IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) **REPORTABLE: YES / NO**
(2) **OF INTEREST TO OTHER JUDGES: YES / NO**
(3) **REVISED**

2016-04-15
DATE **SIGNATURE**

CASE NUMBER: 34104/14
DATE: 15 April 2016

STATE INFORMATION TECHNOLOGY AGENCY SOC LTD — Applicant

V

ELCB INFORMATION SERVICES (PTY) LTD — First Respondent

LEON DICKER N.O. — Second Respondent

JUDGMENT

MABUSE J:

[1] By notice of motion issued on 13 May 2014 by the Registrar of this Court, the Applicant, a public entity duly established as such in terms of the State Information Technology Agency Act 1998 ("SITA"), seeks the following orders against the First Respondent, a private company with limited liability duly registered as such in terms of the company

laws of this country and the Second Respondent, an adult male advocate who practises as such in Pretoria:

1.1 an order reviewing and setting aside the arbitration award made by the Second Respondent in arbitration proceedings between the Applicant and the First Respondent conducted under the auspices of the Arbitration Foundation of South Africa under case number AFSAPTA01072012;

1.2 declaring that the agreement concluded between the Applicant and the Respondent on 13 March 2006 ("the first agreement") is constitutionally invalid and is unenforceable against the Applicant;

1.3 declaring that the process which was followed by the Applicant to procure goods and services from the respondent in terms of the first agreement was constitutionally invalid and unlawful;

1.4 declaring that the first agreement did not give rise to a valid arbitration agreement between the Applicant and the First Respondent;

1.5 setting aside the first agreement;

1.6 declaring that the agreement purportedly concluded between the Applicant and the First Respondent in March 2007 ("the second agreement") is constitutionally invalid and is unenforceable against the Applicant;

1.7 declaring that the process which was followed by the Applicant to procure goods and services from the First Respondent purportedly in terms of the second agreement was constitutionally invalid and unlawful;

1.8 declaring that the second agreement did not give rise to a valid arbitration agreement between the Applicant and the First Respondent; and

1.9 setting aside the second agreement.

This aforegoing application constitutes the main application of the three applications that served simultaneously before court at the hearing. The second application is a counter-

application by the First Respondent in terms of the provisions of s 31(1) of the Arbitration Act 42 of 1965, in which the First Respondent seeks this Court's order of confirmation of the arbitration award made on 31 March 204 by the Second Respondent in favour of the Second Respondent in terms of which award the Applicant was ordered to pay certain amounts and interest to the First Respondent. The third application is an application by the First Respondent to strike out certain paragraphs of the founding and replying affidavit of Vincent Tendani Mphaphuli, the deponent to the Applicant's founding affidavit on the basis that they such paragraphs contain unsupported hearsay evidence.

[2] Before setting out the facts of the main application it is only apposite to first set out the procedure that has to be followed in the procurement of goods and services by such entities as the Applicant and the government departments.

[3] The Applicant procures information, technology, goods and services on behalf of itself and government departments. In doing so it is required to procure goods and services in the manner contemplated in s 217 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"). The said section states as follows:

"217(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 the allocation of contracts; and

(b) the protection or advisement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) The national legislation must prescribe a framework within which the policy referred to in (2) must be implemented."

The Applicant, it is so contended, is in law obliged to resist the enforcement of procurement contracts concluded in violation of the procurement system contemplated in s 217 of the Constitution.

[4] What is required by s 217 is that, amongst others, interested parties should be publicly invited to submit tenders for the provision of goods or services to the state organ concerned and that all the relevant information should be accessible to interested tenderers. In addition the said section requires that adjudication of tenders submitted should be done in a transparent manner and that the contract is awarded to a bidder which has scored the highest points in the adjudication process. It is contended by the Applicant that this process was not followed before the two agreements which are the subject matter of this application were concluded.

[5] The Applicant is bound by the provisions of the Preferential Procurement Policy Framework Act 5 of 2000 ("the PPPFA") and its regulations when it procures goods and services. It is also bound by the Supply Chain Management Policy ("the SCMP"). The introduction in the Supply Chain Management Policy states as follows:

"(a) The purpose of this document is to outline the policy of SITA on procurement activities and related contracts entered into by SITA (for work, products and services);

(b) The object of this policy is to establish a competitive advantage a competitive advantage to SITA through procurement of all products and services, which meet the needs of SITA;

(c) The policy is governed by the supply chain management guidelines issued by the National Treasury, with the primary focus on the acquisition methods; and

(d) The Head: Procurement Services, as the custodian of the procurement policy, has the full accountability and responsibility for the procurement policy, including all annexes in this document. Updates on this policy and process will be done through procurement circulars issued by the Head: Procurement Services and they will have the same weight and effect as this policy document."

[6] S 2 of the Constitution provides as follows:

"This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled."

According to this section the obligations imposed by the Constitution must be complied with and failure to do so renders the conduct in issue invalid. The implication of s 2 is simply that the conduct of those to whom the Constitution applies must at all material times comply with it; that the conduct which is in contravention of the Constitution is invalid and cannot in law be enforced; and, thirdly, that in so far as this matter is concerned, the procurement of goods and services in contravention of s 217 of the Constitution is invalid and the relevant organ of state is in law not bound by an agreement concluded in contravention of s 217 of the Constitution.

[7] It is furthermore contended by the Applicant that s 2 of the Constitution does not contain any requirement which must be complied with before an application for the relief such as sought herein is instituted. It is submitted by the Applicant that such an application may be instituted at any time and in particular in circumstances such as the present where the First Respondent seeks to enforce what are clearly constitutionally invalid agreements.

[8] The Applicant is in law required to conduct itself in a manner which is consistent with the Constitution and any of its conduct which is inconsistent with the Constitution is invalid. The Courts are also bound by the Constitution to declare as constitutionally invalid any conduct which is inconsistent with the Constitution invalid.

[9] The facts of the matter relating to the first agreement

I proceed hereunder to set out the facts that relate to the conclusion of the first agreement. On 16 March 2006, the Applicant and the First Respondent concluded a written agreement for the provision of goods and services. A copy of the said agreement was attached to the founding affidavit as Annexure 'FA2'. Clause 3 of the first agreement provides for the appointment of the First Respondent by the Applicant *"to perform the services detailed in schedule 1 upon the terms and conditions set out herein."* In terms of the first agreement, the First Respondent was required to develop and implement an information management system for the South African Social Security Agency. Accordingly the first agreements provided for the procurement of goods and services by the Applicant and ought to have been concluded pursuant to the procurement processes contemplated in s 217 of the Constitution. The said section requires, amongst others, that a service provider from whom goods and services are produced should be selected through a competitive tender process.

[10] For the following reasons it is contended by the Applicant that the first agreement was not concluded in accordance with the prescripts of s 217 of the Constitution in as much as:

1. there was no public invitation to interested parties to submit tenders for the provisions of the goods and services provided for in the first paragraph;

2. the First Respondent did not submit a tender for the provision of the goods and services provided for in the agreement;
3. it was not concluded in the transparent manner;
4. the respondents' goods and services were not assessed to determine if the agreed price was competitive and cost effective;
5. the process which led to the conclusion of the agreement was not fair in that other service providers were not publicly invited to submit tenders for the provisions of the goods and services in issue.

[11] On those bases it is submitted by the Applicant that the appointment of the First Respondent in terms of the first agreement was constitutionally invalid in terms of s 2 of the Constitution; that the conclusion of the first agreement was not authorised by the defendant (Applicant) in the manner contemplated in s 217 of the Constitution and it is therefore invalid; that the appointment of the First Respondent was not enforceable against the Applicant as its enforcement would constitute an illegality and would perpetuate the very mischief which s 217 of the Constitution was designed to combat; and lastly, that the first agreement was invalid, unenforceable and did not give rise to a valid and enforceable arbitration agreement between the Applicant and the First Respondent.

[12] Clause 25 of the impugned agreement provides for a dispute resolution. It provides as follows:

"25.1 In the event of a dispute arising between SITA and the Service Provider, in respect of any cause whatsoever, including a dispute with regard to the remuneration in terms of paragraph 11, it shall be referred to mediation within 7 (seven) calendar days of written notification by either party to the other.

25.2 If the dispute remains unresolved at the expiry of 14 (fourteen) calendar days after the referral of the dispute to mediation, then the dispute may be referred to arbitration. In this regard:

25.2.1 the arbitration would be conducted in accordance with the rules of the Arbitration Foundation of South Africa ("AFSA") as amended from time to time;

25.2.2 AFSA shall appoint an arbitrator to preside over the arbitration provided that more than one arbitrator may be appointed where the parties agree thereto; and ..."

It is contended by the Applicant that, in view of the fact that the first agreement is constitutionally invalid for the reasons set out above, so is the arbitration agreement. Accordingly, for these reasons, the arbitration proceedings conducted by the Second Respondent under the auspices of AFSA under this aforementioned number are invalid and the arbitration award issued in terms thereof ought to be set aside.

[13] The second agreement

The deponent has set out the facts relating to the second agreement as follows. In a letter dated 11 January 2007, the superintendent general of the Eastern Cape Department of Health ("ECDH") requested the Applicant to appoint the First Respondent to develop a record management system for that department. The said letter, which was addressed to the General Manager State Information Technology Agency Bisho 5609 for the attention of Mr. Padayachy stated as follows:

"RE: REQUEST FOR SYSTEMS ON RECORDS MANAGEMENT PROJECT BY ELCB AND PRICE WATERHOUSE COOPERS THROUGH SITA

The Department of Health is requesting your organisation to come and assist us in providing a solution in addressing the problem we have in keeping, managing and correcting our manual records.

During the 2005/2006 Financial Year, our Department was given a disclaimer by the Auditor General due amongst other things the non-availability of essential documents or records that could have enable Auditor General to conduct an audit and give opinion in the performance of the Department. After the thorough investigation that the Department had done, the MEC had recommended that we request your organisation to come and assist us in addressing this problem. The MEC had also made it very clear that SITA should utilise or appoint the very same companies that you utilise when you were addressing Department of Education's problem. We had discovered that the companies that were subcontracted by SITA in that project were ELCB and Price Waterhouse Coopers through ELCB. The reasons why the Department request the very same companies are because of the quality of work that they had done for the Department of Education. The Department felt that we need the very same type of expertise and services to ensure that we get a good quality output. The skills and the experience that these two companies had portrayed when they were doing this project for the Department of Education, let our Department to decide and recommend that the two companies be the one provided this service to us.

The Department therefore request SITA to work specifically with ELCB and Price Waterhouse Coopers in this project.

Your assistance in this matter will be highly appreciated.

LM Boya

Superintendent

11/1/2007."

Following the said letter the Applicant appointed the First Respondent to develop a records management system for the Eastern Cape Department of Health and according to the First Respondent an agreement was concluded in relation thereto. No trace of a copy of the said agreement could be found.

[14] In the arbitration proceedings the First Respondent relied on an unsigned agreement which it alleged had been concluded between the Applicant and the First Respondent. The Applicant contends that in the absence of a duly signed agreement no proof exists that such an agreement was ever concluded. It is contended furthermore by the Applicant that in the absence of any such signed agreement there is no basis for the existence of an arbitration agreement.

[15] It was submitted by the Applicant that even if the second agreement were signed, the Applicant was still entitled to the relief which it seeks due to the fact that the Applicant's case was based on the following grounds as far as the second agreement was concerned:

15.1 if the said agreement was indeed concluded and signed by the Applicant it was still invalid due to the fact that it was concluded in contravention of the provisions of s 217 of the Constitution;

15.2 secondly, if the said agreement was not signed and therefore not concluded by the parties then in that event there was no valid arbitration agreement to arbitrate for the First Respondent's second claim.

For that reason the Second Respondent had no jurisdiction to arbitrate the First Respondent's second agreement and accordingly the Second Respondent's arbitration award should be set aside.

[16] Although clause 2 of the second agreement recorded that the Applicant advertised a request for quotation for interested parties to submit quotations for the provisions of the records management system contemplated in the second agreement, this was done only to create an impression that there was compliance with the Applicant's obligations in terms of s 217 of the Constitution when in fact there was no such compliance. The following circumstances show quite clearly that there was no compliance with the provisions of s 217 of the Constitution. The process contemplated in s 217 of the Constitution is designed to identify a successful bidder who does not know when the invitation to a tender or submit quotations is issued. If the request for quotations was indeed issued it was issued in circumstances where the Applicant had already been told by the Eastern Cape Department of Health to appoint the First Respondent as the aforesaid and it had agreed to do so. Thirdly, the conclusion that the Applicant appointed the First Respondent to give effect to the Eastern Cape Department of Health request to appoint the First Respondent cannot be avoided. Finally when regard is had to value of the services for which the First Respondent was appointed, in other words for the amount of R23 million, a full tender process ought to have been followed as opposed to a request for quotations which at the time was prescribed for procurement of services and goods whose value did not exceed R200,000.00. Finally, there is no record to confirm the contents of clause 2 of the second agreement, in other words, that a proper and lawful request for quotation processes had been followed.

[17] Even if that had been followed, it is still unlawful because procurement of the services in question were far in excess of the threshold of R200,000.00 for which a request for quotation is allowed.

[18] Clause 23 of the second agreement provides for the dispute resolution through arbitration. According to clause 23.6 of the second agreement the arbitrator *"shall be obliged to give his award in writing fully supported by reasons."* It is the Applicant's case that the arbitrator, the Second Respondent, failed to comply with the provisions of clauses 23.6 and 23.8 of the second agreement in as much as he exceeded his powers.

[19] Through the affidavit of one Shaun Bernard Gouws ("Gouws"), an adult business man employed by the First Respondent at its Divisional Head: Business Solutions, the First Respondent, which opposes this application, has raised certain crucial issues against the application. Before I attend to enumerating such issues it is apposite at this stage to point out that the Second Respondent has not filed any papers. The First Respondent has, however, and through the affidavit of Gouws, taken up cudgels on behalf of the Second Respondent.

[20] The various issues that the First Respondent has raised against the application are as follows:

20.1 that there had been an inordinate and unexplained delay in bringing this application;

20.2 that there is no merit in the application;

20.3 that the First Respondent has, throughout and over the years, performed all of its obligations in respect of the two aforementioned agreements;

20.4 that the Applicant has, in respect of both agreements, substantially complied with its obligations;

20.5 that on no single occasion during the performance of its obligations arising from the two contracts did the Applicant complain about the invalidity of the agreements;

20.6 that when the Applicant defaulted with its payments for the outstanding amount, despite numerous protracted negotiations between the parties, the Applicant did not raise the issue of the constitutional invalidity of the agreement; and,

20.7 that the Applicant participated in the arbitration process.

[21] I now proceed to deal with the First Respondent's consents singly:

THE DELAY IN BRINGING THIS APPLICATION

21.1 It is contended by the First Respondent that procurement of goods and services constitutes administrative law and that any irregularities in the manner in which goods and services by an organ of state were procured must be addressed by our Courts in terms of the provisions of the Promotion of Justice Act 3 of 2000 ("PAJA"). PAJA sets out in section 7 a time period in which an application of this nature must be launched. Section 7(1) thereof provides as follows:

"Any proceedings for judicial review in terms of s. 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 proceeding 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."

It is contended by the First Respondent that where there has been a failure by a party, such as the Applicant in this matter, to bring the review in terms of PAJA within the time period prescribed by s. 7(1) of PAJA, it requires that condonation for such non-compliance must be sought before relief can be granted. The First Respondent is mainly concerned about what it calls in 7 to 8 years of an unexplained delay in bringing this current application.

[22] During the aforementioned delay the following events took place. The First Respondent throughout and over a number of years performed its obligations in respect of the two agreements. Simultaneously the Applicant also performed a substantial part of its obligations, for instance in respect of the first agreement, a total amount payable by it to the First Respondent for the services of the First Respondent was R220 million. Of the said amount only the balance of R891,155.85 remains unpaid. In respect of the second agreement whose contract value was R20.1 million, the Applicant has paid a substantial portion of it and only R2,911.674.64 remains unpaid.

[23] The Applicant contends that the fact that the relief which the Applicant seeks in the application may be brought in terms of PAJA does not mean that it cannot be brought under s. 2 of the Constitution or the general principles of legality. It was argued by counsel for the Applicant that s. 2 of the Constitution does not contain any requirements which must be complied with before an application for the relief sought herein is instituted. He developed his argument and stated that there is nothing contained in the Constitution that suggests that the relief sought by the Applicant in the notice of motion

can only be brought by way of a review application in terms of the provisions of PAJA. He has not referred this Court to any authority in support of his contention.

[24] The Applicant contends that because s. 2 of the Constitution is not time bound, it was entitled to launch this application notwithstanding the unexplained delay of 7 to 8 years. The Applicant expressly disavows any reliance on the provisions of PAJA. It opines that it is not bound by PAJA's prescription in terms of s. 7(1) thereof that an application for the review of an administrative action must be brought within 180 days after the Applicant had become aware of the action and the reasons for it or such Applicant might reasonably have been expected to have become aware of the actions and the reasons.

[25] The Applicant's view is, in my view, somewhat flawed. The fit of clay in its argument is the contention that s. 2 of the Constitution is not time-bound and secondly, that it is not bound by PAJA's stipulations that an application for review of an administrative action must be brought within 180 days. It has now become settled law in this country that the procurement of goods and services or tender process constitutes an administrative action.

[26] Section 1 of PAJA defines *"administrative action"* as any decision, taken or any failure to take a decision, by –

"(a) an organ of State, when –

(i) exercising a power in terms of the Constitution over a Provincial Constitution;

(ii) exercising a public power or performing a public function in terms of any legislation;

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person which has a direct, external legal effect, but does not include ..."

According to **Chairman, State Tender Board and Another v Supersonic Tours (Pty) Ltd 2008(6) SA 220 SCA**, the Applicant is an *"organ of state"* as defined in s 239 of the Constitution read with s 1 of PAJA. The Applicant made a *"decision"* as contemplated in s 1 of PAJA, to award the tender to, or to procure services from, the First Respondent. That decision that the Applicant took in awarding the tenders to, or procuring services and goods from, the First Respondent was an exercise of public power as envisaged in s 1 of PAJA. Accordingly the requirements of *"administrative action"* were fulfilled. The decision of the Applicant to award tenders to, or to procure goods and services from, the First Respondent was clearly an administrative action as contemplated by PAJA. Consequently such an administrative action is susceptible to be reviewed in terms of s 6(1) of PAJA provided that the grounds set forth in s. 6(2) of PAJA are established.

[27] Law Authorities

In this regard **Logbro Properties CC v Beddenson NO and Others 2003(2) SA 460 SCA** at page 465 F-G this is what the Court stated:

"(5) The starting point must be that the tender process constituted "administrative action" under the Constitution.

This entitled the appellant (and it does not matter in this case whether the interim or the 1996 condition applied) to a lawful and procedurally fair process and outcome where its rights were affected or threatened justifiable in relation to the reasons given for it."

See also **Umfolozi Transport (Edms) Beperk v Minister van Vervoer en Andere (1997) 2 ALL SA 548 (SCA) at 552J – 553A; Transnet Ltd v Goodman Brothers (Pty) Ltd 2001(1) SA 853 (SCA) at 870 paragraph 7** where Schutz JA, as he then was, remarked that:

"Turning to the first question, whether administrative action was involved, it has already been held in this Court that the State Tender Board's handling of tenders ... constituted administrative action, - Umfolozi Transport (Edms) Beperk vs Minister van Vervoer en Andere (1997)2B ALL SA 548 (SCA) at page 552 J to 553 A. Howie JA pointed out that the steps that had preceded the conclusion of the contractual of the contract were purely administrative actions and decisions by officials whilst in addition public money was being spent by a public body in the public interest. Naturally, said Howie JA, in such a case, the subject is entitled to a just and reasonable procedure."

At page 871 B the Court continued and stated that:

"For the reasons given I am of the view that the actions of Transnet in calling for an adjudicating tender constituted administrative actions wherever contractual arrangements may have been attendant upon it."

[28] Finally s 33 of the Constitution deals with just administrative action. It provides as follows:

"33(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 an update 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 (1) and (2); and

(c) promote an efficient administration."

It is now trite law that the actions of the Applicant in calling and adjudicating for a tender for the supply of goods and services or that resulted in the conclusion of the impugned agreements constituted, as the authorities cited above have demonstrated, or in concluding the impugned agreements, administrative actions irrespective of the consequent contractual arrangements. That being the case then s 6 of the PAJA, and not s. 2 of the Constitution, provides for the mechanism of challenging, by way of judicial review, of the constitutional validity or legality of any administrative action. S 6 provides that:

"(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) an 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) ...

(f) the action itself –

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

*(ii) is not originally** 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) ...

(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."

[29] The Applicant's contention that s 2 of the Constitution does not contain any requirement which must be complied with before an application for the relief sought herein instituted, is incorrect. The feet of clay in the Applicant's contention is to look in s 2 of the Constitution in isolation for the procedure that one has to follow or in order to give effect to the provisions of s 2. How does one approach the Court in law for a declaration of invalidity of law or conduct? The answer lies in s 33(3)(a) of the Constitution read with s 6 of PAJA. Accordingly the Applicant's contention that s 2 does not contain any requirement that must be complied with before an application for relief is instituted may be correct only if the said section is considered in isolation. Other provisions of the Constitution and PAJA do provide for a mechanism of giving effect to s 2 of the Constitution. It was accordingly obligatory for the Applicant to bring this application in accordance with the provisions of s. 33 of the Constitution read with s. 6 of PAJA.

[30] Finally, in **Bato Star Fishing (Pty) Ltd vs The Minister of Environmental Affairs 2004(4) SA 490 CC at p. 564 paragraph 22** the Court, O'Regan J, had the following to say:

"The Court's power to review administrative action no longer flows directly from common law but from PAJA and the Constitution itself."

In **paragraph 25** the Court continued and stated that:

"The provisions of s 6 divulge a clear purpose to qualify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from common law as in the past ... As PAJA gives effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters."

[31] With regards to the time limitation set out in s 7(1) of PAJA, one merely has to refer to **Khumalo and Another vs MEC for Education, Kwazulu Natal SA 579 SCA** *"the Khumalo matter"*. It is the law in this country that legality review should be brought without delay. Courts do have a discretion to refuse or grant a review application when there has been a delay in bringing it. According to the Khumalo matter at page 594:

"But that does not mean that the Constitution has dispensed with the basic procedure requirement that review proceedings are to be brought without undue delay or with a Court's discretion to overlook the delay."

It is clear that there was an inordinate delay of between 7 to 8 years before this application could be launched. This delay has not been explained. There was before the Court no application for condonation for the late filing of this application. Even if the Applicant had not planned to launch this review application in terms of PAJA, there is no explanation as to why the application was launched after so long a period.

[32] In deciding whether to exercise its discretion, which it must do judicially, in favour of the applicant, this Court must have regard to other circumstances such as the length of the delay; the reasons for the delay; the extent to which the parties have performed their obligations; and the prejudice to the parties if the delay is overlooked or not. Where there is no application for condonation and therefore no reasons for the delay furnished the Court will, without much ado, readily infer that the Applicant has no genuine reasons for the delay. Where the parties have rendered substantial performance of the obligations, like in the present application, and it will prejudice the First Respondent unfairly if the delay is overlooked, the Court should exercise its discretion in favour of the First Respondent and refuse to overlook the delay.

[33] There is another fundamental problem with the application. The following lines in the Khumalo matter *supra* might well demonstrate that fundamental problem:

"A Court has greater powers under the Constitution to regulate any possible unjust consequences by granting an appropriate order. While a Court must declare conduct that it finds to be unconstitutional invalid, it need not set the conduct aside."

In conclusion, as no circumstances on the basis of which this Court could exercise its discretion in favour of the Applicant have been placed before it, the inference is inevitable that this application must fail on this point alone. There is no basis upon which another procedure, which envisages a different set of circumstances, could be regarded as applying in this application. Accordingly the Applicant has failed to show that this application does not qualify to be dealt with in terms of s 93 of the Constitution read with s 6 and 8 of PAJA.

[34] In the light of the conclusion I have come to, I do not I do not deem it necessary to consider the other applications raised by the First respondent. It goes without saying

that if this Court dismisses the application the fundamental point that there was an unexplained inordinate delay in bringing this application, which application would have upset the arbitration award if successful, the application by the first Respondent to an order confirming the said award should be successful.

In the result I make the following order:

1. The application is dismissed.
2. The First Respondent's counter-application that the award of the arbitrator made on 31 March 2014 be made an Order of Court in terms of section 31(1) of the Arbitration Act 42 of 1965 is hereby granted.
3. The arbitration award made by the Second Respondent in favour of the First Respondent on 31 March 2014 is hereby confirmed.
4. The Applicant is hereby ordered to pay the costs of the application, including the costs of the First Respondent's counter-application.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	*Adv. K Tsatsawane*
Instructed by:	*Kunene Ramapala Botha Attorneys*
Counsel for the First Respondent:	*Adv. S Rorke (SC)*
Instructed by:	*Smith Tabata Inc.*
	c/o Barnard Inc.
Date Heard:	*25 August 2015*
Date of Judgment:	*15 April 2016*