



CONSTITUTIONAL COURT OF SOUTH AFRICA

State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd

CCT 254/16

Date of hearing: 9 May 2017

Date of judgment: 14 November 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 14 November 2017 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal in a matter concerning whether an organ of state can seek to have its own decision reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

On 27 September 2006, the State Information Technology Agency SOC Ltd (SITA) and Gijima Holdings (Pty) Ltd (Gijima) entered into an agreement in terms of which Gijima was to provide information technology services (IT services) to the South African Police Service (SAPS agreement). That agreement was subsequently terminated by SITA, which resulted in a loss of R20 million in future revenue for Gijima. In response, Gijima instituted urgent proceedings in the High Court of South Africa, Gauteng Division, Pretoria (High Court). On 6 February 2012, the parties entered into a settlement agreement in terms of which Gijima would render IT services to the Department of Defence (DoD agreement). The settlement agreement also provided that SITA would compensate Gijima for losses which arose from the termination of the SAPS agreement. Gijima raised its concerns about the lawfulness of the DoD agreement with SITA, but on more than one occasion SITA assured Gijima that the agreement complied with procurement prescripts. Gijima accordingly rendered IT services to the Department of Defence. The agreement concerning these services was extended several times, but a payment dispute subsequently arose between the parties. This dispute went to arbitration, in the course of which SITA pleaded that the DoD agreement was concluded in contravention of section 217 of the Constitution. The arbitrator ruled that he did not have jurisdiction to determine this constitutional challenge.

In the High Court, SITA brought an application to set aside the DoD agreement on the same basis. It instituted these proceedings outside of the 180-day period within which a review of administrative action must be brought in terms of PAJA. The Court held that PAJA applied, because a decision to award and renew the DoD services agreement qualifies as administrative action as defined in PAJA. This meant that, unless the Court – acting in terms of the provisions of PAJA – sanctioned the late application, the application could not be entertained. The Court concluded that it would not be just and equitable to set aside the main agreement and dismissed the application with costs.

In the Supreme Court of Appeal, the majority agreed with the High Court that a decision to award a contract for services constitutes administrative action in terms of PAJA. The majority concluded that PAJA applies to review applications instituted by organs of state and dismissed the appeal with costs, because the application was brought after the expiry of the 180-day period.

In the Constitutional Court, SITA argued that when an organ of state seeks to review and set aside its own conduct, it does so on the basis that its conduct is inconsistent with the Constitution. It contended that the review should be decided in terms of the principle of legality, and not in terms of PAJA. Gijima argued that there is no reason to exempt organs of state from the applicability of PAJA.

The Court, in a judgment written by 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) held that PAJA does not apply when an organ of state applies for the review of its own decision and that an organ of state seeking to review its own decision must do so under the principle of legality. The Court held that, on an interpretation of section 33 of the Constitution and PAJA itself, it cannot be said that an organ of state seeking to review its own decision can be a beneficiary of the rights under section 33. The Court held that section 33 of the Constitution creates the right to just administrative action to be enjoyed by private persons only, and that the State is the bearer of obligations under that section.

The Court accepted that, by awarding the contract to Gijima, SITA acted contrary to the dictates of section 217 of the Constitution. It thus declared the award of the contract invalid. However, SITA's delay of nearly 22 months before approaching the High Court for review was found to be inordinate and the Court held that there was no basis for it to exercise a discretion to overlook the delay. Despite the invalidity of the award of the DoD agreement, the Court held that, in the interests of justice and equity, SITA must not benefit from having given Gijima false assurances from its own undue delay in instituting proceedings. It therefore declared the award of the contract to Gijima and the subsequent decisions to extend that contract to be invalid, but ordered that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it would have been entitled.