



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 5278/2024

In the matter between

**FREE STATE PROVINCIAL GOVERNMENT: DEPARTMENT OF
COMMUNITY SAFETY, ROADS AND TRANSPORT**

APPLICANT

and

ITUMELE BUS LINES (PTY) LTD

FIRST RESPONDENT

MINISTER OF TRANSPORT

SECOND RESPONDENT

MINISTER OF FINANCE

THIRD RESPONDENT

AUDITOR-GENERAL OF SOUTH AFRICA

FOURTH RESPONDENT

Neutral citation: *FS Department of Community Safety, Roads and Transport v Itumele Bus Lines (Pty) Ltd and Others* (5278/2024) [2026] ZAFSHC 300 (18 May 2026)

Coram: Daffue et Mhlambi JJ

Heard: 17 November 2025

Delivered: These reasons were handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 14h30 on 18 May 2026.

Summary: Self-review application by Provincial Government – Provincial Government failed to file replying affidavit and heads of argument and to instruct legal practitioner to appear on its behalf to present oral argument – unreasonable delay – failure to join the relevant Municipality in whose area bus transport services are rendered – although points *in limine* valid, the court dismissed the application on the merits.

REASONS

Daffue J (Mhlambi J concurring)

Introduction

[1] This application concerned a challenge by a provincial government of the lawfulness of an extension on 1 October 2019 of a contract between it and a service provider for the delivery of a public transport service. The matter also raised the enforcement of the rule of law insofar as there was a significant delay in bringing the challenge to court.

[2] On 17 November 2025 the following order was made after the events occurring on that date as explained hereafter:

'1. The self-review is dismissed with costs inclusive of the costs of two counsel on scale C and B respectively.'

[3] It is recorded that this application and review application 5090/2023 by Zeus Shuttles and Coaches (Pty) Ltd and Lungi and Sons Services (Pty) Ltd were set down before the same two judges with the leave of the Acting Judge President as these two applications are interlinked. We decided that our reasons for dismissing the self-review application shall be provided simultaneously with our judgment in application 5090/2023.

The parties

[4] The applicant was cited as the Free State Provincial Government: Department of Community Safety, Roads and Transport (the Department). The first respondent is Itumele Bus Lines (Pty) Ltd (IBL), a provider of public transport services to members of the public between Bloemfontein and its surrounds. The Ministers of Transport and Finance were cited as second and third respondents and the Auditor-General of South Africa as the fourth respondent. The last-mentioned three respondents have not played any role in the application. They did not oppose the application and failed to file any answering affidavits or heads of argument.

The relief sought

[5] Save for seeking condonation for the delay in launching the review application, the Department applied for the following substantive relief in accordance with its application for self-review:

- (a) that the extension of the contract between the Department and IBL on 1 October 2019 in respect of tenders VT20282/98, VT20283/98, VT20284/98 and VT20285/98 (the extended contract) contrary to the provisions of the Public Finance Management Act 1 of 1999 (PFMA) and s 217 of the Constitution of the Republic of South Africa be declared invalid and set aside;
- (b) that it be declared that the Department is not liable for any payments to IBL from 1 November 2019 onwards and in the event of payments having been effected from 1 November 2019, that these be set off against what the court may determine under the rubric of just and equitable remedy for bus road transportation services provided; and
- (c) that IBL file independent audited statements of expenses to *inter alia* show the income received and the net profit earned from the extended contract, whereupon the court would eventually be requested to determine a just and equitable remedy.

[6] It is now trite that an organ of state cannot rely on the principles enunciated in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) but is bound to rely on legality reviews. Unlike in the case of PAJA, no time limit is placed on legality reviews. No formal and explicit application for condonation is required in legality reviews as stated in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*,¹ although the reasonableness of the delay must still be considered.

The proceedings on 17 November 2025.

[7] This application and application 5090/2023 were set down for hearing on 17 November 2025. IBL's counsel filed extensive heads of argument in accordance with the Practice Directives of this Court. The Department did not file a replying affidavit and also failed to file heads of argument. When the application was called, there was no appearance for the Department. We were informed by IBL's senior counsel that his attorney had been in contact with Ms Engelbrecht of the State Attorney's office who had advised her that the State Attorney did not hold any instructions to appoint counsel to argue the application. In the absence of any appearance on behalf of the Department, IBL sought the dismissal of the self-review application

¹ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 51.

with costs, inclusive of the costs of two counsel on scale C and B respectively. Such an order was made. We decided not to provide reasons at the time, but to do so when we deliver judgment in application 5090/2023. Having said this, I shall deal with two points *in limine* raised by IBL, to wit the alleged unreasonable delay to launch the self-review proceedings and the non-joinder of the Mangaung Metropolitan Municipality (the Municipality) under the next headings.

Delay

[8] Despite trying to impress upon us that the Department was doing the right thing to challenge the legality of the extended contract, the Department's delay in bringing the application is reprehensible. IBL has taken issue with the delay. It submitted that it was unreasonable and that the Department should be non-suited. As mentioned, the Department did not even bother to respond to IBL's answering affidavit. On the Department's version, it and IBL (or its predecessors) acted unlawfully when the contract period was extended. Bearing in mind such conclusion, the self-review application should have been brought within a reasonable time after the Department's decision on 7 August 2003 to extend the initial contract period. Alternatively, the application should have been brought within a reasonable period after any of the Department's subsequent decisions to extend the contract period from time to time. The Department failed to present a factual basis and/or reasons for the failure to institute the self-review application prior to 16 September 2024.

[9] The last extension of the contract, on a month-to-month basis, occurred on 1 October 2019. Five years later, in September 2024, the Department caused its self-review application to be issued. The Department failed to present a factual basis and/or reasons for the neglect to institute the self-review application within a reasonable time.

[10] I accept that there is a duty on a state functionary, such as the Head of the Department (HOD), or the MEC of a particular department, to rectify unlawfulness. In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal*² the Constitutional Court stated that '[i]t is the duty of courts to insist that the state, in all its dealings, operates within the confines of the law . . .'. The founding affidavit was deposed to by the HOD. Neither the MEC

² *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) paras 39-52; see also *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) paras 43-49.

at the time when contract was extended, nor the present MEC filed a confirmatory affidavit in support of the self-review application. This is not insignificant, bearing in mind the record of decision filed in application 5090/2023, reflecting communication between the Minister of Transport and the MEC. This has been dealt with in our judgment in that application.

[11] Notwithstanding no time limit being applicable in legality reviews, it is trite that these reviews must be instituted without undue delay to ensure certainty and promote legality. Cameron J stated the following in *Merafong City Local Municipality v AngloGold Ashanti Limited*:³

'... The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself. . . '

[12] I accept that even in the case of unreasonable delay by an organ of state, the Court may overlook that as explained in *Department of Transport and Others v Tasima (Pty) Limited*⁴ and consider the self-review on the merits. Notwithstanding the fact that the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*⁵ concluded that the decisionmaker had failed to provide a satisfactory explanation for the delay, which could not be overlooked, the majority held that the court could not ignore the unlawfulness of the particular contract and consequently set it aside.

[13] In my view, uncertainty has been created by the Constitutional Court in several judgments on this topic. I respectfully agree with the *dictum* of Unterhalter JA, the scribe of the unanimous judgment in *Petersen and Others v South African Social Security Agency*:⁶

'[10] The law that governs delay in cases of self-review under the legality principle lacks satisfactory coherence as a result of the shifting sands that have blown through the Constitutional Court on this matter. It is no modest endeavour to determine what settled propositions emerge from the dicta of the Constitutional Court in *Khumalo*, *Gijima*, *Tasima*, *Asla Construction*, *Notyawa* as to the discretion of a

³ *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) paras 73-77; see also *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) *loc cit* para 44.

⁴ *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) paras 160-171.

⁵ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) paras 100-101.

⁶ *Petersen and Others v South African Social Security Agency* 2025 (3) SA 153 (SCA) para 10.

court to overlook delay in this species of review. . . .'

Unterhalter JA continue to state in the same paragraph quoted just now that '[h]appily, there is no need for this Court to undertake this task.' The same applies *in casu*.

[14] I refer to the principles pertaining to condonation applications mentioned in paragraph 22 of our judgment in application 5090/2023. Bearing in mind the principles referred to by both the Constitutional Court and the Supreme Court of Appeal, I am satisfied that the delay in this case was unreasonable. The application could and should have been dismissed for failing to launch it within a reasonable time without even considering the merits.

Non-joinder of the Municipality

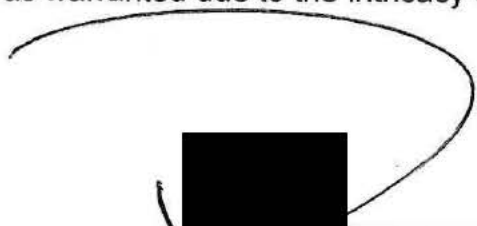
[15] Over and above the point *in limine* raised by IBL that the Department delayed the launching of its application for self-review unreasonably and also failed to explain the delay, it took a further point *in limine* that the Department failed to join the Municipality as a respondent. Clearly, the Municipality is a contracting authority as contemplated in s 1 of the National Land Transport Act 5 of 2009 (the Transport Act). The Municipality had a direct and substantial interest in any order which the court might have made in the self-review application, should the month-to-month extension of the contract between the Department and IBL be set aside as requested by the Department in its notice of motion. In such a case the Municipality would have to conclude either a negotiated contract in terms of s 41 of the Transport Act, or a subsidised service contract in terms of s 42 of the Transport Act in order to provide the required passenger bus road transportation to members of the public. This service has been provided by IBL for decades and it is still continuing to do deliver same.

[16] At best for the applicant, the self-review application would have to be suspended until the joinder of the Municipality in which case the applicant would have been ordered to pay IBL's wasted costs. Notwithstanding these comments, we considered the application on the merits.

The merits of the self-review application

[17] There is no reason why we shall copy our reasoned judgment in 5090/2023 and paste same herein. The reader is referred to paragraphs 30 to 52 of our detailed judgment from which it will be apparent why the application for self-review was unmeritorious. Consequently, the application was dismissed on its merits for the reasons set out herein and particularly those

contained in application 5090/2023. The costs order was warranted due to the intricacy of the dispute and the importance of the case.



J P DAFFUE
JUDGE OF THE HIGH COURT

I concur.



J J MHLAMBI
JUDGE OF THE HIGH COURT

Appearances

For the Applicant:

No appearance

Instructed by:

For the First Respondent:

DJ van der Walt SC and

JS Rautenbach

Instructed by:

Symington De Kok Attorneys

For the Second, Third and Fourth Respondents: No appearance.

Appearances

For the Applicants:

S Grobler SC

Instructed by:

Peyper Attorneys

For the Second Respondent:

DJ van der Walt SC and

JS Rautenbach

Instructed by:

Symington De Kok Attorneys

For the First, Third and Fourth Respondents:

No appearance.

For the Fifth Respondent:

PT Masihleho - watching brief only

