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Looking back at *Gijima*: The evolution of self-review in South African administrative law

by

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Abstract

In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC), the Constitutional Court held that the Promotion of Administrative Justice Act 3 of 2000 could not be relied on by organs of state who seek to review their own decisions and affirmed the principle of legality as the appropriate pathway for state self-reviews. The court suggested that the applicability of the principle of legality in self-reviews does not necessarily extend to cases concerning the judicial review of a decision of an organ of state by another organ of state or when self-reviews are instituted in the public interest in terms of s 38*(d)* of the Constitution.

Gijima is a controversial judgment that has attracted considerable criticism from practitioners and scholars. The widespread criticism relates to the proliferation of PAJA-avoidance, the bifurcation between PAJA and the principle of legality and the judgment's dilution of the delay rule.

This Research Report reflects on the development of self-review in South African administrative law before *Gijima*; how self-review has evolved since the ground-breaking judgment; and how the courts have in subsequent judgments dealt with the murkiness caused by *Gijima*.

The Research Report concludes that, on the face of it, *Compcare Wellness Medical Scheme v Registrar of Medical Schemes* 2021 (1) SA 15 (SCA) is a promising solution for the reform of self-review in South African administrative law. The Research Report also concludes that legislative intervention may be necessary to make the PAJA more widely applicable in self-review cases.

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1. **Introduction**

Self-review in South African administrative law has developed tremendously over the years. Initially, it was erroneously thought that the *functus officio* doctrine prevented organs of state from challenging their own irregular decisions by means of judicial review. This false limitation dissipated as South African courts slowly but surely began to recognise that organs of state are legally entitled to seek review of their own unlawful conduct.

Self-review in South African administrative law has become even more of a phenomenon in the post-democratic era, mainly because of the inception of s 33 of the Constitution[1] and the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') that gives effect to it. Even though South African courts did not expressly identify the appropriate pathway for self-reviews of administrative action before *Gijima*,[2] established law and judicial principles made it patently clear that PAJA was applicable.

However, instead of confirming the above and providing clarity and certainty as to the approach to self-reviews, the Constitutional Court's decision in *Gijima* contradicted and subverted existing precedent, causing much confusion and uncertainty in subsequent self-review judgments.

This Research Report reflects on the development of self-review in South African administrative law before *Gijima*; how self-review has evolved since the ground-breaking judgment; and how the courts have subsequently dealt with the murkiness caused by *Gijima*, particularly with reference to *Compcare Wellness Medical Scheme v Registrar of Medical Schemes*[3] as a potential cure and to restore the PAJA as the applicable pathway for self-reviews.

The Research Report concludes that, on the face of it, *Compcare* is a promising solution for the reform of self-review in South African administrative law. The Research Report also concludes that legislative intervention may be necessary to make the PAJA more widely applicable in self-review cases.

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[1] Constitution of the Republic of South Africa, Act 108 of 1996.
[2] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).
[3] *Compcare Wellness Medical Scheme v Registrar of Medical Schemes* 2021 (1) SA 15 (SCA) ('*Compcare*').

The wider applicability of the PAJA is desirable because it was enacted to give effect to the substantive right to lawful administrative action in s 33 of the Constitution, in pursuit of a constitutionally rights-based conception of administrative justice in our law. Therefore, it is important that courts' do not derogate from this vital piece of legislation by relying on the principle of legality when PAJA ought to be applicable.

2. **The development of self-review**

During the pre-democratic era, the *functus officio* doctrine was erroneously thought to prevent public bodies from taking their own irregular decisions on judicial review. This was in accordance with the court's position in *Bronkhorstspruit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd*[4] where the court reasoned that, in the absence of specific statutory authority making provision for it, the Bronkhorstspruit Liquor Licensing Board could not reverse its erroneous granting of a liquor licence to Rayton Bottle Store.

The courts' position began to evolve, most evidently in *Rajah & Rajah Ltd v Ventersdorp Municipality*,[5] where Holmes JA importantly recognised the need for state institutions to take their own unlawful conduct on review, in the public interest.

The court's approach in *Rajah* was further adopted by the then Appellate Division in *Transair (Pty) Ltd v National Transport Commission*,[6] where Jansen JA highlighted that the court's position in *Bronkhorstspruit* ought not to be regarded as the norm, and that it was competent for administrative bodies to approach the courts for the judicial review of their own prior decisions. Jansen JA's reasoning in *Transair* emphasized that the *locus standi* of an organ of state to review its prior irregular or unlawful decision depended on "the legislation involved and the nature of the functions of the particular body".[7] Jansen JA further emphasized that such self-reviews by organs of state may not only be important, but in fact legally necessary.[8]

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[4] *Bronkhorstspruit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd* 1950 (3) SA 598 (T) ('*Bronkhorstspruit*').
[5] *Rajah & Rajah Ltd v Ventersdorp Municipality* 1961 (4) SA 402 (A) ('*Rajah*') at 407E.
[6] *Transair (Pty) Ltd v National Transport Commission* 977 (3) SA 784 (A) ('*Transair*').
[7] Ibid 793A.
[8] Ibid 793F.

In the democratic era, *Pepcor Retirement Fund v Financial Services Board*[9] re-entrenched the principles stated above. Here Cloete JA held that the Registrar of Medical Schemes had the requisite *locus standi* to seek review of his own previously erroneous issuing of approvals in terms of the Pension Funds Act 24 of 1956. Importantly, Cloete JA's reasoning emphasized the public interest mandate and significant role of state functionaries when pursuing self-reviews.[10]

Subsequently, the Supreme Court of Appeal ('SCA') adopted a similar line of reasoning in *Ntshangase v MEC for Finance, KwaZulu-Natal*,[11] where the MEC for Education had applied to set aside a disciplinary sanction for a more severe one. Bosielo AJA held that the MEC was not only entitled but duty-bound to ensure that the decision was reviewed.[12] *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC*[13], another SCA judgment, reasoned in similar terms in confirming the relevant municipality's entitlement to seek the review of an allegedly invalid contract.[14]

Rajah, *Transair*, *Pepcor*, *Ntshangase* and *Qaukeni* entrenched the right to self-review for public bodies, especially in circumstances where a functionary's duty to act in the public interest was compromised by the prior irregular decision. Self-review in South African administrative law has since developed at a rapid rate. In *Khumalo v Member of the Executive Council for Education: KwaZulu-Natal*,[15]a case which concerned a legality challenge against a public employment decision, the Constitutional Court emphasised the constitutional duty of administrators to approach the courts to correct unlawfulness in the public interest.[16]

Cameron J's reasoning in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd*[17] was in accordance with Skweyiya J's above. Here he reaffirmed the principle that organs of state may not ignore their own unlawful administrative decisions but must

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[9] *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) ('*Pepcor*').
[10] Ibid para 14.
[11] *Ntshangase v MEC for Finance, KwaZulu-Natal* 2010 (3) SA 201 (SCA) ('*Ntshangase*').
[12] Ibid para 18.
[13] *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 (1) SA 356 (SCA) ('*Qaukeni*').
[14] Ibid paras 23-26.
[15] *Khumalo v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (5) SA 579 (CC) ('*Khumalo*').
[16] Ibid para 35.
[17] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) ('*Kirland*').

instead seek the review and setting aside of such decisions through the courts.[18] In *Merafong City Local Municipality v AngloGold Ashanti Ltd*[19] Cameron J further reiterated this principle by reasoning that organs of state as worthy constitutional citizens are obliged to approach the courts to rectify unlawfulness.[20]

Khumalo, *Kirland* and *Merafong* illustrate the substantive evolution of self-review in South African administrative law by incorporating a general duty for organs of state to rectify their own unlawful decisions and those of other related state functionaries, through judicial proceedings. Unfortunately, a clear and determinative answer to the question which pathway was appropriate for self-reviews was avoided by the Constitutional Court in all three of these cases.[21]

As Freeman argues, faced with an opportunity to deal comprehensively with this question in *Department of Transport v Tasima*,[22] the Constitutional Court opted rather to sidestep the issue once again, stating that "the question of whether challenges, reactive or otherwise, to exercises of public power by the state can be initiated through PAJA need not be decided here".[23]

Another opportunity presented itself in *City of Cape Town v Aurecon South Africa*;[24] however, the court decided against determining the question whether PAJA or the principle of legality was the appropriate and applicable pathway for self-reviews. The basis for this was that neither of the parties had presented submissions to the court on the question.[25]

Freeman also argues that although these cases failed to pronounce definitively on the issue, the fact that PAJA had to be used where the state sought to review its own administrative action is consistent with the subsidiarity principle and the Constitutional Court's established jurisprudence on determining whether conduct amounts to administrative action.[26] In this regard, it seemed trite that the principle of legality ought

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[18] Ibid para 82.
[19] *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) ('*Merafong*').
[20] Ibid para 55.
[21] RH Freeman'*The Rights of the State, and the State of Rights in State Information Technology Agency Soc Limited v Gijima Holdings (Pty) Limited'* (2019) 9 *CCR* 521 at 523-4.
[22] *Department of Transport v Tasima* 017 (2) SA 622 (CC) ('*Tasima*').
[23] Ibid at footnote 78.
[24] *City of Cape Town v Aurecon South Africa* 2017 (4) SA 223 (CC) ('*Aurecon*').
[25] Freeman (note 21 above) at 525.
[26] Ibid.

not to apply to self-reviews where the impugned decision qualified as administrative action.[27]

The application of the PAJA to conduct that constitutes administrative action is legally principled and desirable because PAJA is procedurally more stringent than the principle of legality as a result of its; duty to exhaust internal remedies prior to instituting review proceedings;180-day time bar clause; and procedural fairness as a ground of review.[28] Substantively, the standards of review between the PAJA and the principle of legality differ. PAJA provides for a comprehensive review based on reasonableness and a proportionality analysis, in comparison to the principle of legality's narrower rationality review.[29] This makes application of the PAJA to administrative action even more desirable.

There is no reason why organs of state, with all the resources at their disposal, should not be subjected to the stringent administrative requirements of PAJA in the way that all other litigants are. As Cameron J explained in *Kirland*:

> "Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."[30]

Definitive pronouncement on whether PAJA or the principle of legality was the applicable pathway for an organ of state seeking to review its own decision could no longer be avoided in *Gijima*.

3. **The *Gijima* judgment**

3.1. ***The facts and judgments of the courts below***

During September 2006, the State Information Technology Agency Soc Ltd ('SITA') entered into an agreement with Gijima Holdings (Pty) Ltd ('Gijima'), a private information and communication technology services company, for the provision of IT-

[27] Ibid.
[28] The Promotion of Administrative Act 3 of 2000, s 7.
[29] Ibid s 6(2)(h).
[30] *Kirland* (note 17 above) at para 82.

related services to the South African Police Service, on behalf of SITA ('the SAPS Agreement'). This agreement was automatically extended several times, based on Gijima's performance and adherence to the contractual obligations in the agreement.[31]

In January 2012, SITA terminated the Agreement, which led to the institution of court proceedings for urgent relief by Gijima. To avoid this round of litigation, SITA and Gijima decided instead to conclude a settlement agreement in terms of which Gijima agreed to provide IT-related services to the Department of Defence and the KwaZulu-Natal Department of Health ('the DoD Agreement').[32]

On several occasions Gijima raised its concerns in relation to whether the DoD Agreement had followed the relevant procurement procedures. To put Gijima at ease, SITA inserted a clause in the DoD Agreement guaranteeing Gijima that all necessary steps had been taken to ensure that the DoD Agreement complied with the Constitution and other relevant legislation.[33]

In 2013, a payment dispute to the tune of approximately R10 million arose between SITA and Gijima, which resulted in the institution of arbitration proceedings by Gijima. SITA disputed Gijima's claim on the basis that the DoD Agreement and its three addenda were invalid due to non-compliance with s 217 of the Constitution and overall non-adherence with public procurement standards.

In 2014, the arbitrator referred the parties to the High Court because of a lack of jurisdiction to decide whether proper procurement processes were complied with. SITA instituted judicial review proceedings in the High Court to set aside the DoD Agreement and the three addenda.

The High Court held that the decision to award and renew the DoD Agreement qualified as administrative action in terms of s 1 of PAJA.[34] It further held that the review had been brought well outside the 180-day period stipulated in s 7(1) of PAJA and that SITA had not sought an extension of this period, nor had it bothered to explain the delay. Because of this, the court could not find any basis for extending the period.

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[31] *Gijima* (note 2 above) para 3.
[32] Ibid paras 4-5.
[33] Ibid para 6.
[34] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2015] ZAGPPHC 1079 (18 May 2015) para 10.

It concluded that it would not be just and equitable to set aside the DoD Agreement and the addenda. Consequently, SITA's application was dismissed with costs.[35]

SITA approached the SCA. On behalf of the majority, Cachalia JA confirmed that a decision by an organ of state to award an agreement for services constitutes administrative action in terms of PAJA.[36]

The majority held that the wording in s 6(1) of PAJA, which allows *any person* to institute proceedings in a court or tribunal for the judicial review of an administrative action, is wide enough to include organs of state. The court held that SITA's repeated assurances that the DoD Agreement had been validly concluded would have created a legitimate expectation that that contract would be honoured. It also held that litigants may not rely on s 33(1) of the Constitution or the common law when reviewing unlawful administrative action, and that PAJA was the constitutional, statutorily mandated mechanism for this purpose.[37]With reference to *National Director of Public Prosecutions & Others v Freedom Under Law*,[38] the majority reasoned that given the fact that PAJA was applicable in the circumstances, the principle of legality ought not to be resorted to as an alternative pathway for review.[39] Therefore, SITA's appeal was dismissed with costs.[40]

In a minority judgment, Bosielo JA reasoned that it was legally permissible for SITA to launch review proceedings under the principle of legality, as there was no clarity on whether organs of state were obliged to institute review proceedings under PAJA.[41] He further reasoned that it would be subversive of the obligation contained in s 7(2) of the Constitution for a court to deny an applicant its right to challenge the constitutionality of an agreement simply because it opted for an attack based on the principle of legality, not PAJA.[42] Bosielo JA was of the strongly held view that it "would be unfair to put up such procedural technicalities as hurdles to deny SITA the right to

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[35] Ibid para 31.
[36] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) paras 21, 44.
[37] Ibid paras 21-45.
[38] *National Director of Public Prosecutions & others v Freedom Under Law* 2014 (4) SA 298 (SCA) ('*Freedom Under Law*') para 28.
[39] Supra note 36 para 38.
[40] Supra note 36 para 45.
[41] Ibid para 47.
[42] Ibid para 55.

vindicate legality", and that the majority's approach would amount to formalism over substance.[43]

3.2. ***The reasoning and decision of the Constitutional Court***

On appeal in the Constitutional Court, SITA argued that PAJA does not apply in the circumstances.[44] The court granted SITA leave to appeal on the basis that the matter had major administrative and constitutional implications in relation to the applicability of the PAJA.[45]

Writing for the court, Madlanga J and Pretorius AJ narrowly construed the issue as whether an organ of state is entitled to seek review of its own decision, in its own interest, under PAJA.[46] The court excluded circumstances in which an organ of state seeks review of a decision of another organ of state ('the first exception'), or where it institutes judicial review proceedings in the public interest in terms of s 38*(d)* of the Constitution ('the second exception').[47]

As part of its reasoning, the court considered the context of human rights, in particular s 33 of the Constitution.[48] The court then explained "the philosophical underpinnings of the very notion of whom fundamental rights are meant to protect,"[49] being "warm-bodied human beings primarily against the State."[50] The court referred to the development of human rights in international law and the incorporation of same into South Africa's interim and final Constitutions as further justification for this line of reasoning.[51]

The court considered the history of administrative law in the pre-democratic era, particularly its use as a tool of oppression and discrimination, as well as the overly deferential approach that defined judicial decision-making in that era.[52] The court

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[43] Ibid.
[44] *Gijima* (note 2 above) para 13.
[45] Ibid para 17.
[46] Ibid para 2.
[47] Ibid.
[48] Ibid para 27.
[49] Ibid para 18.
[50] Ibid.
[51] Ibid.
[52] Ibid para 27.

explained that the purpose of the s 33(1) right to lawful, procedurally fair and reasonable administrative action is to transform administrative law under the Constitution, in favour of ensuring that decisions taken by organs of state are constrained and that public officials are held accountable for unlawful acts.[53] Within this context, the court concluded that 'everyone' in s 33 does not include organs of state.[54] Madlanga J and Pretorius AJ stated:

> "It seems 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. This must, indeed, be an indication that only private persons enjoy rights under section 33."[55]

The court then considered whether s 6(1) of PAJA – which provides that "[a]ny person may institute proceedings in a court or tribunal for the judicial review of an administrative action" – means that an organ of state is entitled to use the PAJA to have its own decision reviewed.[56] It highlighted that PAJA was enacted to give effect to s 33(3)(a) of the Constitution, which requires Parliament to enact legislation to provide for the review of administrative action. In this regard, the court reasoned that:

> "The concept of 'administrative action' in whatever section of PAJA cannot suddenly have a meaning wider than that envisaged by the source of the concept, namely the Constitution…Surely then, the same parameters that delineate the ambit of 'administrative action' in section 33 of the Constitution apply to 'administrative action' under PAJA."[57]

The court ignored the concerns of the majority of the SCA in relation to the proliferation of PAJA-avoidance and the contravention of the subsidiarity principle that this approach would cause, especially in cases where litigants intentionally avoid PAJA because of its exacting requirements and strict time-limit within which to challenge decisions. It reasoned that "there is no basis for suggesting that an organ of state seeking a review of its own decision may simply choose to avoid review under PAJA for reasons of expediency".[58] This is because PAJA is not available to an organ of

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[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid para 31.
[57] Ibid para 32.
[58] Ibid.

state when it seeks to review its own administrative decision in its own interest.[59] Rather, the principle of legality was the applicable pathway for such a review.[60]

The court recognised the fact that the agreement had been concluded without a competitive bidding process, and thus in breach of s 217 of the Constitution.[61] However, it expressed its concern regarding SITA's delay in launching the review.[62] It re-emphasized its jurisprudence that applications for judicial review should be instituted timeously to preserve the certainty and finality of administrative decisions, and that organs of state hold a higher duty in this regard, owing to s 237 of the Constitution.[63] Despite this reasoning, the court highlighted that it had a discretion to 'overlook' SITA's delay, so long as such discretion was exercised cautiously on a basis "gleaned from facts placed before the court by the parties or objectively available factors".[64]

The court reasoned that there was no basis for it to exercise its discretion in favour of overlooking SITA's delay of taking 22 months to institute review proceedings.[65] Nevertheless, it concluded that owing to SITA's breach of s 217 of the Constitution, its contract with Gijima fell to be declared invalid under s 172(1)(a) of the Constitution.[66] In exercising its power under s 172(1)(b) of the Constitution, the court reasoned that:

> "Justice and equity dictate that, despite the invalidity of the award of the DoD agreement, SITA must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract, while SITA sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings."[67]

Accordingly, the nature of the relief granted by the court was that Gijima would be entitled to claim for rights it had accrued under the contract for what it had duly

[59] Ibid.
[60] Ibid.
[61] Ibid para 40.
[62] Ibid para 45.
[63] Ibid paras 47-50.
[64] Ibid.
[65] Ibid para 49.
[66] Ibid para 52.
[67] Ibid para 54.

performed.[68] The court further held that the extent of Gijima's accrued rights and quantum of its claim would be determined in the arbitration.[69]

4. **Critique of the Constitutional Court's approach**

4.1. ***Rights and standing***

The Constitutional Court's bizarre reasoning in *Gijima* has been the subject of scathing criticism from academic scholars and practitioners.[70]

On the issues of rights and standing, Nold de Beer and Boonzaier argue that the Constitutional Court's reasoning fails to acknowledge the obvious and fundamental distinction between the holder of a right and the person with standing to enforce that same right.[71] Instead, the court merely states the obvious, insofar as establishing that organs of state are not holders of the rights in PAJA. This bears no relevance to the question whether organs of state lack standing to enforce their rights, which is the crux of the issue in *Gijima*.[72]

With reference to s 38 of the Constitution, it is trite that an applicant need not be the holder of a right being vindicated. Section 38 envisages standing for broad categories of litigants in matters where a constitutional right is alleged to have been breached. Boonzaier critically highlights that this includes anyone acting in their own interest, the interests of others or a group, an association acting in its members' interests and, of most relevance in *Gijima*, anyone acting in the public interest.[73]

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[68] Ibid.
[69] Ibid.
[70] L Boonzaier *'A Decision to Undo'* (2018) 4 *SALJ* 642 at 643; M Nold de Beer *'A New Role for the Principle of Legality in Administrative Law*: *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd'* (2018) 135 *SALJ* 613 at 614; G Quinot & E van der Sijde *'Opening at the Close: Clarity from the Constitutional Court on the Legal Cause of Action and Regulatory Framework for an Organ of State Seeking to Review its Own Decisions'* (2019) 2 *Journal of South African Law* 324 at 325; and G Quinot *'The Conundrum of Self-Review – Sanctioning Parallel Systems of Administrative Law'* (2020) 66 *Loyola Law Review* 523 at 523-524.
[71] Nold de Beer and Boonzaier (note 70 above) at 621-3 and 644.
[72] Ibid.
[73] Boonzaier (note 70 above) at 646-7.

In *Giant Concerts CC v Rinaldo Investments*[74] the court held that even though s 38 was not expressly included or referred to in PAJA, it was clear that it had to be read into the statute.[75] This broad and substantive approach to the question of standing was also adopted in *Areva NP v Eskom Holdings SOC Ltd*.[76] One wonders why the Constitutional Court's judgment in *Gijima* failed to refer to either *Giant Concerts* or *Areva*.

Gijima left the question open as to whether an organ of state acting in the public interest may rely on PAJA to challenge its own decision. This is rather perplexing, mainly because it is difficult to conceive of instances in which an organ of state would be reviewing its own decision independently of the public interest.[77] In this regard and with reference to Elliott, Hoexter and Penfold argue that in most, if not all cases "government is uniquely devoid of any legitimate self-interests, meaning that it may properly act only in the public interest".[78] In relation to the above, these authors are of the opinion that one of the most bizarre and pointless features of *Gijima* is its second (public interest) exception. This is because it "is so obviously capable of defeating the core proposition of the judgment, ie that the PAJA is not available to organs of state seeking self-review".[79]

4.2. ***The avoidance and subversion of PAJA***

On the proliferation of PAJA avoidance and creation of alternative pathways for review, Cachalia JA's reasoning in the SCA is not only cogent but legally principled.

Cachalia JA correctly highlighted that because of the flexible and now broad application of the principle of legality, litigants and the courts have become fatally attracted to it resulting in the avoidance and subversion of PAJA even in cases where the legislation ought to be applicable.[80] He acknowledged the inherent difficulties in determining whether a decision qualifies as administrative action within the

[74] *Giant Concerts CC v Rinaldo Investments* 2013 (3) BCLR 251 (CC) ('*Giant Concerts*').
[75] Ibid para 29.
[76] *Areva NP v Eskom Holdings SOC Ltd* 2017 (6) SA 621 (CC) ('*Areva*').
[77] C Hoexter & G Penfold *Administrative Law in South Africa* 3 ed (2021) 693-4.
[78] Ibid.
[79] Ibid.
[80] *Gijima* (note 36 above) para 35.

parameters of PAJA but emphasised that these difficulties cannot and must not be avoided.[81]

If South African litigants and courts continue to avoid PAJA in cases where the nature of the impugned decision amounts to administrative action, PAJA, in Hoexter's words, will "soon become redundant, for no sane applicant would submit to its definition of administrative action (or to the strict procedural requirements of s 7) if he or she actually had a choice".[82] The Constitutional Court's lack of appreciation of this and disrespect of PAJA in *Gijima* is extremely unfortunate. Furthermore, it contradicts the Constitutional Court's own jurisprudence in previous cases, in which it has held that the principle of legality is applicable only as an alternative pathway to judicial review where PAJA finds no application (ie when the decision, which is the subject of judicial review, does not amount to administrative action).[83]

In this regard, one of the most concerning features of the Constitutional Court's flawed reasoning in *Gijima* is that the correct self-review pathway now depends on whether the applicant is an organ of state, and not on the nature of the decision or function in question.[84] This creates uncertainty by establishing parallel systems of judicial review for the same governmental conduct, depending on the nature of the applicant.[85]

4.3. ***The dilution of the delay rule***

Before *Gijima*, the delay rule played an important procedural role under both the principle of legality and PAJA. In *Khumalo*, Skweyiya J described the crucial role of the rule by stating that:

> "[It] is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions."[86]

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[81] Ibid.
[82] Ibid para 36.
[83] Ibid para 38.
[84] Nold de Beer (note 70 above) at 625-6.
[85] Ibid.
[86] *Khumalo* (note 18 above) para 47.

The courts strictly followed a two-stage process when deciding delay in review applications.[87] In the first instance, they considered whether the delay was unreasonable and undue, taking into consideration any explanation given for the delay.[88] Such explanation required a full account of what happened in the intervening time between the decision being made and the application being launched.[89] Secondly, the courts considered whether there were any reasons to exercise discretion in favour of overlooking an unreasonable delay, and thus entertaining the review.[90]

Regarding the second stage, the court in *Khumalo* reasoned that delay should not be "evaluated in a vacuum but must be assessed with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision".[91]

Khumalo also described uncondoned delay as non-suiting an applicant.[92] In circumstances in which the court decided that the delay could not be overlooked, it necessarily followed that the review would be dismissed.[93] In *Aurecon*, for instance, the court dismissed the application based on delay alone, which disposed of the application without any need to consider the merits.[94]

In *Gijima*, the court initially followed the two-stage test and reasoning in *Khumalo* by holding that the case had been brought belatedly, and that in the absence of an explanation, there was no reason to overlook the unreasonable delay. However, notwithstanding an inexcusable delay, it proceeded to decide the merits of the case and concluded that the contract had been awarded illegally, and that the extent of the illegality necessitated a declaration of invalidity in terms of s 172(1)(a) of the Constitution. Instead of dismissing SITA's review application at the preliminary stage of the enquiry, the court factored in the unreasonable delay at the remedial stage, in accordance with its remedial powers in s 172(1)(b) of the Constitution.

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[87] Ibid para 49.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] *Khumalo* (note 15 above) para 52.
[92] Ibid para 56.
[93] Ibid.
[94] *Aurecon* (note 24 above) para 54.

The Constitutional Court's extension and application of the delay rule in *Gijima* constitutes a major deviation from the strict interpretation and application of the rule in *Khumalo* and *Aurecon*.[95] The *Gijima* approach risks diluting the significance of the delay rule by conflating the inquiry of delay with the legality and merits of the case, and thus diminishing its role of preserving the certainty and finality of decisions taken by the administration.[96]

4.4. ***The effect of s 172(1)(a) of the Constitution on the delay rule***

Gijima established the principle that s 172(1)(a) of the Constitution may oblige the court to declare an impugned decision invalid, despite the court's non-condonation of an unreasonable delay, where the unlawfulness is clear and indisputable ('the *Gijima* principle').[97]

In line with Boonzaier's view, the *Gijima* principle is incorrect and inconsistent with the majority judgments of the Constitutional Court in *Kirland* and *Merafong*, especially in relation to the restricted ambit of s 172(1)(a) of the Constitution.[98] Despite strong opposition by some dissenting judges in these cases, it is now well established in our law that even if a decision was made unlawfully, and acknowledged to be so by a court, s 172(1)(a) does not impose an absolute duty on the court to declare the unlawful conduct invalid.[99]

In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*[100], Froneman J described this reasoning as "a pragmatic blend of logic and experience" which aims to balance the court's duty to declare unlawful conduct invalid with its vital responsibility to preserve the certainty and finality of decisions made by the administration.[101]

The reasoning of the Constitutional Court's majority in *Tasima* is further confirmation of the above, in which it held that:

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[95] Boonzaier (note 70 above) at 666-7.
[96] Nold de Beer (note 70 above) at 627.
[97] *Gijima* (note 2 above) para 52.
[98] Boonzaier (note 70 above) at 671–2.
[99] Ibid.
[100] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) ('*Bengwenyama*').
[101] Ibid para 85.

> "[T]he only arguably new question presented by the first judgment is whether, in instances where the subject of the review implicates a court's s 172 (1)(a) obligations, the court should substitute *Khumalo's* factual, multifactorial and context-sensitive framework for a strict rule that delay can never prevent a court from deciding the matter. In my view, the answer is 'no'. *Khumalo* made it perspicuous that timely performance of constitutional obligations is itself a constitutional concern. Therefore, s 172(1)(a) cannot automatically subordinate s 237."[102]

Based on the reasons discussed above, Boonzaier correctly argues that the Constitutional Court's reasoning in *Gijima* contains very serious errors and contradicts its own previous jurisprudence.[103] The *Gijima* judgment may have succeeded in providing direction regarding the principle of legality as the applicable pathway for self-reviews. However, its legally flawed reasoning has created even more confusion, uncertainty and fragmentation. This is in contradiction to the intention of s 33 of the Constitution and the PAJA, which aim to create a coherent and unitary framework for the judicial review of all administrative action, including self-reviews.[104]

As Quinot and Van der Sijde suggest, the *Gijima* judgment is a major impediment for the development of self-review in South African administrative law. This is because the Constitutional Court's reasoning in *Gijima* is a subversion of the PAJA and an endorsement of a restrictive conception of administrative justice instead of a constitutionalized and substantive rights-based regulatory framework for the exercise of public power by the state and its organs.[105]

5. ***Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd***[106]

Shortly after the *Gijima* judgment, the Buffalo City Metropolitan Municipality sought the review and setting aside of its own decision (in terms of the PAJA) to award a contract which it alleged was unlawful because of non-compliance with the constitutional and statutory requirements for the procurement of goods and services.[107]

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[102] *Tasima* (note 22 above) para 144.
[103] Boonzaier (note 70 above) at 642.
[104] Quinot & van der Sijde (note 70 above) at 331-2.
[105] Ibid at 335-6.
[106] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) ('*Asla*').
[107] Ibid para 11.

The High Court held that the contract was unlawful, declared it invalid and set it aside because of that, despite the fact that review proceedings were launched outside the 180-day period provided for in s 7(1) of the PAJA.[108]

Asla Construction (Pty) Ltd took the High Court's decision on review at the SCA. The SCA held that the Buffalo City Metropolitan Municipality had not made out a case for condonation for the delayed institution of review proceedings, in terms of s 9 of PAJA. The SCA also held that this ought to have disqualified the Buffalo City Metropolitan Municipality's review application, without having to consider the merits of the case.[109]

The Buffalo City Metropolitan Municipality sought leave to appeal against the SCA's judgment, at the Constitutional Court. On behalf of the majority, Theron J reasoned that the court was bound by *Gijima* and because of this, it might be constitutionally obliged to declare conduct invalid even in the absence of a basis to overlook the delay in instituting proceedings ('the *Gijima* principle').[110]

Theron J further reasoned that when interpreting and applying the *Gijima* principle, courts should balance the objectives of the delay rule with those of declaring unlawful conduct to be invalid and inconsistent with s 172(1)(a) of the Constitution.[111] In this regard, the *Gijima* principle ought to be interpreted "narrowly and restrictively, and its application limited to cases where the impugned decision is indisputably and clearly inconsistent with the Constitution".[112]

Based on the above, Theron J held that there were serious irregularities in the awarding of the contract by the Buffalo City Metropolitan Municipality and that the unlawfulness was ''clear and undisputed''.[113] Theron J concluded that it necessarily followed that the court was obliged to declare it invalid.[114]

On behalf of the minority, Cameron and Froneman JJ (with Khampepe J concurring) reasoned that in the absence of an adequate explanation for an unreasonable delay, the court should not exercise its discretion in favour of determining the unlawfulness

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[108] Ibid.
[109] Ibid para 12.
[110] Ibid paras 64-5.
[111] Ibid para 68.
[112] Ibid para 71.
[113] Ibid paras 92, 95.
[114] Ibid para 101.

of the impugned decision "unless the seriousness of the unlawfulness at issue warrants overlooking the manifest deficiencies in the state actor's case".[115]

Given the facts of the case, the minority held that it was not in the interests of justice to entertain the self-review.[116] Cameron and Froneman JJ also held that there was "no manifestly serious irregularity or illegality demanding intervention".[117]

5.1. ***Analysis of Asla***

Of critical importance is the fact that even though the Constitutional Court confirmed and re-applied *Gijima* in *Asla*, some of the justices that concurred in the *Gijima* judgment dissented in the form of a minority judgment, which seems to be an acknowledgment of the wide-scale criticism of the reasoning in *Gijima*. Cameron and Froneman JJ went so far as to state that "[i]t may in due course become necessary to reconsider whether the legality review pathway chosen in *Gijima* withstands the test of time".[118]

The minority further acknowledged the fact that the court's reasoning in *Gijima* exacerbates the undesirable bifurcation that has emerged between PAJA and the principle of legality as pathways for the judicial review of conduct which amounts to administrative action in terms of s 1 of PAJA.[119]

With reference to Hoexter and Penfold, *Asla* also highlights the tension in our law between the exercise of judicial pragmatism in favour of declaring unlawful conduct invalid, in terms of s 172(1)(a) of the Constitution and ensuring adherence to procedural requirements such as the delay rule.[120] The *Gijima* principle has merely heightened this tension, despite the majority and minority's efforts to curtail it somewhat in *Asla*.

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[115] Ibid para 127.
[116] Ibid para 130.
[117] Ibid para 147.
[118] Ibid para 112.
[119] Ibid.
[120] Hoexter & Penfold (note 77 above) 741.

6. ***Compcare Wellness Medical Scheme v Registrar of Medical Schemes***[121]

Compcare Wellness Medical Scheme ('Compcare') made an application to the Registrar, in terms of s 23(1)(c) of the Medical Schemes Act 131 of 1998, for the approval of a name change. The Registrar rejected this application on the basis that it was likely to mislead the public. The Appeal Committee of the Council for Medical Schemes upheld the Registrar's decision. Compcare then appealed the decision of the Appeal Committee via the Appeal Board, which upheld the appeal. The Registrar was ordered to approve the name change.[122]

The Registrar and the Council then launched a review application of the Appeal Board's decision in the Gauteng Division of the High Court, Pretoria, which sought to set aside the Appeal Board's decision on the basis that it had the effect of directing the Registrar to conduct itself in a manner that was *ultra vires* the Act.[123]The review application was successful, and Fabricius J set aside the decision of the Appeal Board on that basis.[124]

Importantly, the High Court did not consider whether PAJA or the principle of legality was the applicable pathway for review. Fabricius J reasoned that this determination was not necessary because the grounds of review invoked by Compcare, lawfulness and rationality, are the same under PAJA and the principle of legality.[125]

Plasket JA, on behalf of the SCA, set out the issues that arose for decision as: (i) whether the Appeal Board's decision was reviewable at the instance of the Registrar and the Council in terms of PAJA, or in terms of the principle of legality and (ii) whether the grounds of review relied upon by the Registrar and the Council had been established.[126]

Plasket JA referred to s 6 of the PAJA and the principle of legality as the two main pathways for the review of administrative action.[127] He reasoned that the PAJA applies to the review of administrative action, as defined in s 1, and the principle of legality

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[121] *Compcare* (note 3 above).
[122] Ibid.
[123] *Registrar of Medical Schemes v Chairperson of the Appeal Board of the Council for Medical Schemes* (58909/19) [2019] ZAGPPHC 1037 (3 December 2019) para 8.
[124] Ibid para 62.
[125] Ibid paras 11-12.
[126] *Compcare* (note 3 above) para 12.
[127] Ibid para 13.

applies when an exercise of public power does not fall within this definition.[128] He acknowledged the importance of this enquiry, especially in relation to the scope of a court's review jurisdiction.[129]

Reference was then made to the Constitutional Court's decision in *Gijima*, where the court unanimously held that PAJA does not apply to an organ of state which, acting in its own interest, seeks to set aside its decision.[130] Further reference was also made to the crux of the Constitutional Court's rationale in *Gijima*, being that the fundamental right to just administrative action in terms of s 33 of the Constitution is for the exclusive benefit of private persons, not organs of state.[131]

However, the court emphasized the distinguishability of the facts of *Compcare*, on the basis that the Registrar and the Council claimed standing to review the Appeal Board's decision in the public interest under s 38 of the Constitution.[132] .[133] In line with the judgments in *Giant Concerts* and *Areva*, the court reasoned that the Registrar and the Council indeed had standing in terms of s *38(d)* of the Constitution because of the generous approach to representative standing that the Constitutional Court had mandated.[134]

Plasket JA referred to Khampepe J's majority judgment in *Hunter v Financial Sector Conduct Authority*,[135] where the Constitutional Court once again acknowledged the much-criticized position that s 33 of the Constitution confers rights on private persons, not organs of state. He reasoned that, as was the case in *Hunter*, the facts in *Compcare* were different because the Registrar and the Council brought the review application in the public interest. Plasket JA then applied the definition of administrative action to the facts of the case, and based on the reasoning above, held that PAJA was applicable to the review of the Appeal Board's decision.[136]

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[128] Ibid.
[129] Ibid.
[130] Ibid para 14.
[131] Ibid.
[132] Ibid para 15.
[133] Ibid.
[134] Ibid.
[135] *Hunter v Financial Sector Conduct Authority* 2018 (6) SA 348 (CC) ('*Hunter*').
[136] *Compcare* (note 3 above) para 20.

6.1. ***Analysis of Compcare***

Cachalia[137] argues that the court's reasoning in *Compcare* illustrates a remarkable and positive evolution of self-review in South African administrative law since *Gijima*.[138] The basis for this submission is that *Compcare* presents an opportunity for application in every instance where an organ of state seeks the review of administrative action, regardless of whether that organ of state expressly invokes the public interest standing provision in s 38*(d)* of the Constitution.[139]

Cachalia also argues that the legally principled and persuasive reasoning of the minority in *Asla* further substantiates the notion that the very basis upon which organs of state institute self-review proceedings is to "promote open, responsive and responsible government", in the interest of the public.[140] Therefore, organs of state ought to be deemed to be almost always acting in the public interest and this should be held as the rule rather than the exception.[141] If it is generally accepted that s 38*(d)* of the Constitution may be triggered when an organ of state seeks to review its own irregular and unlawful administrative actions, it may result in the PAJA being less avoidable as the applicable pathway for self-reviews.

Very importantly, Hoexter and Penfold suggest that the case of *Registrar of Pension Funds v Howie NO*[142] may present occasional exceptions to the 'public interest' general proposition, in as much as there are limited circumstances in which the granting of *locus standi* under s 38*(d)* for self-review purposes is inconsistent with an intended statutory internal appeal mechanism.[143] In *Howie*, Wallis JA reasoned that this would be the position on the basis that acknowledging the Registrar's *locus standi* to review a decision of the appeal board would subvert the internal appeal system imposed by the special statutory relationship, in the circumstances.[144] Hoexter and Penfold observe that since *Compcare* and *Howie* seem to be at odds with each other,

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[137] R Cachalia '*Resuscitating the PAJA in state self-review? Compcare Wellness Medical Scheme v Registrar of Medical Schemes*' (2022) 38 *SAJHR* 1.
[138] Ibid at 14.
[139] Ibid.
[140] Ibid at 14-15.
[141] Ibid.
[142] *Registrar of Pension Funds v Howie NO* [2016] 1 All SA 694 (SCA) ('*Howie*').
[143] Hoexter & Penfold (note 77 above) 695.
[144] *Howie* (note 142 above) para 14-15.

if the reasoning of *Compcare* is to prevail in the future, it will be important to distinguish it from *Howie*.[145]

The unanimous decision of the SCA in *Compcare* illustrates the counter-intuitiveness and hollowness of the second exception in *Gijima*, whilst also reaffirming the courts' generous and substantive approach to rights and standing, which is consistent with *Giant Concerts* and *Areva*.[146] Cachalia goes so far as to argue that "the principled effect of *Compcare* is to resuscitate the PAJA in all state self-reviews of administrative action and in so doing, to defeat the basic premise in *Gijima* that the state cannot rely on the PAJA".[147] However, even though Cachalia may be correct in her reasoning and analysis, most self-review jurisprudence after *Compcare* seems to suggest that the principle of legality continues to be applied, without any mention of *Compcare* and reference to the substantive interpretation of standing in terms of s 38*(d)* of the Constitution.[148] The only exception to this general norm is *Mapholisa NO v Phetoe NO and Others*.[149] These recent cases will be discussed below.

Compcare ought to be credited for opening the door for the Constitutional Court to redeem itself by further developing Plasket JA's reasoning. This can be achieved if, in subsequent judgments, the Constitutional Court unequivocally holds that organs of state seeking to review their own impugned administrative decisions are deemed to be acting in the public interest unless shown otherwise. In this regard, *Compcare* should be regarded as the most progressive judgment in the evolution of self-review in South African administrative law since *Gijima*.[150]

7. ***Developments in more recent cases***

Self-review in South African administrative law continues to be a burgeoning sub-sphere of judicial review. It has evolved at an alarming rate since the pre-democratic era because of the constitutional duty on organs of state to seek review of their own unlawful administrative decisions as well as those of other organs of state within the

[145] Op cit note 143.
[146] Hoexter & Penfold (note 77 above) 694.
[147] Cachalia (note 137 above) at 15.
[148] Ibid.
[149] *Mapholisa NO v Phetoe NO and Others* (163/2021) [2022] ZASCA 168 (30 November 2022) ('*Mapholisa*').
[150] Op cit note 137 at 21-22.

administration. The unmitigated spread of corruption in the form of state capture, irregular and wasteful expenditure, and maladministration over the years, has also played a major part in the rise of these cases.

Except for *Compcare*, self-review judgments after *Gijima* have failed to provide consistency, clarity, and certainty especially in relation to the application of the delay rule and its effect at the remedial stage. Regarding the first exception, the SCA has now sadly extended the principle of legality to it in two recent judgments, based on the flawed reasoning in *Gijima*.

7.1. ***The application of the delay rule and its effect at the remedial stage***

In *Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality*,[151] the City of Tshwane sought the review of its own award of a tender to Altech Radio Holdings (Pty) Ltd for a municipal broadband network project. The City of Tshwane had delayed for more than two years in bringing the review under the principle of legality.

In the end, the court held that the contract ought not to be set aside for reasons of unreasonable delay and unconscionable conduct on the part of the City of Tshwane.[152] In terms of the application of the *Gijima* principle, Ponnan JA reasoned that this was not a case of clear and undisputed illegality and dismissed the application purely because of the delay.[153]

Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd[154] was a self-review of the decision to sell 10 million barrels of South Africa's strategic crude oil stocks. In the High Court, Rogers J applied the *Gijima* principle and held that the delay must be condoned because of the severity of the illegality, which was clear and undisputed.[155] However, the egregious delay and unsatisfactory explanation played a major part in

[151] *Altech Radio Holdings (Pty) Limited v City of Tshwane Metropolitan Municipality* 2021 (3) SA 25 (SCA) ('*Altech*').
[152] Ibid para 72.
[153] Ibid.
[154] *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* [2020] ZAWCHC 164 (20 November 2020) ('*Venus Rays Trade*').
[155] Ibid paras 329-30.

Rogers J's formulation of just and equitable relief.[156] The SCA[157] dismissed the appeal in *Venus Rays Trade* and upheld the relief granted by the High Court as just and equitable.

In *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd*,[158] Navsa JA adopted a similar approach to the self-review of the municipality's irregular tender for debt management services. Navsa JA decided the self-review in terms of the principle of legality, reaffirming the post-*Gijima* position that PAJA is not ordinarily applicable to self-reviews by organs of state.[159] Navsa JA reasoned that the municipality's 22-month delay in instituting proceedings was egregious and unreasonable. However, given that the agreement was clearly unlawful and in the presence of a duty to declare it so, he factored delay into the question of remedy.[160]

Gijima, *Asla*, *Venus Rays Trade* and *Govan Mbeki* all illustrate that even when the *Gijima* principle has been applied, the conduct of the organ of state instituting self-review proceedings has been factored into the formulation of a just and equitable remedy.[161] In this regard, Cachalia writes that these cases indicate that whilst delay in terms of the PAJA remains a strictly procedural threshold requirement in cases, delay under the principle of legality continues to be diluted, often most relevant to the question of an appropriate remedy in the circumstances.[162]

7.2. ***The first exception***

In *Special Investigating Unit v Engineered Systems Solutions (Pty) Ltd*,[163] the Department of Correctional Services and the Special Investigating Unit (SIU) were co-applicants in the review of an irregular contract that was awarded to Engineered Systems Solutions (ESS). The effect of this was that the department brought a self-

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[156] Ibid.
[157] *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* [2022] 2 All SA 626 (SCA).
[158] *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* 2021 (4) SA 436 (SCA) ('*Govan Mbeki*').
[159] Ibid para 34.
[160] Ibid.
[161] Cachalia (note 137 above) at 17.
[162] Ibid at 15.
[163] *Special Investigating Unit v Engineered Systems Solutions (Pty) Ltd* 2021 (3) All SA 791 (SCA) ('*Engineered Systems Solutions*').

review against its own impugned decision, whereas the SIU brought a review against decisions by the department as another organ of state.

Mabindla-Boqwana AJA, on behalf of a unanimous court, reaffirmed *Gijima* by reasoning that an organ of state may not apply for the review of its own decision under PAJA. On this basis, the court applied the principle of legality to the department's self-review.[164] Mabindla-Boqwana AJA went even further by applying the principle of legality to the SIU's review of the department's decision, even though this was a judicial review of an organ of state by another organ of state ('the first exception'). She reasoned that:

> "Although the scenario seemed to have been left open by the Constitutional Court in *Gijima*, it seems doubtful that the SIU would be regarded as being in a position akin to that of a private person. The Constitutional Court in *Gijima* went on to say it seems 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. This must, indeed, be an indication that only private persons enjoy rights under section 33 and by extension under PAJA. In regard to the delay question, it would, in any event, be in favour of the appellants to proceed by way of legality than PAJA."[165]

This part of Mabindla-Boqwana AJA's reasoning in *Engineered Systems Solutions* is unfortunate because it incorrectly extends *Gijima's* application to cases where an organ of state reviews a decision of another organ of state, further exacerbating the exclusion of PAJA as a pathway for state self-reviews.[166] Ultimately, owing to the SIU's and the department's unreasonable delay and unconscionable conduct, the court declined to decide the merits of the review and dismissed the case at the level of delay.[167]

This negation of the first exception was recently confirmed by the SCA in *Mapholisa*. This was an appeal against a Pretoria High Court Order dismissing the self-review application of a decision of the Professional Conduct Committee of the Health Professions Council of South Africa. The self-review application was brought by Mr

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[164] Ibid para 24.
[165] Ibid para 25.
[166] Ibid.
[167] Ibid.

Mapholisa in his official capacity as a *pro forma* complainant, litigating as an organ of state, in terms of the Health Professions Act 56 of 1974.[168]

The core issue before the SCA was whether the Pretoria High Court had erred in its application of the PAJA when dismissing an application to review a decision by an organ of state against another organ of state, and based on that reasoning, concluding that the internal remedy of an appeal in the circumstances ought to have been exhausted in terms of s 7(2) of the PAJA.[169]

The SCA held that, even though in *Gijima* an organ of state sought to review and set aside its own decision, the Constitutional Court quite clearly reasoned that the rights under s 33 of the Constitution are enjoyed by private persons only and not organs of state. In reaching this conclusion, Mali AJA directly quoted and adopted the reasoning of Mabindla-Boqwana AJ in *Engineered Systems Solutions*.[170]

The SCA also held that the second exception to *Gijima* did not apply in the circumstances because Mr Mapholisa had failed to plead that he was acting in the public interest in bringing the self-review application.[171] Therefore, the SCA concluded that the correct pathway to review was the principle of legality and not the PAJA. Accordingly, the duty to exhaust internal remedies in terms of s 7(2) of the PAJA was not applicable. The Pretoria High Court erred in dismissing the application.[172]

As suggested by Cachalia, *Altech*, *Venus Rays Trade*, *Govan Mbeki* and *Engineered Systems Solutions* show that it is often not in the interests of state-reviewing parties to invoke s 38(*d*) of the Constitution in self-review cases, especially when acting as applicants in procurement-related judicial reviews.[173] This is most likely because of the desire to avoid a more stringent application of the delay rule, in terms of PAJA's 180-day time-bar clause, and the need to apply for condonation in circumstances in which it is breached .[174] Boonzaier correctly highlights that this is consistent with the

[168] *Mapholisa* (note 149 above) paras 1-2.
[169] Ibid para 13.
[170] Ibid paras 17-9.
[171] Ibid para 20.
[172] Ibid para 26.
[173] Cachalia (note 137 above) at 15.
[174] Ibid.

capability of state litigants to act "irrationally, arbitrarily or opportunistically even when they are undoing unlawful decisions".[175]

Cachalia also suggests that another common thread in *Altech* and *Engineered Systems Solutions* is a recent emphasis by the courts on the conduct of organs of state when instituting self-review proceedings.[176] There seems to be an attempt to restrict the application of the *Gijima* principle at the delay stage of the enquiry, especially when the facts of a case indicate self-interest, opportunism, egregious delay or unconscionable conduct by an organ of state instituting review proceedings.[177] This was the case in both *Altech* and *Engineered Systems Solutions*.

Compcare may be manifestly distinguishable from the cases discussed above, on the basis that it is not procurement-related. The self-review in *Compcare* was also not instituted for self-interested and opportunistic reasons such as was the case in *Altech* and *Engineered System Solutions*. The *Compcare* review was genuinely instituted in the public interest, without egregious delay and unconscionable conduct by the Registrar of Medical Schemes as a public functionary.[178] These distinguishable factors are important, I suggest, because they highlight the limitations of *Compcare* as a potential cure for the *Gijima* judgment and restoration of the PAJA as the applicable mechanism for self-reviews.

8. **Recommendations**

In recognition of the fact that the courts' approach to self-reviews has become 'encrusted', Navsa JA stated the following in *Govan Mbeki*:

> "Appreciating that our law on self-review has become somewhat encrusted […] [o]ur 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

[175] L Boonzaier *'Good Reviews, Bad Actors: The Constitutional Court's Procedural Drama'* (2015) 7 *CCR* 1 at 1.
[176] Cachalia (note 137 above) at 17.
[177] Ibid.
[178] Ibid.

> Constitutional Court might, in time, revisit prior decisions. An aspect however, that is of immediate concern, noted at the commencement of this judgment, is that self-review is now a burgeoning and troubling phenomenon."[179]

Ideally, the legislature ought to intervene by amending the PAJA to cover all forms of review as comprehensively as possible, including self-reviews. In the circumstances, legislative reform is the most efficient option especially when compared with the slow development of case law.

In addition to the above, Rule 53 of the Uniform Rules of Court could be supplemented to include a provision expressly stating that an organ of state seeking to review its own prior decision will be deemed to be acting in the public interest, in terms of s 38*(d)* of the Constitution, unless the respondent in the matter is able to plead and satisfy the court that the contrary is true. This proposed development of Rule 53 offers another efficient and pragmatic way of providing a clear and streamlined approach to self-reviews after *Gijima*.

9. **Conclusion**

The Constitutional Court has had several opportunities (in *Asla*, *Hunter* and most recently *MEC for Cooperative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality*[180]) to revisit and cure the defects of the *Gijima* judgment. However, it has shown no indication of doing so, except perhaps for the minority judgment in *Asla*. Instead, the majority of the Constitutional Court has continued to ignore the consistent and justified criticism of the *Gijima* judgment. This stubbornness from the highest court in the land has the unfortunate effect of binding courts to a problematic and fatally flawed judgment.

On the face of it, *Compcare* is a promising solution for the reform of self-review in South African administrative law, insofar as it opens the door for the Constitutional Court to redeem itself by further developing Plasket JA's reasoning to hold unequivocally that organs of state seeking review of their own impugned administrative

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[179] *Govan Mbeki* (note 158 above) at para 47.
[180] *MEC for Cooperative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality* 2022 (8) BCLR 959 (CC).

actions are deemed to be acting in the public interest unless shown otherwise, thus making PAJA the pathway for self-reviews in most cases. This position is desirable because it may assist in addressing the persistent derogation and avoidance of PAJA in favour of the principle of legality, as well as the lack of clarity and uncertainty caused by having two different pathways for review of conduct that qualifies as administrative action.

The fact that *Compcare* has not been applied and judicially developed in recent self-review cases such as *Altech*, *Venus Rays Trade*, *Govan Mbeki* and *Engineered Systems Solutions* is concerning, and highlights the limited ambit of its precedent. Legislative intervention in the form of amendments to the PAJA as well as the supplementation of Rule 53 of the Uniform Rules of Court, as suggested above, may be the most effective and efficient mechanism for accelerating the resurrection of the PAJA in self-reviews.

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