



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 95/17

In the matter between:

JOHAN PIETER PRETORIUS First Applicant

MONTANA DAVID KWAPA Second Applicant

and

TRANSPORT PENSION FUND First Respondent

TRANSNET SECOND DEFINED BENEFIT FUND Second Respondent

TRANSNET LIMITED Third Respondent

Neutral citation: *Pretorius and another v Transport Pension Fund and others* 2018 ZACC 10

Coram: Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgments: Froneman J (unanimous)

Heard on: 16 November 2017

Decided on: 25 April 2018

Summary: Exceptions — pension funds — pension benefits — class action

ORDER

It is ordered that:

1. The applicants are granted leave to appeal.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The High Court's main orders in paragraph 54.1 are replaced with the following:

“The defendants’ exceptions are dismissed with costs including the costs of two counsel.”
4. The High Court's order for costs in the applicants' application for leave to appeal to the Supreme Court of Appeal is replaced with an order that the costs of the application, including the costs of two counsel, be costs in the appeal to this Court.
5. The applications for leave to cross-appeal are dismissed with costs, including the costs of two counsel.

JUDGMENT

FRONEMAN J (Zondo DCJ, Cameron J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurring):

Introduction

[1] This matter concerns the material livelihood of pensioners who were employed by successive incarnations of the transport enterprise operated by the state. Its origin lies in a promise made to them in 1989 that they would receive the same pension benefits

under a commercial entity, Transnet,¹ as they did under the statutory state institution that employed them until then, namely the South African Transport Services (SATS) and its two pension funds (old pension funds). This promise was kept after the transfer to Transnet in April 1990, but after 2003 it was discontinued.

[2] The applicants instituted a class action against Transnet and its current pension funds (new pension funds)² in the High Court. The first claim (1989 promise) was based on a promise made in 1989 and formulated in the particulars of claim as enforceable either in contract, or as an enforceable state promise, or as an unfair labour practice under the Constitution. The second claim (legacy debt) was based on the ground that Transnet was obliged to take over its predecessors' obligation to maintain the old pension funds in a sound financial position. The amount necessary to fulfil that obligation was duly determined. Despite the determination of the amount to be paid in that regard, Transnet has failed to pay it over to the new pension funds. The third and last claim (unlawful donation) is said to flow from an unlawful donation made by one of the new pension funds to Transnet that needs to be paid back.

[3] The respondents filed exceptions to all three claims on various grounds. The High Court upheld three exceptions to the 1989 promise claim, but dismissed all of the others.³ Leave to appeal to the Supreme Court of Appeal was refused. The applicants seek leave to appeal to this Court against the upholding of the three exceptions relating to the 1989 promise. The respondents seek conditional leave to cross-appeal against the dismissal of some of the other exceptions.

[4] I will deal with the application for leave to appeal against the upholding of the exceptions to the 1989 promise first, before turning to the application for leave to cross-appeal against the dismissal of the other exceptions.

¹ Transnet Limited, the third respondent (Transnet).

² The Transport Pension Fund (Transport Fund) and the Transnet Second Defined Benefit Fund (Second Fund), who are the first and second respondents.

³ *Pretorius v Transport Pension Fund* [2016] ZAGPPHC 352 (High Court judgment).

The 1989 promise

[5] The background facts pleaded in the particulars of claim show that the transport enterprise of the state successively vested in the South African Railways and Harbours Administration (SAR&H),⁴ SATS,⁵ and, since 1990, in Transnet.⁶ Transnet inherited two defined pension funds, divided on racial lines, from SAR&H. The Transport Fund is a merger of these old pension funds. It inherited all of the old pension funds' assets, liabilities, rights and obligations. The Second Fund is a new defined benefit fund established in November 2000 to house all of the pensioner-members of the Transport Fund at that date. It inherited all of the assets, liabilities, rights and obligations relating to these pensioner-members of the first respondent.

[6] The rules of the old pension funds entitled their members to increases of their pensions of at least 2% per year. These funds, with the concurrence of SAR&H and SATS, followed a consistent practice, over decades, of granting pension increases of at least 70% of the annual rate of inflation.

[7] In the run-up to the establishment of Transnet, SATS and the old pension funds made a promise to all its employees and members that the funds would continue to increase their pensions as before. The promise was made orally by the general manager of SATS and chair of the boards of the old pension funds, as well as by the Minister of Transport at meetings throughout the country with some 80000 employees in May and June 1989. The promise was repeated in writing in a SATS brochure, distributed to all SATS employees and pensioners later in 1989.

[8] The promise was one of the means by which SATS persuaded its employees to remain in its employ after SATS's conversion to Transnet. Transnet and the new

⁴ Railway Board Act 73 of 1962.

⁵ South African Transport Services Act 65 of 1981.

⁶ Legal Succession to the South African Transport Services Act 9 of 1989.

pension funds kept the promise until 2002 by granting annual pension increases of about 80%, on average, of the rate of inflation. Since then, they have broken the promise in that they have consistently failed to grant any pension increases beyond the minimum of 2% per year.

[9] The applicants pleaded that the failure to keep the promise was unlawful on three grounds: breach of contract, unlawful state action and an unfair labour practice. Exception was taken to the first as being vague and embarrassing and to the other two as disclosing no cause of action and being bad in law.

[10] In the High Court, Legodi J upheld the exception to the contractual claim as vague and embarrassing because it did not contain sufficient particularity regarding: who would decide the rate of the pension increase; when the decision would be made and implemented; who would benefit from the promise; the period that the promise would endure; and, if the promise was in perpetuity, whether it was capable of termination. With regard to the unlawful state action claim, he held that the state action complained of could only be administrative action and should thus have been challenged under the provisions of the Promotion of Administrative Justice Act⁷ (PAJA). The exception to the unfair labour practice claim was upheld on the ground that the particulars of claim failed to aver the existence of a labour relationship between the applicants and the respondents.

[11] Applications seeking leave to appeal to the Supreme Court of Appeal failed in the High Court and in the Supreme Court of Appeal.

A constitutional matter?

[12] Whether the 1989 promise binds current state successors is a constitutional matter because it concerns the exercise of public power and its appropriate use. There was no dispute that the unlawful state action and unfair labour practice claims raised

⁷ 3 of 2000. See High Court judgment above n 3 at paras 41-2.

constitutional matters within this Court's jurisdiction, but it was contended that the contractual claim did not. This approach is not correct.

[13] The underlying facts for the contractual claim are the same as that of the other two claims, namely the 1989 promise by state functionaries that existing pension benefits will remain the same. All that is added is the allegation that this amounted to a valid offer accepted by the beneficiaries. The formation, implementation and possible termination of the contract all involve contested legal issues relating to whether the state had the legal competence to conclude, implement or terminate the contract and, if so, whether the exercise of those competencies amounted the use of public or private power. Those issues all involve constitutional matters.⁸ This Court's jurisprudence shows that the attempted compartmentalisation of public and private power in contractual relations involving the state is one that should not generally be countenanced.⁹ This court has jurisdiction.

Leave to appeal

[14] It is in the interests of justice to grant leave to appeal. The upholding of the exceptions is final and dispositive of discrete and important legal issues.¹⁰ It is not only in the parties' interests that this Court determines them, but also in the broader national interest. And, as we will see, there are reasonable prospects of success as well.

Merits

[15] In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has

⁸ *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) (*KZN*) at paras 37, 48, 52, 57 and 62-5.

⁹ *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) at paras 22-5 and *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at paras 63 and 198.

¹⁰ Compare *Baliso v Firstrand Bank Limited t/a Wesbank* [2016] ZACC 23; 2017 (1) SA 292 (CC); 2016 (10) BCLR 1253 (CC) at paras 4-8.

satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.¹¹ The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception.¹² It is a useful procedural tool to weed out bad claims at an early stage, but an overly-technical approach must be avoided.¹³

Breach of contract

[16] In their particulars of claim the applicants pleaded that the 1989 promise was made orally by the general manager of SATS, who was also the chairperson of the old pension funds, and the Minister of Transport at meetings throughout the country with some 80 000 SATS employees in May and June 1989. The promise was repeated in writing in a SATS brochure distributed to all SATS employees and pensioners later in 1989.

[17] The material terms of the contract pleaded was that in the run-up to the establishment of Transnet, SATS and the old pension funds made a promise to all of their employees and members that the funds would continue to increase their pensions as before. The rules of the old pension funds entitled their members to increases of their pensions by at least 2% per year. These funds, with the concurrence of SAR&H and SATS, followed a consistent practice, over decades, of granting higher pension increases of at least 70% of the annual rate of inflation.

[18] The promise was pleaded as “an offer to contract duly made by and on behalf of SATS, the [old pension funds]”, which was “tacitly accepted . . . by [the] remaining

¹¹ *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2018 (1) SA 335 (CC); 2017 (12) BCLR 1528 (CC); (*DZ*) at para 29; *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (5) BCLR 127 (CC) (*Fetal Assessment Centre*) at para 10 and *Wellington Court Shareblock v Johannesburg City Council; Aghar Properties (Pty) Ltd v Johannesburg City Council* [1995] ZASCA 74; 1995 (3) SA 827 (A) (Wellington) at 834.

¹² *Barclays National Bank Ltd. v Thompson* [1988] ZASCA 126; 1989 (1) SA 547 (A) at 553F-I and *Kahn v Stuart* 1942 CPD 386 at 391.

¹³ *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) at para 3.

employees and pensioners of SATS, [and] the [old pension funds] without demur”. SATS and the old pension funds “were thus contractually bound to keep the promise” and “Transnet, the Transport Fund and the Second Fund inherited the contractual duty to keep the promise”. The failure to keep the promise after 2002 was “thus in breach of contract”.

[19] The pleaded contract is simple and straightforward, but its simplicity is elegant, rather than vague. The terms of the contract are expressly and clearly set out and so are the parties bound by those terms. There is nothing vague and embarrassing that prevents the respondents from knowing what case they have to meet.

[20] The respondents also seek leave to cross-appeal against the dismissal of some of the other grounds of exception in relation to the contract based on the 1989 promise. The cross-appeal may not have been necessary to support an order in their favour on appeal,¹⁴ but in the end it makes no material difference by which route it is before us.

[21] The dismissal of an exception is not usually finally dispositive of the legal issue at stake, unlike the upholding of an exception on the basis that the claim is bad in law.¹⁵ This applies to the exceptions raised against the contractual claim based on the legislative regime and Transport Fund rules. In essence the respondents contend that their predecessors either did not have the capacity to enter into a contract on the basis of the 1989 promise or that, in any event, they are lawfully precluded from implementing that promise. There is precedent that for the purposes of deciding an exception contractual capacity is assumed¹⁶ and that reference to rules that do not form

¹⁴ *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43; 2016 (4) SA 432 (SCA) at paras 21-5.

¹⁵ See *Fetal Assessment Centre* above n 11 at para 79. See also *Maize Board v Tiger Oats Ltd* [2002] ZASCA 74; 2002 (5) SA 365 (SCA) at paras 12-4 and *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 at 601 for dismissal of an exception and compare with upholding an exception that is bad in law that is finally dispositive of the legal issue.

¹⁶ *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265 (O) at para 271-2.

part of the particulars of claim offends against the principle that exceptions must not be decided on information or facts extraneous to those pleaded.¹⁷

[22] Dismissal of the exception on these grounds does not deprive the respondents of the opportunity to raise them as substantive defences in their respective pleas and for their merits to be determined after the leading of evidence at the trial. That is probably, in any event, a better way to determine the potentially complex factual and legal issues involved.¹⁸

[23] The appeal against the upholding of the exception against the contractual claim based on the 1989 promise must thus succeed.

Unlawful state action

[24] For their unlawful state action claim in relation to the 1989 promise the applicants rely on this Court's decision in *KZN* as its legal foundation. They contend that the principle recognised in that case is that a promise by the state to make a payment is enforceable against the state when it would be legally and constitutionally unconscionable for the state to renege on that promise.

[25] In *KZN* the provincial department of education had issued a written notice to independent schools in September 2008 setting out a table of approximate subsidy funding for these schools under the South African Schools Act.¹⁹ The first payment was promised for April 2009 but was not paid. In May 2009 the department issued a further circular announcing that it had decided to reduce the subsidies with retrospective effect. The schools instituted legal proceedings to enforce payment of the promised subsidies for the whole year. Their efforts were unsuccessful until they eventually obtained partial relief in this Court.

¹⁷ *Wellington* above n 11 at 834.

¹⁸ Compare *Fetal Assessment Centre* above n 11 at paras 11-2.

¹⁹ 84 of 1996.

[26] In a majority judgment, Cameron J held that the retroactive retraction or reduction of the April payment was unlawful. He held that the reduction in May, a month after the April payment was due, was legally and constitutionally unconscionable when measured against public law standards of reliance, accountability and rationality.²⁰ The applicants rely on this as establishing a general principle, not restricted to the facts of *KZN*.

[27] The features that they emphasise in their particulars of claim as establishing this unconscionableness include the fact that the promise was made to persuade SATS's employees to remain in its employ after its conversion to Transnet; that this was done by expressly promising that pensioners "need not worry"; that "the conversion will have no influence on pensioners; that 'in addition to the usual annual increase of 2% in pensions, the Transport Services [would], as in the past, continue to grant higher increases to enable them to counter the effects of inflation"; and that Transnet and the new pension funds kept the promise until 2002, which no doubt reinforced the assurance of their predecessors that they could be trusted to keep their promise.

[28] The making of the promise and its implementation for more than a decade created the legitimate expectation for the affected employees that the promise would be kept; they organised their lives and arranged their affairs on the assumption that the promise would be kept; and, as a result of the failure to do so, they "have suffered untold hardship".

[29] The High Court upheld the exception to the unlawful state action ground in relation to the 1989 promise. It held that the claim was founded on administrative action by an organ of state, but no entitlement to protection under PAJA was pleaded. It found support for this in a passage in the *KZN* majority judgment.²¹ It concluded that the

²⁰ *KZN* above n 8 at paras 62-3.

²¹ *Id* at para 31.

applicants were attempting to circumvent the provisions of PAJA, which they may not do.²²

[30] The applicants contend that the High Court's approach is based on a misunderstanding of the majority judgment in *KZN* and the nature of their claim. The principle established in *KZN* is not based on a breach of the right to just administrative action in terms of section 33 of the Constitution read with PAJA, but on far more fundamental misconduct by the state. That conduct is unconscionable when measured against the constitutional standards of reliance, accountability and rationality. On the pleaded facts the requirements of reliance, accountability and rationality were not met. This conclusion is buttressed by the fundamental right to social security under the Constitution,²³ the reasonable pension benefit expectations of pensioners recognised under statute,²⁴ comparative law, and the doctrine of substantive legitimate expectation. This claim stands independent of a claim to administrative justice under PAJA.

[31] The respondents' counter that *KZN* cannot assist the applicants. In *KZN* the promise to pay was sourced in legislation, which is absent here. So too, there is no reduction of pensions that were already due. To enforce the 1989 promise would contravene the current legislative scheme for pension payments. The fundamental right to social security has not been implicated. Reasonable statutory pension benefit expectations are irrelevant because the relevant legislation does not apply. And our law does not recognise the doctrine of substantive, as opposed to procedural, legitimate expectation.

²² High Court judgment above n 3 at para 38.

²³ Section 27 of the Constitution reads:

“(1) Everyone has the right to have access to—

...

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”

²⁴ Preamble of the Transnet Pension Fund Act 62 of 1990; and generally the Pensions Funds Act 24 of 1956.

[32] From this it appears that a resolution of the appeal against the upholding of the exception in the High Court depends on a number of cascading questions:

- (a) Are claims against the state cognisable outside PAJA even if the conduct complained of is administrative action within PAJA?
- (b) If so, what are the parameters of these claims, independent and separate from claims under PAJA?
- (c) Does the applicants' unlawful state action claim pass muster in accordance with (a) and (b)?
- (d) Does the exception procedure have any specific relevance to how the assessment in relation to (a), (b) and (c) should be made?

Administrative action outside PAJA?

[33] In *KZN* it was stated that, “if enforcement is sought on the basis of administrative action, the proceedings should have been brought under [PAJA]”²⁵ and that it was not possible to consider the claim on the basis of a breach of the right to just administrative action.²⁶ Nevertheless, Cameron J stated that—

“the setting in which the 2008 notice promised a payment to its recipients indicates that it was seriously given, in the expectation that it would be relied upon, and that the payment in its terms would indeed be forthcoming, subject only to the possibility of due revocation.”²⁷

[34] These indications included the learners' right to basic education,²⁸ the competence of the Minister to determine norms and minimum standards for granting subsidies to independent schools and the Member of Executive Council's (MEC) competence to pay subsidies from the funds so appropriated by the provincial

²⁵ *KZN* above n 8 at para 31.

²⁶ *Id* at para 33.

²⁷ *Id* at para 37.

²⁸ *Id* at para 38.

legislature.²⁹ This meant that the payment of subsidies was “plainly acting in accordance with [the state’s] duty under the Constitution in fulfilling the right to a basic education of the learners . . . that benefit from the subsidy”.³⁰ Although the subsidy could be revoked, it could not be retroactively revoked in respect of the April subsidy because the date on which the unilateral obligation undertaken by the state became due had already passed.³¹

[35] Because *KZN* was not argued under PAJA it was not necessary to determine whether the decision to reduce the subsidy satisfied all the elements of the definition of administrative action under PAJA. As Professor Cora Hoexter points out, however, the reduction decision seems easily to fulfil those requirements.³² This Court’s decisions in *Premier, Mpumalanga*³³ and *MEC, Education and Training, Eastern Cape*³⁴ would also lend support to that conclusion. Professor Hoexter is critical of this development:

“It is a pity that this case was not argued under the PAJA, for it could easily have inspired significant developments under that statute: the introduction of substantive enforcement of legitimate expectations, or at the very least a reconsideration of the law relating to fettering, and perhaps the application of estoppel against administrators. . . . But as things are, the majority judgment effectively adds to the possibilities of enforcing just administrative action without recourse to regular administrative law, and it adds to the advantages of avoiding PAJA in favour of more general and more abstract constitutional principle.”³⁵

²⁹ Id at paras 39-44.

³⁰ Id at paras 45 and 47.

³¹ Id at para 52.

³² Hoexter “The Enforcement of an Official Promise: Form, Substance and the Constitutional Court” (2015) 132 *SALJ* 207 at 223.

³³ *Premier, Mpumalanga v Executive Committee of the Association of State Aided Schools: Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC).

³⁴ *Fredericks v MEC for Education and Training Eastern Cape* [2001] ZACC 6; 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC) (*MEC, Education and Training, Eastern Cape*).

³⁵ Hoexter n 32 above at 233-4.

[36] Before us no one argued that *KZN* was wrongly decided. It is authority for the proposition that a separate claim may lie, based on the same conduct, even though that conduct might also amount to administrative action under PAJA. The reason for upholding the exception in the High Court thus cannot stand. Finding that the conduct relied upon could also be administrative action under PAJA is not dispositive of the issue. One needs to go further and determine whether the pleaded claim outside PAJA in its own terms truly falls outside PAJA's reach.

Claims not falling within PAJA

[37] *KZN* is not the only instance where claims outside PAJA have been recognised by this Court. PAJA's "current main competitor is the constitutional principle of legality".³⁶ Commentators have been critical of this development on the grounds that its application is sometimes inconsistent;³⁷ leads to a blurring of the requirements of rationality and reasonableness;³⁸ undermines the doctrine of subsidiarity;³⁹ and promotes the avoidance of PAJA.⁴⁰ These criticisms also need to be considered carefully where the constitutional principles are not couched in direct terms of legality, but of unconscionable conduct when measured against the constitutional principles of reliance, accountability and rationality as was done in *KZN*.

[38] It is important to remember that in *KZN* the counterpoint made by Profesor Hoexter – that PAJA was as good a candidate within which the law could have been developed to assist the learners – was not raised by the parties. Nor did the respondent MEC raise the argument that the time limits under PAJA were being circumvented. The underlying constitutional principles of reliance, accountability and

³⁶ Hoexter above n 32 at 219.

³⁷ Murcott and van der Westhuizen "The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *My Vote Counts*" (2015) 7 Constitutional Court Review at 45 and 58-59.

³⁸ Hoexter "The Rule of Law and the Principle of Legality" in Carnelley and Hoxter (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* 2013 (University of KwaZulu-Natal Press Scottsville 2011) 55 at 59; Price "The Evolution of the Rule of Law" (2013) 13 *SALJ* 649 at 655-656.

³⁹ Hoexter id at 65.

⁴⁰ Kohn L "The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone too Far?" (2013) *SALJ* 810 at 812; and Hoexter id at 66-8.

rationality were sourced in the context of the state's duty under the Constitution to fulfil the right to a basic education of the learners that benefitted from the subsidy,⁴¹ not primarily in any administrative law principle codified in PAJA.⁴²

[39] Similarly, here, the facts pleaded and arguments raised are, on their face at least, not based on administrative justice, but on the asserted application of the *KZN* constitutional principle of unconscionable state conduct that is in breach of reliance, accountability and rationality. The pleaded factual context of the 1989 promise being made with obvious intent to make good on it in order to facilitate the transfer of the state's transport enterprise to a commercial entity; the legal support of that being sought in the constitutional right to social security and special legislative protection of pensioners; and the assertion of substantive legitimate expectations, do not on their own show the inevitability of the application of PAJA.

[40] That does not mean that the door is closed to Transnet and the new pension funds to raise defences that show that the application of the *KZN* principle in this case would give the applicants an unfair advantage because applicable PAJA provisions are being circumvented.⁴³ At this stage of the proceedings all it means is that the potential unfair advantages do not jump in one's face from the particulars of claim.

Is the applicants' unlawful state action claim legitimately outside PAJA?

[41] The last sentence of the previous paragraph already gives the answer. Yes it is.

[42] The respondents' arguments that *KZN* does not apply here may eventually be found to have merit, but they run into the obstacle that exception proceedings are inappropriate to decide the complex factual and legal issues raised by these objections.

⁴¹ See [34].

⁴² Compare *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC), where the minority judgment also relied directly on other fundamental rights, but the majority declined to follow that approach because it was clear on the papers that it was being used to circumvent PAJA time limits.

⁴³ *Id.* Also compare *KZN* above n 8 at paras 104-5.

Development of the law on exception

[43] In their written submissions, the applicants readily conceded that the “contours and scope” of the *KZN* principle “have not yet been fully developed”. This Court has recently declined to decide on the development of the common law where all the factual issues were not raised in the papers before us and where the legal issues are complex.⁴⁴

[44] Some of the arguments made against the applicability of the *KZN* principle are similar to those rejected earlier in relation to the breach of contract claim. The alleged absence of legislative authority to make the promise and the alleged contravention of the current legislative scheme relate to matters of capacity that lie outside the material pleaded in the particulars of claim and may be pleaded as substantive defences. The legal issues surrounding fundamental social security rights, pensioner expectations and substantive legitimate expectation and their effect on the principles of reliance, accountability and rationality are complex. To decide the possible unconscionableness of state conduct, it will be better to get the full story thrashed out at a trial.⁴⁵

[45] The appeal against the upholding of the exception against the unlawful state action claim must thus also succeed.

The unfair labour practice claim

[46] The third cause of action pleaded as flowing from the 1989 promise was that the failure to pay constituted an unfair labour practice in breach of section 23(1) of the Constitution.⁴⁶ The High Court upheld the exception to this leg of the respondents application on the ground that it must be pleaded that there was and is an

⁴⁴ See *DZ* above n 11 at paras 57-8. See also, for example, *Fetal Assessment Centre* above n 11 at paras 12 and 78.

⁴⁵ See, for example, *Fetal Assessment Centre* id at paras 11, 26 and 74.

⁴⁶ Section 23(1) of the Constitution reads:

“Everyone has the right to fair labour practices.”

employer-employee relationship between the applicants and the respondents and that they failed to do so.⁴⁷

[47] That appears to be unnecessarily restrictive. The section refers to “everyone” having the right and its purpose is to protect persons from unfair labour practices that originated in an employer-employee relationship. Labour law jurisprudence under the Labour Relations Act⁴⁸ (LRA) recognises that unfair labour practices under the Act may extend beyond the termination of employment.

[48] Contemporary labour trends highlight the need to take a broad view of fair labour practice rights in section 23(1). Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the “twilight zone” of employment as supposed “independent contractors” in time-based employment subject to faceless multinational companies who may operate from a web presence.⁴⁹ In short, the LRA tabulated the fair labour practice rights of only those enjoying the benefit of *formal employment* – but not otherwise. Though the facts of this case do not involve these considerations, they provide a compelling basis not to restrict the protection of section 23 to only those who have contracts of employment.

[49] Two other objections against this part of the claim were raised in argument. The one was that direct reliance on the Constitution rather than on the provisions of the LRA relating to unfair labour practices undermined the principle of subsidiarity. The other was that the new pension funds never employed any of the applicants.

[50] The application of the principle of subsidiarity in relation to the LRA and other labour legislation is complex. The Constitution in some instances, like with the rights

⁴⁷ High Court judgment above n 3 at para 51.

⁴⁸ 66 of 1995.

⁴⁹ “Twilight zones” of employment refer to types of employment wherein there is no clear employer and employee, examples include Uber and Airbnb.

of access to information⁵⁰ and just administrative action⁵¹ require national legislation to give effect to these rights. The same requirement is not made in section 23. The LRA itself, however, sets that as one of its objects.⁵² Nevertheless there are other pieces of labour legislation that also cover aspects of potential unfair labour practices.⁵³

[51] The principle of subsidiarity was recently considered by this Court in *My Vote Counts*.⁵⁴ Neither the majority nor minority judgments in that case are directly on point because the issue involved a provision of the Constitution that required Parliament to act. Section 23(1) lacks that requirement. A decision by Parliament *not* to cover the entire field would not fail to fulfil a duty in the Constitution. A fair labour practice claimant may be entitled to rely on the Constitution directly without having to show that the LRA (or patchwork of other statutes) is deficient.

⁵⁰ Section 32 of the Constitution reads:

- “(1) Everyone has the right of access to—
- (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

⁵¹ Section 33 of the Constitution reads:

- “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must—
- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.”

⁵² See section 1 of the LRA reads:

“The purpose of *this Act* is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of *this Act*, which are—

- (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996.”

⁵³ Consider the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.

⁵⁴ *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 2015 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) (*My Vote Counts*) at paras 44-74.

[52] The majority judgment in *My Vote Counts* expressly disavowed that subsidiarity was a hard rule:

“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. 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.”⁵⁵ (Footnotes omitted.)

[53] This indicates that as in *Fetal Assessment Centre* this is a matter where the “factual situation is complex and the legal position uncertain”.⁵⁶ Here there is more than enough legal uncertainty to send the unfair labour practice claim to trial.

[54] If it is accepted that in this matter the principle of subsidiarity does not apply, at least at the exception stage, there is no reason to find that a claim against the new pension funds is facially implausible. A claim like this, invoking the fundamental right to fair labour practices under section 23, has not been litigated before. We should not hold – on exception – that the constitutional guarantee against unfair labour practices does not extend to the actions of pension funds taken in concert with an employer.

[55] The appeal against the upholding of the exception to the unfair labour practice claim must also succeed.

The conditional cross-appeals

[56] Dismissal of an exception does not usually involve a final dispositive pronouncement on a legal issue.⁵⁷ For that reason, as well as the complexity of the factual and legal issues surrounding all the claims made in the applicants’ particulars of claim, it is not in the interests of justice to grant leave to the respondents to cross-appeal.

⁵⁵ Id at para 182.

⁵⁶ *Fetal Assessment Centre* above n 1 at paras 11-2, relying on *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (1) BCLR 995 (CC).

⁵⁷ See above n 15.

The respondents may raise the issues in substantive defences to the applicants' claim for determination at the trial.

Costs

[57] The High Court dismissed the applicants' application for leave to appeal to the Supreme Court of Appeal with costs, including the costs of two counsel. In view of the outcome, that will have to be corrected. In these proceedings, the applicants sought a costs order for three counsel. That is not normal practice and although the matter is complex and of importance it is not so exceptional as to warrant a deviation from the ordinary order of costs of two counsel to be allowed when such order is reasonable.

Order

[58] It is ordered that:

1. The applicants are granted leave to appeal.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The High Court's main orders in paragraph 54.1 are replaced with the following:

“The defendants' exceptions are dismissed with costs including the costs of two counsel.”
4. The High Court's order for costs in the applicants' application for leave to appeal to the Supreme Court of Appeal is replaced with an order that the costs of the application, including the costs of two counsel, be costs in the appeal to this Court.
5. The applications for leave to cross-appeal are dismissed with costs, including the costs of two counsel.

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