"FA6" 247

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 32665/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE .... DATE 18.05.2015

In the matter between:

STATE INFORMATION TECHNOLOGY AGENCY SOC LTD	Applicant
And	
GIJIMA HOLDINGS (PTY) LTD	Respondent

JUDGMENT

MATOJANE J

Introduction

[1] This is an application to set aside the main agreement and addenda which was entered into without complying with proper procurement procedures laid down in section 217 of the Constitution and supply chain management policy in circumstances where applicant has delayed in bringing the application and has permitted the respondent to perform in full on the main agreement and its addenda.

[2] The applicant seeks an order reviewing and setting aside the decision of its own functionaries to appoint the respondent to provide information technology hardware, maintenance and support services to an organ of state by circumventing the peremptory requirement of the Promotion of Administrative Justice Act[1] ("PAJA") and relying directly on sections 2 and 217 of the Constitution and the principle of legality.

[3] The respondent contends that this application ought to have been brought in terms of PAJA and within 180 days from the date on which the agreement was concluded.

The parties

[1] Act 3 of 2000

[4] The respondent, a listed company, is one of South Africa's leading information and communication technology services companies. It services both private and public entities.

[5] The applicant is the State Information Technology Agency. It is incorporated by the State Information Technology Act[2] ("SITA Act"). It is subject to and bound by, *inter alia*, section 217 of the Constitution of the Republic of South Africa Act, the Public Finance Management Act[3] ("PFMA"), and the SITA Act. The Preferential Procurement Policy Framework Act and its regulations apply to the applicant when it procures goods and services and so does applicant's supply chain management policy.

Salient common cause or admitted facts

[6] On 27 September 2006, the applicant and the respondent entered into an agreement in terms of which the respondent, on behalf of the applicant, was to provide information technology services to the South African Police Service ("SAPS agreement").

[7] The respondent performed in terms of the agreement and the agreement was extended on various occasions. On 25 January 2012 the applicant unlawfully attempted to terminate the SAPS

[2] Act 88 of 1998
[3] Act 1 of 1999

agreement. This repudiation threatened to cause the respondent significant damage and it stood to suffer at least R20 million in lost revenue.

[8] On 1 February 2012 the respondent brought an urgent application seeking an order compelling applicant to comply with its obligations in terms of the SAPS agreement. The urgent application was settled in terms of a confidential agreement concluded between the respondent and applicant, the settlement agreement was not made an order of court. The intention of the settlement agreement was to compensate the respondent for the losses that the applicant's unlawful termination of the SAPS agreement would cause the respondent.

[9] In terms of the settlement agreement respondent was appointed for the provisioning of hardware maintenance and support services for the Department of defence.

[10] During the currency of the main agreement and its addenda, a payment dispute arose between the applicant and the respondent. The respondent contended that it was short paid by the applicant. This caused the respondent, after the termination of the main agreement and addenda by the effluxion of time to refer the payment dispute to arbitration. In its plea in the arbitration, the

applicant, for the first time contested the validity of the main agreement and its addenda on the basis that the agreement and addenda breached the constitution. On 20 March 2014 the arbitrator ruled that he could not determine the validity of the agreement on the basis of the constitutional challenge. After some delay, in May 2014 the applicant brought the present application to set aside the main agreement and its three addenda.

Legislative framework

[11] At common law, the High Court has inherent jurisdiction to review administrative decisions and to set aside or correct them in order to remedy invalid administrative action[4]. It is now trite law that reviews under the principle of legality are competent where PAJA finds no application. Ngcobo J in **Affordable Medicines Trust & others v Minister of Health & others**[5] explained its underlying constitutional foundation as follows:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."

[4] [4] Johannesburg Consolidated Investments Co v Johannesburg Town Council 1903 TS 111 at 115.

[5] 2006 (3) SA 247 (CC) para 49:

[12] The reviews under the principle of legality must still be brought without unreasonable delay and courts have the power to refuse a review application in the face on an undue delay. The delay in reviewing unlawful administrative action my render it unassailable. The Supreme Court of Appeal in Opposition **to Urban Tolling Alliance v Sanral**[6] judgment stated in paragraph 36 that:

> "The fourth basis invoked by the appellants as to why the 180-day time bar should be extended was that it is a requirement of the rule of law that the exercise of all public power should be lawful and that SANRAL and the government has failed to act legally. As I see it, however, the argument is misconceived. While it is true that the principle of legality is constitutionally entrenched, the constitutional enjoinder to fair administrative action, as it has been expressed through PAJA, expressly recognises that even unlawful administrative action may be rendered unassailable by delay."

[13] In **Allpay Consolidated Investment Holdings (Pty) Ltd v. Chief Executive Officer, South African Social Security Agency and Other**[7] the Constitutional Court explained the legislative framework for procurement policy under the Constitution, PFMA and PAJA as follows:

> "Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA. The central focus of this

[6] [2013] 4 All SA 639 SCA
[7] 2014(1) SA 604 (CC) ("Allpay I")

enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA. There is no magic in the procurement process that requires a different approach. Alleged irregularities may differ from case to case, but they will still be assessed under the same grounds of review in PAJA. If a court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy. That enquiry must entail weighing all relevant factors, after the objective grounds for review have been established."

[14] In **Bato Star fishing (Pty) Ltd v Minister of Environmental Affairs**[8] O'Reagan J confirmed that ("PAJA") gives effect to section 33[9] of the Constitution of the Republic of South Africa ("The Constitution")[10]. Accordingly, the cause of action for the judicial review of administrative action ordinarily arises from PAJA and not the common law, as in the past.

[15] Section 172 of the Constitution regulates the powers of the Court in respect of constitutional matters. Section 172 (1) provides as follows:

(1) When deciding a constitutional matter within its power, a court-

(a) Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

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[8] 2004 (4) SA 490 (CC) para 25.

[9] Section 33 provides that: "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[10] The long title of PAJA reads: " To give effect to the right to administrative action is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in secion 33 of the Constitution of the Republic of south Africa, 1996: and to provide for matters related hereto."

(b) May make any order that is just and equitable,including–

(ii) An order limiting the retrospective effect of the declaration of invalidity; and

(iii) An order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[16] The applicant contends that the appointment of the respondent was made and the resultant agreement concluded in order to comply with the settlement agreement and not in terms of a power vested upon the applicant by any legislation. Applicant submit in its heads of argument and in court that the conclusion of the agreement is not a decision and does not fall under the definition of administrative action contained in section 1 of PAJA. This submission is in my view, incorrect.

[17] In **MEC for Health, EC v Kirland Investments**[11] Cameron J confirmed that decisions taken because of unauthorized or unwarranted dictates of another person or body constitutes administrative action that is reviewable. It follows that an unlawful decision is still a decision for purposes of PAJA[12]. Section 1 of PAJA defines a "decision" to mean, "any decision of an administrative nature made, proposed to be made or *required to be made*, as the case may be under an empowering provision". Cameron J further

[11] 2014(3) SA 481 par 96
[12] s 6(2)(e)(iv)

stated that a decision might exist if an administrator is required to make a decision but as a matter of fact has not decided[13]. In the present matter the conclusion of the agreement even if unauthorized is a decision as defined.

[18] SITA is exercising a public function in spending public funds for information technology services required by the Defence force. It is empowered by Sita Act to provide information technology systems and related services on behalf of participating departments and organs of state, an in regard to these services, act as an agent of the Government.

[19] It follows therefore that the decision to award and renew the main agreement, qualifies as an administrative act [14] and PAJA is implicated. It is common cause that the tender process required by section 217 of the Constitution, the Procurement Act and the Public Finance management Act were not complied with. The appropriate legislation to judicially review such decision is s 6 of PAJA - in particular that the decision maker was not authorised to take the decision [s 6 (2) (a) (i)], that a mandatory and material procedure or condition was not complied with[s 6 (1) (b)], and that the action

[13] Para 94
[14] Millennium Waste Management (Pty) Ltd v Chairperson Tender Board :Limpopo Province and others 2008(2)SA 481 (SCA) at para 4 and 21

contravenes a law or is not authorised by the empowering provision s 6(2)(f)(i).

[20] Section 6 of PAJA is subject to s 7 which reads:

> "(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
> (a) . . .
> (b) . . . on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

[21] Section 9 of PAJA allows the time period of 180 days to be varied only "by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned."

[22] On the facts, applicant should have reviewed the award of the main agreement by not later than, 14 January 2013, it has brought this review application some 14 months out of the 180-day time in terms of PAJA. The applicant has provided no explanation for its delay in bringing the present application nor sought an extension of the 180-day time period by applying to court. This delay is *per se* unreasonable and has validated the decision by applicant to appoint

the respondent to provide hardware, maintenance and support services to the Department of Defence

[23] In **Opposition to Urban Tolling Alliance v South African National Roads Agency Limited**[15] the SCA emphasized that a review after the time period of 180 days prescribed by section 7(1) is unreasonable, the court stated at para 26 that :

> "At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg *Associated Institutions Pension Fund and others v Van Zyl and others* **2005 (2) SA 302** (SCA) para 47). Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay (see eg *Associated Institutions Pension Fund* para 46). That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg *Camps Bay Ratepayers' and Residents' Association v Harrison* **[2010] 2 All SA 519** (SCA) para 54)."

[15] [2013] 4 All SA 639 (SCA) para 26

[24] In my view, it will not be in the interest of justice to grant an extension in terms of s 9 since the respondent has fully performed on its obligations in terms of the main agreement and its addenda and its invoices has been paid and applicant did not at any stage raise its concerns regarding the validity of the agreement.

[25] Froneman J, **in Allpay Consolidated investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and Others,**[16] explained the co-operative effect of section 172 (1) of the Constitution and section 8 of PAJA as follows:

> "Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172 (1) (a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172 (1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy."

[26] In the present matter the applicant's ground of review of the award and extention of the main agreement falls within the ambit of the grounds set out in section 6(2) of PAJA. Applicant states it its founding affidavit *inter alia* that (a) there was no public invitation to interested parties to submit tenders for the provision of the goods

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[16] [2014(1) SA 604, para 25

and services provided for in the agreement (b) the respondent did not submit a tender for the provision of the goods and services provided for in the agreement (c) The Respondent's goods and services were not assessed to determine if the agreed upon price was competitive and cost effective (d) the process which led to the conclusion of the agreement was not fair in that other service providers were not publicly invited to submit tenders for the provision of goods and services in issue.

[27] Applicant submit in its head of argument and it court that the relief it seeks is contemplated in section 172(1) of the Constitution and does not depend on the applicant having first invoked PAJA due to the fact that the applicant does not rely on a contravention of section 6 of PAYA.

[28] Firstly, the applicant cannot disavow PAJA and claim to bring this review directly on the principle of legality. Applicant must bring its claim under PAJA which has been enacted to give effect to section 33 of the Constitution. The application falls to be dismissed on this ground alone.

[29] In New Clicks[17] Chief Justice Chaskalson explained at par 95 that:

[17] Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (CCT 59/2004) [2005] ZACC 14; 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC)

"PAJA is the national legislation that was passed to give effect to the rights contained in section 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.

A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights in section 33 to be given effect to by means of national legislation."

Ngcobo J elaborated on this duty as follows:-

"Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on s 33(1) of the Constitution and on common-law when PAJA, which was enacted to give effect to s 33 is applicable, is, in my view, inappropriate. It will encourage the development of two parallel systems of law, one under PAJA and another under s 33 and the common law."

[30] Secondly, while the principle of legality generally requires that invalid administrative acts should be set aside, the court has a discretion to refuse this remedy in the interest of finality of administrative decisions and the exercise of administrative functions[18]. This normally arises in the context of " third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside[19]. It is not in dispute that there was an extensive negotiations process preceding the main agreement and before each extension of the main agreement. The applicant did not at any stage

[18] Associated Institutions Pension Fund and Others v Van Zyl and Others 2005(2) SA 302 par 46

[19] Bengwenyama Minerals at par 84

raise its concerns regarding the validity of the agreement. The respondent performed on the main agreement and its addenda and provided invoices for its services to senior representatives of the applicant who authorised payment of the invoices. During negotiations over the payment dispute between applicant and respondent, applicant never raised concerns with the validity of the main agreement and its addenda.

[31] The applicant did not make an application for the condonation of his delay in bringing the application and did not offer any explanation for the delay. In my view, the applicant has unreasonably delayed in bringing the present application to the prejudice of the respondent who has performed in full in terms of the main agreement and its addenda.

[32] Even if the court was to condone applicant's failure to comply with the peremptory provisions of PAJA as well as the unreasonable delay in bringing the review application, valid grounds for review exists and the Court must consider a just and equitable remedy to address the consequences of the constitutionally required declaration of unlawfulness.[20]

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[20] **Allpay Consolidated Investment Holding (Pty) Ltd** *supra* , para 45.

[33] In **Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others**[21] it was held that:

> "The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent."

[34] Moseneke DCJ in **Steenkamp NO v Provincial Tender Board, Eastern Cape:**[22] stated:

> "The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative action... Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."

[35] Froneman J, in the **Allpay** decision on remedy confirmed that the default position requires that the consequences of invalidity must be corrected or reversed where they can no longer be prevented and that such approach accords with the rule of law and the principle of legality;[23] The court explained that this corrective approach, in the context of public procurement, operates at different levels; firstly, the corrective approach is applied to correct the wrongs that led to the declaration of invalidity (by having regard to the constitutional principles governing public procurement);secondly, in giving priority

[21] 2011 (4) SA 113 (CC) at paras 84 and 85.
[22] [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 29.
[23] **Allpay (judgment on remedy)** *supra* at para 30,

to the public good, the public interest must be assessed in relation to: (a) the immediate consequences of the declaration of invalidity; and (b) the effect of the order on future procurement;[24]

[36] The court emphasised that "a just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position. It may lie somewhere in between..."[25].

[37] In my view, it will not be just and equitable to set aside the main agreement and its addenda for the following grounds. Firstly, for a lengthy period of time, the applicant has received the services for which it contracted for in the main agreement and its addenda. Substantial payments have been made to the respondent and the services cannot be reversed. The only dispute is the alleged under invoicing for services rendered which has been referred for arbitration.

[38] Secondly, there is no indication of corruption or wrongdoing by respondent at all for the applicant's non-compliance with section 217 of the Constitution. Both parties have throughout considered

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[24] **Allpay Consolidated Investment Holdings (Pty) Ltd** (judgment on remedy) para 32.
[25] Allpay Consolidated Investment Holdings (Pty) Ltd (judgment on remedy) para 39.

themselves bound by the contract and the addenda thereto and the contract has been duly executed and performed. **264**

[39] Thirdly, there are no disappointed tenders who wasted resources tendering and who stand to benefit by the setting aside of the main agreement and its addenda. Lastly and most importantly, the respondent forfeited contractual damages against applicant in excess of R20 million in the settlement negotiations that ultimately let to the conclusion of the main agreement and its addenda.

[40] With regard to the costs, I am of the view that the complexity of this matter justifies the costs of employment of two counsel.

[41] In the result the following order is made:

1. The application is dismissed with costs, including the costs of two counsels.

K E MATOJANE
JUDGE OF THE HIGH COURT