6 DECEMBER 2017

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

PUBLIC AND ADMINISTRATIVE LAW: ARE ORGANS OF STATE BOUND BY PAJA WHEN REVIEWING THEIR OWN DECISIONS?

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THE BLITZBOKS, THE CONSTITUTION AND UBUNTU – AN INTERESTING TRIANGLE

Although our daily newspaper headlines focus on state capture, corruption and a dwindling economy South Africa has every reason to be proud of both the Bill of Rights in our Constitution, widely regarded as one of the most progressive in the world, and the Blitzboks. The Blitzboks epitomise teamwork, selflessness and dedication to a cause bigger than the individual. Okay, but where does that intersect with the Bill of Rights?

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The facts were these: In September 2006 the State Information Technology Agency (SITA), the government's information technology procurement agency, concluded an agreement in terms of which Gijima, a private company, would provide information technology services to the South African Police Service. The agreement was subject to various extensions and revisions. Throughout the contract and negotiation period Gijima was concerned that the necessary procurement processes had not been complied with. SITA, however, assured Gijima that proper procedures had been followed and went so far as to provide an unconditional warranty in this regard.

When a payment dispute arose in 2013, SITA argued that the agreement with Gijima was invalid for want of compliance with the constitutional prescripts regarding public procurement, in particular, s217 of the Constitution. The issue could not be determined at arbitration and SITA approached the High Court to review and set aside the agreement under the principle of legality.

The High Court concluded that SITA had to challenge its decision to conclude the agreement by way of judicial review in terms of PAJA. Such a review should have been brought within 180 days of the impugned decision, rendering SITA's review application many months late. However, the High Court found that SITA had failed to explain its reasons for the lengthy delay and further failed to make out any case for the extension of the 180-day period. It therefore dismissed SITA's challenge.

A majority of the Supreme Court of Appeal came to the same conclusion as the High Court, deciding emphatically that SITA was bound by, and had failed to comply with, the provisions of PAJA in prosecuting the review. On the other hand, a minority of

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The Constitutional Court did not agree with the High Court or the majority decision of the Supreme Court of Appeal, finding that an organ of state is not bound by PAJA when seeking to set aside its own decision.

the appeal judges favoured a more flexible approach and would have permitted SITA to have the impugned contract reviewed in accordance with the principle of legality, with the result that SITA would not have been required to comply with the 180-day period imposed by PAJA.

The Constitutional Court did not agree with the High Court or the majority decision of the Supreme Court of Appeal, finding that an organ of state is not bound by PAJA when seeking to set aside its own decision. Essentially, so Madlanga J and Pretorius AJ reasoned, this is because s33 of the Constitution, and therefore the provisions of PAJA, operates for the benefit of private persons and functions only to impose duties – rather than to confer rights – on organs of state. That being so, SITA – as the public decision-maker in question – was not obliged to comply with PAJA's 180-day period when it sought to set aside the agreement with Gijima.

The Constitutional Court determined that SITA had to review its decision in terms of the principle of legality. The Court accepted that the agreement had not been concluded pursuant to a competitive bidding process, in contravention of s217 of the Constitution. However, Madlanga J and Pretorius AJ found SITA's delay in instituting the review to have been unreasonable, particularly in the face of Gijima's repeatedly expressed concerns about the procurement process. The Court therefore declared the agreement invalid, but qualified that declaration so that it would "not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled". This could, in effect, allow Gijima to seek contractual relief against SITA notwithstanding that contract having been determined by the Court to be invalid.

The Constitutional Court's decision will introduce a measure of uncertainty into the realm of administrative law as administrators are no longer bound by PAJA's 180-day rule when seeking to correct their own decisions. While the principle of legality still requires a review to be brought without undue delay, the determination of what constitutes an "undue delay" is done on a case-by-case basis with no hard and fast rules. Citizens may therefore no longer rely on the 180-day period as an assurance that a particular administrative decision will generally be insulated from review.

Another concerning aspect is that if administrators must utilise the principle of legality in reviewing their own decisions, it means that they cannot initiate a review based on grounds that arise only under PAJA. The principle of legality provides that a decision may be

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The Court has limited the bases on which administrators may review their own decisions and, at the same time, introduced a further measure of uncertainty to administrative decisions.

reviewed if it is unlawful or irrational. PAJA goes further and provides that a decision may also be reviewed if it is unreasonable or procedurally unfair. Following the Constitutional Court's decision, it is possible that, in the absence of other legislative provisions imposing standards of fairness and reasonableness, administrators may not be able to rely on these fundamental grounds of review in seeking to correct their own defective decisions.

The Court has now brought clarity to PAJA's applicability in certain circumstances. It was also careful not to extend its findings to public-interest litigation by an organ of state or to an attempt by one organ of state to review the decision of another organ of state. Nevertheless, the Court has limited the bases on which administrators may review their own decisions and, at the same time, introduced a further measure of uncertainty to administrative decisions.

Ashley Pillay, Vincent Manko and Deborah Tumbo

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THE BLITZBOKS, THE CONSTITUTION AND UBUNTU – AN INTERESTING TRIANGLE

The Bill of Rights is not static and is being developed all the time by our courts as they grapple with its interpretation and application.

Although our daily newspaper headlines focus on state capture, corruption and a dwindling economy, South Africa has every reason to be proud of both the Bill of Rights in our Constitution, widely regarded as one of the most progressive in the world, and the Blitzboks. The Blitzboks epitomise teamwork, selflessness and dedication to a cause bigger than the individual. Okay, but where does that intersect with the Bill of Rights?

Well, both are dynamic, forced to adapt to the various scenarios that arise and it is that ability that sets them both apart and makes them the gold standard. The Bill of Rights is not static and is being developed all the time by our courts as they grapple with its interpretation and application.

Also, in the law of contract, our courts have started debating the development of the common law around the values enshrined in our Constitution, specifically the principle of Ubuntu, lived by the Blitzboks. This principle highlights the reality of human interdependence and solidarity in the interaction between people and includes ideas of humanness, social justice and fairness. The decision of the Constitutional Court judgment in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* highlights the point where the court was receptive to the idea of developing the common law on agreements to agree and debated - but did not apply in the case - the existence of an obligation arising from Ubuntu to negotiate in good faith.

Currently, our courts do not recognise an undertaking to negotiate as enforceable. Firstly, there is no agreement and the need for legal certainty is offended. In addition, a court enforcing an agreement to agree is almost certain to run foul of the requirement that the court should not dictate the terms of the envisaged substantive contract to which it is not a party.

Very recently, the Supreme Court of Appeal had the opportunity to develop the common law by relying on the principle of Ubuntu and to impose a duty on a landlord to negotiate the renewal of a lease agreement where the parties had recorded an agreement to agree. In *Roazar CC v The Falls Supermarket*, Roazar argued that the Falls did not give notice to renew in terms of the agreement and Roazar could, therefore, terminate the agreement on one month's notice. The Falls countered that the agreement could only be terminated after good faith negotiations, the agreement providing that the renewal period must be negotiated and the parties must endeavour to reach agreement on the rental, and argued the court should develop the common law.

The court was concerned that incorporating a duty to negotiate in good faith in agreements to agree would bring such uncertainty to a contract as to make it void for vagueness.

The court was concerned that incorporating a duty to negotiate in good faith in agreements to agree would bring such uncertainty to a contract as to make it void for vagueness. The problem is clear – how will a court determine whether an offer had been made in good faith absent a readily ascertainable external standard? The court found in favour of Roazar as there was no basis to decide how long good faith negotiations should run and therefore no basis to find a breach of such a duty to negotiate, even if it accepted that such a duty existed.

So the common law position was confirmed for the time being but the Constitutional Court will now have to grapple with this issue. Like the Blitzbokke, the development goes on, the actors change, new problems emerge. A case of sport imitating life but where to now for Ubuntu?

Tim Fletcher and Mari Bester

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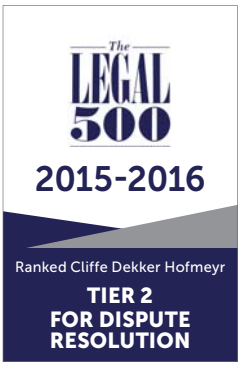

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Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 in Band 2 for dispute resolution.

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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