

DISPUTES

Does Validity Of A Contract Trump All Considerations In Review Of Agreements With Organs Of State?

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Recently, Theron J handed down a judgment in the Buffalo City Metropolitan Municipality / Asla Construction (Pty) Ltd matter with 5 other judges (Basson AJ, Dlodlo AJ, Goliath AJ, Nhlangtla J and Petse AJ) concurring. This case is worth a read not only because it builds upon the foundations of what has been recently regarded as a seminal ruling in the field of administrative review law, namely *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd [2017] ZACC40; 2018 (2) SA 23(CC)* ("the Gijima case"), but also because the dissenting judgment of Cameron J and Froneman J leaves one with the very real sense that the debate concerning the stance to be taken with respect to, on the one hand, the treatment and attitude of the Court to what would in any ordinary circumstances be regarded as an illegal contract, as against the role which the conduct of the applicant bringing the review proceedings, and particularly the attitude of the Court to the issue of delay is concerned, is still, it would seem, very much alive.

The Gijima case played an important role for two reasons:

- It clarified the basis upon which an Organ of State may bring review proceedings. Whereas the *Promotion to Access to Justice Act, 3 of 2000* ("PAJA") specifies time limits in which the parties are required to bring proceedings for the review and setting aside of decisions which they regard to be unlawful, Organs of State are not bound to those provisions. Gijima ultimately corrected the commonly held misconception that PAJA applied with respect to State entities bringing review proceedings in respect of their own. 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;
- It held that no matter the delay, even if unreasonable, if the agreement was invalid, it could never be enforced – to do so would be unconstitutional ("the Gijima principle").

In this matter, and by way of brief background, the Buffalo City Metropolitan Municipality ("BCM"), having approved the appropriate residential spatial framework, set about issuing notices of tender for the construction of certain housing projects in the greater East London area.

Asla Construction (Pty) Limited ("Asla"), the respondent in these proceedings, was successfully awarded a tender for certain of the construction works.

Separately from the awarded tenders to Asla, and as a result of a failed tender process in relation to a separate construction project in Reeston, Asla was approached by the Municipality's Chief Financial Officer, Mr Pillay, and "awarded" the Reeston contract without any due process or procedure being followed. Asla then proceeded to undertake the construction works in question.

Approximately a year later the same Mr Pillay, now acting in a different capacity, as acting City Manager, alleged that the agreement was unlawful and caused an investigation to be undertaken, which subsequently ascertained and confirmed illegality of the Reeston contract. All the while, Asla continued with the construction of the Reeston project, and issued payment certificates, which were not honoured. Asla consequently applied for provisional sentence summons in the Grahamstown High Court, which BCM opposed on the basis that the contract itself was invalid, and launched review proceedings in terms of PAJA. The Grahamstown High Court, after condoning the late delivery of the review application (outside of the 180 day period under PAJA) found the Reeston contract to be patently unlawful and dismissed Asla's contractual claims. Asla successfully thereafter approached the SCA, which held that the approach of the High Court, in having regard to the merits, in its consideration of whether or not to condone the delay, was incorrect, and declined to grant condonation and thereby to make any findings as to the legality or otherwise of the Reeston contract. The corollary to that was confirmation of Asla's contractual claims.

BCM subsequently appealed to the Constitutional Court in March 2017, which had in the same year handed down the Gijima judgment and as such invited the parties to make further submissions in the foregoing circumstances in the light of the findings of that case. Some 2 months after the matter was heard, BCM filed an application for leave to withdraw its application and presented an agreement that the parties had reached by way of settlement, which was subject to the sanction of the court. The court refused to allow the withdrawal for a number of reasons, including most pertinently that the court was unwilling (indeed unable) to render valid that which was in the first instance invalid.

Aside from the incisiveness and artfulness of the judgments of both Theron on the one hand, and Cameron and Froneman on the other (dissenting), whilst the jurisprudence and rationale that led the parties to their conclusions differed, the outcomes are ultimately similar.

- The majority ruling found the agreement to be invalid, with the result that Asla had to be compensated by the Municipality for unjustified enrichment relating to work done.
- The minority ruling on the other hand held that the review should not be allowed, with the result that the agreement had to be upheld, and Asla compensated for the monies owing to it in terms of the contract, which was for work done.

The nett effect is the same, and this begs the question: what difference does it make if the result is essentially the same?

The answer is quite simply that it depends on the matter – the decision to render an agreement valid or invalid may well have a huge effect because the measure for damages under common law (where a contract is deemed invalid) in one matter often does not equate to performance or damages under the contract (where it is deemed to be valid).

To illustrate this point, had Asla only constructed half of the units, and the contract been deemed valid, the Municipality would have been liable for the contractual damages for breach (for non-payment) in the event that Asla had elected to cancel – i.e. the measure of compensation would have been the full contractual value of the units constructed and the profit on the balance of the units not constructed. If the contract was invalid, Asla could only have claimed for that which it had constructed and by which the municipality had been unjustifiably enriched, and no more. The difference in the position can therefore be considerable.

It is therefore important to scrutinise and appreciate what the differences in the respective approaches are, as they will no doubt inform future debates concerning issues which unfortunately, all too often find themselves before our Courts.

As recognised by this judgment, it is more and more the case that organs of state are bringing applications to Court for the review and setting aside of decisions, which they made concerning the awarding of tenders, the sale of State assets and/or the treatment of public funds. Regime change has a lot to do with this.

South Africans all too often watch the organs of state make appalling decisions, resulting in wasteful expenditure not only in relation to the execution of the decisions sought to be impugned, but the subsequent litigation that engages the parties thereafter. This is a very real and prevalent issue in the context of State Capture, corruption and delay (often the basis of subsequent assertions that contracts are invalid and fall to be set aside).

It is also an all too convenient basis/excuse for an organs of state refusal to pay debts and honour contractual obligations to unsuspecting parties who were lured into what they understood to be a legitimate transaction – how much is the ordinary man on the street actually required to know about the inner workings of process within an organ of state which, absent compliance by the organ of state, will render the agreement invalid?

It is also somewhat unfair to require a third party to bring proceedings to review and set aside an impugned transaction within a statutory period and absent substantial compliance (which can only be condoned on application with considerable justification and explanation for any delay), that the agreement is automatically deemed valid if not challenged, against the position arising from the Gijima principle, whereby the state can quite literally bring an application ten years down the line to challenge and set aside what was an invalid agreement simply because validity trumps all considerations.

As applicant/*dominis litis* the officers of the organs of state who are querying and seeking to set aside the impugned decision/s of their former office bearers, act under the guise of legitimacy and are often also disinclined to drive the litigation with any genuine intent – in fact, they may be motivated to do the very opposite and protract the outcome for as long as humanly possible in the hope that the media, the watchdogs and the respondent/s lose interest or run out of money or both.

There is no shortage of displeasure noted by each of the judgments of Theron and Cameron, respectively, concerning the conduct of the Municipality (in this case) concerning oversight and lack of proper accountability. Unfortunately, none of that displeasure could, in the hands

of this court, translate into any consequences for those ultimately responsible for the unconscionable conduct and the significant legal costs, which the Municipality had to carry.

The following are the key take-aways from the majority judgment:

- the approach under PAJA, where there has been delay, as against the approach under a legality review, and the role of delay in that context were compared;
- the delay in this matter was regarded unreasonable absent an explanation;
- it was held that even if unreasonable, delay could be overlooked on a consideration of various factors, including prejudice to parties, the nature of the impugned decision and the conduct of the applicant;
- even where there is no other 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^[1];
- Theron and the majority ultimately found the agreement to be invalid on the basis of the Gijima principle;
- a Court is empowered to make an award that is just and equitable taking into account various relevant factors and considerations, including the prejudice to the respondent, delays and other considerations.
- The result was "*an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to that the respondent might have been entitled. It should be noted that such an award preserves the rights which have already accrued, but does not permit a party to obtain further rights under the invalid agreement*".

The minority judgment of Cameron and Froneman was in agreement with Theron's judgment that the delay in bringing the review proceedings by BCM was unreasonable. They essentially diverged on the principle that a Court can never uphold an agreement, which is invalid. They held that when determining the unreasonableness of the delay and exercising its discretion whether to allow consideration of the review, the Court must balance the seriousness of the possible illegality with the extent and unreasonableness of the delay.

In the circumstances of this case, Cameron and Froneman J held that the delay was sufficiently more inexcusable than the possible illegality was egregious, and that the balance tipped against the Court's intervention^[2].

Cameron and Froneman noted:

"A Court should be vigilant in ensuring that the State self-review is not brought by State officials with a personal interest in evading the consequences of their prior decisions. It should scrutinise the conduct of the public body and it can and explaining that conduct to ensure, in the public interest, open, responsive and accountable Government. Where there is a glaring arbitrariness and opportunism – that is, where the Government actor's efforts to correct the suspected unlawful decisions serve the antitheses of the Rule of law – the interest of justice weigh against giving a free pass by overlooking an unreasonable delay".^[3]

They went on to conclude:

"The Municipality's hands are thoroughly smudged and grimy. It wanted the High Court and this Court to uphold its defence to a private actor's claim for monies due on the premise that the claim sprang from an unlawful contract. Yet it did not tell the Court what it knew or knows now, or ought to have known, about precisely that unlawfulness.... For the Municipality to seek to invoke judicial sanction for unexplained shenanigans while shielding persons from the duty to testify was to treat the duty of full explanation this Court propounded in Khumalo, Kirland and Tasima with near insolence".^[4]

Whilst the net effect is broadly similar, the jurisprudential divide between these differing stances is significant and may yet spell the stage of further debates along similar lines in instances, where even more egregious delays, misconduct and lack of bona fides on the part of an applicant organ of state seeking to set aside its own decision may yet form the subject matter of scrutiny in our Courts.

Whilst it is at odds with the Constitution that you can declare that which is dead and never lived (i.e. invalid) to be alive (i.e. valid), it is entirely reasonable to suppose that the only just and equitable relief, which can rightly flow from an invalid agreement would be the granting of the

contractual remedy that would otherwise be precluded by the declaration of its validity – the court will yet come upon such a conundrum – Froneman and Cameron portended it and have thus left the door open on the debate.

[1] See para 63 of this judgment which in turn quotes the second judgment of Gijima at 150.

[2] Paragraph 148 (second judgment)

[3] Paragraph 140

[4] Paragraph 145 (second judgment) – a reference to three other seminal judgments relating to judicial review and administrative law.

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