[redacted]

20 May 2026

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Circulate to Judges:	NO
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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 033351/2023

In the matter between:-

THE TRUSTEES FOR THE TIME BEING OF THE INDEPENDENT DEVELOPMENT TRUST (IDT) — Applicant

and

BAKHI DESIGN STUDIO CC — First Respondent

ADV TERRY MOTAU N.O. — Second Respondent

ARBITRATION FOUNDATION OF SOUTH AFRICA (AFSA) — Third Respondent

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JUDGMENT

Reid J

Introduction

[1] This matter comes before me as an opposed application for review in terms of Part B of the applicant's notice of motion. The applicant, being the Independent Development Trust (IDT), seeks to review and set aside five decisions taken between 2013 and 2014 to appoint the first respondent, Bakhi Design Studio CC, as a principal consultant and project manager for various government departments. The applicant also seeks to declare the resultant contracts void *ab initio* and to order the repayment of profits.

[2] The applicant seeks condonation for the late launching of the review application. The first respondent opposes the application for condonation.

[3] The matter contains more than 700 pages and the parties should have applied for a special motion date. The matter served before me on the normal opposed motion roll. Since the parties did not request a special motion date, the parties agreed, and I subsequently ordered, that this Court will only determine the issue of condonation for the late filing of the review application.

Background

[4] The impugned appointments occurred on 18 April 2013, 5 December

2013, 23 January 2014, 7 October 2014, and 15 December 2014. The contracts were signed on 13 December 2013 and 16 April 2015. The first respondent's services were terminated on 1 July 2016.

[5] The first respondent was appointed by IDT as the principal consultant/project manager for the provision of architectural services and project manager services in respect of the implementation of various projects for the Department of Agriculture. The first respondent contends that all the work was duly and professionally executed. The period that the first respondent executed the contract was approximately 3 years which spanned from 18 April 2013 to 1 July 2016.

[6] On 14 November 2018, the first respondent issued summons against the IDT for a substantial sum of approximately R42 million to claim monetary payment and compensation arising from work done under these appointments. The IDT filed a plea in March 2019. In that plea, the IDT raised several of the same irregularities relied upon in the review application, including the alleged failure of the first respondent's directors to be registered under the Architectural Profession Act 44 of 2000.

[7] In September 2022, the parties agreed to refer the dispute to arbitration. An arbitration agreement was signed, and an arbitrator was consequently appointed. Pre-arbitration meetings were held in

December 2022, 3 February 2023 and March 2023.

[8] On 14 April 2023, the IDT launched Part A of the present application on an urgent basis, seeking interim relief (Part A) to interdict the arbitration pending the review (Part B). The order in Part A was granted on 12 May 2023 by Labuschagne AJ in the following terms:

8.1. That the matter was heard on an urgent basis.

8.2. That the arbitration proceedings are stayed, pending these review proceedings.

8.3. Pending the finalisation of this review application (Part B), the respondents (Bhaki Trading) are interdicted from proceeding with the arbitration proceedings between the applicant (IDT) and the first respondent.

[9] The review application (Part B) was thereafter set down for hearing. The IDT now seeks condonation for the delay in bringing the review. As mentioned, the condonation application is the only issue that serves to be determined by this Court.

The applicable legal principles

[10] The applicant brings the review application under the principle of legality and not in terms of the Promotion of Administrative Justice Act 3 of 2000

(PAJA). The applicant relies on *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA CC in which it was determined by the Constitutional Court that Organs of State may not bring reviews of their own decisions under PAJA, but it should bring such reviews under the legality principle.

[11] The applicant further relies on *Khumalo & Another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (5) SA 579 (CC) ("Khumalo") in which the Constitutional Court found that Organs of State are to bring legality reviews, and not administrative justice reviews (in terms of PAJA) to correct their own decisions. The applicant argues that no formal condonation application is required because this is a legality review, and the court may simply overlook the delay in the interests of justice.

[12] In the *Khumalo* matter, the Member of the Executive Council for Education, KwaZulu-Natal (the MEC) approached the court to set aside impugned decisions to promote 2 individuals without following the correct process and procedure. The decision to promote the individuals was unlawful, and the MEC approached the court to set aside the promotions in a self-review application. The matter raises the enforcement of the rule of law in the context of a significant delay by the MEC in bringing her challenge to court. For the reasons set out in in paragraphs [13] to [15] of this judgment, the Constitutional Court did not condone the delay.

[13] The Constitutional Court formulated a number of factors in *Khumalo* to include in the assessment of whether the delay was unreasonable. This was, in later decisions, referred to as the *"Khumalo"* test. The factors relevant to assessing delay include:

13.1. The period of the delay;

13.2. The reasons given for the delay;

13.3. Whether the applicant can be said to have acted reasonably and diligently;

13.4. Any prejudice to the respondent;

13.5. The importance of the issues raised; and

13.6. The overall interests of justice.

[14] In *Khumalo*, the Constitutional Court held that a court has a discretion to overlook a delay, but that discretion must be exercised judicially, having regard to the nature of the impugned decision, the reasons for the delay, the prejudice to the respondent, and the interests of justice. This is set out as follows in *Khumalo*:

> *"[44] But what do we make of the legislature's decision to remove these time-limits? Does this mean that litigants are not constrained by any requirement to act timeously? In my view, the legislature's decision to remove the 12-month prescription period opens the actions of public functionaries in terms of the PSA to ongoing scrutiny and transparency. Bearing in mind the purpose of the Repealing Act, the repeal of s 39 allows that an applicant*

cannot automatically be non-suited on the basis of a delay. Nevertheless, it is a long-standing rule ***that a legality review must be initiated without undue delay*** *and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution. However, because there are no express, legislated time periods in which the MEC was required to bring her application, there is no requirement that a formal application for condonation needs to have been brought.*

[45] In the previous section it was explained that the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, inter alia by seeking the redress of their departments' unlawful decisions. Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the ***basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay.***

[46] Section 237 of the Constitution provides: 'All constitutional obligations must be performed diligently and without delay.' Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. ***The principle is thus a requirement of legality****.*

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

[48] In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision makers' memories are bound to decline

with time. Documents and evidence may be lost or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.

[49] In Gqwetha 2006 (2) SA 603 (SCA) the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of 'all the relevant circumstances'); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.

...

[52] But should we nevertheless overlook the unreasonable delay? On this leg of the test, the majority in Gqwetha held that the delay cannot 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. In the context of public sector employment, the value of security for employees and in mitigating the arguably inherent inequality of the workplace must be kept in mind.

[53] Under the Constitution, however, the requirement to consider the consequences of declaring the decision unlawful is mediated by a court's remedial powers to grant a 'just and equitable' order in terms of s 172(1)(b) of the Constitution. A court has greater powers under the Constitution to regulate any possible unjust consequences by granting an appropriate order. While a court must declare conduct that it finds to be unconstitutional invalid, it need not set the conduct aside. The delay was indeed a factor taken into account by the Labour Appeal Court when deciding whether or not to set aside the applicants' promotions once they had been found unlawful."

(Footnotes omitted; own emphasis)

[15] The conclusion in *Khumalo* was that the nature of the impugned decision and the strength of the merits were additional considerations in overlooking an unreasonable delay. It was found in *Khumalo* that the delay constrained the ability of the court to determine the lawfulness of the decision accurately, and that condoning the delay was not warranted. The application for condonation was consequently dismissed.

[16] In *Buffalo City Metropolitan Municipality v Alsa Construction (Pty) Ltd* 2019 (4) SA 331 (CC) ("Alsa") the facts that served before the Constitutional Court were similar to the facts *in casu*. In *Alsa*, the municipality decided to award a construction contract to a company without following the tender process. The respondent performed the work under the contract. The municipality later refused to pay, and the respondent instituted proceedings for payment. The municipality's defence was, that absent a lawful tender process, the decision to award the contract was unlawful, and that this rendered the contract invalid. It applied to review the decision to award the contract to the respondent. The review was, however, brought out of time. The contract was ultimately declared to be invalid, but was <u>not</u> set aside.

[17] In *Alsa* the Constitutional Court found that the decision to decide whether the delay to institute review proceedings by an organ of state was reasonable, are to be decided by considering the following four factors:

17.1. The consequences of setting the decision aside.

17.2. The decision and the challenge to it (the asserted illegality).

17.3. The applicant's conduct.

17.4. The court's duty to declare an unlawful decision invalid.

[18] Moreover, in *Alsa* the Constitutional Court declared that the decision to award the contract was invalid, but despite the invalidity the contract should not be set aside. This is to preserve the respondent's accrued rights thereunder. It remained in force (albeit invalid) for the parties to the contract to claim respective rights obtained under the contract. Only existing rights could be claimed and not future rights.

[19] The following was held in *Alsa* as the majority decision:

> *"[104] When the Municipality took the view that the Reeston contract was invalid, the implementation of the contract had commenced and was continuing. The Municipality was content for the respondent to complete the contract (building low-cost houses) to the benefit of the Municipality and residents of Reeston. It was common cause that the work has been practically completed.*
> *[105] In these circumstances, justice and equity dictate that the* ***Municipality should not benefit from its own undue delay and in allowing the respondent to proceed to perform*** *in terms of the contract. I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to that the respondent might have been entitled. It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement."*

(own emphasis)

[20] It was held by the Supreme Court of Appeal in *Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality* 2021 (3) SA 25 (SCA) in paragraph [71] that:

> *"(t)he objective of state self-review should be to promote open, responsive and accountable government. The conduct of [the Department] 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."*

[21] The Supreme Court of Appeal in *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* 2021 (4) SA 436 (SCA) had the following stern words to say in relation to self-reviews and inordinate delays in bringing the self-review:

> *"[47] Appreciating that our law on self-review has become somewhat encrusted, it would nevertheless be presumptuous 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. 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. As recorded by the Constitutional Court in Asla, corruption and maladministration are inconsistent with the rule of law and are the antithesis of open, accountable and democratic government. The functionaries involved are almost never subject to scrutiny and sanctions and*

in some cases falsely assume the moral high ground. The problem, as the cases demonstrate, is that corrective action, by way of self-review, is usually sought a considerable time after an impugned decision was made and disciplinary steps against those concerned might face time problems. 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 action, 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 moneys and ensure that our country's necessary developmental goals as envisaged by the Constitution, in the interest of all our people, are met."

[22] In *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* 2022 (5) SA 416 (SCA) the Supreme Court of Appeal held that the test for legality reviews is reasonableness. If the delay in the legality review is found to be unreasonable, then the next question was whether the court ought, on the available facts, overlook the delay in the interests of justice. Relevant factors included potential prejudice to the affected parties, the consequences of setting aside the impugned decision, the nature of the decision and the conduct of the appellant.

[23] I will now proceed to analyse the facts applicable to the application for

condonation as provided by the abovementioned principles.

The period of delay

[24] The delay is extraordinary. The earliest appointment sought to be reviewed is dated 18 April 2013, which is almost **thirteen years** before this application for condonation was argued. The most recent appointment is from 15 December 2014, which is more than eleven years ago.

[25] The period of delay commences when the irregularity was discovered. (See: *Buffalo City Metropolitan Municipality v Alsa Construction (Pty) Ltd* 2019 (4) SA 331 (CC)). The contracts were terminated on 1 July 2016, nearly ten years ago. The applicant thus brought the application for review only after a period of approximately ten years after discovering the irregularity.

[26] It is significant that the IDT raised the core ground of review (non-registration under the Architectural Profession Act 44 of 2000) in its plea of March 2019. That was more than five years before this review application was launched.

[27] Despite that awareness, the IDT did not then bring a review application to set aside their decision. Instead, it participated in litigation, agreed to

arbitration, and only afterwards sought to collaterally and retrospectively attack the appointments.

[28] I cannot accept that the delay is anything other than grossly excessive.

The explanation for the delay

[29] The applicant argues that it became aware of the irregularities during November 2018 when summons was issued. The applicant attributes the delay in the discovery of the irregularities of the contracts, to the fact that the contracts were executed in KwaZulu Natal, whilst the deponent to the review application is situated in the IDT Head Office Pretoria. The deponent states:

> *"363. The deponent sits at IDT Head Office at Pretoria and the contracts which are the contract subject of this application were issued by IDT KZN, hence only became aware of the issues between the parties, not the irregularities thereof, from the date that the summons was (served) around November 2018.*
>
> *364. However, the IDT only became aware of possible irregularities with respect to the impugned decisions around September 2022, from the legal opinion of the, then appointed counsel. The counsel, who has since been debriefed, was of the opinion that the review proceedings could not be instituted by the IDT and rather advised that the matter be referred to arbitration."*

[30] The applicant's explanation is set out in paragraphs [359] to [381] of the founding affidavit, deposed to by Ms Tebogo Malaka, the Acting CEO. In summary, the IDT says:

30.1. It only became aware of the irregularities around September 2022, after receiving a legal opinion from counsel.

30.2. Previous counsel had advised that review proceedings could not be instituted, and instead recommended arbitration.

30.3. New counsel was appointed in November 2022 and advised on 2 March 2023 to bring a legality review.

30.4. The IDT argued that it acted swiftly after receiving that advice, launching the application on 14 April 2023.

[31] This explanation is, with respect, woefully inadequate and unpersuasive for several reasons.

[32] First, the IDT's plea of March 2019 explicitly raised the lack of professional registration as a defence. Ms Malaka (deponent to the founding affidavit of IDT) says she only became aware of irregularities in September 2022, but the IDT as an institution knew of the registration issue from at least March 2019, when its legal representatives drafted and filed the plea. An organ of state cannot shield itself from delay by attributing ignorance to a particular deponent when the institution itself had actual knowledge of the material irregularities through its legal representatives.

[33] Second, the IDT does not explain why it took from March 2019 until

September 2022 – a period of three and a half years – to obtain a legal opinion on the legality of the appointments. The first respondent's summons was served in November 2018. The IDT had every incentive to investigate the validity of the contracts at the outset of the litigation. It did not.

[34] Third, the IDT's reliance on the advice of previous counsel is not a complete answer. The IDT is a sophisticated organ of state with ready access to legal advice. If it received advice in September 2022 that a review could not be brought, it does not explain why it took until November 2022 to appoint new counsel, or why the new counsel took a further five months (from November 2022 to April 2023) to finalise the review application. The matter was already fully pleaded. The record was available. The delay in preparing and instituting the review is unexplained.

[35] Fourth, the IDT's decision to agree to arbitration in September 2022 is inconsistent with its present stance that the appointments were unlawful from the outset. The arbitration agreement was freely entered into. The IDT did not then seek to review the appointments when litigation commenced. It cannot now use its own change of legal strategy as a justification for extreme delay.

[36] In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) (*Gijima*), the Constitutional Court emphasised that an organ of state that seeks to self-review its own conduct must act diligently and promptly. The IDT has not done so.

[37] The explanation proffered is simply inadequate.

Prejudice to the respondent

[38] The first respondent argues that it will suffer substantial prejudice should an application for self-review be succesful. The contracts were performed between 2013 and 2016. Invoices were rendered, work was done (whether lawfully or not), and payments were made. IDT has on its own version, accepted that the first respondent incurred costs and provided services to IDT over many years. Furthermore, the passage of time has inevitably led to the loss of documents, fading memories of witnesses, and the unavailability of key personnel.

[39] It is argued that the IDT's delay may have been tactical. By waiting until after the arbitration had been agreed upon and was well underway, the IDT has sought to derail a process to which it voluntarily submitted. The first respondent has incurred costs in preparing for arbitration, only to have that process interdicted by the IDT. This is a form of prejudice to which this Court cannot turn a blind eye.

[40] The IDT argues that there is no prejudice because the review raises issues of legality and the protection of public funds. That is not a complete answer. Even in public procurement cases, the interests of finality and the prejudice to private parties who have rendered services in good faith (or at least without knowledge of the internal failures of the procuring entity) must be considered. The first respondent is not an innocent bystander; it may have known or ought to have known of the procurement irregularities, but that does not mean it suffers no prejudice from a decade-long delay.

[41] I find that the delay results in significant prejudice to the first respondent.

The interests of justice

[42] IDT places heavy reliance on the seriousness of the alleged irregularities: the absence of a competitive bidding process, the lack of registration under the Architectural Profession Act, the non-compliance with VAT and the Public Finance Management Act 1 of 1999 (PFMA) requirements, and the large sums of public money involved. I accept that these are serious allegations. If proven, it would indeed point to a profound failure of governance.

[43] However, the interests of justice are not one-sided. It also requires that

legal proceedings be brought within a reasonable time, that parties not be subject to indefinite uncertainty, and that organs of state be held to the same standards of diligence (or higher) than ordinary litigants. In *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* 2021 (4) SA 436 (SCA) it was stated that a higher standard is required from organs of state, since the public purse is at stake.

[44] In *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 837 (CC), the Constitutional Court held that condonation is not a mere formality; it requires a full explanation of the delay, and the court has a discretion to refuse condonation even where the prospects of success are good, if the delay is inordinate and the explanation poor.

[45] Here the delay is inordinate – measured in years, indeed a decade. The explanation is poor. The IDT knew of the core ground of review as early as 2018. It chose a different litigation path. It cannot now, when that path has become inconvenient, seek to revisit contracts made more than ten years ago.

[46] To condone or overlook this delay would undermine the principle of finality and send a message that organ of states may litigate at their leisure, changing strategy whenever it suits them, while private parties bear the burden of uncertainty and wasted costs. That is not in the

interests of justice.

Conclusion

[47] After hearing argument and considering the papers in the court file, I hold the view that the delay is unreasonable. For the reasons and on the basis set out above, I find that the late institution of the review application should not be condoned.

[48] I am satisfied that the application for condonation must be dismissed.

Costs

[49] As to costs, the first respondent has been substantially successful in opposing condonation. There is no reason to deviate from the normal rule that costs follow the result.

[50] The first respondent has sought costs on scale C (the scale applicable to complex, opposed motion proceedings involving substantial commercial interests). Given the complexity of the papers, the number of legal representatives involved, and the amounts at stake, I consider scale C to be appropriate. There is no basis for a punitive scale (attorney and client) in the absence of evidence of gross misconduct or bad faith, although the conduct of the IDT in delaying so long is troubling.

[51] In the premise, I make the following order:

Order

(i) The applicant's application for condonation in respect of Part B of the notice of motion is dismissed.

(ii) The applicant is to pay the first respondent's costs of the condonation application, such costs to be on scale C as contemplated in the Consolidated Practice Directives of the High Court, Gauteng Division, Pretoria, including the costs of two counsel where employed.

(iii) The remainder of the relief sought in Part B is dismissed in light of the refusal of condonation.

[redacted]

FMM REID
JUDGE OF THE HIGH COURT
SEATED AT GAUTENG, PRETORIA

Date of hearing: 12 February 2026

Date of judgment: 20 May 2026

Appearances:

For the applicant:	Adv J Mnisi (with Adv B Ledwaba)
Instructed by:	Sibanda Bukhosi Attorneys Inc.
For the first respondent:	Adv Madonsela SC
Instructed by:	Strauss Daly Attorneys