PROCUREMENT LAW*

In *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* [1995] ZACC 7; 1995 (4) SA 631 (CC) at 637D, albeit with reference to the Interim Constitution and in a somewhat different context, Sachs J observed:

'The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality . . . The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which . . . [we derive] the principles and rules . . . [we apply], and the final measure . . . [we use] for testing the legitimacy of impugned norms and conduct.'

Procurement, notionally at least, is critical to service delivery and has been identified as key to achieving societal transformation. Justice Madlanga J, writing for the majority in *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) (*Afribusiness*), described s 217(1) of the Constitution as 'the norm- setting constitutional provision on the procurement of goods and services by organs of state'. Section 217(1) provides that when 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'.

The framers of our Constitution recognised that in a country with deep-seated historical economic disadvantage, procurement in accordance with those considerations, without more, would likely further entrench that disadvantage. That is why section 217(2) of the Constitution permits the implementation by organs of state of procurement policies providing for . . . categories of preference in the allocation of contracts; and . . . the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014

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* Justice V Ponnan (Supreme Court of Appeal)
SAJEI - Friday, 5 July 2024.

(1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*Allpay*), Froneman J explained that '[e]conomic redress for previously disadvantaged people also lies at the heart of our constitutional and legislative procurement framework'.

Section 217(2) of the Constitution accordingly allows organs of state to implement a procurement policy providing for categories of preference in the allocation of contracts, and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. What section 217(2) seeks to achieve is consonant with the transformative nature and goal of our Constitution. Its provisions dovetail with those of section 9(2) of the Constitution. Section 217(3) makes it clear, however, that national legislation must prescribe the framework in terms of which the policy in subsection (2) must be implemented.

Thus, the general rule under s 217 of the Constitution is that all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The exception to that general rule is envisaged by subsections (2) and (3) of s 217. Subsection (2) allows organs of state to implement preferential procurement policies – policies that provide for categories of preference in the allocation of contracts and the protection and advancement of people disadvantaged by unfair discrimination. Express provision to permit this was included in the Constitution in order for public procurement to be an instrument of transformation and to prevent that from being stultified by appeals to the guarantee of equality and non-discrimination in s 9 of the Constitution. The freedom conferred on organs of state to implement preferential procurement policies is however circumscribed by subsection (3), which states that national legislation must prescribe a framework within which those preferential procurement policies must be implemented. The clear implication therefore is that preferential procurement policies may only be implemented within a framework prescribed by national legislation.

The national legislation envisaged in section 217(3) of the Constitution is the Preferential Procurement Policy Framework Act. The Act is meant, according to its long title '[t]o give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution'. Section 2(1) of the Procurement Act provides that '[a]n organ of state

must determine its preferential procurement policy', which it must implement within the framework set out in that section. Section 5(1) of the Act provides that '[t]he Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act'. Ordinarily therefore the only escape for an organ of state from the reach of s 217(1) is if it is able to bring itself within subsections (2) and (3). In the event, should an organ of state undertake preferential procurement outside the ambit of legislation such as the Procurement Act, it would be invalid.

Section 217(1) of the Constitution and the legislative and regulatory framework promulgated pursuant to the provisions of that section, including, in addition to the Procurement Act, the Public Finance Management Act (PFMA) and subordinate legislation like the Treasury Regulations, as well as other instruments, for instance, Supply Chain Management Policies, provide how an organ of state in any of the three spheres of government, if authorised by law, needs to proceed when contracting for goods and services. They both empower and limit the powers of public bodies involved in the procurement of goods and services and are not merely internal prescripts that may be disregarded at whim.

Their provisions, said the Constitutional Court in *Agribee Beef Fund (Pty) Ltd and Another v Eastern Cape Development Agency and Another* [2023] ZACC 6; 2023 (5) BCLR 489 (CC); 2023 (6) SA 639 (CC), 'have been the subject of numerous decisions of our Courts, yet for some reason state organs still seem to struggle to determine with precision when to apply their provisions when they enter into contracts'.

A tender process constitutes 'administrative action' under the Constitution (*Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 33). The concept of 'administrative action', as defined in section 1 of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements. There must be – a decision of an administrative nature; by an organ of state or a natural or juristic person; exercising a public power or performing a public function; in terms of any legislation or an empowering provision; that adversely affects rights; that has a direct, external legal effect; and, that does not fall under any of the listed exclusions.

The Constitutional Court has stated that a cause of action for the judicial review of administrative action ordinarily arises from the provisions of PAJA and not directly from the right to just administrative action in section 33 of the Constitution. The grounds for judicial review under PAJA are contained in section 6, which reads in relevant part:

'(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it –

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken –

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.'

As it was put in *Allpay*:

'[42] It is apparent from section 6 that unfairness in the outcome or result of an administrative decision is not, apart from the unreasonableness ground, a ground for judicial review of administrative action. Section 6 gives legislative expression to the right to administrative action "that is lawful, reasonable and procedurally fair" under section 33 of the Constitution. Importantly, the primary focus in scrutinising administrative action is on the fairness of the process, not the substantive correctness of the outcome.

[43] The legislative framework for procurement policy under section 217 of the Constitution . . . provides the context within which judicial review of state procurement decisions under PAJA review grounds must be assessed. . . . The facts of each case will determine whether any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.

[44] . . . The judicial task is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist.

[45] . . . The central focus of the enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA. . ..'

It is well established that an incident of legality is rational decision-making. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that decisions must be rationally related to the purpose for which the power was given. (See *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2002 (2) SA 674 (CC) para 85.) But, as Nugent JA pointed out (*Scalabrini* para 65): 'rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. . .. [R]ationality entails that the decision is founded upon reason – in contradistinction to one that is arbitrary – which is different to whether it was reasonably made.'

The Procurement Act defines an acceptable tender as 'any tender which, in all respects, complies with the specifications and conditions of the tender as set out in the tender document'. In *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others,* Scott JA said (para 14):

'The definition of "acceptable tender" in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective". In other words, whether "the tender in all respects complies with the specifications and conditions set out in the contract documents" must be judged against these values.'

The process must, of necessity, be conducted in a manner that promotes the administrative justice rights while satisfying the requirements of PAJA (*Du Toit v Minister of Transport*). Conditions should not be mechanically applied with no regard to a tenderer's constitutional rights. As Jafta JA observed in *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) (*Millennium Waste*): 'by insisting on disqualifying the appellant's tender for an innocent omission, the tender committee acted unreasonably. Its decision in this regard was based on the committee's error in thinking that the omission amounted to a failure to comply with a condition envisaged in the Preferential Procurement Act. Consequently, its decision was "materially influenced by an error of law" contemplated in s 6 (2)(*d*) of PAJA, one of the grounds of review relied on by the appellant. Therefore, the tender process followed by the department was inconsistent with PAJA'.

It goes without saying that a tender process cannot be open-ended. Certainty has to be the touchstone. The validity period is indeed one of the fundamental 'rules of the game', being the period within which the process should be finalised. To extend the tender validity period, the consent of all the participants to the tender process is required. Unless there is a timeous request and favourable response from all the tenderers prior to the expiry of the tender, the tender comes to an end. (See *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others* [2022] ZASCA 82; 2023 (1) SA 44 (SCA) and the authorities there cited)

Parties are entitled to a lawful and procedurally fair process and an outcome that is justifiable in relation to the reasons given for it. It was held in *Logbro Properties CC v Bedderson NO* [2002] ZASCA 135; 2003 (2) SA 460 (SCA) (*Logbro*) that principles of administrative justice will continue to govern the relationship, and that an organ of state in exercising its contractual rights in the tender process is obliged to act lawfully – both procedurally and fairly. In consequence, some of the contractual rights of the organ of state may necessarily have to yield before its public duties under the Constitution and any applicable legislation. This is because of 'the ever-flexible duty to act fairly' that rests on an organ of state. Accordingly, the principles of administrative justice that frame the parties' contractual relationship, will continue to govern the exercise of the rights derived by an organ of state from a contract concluded by it following a tender process. This means that an organ of state cannot act capriciously or for an improper or unjustified reason (See *Ex parte Neethling*)

It bears noting that an administrative subject is not entitled to a perfect process. That is a process that is entirely free of innocent errors. Nor can one expect to be immunised from all prejudicial consequences flowing from such errors. In some cases, it might be appropriate for an administrator in repairing a flawed process to take changed circumstances into account. Not every administrative error (whether innocent or not) can rightly attract the epithet 'unlawful' or 'improper'. 'Unlawful' or 'improper', it must be understood, represent conclusions of law and may be applicable to a wide range of administrative errors, some innocent and others not so.

In any review by an aggrieved tenderer a court should not lose sight of two things: first, the polycentric nature of the decision-making by the organ of state; and second, any question requiring adjudication would entail more than the mere assertion of rights by one subject against an administration. It would usually implicate as well the rights of the others (both successful and unsuccessful) who participated in the tender process. Thus, if an applicant's right to a fair tender process is vindicated, it would ordinarily be for the court to direct that the decision-maker reconsider the tender. An applicant is naturally not entitled to an order that its tender should be accepted, but only to have its offer considered without competition from a tender which does not comply with the tender conditions. In reconsidering the compliant tenders, the organ of state will have to undertake, as it should have done in respect of the impugned process, the typically

complex task of balancing all of the relevant interests. It is so that usually when a court reviews and sets aside a decision of an administrative body it almost always refers the matter back to that body to enable it to reconsider the issue and make a new decision (per Heher JA, *Gauteng Gambling Board v Silverstar Development Ltd & another* 2005 (4) SA 67 (SCA) para 1). Occasionally, however, as Heher JA added, 'the court does not give the administrative organ a further opportunity. Instead it makes the decision itself.'

In *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA), ACSA issued a request for bids (RFB) for the awarding of various car rental concessions at airports. The RFB sought to establish car rental opportunities for the letting of kiosks and parking bays at airports nationally. The bids were to be evaluated in accordance with a four-staged approach. The first was the pre-qualification stage, which comprised an initial assessment of each bid and an audit of all mandatory administrative requirements. The second was the technical evaluation stage. The third was the stage at which price was assessed and categories of preference were considered. And, the fourth stage implicated transformation imperatives.

Imperial, having taken the view that, if implemented, the RFB would be disastrous for its business, challenged some of the provisions in the RFB. It contended that the criteria, which included that large entities such as it had to be at least 30% black owned and at least 15% black women owned, were unlawful. In terms of the RFB, a bidder that did not meet all of the pre-qualification criteria would immediately be disqualified. As Imperial was unable to meet the criteria, its bid had to be disqualified. Imperial also attacked the method of assessment of the bids – it contended that the method of assessment, in terms of which 50 points were awarded for price and 50 points for BEE status, was unlawful.

Dealing firstly with the preliminary contention raised by ACSA that the review challenge was premature, the SCA held that it was evident from the provisions of the RFB that a bidder who did not meet the prescribed pre-qualification criteria would be automatically disqualified from the evaluation process at stage 1. It was evident that the RFB did not allow ACSA to exercise any discretion in that regard. In the light of the pre-qualification

criteria set out in the RFB, the self-evident outcome of stage 1 of the evaluation process was that Imperial would be disqualified from further evaluation. It drew on an earlier judgment in *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman of the State Tender Board v Sneller Digital (Pty) Ltd & others*:

'Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process . . . Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma.'

In a similar vein, in *AllPay* the Constitutional Court had stated:

'The decision to exclude AllPay from the second, pricing stage certainly affected its rights and legitimate expectations. Because of its exclusion we are not in a position to know what the outcome of the pricing stage would have been; it is mere speculation. . .. [I]n *Grey's Marine* it was stated, with reference to the phrase "adversely affect the rights of any person" in section 1 of PAJA, that what "was probably intended [was] rather to convey that administrative action is action that has the capacity to affect legal rights." Irregularities in the process, which may also affect the fairness of the outcome, certainly have the capacity to affect legal rights.'

ACSA contended that s 217 of the Constitution did not apply to the RFB, inasmuch as it was granting concessions to bidders who are paying for such concessions. Accordingly, ACSA was not engaging in 'procurement' or 'contracting for goods and services'. And, even if s 217 did apply to the RFB, then the Procurement Laws were patently inapplicable because those laws, in their terms, could have no application to a situation such as the one encountered there.

The SCA reasoned that the language of s 217(1) is clear. It applies whenever an organ of state 'contracts for goods or services'. These words are plain and unqualified. They make it clear that the section applies whenever an organ of state contracts for goods or services, whether for itself or for somebody else. ACSA's restrictive reading thus finds no support in the plain language of the section. ACSA suggests that the ambit of the section is limited by the reference to the word 'procurement' in the heading and in s 217(2). The ordinary meaning of 'procure' is 'obtain'. In any event, s 217(1) spells out what the section means when it speaks of 'procurement', which is 'to contract for goods or services'. It thus places the meaning of the word beyond doubt. ACSA also

contended that the RFB is not directed at procurement but only at contracts for the lease of premises to car rental companies, who provide their services directly to the public. The SCA said that is to elevate form above substance. The substance of the transaction is that ACSA contracts with car rental companies to provide a public service at its airports.

The SCA added that it is so that s 2 clearly contemplates a conventional transaction by which an organ of state purchases goods or services at the lowest possible price. It accordingly allocates higher scores to lower prices. A transaction of the kind contemplated by the RFB, on the other hand, seeks to elicit bids for leases at the highest possible rental. Does it mean, as ACSA argues, that such a transaction is not subject to s 2? The SCA held that section 2 must be read and understood to be *mutatis mutandis* applicable to such a transaction. It accordingly allows a scoring system which allocates more points for higher rentals. The principle remains the same. As a general rule the words of a statute must be given their ordinary, grammatical meaning in the context in which they appear, unless to do so 'would lead to absurdity so glaring that it could never have been contemplated by the legislature or where it would lead to a result contrary to the intention of the legislature as shown by the context or by such other considerations as the Court is justified in taking into account' (*Venter v R*). In that event the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the legislature.

As judgments such as *Fedsure* and *Pharmaceutical Manufacturers* make perfectly plain, the Legislature and Executive may exercise no power and perform no function beyond that conferred upon them by law. Thus, fundamental to our constitutional order is the principle of legality. The ultra vires doctrine, which is a subset of the principle of legality, is accordingly central to the determination of the lawfulness of the exercise of any public power. In the case of public procurement, the exercise of public power must, therefore, occur within the bounds set by the legal framework. This was the animating principle in the *Afribusiness matter*, which was concerned with the use of pre-qualification criteria in the procurement process to achieve the Constitution's transformational goals. The SCA held that the Preferential Procurement Regulations

promulgated by the Minister of Finance were inconsistent with the Procurement Act. The Constitutional Court split 5 to 4.

Regulations, as we know, are subordinate legislation and it is trite that subordinate legislation must be created within the limits of the empowering statute. If not, the exercise of the power is unlawful and may be set aside. Both the majority and minority judgments in *Afribusiness* accepted that the Minister does not have boundless regulatory power, because his power is curtailed by the Constitution and the Procurement Act. The latter regulates how a preferential procurement policy ought to be implemented.

Afribusiness is instructive for its consideration of delegated legislation. The purpose served by regulations is to make an Act of Parliament work. The Act itself sets the norm or provides the framework of the subject matter legislated upon. Regulations cover the detail that is best left by Parliament to a functionary to look beyond the framework and to ascertain what is necessary to achieve the object of the Act or to make the Act work. This means that the intention of the Legislature, as articulated in the enabling Act, must be the prime guide as to the meaning of delegated legislation and the extent of the power to make it. The delegate is not intended to travel wider than the object of the Legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it. One must therefore have regard to the intention of the Legislature as reflected in the Act in order to ascertain whether the regulations are in conformity with such intention. To the extent that they are in conflict with such intention they are *ultra vires*. It follows that conduct by an organ of state that has no foundation in law breaches the principle of legality, an incident of the rule of law, which is a foundational value of the Constitution.

It is important for the efficient functioning of public bodies that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for this longstanding rule is twofold: first, the failure to bring a review within a reasonable time may cause prejudice. The decision may have been acted upon and despite the decision being susceptible to review, it may have lawful consequences. This of necessity has to be balanced with the following: It cannot be expected of an applicant that she rush to court to review and set aside administrative action without investigating and attempting to determine whether she has a case.

In *Scott & others v Hanekom & others* Marais AJ, although dealing with a different context, stated:

'The scope of review proceedings is limitless. The antecedent investigations and preparation of process may be simple or complex. The time required for this purpose may be short or it may be long. The parties may have spent many fruitless months in attempting to negotiate an acceptable compromise or settlement before resorting to litigation.'

There is thus a public interest element in the finality of administrative decisions and the exercise of administrative functions. The delay rule is thus a principle that flows directly from the rule of law and its requirement for certainty. Properly understood therefore to bring a review application without undue delay is not just a procedural requirement, it also serves a substantive purpose. It is based on sound judicial policy and operates in the public interest that there be finality and certainty in matters. Although the delay rule has its origin in common law, it is now encompassed by s 7(1) of PAJA which provides in relevant part:

'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.'

Section 9(1) provides, however, that the 180-day period, may be extended for a fixed period, by agreement between the parties or, failing agreement, on application. Section 9(2) provides that such an application may be granted, where the interests of justice so require.

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 e.g. *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) para 47). In *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) (*OUTA*), Brand JA expressed the view that up to a point s 7(1) of PAJA requires the same two stage approach. He said:

'[t]he 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 e.g. *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 e.g. *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54). Plasket Section 7(1) talks of applications for review being brought 'without unreasonable delay and not later than 180-days . . .'. Notionally, therefore, it is possible that a delay in launching a review application of less than 180-days after the cause of action arises can be an unreasonable delay but I think that it is fair to say that cases of this sort will be rare and have exceptional characteristics.'

Section 7(1) envisages asking when the person concerned was informed, or became aware, or might reasonably be expected to have become aware, of the administrative action. This admits more readily of an answer where the act or conduct affects and is challenged by an individual, but not where the act or conduct sought to be challenged affects the public at large. *OUTA* alluded to the absurdity of an administrative act being reviewable at the instance of one member of the public, but not another, depending upon the peculiar knowledge of each. In those circumstances a court may well take a broad view of when the public at large might reasonably be expected to have had knowledge of the action.

Lawful procurement is patently a constitutional issue (*Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) (*Asla*). Although it seems axiomatic that unlawful conduct must be undone, to borrow from Dr Seuss 'simple it's not' (*Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) (*Altech*)). Particularly worrisome are public procurement cases,

where an organ of state seeks to undo its own prior decisions. State self-review has become a novel, but growing species of judicial review. However, even in circumstances where an organ of state takes the view that it is compelled as a matter of constitutional duty to bring a self-review application, it is duty-bound to do so expeditiously. This, because of the strong public interest in both certainty and finality.

Self-review has been dealt with in the decisions of the Constitutional Court in *Tasima I*, *Khumalo*, *Kirland*, *Aurecon* and *Gijima*. However, these cases – save for *Khumalo* and *Gijima* – dealt with PAJA reviews. Despite concerns having been expressed about the increasing reliance on legality review at the expense of the constitutionally mandated legislation, PAJA, it is now settled that an organ of state seeking to review its own decision must do so under the principle of legality and cannot rely on PAJA. Until the decision in Gijima, organs of state seeking to set aside their own decisions were obliged to do so under PAJA. Following *Gijima*, it is now settled that an organ of state seeking to review its own decision must do so under the principle of legality and cannot rely on PAJA.

Even though both hinge on reasonableness, assessing delay under PAJA and legality differs in two respects. The first difference is the role of the 180-day bar in section 7(1) of PAJA. Legality review has no similar fixed period. As with the two-stage common law test: Firstly, it must be determined whether the delay is unreasonable or undue, which is a factual enquiry upon which a value judgment is made, having regard to all the circumstances. Secondly, if the delay is unreasonable, the question becomes whether the Court's discretion should nevertheless be exercised to overlook the delay and entertain the application. In both under PAJA and legality the clock starts ticking from the date that the applicant became aware or reasonably ought to have become aware of the action taken.

Prof Hoexter observes that 'the development of the principle of legality is another illustration of the vigour and fecundity of the rule of law'. She does add however that 'in short, the courts made the principle of legality mean whatever they wanted it to mean as they went about creating a sort of common law for the constitutional era' (see *Altech* para 17).

In *Asla,* the majority stated:

'The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to section 7 of PAJA. The 180-day bar in PAJA does not play a pronounced role in the context of legality.' (para 50)

. . .

'The second difference between PAJA and legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required. A court can simply consider the delay, and then apply the two-step *Khumalo* test to ascertain whether the delay is undue and, if so, whether it should be overlooked.' (para 51) (underlining for emphasis)

Going forward, some aspects of *Asla* may require further elucidation:

(a) It is unclear what is meant to be conveyed by 'broader discretion'. 'Broader', employed as it is as a comparator, would presumably connote a more expansive discretion. However, the reference in the succeeding paragraphs of the judgment to *Khumalo* (which concerned a legality review) and *Tasima 1* (which concerned a review under PAJA), the general approach postulated to the delay enquiry, as well as the conclusion that 'the approach to overlooking a delay in a legality review is flexible', lends some support to the perception that the test to be employed in either instance would be the same.

(b) The judgment does not seem to entirely rule out the invocation of the statutorily ordained 180-day period in the consideration of delay. This is perhaps implicit in the notion that 'the 180-day bar does not play a pronounced role (as opposed to no role) in the context of legality'. There thus seems to be an acceptance that there may be instances when that yardstick can be invoked in considering whether a delay is unreasonable. Otherwise, it may well be passing strange perhaps that the consideration of the same period, depending upon whether a legality or a PAJA review, could yield a different outcome.

(c) The use of the qualifier 'explicit' in relation to a condonation application, suggests, so it would seem, that such relief (namely, an order granting condonation) does not have to be sought in the notice of motion. There nonetheless appears to be an acceptance that there must be an explanation for the delay, because 'if there is no explanation for the delay the delay will necessarily be unreasonable' (para 52). Ordinarily, however, the grant of

condonation, is a necessary prerequisite to a Court entering into the substantive merits of a matter.

(d) *Asla* emphasises the importance of prospects of success. However, whilst, prospects of success, are no doubt an important factor, our courts have long recognised that where for example the breach is so flagrant, the conduct so wilful and the prejudice so significant, a court may refuse the indulgence of condonation without entering into a consideration of the prospects of success. Thus, whether a bright dividing line can indeed be drawn between a review under PAJA, on the one hand, and legality, on the other, particularly with regard to the contours of the test, the approach to be adopted both procedurally and substantively to the enquiry, and the outcome that each could possibly yield, may well prove nettlesome.

Indeed, in *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* [2021] ZASCA 34; [2021] 2 All SA 700 (SCA); 2021 (4) SA 436 (SCA), Navsa ADP felt compelled to note:

'Appreciating that our law on self-review has become somewhat encrusted, it would nevertheless be presumptious of us to become embroiled in the differences between the majority and minority judgments in *Asla*. Our courts might, in time, after adjudicating a string of cases with various permutations streamline an approach to self-review, or the legislature might intervene, in a constitutionally compliant manner, to cover all forms of review, including those that pertain to the executive and provide for how delay is to impact on such reviews. The Constitutional Court might, in time, revisit prior decisions. An aspect however, that is of immediate concern, noted at the commencement of this judgment, is that self-review is now a burgeoning and troubling phenomenon.'

As Khampepe J made plain in *Tasima 1*, the approach is a flexible one. In that regard, *Altech* is instructive – it cited with approval the following from *Valor IT v Premier, North West Province and Others*:

'Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a 'factual, multi-factor and context-sensitive' enquiry in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other.'

Altech is also important for these additional reasons: First, it frequently happens that a change of political leadership triggers heightened scrutiny of previously awarded tenders. *Altech* affirmed that 'at the level of law, a change in political control of an organ of state, such as the City, is irrelevant'. Second, search hard enough in public procurement cases, and one will surely find compliance failures. There will seldom be a public procurement process entirely without flaw. But, perfection is not demanded and not every flaw is fatal. Nor does every flaw in a tender process amount to an irregularity, much less a material irregularity. Public contracts do not fall to be invalidated for immaterial or inconsequential irregularities. Indeed, as it has been put, '[n]ot every slip in the administration of tenders is necessarily to be visited by judicial sanction'.

Asla emphasised with reference to *Gijima* that even where there is no basis for a court to overlook an unreasonable delay, the Court may nevertheless be constitutionally compelled to declare the state's conduct unlawful. This is so because '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'. *Gijima* dictates that where the unlawfulness of the impugned decision is clear and not disputed, then the Court must declare it unlawful. The minority in *Asla* alluded to the tension that this creates in our law. On the one hand, there is a long line of cases explaining that the state must adhere to the procedural requirements of review, including timeous approaches to courts. On the other hand, *Gijima* implies that these procedural hurdles, while important, can sometimes yield to the injunction under section 172(1)(*a*) to declare invalid that which is inconsistent with the Constitution. The majority in *Asla* took the view that: the precise contours of the tension need not be determined in that matter. 'All that needs to be said is that in interpreting and applying the *Gijima* principle, and the initial three principles detailed in this judgment, must be done with their purpose in mind. That is, to balance the objectives of the rules on delay with those objectives of declaring unlawful conduct as such.' The majority did conclude however that 'The *Gijima* principle should thus be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay are not undermined'.

In both *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa* (*Swifambo*) and *Siyangna Technologies (Pty) Ltd v PRASA and Others* [2022] ZASCA 149; [2023] 1 All SA 74 (SCA); 2023 (2) SA 51 (SCA), a newly constituted Board

struggled to unearth the true state of affairs at PRASA in part because the officials who had remained in their position had taken steps to conceal the irregular and unlawful conduct. The reconstituted board thus required time to ascertain the nature and extent of the irregular activities and expenditure. In *Swifambo* a delay of as much as three years was condoned. In condoning a delay of 10 months, *Siyangna Technologies* referred to the judgment of the Constitutional Court in *City of Cape Town v Aurecon South Africa (Pty) Ltd*, to the effect that:

'. . . If the irregularities raised in the report had unearthed manifestations of corruption, collusion or fraud in the tender process, this Court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention.'

In *Allpay*, Froneman J stressed that '[c]ompliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is legally required' and that those requirements 'are not merely internal prescripts' that may be disregarded at whim.

In the *Pepper Bay Fishing* case, Brand JA said (para 31):

'As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so. . .. The decision-maker derives all his (delegated) powers and authority from the enactment constituted by [in that case] the general notice. If the general notice therefore affords him no discretion, he has none. The question whether he had a discretion is therefore entirely dependent on a proper construction of the general notice.'

Our law of course permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with the public interest and if such condonation is granted by the body in whose benefit the provision was enacted (*SA Eagle Co Ltd v Bavuma*), if by condoning the failure, the organ of state would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in s 217 (*Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) (*Millennium Waste*)).

As the SCA put it in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality & others* 2007 (6) SA 511 (SCA) para 17:

'. . . though the Constitution speaks through its norms and principles, it acts through the relief granted under it.'

'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 s 172(1)(*b*).' (per Froneman J in *Allpay*)

Section 172(1) of the Constitution states:

'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.'

In exercising powers under s 172(1)*(b)*, courts have the widest possible remedial discretion. Our courts have been cognisant of ensuring that innocent parties are not unduly prejudiced. The Constitutional Court in *Electoral Commission v Mhlope & others*, emphasised the need for courts to be pragmatic in crafting just and equitable remedies in the exercise of its wide remedial powers. A just and equitable remedy must be: proportionate (the Constitutional Court has found that it is disproportionate to set aside an entire project as a consequence of an imperfect process *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) para 134.); fair and just in the context of the particular dispute; ample and flexible and should place substance above form. Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy.

As Jafta JA pointed out in *Millenium Waste*:

'Howsoever a court fashions a remedy, it is required by s 38 of the Constitution to award a remedy that is not only just and equitable but also appropriate particularly when a fundamental right has been infringed. Appropriate relief is relief that effectively remedies the breach of the right. It is relief that fits the injury: it must be "fair to those affected by it yet vindicate effectively

the right violated" and be "just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law".'

Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others, made clear that even though courts always retain a discretion to refuse to award a remedy when unlawfulness is found, the default position is that the principle of legality should be upheld and vindicated, and that there must be compelling reasons to override this default position.

In *Asla*, the Constitutional Court made an order declaring the contract invalid, but not setting it aside so as to preserve the rights to which the respondent might have been entitled. In *Joubert Galpin Searle Inc*, Plasket J thought it necessary 'to temper the setting aside . . . in a way that minimises the negative effects'. He accordingly decided to 'suspend the order reviewing and setting aside . . . so that something remains in place, imperfect as it may be'. In *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* [2024] ZASCA 84, the SCA adopted such an approach.

As emerges from *Millenium Waste*, which is instructive for the comprehensive order that issued:

'It is impermissible for a court to confine itself to the interests of the one side only. The section lists a range of remedies from which the court may choose upon a consideration of all relevant facts. As pointed out in *Oudekraal Estates*, often the decision has been acted upon by the time it is brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.'

In *Siyangna Technologies*, the high court declared the award of contracts to the value of approximately R5.5 billion invalid, and set them aside in terms of s 172(1)*(a)* of the

Constitution. The high court further directed, as part of its remedial powers in terms of s 172(1)*(b)* of the Constitution, that an independent engineer be appointed in order to determine whether any of the payments made to Siyangena by PRASA should be set off against the value of the works done. The SCA held:

'There is precedent for an order, for instance, where an independent third party is appointed to assess the financials of the contracts to determine the appropriate accounting reconciliation. Thus, the appointment of the independent engineer, particularly where parties are unable to agree on the value of the works, is not unusual. In this case, PRASA contends that the equipment was not fit for purpose, because it did not meet the need or provide the latest technology and, in various respects, was implemented in a manner that was inadequate and incomplete. All of this points to the need for an independent, qualified third party to assess and determine the financial value of the works. This approach will ensure that Siyangena would not be benefitted unduly and that PRASA would not be paying for services not rendered. Fairness is achieved and justice is ensured for both parties.'

In *Tyte Security Services CC v Western Cape Provincial Government and Others* [2024] ZASCA 88 (*Tyte*), a tender (following upon a state procurement tender process) for essential services was first awarded by the Provincial Government jointly to the appellant, Tyte, and another security company, Seal, on 25 March 2021 (the first contract). Red Ant, an unsuccessful tenderer, applied to the high court to review and set aside the decision to award the first contract jointly to Seal and Tyte. The application succeeded before Binns-Ward J, who, *inter alia*: (i) declared the award of the first contract invalid and set it aside; (ii) suspended the declaration of invalidity, pending the conclusion of an expedited process *de novo* by the Provincial Government to lawfully procure the services, the subject of the tender; and, (iii) directed the Provincial Government to ensure that the process is completed within six months or such further period as may be permitted by the court on application to it. On 21 April 2021, the Provincial Government invited fresh bids for a new 24-month contract. On 31 May 2023, it awarded the tender to – and concluded a contract to commence immediately (the second contract) with the respondent, Royal. On 15 June 2023, Seal brought an urgent application for an order that pending the final determination of a review application (the review application), the Provincial Government be interdicted from implementing or giving effect to its decision to award the tender to Royal. By way of a counter application, Tyte also sought the review and setting aside of the award.

On 27 June 2023, Francis J, in issuing directions in respect of the further conduct of the review application, ordered that Seal and Tyte would continue to render services in terms of the first contract, pending the outcome of the review application. The review application was heard by Gamble et Wille JJ from 28 to 30 November 2023. On 21 February 2024, the review application by Tyte and Seal was dismissed and the award of the tender to Royal confirmed. On 28 February 2024, Tyte applied for leave to appeal the main order. On 7 March 2024, Royal applied urgently in terms of s 18(1) (read with s 18(3)) of the Superior Courts Act 10 of 2013 (the Act) that the order of Willie and Gamble JJ be implemented immediately and not be suspended pending the finalisation of any appeal. The section 18 application succeeded. Exercising an automatic right of appeal under s 18, Tyte filed a notice of appeal and the matter was thereafter enrolled by the SCA as one of urgency for hearing on Monday 27 May 2024. In a judgment delivered on 7 June 2024, the SCA held (paras 22 -24):

'The judgment of Binns-Ward J essentially only concerned the issue of what would be a just and equitable remedy in the circumstances of the case. His order that a fresh tender process be completed within six months was not met and subsequently had to be extended until 31 May 2023. This meant that Seal and Tyte had the full benefit of the entire period of the first contract, notwithstanding the declaration of invalidity and the contract having been set aside. In addition, the effect of the order of Francis J was that Seal and Tyte simply continued to perform services in terms of the tender awarded to them jointly on 25 March 2021.Despite the award having been set aside by Binns-Ward J, by the time the main order came to be delivered on 21 February 2024, Seal and Tyte had the benefit of the award for a further nine months. Thus, not only has Tyte had the benefit of a two-year contract that was set aside as having been unlawfully awarded to it, but by the time the matter came to be heard in this Court, it would have continued to reap the rewards of that contract for an additional year. Conversely, as things presently stand, Royal has been denied the benefit of at least one year of the second contract, which the high court has found in the review application to have been lawfully awarded to it.

Inasmuch as the second contract is due to terminate in June 2025, there is every prospect that by the time the appeal comes to be heard and irrespective of the outcome, Royal will be left remediless. Royal drew attention to the fact that when the review application issued, it had already commenced with the roll-out process, which was well underway. It is not in dispute that, as required by the second contract, it had to provide insurance cover of R5 million per 300 guards, furnish a performance guarantee in an amount equal to 1% of the contract, being R2.8 million and establish sites in six different districts. Royal has also spent in excess of R1

million in respect of uniforms and R7.5 million in respect of an order for tactical response vehicles. As against that, the continued rendering of services in terms of the impugned first contract, has generated in excess of R70 million for Seal and Tyte.

Moreover, it is common ground that the price tendered by Royal was the most favourable to the Provincial Government, being lower than all the others by a significant margin. Royal's bid of R282 million for the 24-month contract was 18.45% below the pre-tender estimate, whereas Seal and Tyte exceeded the estimate by 5.62% and 1.35% respectively. The anticipated windfall to Seal and Tyte of a further turnover of R100 million after the award of the bid to Royal represents 28.16% of the full-term value of the second contract. Apart from illustrating the exceptional nature of this matter, these facts also bear testimony to the extent of the existing and ongoing prejudice to Royal and the public at large. The significance of the public interest was recognised by the high court in the concurring judgment of Gamble J in the review application, in which he said:

"At the end of it all, the approach adopted by the province was in accordance with the touchstone of public procurement – the promotion of competition and cost-effective tendering. Importantly, the exercise resulted in a significant saving for the public purse – around R83m when compared to Seal's price."'

In 2009, the observation was made in *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* [2009] ZASCA 110; 2010 (2) SA 167 (SCA); [2010] 1 All SA 267 (SCA) that 'State tenders have become fertile ground for litigation'. *Tyte* (para 1) noted: 'A decade and a half later, this yet again is one such matter, having occupied the attention of our courts for some four years. A challenge to a previous award for the same services came before the Western Cape High Court, Cape Town (the high court) in 2001. Binns-Ward J commenced his unreported decision in that matter (*Red Ant Security Relocation and Eviction Services (Pty) Ltd v The Department of Human Settlements (Western Cape)* (*Red Ant*)) with a reference to Cachalia and Kohn that: "Tendering has become a verifiably 'messy business' and the courts are increasingly drawn into the quagmire in review proceedings. . ."'