CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 254/16

In the matter between:

STATE INFORMATION TECHNOLOGY AGENCY SOC LIMITED Applicant

and

GIJIMA HOLDINGS (PTY) LIMITED Respondent

Neutral citation:	*State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Madlanga J and Pretorius AJ (unanimous):
Heard on:	9 May 2017
Decided on:	14 November 2017

ORDER

On appeal from the Supreme Court of Appeal the following order is made:

1. Leave to appeal is granted.

2. The appeal is upheld in part.

3. The order of the High Court of South Africa, Gauteng Division, Pretoria is set aside, and replaced with the following:

   (a) The applicant's decision to appoint the respondent as a DSS service provider under a contract which was to be effective from 1 April 2012 to 31 July 2012 and all decisions in terms of which the contract was extended from time to time are declared constitutionally invalid.

   (b) The order of constitutional invalidity in paragraph 3(a) does not have the effect of divesting the respondent of any rights it would have been entitled to under the contract, but for the declaration of invalidity.

4. The applicant must pay the respondent's costs, including costs of two counsel, in the High Court, the Supreme Court of Appeal and in this Court.

JUDGMENT

MADLANGA J AND PRETORIUS AJ (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mhlantla J, Mojapelo AJ and Zondo J concurring):

Introduction

[1] By what means may an organ of state seek the review and setting aside of its own decision? May it invoke the Promotion of Administrative Justice Act[1] (PAJA)? Or, is the appropriate route legality review? These are the questions that must be determined in this matter. An answer given by a majority of the

[1] 3 of 2000.

Supreme Court of Appeal was that PAJA is the appropriate avenue. This is an application for leave to appeal against that decision.

[2] We must emphasise that the issue has nothing to do with a scenario where an organ of state that is in a position akin to that of a private person (natural or juristic) may be seeking to review the decision of another organ of state. Nor are we concerned with a situation where – in seeking a review of its own decision – an organ of state is purporting to act in the public interest in terms of section 38 of the Constitution. Those questions are not before us. Thus in this judgment any statement about the power that an organ of state has or does not have to seek the review of its own decision under PAJA does not go beyond what we are concerned with here.

Background

[3] The applicant, the State Information Technology Agency SOC Limited (SITA), provides information technology services (IT services) to State departments. It does this by concluding agreements with private service providers which then do the actual work of providing IT services to State departments. A department requiring IT services submits a business case and user requirements to SITA. SITA prepares a procurement schedule for the execution of a request bid and a detailed costing for the proposed contract. SITA concludes a business agreement with the relevant department for IT services. Then a procurement process follows, after which SITA enters into an agreement with the successful private service provider for the provision of IT services to the relevant department. The respondent, Gijima Holdings (Pty) Limited (Gijima), is one of the private service providers whose services have in the past been enlisted by SITA.

[4] On 27 September 2006 SITA and Gijima concluded an agreement (SAPS agreement) in terms of which Gijima was required to provide IT services to the South African Police Service on behalf of SITA. Gijima performed in terms of that agreement. The agreement was extended several times. On 25 January 2012 SITA terminated it with effect from 31 January 2012.

[5] As a result of this, Gijima instituted an urgent application against SITA in the High Court of South Africa, Gauteng Division, Pretoria (High Court) on 1 February 2012. SITA and Gijima entered into a settlement agreement on 6 February 2012. This agreement was intended to compensate Gijima for the loss of approximately R20 million that it would have suffered as a result of SITA's termination of the SAPS agreement. The settlement agreement was not made an order of court. The urgent application was then removed from the court roll.

[6] In terms of the settlement agreement Gijima was appointed as the DSS[2] service provider for the KwaZulu-Natal Health Department from 1 March 2012 to 31 July 2012 and for the Department of Defence (DoD) from 1 April 2012 to 31 July 2012 on SITA's standard terms applicable to agreements of that nature. It was agreed that SITA would comply with all its internal procurement procedures in respect of these two agreements. Throughout, Gijima was concerned whether SITA had complied properly with its procurement processes. SITA assured Gijima that it had the authority to enter into the settlement agreement. It inserted the following term into the DoD services agreement (DoD agreement) at the insistence of Gijima:

> "SITA unconditionally warrants, undertakes and guarantees that it has taken all steps necessary to ensure compliance to any relevant legislation governing the award of the Services to the Service Provider and specifically towards ensuring that this Agreement is entirely valid and enforceable, including but not limited to the Public Finance Management Act 1 of 1999. Indemnifies the Service Provider against any loss it may suffer should this warranty be infringed."

[7] After entering into the settlement agreement, protracted negotiations took place between the parties. At a meeting at which the DoD agreement was concluded, SITA's former executive for supply chain management once more allayed Gijima's fears by giving the assurance that SITA's executive committee had the power to authorise agreements up to an amount of R50 million.

[2] This is an unexplained tag given in the contract.

[8] The DoD agreement was extended by addenda on several occasions, namely on 20 September 2012, 21 December 2012 and then, for the last time, on 8 April 2013. On 30 May 2013 SITA informed Gijima that it did not intend to renew the DoD agreement any further.

[9] A payment dispute arose. As at 30 May 2013 SITA allegedly owed Gijima an amount of R9 545 942.72. When the dispute could not be resolved, Gijima instituted arbitration proceedings in September 2013. SITA resisted the claim on the basis that the DoD agreement, as well as the three extending addenda that followed it, were invalid as there was non-compliance with the provisions of section 217 of the Constitution when the parties concluded the agreement. SITA was adopting this stance for the first time as it had always assured Gijima that all relevant procurement processes had been complied with. SITA also argued that Gijima had not performed in terms of the DoD agreement and the three addenda. On 20 March 2014 the arbitrator issued an award. He held that he did not have jurisdiction to adjudicate the question whether proper procurement processes had been followed.

[10] SITA approached the High Court to set aside the DoD agreement and the three addenda. The High Court held that the decision to award and renew the DoD agreement qualified as administrative action in terms of the provisions of PAJA.[3] It further held that the review had been brought way out of the 180-day period stipulated in section 7(1) of PAJA[4] and that SITA had not sought an extension of this period.[5]

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[3] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2015] ZAGPPHC 1079 (*High Court judgment*) at para 19.

[4] Section 7(1) provides:

> "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—
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> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
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> (b) when no such remedies exist, 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."

The Court could not find any basis for extending the period. It concluded that it would not be just and equitable to set aside the DoD agreement and the addenda.[6] Consequently, the application was dismissed with costs.

[11] SITA turned to the Supreme Court of Appeal. Writing for the majority, Cachalia JA held that a decision by an organ of state to award an agreement for services constitutes administrative action in terms of PAJA.[7] The majority also held that the wording in section 6(1) of PAJA, which allows *any person* to institute proceedings in a court or tribunal for the judicial review of an administrative action, is wide enough to include organs of state.[8] It found that the conclusion of the settlement agreement had the capacity to affect Gijima's rights.[9] This was because the effect of this agreement was that Gijima was to forego any damages claim that it might have had as a result of the cancellation of the SAPS agreement. The Court further held that SITA's repeated assurances that the DoD agreement had been validly concluded would have created a legitimate expectation that that contract would be honoured.[10] It also held that litigants cannot rely on section 33(1) of the Constitution or common law when reviewing unlawful administrative action.[11] For that reason, PAJA was the vehicle to use for that purpose. The appeal was dismissed with costs.

[12] In a minority judgment, Bosielo JA held that it was legally permissible for SITA to launch review proceedings under the principle of legality, as there was no clarity on whether organs of state were obliged to institute review proceedings under PAJA.[12] He further held that it would be subversive of the obligation contained in

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[5] *High Court judgment* above n 3 at para 22.

[6] Id.

[7] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] ZASCA 143; 2017 (2) SA 63 (SCA) (*SCA judgment*) at para 16.

[8] Id.

[9] Id at para 19.

[10] Id.

[11] Id at para 33.

[12] Id at paras 63 and 67.

section 7(2) of the Constitution[13] for a court to deny an applicant its right to attack the constitutionality of an agreement simply because it opted for an attack based on the principle of legality and not on PAJA.[14]

[13] In this Court, SITA contended that PAJA does not apply. It argued that the conclusion of the agreement did not constitute administrative action as it did not adversely affect Gijima's rights; on the contrary, the decision to award the DoD agreement had benefited Gijima. SITA further contended that, even if PAJA did apply, the 180-day rule contained in section 7 of PAJA did not apply to organs of state seeking the review of their own decisions. On this, SITA submitted that none of the dates from which – in terms of section 7(1) – the 180-day period is computed could possibly apply to an organ of state seeking the review and setting aside of its own decision. SITA further submitted that no explanation for the delay was needed.

[14] SITA maintained that there is nothing in the Constitution nor PAJA suggesting that the right to lawful administrative action is exercisable by an organ of state *by itself* and *against itself*. Put differently, it is inconceivable that an organ of state can assert the right to lawful administrative action against itself, but then complain to itself that it has violated its own right to lawful administrative action and seek to invoke PAJA against itself. By way of illustration and with reference to section 5 of PAJA,[15] SITA argued that it is difficult to comprehend how an organ of state can request from itself reasons for its own action.

[15] Gijima contended that the central question is whether an organ of state, seeking to set aside its own administrative decision, is required to explain its delay in

[13] Section 7(2) provides: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[14] *SCA judgment* above n 7 at para 55.

[15] Section 5(1) provides:

> "Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action."

instituting review proceedings either under PAJA or under the principle of legality. It asserted that there was no explanation as to how and when SITA became aware of the alleged invalidity of the agreement and the reason for the inordinate delay.

[16] Gijima argued that PAJA applies in the present circumstances as SITA's decision to award the contract to it had the capacity to affect its rights. If, for instance, one considers the matter from the angle of a person that – as a result of non-compliance with proper procurement procedures – was denied the opportunity to submit a bid, the rights of that would-be competitor would be adversely affected. From that perspective, the award of the DoD agreement would certainly be administrative action. On this, Gijima contended that it is untenable for SITA to suggest that the award of the DoD agreement would be or not be administrative action, depending on the identity of the person complaining about it. In providing specificity on its rights that would be affected, Gijima pointed to the fact that SITA prompted it to settle its claim against SITA arising from the unlawful termination of the SAPS agreement. Further, Gijima submitted that the language of section 6 of PAJA was wide enough to permit even an approach to a court or tribunal by an organ of state for the review of its own decision.

Jurisdiction and leave to appeal

[17] This matter raises an important constitutional issue relating to the proper interpretation and application of PAJA. The question whether PAJA applies when an organ of state seeks to review its own conduct has not yet been decided by this Court. It is a question of some import. There are reasonable prospects of success. The interests of justice dictate that the question be finally and authoritatively determined by this Court. Leave to appeal must thus be granted.

Does PAJA apply?

[18] The answer to this question must surely turn on an interpretation of the Constitution and PAJA. In this regard, the most relevant section of the Constitution is

section 33.[16] Before we engage in an interpretation of the Constitution and PAJA, we think it necessary to consider the philosophical underpinnings of the very notion of whom fundamental rights are meant to protect. It is quite axiomatic – it seems to us – that fundamental rights are meant to protect warm-bodied human beings[17] primarily[18] against the State. Why this discussion then? We think it will help inform the interpretative exercise on whether PAJA applies when organs of state seek the review of their own decisions.

[19] That the creation of fundamental rights was about the protection of *human beings* finds expression in the *First Certification Judgment*. There this Court said:

> "The movement to recognise and protect the fundamental rights of all *human beings* gained increased momentum in the international arena from the end of the Second World War. In 1945, the Charter of the United Nations was signed. Among its aims were the achievement of 'international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all' (article 1(3)). This ambition was given further voice by the 1948 Universal Declaration of Human Rights ('UDHR'). Then in 1966, in order to give these rights the binding force of international obligations, the General Assembly of the United Nations adopted the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights ('ICCPR' and 'ICESCR'). The adoption of the UDHR led also to the

[16] This section provides:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
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> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
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> (3) National legislation must be enacted to give effect to these rights, and must—
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> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
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> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
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> (c) promote an efficient administration."

[17] Of course, because of their legal personality, juristic persons also enjoy the protection of some fundamental rights.

[18] We deliberately use "primarily" because we are well aware of the reality that, depending on certain factors, private persons also do bear obligations to respect and protect certain fundamental rights.

> drafting of regional instruments such as the European Convention on Human Rights and Fundamental Freedoms in 1951, the European Social Charter in 1961, the American Convention on Human Rights in 1969 and the Banjul Charter on Human and Peoples' Rights in 1981. These developments in the international sphere were mirrored in various national constitutions, many of which now contain bills of rights."[19] (Emphasis added.)

[20] When the interim Constitution[20] was adopted, the preamble characterised what is known as the Constitutional Principles (CPs) as a solemn pact in the following terms:

> "AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles."

[21] It is out of CP II that the Bill of Rights was born. That principle read:

> "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution."

[22] In the *First Certification Judgment* the Court explained that, in using "fundamental rights, freedoms and civil liberties", "[w]hat the drafters had in mind were those rights and freedoms recognised in open and democratic societies as being the inalienable entitlements of *human beings*".[21] As to what those rights are, there is – as this Court put it – "no finite list"; "[e]ven among democratic societies what is recognised as fundamental rights and freedoms varies in both subject and formulation

[19] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification Judgment*) at fn 46.

[20] Act 200 of 1993.

[21] *First Certification Judgment* above n 19 at para 50. Again the emphasis is ours.

from country to country, from constitution to constitution, and from time to time".[22] But what is the significance of the drafters' use of "universally accepted" in relation to "fundamental rights, freedoms and civil liberties"? The Court explains:

> "Although a strict literal interpretation should not be given to 'universal', for that may result in giving little content to CP II, it nevertheless establishes a strict test. It is clear that the drafters intended that only those rights that have gained a wide measure of international acceptance as fundamental human rights must necessarily be included in the [new text of the Constitution]. Beyond that prescription, the [Constitutional Assembly] enjoys a discretion."[23]

[23] Part of what was at issue in the *First Certification Judgment* were contentions by some that the proposed new text of the Constitution went too far or did not go far enough.[24] The Court clarified the position thus:

> "The 'universally accepted fundamental rights, freedoms and civil liberties' required by the CP is a narrower group of rights than that entrenched by the [interim Constitution]. We emphasise this point because in several instances objectors argued that [Chapter 2 of the new text of the Constitution] should fail certification because the scope of a particular [provision of the new text] falls short of – or goes further than – the corresponding provision in the [interim Constitution]. That is not the test. Although it is true that the drafters of the CPs also drafted [Chapter 3 of the interim Constitution] and had its provisions in mind in plotting the guidelines for the [Constitutional Assembly], they expressly did not bind it to draft a bill of rights identical to that in the [interim Constitution]. To the extent that the [interim Constitution] afforded rights which went beyond the 'universally accepted' norm, the [Constitutional Assembly] was entitled to reduce them to that measure. By like token, the [Constitutional Assembly] was entitled to formulate rights more generously than would be required by the 'universally accepted' norm, or even to establish new rights. It should be emphasised that in general the Bill of Rights

[22] Id.

[23] Id at para 51.

[24] Id at para 52.

> drafted by the [Constitutional Assembly] is as extensive as any to be found in any national constitution."[25]

[24] That is the context in which we came to have our Bill of Rights. And the context explains why the reach of the content of the Bill of the Rights may be more extensive than most bills of rights. But, based on this Court's pronouncement that fundamental rights differ "from country to country, from constitution to constitution, and from time to time",[26] whatever is contained in our Bill of Rights is very much a fundamental right. And that is true of all rights regardless of whether some may be recognised not universally, but only in South Africa or a few countries. For that reason, the right to just administrative action enshrined in section 33 of the Constitution is a fundamental right like any other.

[25] The right to just administrative action has particular significance in the South African context. Hoexter explains that during the apartheid era, administrative law was used as "an instrument of oppression, a means of recognising and facilitating the use of wide discretionary power which was conferred for deliberately discriminatory ends".[27] Because of parliamentary sovereignty, even courts could not do much to curb the excesses of the apartheid government. Hoexter blames part of the judiciary[28] for "self-imposed factors constraining [it]". She writes:

> "The most important of these were the courts' generally parsimonious attitude towards administrative justice and their exaggerated deference to other branches of government, which at times made them 'all too willing partners, displaying what virtually amounts to a phobia of any judicial intervention of the exercise of powers by administrative agencies.'"[29]

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[25] Id.

[26] Id at para 50.

[27] Hoexter *The Transformation of South African Administrative Law since 1994 with Particular Reference to the Promotion of Administrative Justice Act 3 of 2000* (Thesis submitted in fulfilment of the requirements of the Degree Doctor of Philosophy, University of the Witwatersrand, 2009) at 231.

[28] We use "part of" because of her use of "generally"; see the quote that follows.

[29] Hoexter above n 27 at 231.

[26] So obnoxious and unjust was South Africa's administrative law that Corder says it "ha[d] [deservedly] been called a 'dismal science'".[30] All this explains the need for a significant overhaul of South Africa's administrative law. Needless to say, the intended beneficiaries of the change were private persons (natural and juristic). The State was to be the bearer of any obligations brought about by the innovation. In this context, we can conceive of no reason why an organ of state seeking to review its own decision could ever have been meant also to be a beneficiary. After all, it was the conduct of organs of state that had necessitated the change.

[27] Does section 33 of the Constitution, which is at the centre of the innovation, shed a different light to that gleaned from this background? This section is primarily concerned with "everyone's" right to procedurally fair, reasonable and lawful administrative action. Is "everyone" in this section so wide as to extend to the State? We think not.[31] Section 33(3)(b) provides that national legislation, which – in terms of section 33(3) – has to give effect to the section 33 rights, must impose a duty *on the State* to give effect to the rights in section 33(1) and (2). It seems inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights. This must, indeed, be an indication that only private persons enjoy rights under section 33.

[28] Let us look more closely at the rights themselves. We have mentioned the one created by section 33(1), which is the right to lawful, reasonable and procedurally fair administrative action. If the State holds this right, who is the correlative duty-bearer? Put differently, from whom would an organ of state whose own decision is the subject of its concern expect this lawful, reasonable and procedurally fair administrative action? From itself? That simply cannot be. Section 33(2) affords a person whose rights have been adversely affected by administrative action a right to be given written reasons. Surely, it could never have been the object of the section that an organ of state should – like private persons – also enjoy a right to be furnished, by itself,

[30] Corder "Introduction: Administrative Law Reform" (1993) *Acta Juridica* 1 at 1. (Footnote omitted.)

[31] What we express here should be viewed in the light of what we say in [2].

written reasons for administrative action taken by itself. What purpose would a right of that nature serve? None whatsoever.

[29] In the end, we are fortified in the conclusion that section 33 of the Constitution creates rights enjoyed only by private persons. And the bearer of obligations under the section is the State.

[30] Given this interpretation of section 33 of the Constitution, does the language of section 6 of PAJA extend to an organ of state seeking the review of its own administrative action? In answering this question, a fact that should be paramount is that PAJA is legislation that was enacted pursuant to the provisions of section 33(3) of the Constitution to give effect to the rights contained in section 33(1) and (2) of the Constitution.[32] PAJA must therefore be interpreted through the prism of section 33 of the Constitution.

[31] Section 6(1) of PAJA provides that "[a]ny person may institute proceedings in a court or tribunal for the judicial review of an administrative action". Section 6(2) then itemises the grounds on which a court or tribunal may undertake this review. When decreeing – in section 33(3) – that national legislation must be enacted to, *inter alia*, "provide for the review of administrative action", the reference to "administrative action" in this section must surely be a reference to the earlier "administrative action" referred to in section 33(1) and (2). The Constitution thus envisages that – in making provision for the review of administrative action – the national legislation must direct itself to the administrative action referred to in section 33(1) and (2). We have already concluded that the right to administrative action that is lawful, reasonable and procedurally fair (section 33(1)) and the right of everyone whose rights have been adversely affected to be given written reasons (section 33(2)) are enjoyed by private persons, not organs of state. Therefore, when

[32] *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 95 and 433 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25.

section 33(3)(a) stipulates that national legislation which provides for the "review of administrative action" must be enacted, that can only be administrative action that relates to the rights enjoyed by private persons under section 33(1) and (2).

[32] That being the case, it escapes us how – in reading section 6 of PAJA – one would start on a clean slate and disregard all this constitutional background. The concept of "administrative action" in whatever section of PAJA cannot suddenly have a meaning wider than that envisaged by the source of the concept, namely the Constitution. Unsurprisingly, PAJA itself recognises that it was enacted to "give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution . . . and to provide for matters incidental thereto".[33] Surely then, the same parameters that delineate the ambit of "administrative action" in section 33 of the Constitution apply to "administrative action" under PAJA.

[33] Does the provision in section 9 of PAJA that an "administrator" may apply for an extension of time support Gijima's argument? Section 7(1) provides for a 180-day limit within which to bring review proceedings under section 6.[34] Section 9(1) provides that this limit may be extended by a court or tribunal on application by "the person or administrator concerned".[35] According to Gijima this means an

[33] See PAJA's long title.

[34] Section 7(1) of PAJA provides:

> "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—
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> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
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> (b) where no such remedies exist, 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."

[35] Section 9 of PAJA reads:

> "(1) The period of—
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> (a) 90 days referred to in section 5 may be reduced; or
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> (b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement,

administrator is entitled to seek an extension of the period within which to bring a review under section 6. And it may only do so if, in the first place, it is entitled to launch a review under section 6.

[34] This argument is without merit. Context is important. In section 5(2) the administrator is required to give reasons within 90 days of receipt of a request. In terms of section 7 a person must lodge an application for review within 180 days of the stipulated date. When section 9 says "the period of 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period . . . on application by the person or administrator concerned", all it means is that the 90-day period applicable to the administrator may be extended on application by the administrator and the 180-day period applicable to the person seeking review in terms of section 6 may be extended on application by that person. We now know who enjoys the right to bring review proceedings under section 6.

[35] In sum, SITA ought not to have been non-suited on the basis of the time limit in section 7 of PAJA because PAJA does not apply to the review of its own decision.

[36] The majority judgment in the Supreme Court of Appeal suggests that an approach that says, in circumstances as we have here, PAJA is not available to organs of state as a vehicle for review may make it easy for them to escape accountability.[36] Indeed, Gijima asserted that SITA simply wished to avoid the provisions of PAJA. The Supreme Court of Appeal, relying on *Kirland*,[37] held that there was no "justification for permitting the State, with all the resources at its disposal, not to be subjected to the exacting requirements of PAJA in the way that all

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by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

[36] *SCA judgment* above n 7 at para 30.

[37] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*).

other litigants are".[38] In *Kirland*, the organ of state concerned had taken a decision that overturned its earlier decision. It averred that it had done so because the earlier decision was vitiated by impropriety. Of importance, it had taken a conscious decision not to seek the review and setting aside of the earlier decision because that decision had been taken well over the 180-day time limit for instituting review proceedings provided for in section 7 of PAJA.[39] Obviously, it had adopted this stance because it was under the impression that a review of the earlier decision would have had to be under PAJA. Thus it was not an issue in *Kirland* whether PAJA applies to an organ of state seeking to have its own decision reviewed. So, *Kirland* is distinguishable and cannot provide an answer to the issue at hand.

[37] The Supreme Court of Appeal also makes the point that no sane applicant would submit to PAJA's definition of administrative action or to the strict procedural requirements of section 7 if he or she had a choice and that, as a result, PAJA would soon become redundant.[40] We do not agree. The point of the matter is that no choice is available to an organ of state wanting to have its own decision reviewed; PAJA is simply not available to it. That is the conclusion we have been led to by an interpretation of, primarily, section 33 of the Constitution and, secondarily, PAJA itself. Thus there is no basis for suggesting that an organ of state seeking a review of its own decision may simply choose to avoid review under PAJA for reasons of expediency.

Review under legality

[38] The conclusion that PAJA does not apply does not mean that an organ of state cannot apply for the review of its own decision; it simply means that it cannot do so under PAJA. In *Fedsure* this Court said that "[i]t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are

[38] *SCA judgment* above n 7 at para 16.

[39] See *Kirland* above n 37 at para 83.

[40] *SCA judgment* above n 7 at para 36.

constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".[41] It also said that—

> "a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* the Supreme Court of Canada held that:
>
> > 'Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen,* [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.'"[42]

[39] *Pharmaceutical Manufacturers* tells us that the principle of legality is "an incident of the rule of law",[43] a founding value of our Constitution.[44] In

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[41] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*) at para 58.

[42] Id at para 56.

[43] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 17.

[44] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> …

Affordable Medicines Trust the principle of legality was referred to as a constitutional control of the exercise of public power. Ngcobo J put it thus:

> "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."[45]

[40] What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what section 2 of the Constitution stipulates.[46] Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.

[41] It was not in dispute that the award of the DoD agreement by SITA was not pursuant to a competitive bidding process. Neither party produced evidence to show that, despite not following a competitive process, the process followed complied with the relevant public procurement prescripts. Section 217 of the Constitution insists on a system of public procurement that complies with certain factors. It provides that "[w]hen an organ of state . . . contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective". It therefore seems reasonable for this Court to infer that, in awarding the contract, SITA acted contrary to the dictates of the Constitution. Based on *Fedsure*, this was at odds with the principle of legality and liable to be reviewed and possibly set aside. Indeed, we have previously held that the principle of legality would be a

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(c) Supremacy of the Constitution and the rule of law."

[45] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49.

[46] Section 2 of the Constitution provides that the Constitution "is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

means by which an organ of state may seek the review of its own decision. This was in *Khumalo*.[47]

[42] SITA delayed by just under 22 months before approaching the High Court for review. What impact, if any, should this delay have?

Delay

[43] Relying on section 237 of the Constitution,[48] Skweyiya J held in *Khumalo*:

> "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.
>
> 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.
>
> 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. . . . 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] (Footnotes omitted.)

[44] The reason for requiring reviews to be instituted without undue delay is thus to ensure certainty and promote legality: time is of utmost importance. In *Merafong* Cameron J said:

> "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

[47] *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR (CC).

[48] This section provides: "All constitutional obligations must be performed diligently and without delay."

[49] *Khumalo* above n 47 at paras 46-8.

> 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."[50]

[45] Reverting to the present matter, according to SITA, it only dawned on the relevant officials that the award of the DoD agreement did not comply with legal prescripts after the arbitration proceedings had commenced. At that stage it had received legal advice. This explanation is rather curious. From the background set out above, it appears that in its business SITA engages external service providers as a matter of course. That means procurement is part and parcel of its business operations. In the absence of a cogent explanation, it escapes us how SITA would not have been aware – when it awarded the DoD agreement – that it was straying from set procurement prescripts. That this "ignorance" endured for just under 22 months thereafter is even more puzzling. All that, in the face of Gijima's repeated expression of concern about the lawfulness of the process that led to the award of the contract. This is unacceptable. Not surprisingly, in oral argument before us SITA's counsel conceded that the delay was unexplained.

[46] The views we have just expressed also dispose of another of SITA's arguments which is that the delay should be computed from the date SITA got legal advice.

[47] *Khumalo* also says that courts have a "discretion to overlook a delay".[51] Here is what we said:

> "[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

[50] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) (*Merafong*) at para 73.

[51] *Khumalo* above n 47 at para 45.

> to be brought without undue delay or *with a court's discretion to overlook a delay*."[52] (Emphasis added.)

[48] *Tasima* explained that this discretion should not be exercised lightly:

> "While 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', it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise."[53] (Footnotes omitted.)

[49] From this, we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us to do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here. That should be the end of the matter. Not according to SITA.

[50] SITA argued that, in a reactive challenge, the question of "unwarranted delay" does not arise due to the fact that the challenge is raised as a defence to the relief which is sought in the main proceedings. Cameron J puts paid to this in *Kirland*. That judgment – not purporting to decide the PAJA/principle of legality controversy – held:

> "PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural

[52] Id. This was partially quoted with approval in *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima*) at para 142.

[53] *Tasima* id at para 160.

> requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."[54] (Footnotes omitted.)

[51] Does that mean the decision to award the DoD agreement stands?

Relief

[52] We concluded earlier that, in awarding the DoD agreement, SITA acted contrary to the dictates of the Constitution. Section 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution.[55] The award of the contract thus falls to be declared invalid.

[53] However, under section 172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity. Here it must count for quite a lot that SITA has delayed for just under 22 months before seeking to have the decision reviewed. Also, from the outset, Gijima was concerned whether the award of the contract complied with legal prescripts. As a result, it raised the issue with SITA repeatedly. SITA assured it that a proper procurement process had been followed.

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[54] *Kirland* above n 37 at para 82.

[55] Section 172(1) provides:

> "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
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[54] Overall, it seems to us that justice and equity dictate that, despite the invalidity of the award of the DoD agreement, SITA must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract,[56] while SITA sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings. In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled. Whether any such rights did accrue remains a contested issue in the arbitration, the merits of which were never determined because of the arbitrator's holding on jurisdiction.

Costs

[55] SITA achieves nominal success to the extent that there is a declaration of constitutional invalidity. Must this affect the question of costs? No. Substantially it is Gijima that succeeds. We say so because SITA's efforts were directed at avoiding the contract and Gijima, on the other hand, sought to hold on to the contract. To the extent that it is not to be divested of its entitlement under the contract, Gijima has managed to ward off SITA's efforts; that is the success we are referring to. Also counting against SITA on the question of costs is its repeated, but untruthful, assurances that proper procurement prescripts had been complied with in awarding the contract. Gijima is thus entitled to all its costs, including costs of two counsel.

Order

1. Leave to appeal is granted.
2. The appeal is upheld in part.
3. The order of the High Court of South Africa, Gauteng Division, Pretoria is set aside, and replaced with the following:

[56] We cannot express any categorical views in this regard because in the arbitration, whose merits are yet to be determined, SITA is contesting Gijima's assertion that it has performed.

(a) The applicant's decision to appoint the respondent as a DSS service provider under a contract which was to be effective from 1 April 2012 to 31 July 2012 and all decisions in terms of which the contract was extended from time to time are declared constitutionally invalid.

(b) The order of constitutional invalidity in paragraph 3(a) does not have the effect of divesting the respondent of any rights it would have been entitled to under the contract, but for the declaration of invalidity.

4. The applicant must pay the respondent's costs, including costs of two counsel, in the High Court, the Supreme Court of Appeal and in this Court.

For the Applicant:	N G D Maritz SC, K N Tsatsawane and C R Marule instructed by Gildenhuys Malatji Incorporated
For the Respondent:	A Subel SC and K Hofmeyr instructed by Baker & McKenzie