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DISPUTE RESOLUTION
ALERT

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Bringing claims against the South African government for extra-territorial conduct

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Bringing claims against the South African government for extra-territorial conduct

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The disbandment of the SADC Tribunal has resulted in the South African government being sued for billions of Rands in its domestic courts by several plaintiffs. The trigger point for these lawsuits was the 2018 Constitutional Court judgment, *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) where the court held that South Africa's participation in the disbandment of the SADC Tribunal was unconstitutional.

The Constitutional Court was particularly scathing of the former President Zuma's conduct, labelling it procedurally unlawful, *ultra vires* his constitutional authority and in bad faith against an international Treaty that South Africa bound itself to. As such, the court confirmed that where executive power is exercised, be it on an international stage or domestic, such power must be exercised in conformity with the principles of the Constitution.

The court also ordered the President to withdraw his signature from the 2014 Protocol on the SADC Tribunal, which decision President Ramaphosa complied with in 2019.

Context to the Disbandment of the SADC Tribunal

The SADC Tribunal was established under the SADC Treaty for the adjudication of various disputes within SADC. From August 2000, SADC nationals started approaching the Tribunal for recourse against members states for violations of rights against nationals or SADC member states within the jurisdiction of a SADC member state.

In the most notable case to date, *Campbell v Zimbabwe* [2008], the SADC Tribunal ruled that the Zimbabwean government had violated the rights of various Zimbabwean farmers by unlawfully expropriating their farms. As a consequence of the Campbell decision, Zimbabwe exerted pressure on other SADC member states to essentially make the SADC Tribunal "*dysfunctional*". The strategy worked: A series of political processes and decisions taken by other SADC members began to erode the effectiveness of the Tribunal, including, a failure to appoint SADC tribunal judges. In August 2010, at the SADC Summit, members resolved that the Tribunal would no longer hear new cases.

While this process was ongoing, several other parties commenced proceedings at the SADC Tribunal including Swissborough Diamond Mines (Pty) Ltd against the Kingdom of Lesotho to which the case of the Trustees for the time being of the *Burmilla Trust and Another v President of the Republic of South Africa and Another* [2021] 1 All SA 578 (GP) relates and several other Zimbabwean farmers to which the *Luke Thembani and Others v President of the Republic of South Africa and Another* (Case No 24552/2019) relates. These two judgments, albeit in relation to exceptions raised by the South African government, are important because they reflect the courts position on the circumstances under which the South African government could be held liable for extraterritorial conduct.

Bringing claims against the South African government for extra-territorial conduct...*continued*

Although the High Court recognised that non-nationals have rights under the Constitution while they are in the Republic and in respect of acts performed by government actors within its borders, South Africa owes no duties to foreign corporate nationals for acts of and in conducting foreign policy performed outside its borders.

Brumilla

In *Burmilla*, the High Court held that Swissborough and its successors in title had no right under the South African Constitution to require South Africa and its President to uphold its terms. Although the High Court recognised that non-nationals have rights under the Constitution while they are in the Republic and in respect of acts performed by government actors within its borders, South Africa owes no duties to foreign corporate nationals for acts of and in conducting foreign policy performed outside its borders. To repeat the words of the court: "*in formulating and executing its foreign policy, South Africa is under no legal obligation to have regard to or protect the interests of foreign corporate nationals when they are doing business outside South Africa*", and that "*foreign policy must on occasion require South Africa to act to the detriment of foreign nationals in their interests and activities outside South Africa*". The High Court held that to hold otherwise and order the payment of monetary compensation to non-nationals would diminish the store of wealth available to the South African government to fulfil its constitutional obligations to its own nationals.

Thembani

In *Thembani*, the High Court held that Burmilla was correctly decided on the issue of extraterritorial conduct and was consistent with the *Constitutional Court's judgment in Kaunda and Others v President of the RSA and Others* 2005 (4) SA 235 (CC), where Chief Justice Chaskalson held that whilst non-nationals were in South Africa, they would be entitled to the protections afforded by the Constitution, but that they would lose the benefit of that protection when they move beyond South Africa's borders.

Bringing claims against the South African government for extra-territorial conduct...*continued*

The disbandment of the SADC Tribunal reflects a stagnation of the multilateral dispute resolution system in SADC, both for nationals within SADC and for investor-state dispute resolution.

Conclusion

The High Court judgments in *Burmilla* and *Thembani* clarify that extraterritorial conduct by the South African government or its functionaries which results in harm being caused to non-nationals and which conduct is also in breach of the Constitution, will not entitle those non-nationals to bring a claim for damages out of South African courts against the South African government. Importantly, the circumstances here relate to the conduct of another sovereign state (i.e., human rights abuses against its national) and that state's national then suing the South African government for its participation on a multilateral level to disband the SADC Tribunal. The causal link between the harm caused by the other states and South Africa's conduct in the disbandment of the SADC Tribunal was considered far removed. Conversely, South African nationals may have a claim against the South African government for its the extraterritorial conduct (i.e., the disbandment of the SADC Tribunal) as their access to the SADC Tribunal was removed to lodge any claims against the against the South African government for violations of their fundamental rights by the state. There is thus a much clear causation (i.e., link between the act and the harm) for South African nationals than non-nationals.

In general, the disbandment of the SADC Tribunal reflects a stagnation of the multilateral dispute resolution system in SADC, both for nationals within SADC and for investor-state dispute resolution. The adoption of the 2014 Tribunal Protocol and the later adoption of the Amendments to the Investment Protocol in 2016 have both had a profound impact on the recourse available for aggrieved nationals and/or investors within the region.

It is wishful thinking to deem South Africa's decision to withdrawal its signature to the 2014 Tribunal Protocol as making a standalone difference to current position of the multilateral dispute resolution system. Any change to the stagnation can only be done through political lobbying by the South African government with other SADC member states. It is now a wait-and-see position.

Jackwell Feris and Imraan Abdullah

A need for haste? The state's self-review of the legality of its contracts

The legality pathway to review is not only broader than PAJA, but less constrained by time limits.

In the recent case of *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* (121/2020) [2021] ZASCA 34 (7 April 2021), the SCA bemoaned the "*ever-growing, and frankly disturbing long line of cases*" wherein municipalities and organs of state seek to have the decisions underlying contracts with service providers set aside for want of legality when, more often than not, the contracts have run their course and services have been rendered.

The growth in such cases one can say is attributable to the Constitutional Court's decision in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) which held *inter alia* that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) does not apply in self-review cases, and that such reviews should be performed under the broader principle of legality instead.

The legality pathway to review is not only broader than PAJA, but less constrained by time limits. Whereas a PAJA review needs to be brought within 180 days, legality reviews have no predetermined time-bar, but may be dismissed where brought after an "*unreasonable delay*". Here too the impact of *Gijima* may be felt. Even if a delay is considered "*sufficiently more inexcusable than the possible illegality is egregious*" (i.e. an undue delay) *Gijima* enjoins courts to overlook such an unreasonable delay and declare a state's conduct "*constitutionally invalid*". This obligation is derived from section 172(1)(a) of the Constitution that requires courts to declare invalid any law or conduct it finds to be inconsistent with the Constitution.

In the *Govan Mbeki* case, the SCA was called upon by a municipality to review its own decision some 17 months after it should have reasonably been aware of the irrationality on which it relied as a ground of review (and in the instance where the municipality owed the NICS some R40 million in terms of the contract it sought to set aside).

The SCA held that such a delay was undue and inexcusable but nevertheless that it was enjoined by section 172(1)(a) of the Constitution and *Gijima* to invalidate the offending irrational component of the contract, which it found to be inconsistent with the Constitutional principles governing public procurement.

The SCA was self-evidently uncomfortable doing so. It decried the current legal regime as one within which the state entities turn to self-review as a corrective measure long after it's possible to take disciplinary action against the offending individuals. After failing their constitutional duties, state entities litigate at large, at the public expense and free of sanctions against the functionaries involved.

A need for haste? The state's self-review of the legality of its contracts...*continued*

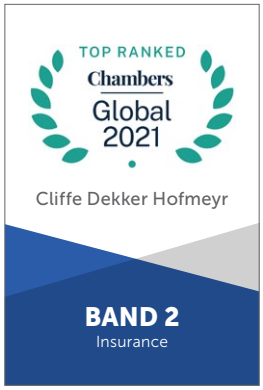
The SCA signalled to the legislature that intervention may be necessary to address the issue of delayed self-reviews, and to the Constitutional Court that *Gijima* may need to be revisited.

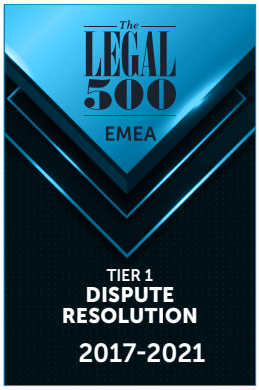
The *Govan Mbeki* case and the cases before it have the effect of placing the brunt of the burden for irrationally entered contracts on the service providers themselves, rather than the state entity. Whilst this may be desirable if the service provider obtained a tender through illegitimate means, the uncertainty as to whether an institution might self-review before payment becomes due creates a business risk for those seeking to contract legitimately with state institutions.

One way this risk can be managed is for firms seeking to contract with the state pursuant to a tender process, to be wary of incorporating additional, perhaps ancillary, work into the final contract, especially where such did not form part of the scope of work initially put out to tender.

The SCA signalled to the legislature that intervention may be necessary to address the issue of delayed self-reviews, and to the Constitutional Court that *Gijima* may need to be revisited. Until then however, private firms contracting with the state will need to take extra care to ensure that the process in terms of which their contract was concluded could withstand judicial scrutiny.

Corné Lewis, Lawrence-John Maralack and Alistair Dey-van Heerden





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Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2021.
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The LEGAL 500 EMEA

2021 RESULTS

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CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

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Chambers Global 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

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Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2021 in Band 3: Dispute Resolution.

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Joe Whittle ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Construction

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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