SUBSIDIARITY IN THE CONTEXT OF ADMINISTRATIVE LAW

BY NHLAMULO ISAAC NKANYANE

A mini-dissertation submitted to the Faculty of Law, Department of Public Law, University of Pretoria, in partial fulfilment of the requirements for the LLM (course work) in Administrative and Constitutional Law

November 2018

Student number: 17121389

Email: lsaac.nkanyane@sapc.za.org
Cell: 0737630996

Supervisor: Prof. Danie Brand

SUMMARY

In this dissertation I indicate the angle in which the principle of subsidiarity has developed the administrative law and the manner in which the Constitutional Court has in the *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (SITA)* able to lay down the important or fundamental basis of the principle of subsidiarity in the context of administrative law.

In chapter 1, I deal with the origin of the principle of subsidiarity. I argue that this principle was first introduced in church by Pope Pius XI. In that time the principle did not have a legal meaning as it was only applied or taught in church. I further deal with the general meaning of the principle of subsidiarity and make reference to Melanie Murcott definition, in which she state that in South African law, subsidiarity means the notion that adjudication of substantive issues should be determined with reference to more particular indirect constitutional norms applicable rather than more general direct constitutional norms.

In chapter 2, I deal with A J van der Walt two principles of subsidiarity with their provisos and how these principles with their provisos are applied. This is done with reference to case law which relate to the two principles and their provisos. I argue that the two principles and their provisos do not provide clarity on the question of which source of law apply when a state organ seek to review its own decision.

In chapter 3, I answer the question which the two principles of subsidiarity and provisos have failed to answer being which source of law apply when a state organ seek to undo its own decision. I do so by first dealing with cases which lost the opportunity to answer the question, secondly analyse the SITA judgement in the Supreme Court of Appeal and lastly deal with the Constitutional Court Judgement, which at least provided a clarity on the question of source of when a state organ seek to review its own decision.

In chapter 4, I deal with the threshold question and argue that it is important for litigants to outline their cause of action from the beginning of the case to enable the court to properly determine which source of law applies to particular facts or circumstances. In

doing so I refer to the interpretative threshold question. The interpretative threshold question in SITA answered the threshold question by asking what is the purpose of the fundamental rights and who did they seek to protect?

In chapter 5 I conclude by indicating that the failure by the courts or the avoidance by the courts in some cases to deal with the question which source of law applies when a state organ seek to review its own decision has led to wrong precedents of courts electing to avoid the question. I argue that it is the Constitutional Court judgement in *SITA* that has paved a new approach to the question of source of law in the administrative context of subsidiarity.

ACKNOWLEDGEMENTS

I would like to firstly acknowledge Prof. Danie Brand, who introduced to me the concept of subsidiarity. I am further grateful for the supervision of Prof. Danie Brand and for his encouragement, patience and the insights he provided to me to better understand the concept of subsidiarity.

I would also like to acknowledge my Senior Manager Mrs Debbie Hoffmann for encouraging me to further my studies. I am also grateful for the support that I have received from Mr Pierre Malan a Director: Client Service at Sabinet for providing me with articles for my research.

Lastly this mini-dissertation would not have been finalised without the support of my family and mostly my late mother Tendani Fracinah Ramaite, who always encouraged me to be educated as she believed that education was the only weapon that can remove me from poverty.

DECLARATION OF ORIGINALITY

I, Nhlamulo Isaac Nkanyane (student number 17121389), declare that:

1. I understand what plagiarism means and I am aware of the University's policy in this regard.
2. This mini-dissertation is my own original work (unless and to the extent stated otherwise). Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used as my own, work previously produced by another student or any other person.
4. I have not allowed, and will not allow anyone to copy my work with the intention of passing it off as his or her own.

Signature of student: _____

Signature of supervisor: _____

Date:

TABLE OF CONTENTS

Introduction

In South Africa before the constitutional era, administrative law was entirely based on Common law. However this changed when South Africa became a democratic country. According Cora Hoexter, the South African's transition to democracy did not leave any branch of law untouched, but in administrative law the effects have been especially dramatic.[1] The Interim Constitution[2] and more recently the 1996 Constitution[3] and the statute that gives effect to it, the Promotion of Administrative Justice Act[4] (PAJA), have produced a new brand of administrative law that is removed from the common law.[5] My broad purpose in this dissertation is to show the angle in which the principle of subsidiarity has developed the administrative law and to show how the court in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*[6] was able to apply this principle to resolve the threshold question of which source of law applies when a state organ seeks to review its own decision.

In chapter 1, I deal with the origin and the meaning of the principle of subsidiarity. In this chapter there are three sub aspects which are firstly subsidiarity and the church through the social teachings of Catholics, secondly I deal with the general legal meaning of subsidiarity and the last sub aspect is the meaning of subsidiarity in the context of the administrative law. In chapter 2, I deal with the two principles of subsidiarity with proviso as identified by A J van der Walt. I indicate how one can resort to the Constitutional principle of legality or common law directly instead of PAJA. This will be done by referring to case law.

In Chapter 3, I deal with the question of whether legality or subsidiarity applies, when one seeks to undo or review his or her unlawful decision. I refer to two cases, one case from the Supreme Court of Appeal (SCA) and the other from the Constitutional Court (CC). In answering the question I analyse the interpretation that was given by

[1] C Hoexter, "Administrative Law in South Africa" 2nd edition, 2012 p2 (Hoexter, "Administrative Law").
[2] Constitution of the Republic of South Africa, Act 200 of 1993.
[3] Constitution of the Republic of South Africa, 1996.
[4] 3 of 2000
[5] Hoexter "Administrative Law" (note 1 above) p2.
[6] [2017] ZACC 40; (*"SITA Constitutional Court Judgement"*)

the Constitutional Court and the minority judgement of the SCA. In chapter 4, I deal with the threshold question that the court must deal with before deciding whether legality or subsidiarity applies. I will indicate that it is important for a court to deal with this question as it will not undermine PAJA as the Act that gives effect to a constitutional right to just administrative action in terms of section 33.

In chapter 5, I conclude my dissertation by providing that it is important for a court to ask the litigants to properly state their cause of action, in order for a court to properly interrogate the question of whether PAJA or the principle of legality applies.

Chapter 1 The Origin and meaning of Subsidiarity

1.1 Subsidiarity and the Church: Social teachings of Catholics

The principle of subsidiarity is not primarily a legal term. The principle evolved in the Roman Catholic Church. The principle was first named and stated by Pope Pius XI in 1931 in his social encyclical, Quadragesimo Anno in the following way:

> "It is a fundamental principle of social philosophy, fixed and unchangeable, that one should not withdraw from individuals and commit to the community that they can accomplish by their own enterprise and industry. So, too it is injustice and at the same time a grave evil and a disturbance to right order transfer to the larger and higher collectively functions which can be performed and provided for by lesser and subordinated bodies. Inasmuch as every social activity should by its nature, prove a help to members of the body social, it should never destroy or absorb them".[7]

The principle has its clear roots from social and political theory, however its statement grew to cover also historical conditions. The principle recognises both that the good of the individual person is primary in all decisions of social and political organisation and that person's can live only in communities, which therefore have their own specific goods and exercise of powers in their own right.[8]

The Pope applied the principle in both the relationship between individuals and the community and to the relationship between the higher and lower organisations in more complexly structured society. Thus the Pope summarised the principle as follows:

[7] A Murray, "The Principle of Subsidiarity and the Church" in Pius XI, Quadragesimo Anno (1931), No. 79 in Catholic Social Thoughts: The Documentary Heritage, ed. by David J. O'Brien and Thomas A Shannon p1 (Murray, "Subsidiarity").
[8] J Y Calvez and J Perlin, "The Church and Social Justice: The Social Teachings of the Popes from Leo XII to Pius XI (1878-1958)" 1961 Chicago: Regnery 328.

"That government should intervene in affairs of citizens where help is necessary for individual common good but insist that all functions that can be done by individuals or by lower level organisations be left to them".[9]

1.2 The General Legal Meaning of Subsidiarity

According to Melanie Murcott[10] subsidiarity as endorsed in South African law means the notion that adjudication of substantive issues should be determined with reference to more particular, indirect constitutional norms applicable rather than more general direct constitutional norms applicable.[11] It will be not be useful to apply more general direct constitutional norms where more specific constitutional norms can be applied to solve the legal question.[12]

In 1995, the Constitutional Court endorsed the subsidiarity principle in constitutional adjudication in the case of *S v Mhlungu* and it held that, a court should not protect a constitutional right by a way of a direct validity attack or by way of direct constitutional remedy before considering whether the legislation or common law in question could be interpreted in a constitutionally conforming way.[13]

In *Zantsi v Council of State, Ciskei*,[14] the subsidiarity principle was further developed by the court when it held that the matter was sought to have been disposed of at the Supreme Court of Appeal before being referred to the Constitutional Court. The court held further that this rule allows the law to develop incrementally.[15] In *Amod v Multilateral Motor Vehicle Accident Fund*,[16] the court held that the question whether the common law should be developed to allow the applicant to claim damages for loss of support, whether the matter was supposed to be dealt under the 1996 Constitution

[9] Pope Pius XI based his subsidiarity principle from the German social philosopher Gustav Gundlach (1892-1963); see also Murray "Subsidiarity" p4.
[10] M Murcott "The Ebb and Flow of the Application of the Principle of Subsidiarity-Critical Reflection on *Motau* and *My Vote Counts*" (2015) VII Constitutional Court Review 43-44 (Murcott, "The Ebb and Flow of Subsidiarity").
[11] Murcott "The Ebb and Flow of Subsidiarity" (note 10 above) p46.
[12] Murcott "The Ebb and Flow of Subsidiarity" (note 10 above) p47.
[13] *S v Mhlungu and others* 1995 ZACC 4, 1995 (3) SA 867 (CC) ("*Mhlungu"*).
[14] (1995) ZACC 9; 1995 (4) SA 615 (CC) ("*Zantsi"*).
[15] *Zantsi* (note 14 above) para 5.
[16] 1998 (4) SA 753 (CC) ("*Amod"*).

or as if that Constitution had not been passed, the question is one within the jurisdiction of the Supreme Court of Appeal and that the appeal was supposed to have been dealt at the Supreme Court of Appeal not the Constitutional Court.[17]

According to A J van der Walt, the subsidiarity principle is an angle of approach that allows courts to adopt a coherent approach to solving complex questions about which source of law apply in constitutional adjudication.[18] Van der Walt identifies two principles with provisos. The first principle state that a litigant who avers that a right protected by the Constitution has been infringed must rely on the legislation enacted to protect the right and may not rely on the Constitution directly. The proviso to the principle is that the litigant may rely on the Constitution directly when the enacted legislation is being challenged for being inconsistent with the Constitution. The second principle is that litigant who avers that a right protected by the Constitution has been infringed must rely on the legislation enacted to protect that right and may not rely on Common law to protect that right. The proviso to this principle is that Common law can be invoked when the enacted legislation does not cover a particular aspect of Common law. I will deal with these two principles and provisos in detail in Chapter 2.

According to Petzold, subsidiarity is generally understood to mean that in a community of societal pluralism the larger social unit should assume responsibility for functions only in so far as the smaller social unit is unable to do so.[19] According to Andrew Murray the word subsidiarity was first found in the English Oxford Dictionary in its 1989 first edition, where it was defined as the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more intermediate or local level.[20]

Lourens du Plessis defines the principle of subsidiarity as a reading strategy where courts will refrain from taking decisions that can be taken by lower courts or avoid a

[17] *Amod* (note 16 above) para 34.
[18] A J van der Walt, "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 Constitutional Court Review 77-99 (Van der Walt, "Normative Pluralism").
[19] H Petzold, "The Convention and the Principle of Subsidiarity" in R Macdonald, F Matscher and H Petzold, The European System for the Protection of Human Rights (1993) 41.
[20] Murray "Subsidiarity" (note 7 above) p1.

constitutional decision where a matter can be decided on non-constitutional issues.[21] In the case of *My Vote Counts NPC v Speaker of the National Assembly and Others*, Cameron J defined subsidiarity as denoting the hierarchical ordering of institutions, of norms, of principles or remedies and signifies that central institutions or higher norm should be invoked where the more local institutions or concrete norms or detailed principles or remedy does not avail.[22]

1.3 Administrative Law context of Subsidiarity.

As I have already indicated in my introduction, before constitutional era, administrative law was based on common law.[23] In this era, judicial review was based on two principles. The first principle was that the functionaries or bodies exercising delegated powers are confined to the powers vested in them by the empowering legislation and that should they exceed such powers, their actions are illegal and invalid. The second principle was that the exercise of delegated powers by such persons or bodies must ordinarily be carried out in accordance with fair procedure.[24]

This was the body of law which was influenced by the English law and was built around these two principles which later developed into well-known doctrines of *ultra vires* and procedural fairness. In applying these principles, courts were very careful to distinguish between their powers on appeal, which ordinarily included the power to consider the merits of the decision appealed against and their power on review, which was directed against consideration of issues of legality and procedural fairness.[25]

In that regard the courts followed the approach in *Kruse v Johnson*,[26] where it was stated that:

---

[21] L du Plessis, "The South African Constitution as a memory and promise" (2000) 11 Stellenbosch Law Review 385. See also *Mhlungu* (note 13 above); *Zantsi* (note 14 above) and *Amod* (note 16 above).
[22] 2015 ZACC 31; 2016 (1) SA 132 (CC) ("*My Vote Counts"*).
[23] L Kohn & H Corder, "Judicial Regulation of Administrative Action" in the South African Monograph on Constitutional Law, Murray & Kirkby (eds) (2014) Suppl. 108 International Encyclopaedia of Laws (IEL) 101.
[24] *Minster of Health and Another No v New Clicks South Africa (Pty) Ltd and Other* (*Treatment Action Campaign and Another as Amici Curiae*) 2006 (2) SA 311 (CC) ("*New Clicks"*).
[25] *New Clicks* (note 24 above) para 102.
[26] [1898] 2 QB 91 ("*Kruse"*).

> "I do not mean to say that there may not be cases I which it would be the duty of the court to condemn by-laws as invalid because of unreasonableness. But unreasonableness in what sense? If, for instance they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say; Parliament never intended to give authority to make such rules, they are unreasonable and ultra vires".[27]

In *R v Abdurahman*, the court treated unreasonableness in this sense as part of the *ultra vires* doctrine, because Parliament did not intend to give authority to make such regulations.[28] However there was limited scope for reviewing the exercise of delegated powers on the ground of unreasonableness and our courts were very reluctant to even exercise these limited powers.[29]

The court followed the Wednesbury test, which was that:

> "it is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the court can interfere but to prove a case of that kind would require something overwhelming".[30]

However the Wednesbury test was criticised on the basis that it could not be applied in all types of review.[31]

---

[27] *Kruse* (note 26 above) paras 99-100.
[28] 1950 (3) SA 136 A para 150D.
[29] *Theron en Andere v Ring van Willington van die NG Sendingkerk in Suid Afrika en Andere* 1976 (2) SA 1 (A).
[30] *Associated Provincial Picture House Limited v Wednesbury Corporation* (1948) 1 KB 223 (CA) para 230.
[31] J Jowell and A Lester QC, "Beyond Wednesbury: Substantive Principles of Adminstrative Law" (1988) 14 (2) Commonwealth Law Bulletin 858-870.

However when the Interim Constitution was enacted, it had a material impact on the existing body of administrative law.[32] The Bill of Rights contained section 24[33] which entitled every person to-

(a) Lawful administrative action where any of his or her rights or interest is affected or threatened;
(b) Procedurally fair administrative action where any of his or her rights or legitimate expectation is affected or threatened;
(c) Be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such actions have been made public; and
(d) Administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

The scope of judicial review was also broadened by other provisions of the interim Constitution and in particular the anti-discrimination provisions of the equality right;[34] the right to access to information;[35] the property right;[36] and the right to have justiciable disputes settled by a court of law.[37]

The interim Constitution was latter replaced by the 1996 Constitution,[38] which further had an impact on judicial review. The Bill of Rights contained Section 33 which provides that-

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

[32] The Interim Constitution was approved in Kempton Park and it was duly endorsed by the last apartheid Parliament and became the Constitution of the Republic of South Africa, Act 200 of 1993. The Interim Constitution came into effect on 27 April 1994 to administer South Africa's first democratic elections.
[33] Section 24 of the Interim Constitution.
[34] Section 8.
[35] Section 23.
[36] Section 28.
[37] Section 22.
[38] The 1996 Constitution came into effect on 04 February 1997. This Constitution was drafted in terms of Chapter 5 of the interim Constitution and on 08 May 1996 it was adopted.

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

(3) National legislation must be enacted to give effect to these rights, and must-

(a) Provide for the review of the administrative action by court or, where appropriate, an independent and impartial tribunal;

(b) Impose a duty on the state to give effect to the rights in subsection (1) and (2); and

(c) Promote an efficient administration.

In my own observation, the only difference between section 24 and 33 is that section 33 contains subsection (3) that mandates Parliament to enact legislation that will give effect to this constitutional right. It was as a result of that subsection that PAJA was enacted. This meant that all action which amounts to administrative action in terms of Section 1 of PAJA will be reviewed in terms of this Act.

The enactment of PAJA introduced the principle of subsidiarity in administrative law. This meant judicial review based on administrative action will be based on PAJA not the Constitution or common law. Therefore litigants could no longer invoke the provisions of the Constitution directly as there was a law that was enacted to give effect to the Constitution. This makes me to arrive to chapter 2, where I will deal with the principle of subsidiarity in detail, in relation to the two principles and provisos as provided by A J van der Walt.

Chapter 2 The Application of Subsidiarity Principles and their provisos

2.1 Introduction

According to Van der Walt[39] the issue which litigants must concern themselves with is the question of sources of law and authority. The question is how litigants decide whether the Constitution, legislation or the common law apply to a particular dispute.[40] Van der Walt states that the constitutional obligation require a reflection upon the sources of law that apply to a particular dispute.[41] He further states that the Constitutional Court has developed a set of guidelines, which are described as subsidiarity principles for the process of reflection on the sources of law.[42] I will below deal with the two principles and their provisos which enables the court to decide which source of law apply to a particular dispute.

2.2 The Subsidiarity Principles and Provisos

The Constitutional Court has set out two principles plus a provisos, according to which courts can decide whether to apply the legislation enacted to give effect to the constitutional right, a constitutional provision or the common law. These two principles together with their provisos are called subsidiarity principles as they establish a guideline that identify the source of law that will govern litigation about the alleged infringed right.[43]

What these two principles and provisos means is that when a legislation has been enacted to give effect to a particular constitutional right, the dispute about the right must be adjudicated with reference to the enacted legislation rather than either the Constitution or the common law. The first proviso to the principle allows direct recourse to the constitutional right to attack the validity of the legislation and the second proviso

[39] A J van der Walt, "Property and Constitution" 2012 PULP 1 - 12 (Van der Walt, "Property").
[40] Van der Walt "Property" (note 39 above) p13.
[41] Van der Walt "Property" (note 39 above) p24.
[42] Van der Walt "Normative Pluralism" (note 18 above) p77-128.
[43] Van der Walt "Property" (note 39 above) p35.

provide instance where the common law will apply despite the existence of the enacted legislation.[44] I therefore outline these principles and their provisos below.

2.2.1 The Fisrt Principle and Proviso

The first principle states that a litigant who avers that a right protected by the Constitution has been infringed must rely on legislation specifically enacted to protect that right and may not rely on the constitutional provision directly when bringing an action to protect the right.[45]

The proviso to the first principle is that even though the litigant who avers that the constitutional right has been infringed may not rely on the constitutional provision to protect the right, however the litigant may directly rely on the constitutional right to attack the enacted legislation for being unconstitutional or inadequate in protecting the right.[46]

In *SANDU*, the court had to deal with a dispute regarding collective bargaining that arose between the union and the South African National Defence Force (the SANDF). The union challenged the constitutionality of certain regulations that were promulgated in chapter XX and the question that the court had to deal with was whether the SANDF beard the duty to bargain with the union arising from either the provisions of section 23(5) of the Constitution, chapter XX of the regulations and/or the constitution of the Military Bargaining Council (MBC). Therefore as result of the above question, the court had to determine whether SANDU was entitled to rely directly on section 23(5) of the Constitution when regulations have been acted to regulate the rights contained in section 23(5).[47] The other issue was whether the individual regulations were inconsistent with the Constitution and therefore invalid.[48]

---

[44] Van der Walt "Property" (note 39 above) p36.
[45] Van der Walt "Property" (note 39 above) p36; see also the following cases; *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) ("*SANDU"*); *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) paras 39-40 ("*Pillay"*); *Chirwa v Transnet Ltd* 2008 (2) SA (CC) para 59 (Skweyiya)- 69 (Ngcobo J) ("C*hirwa"*) and *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras 29-30 ("*Walele"*).
[46] Van der Walt "Property" (note 39 above) p36.
[47] *SANDU* (note 45 above) para 44.
[48] *SANDU* (note 45 above) para 45.

The court in *SANDU* stated that section 23(5) expressly provides that legislation may be enacted to regulate collective bargaining. Therefore the question that arises is whether a litigant may bypass any legislation so enacted and rely directly on the Constitution.[49] In answering the question the court referred to the matter of *NAPTOSA and Others v Minister of Education, Western Cape and Others*[50], where the High Court held that a litigant may not bypass the provisions of the Labour Relations Act[51] and rely directly on the Constitution without first challenging the provision of Labour Relations Act on the constitutional grounds. However the correctness of this approach has been left open by the Constitutional Court in two cases.[52]

In *New Clicks*[53], the court per Ngcobo J held that there was a considerable force in the approach adopted in *NAPTOSA* and that if it were not to be followed the result might well be the creation of dual system of law one under the Constitution and the other under the legislation. Therefore the court in *SANDU*, held that the approach in *NAPTOSA* was correct in that where legislation was enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation of falling short of the constitutional standards.[54]

The Court in *SANDU* concluded by stating that a litigant who seeks to assert his/her right to engage in collective bargaining under section 23 (5) of the Constitution should in the first place base his/her case on the legislation enacted to regulate the right not on section 23 (5) of the Constitution and if the legislation is wanting in its protection of the section 23(5) right in the litigants view then the legislation should be challenged constitutionally.[55] To allow the litigant to bypass the legislation and rely directly on the constitutional provision would be to fail to recognize the important task conferred upon

[49] *SANDU* (note 45 above) para 51.
[50] 2001 (2) SA 112 (C) at para 123I-J; 2001 (4) BCLR 388 (C) at para 396I-J (*"NAPTOSA"*).
[51] 66 of 1995 ("LRA").
[52] *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 17 and *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) paras 23-24.
[53] *New Clicks* (note 24 above) paras 434-437.
[54] *SANDU* (note 45 above) para 51.
[55] *SANDU* (note 45 above) para 52.

the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.[56]

In *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others*[57], the Constitutional Court tested the validity of the provision of the Pound Ordinance Act[58] directly against section 33 of the Constitution. The legislation was challenged on the basis of a conflict with the administrative justice right and the court held that, the right itself must be benchmarked against which the conflict is assessed and not the PAJA.[59]

2.2.2 The Second Principle and Proviso

The second principle states that a litigant who avers that a right protected by the Constitution has been infringed must rely on the legislation specifically enacted to protect that right and may not rely on the common law directly when bringing action to protect the right.[60] The proviso to this principle is that a litigant who avers that the right protected by the Constitution has been infringed may rely on the common law instead of the enacted legislation insofar as the legislation was not intended to cover that a particular aspect of the common law or in fact does not cover that particulars aspect of the common law and insofar as the common law is not in conflict with the constitutional provisions or with the scheme introduced by the legislation or can be developed through interpretation to that effect.[61]

This principle and proviso was properly outlined in the Bato Star case, where the court had to deal with an appeal of a judgement which concerned the allocation of fishing quotas. The applicants in their papers did not or failed to state whether the cause of

---

[56] Section 7 (2) of the Constitution provides – The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
[57] 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) (*"Zondi"*).
[58] 32 of 1947.
[59] *Zondi* (note 57 above) para 104.
[60] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 25 ("*Bato Star"*); *New Clicks* (note 24 above) para 96; *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) para 37 (*"Fuel Retailers"*), *Chirwa* (note 45 above) para 23; *Walele* (note 45 above) para 15 and Van der Walt "Property" (note 39 above) p36.
[61] Van der Walt "Property" (note 39 above) p36.

action arose form PAJA and the court had to ask the applicants to as to why their application was not based on the provisions of PAJA.[62] The court asked the applicant to indicate whether their cause of action was based on the common law; PAJA and/or section 33 of the Constitution and if the cause of action was founded on PAJA, what effect if any will it have on the grounds of appeal as argued by the applicant.

In addressing the above issue, the court referred to the *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others*,[63] where the court had to consider the issue of relationship between the common law grounds of review and the Constitution. In considering this issues the court held that:

> "Under our new constitutional order, the control of public power is always a constitutional matter. There are no two systems of law regulating administrative action, the one based on common law and the one on the Constitution but one system of law based on the Constitution"[64].

The power of the court to review administrative action is no longer come directly from the common law but from PAJA and the Constitution itself.[65] The groundnorm of administrative law is no longer to be found in the doctrine of ultra vires[66] nor in the doctrine of parliamentary sovereignty nor the common law but in the Constitution. In Pharmaceutical case the court further held that the common law only informs the provision of PAJA and the Constitution and it derives its force from the Constitution.[67] The relevancy of the common law on the administrative law review will be applied on a case by case basis as when the court interpret and apply the provision of PAJA and the Constitution.[68]

---

[62] *Bato Star* (note 60 above) para 21.
[63] 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*"Pharmaceutical case"*).
[64] *Pharmaceutical case* (note 63 above) paras 33-45.
[65] *Bato Star* (note 60 above) para 22.
[66] This aspect was discussed in more detailed in the matter of *Staatspresident en Andere v United Democratic Front en 'n Ander 1988 (4) SA 830 (A)*.see also A Breitenbach, "Justification for Judicial Review" (1992) 8 South African Journal on Human Rights 515.
[67] *Pharmaceutical case* (note 63 above) para 45.
[68] *Bato Star* (note 60 above) para 22.

As I have indicated that the cause of action in judicial review of administrative action arises from PAJA and not from the common law as it was in the past. Therefore the Court in *Bato Star* held that it was clear that PAJA was of application and the case could not be decided without reference to PAJA. The court further held that the High Court[69] and Supreme Court of Appeal[70] erred in considering the matter without reference to PAJA. [71] In *Bato Star* the court held that the provisions of section 6 of PAJA indicate a clear purpose to codify grounds of judicial review of administrative action as defined in section. Therefore the cause of action in administrative action will ordinarily arise from PAJA and not from the common law.[72]

Van der Walt concludes by stating that these two principles as developed by the Constitutional Court provide a space where the interpretation of legislation in terms of section 39 (2)[73] of the Constitution must take place while the proviso to the second principle provide a space where the development of the common law in terms of section 39 (2) must take place.[74]

In my observation of the two principles and the provisos, they do not provide a clarity, when an administrator or a state organ is faced with a situation where, it has to review its own decision. It is not clear whether PAJA or the principle of legality applies when the state organ seek to review its own decision. The only thing the principles states is that a litigant may not rely on the Constitution directly must rely on the legislation enacted to review a decision and the only time when the litigant is allowed is when he/she want to attack the validity of the enacted legislation. What the principles do not indicate is whether the organ of state as the administrator who makes the decision, does also has a right under the enacted legislation to review its own decision. Put simply, does the enacted legislation exclude the organ of state to review its own decision and if yes, which source of law is applicable to the organ of state then if it

---

[69] *Phambili Fisheries (Pty) Ltd and Another v Minister of Environmental Affairs and Tourism and Others*, Case 1171/2002, 27 November 2002.
[70] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA).
[71] *Bato Star* (note 60 above) para 26.
[72] *Bato Star* (note 60 above) para 25.
[73] Section 39 (2) provides that- when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
[74] Van der Walt "Property" (note 39 above) p37.

wants to undo its own decision. I will consider the above statement and/or question in the below chapter.

Chapter 3 Reviewing Your Own Decision

3.1 Introduction

It is important to outline from the beginning that in this chapter I will deal with the question that has been left open by the courts, of which source of law applies when an organ of state seek to undo its own decision. I will first make reference to those cases which have missed the opportunity to consider the question and later deal with judgements which dealt with the question extensively in the Supreme Court of Appeal (both the majority and minority judgements) and the Constitutional Court judgement.

3.2 The Missed Opportunity

The question here is which source of law applies when the administrator or the organ of state seek to review its own decision. To be specific which source of law applies when the state organ seek to review its own decision, for unlawfully awarding a contract. In *Steenkamp NO v Provincial Tender Board, Eastern Cape*[75], the court held that it is well established that a decision[76] by a state organ to award a contract for services constitutes administrative action. This was so because the decision taken by an organ of state which wields public power or performs a public function in terms of the Constitution or legislation, it materially and directly affects the legal interests or rights of the tenderers concerned.[77]

In *Steenkamp*, the applicants contended their case on the basis that, firstly the invitation and consideration of tenders is an administrative function[78] and secondly, that the legal duties pleaded[79] do not derive from the common law principles of

[75] 2006 ZACC 16; 2007 (3) SA 121 (CC) (*"Steenkamp"*).
[76] Section 1 of PAJA defines a decision as- any decision of an administrative nature made under the empowering provision.
[77] *Steenkamp* (note 75 above) para 90; see also *Greys Marine Houtbay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 21-24.
[78] *Transnet v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) at 870D-F; see also *Umfolozi Transport (EDMS) Bpk v Minister van Vervoer en Andere* (1997) 2 All SA 548 (A) at 552j-553a.
[79] The applicants in their particulars of claim averred that when the tender board considered the tenders it owed Balraz a duty in law to (a) exercise its powers and functions fairly, impartially and independently; (b) take reasonable care in the evaluation and investigation of tenders and (c) properly evaluate tenders within the parameters imposed by the tender requirements so as to ensure that the award of the tender was reasonable in the circumstances.

administrative law but from the Constitution and the controlling legislation.[80] The court in Steenkamp supported the approach by the applicant as being correct and made reference to the *Pharmaceuticals case* were it was held that:

> "Since the advance of our constitutional democracy, administrative justice has become a constitutional imperative. The administrative law is an incident of separation of powers through which courts review and regulate the exercise of public power".[81]

The court held that the Bill of rights achieves this by conferring "everyone" a right to lawful administrative action that must be also be reasonable and procedurally fair.[82] This was properly captured at *Bato Star* where O'Regan J, reminded us that:

> "The groundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires nor in the doctrine of parliamentary sovereignty, nor in the common law itself but in the principle of our Constitution".[83]

However the court in *Steenkamp*, still left open the question of whether PAJA or the principle of legality applies when the state organ seek to review its own decision. This question continued to surface.

In *Municipal Manager: Qaukeni Local Municipality and another v F V General Trading cc*[84] the court was faced with the issue which concerned the validity of a contract concluded by the municipal without compliance with various statutory[85] prescribed procedures relating to municipal procurement. The invalidity issue was raised as an appeal not as a review. There was no indication whether the cause of action was

---

[80] *Steenkamp* (note 75 above) para 27.
[81] *Pharmaceuticals case* (note 63 above) paras 45, 51, 79 and 85; see also *Steenkamp* (note 75 above) para 28.
[82] Section 33 of the Constitution.
[83] *Bato Star* (note 60) para 28.
[84] 2010 (1) SA 356 (SCA). ("*Qaukeni"*)
[85] Section 217 (1) of the Constitution provides that- when an organ of state in a 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; see also section 111 and 112 (1)(f), (h)(iii) and (m)(i) of the Municipal Finance management Act 56 of 2003 and also section 76(b)(v) and section 80(1)(a) read with section 83 of the Municipal Systems Act.

based on PAJA or the principle of legality. The only time the cause of action was raised was in the Supreme Court of Appeal, where the respondents counsel argued that the award of contract by municipality amounts to administrative action in terms of PAJA, and the respondents counsel argued that he applicant were supposed to have brought a review proceedings under PAJA to set aside their actions and that they have failed to do so.[86]

The court held that, while it accepts that the award of contract by municipality amounts to administrative action and that interested parties may bring review application under PAJA, it did not agree that it was necessary to proceed by way of review when a municipality seeks to avoid a contract is has concluded in respect of which no other party has interest.[87] However the court held that it was not necessary to reach a final conclusion on this matter. The court further held that if the applicant's procurement of municipal services through the contract with the respondent was unlawful, it is invalid and in this matter the appellants were bound not to submit to an unlawful contract but oppose the respondent's attempts to enforce the contracts.[88] By seeking to declare the contract unlawful the court held that the appellants raised the question of legality fairly and squarely as it would have done in the review application.

The court in *Qaukeni* further held that the failure by the appellants to bring a formal review under PAJA, it will not necessary mean that the court must deny the appellants the relief they are seeking. Again in my observation, the court did not concern itself with the proper cause of action or which source of law apply when a municipality (to be precise in this case) seek to review its own decision. The court left open the precise nature of the application (whether PAJA or principle of legality) to be brought when a municipality seek to undo its own decision.

[86] *Qaukeni* (note 84 above) para 25.
[87] *Qaukeni* (note 84 above) para 26.
[88] *Qaukeni* (note 84 above) para 26; see also *Premier, Free State and Others v Firechem Free State (pty) Ltd* 2000 (4) SA 413 (SCA) para 36 and *Eastern Cape Provincial Government v Contractprops 25 (pty) Ltd* 2001 (4) SA 142 (SCA) paras 8 and 9.

3.2 SITA: Supreme Court of Appeal Judgement

The question of whether PAJA or the principle of legality applies was further dealt by the Supreme Court of Appeal in the case of *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*.[89] The case was before the SCA as result of the High Court judgement[90] in which the High Court per Matojane J dismissed the application by SITA to declare its contract unenforceable for failure to comply with section 217 of the Constitution. The High Court reasons to dismiss the application were that, SITA in its application relied directly on the constitutional principle of legality instead of bringing a review application in terms of section 6 of PAJA.[91] In the SCA, SITA contended that PAJA does not apply when it seek to review its own decision and even if PAJA applies, the organ of state may elect to proceed either by way of review under PAJA or rely directly on the constitutional principle of legality.[92]

The issues that gave rise to the above contention by SITA was as a result of the contract entered into between SITA and Gijima. In September 2006 a contract was entered in terms of which Gijima was to provide IT services to the South African Police Services (SAPS). In January 2012, SITA terminated the contract and as a result Gijima approach the High Court for an urgent interdict. However the parties settled the matter and the matter was removed from the roll. A lot of disputes arose between the parties from the settlement agreement and SITA then approached the High Court to have its own decision declared invalid and set aside.

As it was indicated in *Steenkamp* that the decision by state organ to award a contract for services constitute administrative action in terms of section 1 of PAJA.[93] There was no dispute in relation to the fact that the award of contract constitute an administrative action. However what was critical in the SCA, was which source of law applies, when now SITA seek to undo its own decision. The argument by SITA was that, PAJA as a source of law did not apply as the conclusion of contract did not fall within the definition

[89] (2016) ZASCA 143; 2017 (2) SA 63 (SCA). (*"SITA SCA"*).
[90] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty)* Ltd [2015] ZAGPPHC 1079. (*"SITA High Court Judgement"*).
[91] *SITA High Court Judgement* (note 90 above) para 28.
[92] *SITA SCA* (note 89 above) para 2.
[93] *Steenkamp* (note 75 above) para 90.

of administrative action, as it did not adversely affects Gijima's rights and it did not have any direct or external legal effect to Gijima.[94]

The court replied to the above contention by referring to the case of *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works and Others*[95], where the court held that such a construction is inconsistent with section 3(1) of PAJA, which states that administrative action might or might not affects the right directly. Then the court in SITA held that the conclusion of the contract had the capacity to adversely affect Gijima's right[96] and those of the Defence Department as it contemplated Gijima's foregoing its damages claims under the SAPS contract in return for rendering IT services to the Defence Department.[97]

The majority judgement concluded that SITA cannot avoid PAJA and rely on the principle of legality as the failure by SITA to follow competitive tender process fell to be reviewed in terms of section 6 of PAJA, therefore PAJA applies when state organ seek to review its own administrative decision.[98] The majority judgement in SITA answered the question by holding that:

> "PAJA applies when the organ of state seek to set aside its own administrative decision. And when PAJA applies, litigant and the court are not entitled to bypass its provisions ad rely directly on the constitutional principle of legality. But even if this was approached as legality review, SITA failed to place facts before the court to overcome the hurdle of unreasonable delay in commencing proceedings against Gijima.[99] The proper place for the principle of legality in our law is to act as a safety net or as 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".[100]

---

[94] *SITA SCA* (note 89 above) para 17.
[95] [2005] ZASCA 43; 2005 (6) SA 313 (SCA). (*"Grey's Marine Case"*).
[96] *SITA SCA* (note 89 above) para 19
[97] *SITA SCA* (note 89 above) para 20.
[98] *SITA SCA* (note 89 above) paras 21 and 22.
[99] *SITA SCA* (note 89 above) para 44.
[100] *SITA SCA* (note 89 above) para 38.

The minority judgement per Bosielo JA did not agree with the above judgement by Cachalia JA. According to Bosielo the question that was supposed to be answered in the appeal was whether it was permissible, in the context of the court's constitutional obligation as set out in section 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 the principle of legality. In other terms, can SITA be denied the opportunity to vindicate section 217 and the principle of legality by such procedural technicalities, certainly not because PAJA owes its existence to the Constitution.[101]

Bosielo held further that it was correct of Cachalia JA to state in his judgement that there is no clarity on whether organs of state are obliged to use PAJA and not to invoke the principle of legality when they seek to review their own decision[102], as question was left open by previous cases.[103] The minority judgement goes further by stating that, for SITA to use the principle of legality it did not violate the principle of subsidiarity as the principle of subsidiarity is not inflexible. There will be cases where the principle will not be applicable[104], like in the case of *My Vote Count NPC v Speaker of the National Assembly*[105], where the court held that:

> "We should not be understood to suggest that the principle of constitutional subsidiarity applies as a hard and fast rule. There are decisions in which this Court has said that the principle may not apply.[106] This Court is yet to develop the principle to a point where the inner and outer contours of its reach are clearly delineated. It is not necessary to do that in this case".[107]

---

[101] *SITA SCA* (note 89 above) para 58 (*minority judgement).*
[102] *SITA SCA* (note 89 above) para 63 (*minority judgement).*
[103] *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* [2015] ZASCA 24; [2015] 2 All SA 657 (SCA); *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye & Lazar Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC) and *Municipal Manager: Qaukeni Local Municipality and another v F V General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA).
[104] *SITA SCA* (note 89 above) para 65 (minority judgement).
[105] 2016 (1) SA 132 (CC) (*"My Vote Count").*
[106] *Mazibuko and others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) (*"Mazibuko"*) para 73-74.
[107] *My Vote Count* (note 105 above) para 182.

Therefore according to the minority judgement, the failure to use PAJA cannot be a reason enough to deny SITA the relief it seek (to undo its own decision).[108] Bosielo JA concluded by providing a clear interpretation of section 6 (1) of PAJA, when he stated that judicial review under PAJA is an important remedy for individuals aggrieved by the decisions made by public administrators. The clear language of section 6(1) of PAJA suggest that only persons who are aggrieved by a decision by an administrator may institute review proceedings against such an administrator.[109]

The provision of section 6 draws a distinction between who may take a matter on review under PAJA and against whom. This is important because, it was not by chance that section 6 does not refer to an instance where an organ of state initiates review proceedings, particularly where legality is involved. The direct attack by SITA based on the principle of legality was a proper cause of action. The notion that litigant cannot avoid PAJA by going behind it and seeking to rely on section 33(1) of the Constitution or the common law does not assist, as it mean that a state organ which wishes to bring a constitutional challenge gainst its own decision can only rely to PAJA and not through the principle of legality.[110]

It is a well-known fact that PAJA is a national legislation that was enacted to give effect to the rights in section 33, which clearly contemplates private citizens (persons). The above statement is supported by the provision of section 33(2) which refers expressly to everyone whose right have been adversely affected by an administrative action ad it is known that only an organ of state can take administrative decision.[111]

3.3 SITA: Constitutional Court Judgement

The minority judgement of Bosielo JA was expanded on appeal in the Constitutional Court case[112], where SITA appealed the majority judgement of the SCA, when it concluded that PAJA and not the principle of legality was the appropriate route for an

[108] *SITA SCA* (note 89 above) para 65 (*minority judgement*).
[109] *SITA SCA* (note 89 above) para 68 (*minority judgement*).
[110] *SITA SCA* (note 89 above) para 68 (*minority judgement*).
[111] *SITA SCA* (note 89 above) para 68 (*minority judgement*).
[112] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty)* Ltd [2017] ZACC 40; (*"SITA Constitutional Court Judgement").*

organ of state to review its own decision. In the Constitutional Court, SITA continued with its argument that PAJA does not apply as the conclusion of the agreement did not constitute administrative action and it did not adversely affect Gijima's right.[113] SITA further contended that there was nothing in the Constitution nor PAJA that suggested that the right to lawful administrative action is exercisable by an organ of state by itself and against itself.[114]

This mean that the rights created in section 33 of the Constitution will apply or be enjoyed by private persons, therefore it cannot be said that section 6 of PAJA applies when a state organ seek to review its own decision. This is so because PAJA was enacted as a result of section 33 of the Constitution, therefore PAJA owes its existence to the Constitution and it must be interpreted through the prism of section 33 of the Constitution.[115]

The Constitutional Court, therefore held that when interpreting section 6 of PAJA, a court will not start on a clean slate and ignore the constitutional background[116], because the same parameters that describe the ambit of administrative action in section 33 of the Constitution apply to administrative action under PAJA.[117] The Constitutional Court concluded by stating that PAJA does not apply when an organ of state seek to review its own decision. However the fact that PAJA does not apply does not mean that an organ of state cannot review its own decision but what it mean is that the organ of state cannot do so under PAJA but will have to review its own decision under the principle of legality.[118]

---

[113] *SITA Constitutional Court Judgement* (note 112 above) para 13.
[114] *SITA Constitutional Court Judgement* (note 112 above) para 28.
[115] *SITA Constitutional Court Judgement* (note 112 above) para 30.
[116] The Constitutional Court in *SITA* held that, section 6 (1) of PAJA provides that any person may institute proceedings in a court or tribunal for judicial review of an administrative action. Section 6 (2) provide the grounds for review. Section 33 (3) of the Constitution which provides for national legislation to be enacted to provide for review of administrative action, the reference to administrative action means administrative action mentioned in section 33 (1) and (2) of the Constitution. The Constitution, therefore provides that in making provision for review of administrative action, the national legislation must direct itself to administrative action referred to in section 33 (1) and (2) of the Constitution. These rights in section 33 (1) and (2) as the court concluded they are enjoyed by private person's ad not by the organ of state. Therefore when section 33 (3) of the Constitution state that national legislation must be enacted to give effect to these rights, it refers to the rights in section 33 (1) and (2), which are enjoyed by private person's.
[117] *SITA Constitutional Court Judgement* (note 112 above) para 32.
[118] *SITA Constitutional Court Judgement* (note 112 above) para 38.

In other words, SITA cannot be denied the right to review its own decision because PAJA does not apply. In *Municipal Manager: Qaukeni Local Municipality and another v F V General Trading CC*[119], the court held that:

> "while I accept that the award of a municipal services amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not 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 necessary to reach a final conclusion in that regard. If the second respondent's procurement of municipal services through its contract with 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 attempts 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 contract to the respondent could not have been brought by an interested party, the applicant's failure to bring formal review proceedings under PAJA is no reason to deny them the relief."[120]

The Constitutional Court, in *SITA* was able to answer the question that was missed in *City of Cape Town v Aurecon South Africa (Pty) Ltd*.[121] In this case the City of Cape Town seeks to review its own decision in terms of which Aurecon was awarded a tender to decommission the Athlone Power Station. The City of Cape Town relied on the provision of PAJA to review its own decision. However in the Constitutional Court a question arose during the hearing. The question was "is an administrator's right to review its own decision sourced in PAJA or on the principle of legality?

[119] *Qaukeni* (note 84 above) para 26.
[120] *Qaukeni* (note 84 above) para 26.
[121] [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017(4) SA 223 (CC) (*"City of Cape Town"*).

The court held that the position in our law on the question was presently uncertain.[122] The court was of the view that the case presented a certain nuance that militated against venturing into judicial inquisition and that the court was not certain that the litigant's reliance on PAJA was wrong in law because the law on the issue has not been settled.[123] The court in the *City of Cape Town case* further held that, while it was tempting to settle the question, it was of the view that the case was an inappropriate channel through which to so.[124]

The court in *City of Cape Town case* referred to the case of *Ferreira*[125], where the court held that it was important that the court should not be required to deal with abstract or hypothetical issues, an should devote its scarce resources to issues that are properly before it.[126] Therefore the court in *City of Cape Town case* held that it would be undesirable for it to attempt to answer this administrative law question without the benefit of the legal argument by the litigants.

In *Albutt*[127], the Constitutional Court held that:

> "Sound judicial policy requires the court to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is so in constitutional matters, where jurisprudence must be developed incrementally. At times it might be tempting, as in the present case, to go beyond that which is strictly necessary for proper disposition of the case. Judicial wisdom requires the court to resist temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so."[128]

---

[122] *In Khumalo v MEC for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC), this Court considered the nature of an application that was made in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 to review the administrative acts of decision-making officials. At para 28, the majority found that the "true nature of the application [was] one for judicial review under the principle of legality". While the minority, on the other hand, at para 92, found that "the procedure for bringing the application to Court was governed by the PAJA".
[123] *City of Cape Town* (note 121 above) para 34.
[124] *City of Cape Town* (note 121 above) para 35.
[125] *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*"Ferreira"*).
[126] *Ferreira* (note 125 above) para 165.
[127] *Albutt v Centre For the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) (*"Albutt"*).
[128] *Albutt* (note 127 above) para 82.

The Court in *City of Cape Town case*, concluded by holding that the benefit of full argument is indispensable in the decision making process and therefore the court was of the view that the issue ought to be left open until the opportunity properly present itself. The court held that determining the matter within the strictures of PAJA, without dealing with whether it was the appropriate or not, was the only way to proceed with the matter.[129] The court did so because both the litigants did not expressly rely on PAJA in the High Court and the SCA and the only time the question was raised was during the hearing at the Constitutional Court hence the Constitutional Court did not deem it fit to answer the question.

In the *SITA case*, the pronunciation by the Constitutional Court of the fact that PAJA does not apply when a state organ seek to undo its own decision rather the principle of legality applies, will pave a way for future cases with similar facts as the *SITA case*. This pronunciation was long overdue. What we have seen from the *SITA case* from the onset, is that the parties were able to raise the cause of action. This has enable the courts to deal with the matter effectively, as they were able to hear from both sides as to why Gijima says PAJA applies and why SITA indicates that the principle of legality applies. This has also enable the Constitutional Court to properly interpret the relevant section of the Constitution and PAJA. The Constitutional Court had the benefit of hearing the full arguments from both parties in the inception of the matter in the High Court and the Supreme Court of Appeal, hence it could no longer leave the question open than to settle the question once and for all.

3.4 The Legality Review

Why would the Constitutional Court hold that the principle of legality was the correct route for state organ to review its own decision? To answer this question, the court remarked that the award of the Department of Defence (DoD) agreement was an exercise of public power, therefore the principle of legality is the route to have the decision reviewed.[130] As it was stated in the Affordable Medicines Trust[131] that the

[129] *City of Cape Town* (note 121 above) para 36.
[130] U Ahir, "PAJA v Legality" (2018) 18 (2) Without Prejudice 21-22 (Ahir, "PAJA v Legality").
[131] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*"Affordable Medicines Trust"*).

principle of legality was referred to as a constitutional control of exercise of public power.

The court per Ngcobo J put it as follows:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law and, the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."[132]

In *SITA* it was not in dispute that the DoD agreement was awarded in the absence of a competitive bidding process. The provisions of section 217 of the Constitution provides that "when an organ of state contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Therefore it was clear that in awarding the contract, SITA acted contrary to the dictates of the Constitution and based on the *Fedsure case* this was at odds with the principle of legality and it was liable to be reviewed and possibly set aside.[133]

[132] *Affordable Medicines Trust* (note 131 above) para 49.
[133] *SITA Constitutional Court Judgement* (note 111 above) para 41; see also Ahir "PAJA v Legality" (note 130 above) p21-22.

Chapter 4 Threshold Question

4.1 Introduction

In this chapter I will outline the importance of the threshold question in relation to the subsidiary principle. I will indicate that the Constitutional Court in *SITA*, applied the threshold question properly as it has been left open by other cases.[134] In *SITA* the court was able to determine the threshold question from the onset. In chapter 3, I have already mentioned that the court in *SITA* was concerned with the question of whether PAJA or the principle of legality applies source of law apply when state organ seek to undo its own decision.

This was the dispute between SITA and Gijima, as SITA's contention was that the principle of legality applies and Gijima contended that PAJA applies. The Constitutional Court had to determine the threshold question by applying the subsidiarity principle. According to Murcott, subsidiarity offers a basis for solving the threshold question of whether and when PAJA as opposed to the principle of legality ought to be invoked in judicial review proceedings.[135] I will below deal with the interpretative threshold questions used by the Constitutional Court to arrive to a conclusion that the principle of legality instead of PAJA was applicable, when state organ seek to undo its own decision.

4.2 Interpretative Threshold Questions

The application of the subsidiarity principle in adjudication requires that substantive issues be determined with reference to more particular constitutional norms rather than more general constitutional norms.[136] In the administrative law context the application of the subsidiarity principle entails that in judicial review proceedings, the applicability of PAJA ought to be determined first before regard is had to the principle of legality.[137] However in some instances the court has failed to apply the subsidiarity

[134] *Qaukeni* (note 84 above).
[135] Murcott "The Ebb and Flow of Subsidiarity" (note 10 above) p45-46.
[136] J de Visser, "Institutional Subsidiarity in the South African Constitution" (2010) 1 Stellenbosch Law Review 90; and see also Murcott "The Ebb and Flow of Subsidiarity" (note 10 above) p44.
[137] Murcott "The Ebb and Flow of Subsidiarity" (note 10 above) p44-45.

principle by invoking the legality principle as a basis for reviewing the exercise of public power without first deciding whether PAJA is applicable.[138]

The Constitutional Court in *SITA* dealt with the subsidiarity principle properly, when faced with the question of which source of law applies when a state organ seek to review its own decision. The parties in this matter, for example SITA contended that the principle of legality applies in the circumstances and Gijima contended that PAJA applied. In order for the court to deal with these contentions by the parties, it had to resort to the interpretation of the Constitution (section 33) and PAJA.[139] The court had also to deal with the question whom does the fundamental rights seek to protect.

The Constitutional Court in *SITA* held that the creation of fundamental rights were meant to protect human beings. The Constitutional Court made reference to the case of the *First Certification* Judgement[140] where the court also confirmed that the creation of fundamental rights was meant for the protection of human being.[141] In support of the above statement the Constitutional Court held that, if the state hold this right[142], who is the correlative duty-bearer? Put differently, from whom would an organ of state whose own decision is the subject of its concern expect this lawful, reasonable and procedurally fair administrative action? From itself? That simply cannot be because if the organ of state was to request reasons for the decision in this instance, was it going to request the reasons from itself.[143]

These were the interpretative threshold questions which the Constitutional Court had to answer in order for it to arrive to a conclusion that the principle of legality applied in those circumstance. The court held further that, the point is that no choice is available

---

[138] In *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2013] ZACC 10, 2010 (3) SA 291 (CC), 2010 BCLR 391 (CC) the court flouted the subsidiarity principle by invoking the legality principle without first deciding as to whether PAJA was applicable.
[139] *SITA Constitutional Court Judgement* (note 112 above) para 18.
[140] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the republic of South Africa*, 1996 ZACC 26, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*"First Certification Judgement"*).
[141] The movement to recognize and protect the fundamental rights of all human beings gained momentum in the international arena from the end of the Second World War. In 1945 the Charter of the United Nations was signed. Among its aim were achievement of international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all.
[142] The right to lawful, reasonable and procedurally fair administrative action (Section 33(1)).
[143] *SITA Constitutional Court Judgement* (note 112 above) para 28.

to an organ of state seeking to have its own decision reviewed: PAJA is simply not available to it. However this does not mean that state organ may not invoke PAJA. According to Hoexter PAJA must be applied where it is applicable.[144] This is because the relationship between PAJA and the principle of legality is one of subsidiarity and they are the main contenders of source of law in judicial review.[145]

The interpretative threshold question adopted by the Constitutional Court in *SITA* was important as it helped the court to determine which source of law applies when the organ of state seek to review its own decision. In *Minister of Defence and Military Veterans v Motau and Others*[146] the court also adopted the subsidiarity principle in order to answer the threshold questions. In *Motau*, the court in analysis of the threshold question had to determine, whether the minister decision[147] amount to administrative or executive action? This was a very important question the court had to answer. The court held that if the ministers decision amount to administrative action, it will be subjected to a higher level of scrutiny in terms of PAJA and if it amounts to executive action, it will be subjected to a less exacting constraints imposed by the principle of legality.[148]

The threshold question of whether PAJA or the principle of legality applies in a particulars circumstances must be determined by the court before it can pronounce which source of law applies in a particular circumstances. However it is important to note that the threshold question must be applied in line with the principle of subsidiarity, as in administrative context subsidiarity means that PAJA must be applied first then if it's not applicable the principle of legality will act as safety net. The application of the principle of legality can be seen also as the filling of an intentional gap in PAJA.[149] According to Van der Walt such a gap indeed exists in PAJA with the effect that the review of conduct that does not amount to administrative action takes place by direct reliance on the constitutional principle of legality (as a safety net).[150] In

[144] Hoexter "Administrative Law" (note 1 above) 134.
[145] Murcott "The Ebb and Flow of Subsidiarity" (note 10 above) p 49.
[146] [2014] ZACC 18; 2014 (5) SA 69 (11) (*"Motau"*).
[147] The minister decision to remove General Motau and Ms Mokoena from the Board of Directors of Armscor.
[148] *Motau* (note 145 above) para 27.
[149] Murcott "The Ebb and Flow of Subsidiarity" (note 10 above) p53.
[150] Van der Walt "Normative Pluralism" (note 18 above) p 106.

Motau where the conduct did not amount to administrative action but executive action, the principle of legality served its subsidiarity function by providing a safety net that which imposed standards of constitutional accountability further along the continuum of accountability: where the general norm of the rule of law took over where the specific norm of administrative justice has run out.[151] The court having concluded that the ministers action amounted to executive active, was based on the fact that the ministers decision involved the formulation of policy in respect of Armscor in the broad sense rather than the implementation of policy in a narrow sense hence the court invoked the rationality standard imposed by the principle of legality as a safety net and found that the Minister's conduct was rational.[152]

[151] Murcott "The Ebb and Flow of Subsidiarity" (note 10 above) p53.
[152] *Motau* (note 145 above) paras 44 and 51; see also Murcott "The Ebb and Flow of Subsidiarity" (note 10 above) p58.

Chapter 5 Conclusion

It is evident that before the Constitutional Court judgement in *SITA*, courts were reluctant to deal with the question whether PAJA or the principle of legality applied when state organ seek to review its own decision. This is also shown in the case of the *Minister of Education, Western Cape and Another v Beauvallon Secondary School and Others*[153] where the court failed to deal with the question whether the closing of schools by the Minister was an administrative or executive decision. The court per Leach JA held that in judicial review proceedings concerning a decision to close a number of schools it was unnecessary to determine whether PAJA was applicable.

The court in *Beauvallon* further held that it was aware that as a rule a court considering the review of a decision of a public official should determine whether or not the proceedings are governed by PAJA. But the court did not believe that the rule was rigid and inflexible, as it was now well established that even in cases where PAJA is not of application, the principle of legality may be relied upon to set aside an executive decision made no in accordance with the empowering statute. And in the present case the statutory incorporation into section 33(1) of the Schools Act[154] of a notice and comment procedure essentially the same as that envisaged by section 4(3) of PAJA renders superfluous any attempt to pigeon-hole the decision to close the schools as either executive or administrative in nature.[155]

The case indicate the failure by the court to apply the subsidiarity principle to properly determine which source of law applied in those circumstances. This was not the only judgement which failed to answer the administrative law threshold question as in *Aboobaker No v Serengeti Rise Body Corporate*[156] where the court in reviewing a decision of the eThekwini Municipality to rezone the property and approve building plans for development in Durban, bypassed PAJA and applied the principle of legality because legality had not been previously ruled out.[157]

---

[153] [2014] ZASCA 218, 2015 (2) SA 154 (SCA) ("*Beauvallon"*)
[154] The South African Schools Act, 84 of 1996.
[155] *Beauvallon* (note 153 above) para 16.
[156] [2015] ZAKZDHC 54, 2015 (6) SA 200 (KZD) (*"Serengeti Rise"*).
[157] *Serengeti Rise* (note 156 above) para 8. See also Murcott "The Ebb and Flow of Subsidiarity" (note 10 above) p66, *Relmar Holdings (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries and*

The Constitutional Court judgement in *SITA* it was long overdue as the court was able to properly deal with the subsidiarity principle in the context of administrative law by first determining whether PAJA was applicable in the circumstances and if PAJA is not applicable, then the principle of legality is applicable as it has been acting as a safety net where PAJA was not applicable.

The Constitutional Court judgement indicates that it is important to first give recognition the Act that was enacted to give effect the constitutional right before resort can be had to the Constitution itself. This is manifestly demonstrated by the court's interpretative threshold question. The court in doing so it was confirming the subsidiarity principle by first demanding the application of the constitutionally mandated statute, PAJA, when the statute is applicable.[158]

The court showed that it was time to answer the administrative law threshold question of whether PAJA or the principle of legality applies when state seek to review its own decision and the court did answer the question by applying the subsidiarity principle of first determining the applicability of PAJA then the principle of legality.

Another [2015] ZAWCHC 103, 2015 JDR 1546 (WCC) para 73 and *Gidani (Pty) Ltd v Minister of Trade and Industry and Others* [2015] ZAGPPHC 457, 2015 JDR 1471 (GP).

[158] Murcott "The Ebb and Flow of Subsidiarity" (note 10 above) 67.

Bibliography

Books

Hoexter, C “Administrative Law in South Africa” 2nd Edition, 2012.

Quinot, G “Administrative Law: Cases and Materials” 1st Edition 2009.

Van der Walt, A J “Property and Constitution” PULP 2012.

Journal articles

Ahir, U “PAJA v Legality” (2018) 18 (2) Without Prejudice 21.

Breitenbach, A “Justification for Judicial Review” (1992) 8 South African Journal on Human Rights 515.

Calvez, J Y and Perlin, J “The Church and Social Justice: The Social Teachings of the Popes from Leo XIII to Pius XII (1878-1958)” (1961) Chicago: Regnery 328.

De Visser, J “Institutional Subsidiarity in the South African Constitution” (2010) 1 Stellenbosch Law Review 90.

Du Plessis, L “The South African Constitution as a memory and promise” (2000) 11 Stellenbosch Law Review 385.

Du Plessis, L “Subsidiarity: What’s in the Name for Constitutional Interpretation and Adjudication?” (2006) 17 Stellenbosch Law Review 207.

Hoexter, C “The Enforcement of an Official Promise: Form, Substance and the Constitutional Court” (2015) 132 South African Law Journal 207.

Jowell and Lester, “Beyond Wednesbury: Substantive Principles of Adminstrative Law” (1988) 14 (2) Commonwealth Law Bulletin 858.

Klare, K E “Legal Subsidiarity and Constitutional rights: A Reply to A J van der Walt” (2008) 1 Constitutional Court Review 129.

Kohn, L & Corder, H “Judicial Regulation of Administrative Action” in the South African Monograph on Constitutional Law, Murray & Kirkby (eds) (2014) International Encyclopaedia of Laws 108.

Komochak, J A “Subsidiarity in the Church: The state of the question” (1988) The Catholic University of American Press 298.

Murcott, M & van der Westhuizen, W “The Ebb and Flow of the Application of the Principle of Subsidiarity: Critical Reflection on Motau and My Vote Counts” (2015) VII Constitutional Court Review 43.

Murray, A “The Principle of Subsidiarity and the Church” (1995) 72 (2) The Australasian Catholic Record 163.

Petzold, H “The Convention and the Principle of Subsidiarity” in R Macdonald, F Matscher and H Petzold, (1993) The European System for the Protection of Human Rights 41.

Pius XI, Quadragesimo Anno (1931) “The Catholic Social Thought No 79: The Documentary Heritage” ed. D J O’Brien & T A Shannon (Maryknoll NY: Orbis Books, 1992) 60.

Van der Walt, A J “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 Constitutional Court Review 77.

Legislation

Constitution of the Republic of South Africa, 1996.

Interim Constitution Act No. 200 of 1993.

Promotion of Administrative Justice Act No. 3 of 2000.

Promotion of Access to Information Act No. 2 of 2000.

Labour Relations Act No. 66 of 1995.

Pound Ordinance Act No. 32 of 1947.

The South African Schools Act, 84 of 1996.

Cases

S v Mhlungu and others 1995 ZACC 4, 1995 (3) SA 867 (CC).

Zantsi v Council of State, Ciskei (1995) ZACC 9; 1995 (4) SA 615 (CC).

Amod v Multilateral Motor Vehicle Accident Fund 1998 (4) SA 753 (CC).

My Vote Counts NPC v Speaker of the National Assembly and Others 2015 ZACC 31; 2016 (1) SA 132 (CC).

Minster of Health and Another No v New Clicks South Africa (Pty) Ltd and Other (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC).

Kruse v Johnson [1898] 2 QB 91.

R v Abdurahman 1950 (3) SA 136 A.

Theron en Andere v Ring van Willington van die NG Sendingkerk in Suid Afrika en Andere 1976 (2) SA 1 (A).

Associated Provincial Picture House Limited v Wednesbury Corporation (1948) 1 KB 223 (CA).

South African National Defence Union v Minister of Defence 2007 (5) SA 400 (CC).

KwaZulu Natal v Pillay 2008 (1) SA 474 (CC).

Chirwa v Transnet Ltd 2008 (2) SA (CC).

Walele v City of Cape Town and Others 2008 (6) SA 129 (CC).

NAPTOSA and others v Minister of Education, Western Cape and Others 2001 (2) SA 112 (C) at para 123I-J; 2001 (4) BCLR 388 (C).

National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC).

Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC).

Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC).

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC).

Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC).

Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

Staatspresident en Andere v United Democratic Front en 'n Ander 1988 (4) SA 830 (A).

Phambili Fisheries (Pty) Ltd and Another v Minister of Environmental Affairs and Tourism and Others, Case 1171/2002, 27 November 2002.

Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and another [2003] 2 All SA 616 (SCA).

Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 ZACC 16; 2007 (3) SA 121 (CC).

Greys Marine Houtbay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA).

Transnet v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA).

Umfolozi Transport (EDMS) Bpk v Minister van Vervoer en Andere (1997) 2 All SA 548 (A).

Municipal Manager: Qaukeni Local Municipality and another v F V General Trading cc 2010 (1) SA 356 (SCA).

Premier, Free State and Others v Firechem Free State (pty) Ltd 2000 (4) SA 413 (SCA).

Eastern Cape Provincial Government v Contractprops 25 (pty) Ltd 2001 (4) SA 142 (SCA).

State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd (2016) ZASCA 143; 2017 (2) SA 63 (SCA).

State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd [2015] ZAGPPHC 1079.

Kwa Sani Municipality v Underberg/Himeville Community Watch Association [2015] ZASCA 24; [2015] 2 All SA 657 (SCA).

MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye & Lazar Institute [2014] ZACC 6; 2014 (3) SA 481 (CC).

My Vote Counts NPC v Speaker of the National Assembly 2016 (1) SA 132 (CC).

Mazibuko and others v City of Johannesburg and Others [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC).

State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd [2017] ZACC 40.

City of Cape Town v Aurecon South Africa (Pty) Ltd [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017(4) SA 223 (CC).

Khumalo v MEC for Education: KwaZulu-Natal [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC).

Ferreira v Levin NO; Vryenhoek v Powell NO [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

Albutt v Centre For the Study of Violence and Reconciliation [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

Affordable Medicines Trust v Minister of Health [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the republic of South Africa 1996 ZACC 26, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

Minister of Defence and Military Veterans v Motau and Others [2014] ZACC 18; 2014 (5) SA 69 (11).

Minister of Education, Western Cape and Another v Beauvallon Secondary School and Others [2014] ZASCA 218; 2015 (2) SA 154 (SCA).

National Director of Public Prosecutions and Others v Freedom Under Law 2014 (4) SA 298 (SCA).

Relmar Holdings (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries and Another [2015] ZAWCHC 103; 2015 JDR 1546 (WCC).

Gidani (Pty) Ltd v Minister of Trade and Industry and Others [2015] ZAGPPHC 457; 2015 JDR 1471 (GP).