf accessed 19 August 2021

National Treasury "Advertisement of Bids and the publication of notices in respect of awarded bids, cancelled bids, variations and extensions of existing contracts on the eTender Publication Portal"

National Treasury "Advertisement of Bids and the publication of notices in respect of awarded bids, cancelled bids, variations and extensions of existing contracts on the eTender Publication Portal" 2016 available at http://mfma.treasury.gov.za/Circulars/Documents/MFMA%20Circular%2083%20-%20eTender%20Portal%20-%2018%20July%202016.pdf Accessed 01 December 2021

National Treasury "Standard for Infrastructure Procurement and Delivery Management"

National Treasury "Standard for Infrastructure Procurement and Delivery Management" 2016 available at http://www.treasury.gov.za/legislation/pfma/TreasuryInstruction/Annexure%20A%20%20Standard%20for%20Infrastructure%20Procurement%20and%20Delivery%20Management.pdf accessed 29 September 2021

National Treasury "MFMA Circular No 103"

National Treasury "MFMA Circular No 103: Preventative Measures in Response to the Covid-19 Pandemic that Resulted in the National State of Disaster" 2020 available at http://mfma.treasury.gov.za/Circulars/Documents/MFMA%20Circular%20No%20103%20%20Preventative%20Measures%20in%20Response%20to%20COVID%2019%20-27%20May%202020.pdf accessed 1 December 2021

Ndebele and Mdlalose 2021 *Journal of Public Administration*

Ndebele CN and Mdlalose MZ "Transparency in Local Government During the Era of Covid-19 in South Africa" 2021 *Journal of Public Administration* 539-550

Ngcobo *The Informal economy for local economic development in South Africa: A constitutional law approach*

Ngcobo N *The Informal economy for local economic development in South Africa: A constitutional law approach* (LLM Dissertation, North-West University 2021)

Okpalupa 2015 *SAPL*

Okpalupa C "Judicial review of executive power: Legality, rationality and reasonableness (Part 1)" 2015 30 *SAPL* 122-152

Pooe 2015 *International Business & Economics Research Journal*

Pooe D "Investigating Municipal Procurement Challenges in South Africa: A Qualitative Study" 2015 14(1) *International Business & Economics Research Journal* 67-78

Public Protector Report 2021 Closing Report

Public Protector Report 30 of 2020/21: Closing Report on an own initiative investigation relating to the Procurement of Covid 19 related items from Alfrehutch trading and Mavuka 010115 trading by the KwaZulu-Natal

Department of Education Puublished 31/03/21 2021 available at http://www.pprotect.org/sites/default/files/legislation_report/Annexure%20A_Closing%20Report_KZN%20Department%20of%20Education_signed_5%20February%202021.pdf accessed 16 August 2021

Public Protector Report 2021

Public Protector Report:41 of 2020/21 Closing Report An investigation into allegations of maladministration in the procurement of personal protective equipment by the Free State Provincial Government Published 31/03/21 available at http://www.pprotect.org/sites/default/files/legislation_report/Formal%20closing%20report%20PPE%20Free%20State%28%20MS%2005%2003%202021%29.pdf accessed 16 August 2021

Quinot 2018 *TSAR*

Quinot G 2018 "The third wave of preferential procurement regulations in South Africa" *TSAR* 856-867

Quinot 2020 *Loyola Law Review*

Quinot G "The conundrum of self-review – Sanctioning parallel systems of administrative law" 2020 *Loyola Law Review* 523-552

Quinot *et al Administrative Justice in South Africa*

Quinot G *et al* Administrative Justice in South Africa – An Introduction (Oxford University Press Cape Town 2015)

Raboshakga and Fuo 2020 *PELJ*

Raboshakga N and Fuo O "Appropriate Internal Appeal Mechanisms for Approval of Building Plans: Exploring the Gaps Left by the Constitutional Court" 2020 *PELJ* 1-32.

Raga and Taylor "Legislative and administrative directives governing procurement procedures: A case study for South Africa"

Raga K and Taylor JD Legislative and administrative directives governing procurement procedures: A case study for South Africa 2010 available at http://ippa.org/images/PROCEEDINGS/IPPC4/10LegalIssueInPublicProcurement/Paper10-7.pdf accessed 15 October 2021

Raga and Taylor "Preferential Procurement: A Case Study of South Africa"

Raga K & Taylor JD Preferential Procurement: A Case Study of South Africa (2010) available at http://www.ippa.org/images/PROCEEDINGS/IPPC4/13ProcurementPreferences/Paper13-6.pdf accessed 29 November 2021

Rautenbach and Venter *Constitutional Law*

Rautenbach IM and Venter R *Constitutional Law* 7th ed (Lexis Nexis Durban 2018)

Saba 2019 *KAS African Law Study Library*

Saba AM "The Constitutional Role of Judicial Service Commission in Protecting Independence of the Judiciary" 2019 *KAS African Law Study Library* 105-113

Satterthwaite and *Mitlin Reducing Urban Poverty in the Global South*

Satterthwaite D and Mitlin D *Reducing Urban Poverty in the Global South* 1st ed (Routledge Oxford 2013)

Sewpersadh and Mubangizi 2017 *Law Democracy and Development*

Sewpersadh P and Mubangizi JC "Judicial review of administrative action executive decisions: Overreach, activism or pragmatisim?" 2017 *Law Development and Development* 201- 220

Siyo and Mubangizi 2015 *PELJ*

Siyo L and Mubangizi JC "The independence of South African judges: a constitutional and legislative perspective" 2015 *PELJ* 817- 846

Sohail and Cavill 2008 *Journal of Construction of Engineering and Management*

Sohail M and Cavill S "Accountability to prevent corruption in construction projects" 2008 J*ournal of Construction Engineering and Management* 729 -738

Snyman *Criminal Law*

Snyman CR *Criminal Law* 6th ed (Lexis Nexis Johannesburg 2014)

Steyn-Kotze *Delivering an Elusive Dream of Democracy: Lessons from Nelson Mandela Bay*

Steyn-Kotze J *Delivering an Elusive Dream of Democracy: Lessons from Nelson Mandela Bay* 1st ed (AFRICAN SUN MeDIA 2018)

Sugudhav-Sewpersadh *Corruption and the Law: An evaluation of the legislative Framework for Combating Public Procurement Corruption in South Africa*

Sugudhav-Sewpersadh P *Corruption and the Law: An evaluation of the legislative Framework for Combating Public Procurement Corruption in South Africa* (LLD Dissertation University of KwaZulu-Natal 2015)

Sugudhav-Sewpersadh and Mubangizi 2019 *Loyola Journal of Social Sciences*

Sugudhav-Sewpersadh P and Mubangizi JC "Public Procurement and Corruption: The litmus test for South Africa's transformative outlook" 2019 *Loyola Journal of Social Sciences* 71-91

Thebe 2017 *African Journal of Public Affairs* 123-135

Thebe P "Political education for good governance in South Africa's local government and communities" 2017 *African Journal of Public Affairs* 123-135

Thobakgale and Mokgopo 2018 *Journal of Public Administration and Development Alternatives*

Thobakgale and Mokgopo "Public procurement and South Africa's 1996 Constitution: Panacea for Combatting Corruption?" 2018 *Journal of Public Administration and Development Alternatives* 41- 54

Wong and Welch 2004 *Governance*

Wong W and Welch E "Does E-Government Promote Accountability? A Comparative Analysis of Website Openness and Government Accountability" 2004 17(2) *Governance* 275–297

Werksmans Inc 2018 "BBBEE Act and Codes Explained"

Werksmans Inc BBBEE Act and Codes Explained 2018 available at https://www.werksmans.com/wp-content/uploads/2018/11/BBBEE-Codes-Explained.pdf#:~:text=As%20at%20the%20publication%20date%20of%20this%20Guide%2C,of%20Black%20People%20in%20the%20South%20African%20economy. Accessed 6 December 2021

Wright *Legal perspectives on the prevention and minimization of corruption for sustainability in South African municipalities*

Wright J.S *Legal perspectives on the prevention and minimization of corruption for sustainability in South African municipalities* (LLD -Dissertation North-West University 2021)

Case law

Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others 2020 (4) SA 17 (SCA)

Albutt v Centre for the Study of Violence and Reconciliation 2010 (5) BCLR 391 (CC)

Althech Radio Holding (Pty) Limited and Others v City of Tshwane Metropolitan Municipality (unreported) case number 1104/2019 of 5 October 2020

Bigen Africa Services (Pty) Ltd and Others v City of Cape Town and Others (unreported) case number 18681/2020 of 1 June 2021

Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd 2019 (b) BCLR 661 (CC)

BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation 2019 (6) SA 443 (ECG)

Corruption Watch NPC and Others v President of the Republic of South Africa and Others 2018 (10) BCLR 1179 (CC)

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

City of Tshwane Metropolitan Municipality and Others v New GX Enviro Solutions and Logistics Holdings (Pty) Ltd (unreported) case number 53694/20 of 21 June 2021

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

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 12 BCLR 1458

Glenister v President of the Republic of South Africa and Others 2011 (7) BCLR 651 (CC)

Goodman Bros (Pty) Ltd v Transnet Ltd 1998 (4) SA 989 (W)

Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd (unreported) case number 121/2020 of 7 April 2021

Joseph and Others v City of Johannesburg and others 2010 (3) BCLR 212 (CC)

Khumalo and Another v Member of the Executive Council for Education: Kwa-Zulu Natal 2014 (3) BCLR 333 (CC)

Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd 2006 (2) SA 25 (T)

Koyabe v Minister for Home Affairs 2010 4 SA 2009 (12) BCLR 1192 (CC)

KwaZulu-Natal Joint Liaison Committee v MEC Department of Education 2013 (6) BCLR 615 (CC)

Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute 2014 (5) BCLR 547 (CC)

Minister of Defence and Military veterans v Motau and Others 2014 (8) BCLR 930 (CC)

Minister of Education v Harris 2001 (11) BCLR 1157 (CC)

Minister of Home Affairs and Another v Public Protector 2018 (3) SA 380 (SCA)

Minister of Public Works v Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC)

Municipal Manager: Quakeni and Others v F V General Trading CC 2010 (1) SA 356 (SCA)

Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 6 SA 222 (SCA)

Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd 2017 ZAGPJHC 177

Pepcor Retirement Fund v Financial Service Board 2003 (6) SA 38 (SCA)

Phaahla v Minister of Justice and Constitutional Services 2019 (7) BCLR 795 (CC)

Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another 2014 (3) SA 251 SCA

Sakhisizwe Local Municipality v Tshefu and others 2020 2 All SA 299 ECG

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

State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd 2017 (2) SA 63 (SCA)

State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) BCLR 240 (CC)

Steenkamp NO v Provincial Tender Board of the Eastern Cape (CCT71/05) 2006 ZACC

Swifambo Rail Leasing v PRASA 2018 ZASCA 167

Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works and Others 2008 (1) SA 438 (SCA)

Turnbull-Jackson v Hibiscus Court Municipality 2014 (6) SA 592 (CC)

Viking Pony Africa Pumps (Pty) Ltd t/a Tricon Africa v Hidro-Tech Systems (Pty) Ltd and Another 2011 (1) SA 327 (CC)

Legislation

Broad-Based Black Economic Empowerment Act 53 of 2003

Constitution of the Republic of South Africa, 1996

Disaster Management Act 1 of 1999

Local Government: Municipal Systems Act 32 of 2000

Local Government: Municipal Finance Management Act 56 of 2003

Local Government: Municipal Structures Act 117 of 1998

Preferential Procurement Policy Framework Act 5 of 2000

Preferential Procurement Policy Framework Act 5 of 2000: Preferential Procurement Regulations 2017

Prevention and Combating of Corrupt Activities Act 12 of 2004

Promotion of Administrative of Justice Act 3 of 2002

Promotion of Access to Information Act 2 of 2000

Protected Disclosures Act 26 of 2000

Public Finance Management Act 1 of 1999

Public Service Act 103 of 1994

International Instruments

African Charter on Human and Peoples Rights (1981)

African Union Convention on Preventing and Combating Corruption (2003)

OECD Preventing Corruption in Public Procurement (2016)

Southern African Development Community Protocol against Corruption (2001)

United Nations Convention Against Corruption (2003)

United Nations Commission for the International Trade Law's Model Procurement of Goods, Construction and Services (1995)

Government Publications

Gen Not 691 in GG 17928 of 14 April 1997

Gen Not 32 in GG 40553 of 20 January 2017

GN R 868 in GG 27636 of 30 May 2005

GN R31 in GG 40553 of 20 January 2017

GN 318 in GG 43107 of 18 March 2020

Internet Sources

Anon 2013 http://www.makana.gov.za

Anonymous 2013 Functions and Objectives of Municipal Council http://www.makana.gov.za/wp-content/uploads/2013/07/Local-Government-Functions-and-Objectives.pdf accessed 10 July 2022

Auditor-General of South Africa 2020 https://www.gov.za

Auditor-General of South Africa 2020 *Consolidated general report on local government audit outcomes MFMA 2020-21*

https://www.agsa.co.za/Portals/0/Reports/MFMA/2020-21/FINAL_MFMA%202020-21%20GR_15%20June_2022%20tabling.pdf?ver=2022-06-15-095648-557 accessed 20 July 2021

Bracher 2017 https://www.financialinstitutionslegalsnapshot.com

Bracher P 2017 Constitutional Court explains the nature of the right to fair administrative action https://www.financialinstitutionslegalsnapshot.com/2017/11/constitutional-court-explains-the-nature-of-the-right-to-fair-administrative-action/ accessed 28 July 2022

Bracher and Le Roux 2022 https://www.financialinstitutionslegalsnapshot.com

Bracher P and Le Roux F 2022 https://www.financialinstitutionslegalsnapshot.com/2022/07/the-primacy-of-paja-in-judicial-review-proceedings-involving-administrative-action/ accessed 28 July 2022

Corruption Perceptions Index 2017 https://www.transparency.org

Corruption Perceptions Index 2017 available at https://www.transparency.org/en/cpi/2020/index/nzl accessed 26 July 2021

Department of Justice 2022 https://www.justice.gov.za

Department of Justice 2022 https://www.justice.gov.za/paja/about/review.htm accessed date 26 July 2022

Dwyer 2017 https://www.npr.org

Dwyer *C Former Brazilian President Lula Convicted of Corruption, Sentenced to Prison* https://www.npr.org/sections/thetwo-way/2017/07/12/536860998/former-brazilian-president-lula-convicted-of-corruption-sentenced-to accessed 26 July 2021

Fuhrmann and Manko 2017 https://www.cliffedekkerhofmeyr.com

Fuhrmann T and Manko V *Clarity in sight: PAJA review or legality review?* https://www.cliffedekkerhofmeyr.com/en/news/publications/2017/dispute/dispute-resolution-6-september-clarity-in-sight-paja-review-or-legality review.html accessed 22 July 2021

Harper 2022 https://mg.co.za/news/2022-06-15

Harper P 2022 *Failing State: Only 16& of SA's municipalities get clean audit* https://mg.co.za/news/2022-06-15-auditor-general-financial-management-in-municipalities-has-deteriorated/ accessed 24 October 2022

Kohn and Corder *Judicial Regulation of Administrative Action*

Kohn L and H Corder 2015 *Judicial Regulation of Administrative Action* https://www.studocu.com/en-za/document/university-of-cape-town/administrative-law/pathways-to-review/3741820 accessed 2 August 2022

National Treasury *Model SCM Policy for Infrastructure Procurement and Delivery Management*

National Treasury *Model SCM Policy and Standard for Infrastructure Procurement and Delivery Management* 2015 available at http://mfma.treasury.gov.za/Circulars/Documents/Forms/AllItems.aspx?RootFolder=%2fCirculars%2fDocuments%2fCircular%2077%20%2d%20Model%20SCM%20Policy%20for%20Infrastructure%20Procurement%20and%20Delivery%20Management&FolderCTID=0x012000E772703726E2A8479752CF24A134692B.accessed 3 November 2021

Parliamentary Monitoring Group 2020 *Public Procurement Draft Bill: PBO briefing*

Parliamentary Monitoring Group 2020 *Public Procurement Draft Bill: PBO briefing* https://pmg.org.za/committee/meeting/31134/#:~:text=The%20draft%20Bill%20was%20government%E2%80%99s%20response%20to%20procurement,of%20government%20and%20to%20create%20strong%20oversight%20mechanisms. Accessed 02 February 2022

Parliament of the Republic of South Africa 2020 https://www.parliament.gov.za

Parliament of the Republic of South Africa 2020 https://www.parliament.gov.za/press-releases/draft-public-procurement-bill-its-current-form-will-not-result-improved-transparency-and-accountability-committee-hears accessed 6 December 2021

Piper and Charman 2020 https://www.in-formality.com

Piper L and Charman A 2020 https://www.in-formality.com/wiki/index.php?title=Tenderpreneur_(South_Africa) accessed 24 January 2022

Pring and Vrushi 2019 https://afrobarometer.org

Pring C and Vrushi J 2019 *Global Corruption Barometer Africa 2019: Citizens' Views and Experiences of corruption* https://afrobarometer.org/sites/default/files/publications/Publications%20conjointes/partenaires/ab_r7_global_corruption_barometer_report.pdf accessed 02 August 2021

Ramaphosa C 2020 https://www.businesslive.co.za

Ramaphosa C 2020 President Cyril Ramaphosa Letter to ANC members about corruption available at https://www.businesslive.co.za/fm/opinion/2020-08-24-read-in-full-president-cyril-ramaphosas-letter-to-anc-members-about-corruption/ accessed 10 August 2021

Tonkin 2020 https://beeratings.com

Tonkin C 2020 https://beeratings.com/b-bbee-fronting/#:~:text=Criminal%20liability%20may%20ensue%20if,exceeding%2010%20(ten)%20years. Accessed 09 February 2022

Vilakazi 2018 https://www.derebus.org.za

Vilakazi T 2018 *Organs of state seeking a review of own decision: A question of legality or PAJA?* https://www.derebus.org.za/organs-of-state-seeking-a-review-of-own-decision-a-question-of-legality-or-paja/ accessed 28 July 2021