A FUTURE FOR THE DOCTRINE OF SUBSTANTIVE LEGITIMATE EXPECTATION? THE IMPLICATIONS OF *KWAZULU-NATAL JOINT LIAISON COMMITTEE V MEC FOR EDUCATION, KWAZULU NATAL*

M Murcott*

What's in a name? That which we call a rose
By any other name would smell as sweet…
William Shakespeare *Romeo and Juliet*, Act II Scene II

1 Introduction

KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal concerned the retraction of a promise to pay subsidies to independent schools.[1] The MEC for Education in KwaZulu-Natal had granted a subsidy under section 48 of the *South African Schools Act* 84 of 1996 (the *Schools Act*) for 2009/2010 to independent schools in the province, represented by the applicant. In a 2008 notice the Department of Education, KwaZulu-Natal set out "approximate" funding levels for the schools for 2009/2010.[2] However, the Department did not pay the subsidies to the schools in the amounts indicated in the notice.[3] It paid 30% less.[4] The Department did so on the basis of budget cuts for the 2009/2010 financial year, and notified the schools of its intention to reduce the subsidies by 30% from May 2009.

* Melanie Murcott. LLB *cum laude* (University of Cape Town); LLM *cum laude* (University of Pretoria). Senior Lecturer, University of Pretoria. E-mail: Melanie.Murcott@up.ac.za. This paper was originally presented at the Administrative Law seminar of the South African Law Teachers Association Conference in January 2014. I am grateful for the opportunity to have presented the paper, and for the feedback and input of Professors Cora Hoexter, Geo Quinot, Michael Kidd and Hugh Corder following my presentation. I am also grateful for the input of the anonymous reviewers. Errors in the paper are, of course, my own.

1 *KwaZulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal* 2013 4 SA 262 (CC) (hereafter *KZN JLC*) para 2.
2 *KZN JLC* para 3.
3 *KZN JLC* para 6.
4 *KZN JLC* para 6.

The schools sought to enforce the Department's promise to pay the subsidies based on the notice of 2008 for the full year, without any reduction, relying on the law of contract.[5]

The Centre for Child Law, as *amicus curiae*, submitted that a promise to pay a subsidy in terms of the applicable statutory and constitutional framework created a legitimate expectation in respect of the amount promised.[6] It was contended that the promise to pay gave rise to an expectation of a particular outcome (payment of the subsidy), rather than an expectation that a particular procedure would be followed, giving rise to a substantive legitimate expectation that should be afforded substantive protection in the form of an order compelling the payment of the full amount of the subsidy promised. In other words the *amicus curiae* urged the court to develop the doctrine of substantive legitimate expectation in order to compel the payment of the subsidy to the schools.

A majority of the Constitutional Court rejected the arguments of both the applicant and the *amicus curiae*, but nonetheless ordered the payment of a portion of the promised subsidy. For the court, a stumbling block in relation to the development of the doctrine of substantive legitimate expectation was that it was not properly pleaded or relied upon by the applicant. The applicant had also expressly disavowed reliance upon the doctrine. Although courts are not bound by incorrect concessions of law,[7] a majority of the Constitutional Court felt constrained by the applicant's stance. It chose,[8] rather than to develop the doctrine of substantive legitimate expectation, to

5 *KZN JLC* para 14. Although the applicant relied on contract as the basis for the relief sought, and disavowed reliance on the administrative law, during argument the applicant's counsel glibly remarked that it "was 'neither here nor there' whether [the relief sought] derived from administrative action or 'something akin to a contractual obligation'" (*KZN JLC* para 31).

6 *KZN JLC* para 27.

7 See *CUSA v Tao* 2009 2 SA 204 (CC) para 68; *Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd* 2014 6 SA 286 (KZP) paras 84-85.

8 *KZN JLC* para 58. I refer to the court's "choosing" consciously and deliberately. I will argue below that by adopting a substantive rather than formalistic approach, the court could have made a different choice: to adopt the doctrine, despite the manner in which the case was argued and pleaded. I say so because on the facts before the court the doctrine emerged as a potential legal basis for the relief sought by the applicant. My point of departure, which sees the potential for the court to make this choice in spite of the manner in which the case was pleaded and argued by the applicant, aligns with the views of Botha 2004 *SAJHR* 250-251 that: "legal materials do not apply themselves, but are constructed by human beings. Their meaning depends as much on the interpretive habits and reflexes of the interpreter as on the materials themselves". As Hoexter puts

formulate a new legal mechanism at public law. This mechanism, which bears close resemblance to the doctrine as developed under English law, offered some substantive protection to the schools represented by the applicant "on broader public law and regulatory grounds". The court created this new mechanism to afford the schools substantive protection in respect of conduct bearing all the hallmarks of administrative action without reliance on the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA).[9] It did so through the enforcement of a publicly promulgated promise to pay on the grounds of reliance, accountability and rationality.

In this paper I discuss the new legal mechanism created to enforce a publicly promulgated promise to pay created in *KZN JLC*, as well as the impact of this mechanism on the future scope of the doctrine of substantive legitimate expectation. I begin by briefly describing the development of the doctrine of legitimate expectation in South African law,[10] which had left the way open for the Constitutional Court to develop a doctrine of substantive legitimate expectation in *KZN JLC*. Thereafter I analyse the majority's approach in *KZN JLC* pursuant to which, rather than develop the doctrine, it invoked rationality review to enforce unilateral and publicly promulgated promises by government to pay. I then consider the impact of the majority's approach on the scope to develop the doctrine of substantive legitimate expectation in future. Finally, I discuss how the court's approach was "subversive of

it "judges are indeed social engineers, whether they know it or not" (Hoexter 2008 *SAJHR* 282). I appreciate that due to South Africa's enduring formalistic legal culture my point of departure will not sit comfortably with some of the lawyers who read this paper. However, my point of departure is affirmed by the court's rejection of a cause of action based on the doctrine in favour of *another cause of action not pleaded by the applicant*, based on rationality. The majority in *KZN JLC* makes an intriguing choice – the adoption of broad public law values as the basis to enforce a promise to pay, rather than the doctrine of legitimate expectation, in circumstances where neither cause of action was pleaded, and only the latter was argued (and only by the *amicus curiae*) as a basis for the remedy granted. The court relied on precedent in the form of *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) and *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) as authority for the proposition that it was entitled to adopt a basis for the remedy granted that was not the cause of action expressly advanced or argued, since this "claim was apparent from the papers and the evidence" (*KZN JLC* para 68).

9 The majority did so rather than accede to the *amicus*' plea reflected in para 28 that the court ought not to "inquire formalistically whether the label 'legitimate expectation' was used, but must rather determine whether its elements…are pleaded and supported by the facts on record".

10 Hoexter *Administrative Law* 434.

PAJA and the scheme in s 33 of [the Constitution of the Republic of South Africa, 1996]".[11]

2 The doctrine of legitimate expectation under South African law

The doctrine of legitimate expectation was first successfully relied upon in South Africa in the apartheid era case of *Administrator, Transvaal v Traub*,[12] and has been relied upon in a number of cases since then.[13] Currently the doctrine of legitimate expectation entails that a reasonable expectation based on a well-established practice or an express promise by an administrator acting lawfully gives rise to legal protection when the practice or promise is clear, unambiguous and unqualified.[14] The legal protection afforded usually (but not always as I illustrate below) takes the form of ordering that a fair procedure be followed before a decision is made in respect of the expected conduct.[15] This is so even where the expectation is substantive in nature in that it entails the expectation of a particular outcome rather than the expectation that a procedure will be followed.[16]

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11 See Hoexter "Rule of Law and the Principle of Legality" 68, where the author demonstrates that where there is an "accountability vacuum" because, for technical or formalistic reasons, PAJA is not applicable to the conduct under review, the courts have applied its requirements under another name: the principle of legality. Hoexter argues that this approach is open to abuse in a manner that is "subversive of PAJA and s 33 of the Constitution". It will be argued that the Constitutional Court followed the same approach in *KZN JLC* by applying standards of rationality and accountability in circumstances where PAJA had not properly been pleaded to an exercise of public power that arguably amounted to administrative action under PAJA, rather than applying PAJA directly. Although the principle of legality is not expressly invoked in *KZN JLC*, it is arguably the underlying basis for the majority's reasoning.

12 *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) (hereafter *Traub*). In *Traub* the court found that a long-standing past practice of appointing all the doctors recommended for a particular post had created a legitimate expectation that doctors who had been refused appointment would in fact be appointed or at the very least that they would be given a hearing before being refused appointment (ie a hybrid expectation that was both substantive and procedural in nature). The court afforded this expectation procedural relief: they were entitled to be heard if the administrator wished to depart from its long-standing past practice.

13 Quinot 2004 *SAPL* 547. See further the cases discussed at Hoexter *Administrative Law* 394-396, 421-425; 432-434.

14 Quinot 2004 *SAPL* 546-547, referring to *National Director of Public Prosecutions v Phillips* 2002 4 SA 60 (W) para 28. See also *South African Veterinary Council v Szymanski* 2003 4 SA 42 (SCA) para 20 and *Duncan v Minister of Environmental Affairs and Tourism* 2010 6 SA 374 (SCA) (hereafter *Duncan*) para 15.

15 This was the case in *Traub* as discussed in fn 14 above. Also see *Nortjie v Minister van Korrektiewe Dienste* 2001 3 SA 472 (SCA) para 14 and Quinot 2004 *SAPL* 547-548. See further Campbell 2003 *SALJ* 293.

16 Campell 2003 *SALJ* 293. Also see *Duncan* para 13, where Brand JA points out that both the Constitutional Court and the Supreme Court of Appeal have left open the question of whether or

However there are examples, though limited, of substantive protection being afforded to a legitimate expectation of a particular outcome (a substantive expectation). For instance, in *Quinella Trading (Pty) Ltd v Minister of Rural Development* the court assumed that the doctrine of legitimate expectation could afford substantive protection to a substantive expectation, by ordering the state to honour contracts in respect of a land claim, but did not refer to PAJA or clearly explain the basis for such protection.[17] *Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province* is another example of substantive protection being afforded a substantive legitimate expectation, this time in the form of an expectation that a letter would be written confirming the terms of employment of the expectant parties.[18] Again, the court seemed to take for granted that it could protect this kind of expectation, and did not properly explain the basis upon which it did so.

Premier Mpumalanga (a pre-PAJA case concerning the MEC for Education, Mpumalanga's decision that bursaries for certain students in state-aided schools would no longer be paid)[19] is an example of substantive protection being afforded to what was cast by the court as a procedural expectation: the expectation that a procedure would be followed before a decision was taken.[20] The *effect* of the court's order was to confer an advantage (ie to afford substantive protection) in the form of the payment of bursaries to the party whose legitimate expectation had been disappointed.[21] The court did so on the basis of procedural unfairness in the decision-making process (a failure to give reasonable notice).[22] The court cast the expectant party's expectation in procedural rather than substantive terms (an expectation that bursaries would be paid) in that "the previous conduct of an official ha[d] given rise to an expectation that *a particular procedure will be followed* before a decision is made", and that

not the doctrine of legitimate expectation should be extended to afford not only procedural but also substantive protection to a substantive legitimate expectation.

17 *Quinella Trading (Pty) Ltd v Minister of Rural Development* 2010 4 SA 308 (LCC) paras 20-24.

18 *Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province* 2002 2 SA 215 (T) para 56. See further Hoexter *Administrative Law* 432.

19 *Premier Mpumalanga v Executive Committee, Association of State Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) (hereafter *Premier Mpumalanga*) para 1.

20 *Premier Mpumalanga* para 38.

21 *Premier Mpumalanga* paras 45-46.

22 *Premier Mpumalanga* para 38.

procedure had not been followed.[23] Because of the resulting procedural unfairness, the decision taken by the official was invalid and set aside, and the official was required to undertake the expected conduct: the payment of bursaries.[24] Though the effect of the court's order was to afford substantive protection to the expectant party, the court found it unnecessary "to decide…in what circumstances, if any, a legitimate expectation [would] confer a right to substantive relief beyond that ordinarily contemplated by a duty to act fairly".[25]

Post-PAJA, a legitimate expectation will receive procedural protection where a fair procedure was not followed in terms of sections 3 or 4 of PAJA in the decision-making process, and the expectant party had a right to or an expectation of a pre-decision hearing or notice.[26] In the absence of any procedural unfairness, substantive protection and a remedy under PAJA could conceivably be afforded in respect of a substantive legitimate expectation on the basis of a ground of review for unlawfulness or unreasonableness under section 6 of PAJA.[27] There is, however, currently no authoritative judicial precedent setting out whether, when or how a substantive legitimate expectation will be given substantive protection under PAJA.[28] The courts'

23 *Premier Mpumalanga* para 35.

24 *Premier Mpumalanga* paras 45-46.

25 *Premier Mpumalanga* paras 48. See also para 36 and Hoexter *Administrative Law* 433.

26 *KZN JLC* para 31 and fn 7. See also *Walele v City of Cape Town* 2008 6 SA 129 (CC) paras 28-37.

27 Campbell 2003 *SALJ* 316-317. Also see *Premier Mpumalanga* para 41, where the court remarked *obiter* that "it may be that in many cases a retroactive termination of benefits will not be fair no matter what process is followed unless there is an overriding public interest".

28 As discussed above, the Constitutional Court left the development of the doctrine open for another day in *Premier Mpumalanga*, where a legitimate expectation was found to afford procedural protection in the form of reasonable notice that was not afforded the affected schools. It did so again later, in *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 3 SA 265 (CC) (hereafter *Bel Porto*), where reliance on a legitimate expectation was not properly pleaded. Quinot 2004 *SAPL* discusses *Premier Mpumalanga* and *Bel Porto* in detail. More recently in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 109 the court again avoided deciding whether or not the doctrine of substantive legitimate expectations could form part of our law when it held, in the context of residents resisting their eviction from an informal settlement, that: "There was extensive argument concerning the legitimate expectation that 70% of houses built in the Joe Slovo settlement would be allocated to Joe Slovo residents who qualify. The applicants point out correctly that this was not done in the first two phases of the three-phase development. But the respondents say that this failure was due to circumstances beyond their control. It is not necessary to go into the complex argument concerning substantive and procedural legitimate expectation so competently advanced before us. The issue can be appropriately accommodated in the justice and equity analysis. To my mind, the highest at which the legitimate expectation argument can be put is that there was a promise that, as far as was possible, 70% of the accommodation would be made available to Joe Slovo residents who qualify. The state says that it has not been possible to accommodate Joe Slovo residents in

unwillingness to develop the doctrine of substantive legitimate expectation thus far raises the spectre of whether it will do so in the future.

According to Hoexter,[29] the court's reluctance to afford substantive legitimate expectations substantive protection stems from a judicial concern of:

> ... enforc[ing] promises or practices where this would undermine the basic requirement of legality [i.e. result in officials acting ultra vires their powers] or…have the effect of fettering the future exercise of an agency's discretion.

For Campbell[30] the challenge of affording substantive protection to substantive legitimate expectations relates to:

> ... the complexities in preventing legitimate expectations from hardening into rights and in accommodating the constitutional rule whereby the judiciary respects the role and functions of public officials and does not usurp their powers and discretions.

For both Hoexter and Campbell the development of the doctrine of substantive legitimate expectation is challenging due largely to concerns relating to the separation of powers. Given the challenges outlined by Hoexter and Campbell, one can begin to understand why, in cases where the Constitutional Court has been asked to determine whether a legitimate expectation could confer a right to substantive relief, it has avoided doing so, and left the question of the substantive protection of substantive legitimate expectations undecided and open for determination in the future. *KZN JLC* presented another opportunity to afford substantive protection to a legitimate expectation notwithstanding the applicant's position in this regard, since on the facts before the court the doctrine emerged as a potential legal basis for the relief sought by the applicant. Again the court declined to develop the doctrine, choosing instead to afford substantive protection to the schools through a different legal mechanism of another name.

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phases 1 and 2. The state is now prepared to consent to an order in terms of which 70% of the houses yet to be constructed at Joe Slovo will be allocated to Joe Slovo residents. The legitimate expectation of the applicants will be sufficiently satisfied to render the relocation just and equitable." See further, the cases discussed by Hoexter *Administrative Law* 421-436.

29 Hoexter *Administrative Law* 427.

30 Campbell 2003 *SALJ* 294.

3 KZN JLC – Rejection of the law of contract and the administrative law as the bases to afford substantive protection to the schools

In *KZN JLC* the majority afforded the schools some of the substantive relief they sought. It did not, however, do so on the legal basis that the schools asserted: the law of contract. Similarly, the court refused to afford protection to the schools on the basis of administrative law under the doctrine of substantive legitimate expectation, as the *amicus curiae* urged the court to do. Rather, the court created a remedy on a legal basis not expressly pleaded or argued by any of the parties. In what follows I discuss the court's rejection of the arguments of the applicant and *amicus curiae*.

3.1 The schools' contractual arguments

In *KZN JLC* the schools sought to enforce the Department's promise to pay subsidies:

> ... on what [they] simply and persistently described as an enforceable undertaking to pay the entire year's subsidy without any reduction. This cast the claim in contractual, or ostensibly contractual, terms.[31]

The majority rejected the schools' contractual arguments, since the government's promise to pay subsidies "was not extended as part of a bilaterally binding agreement, which is the hallmark of contractually enforceable obligations".[32]

Froneman J, in his separate concurring judgment, disagreed. [33] He argued that there was evidence of both offer and acceptance of the subsidies.[34] He also contended that the mere fact that the Department's powers derived from legislation and could also give rise to administrative law remedies did not mean that there was no intention to contract.[35] Froneman J sought to integrate the rules of public and private law by regarding them as a "fluid continuum"[36] and rejecting the idea that administrative law or other public law considerations prevented the promise of a subsidy and its acceptance being recognised as a contract.[37]

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31 *KZN JLC* para 58.
32 *KZN JLC* para 35.
33 *KZN JLC* paras 97-98.
34 *KZN JLC* paras 97-98.
35 *KZN JLC* para 103.
36 Hoexter *Administrative Law* 451 referring to Quinot *State Commercial Activity*.
37 *KZN JLC* paras 100-107.

In contrast, the formalistic judgments of Nkabinde J and Zondo J (Mogoeng CJ and Jafta J concurring) respectively adopted the view that the Department had not made any enforceable promise because it had not committed itself to "exact amounts".[38] Further, in contrast with the majority, for the minority the absence of an enforceable contract was the end of the school's case. The minority (per Zondo J) all but chastised the majority for having picked the schools up and making them "stand upon a different case".[39]

In my view, there is merit to Froneman J's approach to the contractual arguments raised in *KZN JLC*. By focussing on the substance of the relationship between the parties rather than the labels or names ascribed to their conduct, I submit that it was open to the majority to conclude that a binding agreement had been concluded between the parties. However, the focus of this paper is the majority's creation of a new remedy, the enforcement of a publicly promulgated promise to pay.

3.2 Administrative law abandoned?

Not only did the majority in *KZN JLC* reject the school's contractual arguments, it also found that administrative law could not be applied.[40] Although the Department's refusal to pay subsidies as promised arguably amounted to "administrative action" for the purposes of PAJA,[41] this was not what the schools had pleaded.[42] The schools could have relied on PAJA, for instance, on the basis that a decision of an administrative nature had been taken – the refusal to pay subsidies. This decision, having been taken by an organ of state exercising public power conferred on it in terms of the Schools Act and related provincial legislation and regulations, adversely affected the right to basic education of learners in a direct (final) and external way. The Department's conduct would thus appear to satisfy the "palisade of qualifications" contained in the definition of "administrative action" in PAJA.[43] Accordingly, the

38 This paper does not delve into the deeply formalistic approaches of the dissenting judgments.
39 *KZN JLC* para 158.
40 *KZN JLC* para 33.
41 The conduct would seem to satisfy all the elements of the definition of "administrative action" in PAJA.
42 *KZN JLC* para 19.
43 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) para 21.

decision could well have been susceptible to review on the grounds contained in section 6 of PAJA. However, the schools did not pursue a review application, which they would have been required to do within the 180-day period prescribed by section 7 of PAJA, nor did they call for a record from the Department.[44]

For the majority, it was the school's failure to call for a record in terms of the normal procedure for an administrative law review application that foreclosed the invocation of PAJA,[45] since:

> The record of the budget allocation and decision-making would have been highly pertinent to a claim to enforce a promise at administrative law. It is not before us. The result is that, despite the amicus' argument to the contrary, it is not possible to consider the applicant's claim for payment for the whole of the 2009 school year on the basis that the Department breached the right to just administrative action when it revoked [its] undertaking in May 2009.[46]

Froneman J adopted a different approach. He resisted the idea that the possibility of invoking administrative law ought to turn exclusively on the use of formal labels or procedures.[47] In relation to the school's failure to call for a record, he held that:

> The rule exists principally in the interests of an applicant, and an applicant can choose to waive a procedural right. In this case, where a litigant brings proceedings against the state, 'the latter can always, in answer to an ordinary application, supply the record of the proceedings and the reason for its decision'. There was thus nothing in the form of the proceedings in the High Court that prevented the first and second respondents from producing the record of the budget allocation and decision-making in regard thereto, or anything else they considered relevant. They could have done it whether the claim was based in contract or in administrative law. The blame for their failure to do so cannot be laid at the applicant's door.[48]

Applying Froneman J's logic, the schools would not have been barred from pursuing relief under PAJA merely because they did not call for a record. Froneman J's logic, which avoids the subversion of "substance…to form and principle to technicality",[49] is more in keeping with the transformative mandate of the Constitution than the majority's more formalistic approach, which as I argue below resulted in limited

44 *KZN JLC* paras 31-32.
45 In terms of Uniform Rule of Court 53.
46 *KZN JLC* paras 32-33.
47 *KZN JLC* para 86.
48 *KZN JLC* para 86.
49 Hoexter 2004 *SALJ* 604.

substantive relief outside of PAJA.[50] The *Constitution*'s transformative mandate entails a commitment to "social transformation"[51] through "substantive adjudication",[52] especially in cases concerning access to basic education and the provision of subsidies that enable such access. The *Constitution*'s important transformative goals ought not to be undermined by formalism. They require a substantive application of the law and a departure from formalism. Importantly, despite its refusal to apply PAJA, the majority "eschewed formalism"[53] to the extent that it was nonetheless prepared to grant the schools some of the relief they sought, following the creative approach that I address in the next part of this paper.

4 Substantive protection of a promise to pay – the protection of a substantive legitimate expectation by another name?

Although the schools' contractual arguments and the *amicus curiae's* administrative law arguments were not invoked as a basis to enforce the Department's promise to pay subsidies, the majority of the court was willing to enforce the promise and provide at least some of the substantive protection sought by the applicant "on broader public law and regulatory grounds".[54] This was because the promise "created a legal obligation unilaterally enforceable at the instance of those who were intended to benefit from it".[55] The court found that:

> ... a public official who lawfully promises to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for their payment has passed. *This is not because of a legitimate expectation of payment. Legitimate expectation relates to expected conduct.* Rather, this principle concerns an obligation that became due because the date on which it was promised had already passed when it was retracted.[56]

Thus, for the majority of the court, the fact that the due date for performance had passed was a crucial factor. It was only after that date that the schools could enforce

50 See Hoexter 2008 *SAJHR* 281.
51 Davis and Klare 2010 *SAJHR* 404.
52 Hoexter 2008 *SAJHR* 281.
53 *KZN JLC* para 82.
54 *KZN JLC* para 58.
55 *KZN JLC* para 48. Here the court claimed that the idea that government would be bound by its unilateral promises to pay is "nothing new". It did so by relying on pre-PAJA authority, without explaining why this case remains applicable to conduct bearing all the qualities of administrative action post-PAJA, in circumstances where PAJA had not been relied upon by the schools.
56 *KZN JLC* para 52. Author's emphasis.

a promise to pay.[57] To the extent that the Department gave notice of the reduction before the due date of payment, the schools were left without a remedy, given their disavowal of PAJA. However, once the due date had passed the Department's "hands were tied": it had to make payment as promised.[58]

The bases upon which the Department was found to be obliged to pay subsidies once their due date for payment had passed were "reliance, accountability and rationality".[59] Significantly, although these bases are aspects of the principle of legality, and are thus applicable to all public power, they are also classic principles of the administrative law. Although these bases are aspects of the principle of legality, and are thus applicable to all public power, they are also classic principles of the administrative law. Thus, classic principles of administrative law were invoked in KZN JLC despite the court's purported abandonment of the administrative law. Reliance is the basis, in administrative law, upon which administrators are precluded from varying or revoking their decisions, once they are *functus officio*.[60] A central role of administrative law is to ensure accountable government by controlling some forms of public power: administrative action.[61] Rationality is a ground of review in terms of section 6(2)(f)(ii) of PAJA, requiring that administrative action must be rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator and the reasons given for it by the administrator. For the court to reject the application of the administrative law under PAJA on the grounds that it was not pleaded only to place reliance upon the same principles (cast as broad constitutional principles) that would in any event have been applicable had PAJA been properly pleaded is a curious approach that I discuss more fully below. Before doing so I consider the manner in which the principles of reliance, accountability and rationality were applied in *KZN JLC*.

57 See further *KZN JLC* paras 56-57.
58 *KZN JLC* para 62.
59 *KZN JLC* para 63.
60 Hoexter *Administrative Law* 277.
61 See s 195 of the *Constitution of the Republic of South Africa*, 1996 which sets out a number of accountability enhancing principles applicable to administration in every sphere of government. In relation to the application of these principles in the context of administrative law, see for example *Judicial Service Commission v Cape Bar Council* 2013 1 SA 170 (SCA) and Stacey 2007 *SAPL* 79.

First, the schools were found to have relied upon the "crystallised" entitlement to subsidies that had fallen due in their planning and budgeting.[62] Secondly, the court found that accountability dictates that "[i]t can never be acceptable in a democratic constitutional state for budget cuts to be announced to those whom undertakings have been made after payment has by regulation already fallen due".[63] Lastly, the court found it irrational to revoke a promise when the time for its fulfilment has already expired.[64] This was because "it is impossible to tailor behaviour and expectations to a promise made in relation to a period that has already passed".[65] Thus the Department was ordered to pay the subsidies on the basis that:

> Accountability and rationality demand that government prepare its budgets to meet payment deadlines. It cannot reach back and diminish accrued rights in order to manage its own shortfalls.[66]

Given the irrational revocation of a promise to pay, the majority did not require further evidence in relation to the Department's budgetary constraints.[67] Further, the majority held that there was no "overriding public interest in the *ex post facto* retraction of the promise".[68]

The effect of *KZN JLC* is that substantive protection is now available where:

(1) government has made a publicly promulgated promise to pay;
(2) the due date for payment has fallen due;
(3) the promise has been relied upon;
(4) accountability and rationality demand that the promise be enforced; and
(5) there is no "overriding public interest in the *ex post facto* retraction of the promise".

In other words, government's refusal to honour a publicly promulgated promise to pay may be subjected to review on rationality grounds without the need to institute a review under PAJA, *even where the conduct under review amounts to administrative*

62 *KZN JLC* para 63.
63 *KZN JLC* para 64.
64 *KZN JLC* para 65.
65 *KZN JLC* para 65.
66 *KZN JLC* para 71.
67 *KZN JLC* paras 68-70.
68 *KZN JLC* para 66.

action. This observation underscores the first remarkable feature of the majority judgment. In spite of its refusal to enforce the Department's promise to pay under administrative law, ostensibly because a full record of the decision had not been obtained,[69] the court invoked rationality, a requirement of administrative law encapsulated in section 6(2)(f)(ii) of PAJA, as a basis to do so. What is more, none of the parties had placed reliance on rationality. Thus, at the level of form, the majority rejected administrative law as the basis upon which to protect the schools, but at the level of substance, it was prepared to invoke rationality as a basis to do so outside of the administrative law. It is in this sense that the majority judgment "eschews formalism"[70] and rejects the idea that formal labels, or names, are more important than a substantively just outcome. I support the rejection of formalism and the resulting subjection of the Department's decision to the requirement of rationality, no doubt as a component of the principle of legality (though this is not articulated in *KZN JLC*).[71] At the same time, though, the majority's approach falls to be criticised as being subversive of section 33 of the *Constitution* and PAJA.[72] As I explain below, a further retreat from formalism could have seen the majority invoke rationality and develop its substantive potential in terms of administrative law under section 33 and PAJA, instead of independently thereof.

Another remarkable aspect of the majority judgment which raises the question of whether it was invoking the doctrine of substantive legitimate expectation by another name is that the grounds upon which the majority relied to enforce the promise to pay – reliance, accountability and rationality, and overriding public interest – mimic, to a great extent, those on which a substantive legitimate expectation may be

69 *KZN JLC* para 32. See further para 34. As I shall discuss later, for some reason, this "dearth of evidence" was of no concern to the court in enforcing the promise invoking broad constitutional principles that are also classic principles of the administrative law.

70 *KZN JLC* para 82.

71 This is in keeping with the transformative mandate of our Constitution which requires "the promotion of 'a culture of justification' in public-law interactions" as argued in Hoexter 2008 *SAJHR* 286, referring to Mureinik 1994 *SAJHR* 31 and subsequent publications drawing from that work.

72 Hoexter "Rule of Law and the Principle of Legality" 65.

enforced under English law.[73] In developing the doctrine of substantive legitimate expectation the English courts have held that:

> ... the law will hold a public authority to its promise or practice unless there is good reason not to do so … as "a requirement of good administration, by which public authorities ought to deal straightforwardly and consistently with the public".[74]

These bases for the enforcement of a substantive legitimate expectation at English administrative law bear a striking similarity to the grounds in *KZN JLC* for the enforcement of a promise to pay, namely "crystallised reliance", "accountability" and the absence of "an overriding public interest" in not enforcing the promise. Under English law, a further requirement for the protection of a substantive legitimate expectation is that its denial would not be a "proportionate response".[75] This basis is echoed in a somewhat watered down sense in the finding of *KZN JLC* that "[r]evoking a promise when the time for its fulfilment has already expired does not constitute rational treatment of those affected by it".[76] A promise is accordingly capable of being denied where this is objectively justifiable, under English law as a proportionate measure, and pursuant to *KZN JLC* in South Africa, as a rational measure. The bases upon which a promise to pay will be enforced pursuant to *KZN JLC* are therefore strikingly similar to the bases upon which substantive legitimate expectations are protected under English law. At least in theory, these bases could potentially in future be invoked towards developing a doctrine of substantive legitimate expectation under South African administrative law.

The question of whether the court was invoking the doctrine of substantive legitimate expectation by another name in *KZN JLC* is raised also because the Department's promise to pay subsidies was the kind of promise that would typically receive protection under the doctrine of substantive legitimate expectation at English law.[77]

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73 Hoexter *Administrative Law* 429 referring to *R (Abdi and Nadarajah) v Secretary of State for the Home Department* 2005 EWCA Civ 1363 para 67.

74 Hoexter *Administrative Law* 429.

75 Hoexter *Administrative Law* 430. In the context of tax relief, it has also been held that a legitimate expectation will be afforded substantive protection where it would be irrational or unreasonable not to do so. See *R v Inland Revenue Commissioners, ex parte Unilever* 1996 STC 681 discussed in Hoexter *Administrative Law* 428.

76 *KZN JLC* para 65.

77 In *R v North and East Devon Health Authority, ex parte Coughlan* 2000 3 All ER 850 (CA) discussed in Hoexter *Administrative Law* 429, the court held the authority to its assurance (its promise) that

Indeed, the express promise to pay subsidies, and an established practice of making payment, would also typically secure at least procedural protection under the doctrine of legitimate expectation developed in South African law discussed above.[78]

Yet the majority in *KZN JLC* disavowed reliance on the doctrine of legitimate expectation to offer substantive or procedural protection to the schools. Could it be said, nevertheless, that it relied upon the doctrine by another name (was the mechanism used for the enforcement of a promise to pay in *KZN JLC* the rose that smelled as sweet)? I think not, given that the substantive relief granted to the schools was narrower than would have been the case had the doctrine of substantive legitimate expectation been developed under PAJA. The substantive relief awarded was limited to payments that had been promised and that were already *due*. The Department was not ordered to pay subsidies not due (ie those that were only "expected").[79] Though the distinction between payments that were due and those that were expected is arguably unfounded, it is also potentially a saving grace for the doctrine. In criticising the distinction between payments promised and payments due, Froneman J convincingly argues:

> The substantive justification the main judgment gives for preventing a public official from retracting a lawful promise to pay an amount to someone after the date for payment has passed is that it is "legally and constitutionally unconscionable" when tested against the standards of "reliance, accountability and rationality". But the same may be said of the promise to make payments for the whole year… [80]

In other words, as Froneman J points out it would be no less legally and constitutionally unconscionable to refuse to pay an amount promised but not yet due to the schools than it would to refuse to pay an amount that has fallen due. Reliance, rationality and accountability demanded in this case that once the payment was promised and expected it ought to be paid. For Froneman J the rationale for protecting a promise to pay an amount that had fallen due applied equally to the amount

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it would keep a facility for disabled people open, the applicant, a disabled person, having relied upon that promise, and "there being no overriding public interest to justify the disappointment of the applicant".

78 As was the case in *Premier Mpumalanga* discussed above.

79 *KZN JLC* para 52.

80 *KZN JLC* para 83.

expected.[81] Thus the majority could have afforded the same substantive relief as that afforded to a substantive legitimate expectation.[82] It declined to do so, adopting a narrower approach.[83] On the majority's approach, only the subsidies due as at May 2009 were payable to the schools. The nature of the narrower substantive relief granted to the schools in *KZN JLC* renders it something other than the doctrine of substantive legitimate expectation by another name – and smelling slightly less sweet.

What does this mean for the future development of the doctrine of substantive legitimate expectations? Because of the distinction between "expected" payments and payments that are due, I believe that *KZN JLC* has not foreclosed the possibility of the doctrine's being developed in future litigation. By creating a broad public law or regulatory remedy to enforce the promise to pay subsidies that are due, the court left open the question of whether:

> ... had the matter been pleaded or evidenced differently, there may have been a legitimate expectation entitling the applicant to payment of the final three tranches of the 2009 school year subsidy [not yet due].[84]

In this sense then, the distinction between payments that were due and those that were merely expected in the majority judgment was arguably a saving grace for the future development of the doctrine. The distinction left the space for the doctrine to be developed at administrative law in respect of expected conduct, instead of review for rationality under the principle of legality foreclosing the possibility of its development. Where a publicly promulgated promise to pay has become due it will no longer be necessary to rely on the doctrine of substantive legitimate expectation, as *KZN JLC* may be invoked as the authority to enforce the promise. In this limited respect, by creating a new legal mechanism to enforce a publicly promulgated promise to pay a payment that has fallen due, *KZN JLC* may have narrowed the future scope for the development of the doctrine. Litigants need not seek to develop the doctrine

81 *KZN JLC* para 85.

82 As Froneman J contends (*KZN JLC* para 90), the "substantive logic or reasoning" of the majority "reaches further than it is prepared to countenance".

83 Perhaps the majority did so due to unarticulated concerns regarding the separation of powers, though its express basis for doing so related to the manner in which the case was pleaded and argued.

84 *KZN JLC* para 69.

under PAJA when they can rely on rationality review under *KZN JLC* as precedent to enforce a publicly promulgated promise to pay that has fallen due.

5 Going behind PAJA in *KZN JLC*

As I have demonstrated above, because the Constitutional Court has created a remedy to enforce a publicly promulgated promise to pay "on broader public law and regulatory grounds",[85] litigants will now be able to challenge public power without relying on PAJA in circumstances where:

(1) government has made a publicly promulgated promise to pay;
(2) the due date for payment has fallen due;
(3) the promise has been relied upon;
(4) accountability and rationality demand that the promise be enforced; and
(5) there is no "overriding public interest in the *ex post facto* retraction of the promise".

KZN JLC is thus authority for the proposition that even where the revocation of a promise to pay is administrative action, there is no need to rely on PAJA to review the conduct. Rationality review will be available under the broad constitutional principle of legality.

As Hoexter[86] argues, apart from being subversive of PAJA, the review of administrative action outside of PAJA "is subversive of the scheme laid down in s 33 of the Constitution", "whose purpose is 'to establish a coherent and overarching system for the review of all administrative action'". Hoexter[87] goes on to state:

> The PAJA is, or ought to be, the first resort in any administrative law matter on the basis that it is intended to give effect to the rights in s 33 and because it essentially codifies those rights. For these reasons the Constitutional Court has emphasised that constitutionally mandated legislation such as the PAJA must be used where it is applicable, and it has cautioned that litigants may not go "behind" the PAJA by resorting directly to s 33 or the common law.

85 *KZN JLC* para 58.

86 Hoexter "Rule of Law and the Principle of Legality" 65, 66, referring to Chaskalson CJ in *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 118.

87 Hoexter "Rule of Law and the Principle of Legality" 65. See further *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) (hereafter *Bato Star*) paras 21-26.

In essence, resort to PAJA is consistent with the principle of subsidiarity, which generally requires litigants to rely on the more specific norm (such as national legislation) before invoking a general norm (such as a constitutional right).[88] Moreover, "PAJA, for all its problems, offers litigants some degree of certainty about what the requirements of administrative justice are and what circumstances will attract them".[89]

Yet in *KZN JLC* the Constitutional Court followed the trend adopted in *Albutt v Centre for the Study of Violence and Reconciliation* by ignoring its own advice in relation to this issue.[90] The majority did so by going "behind PAJA" to create a new public law or regulatory remedy for the enforcement of a publicly promulgated promise to pay. The danger of "sidestepping" PAJA in difficult cases such as *KZN JLC* is that it "will soon become redundant".[91] In addition, by invoking an alternative basis to afford substantive relief to the schools, the transformative potential of PAJA to foster accountability and rational decision-making so as to achieve social change and fulfil the *Constitution*'s transformative mandate is arguably undermined.

So what ought the court to have done? Froneman J's judgment demonstrates that to the extent that "a label given to a claim is decisive", it was possible to uphold the schools' claim under contract law.[92] However, the conduct under scrutiny could comfortably have been subject to review under PAJA, had the schools' case been

88 See Hoexter *Administrative Law* 119.

89 Hoexter "Rule of Law and the Principle of Legality" 67-68, discussed in Murcott 2013 *SALJ* 269. See further Kohn 2013 *SALJ* 812, who discusses the current judicial trend of invoking rationality review in parallel to review under PAJA and argues that a risk of reliance on the principle of legality and "its seemingly malleable rationality requirement" is not only the subversion of PAJA contended for by Hoexter, but also that "in developing such an expansive substantive conception of rationality review – in the absence of meaningful engagement with the prescripts of the separation of powers doctrine – and thereby increasing their reservoir of judicial power, the courts may be perceived to be expanding their supervisory review jurisdiction in a manner that amounts to an affront to this doctrine". This criticism does not apply to *KZN JLC*, to the extent that PAJA could have been utilised to secure more (rather than less) expansive relief than was awarded pursuant to rationality review (in other words, the court did not unduly expand its supervisory review jurisdiction). The criticism is probably relevant, however, in relation to the court's failure to "meaningfully engage with the prescripts of separation of powers" as a possible basis for its refusal to develop the doctrine of substantive legitimate expectation in *KZN JLC*.

90 See Murcott 2013 *SALJ* 266-270, where the author criticises the avoidance of PAJA in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC).

91 Hoexter "Rule of Law and the Principle of Legality" 66.

92 *KZN JLC* para 85.

properly pleaded and argued. Given this, it is arguable that the majority ought to have decided *KZN JLC* with reference to PAJA, in spite of the schools' approach.[93] Whilst properly pleading a cause of action is undoubtedly desirable,[94] the absence of formal labels ought not to inhibit substantive adjudication of the administrative law and the culture of justification and social transformation this entails, especially in cases concerning access to basic education and the provision of subsidies that enable such access.[95] Where a claim under PAJA is apparent from the papers and the evidence, "even if it was not the cause of action expressly advanced or argued",[96] it ought to be possible to invoke PAJA, and the courts ought to do so, even in the face of an incorrect concession of law by the applicant. In other words, whilst it would be preferable for PAJA to be expressly relied upon in cases such as *KZN JLC*, where in substance the elements of administrative action and the basis for review are apparent from the evidence, courts should be willing to retreat from formalism and invoke PAJA rather than creating new remedies. Indeed, judicial reliance on PAJA even in circumstances where it is not expressly relied upon received approval in *Bato Star* in O'Regan J's finding that:

> Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action.[97]

The majority in *KZN JLC*, though willing to grant a new public law or regulatory remedy applying a substantive approach, was unwilling to retreat from formalism so as to expressly invoke PAJA in the manner approved by O'Regan J in *Bato Star*.[98]

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93 As O'Regan J points out in *Bato Star* para 26, where PAJA is applicable to a case, the case ought not to be decided without reference to it.

94 *Bato Star* para 28.

95 Hoexter 2008 *SAJHR* 288.

96 *KZN JLC* para 68.

97 *KZN JLC* para 27.

98 *KZN JLC* para 27.

It is arguable that the majority's reticence to invoke PAJA is largely attributable to PAJA itself. With its "technical barriers" and complex definitions,[99] PAJA sanctions "conceptualism" and formalism, and "stultifies" the transformative potential of administrative law.[100] For instance, the requirement in terms of section 7 of PAJA to launch review proceedings within 180 days was seen as an obstacle to reliance on PAJA in *KZN JLC*, as was the failure to secure a record.[101] These technical barriers are invoked by judges in a formalistic manner that prevents substantively just outcomes, including in relation to the protection of socio-economic rights such as education, in cases where PAJA has not been properly relied upon by litigants. An extreme example of this kind of formalism is arguably contained in the dissenting judgments in *KZN JLC*. The dissenting judgments offered no relief to the schools! For more creative judges, avoiding PAJA's technical barriers resulted in the creation of a new legal mechanism in *KZN JLC*: the enforcement of a promise to pay as a broad public law or regulatory remedy. By creating this mechanism the majority in *KZN JLC* filled a perceived "accountability vacuum" arising from the schools' failure to properly plead and argue their case.[102] For the schools concerned in *KZN JLC*, the partial relief that they received pursuant to this new legal mechanism was doubtless a far sweeter prospect than no relief at all.

6 Conclusion

In this paper I have explained that the way was open to develop the doctrine of substantive legitimate expectations to afford substantive protection to a publicly promulgated promise to pay subsidies to schools in *KZN JLC*. However, ostensibly because of the manner in which *KZN JLC* was pleaded and argued by the applicant, the majority did not develop the doctrine. Nor did the majority rely on the contractual or administrative law arguments presented to it by the applicant and the *amicus curiae* respectively. Instead, (somewhat ironically) the majority developed the law so as to create a new legal mechanism not expressly pleaded or argued before it by any of the

99 Most notably, the definitions of "administrative action" and a "decision".
100 Hoexter 2008 *SAJHR* 288-289.
101 *KZN JLC* paras 31-33.
102 Hoexter "Rule of Law and the Principle of Legality" 68, referring to Taggart "Province of Administrative Law Determined" 3.

parties so as to afford substantive relief to the schools in respect of that portion of the subsidies that had fallen due for payment before the promise to pay had been retracted.

Although the underlying bases of this new legal mechanism bear a striking resemblance to those of the doctrine of substantive legitimate expectations developed under English law, I have argued that the mechanism cannot be described as the doctrine by another name. It is narrower, as it applies only to the enforcement of a promise to pay where the payment has become due, and not where the payment is merely expected. Further, though the distinction between payments that are due and those that are merely expected falls to be criticised, as the reasons for enforcing payments that are due arguably apply equally to the enforcement of payments that are expected, I have suggested that the effect of the distinction was to leave the way open for the development of a doctrine of substantive legitimate expectation under PAJA in future, except in relation to a small category of cases where the *KZN JLC* mechanism will apply. Although the way is open, whether the courts will in fact develop the doctrine is uncertain, given the courts' reluctance to do so thus far. One potential barrier to the development of the doctrine could be the court's apparent reluctance to "engage meaningfully with the prescripts of the separation of powers",[103] given the risk, in affording substantive protection to a substantive expectation, of ursurping the role of the executive.[104] Another potential barrier would seem to be the current trend of subverting PAJA in favour of rationality review under the more flexible principle of legality. Indeed, as I have pointed out, since the conduct at issue in *KZN JLC* was theoretically capable of being reviewed in terms of PAJA, the creation of an alternative mechanism based on broad constitutional principles in *KZN JLC* (principles that are also inherent in administrative law) amounts to yet another example of the subversion of PAJA and section 33 of the Constitution.[105] I have, however, suggested that an increasingly formalistic approach to the application of PAJA contributes to this trend. In situations that "cry out for a remedy",[106] PAJA is avoided where the labels

103 Kohn 2013 *SALJ* 812.
104 Campbell 2003 *SALJ* 294.
105 Hoexter "Rule of Law and the Principle of Legality" 68.
106 *Traub* 62.

and procedures it seems to demand are lacking. One of the unfortunate consequences of this trend in cases like *KZN JLC* is that the transformative potential of PAJA to foster accountability and rational decision-making so as to achieve social change and fulfil the *Constitution*'s transformative mandate is undermined.

BIBLIOGRAPHY

Literature

Botha 2004 *SAJHR*

Botha H "Freedom and Constraint in Constitutional Adjudication" 2004 *SAJHR* 249-283

Campbell 2003 *SALJ*

Campbell J "Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa" 2003 *SALJ* 292-321

Davis and Klare 2010 *SAJHR*

Davis D and Klare K "Transformative Constitutionalism and the Common and Customary Law" 2010 *SAJHR* 403-509

Hoexter 2004 *SALJ*

Hoexter C "Contracts in Administrative Law: Life after Formalism" 2004 *SALJ* 595-618

Hoexter 2008 *SAJHR*

Hoexter C "Judicial Policy Revisited: Transformative Adjudication in Administrative Law" 2008 *SAJHR* 281-299

Hoexter "Rule of Law and the Principle of Legality"

Hoexter C "The Rule of Law and the Principle of Legality" in Carnelley M and Hoctor S (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (University of KwaZulu-Natal Press Scottsville 2011) 55-74

Hoexter *Administrative Law*

Hoexter C *Administrative Law in South Africa* 2nd ed (Juta Cape Town 2012)

Kohn 2013 *SALJ*

Kohn L "The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone too Far?" 2013 *SALJ* 810-836

Murcott 2013 *SALJ*

Murcott M "Procedural Fairness as a Component of Legality: Is a Reconciliation between *Albutt* and *Masetlha* Possible?" 2013 *SALJ* 260-274

Mureinik 1994 *SAJHR*

Mureinik E "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 *SAJHR* 31-48

Quinot 2004 *SAPL*

Quinot G "The Developing Doctrine of Substantive Protection of Legitimate Expectations in South African Administrative Law" 2004 *SAPL* 543-570

Quinot *State Commercial Activity*

Quinot G *State Commercial Activity: A Legal Framework* (Juta Cape Town 2009)

Shakespeare *Romeo and Juliet*

Shakespeare W *Romeo and Juliet* (Washington Square Press New York 2004)

Stacey 2007 *SAPL*

Stacey R "Democratising Review: Justifiability as the Animating Vision of Administrative Law" 2007 *SAPL* 79-103

Taggart "Province of Administrative Law Determined"

Taggart M "The Province of Administrative Law Determined" in Taggart M (ed) *The Province of Administrative Law* (Hart Oxford 1997) 1-20

Case law

Great Britain

R (Abdi and Nadarajah) v Secretary of State for the Home Department 2005 EWCA Civ 1363

R v Inland Revenue Commissioners, ex parte Unilever 1996 STC 681

R v North and East Devon Health Authority, ex parte Coughlan 2000 3 All ER 850 (CA)

South Africa

Administrator, Transvaal v Traub 1989 4 SA 731 (A)

Albutt v Centre for the Study of Violence and Reconciliation 2010 3 SA 293 (CC)

Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province 2002 2 SA 215 (T)

Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd 2014 6 SA 286 (KZP)

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

Bel Porto School Governing Body v Premier of the Province, Western Cape 2002 3 SA 265 (CC)

CUSA v Tao 2009 2 SA 204 (CC)

Duncan v Minister of Environmental Affairs and Tourism 2010 6 SA 374 (SCA)

Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 6 SA 313 (SCA)

Judicial Service Commission v Cape Bar Council 2013 1 SA 170 (SCA)

KwaZulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal 2013 4 SA 262 (CC)

Maphango v Aengus Lifestyle Properties (Pty) Ltd 2012 3 SA 531 (CC)

Masetlha v President of the Republic of South Africa 2008 1 SA 566 (CC)

Minister of Health v New Clicks South Africa (Pty) Ltd 2006 2 SA 311 (CC)

National Director of Public Prosecutions v Phillips 2002 4 SA 60 (W)

Nortjie v Minister van Korrektiewe Dienste 2001 3 SA 472 (SCA)

Premier Mpumalanga v Executive Committee, Association of State Aided Schools, Eastern Transvaal 1999 2 SA 91 (CC)

Quinella Trading (Pty) Ltd v Minister of Rural Development 2010 4 SA 308 (LCC)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 3 SA 454 (CC)

South African Veterinary Council v Szymanski 2003 4 SA 42 (SCA)

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

Legislation

Constitution of the Republic of South Africa, 1996

Promotion of Administrative Justice Act 3 of 2000

South African Schools Act 84 of 1996

LIST OF ABBREVIATIONS

PAJA	Promotion of Administrative Justice Act 3 of 2000
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law