THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 641/2015

In the matter between:

STATE INFORMATION TECHNOLOGY AGENCY SOC LTD **APPELLANT**

and

GIJIMA HOLDINGS (PTY) LTD **RESPONDENT**

Neutral citation: *State Information Technology Agency Soc v Gijima Holdings* (641/2015) [2016] ZASCA 143 (30 September 2016)

Coram: Cachalia, Bosielo, Tshiqi and Van der Merwe JJA and Dlodlo AJA

Heard: 30 August 2016

Delivered: 30 September 2016

Summary: Promotion of Administrative Justice Act 3 of 2000 (PAJA) : applicability to organ of state seeking to set aside its own decision : legality review not available when PAJA applies.

ORDER

On appeal from: Gauteng Division, Pretoria (Matojane J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Cachalia JA (Tshiqi and Van der Merwe JJA concurring)

[1] This is an appeal from the Gauteng High Court (Matojane J) dismissing an application by a state entity to declare its contract with a listed company unenforceable for want of compliance with the public procurement requirements of s 217 of the Constitution. There is no dispute that these requirements were not followed in awarding the contract. The court a quo dismissed the application because the entity had relied directly on the constitutional principle of legality, instead of instituting review proceedings under s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It had also not applied under s 9(1)*(b)* to condone its failure to institute such proceedings within 180 days of the contract having been concluded, as s 7(1)*(b)* requires.

[2] The state entity – the appellant in these proceedings – is the State Information Technology Agency (SITA). The respondent – Gijima – is a listed company operating in the area of information and communication technology. SITA advances the following submissions in this appeal: First, it contends that PAJA does not apply

when an organ of state seeks to undo its own decisions; secondly, it says that even if PAJA does apply, the entity may elect to proceed either by way of review under PAJA or rely directly on the principle of legality; and finally, it maintains that if it is entitled to make this election and proceed by way of a legality challenge, the delay in bringing these proceedings was not unreasonable.

[3] It is of some interest to set out the facts that gave rise to the present dispute. The parties have concluded contracts and conducted business together on several projects for more than ten years. SITA provides information technology, information systems, and related services (IT services) to government departments. It performs this function by entering into agreements with private service providers, such as Gijima, which in turn provides IT services to the government department. The way it works is that government departments needing IT services submit a business case and user requirements to SITA, which then prepares a procurement schedule for the execution of the request bid, and a detailed costing for the subsequent contract management.

[4] SITA thereafter concludes a business agreement with the relevant government department for IT services to be provided to it by private service providers. Armed with this agreement and following a procurement process, SITA enters into a further agreement for the provision of IT services with a private service provider on the basis of what the government department is willing to pay for those services.

[5] The relationship between the parties has, since 2006, been regulated by a contract that became known as ‘the 433 contract’, which set forth the general terms and conditions applicable to all service level agreements between them. The 433 contract placed Gijima on SITA’s ‘preferred supplier’ list. It stipulated that the services were to be implemented in accordance with separate service level agreements that would be concluded from time to time. The parties have since

entered into a number of agreements for the provision of IT services to different government departments.

[6] On 27 September 2006, the parties entered into one such agreement in terms of which Gijima was to provide IT services to the South African Police Service (the 'SAPS agreement'). The agreement was extended several times.

[7] On 25 January 2012 SITA unlawfully terminated the SAPS agreement as a result of which Gijima stood to suffer R20 million in lost revenue. This prompted Gijima to institute urgent proceedings to protect its rights under the SAPS agreement. Following negotiations between the parties, SITA recommended a commercial solution to resolve the dispute. It proposed that Gijima abandon its claim arising from the termination of the SAPS agreement in return for which it would receive a new service contract to offset its potential losses.

[8] Gijima was concerned about SITA's competence to conclude this contract without having gone through a competitive bidding process and raised these reservations with SITA. SITA assured Gijima that it had the authority to conclude the contract. Relying on this assurance, Gijima agreed to settle the dispute on the basis proposed by SITA.

[9] Thus, on 6 February 2012, the parties entered into a settlement agreement in terms of which they agreed that Gijima would render IT services to the Department of Defence from 1 April 2012 to 31 July 2012. The agreement contemplated that SITA would compensate Gijima for losses arising from the termination of the SAPS agreement. Mr Blake Mosley-Lefatola, the erstwhile chief executive officer, signed the agreement on behalf of SITA.

[10] After the settlement agreement was concluded a further meeting was held between the parties where Gijima again recorded its concerns that any subsequent agreement appointing it as the Defence Department's service provider may be contrary to the requirement that public procurements are subject to a system of competitive bidding. At this meeting SITA was represented by, amongst others, Ms Thenji Mjoli, its former executive of 'Supply Chain Management'. She allayed Gijima's misgivings by giving her word that the appellant's 'rec' committee had the power to authorise the agreement up to an amount of R50 million. Gijima thus agreed to negotiate the terms of the agreement to render services to the Defence Department.

[11] Protracted negotiations over five months followed. SITA was represented by Ms Mjoli, Mr Carl Masekoameng, its senior procurement contracts manager; Mr Denis Carstens, a senior manager in its Business Division and Mr Toto Matshediso, the lead consultant of 'Budget, Internal Reporting and Projects'. Other senior staff, including Mr Mosley-Lefatola, also participated in the process. Throughout the process, Gijima queried whether SITA was complying with its tender requirements. SITA repeatedly assured Gijima that it was. However, to safeguard its position, Gijima insisted on inserting a term in the contract according to which SITA warranted that all procurement processes had been complied with. SITA willingly agreed to this term. The value of the contract concluded on 17 July 2012 was R11 329 130 and was intended to endure for five months.

[12] Pursuant to the agreement, Gijima rendered IT services to the Defence Department and submitted invoices to SITA for payment. The agreement was thereafter extended on 20 September 2012, 21 December 2012 and 8 April 2013 respectively through the addition of further addenda. I shall hereafter refer to the agreement and its addenda simply as 'the agreement' or 'the contract'.

[13] A payment dispute developed between the parties during the third extension period and was referred to arbitration for resolution. On 30 May 2013, SITA informed Gijima of its intention not to extend the agreement any further.

[14] On 7 July 2013 Gijima submitted its statement of claim to the arbitrator in the payment dispute in which it claimed R9,5 million for services rendered under the agreement. In response, SITA pleaded that the agreement was concluded in contravention of the procurement system contemplated in s 217 of the Constitution and was therefore invalid and unenforceable against it. This was the first time that SITA had adopted this stance after assuring Gijima – repeatedly – that there were no procurement problems with the conclusion of this agreement. Faced with a constitutional challenge to the main agreement, the arbitrator, on 20 March 2014, ruled that he had no jurisdiction to determine this issue. And on 6 May 2014, SITA launched the present proceedings in the court a quo.

[15] I now turn to consider SITA's first contention, which is that PAJA does not apply at all when an organ of state seeks to set aside its own decisions. For this novel proposition it unsurprisingly cites no authority, and I am aware of none.

[16] It is well established that a decision[1] by a state entity to award a contract for services constitutes administrative action in terms of s 1 of PAJA.[2] Once this is accepted, there is no good reason for immunising administrative decisions taken by the state from review under PAJA. PAJA does not expressly exclude the state and its language carries no such implication. In fact, s 6(1) specifically empowers '[a]ny person' to institute proceedings for the judicial review of administrative action, which suggests that administrative actions taken by the state are included. Furthermore, there does not appear to be any justification for permitting the state, with all the resources at its disposal, not to be subjected to the exacting requirements of PAJA in

[1] Section 1 of PAJA defines a 'decision' as –
'any decision of an administrative nature made . . . under an empowering provision . . . .'
[2] *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC) para 90.

the way that all other litigants are. As Cameron J explained in *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazar Institute*:

> '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.'[3]

[17] SITA contends that, even if PAJA applies in principle, the conclusion of the agreement did not fall within the definition of administrative action because it did not adversely affect the rights of any person and did not have a direct, external legal effect. This argument is advanced on the ground that, in fact, the agreement conferred benefits on Gijima and did not deprive it of any rights.

[18] A literal reading of these requirements does not accord with this court's approach in *Grey's Marine Hout Bay (Pty) Ltd v. Minister of Public Works*,[4] where it said that such a construction is '. . . inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely'.[5] The court went on to explain that, when read in conjunction with the requirement that the decision must have an external legal effect, the intention was to convey that administrative action must have 'the capacity to affect legal rights', with the two qualifications in tandem serving to emphasise that it impacts directly and immediately on persons.[6]

[19] In my view, the conclusion of the agreement, whether or not beneficial to Gijima, certainly had the capacity to adversely affect its rights, because it contemplated Gijima's foregoing its damages claim under the SAPS agreement in return for rendering IT services to the Defence Department. And, following upon SITA's express warranty in the agreement that it had complied with all procurement

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[3] *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazar Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 82.
[4] *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA).
[5] Ibid para 23.
[6] Ibid para 23.

requirements, the agreement arguably also affected Gijima's legitimate expectation that SITA would honour its terms. But I need not arrive at any specific conclusion in this latter regard.

[20] The phrase 'direct, external legal effect' was borrowed from German federal law. The allusion to the word 'direct' refers to decisions that are final; the word 'external' to those that affect not only the decision-maker but also other parties, and the word 'legal' overlaps with the requirements that rights must be affected.[7] There can be no doubt that the decision to conclude the agreement met all these requirements. The decision was final; it had the capacity to adversely affect Gijima's rights and those of the Defence Department, which counsel for SITA conceded during his argument.

[21] The upshot is that SITA cannot avoid the provisions of PAJA. Its failure to follow a prescribed competitive process therefore brings its administrative decision, in awarding the contract to Gijima, within the scope of s 6(2)*(a)*(i), s 6(2)*(b)* and s 6(2)*(f)*(i) of PAJA. This is because: it did not have the authority to contract outside of a competitive bidding process to do so; it contravened s 217 of the Constitution and had also failed to comply with a mandatory and material procedure prescribed by law.

[22] Once it is accepted that PAJA applies when state entities challenge their own administrative decisions, the next question, whether the 180-day delay rule in s 7 nevertheless does not apply to them, must be considered. SITA contends that the provision does not apply; this contention is supported by a provincial decision in *Telkom SA Limited v Merid Trading (Pty) Ltd & others* (*Telkom SA*).[8] There, as in this case, it was contended that s 7(1) did not apply when a decision-maker seeks to sets

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[7] See Generally: C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 227-234.

[8] *Telkom SA Limited v Merid Trading (Pty) Ltd & others*; *Bihati Solutions* (*Pty*) *Ltd v Telkom SA Limited & o*thers (27974/2010, 25945/2010) [2011] ZAGPPHC 1 (7 January 2011).

aside its own decision.[9] This is because, the argument went, paragraphs s 7(1)*(a)* and *(b)*, which provide for the date from which the 180-day period begins to run against the decision-maker, do not cover that situation. Instead the common law unreasonable delay rule enunciated in *Wolgroeiers Afslaers (Edms) (Bpk) v Munisipaliteit van Kaapstad*[10] applies. This involves a two stage inquiry: first, whether the proceedings were instituted after a reasonable time has passed, and if so, whether the court should exercise its judicial discretion to overlook the unreasonable delay taking the relevant circumstances into consideration.

[23] The court in *Telkom SA* upheld the contention. In so doing it held that the lawmaker seems to have deliberately omitted applying s7 of PAJA to the situation where a decision-maker seeks to review its own decision.[11] It therefore proceeded to decide the case on the common law rule.

[24] It appears, however, that in interpreting s 7 of PAJA in this manner the court overlooked s 9(1)*(b)*, which empowers a court 'on application by the person or administrator concerned' to extend the 180 days referred to in s 7(1). An 'administrator' is defined in s 1 of PAJA to include an 'organ of state'. So, read together, as ss 7 and 9 must be, the 180-day rule indeed applies to organs of state, and does to the SITA decision at issue in this case. On this point, therefore, *Telkom* was incorrectly decided.

[25] Once the 180-day rule applies, s 9(1)*(b)* allows this period to be extended only by agreement of the parties or if the person or administrator applies for an

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[9] '**Procedure for judicial review**
(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) 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
(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.'

[10] *Wolgroeiers Afslaers (Edms) (Bpk) v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A).

[11] *Telkom* (fn 8 above) para 10.

extension. A court may grant an extension where the interests of justice so require, as s 9(2) states. It follows that where an applicant needs an extension it must apply for one and give a full and a reasonable explanation for the delay.

[26] In the instant matter, as I have mentioned, SITA avoided PAJA by seeking declaratory relief directly under the constitutional principle of legality. It thus could not, and did not, invoke s 9(2) by applying for an extension of the 180-day period. In fact, in its founding affidavit, it did not refer to the delay or offer an explanation for it at all. This is unacceptable.[12] In these circumstances, the court a quo found that it was not in the interests of justice to grant an extension in terms of s 9. However, without an application from SITA, supported by facts justifying an extension of the 180-day period, the court did not have the power to even consider whether it was in the interests of justice to extend the period or to entertain the application.[13] That should have been the end of the matter.

[27] But the matter does not end here. SITA maintains that it is nevertheless entitled to avoid instituting review proceedings under PAJA – and the procedural requirement under s7 to institute its proceedings within 180 days – by relying directly on the constitutional principle of legality to obtain declaratory relief against Gijima. Put differently, it contends that if PAJA applies it had a choice to initiate a review under its provisions or bypass it, and formulate its cause of action as a legality challenge. It relies heavily for this submission on the judgment of this court in *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC*.[14]

[28] These were the facts: The municipality concluded an agreement with a service provider in contravention of prescribed statutory requirements and s 217 of

[12] *Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 51.
[13] *Tasima (Pty) Ltd v Department of Transport & others* [2013] ZAGPPHC 69; 2013 (4) SA 134 (GNP) para 30.
[14] *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA).

the Constitution. It then sought to terminate the contract. The service provider instituted proceedings to declare the purported termination unlawful together with an order enforcing the contract. In a counter-application, the municipality sought a declaratory order that the contract was unlawful and unenforceable against it.

[29] In this court the service provider contended that because the municipality had not instituted review proceedings to set aside the invalid contract under PAJA, and the counter-application was not a review, the municipality had no defence to its action. The court dismissed the argument and said the following:

'While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. If the second appellant's procurement of municipal services through its contract with the respondent was unlawful, it is invalid, and this is a case in which the appellants were duty- bound not to submit to an unlawful contract, but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form. And while my observations should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief.'[15]

[30] Although it is perhaps implicit in this passage that a litigant may raise a legality challenge instead of proceeding by way of a formal review under PAJA, the court explicitly left open the question whether it was necessary for a municipality to do so when it seeks to avoid a contract in respect of which no third party has an interest. It is therefore not binding authority for the issue in this case. Furthermore, and importantly, the delay rule was not in issue there. However, in *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*[16]

[15] Ibid para 26.
[16] *MEC For Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) para 83.

Cameron J, writing for the majority in the Constitutional Court, intimated that an organ of state could not avoid the consequences of the delay rule by resorting to 'procedural tricks'.[17] This is because, he said, when the government has delayed bringing proceedings to set aside its decision 'the court and Kirland are entitled to know what happened in that time'.[18] In other words, it could not simply ignore the rule by not bringing a counter-application.

[31] As with *Qaukeni,* in *Kirland* the court did not decide the extent to which organs of state can or must use the provisions of PAJA in proceedings where they seek to review their own decisions.[19] *Kwa Sani Municipality v Underberg/Himeville Community Watch Association & another*[20] also concerned a municipality seeking to set aside its own decision. This court said that the facts made it unnecessary to determine whether it was necessary for the review to be brought under the common law or under the provisions of PAJA since the delay rule – whether under PAJA or at common law – would apply, thus insulating the unlawful act from being set aside.

[32] However, the issue has now been raised squarely in this case, and can no longer be elided. It is important to bear in mind that SITA did not institute review proceedings by using uniform rule 53 either under PAJA or directly under the Constitution on the ground of legality. If it had, it would have had to have made the complete record available to Gijima and the court; and justify the delay. Instead it applied for declaratory relief, which in substance is a legality review, but without explaining the delay. Under s 7 of PAJA, as we have mentioned, the delay rule is 180 days. When the application is styled as a legality challenge, but in substance is a legailty review, the two-stage enquiry enunciated in *Wolgroeiers*[21] applies. This means that the fact of an undue delay will play a role in the court's exercise of its discretion whether or not to entertain the review.[22] As I have said, SITA's contention

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[17] Ibid para 83.
[18] Ibid para 70.
[19] Ibid para 82 at fn 43.
[20] *Kwa Sani Municipality v Underberg/Himeville Community Watch Association & another* [2015] ZASCA 24; [2015] 2 All SA 657 (SCA) para 32-34.
[21] Fn 10 above. See also *Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 49.
[22] Lawrence Baxter *Administrative Law* (1989) Juta p 715.

is that it had a choice to proceed by way of PAJA or rely directly on the constitutional principle of legality.

[33] It is necessary to distinguish between a PAJA review, on the one hand and a legality review, on the other. PAJA was enacted to give effect to the right to lawful administrative action in s 33 of the Constitution.[23] And, as it was intended to be, and in substance is, a codification of the rights in s 33, so the Constitutional Court said in *New Clicks*,*[24]* it was not possible for litigants to go behind it, by relying either directly on s 33(1) or on the common law, when reviewing unlawful administrative actions as this would undermine the very purpose for which it was enacted.[25] So, PAJA covers administrative action while private (contractual) power remains reviewable at common law.[26] In short, if the unlawful administrative action falls within PAJA's remit there is no alternative pathway to review through the common law.

[34] But the 'burgeoning principle of legality'[27] is arguably a greater threat to PAJA than recourse to the common law because it regulates the exercise of all public power. This includes, in addition to administrative decisions covered by s 33 and PAJA, power exercised by the legislature and the executive.[28] Lord Bingham, one of Britain's most eminent jurists, pithily captured the principle thus:

'Ministers and public officials at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.'[29]

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[23] '**Just administrative action**

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, ...'

[24] *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 CC.

[25] Ibid paras 95 and 143.

[26] C Hoexter 'The Constitutionalization and Codification of Judicial Review in South Africa' in C Forsyth et al *Effective Judicial Review* (2010) at 56.

[27] See C Hoexter (above fn 7) generally at 133-137.

[28] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) paras 58 and 59.

[29] T Bingham *The Rule of Law* (2010) at 60.

[35] Because of the ubiquitous reach of the principle of legality, and the fact that administrative actions also fall within its remit, it is unsurprising that litigants and the courts have sometimes deliberately sidestepped PAJA. The reason is obvious; it is at times difficult to work out whether the unlawful action complained of qualifies as administrative action. Many of the elements of the definition remain unsettled. One only has to look to the difficulty courts have had in establishing whether the action in question has satisfied the element of having 'a direct, external legal effect' to demonstrate the nature of the problem.[30]

[36] But it is not a problem that can legitimately be avoided. For if a litigant or a court could simply avoid having to conduct the sometimes testing analytical enquiry into whether the action complained of amounts to administrative action, PAJA, in Professor Hoexter's words:

'. . . would soon become redundant, for no sane applicant would submit to its definition of administrative action (or to the strict procedural requirements of section 7) if he or she actually had a choice.'[31]

[37] Put differently, the consequence of this would be that the principle of legality, unencumbered by PAJA's definitional and procedural complexities, would become the preferred choice of litigants and the courts – which is happening increasingly – and PAJA would fall into desuetude. This would be a perverse development of the law, one that the framers of the Constitution would not have contemplated when they drafted s 33(3) of the Constitution.[32] Neither would the lawmaker have imagined this when enacting PAJA.

[38] In my view, the proper place for the principle of legality in our law is to act as a safety-net or a measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. It cannot be the first port of call or

[30] See Hoexter (above fn 7).
[31] See Hoexter (above fn 27) at p 59.
[32] See fn 23 above.

an alternative path to review, when PAJA applies. As this court said in *National Director of Public Prosecutions & others v Freedom Under Law*:[33]

'The legality principle has now become well established in our law as an alternative pathway to judicial review *where PAJA finds no application*.' (emphasis added)

[39] The facts of this case demonstrate precisely why SITA should not be allowed to bypass PAJA and rely directly on the principle of legality. Under s 7 of PAJA, SITA was well outside the 180-day rule when it commenced proceedings to nullify its contract with Gijima. By framing its application as a legality review it sought to circumvent PAJA and its 180-day rule. What is more, SITA's true objective in seeking to nullify its contract with Gijima was not to vindicate the principle of legality, but one of self-interest: to avoid having to deal with its payment dispute arising from its breach of contract through arbitration. The courts cannot countenance such dishonourable conduct, particularly from an organ of state.[34] I should emphasise that the delay rule, which is aimed at bringing finality to administrative decisions is itself an incident of the rule of law. As Boonzaier observes in his thoughtful treatment of the topic: 'government can act antithetically to the rule of law even as it purports to assert legality.'[35] SITA's legality challenge was therefore not competent, and its application was correctly dismissed.

[40] But, even if SITA was entitled to rely directly on the principle of legality it would still have had to overcome the insurmountable hurdle of justifying its delay. This is because, having instituted legality review proceedings it would need to show that proceedings were instituted within a reasonable time, failing which, that there were, nevertheless, good reasons for the court to entertain the application and overlook the fact of the unreasonable delay in the circumstances of the case. In this latter regard, SITA would have to persuade the court that any potential prejudice or

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[33] *National Director of Public Prosecutions & others v Freedom Under Law* 2014 (4) SA 298 (SCA) para 28.
[34] *Cf Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (3) SA BCLR 333 (CC) paras 71-73. See also L Boonzaier *'*Good Reviews, Bad Actors' (2017) 7 *CCR* (forthcoming) at 10-11.
[35] Ibid.

adverse consequences caused to Gijima by the delay could be overcome.[36] It has not done so.

[41] It is beyond dispute that the delay of some 22 months in launching its legality challenge is unreasonable. SITA contends that the delay should be overlooked because it became aware that the contract was invalid only when it was required to deliver its plea in the arbitration proceedings. But this explanation was not proffered in its founding papers; in fact there was simply no proper explanation of the process or the delay. Instead, it used affidavits from a deponent who was not involved in the process and who had no direct knowledge of the relevant facts. The first time this account was given was in a laconic, single sentence in the replying affidavit. This alone justifies its rejection.

[42] Furthermore, the explanation appears to be contrived and far-fetched. SITA was aware of Gijima's concerns with the validity of the agreement, which the head of procurement and other senior officials consistently dismissed. In fact, SITA went so far as to give an express warranty to the effect that all procurement requirements had been met in circumstances where its senior management must have been aware that this was not the case. During the lengthy negotiations over the payment dispute between the parties, no issue concerning the validity of the contract was raised. In the circumstances, the perfunctory and cavalier explanation for the delay is unreasonable and must fail. The prejudice to Gijima is evident.

[43] SITA attempts to explain away the prejudice to Gijima by contending that it has already benefitted from the agreement to the tune of R26 million. That is not the point. Gijima has had to forego a R20 million damages claim in respect of the unlawful termination of its SAPS contract, which is probably no longer enforceable because of prescription. What is more, Gijima had pertinently raised its concerns regarding the efficacy of the procurement process and was entitled to rely on SITA's

[36] Ibid para 52.

express warranty regarding the validity of the procurement process. It did so to its prejudice immediately when the contract was concluded. It has since then performed fully under the terms of the agreement, only to be met with a challenge to the lawfulness of the contract 22 months after its conclusion. In the circumstances it would be unfairly prejudicial to Gijima for this court to consider the merits of the dispute, and we decline to do so.

[44] In summary, we hold that PAJA applies when an organ of state seeks to set aside its own administrative decisions. And when PAJA does apply, litigants and the courts are not entitled to bypass its provisions and rely directly on the constitutional principle of legality. But even if this case is approached as a legality review, SITA failed to place facts before the court to overcome the hurdle of the unreasonable delay in commencing proceedings against Gijima.

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

‘The appeal is dismissed with costs, including the costs of two counsel.’

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A Cachalia

Judge of Appeal

Bosielo JA (Dlodlo AJA concurring)

[46] I have had the benefit of reading the judgment by my brother Cachalia JA. I regret that I do not agree with his reasoning and conclusion. I hereunder set out my fundamental grounds for differing with him. As my colleague has set out the salient facts out as fully as possible, I will not repeat them save where it is necessary to give context to my dissenting judgment. More so that to a large extent, the facts are common cause or not seriously disputed.

[47] Essentially, our fundamental point of difference is, whether the parties being in agreement that the impugned contract is invalid for its failure to comply with the peremptory statutory requirements of s 217[37] of the Constitution, SITA should be denied the opportunity to have this illegal contract declared invalid simply because it adopted the route of a review based on legality and not through the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Therefore the crisp legal question to be answered is whether it is legally permissible for SITA to launch a legality attack when PAJA is available.

[48] These background facts are necessary to explain my judgment. SITA is an organ of state; it has for almost 10 years been involved with GIJIMA in various business transactions for various government departments. The relationship between SITA and GIJIMA was regulated by a contract called 'the 433 contract'. Based on this '433 contract' GIJIMA was placed on 'a preferred list' of suppliers. My colleague describes the relationship as follows in paras 3 and 4 of his judgment.

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[37] Section 217 of the Constitution provides:
Procurement – (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –
(*a*) categories of preference in the allocation of contracts; and
(*b*) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination
(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

Para [3] ‘It is of some interest to set out the facts that gave rise to the present dispute. The parties have concluded contracts and conducted business together on several projects for more than ten years. SITA provides information technology, information systems, and related services (IT services) to government departments. It performs this function by entering into agreements with private service providers, such as Gijima, which in turn provides IT services to the government department. The way it works is that government departments needing IT services submit a business case and user requirements to SITA, which then prepares a procurement schedule for the execution of the request bid, and a detailed costing for the subsequent contract management.

Para [4] SITA thereafter concludes a business agreement with the relevant government department for IT services to be provided to it by private service providers. Armed with this agreement and following a procurement process, SITA enters into a further agreement for the provision of IT services with a private service provider on the basis of what the government department is willing to pay for those services.’

[49] Since 2006, the parties have concluded numerous procurement agreements based on the so-called ‘433 contracts’. Pursuant to this, GIJIMA did business with various government departments at both provincial or national levels. These included Public Works; Agriculture; Economic Affairs; Safety and Liason; Sport, Recreation, Arts and Culture; Welfare; Kwazulu-Natal Health and the Office of the Premier, Limpopo. It appears that GIJIMA enjoyed some monopoly of government work.

[50] It is not disputed that the impugned contract was not the result of a normal tender process. It was more of a convenient compromise by SITA to appease the disgruntled GIJIMA for the South African Police Service (SAPS) contract which SITA terminated. This is how this occurred. SITA had concluded an agreement on 26 September 2006 with GIJIMA in terms whereof GIJIMA would render certain services to SAPS. When SITA sought to have this contract terminated, GIJIMA

launched proceedings in the high court to stop SITA from terminating the contract. On 6 February 2016, SITA and GIJIMA settled the matter out of court when essentially SITA offered GIJIMA another contract as a substitute for the SAPS contract. In terms of the settlement the parties agreed 'that Gijima shall be appointed as DSS Service provider to the department of Defence from 1 April 2012 to 31 July 2012 on SITA's standard terms and conclusion.' Based on this settlement agreement, GIJIMA was appointed for the 'provisioning of hardware, maintenance and support for the Department of Defence without any tender. The rand value of this agreement is R11 329 130.

[51] Self-evidently, this contract does not comply with the clear precepts of s 217 nor the Preferential Procurement Policy Framework Act 2000 nor SITA's own supply chain management policy. In simple terms there was no open tender. In the circumstances, the process can hardly be said to be transparent, equitable, fair, competitive or cost effective. Section 172(1)(*a*)[38] of the Constitution commands that such a contract be declared invalid as being inconsistent with the Constitution.

[52] As fate would have it, a dispute arose between the parties regarding payment. As a result, on 30 May 2013, SITA gave notice to GIJIMA of its intention to terminate the contract. On 17 July 2013, GIJIMA instituted arbitration proceedings against SITA. SITA opposed the claim on the basis that the contract was unconstitutional as it did not comply with s 217 of the Constitution. In other words, it impugned the legality of the contract. On 20 March 2014, the arbitrator ruled that based on the constitutional attack, he had no jurisdiction over the matter.

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[38] Section 172(1) of the Constitution provides:
'Powers of courts in constitutional matters –
(1) When deciding a constitutional matter within its power, a court -
(*a*) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(*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.'

[53] Hardly three months thereafter, on 6 May 2014, SITA issued the present proceedings in the high court in terms whereof it sought to review and had this contract set aside as being invalid as it was not compliant with s 217 of the Constitution. GIJIMA opposed the application. GIJIMA contended in the main that the application should be dismissed as it should have been brought under PAJA and not the principle of legality. Paradoxically, this is notwithstanding the fact that it conceded that the impugned contract was not awarded in terms of s 217 of the Constitution.

[54] My colleague accepts GIJIMA's submissions that SITA should have proceeded by way of PAJA and not an attack based on legality. He holds the view that the appeal ought to be dismissed. In dismissing the appeal, my colleague stated the following:

Para 44 'In summary, I hold that PAJA applies when an organ of state seeks to set aside its own administrative decisions. And when PAJA does apply, litigants and the courts are not entitled to bypass its provisions and rely directly on the constitutional principle of legality. But even if this was approached as a legality review, SITA failed to place the facts before the court to overcome the hurdle of unreasonable delay in commencing proceedings against Gijima.'

He then concludes as follows at para 38:

'In my view, the proper place for the principle of legality in our law is to act as a safety-net or a measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. It cannot be the first port of call or an alternative path to review, when PAJA applies.'

[55] I do not agree with my colleague in his findings and conclusion. Section 7(2) of the Constitution[39] states in peremptory terms that organs of state have a constitutional obligation to respect, protect and fulfil our constitutional obligations. Courts are a constituent part of the state. Like all organs of state, they also have a

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

constitutional obligation to ensure that constitutional obligations are respected and fulfilled. It would be subversive of this constitutional obligation to use the courts to thwart a party or deny it the opportunity to assert, protect and promote the principle of legality. I can think of no reason in law, logic or principle that can justify a court to deny SITA its right to attack the constitutionality of a contract which is admitted to be unconstitutional simply because it opted for an attack based on the principle of legality and not through PAJA. For me that amounts to a slavish adherence to formalism and compromising substance. Generally the law is about justice. And justice should not be deflected or sacrificed on the alter of formalism. In the language of s 172 of the Constitution such acts are invalid as they are inconsistent with the Constitution. Section 1(*c*)[40] of the Constitution asserts in unambiguous language the supremacy of the Constitution and the rule of law as one of its foundational values. Self-evidently, this is a constitutional imperative.

[56] In turn, s 2[41] of the Constitution declares the Constitution to be the Supreme Law of the Republic. It states in peremptory terms that any law or conduct inconsistent with it is invalid and, importantly, that the obligations imposed on it must be fulfilled.

[57] Our courts are the foremost and vigilant guardians of our Constitution, its values and *mores*. Like all other organs of state, they have an obligation to respect, protect, promote and fulfil its obligations. As a result, no court may countenance or enforce conduct that is incongruent with the Constitution as it will be acting in violation of the Constitution – the supreme law. This principle was enunciated in Kirkland as follows:

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[40] Section 1 of the Constitution provides:
'1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'
[41] Section 2 of the Constitution provides:

'Section 172(1)(*a*) obliges every court when deciding a constitutional matter within its powers to declare invalid any conduct that is inconsistent with the Constitution. The court has no choice'.

[58] A question that needs to be answered in this appeal is whether it is permissible, in the context of the court's constitutional obligations as set out in s 172(1) of the Constitution for a court to countenance or legitimize a flagrant unconstitutional procurement like the one in this case under the guise that SITA should have proceeded by way of PAJA and not legality. Put simply, can SITA be denied the opportunity to vindicate s 217 and the principle of legality by such procedural technicalities. Certainly not. PAJA owes its existence to the Constitution.

[59] Faced with such an intractable problem, the Constitutional Court held as follows in *Khumalo*:[42]

'In the previous section it was explained that the rule of law is a founding value of the Constitution and that the state functionaries are enjoined to uphold and protect it, inter alia, by seeking the redress of their departments' unlawful actions. Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to lawfulness of an exercise of public power.' (Own emphasis).

[60] SITA, as a public institution or organ of state has a constitutional obligation, when confronted with such a flagrant violation of s 217, to take appropriate action. This obligation assumes greater importance in the sphere of public procurement as public resources are implicated. This puts enormous responsibility on it to ensure that public resources are used properly and prudently. This Court puts it more pointedly as follows in *Premier, Free State Province & others* where it stated:

'the province [SITA] was under a duty not to submit itself to an unlawful contract and [was] entitled indeed obliged, to ignore the delivery contract and to resist'.[43]

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[42] *Khumalo & another v MEC, Education: KwaZulu-Natal* 2014 (3) BCLR (CC).

[61] By parity of reasoning, it is antithetical to the supremacy of the Constitution and the rule of law to compel SITA to comply with an invalid contract, solely because of a procedural technicality. Such an approach would result in contracts that are patently illegal or inconsistent with the Constitution being allowed to stand. Needless to say, this will undermine the constitutional principle of legality. And in the field of public procurement, it will create an opportunity for unscrupulous tenderers and some corrupt government officials to bypass s 217 and embark on corrupt activities. Such conduct will inevitably lead to a wastage of scarce public resources. This legitimate concern is articulated as follows in *Trencon Construction v Industrial Development Corporation* 2015 (5) SA 245 (CC) at para 1:

'In our society, tendering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and government wields massive public power when choosing to award a tender. It is for this reason that the Constitution obliges organs of state to ensure a procurement process is fair, equitable, transparent, competitive and cost-effective. Where a procurement process is shown not to be so, courts have the power to intervene.'

[62] The evidence here is that GIJIMA stood to benefit some R11 329 130 from this contract, where there was no open and competitive process. There is no evidence that it was fair, equitable or cost effective. Section 217 aspires to ensure that whenever public funds are disbursed to procure services, there must be some proof that the process is transparent, competitive and cost effective. In other words, the state must get value for money. Furthermore, by being open and transparent, there is some assurance that the process will be fair and equitable as other competent bidders will have a fair opportunity to put in competing bids. Needless to say that such a process is aimed at dealing a deadly blow to the scourge of fraud, corruption and bribery that are so ubiquitous in the field of public procurement. Sadly, over the years corruption has become synonymous with public procurement in this country. With the passage of time, it has become a malignant cancer which is

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[43] *Premier, Free State & others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); [2000] 3 All SA 247 para 36.

fast eroding our social and moral fabric. The deleterious effect of a failure to abide by s 217 are admirably set out in *AllPay Consolidated*[44] as follows:

'As Corruption Watch explained, with reference to international authority and experience, deviation from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with formalities has a threefold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.'

Furthermore, the Constitutional Court stated the following to about insidious effect of corruption in *Glenister*.[45]

'There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatently undermines the democratic ethos, the institutions democracy, the rule of law and the fundamental values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organized crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.'

[63] It is correct as my colleague states in his judgment that there is no clarity or unanimity on whether organs of state are obliged to use PAJA and not invoke the principle of legality when they seek to review their own decisions. This question was left open in *Kwa Sani Municipality v Underberg/Himeville Community Watch Association*, *MEC for Health, Eastern Cape & another v Kirkland Investments (Pty) Ltd* and *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC.* As my colleague remarked aptly, this is the time for this question to be answered clearly.

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[44] *AllPay Consolidated v Chief Executive Officer, SASSA* 2014 (1) SA 604 (CC) para 27.
[45] *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC); 2 All 16; 2007 (3) BCLR 300 at para 33-35.

[64] In this case it is common cause that there was no open tender when this contract was awarded to GIJIMA. This is a clear violation of s 217. Section 217 (1)(*a*) declares such a contract unconstitutional and invalid to the extent of its inconsistency with Constitution. SITA had instituted proceedings to have its decision reviewed and set aside as being unconstitutional. All the necessary averments were traversed in the affidavits by the respective parties. The question of the legality of this contract was raised clearly and unequivocally. However, instead of PAJA it opted to proceed by way of an attack based on the principle of legality.

[65] To my mind, this step does not violate the principle of subsidiarity as there is no frontal attack against the legality of a procurement process. In any event the principle of subsidiarity is not inflexible. There will be cases like this one where it is not applicable as set out in *My Vote Counts v Speaker* 2016 (1) SA 132 (CC) at para 182. My colleague would dismiss SITA's appeal based on its failure to use PAJA. I think he is wrong. A failure to bring the application under PAJA can never be a good reason to deny SITA the relief it seeks. I am fortified in my view by what this court stated *in Municipal Manager v FV General Trading*[46] where it held:

'While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. If the second respondent's procurement of municipal services through its contract with the respondent was unlawful, it is invalid and this is a case in which the appellants were duty bound not to submit to an unlawful contract but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form. And while my observations should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief.'

[46] 2010 (1) SA 356 (SCA) para 26.

[66] It is common cause that SITA is an organ of state which performs public functions in terms of national legislation. As its functions have a public character, it is subject to the principle of legality, which requires it to perform its functions within the strict parameters of the law. The parties are agreed that the impugned contract was not done in accordance with the prescripts of s 217 of the Constitution. As an organ of state, SITA has a constitutional obligation to have this illegal contract reviewed and set aside. SITA being an organ of state has no choice. It is not only entitled but obliged by the Constitution to approach a court to have its own unconstitutional act or decision declared invalid and set aside. See *Pepcor Retirement Fund & another v Financial Services Board &another* 2003 (6) SA 38 (SCA).

[67] There is some support for the view that PAJA does not purport to exhaust the possibility of reviews based on the exercise of public power. In other words it is not the be all and end all. As a result direct constitutional review of the exercise of public power by an organ of state remains open on the basis of amongst others, the principle of legality in matters that do not strictly qualify as administrative action under Constitution or PAJA itself.[47] The Constitutional Court gave a clear indication in *Bato Star Fishing*[48] that there are administrative actions that do not fall under PAJA. It said at para 25:

'The provisions of s 6 divulge a clear intention to codify grounds of review of administrative action as defined in PAJA. The cause of action for the judicial of review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA.' (My own emphasis).

[68] Essentially, judicial review under PAJA is an important remedy for individuals aggrieved by bad decisions made by public administrators. The clear language of s 6(1) of PAJA seems to suggest that only persons who are aggrieved by a decision

[47] The Promotion of Administrative Justice Act Bench book – the bench book – *Ian Currie and Jonathan Klaasen.*
[48] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 para 25.

by an administrator may institute review proceedings against such an administrator. Section 6(2) gives a court or tribunal the power to judicially review an impugned administrative action taken by an administrator. To my mind, the distinction which s 6 draws between who may take a matter on review under PAJA and against whom, is very crucial. It is not fortuitous that s 6 does not refer to an instance where an organ of state initiates review proceedings, particularly where legality is involved. To my mind, a direct attack by SITA based on the principle of legality was the proper route to take in this case. I do not understand the passage in Minister of Health[49] to the effect that a litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common law to mean that a state organ which wishes to bring a constitutional challenge against its own decision can only go by way of PAJA and never through the principle of legality. It is true that PAJA is the national legislation that was passed to give effect to the rights in s 33,[50] which clearly contemplates private citizens (persons). This must be so as s 33(2) refers expressly to everyone whose rights have been adversely affected by an administrative action. We know that only an organ of state can take an administrative action.

[69] My colleague expressed some disquiet about what he described as unreasonable delay before SITA instituted these review proceedings. This he does by counting from the day the agreement was concluded. His calculations add to 22 months. In contrast SITA stated that it became aware of the unconstitutionality of the agreement during its preparations for the arbitration hearing. It raised unconstitutionality as a defence at the arbitration hearings. It instituted the review proceedings within three months after the arbitrator declined to hear the matter. This cannot be described as unreasonable delay. As a result, there was no need for an

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[49] *Minister of Health v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC) paras 95-96.

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

explanation. In any event, unlike PAJA, an attack based on the principle of legality is not subject to time limits except that it must be done within a reasonable time. What a reasonable time is can only be decided on the facts of each case. This requires the presiding judge to exercise a value judgment. On SITA'S submissions, there was no delay. In any event, I think that it would be unfair to put up such procedural technicalities as hurdles to deny SITA the right to vindicate legality.

[70] On the facts of this case, I have no doubt that it is in the public interest to allow SITA to vindicate s 217 and the principle of legality and not to thwart it by procedural technicalities. This will conduce to proper and accountable use of state resources for the benefit of the public as it offers the organs of state which find themselves in similar circumstances like SITA, an effective mechanism to deal with corruption, inefficiency and wasteful expenditure.

[71] In the result, I would uphold the appeal with costs including the costs of two counsel.

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L O Bosielo

Judge of Appeal

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