

Same parameters, different verdicts

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IN MARCH 2013 a unanimous Supreme Court of Appeal (SCA) in *Allpay Consolidated Investment v CEO, SASSA* 2013 (4) SA 557 (SCA) twice asserted that it would be 'gravely prejudicial to the public interest if the law were to invalidate public contracts for inconsequential irregularities.' Yet, barely eight months later, a unanimous Constitutional Court (Concourt) [2014 (1) SA 604 (CC)] described that approach as a misapprehension.

How was that possible given that the two sets of judges in the two appellate courts had the same legal parameters within which to reach their respective conclusions? The answer appears to lie in the role of underlying values: different points of departure must have been at play in the minds of the respective sets of judges.

Significantly, in *Justice: a personal account* (Tafelberg 2014) at 106 Concourt Justice Edwin Cameron implies that new-era judges should see themselves as 'called to apply legal principles and values so as to find ways to try to secure just outcomes in the cases before them'. Theunis Roux exposed the important role of underlying values: he maintains that liberal legalists whom he broadly defines as the transnational community of legal academics, judges and practising lawyers interested in comparing the way Constitutional Courts in different parts of the world go about their work, accept that the Concourt's 'doctrinal choices ... (are) ... indeed significantly constrained by some combination of the Constitution's language and the force of the moral arguments themselves.' (See Theunis Roux *The Politics of Principle: the First South African Constitutional Court 1995 – 2005* (Cambridge University Press 2013) at 45).

What are practitioners, who on a daily basis are called upon to prophesy what the courts will do, to make of this? (See Oliver Wendell Holmes *The Path of the Law and the Common Law* (Kaplan Publishing 2009) at 6: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.')

The *Allpay*-case concerned a challenge in terms of PAJA to the awarding of a tender to Cash Paymaster Services (Pty) Ltd (CPS) rather than to AllPay Consolidated Investments (Pty) Ltd (AllPay) by the South African Social Security Agency (SASSA) for the administration of the payout of social grants. Section 217 of the Constitution determines that national legislation must prescribe a framework for a fair, equitable, transparent, competitive and cost-effective system for the procurement of goods and services. The Preferential Procurement Policy Framework Act 5 of 2000) was promulgated to comply with section 217.



SASSA

AllPay's case on appeal from the North Gauteng High Court to the SCA was that if there were flaws in the execution of the prescribed procurement procedures, then the process was invalid and the awarded contract had to be set aside. AllPay relied on five such alleged flaws as basis for its claim that the process was invalid. The SCA summarised AllPay's basic argument as follows:

'It was submitted that the process of procurement has a value in itself, which must lead to invalidity if the process is flawed irrespective of whether the flaw has consequences.'

Regarding the five alleged flaws in the execution of the prescribed procurement policy, the SCA found that one was '(p)erhaps ... an internal "irregularity" but it was not an unlawful irregularity' and that the others were not unlawful irregularities.

One of its premises was that as long as there were merely flaws, ie 'inconsequential' or 'not unlawful' irregularities in the procurement process, then the process was not invalid. Thus it found that the process that had been followed, was valid, and that the contract need not be set aside. The court therefore dismissed the appeal.

ONE NEEDS to emphasise at this stage that the SCA in essence found that even if all the irregularities that AllPay complained of were indeed to have been present, SASSA would still have been entitled to award the contract to the other bidder, CPS. The reason is that CPS's contract was the only one that provided the solution that SASSA required. The final outcome would therefore have been the same regardless of the absence or presence of the alleged flaws since AllPay's tender did not qualify, and AllPay could consequently not have been awarded the tender anyway. The SCA therefore termed the latter 'inconsequential irregularities.'

But how, logically, did the SCA get from 'there were mere flaws' (or irregularities, but not unlawful irregularities) in the execution of the prescribed procurement procedure to 'therefore the process was valid'? With the assumption, it is submitted, that the individuals that are supposed to follow the process and for whom the process was constitutionally-prescribed should be trusted with the evaluation and awarding of the contract.

The court's underlying point of departure was that in the absence of proven consequential irregularities the judiciary should not interfere with the inner workings of the executive. From such assumptions it logically follows that the public interest would be gravely prejudiced by judicial interference based on mere flaws. >

The Concourt, on the other hand, on further appeal agreed with AllPay. It ruled that if, as a result of an irregularity in the following of a procurement provision, the purpose of such provision was not achieved, then the process was invalid and the contract had to be set aside in terms of PAJA. The court found that in two of the five instances of non-compliance complained of by AllPay, the non-compliance resulted in the purpose of the provision not being achieved. It therefore found the awarding of the tender to be constitutionally invalid and allowed the appeal.

There was thus a shift from the SCA's reliance on 'irregularities that were inconsequential' to the eventual outcome (ie to the awarding of the tender) or 'irregularities that were not unlawful', to the Concourt's reliance on irregularities that negated the purpose of the particular procurement provision

But how then, logically, did the Concourt get from the premise that 'there were irregularities which resulted in the purpose of the particular provision not being achieved' to the conclusion that therefore the process was constitutionally

invalid? With the assumption, it is submitted, that the officials alone should not be trusted with the process and that the absence of proven consequential irregularities should not justify non-compliance, so that adherence to the prescribed process has a value in itself.

The Concourt's underlying point of departure, therefore, was that courts may interfere in the workings of the executive to ensure compliance with constitutional prerequisites even in the absence of proven consequential irregularities. Wherefore, even though AllPay might in any event not have qualified for the tender, the officials still had the duty to execute their functions in compliance with section 217 of the Constitution.

Compliance with the prescribed process to at least the minimum extent that is necessary for the purpose of each provision to be attained is therefore compulsory. Because otherwise 'it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed' [paragraph 24] and 'it serves as a guardian against a process skewed by corrupt influences' [paragraph 27]. **A**

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