# PAJA vs legality

**March 2018**
*Without Prejudice*

May an organ of state invoke the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the legality review route in seeking to set aside its own decision?

The Constitutional Court in the case of *State Information Technology SOC Limited v Gijima Holdings (Pty) Ltd [2017] ZACC 40* was seized with this vexed question. In a unanimous judgment, written by Justices Madlanga and Pretorius, it was held that an organ of state cannot utilise PAJA for purposes of reviewing and setting aside its own decision and it must do so through the legality route.

## SCA judgment

SITA had appealed the decision of the Pretoria High Court, which had ruled that the decision to award the Department of Defence (DoD) an agreement and the three extensions (the agreement) thereof qualified as administrative action in terms of the provisions of PAJA and, further, that the review was brought way out of the 180-day period provided for in terms of s7(1) of PAJA.

On appeal to the SCA, Justice Cachalia writing for the majority held that the decision by an organ of state to award an agreement for services does constitute administrative action in terms of PAJA, and that the wording of s6(1) of PAJA, which allows for *any person* to institute proceedings in a court or tribunal for judicial review, is wide enough to include an organ of state. The court held that the conclusion of the settlement agreement had the capacity to affect Gijima's rights, as Gijima would have to relinquish any damages claim that it would have as a result of the cancellation of the agreement.

The appeal was dismissed with costs as the court held that litigants cannot rely on section 33(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to review unlawful administrative action, as PAJA was the correct route for that purpose.

## Constitutional Court judgment

Counsel for SITA argued that the conclusion of the agreement does not constitute administrative action as it did not adversely affect Gijima's rights under the agreement. It was further contended that even if PAJA did apply, the 180-day rule provided for in s7 of PAJA, did not apply to organs of state seeking to review their own decision.

Counsel for Gijima contended that the central question is whether an organ of state is required to explain the delay for instituting review proceedings under PAJA or the principle of legality where it seeks to set aside its own administrative decision. Gijima argued that PAJA is applicable as the decision to award the contract to Gijima had the capacity to affect its rights.

**Applicability of PAJA**

To answer this question, the court considered both PAJA and the Constitution, particularly s33 and who has the obligation to give effect to the stated rights.

The section is concerned with *everyone's rights* to procedurally fair, reasonable and lawful administrative action. Is everyone wide enough to include the state? Section 33(3)(b) provides that national legislation, in terms of s33(3), must impose a duty on the state to give effect to rights in s33(1) and (2). The court was of the view that everyone is not wide enough to include the state because it would be inconsonant for the state to be a beneficiary of the rights and the bearer of the corresponding obligation to give effect to the rights. Consequently, only private persons enjoy the rights under s33.

In interpreting the meaning of s6 of PAJA, the court stated that due regard must be given to s33 as PAJA is a legislation that was enacted pursuant to the provisions of s33(3), to give effect to s33(1) and (2). PAJA must be interpreted through the prism of s33. Therefore, s6 of PAJA cannot be interpreted on a clean slate and disregard the constitutional background. Further, the concept of "administrative action" in whatever section of PAJA cannot now be given a wider meaning than what was envisaged in the source, that is, the Constitution.

The court then moved on to look at the argument by Gijima in relation to the delay in bringing the review proceedings. Counsel for Gijima contended that an administrator is entitled to seek an extension for the period within which to bring a review under s6 and it may only do so if, in the first place, it is entitled to launch such review proceedings. The court did not agree with the argument on the basis that the 90-day period referred to in s5(2) relates to the administrator requesting an extension to the period to provide reasons and the 180-day period referred to in s7(1) relates to the time to launch the review proceedings. It held that SITA should not be excluded based on the time limits provided for in s7 of PAJA because, as concluded above, PAJA does not apply to a review of its own proceedings.

**Review under legality**

In casu, the court remarked that the award of the DoD agreement was an exercise of public power, therefore the principle of legality must be the route to have the decision reviewed. It was not in dispute that the DoD agreement was awarded in the absence of a competitive bidding process. S217 of the Constitution provides that “[w]hen an organ of state…contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective”. Based on the *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council [1998] ZACC 17* case, the way the DoD agreement was awarded was at odds with the principle of legality and therefore is liable to be reviewed and possibly set aside.

**Delay**

In dealing with the issue of the delay on the part of SITA, the court considered the cases of *Khumalo v Member of Executive Council for Education: KwaZulu Natal [2013] ZACC 49* and *Merafong City Local Municipality v AngloGold Ashanti Limited [2016] ZACC 35*. In both cases, the court acknowledged the importance of timeous compliance with constitutional prescripts. The court in both cases stated that a review must be brought without any delay, as delaying such proceedings may have a myriad of consequences.

The courts in both cases noted that the delay may weaken the court's ability to assess the unlawfulness on the facts and its ability to evaluate fully an allegation of illegality is impaired. In the case of *Merafong* Justice Cameron stated "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 on the decision but also for the efficient functioning of the decision-making body itself".

In the *Khumalo* case, the court stated that "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 the delay".

The court lastly turned to look at s172(1)(b) of Constitution, which provides that a court deciding a constitutional matter has a wide remedial power. A court is empowered to make any order that is *just an equitable*.

Disappointedly, the court missed an ideal opportunity to tabulate the factors that are taken or ought to be taken into account by our courts to determine the test of undue delay in matters of this nature.

In the case, the court stated that although the DoD agreement was invalidly awarded, SITA must not benefit. It had taken 22 months for SITA to have the decision reviewed and indeed it had repeatedly and untruthfully assured Gijima that all procurement prescripts had been complied with when it awarded the contract.

In the circumstances, stated the court, a just and equitable remedy would be to declare the DoD agreement and the subsequent extensions invalid and set them aside. However, there should be a qualification – the declaration of invalidity must not divest Gijima of any rights to which, but for the invalidity, it might have been entitled The court ruled that SITA must pay all Gijima's costs, including costs of two counsel in the High Court, the Supreme Court of Appeal and the Constitutional Court.

The upshot of this judgment is that it has provided the needed direction in terms of which route organs of state can proceed to review and set aside their invalid contracts or unlawful decisions. I anticipate a plethora of these cases in the foreseeable future, more in particular, in the absence of what it is meant by undue delay.

> Read the full article online