IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG, BRAAMFONTEIN)

Case number: J500/20

In the matter between:

PUBLIC SERVANTS ASSOCIATION	First applicant
NATIONAL PROFESSIONAL TEACHERS ORGANISATION OF SOUTH AFRICA	Second applicant
HEALTH AND OTHER SERVICES PERSONNEL TRADE UNION OF SOUTH AFRICA	Third applicant
SOUTH AFRICAN TEACHERS UNION	Fourth applicant
NATIONAL TEACHERS UNION	Fifth applicant
and	
MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	First respondent
MINISTER OF BASIC EDUCATION	Second respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third respondent
MINISTER OF POLICE	Fourth respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth respondent
MINISTER OF FINANCE	Sixth respondent
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Seventh respondent
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	Eighth respondent
DEMOCRATIC NURSING ASSOCIATION OF SOUTH AFRICA	Ninth respondent
NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION	Tenth respondent
POLICE AND PRISONS CIVIL RIGHTS UNION	Eleventh respondent
NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS UNION	Twelfth respondent
SOUTH AFRICAN POLICING UNION	Thirteenth respondent
SOUTH AFRICAN DEMOCRATIC TEACHERS UNION	Fourteenth respondent

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MINISTER OF FINANCE'S HEADS OF ARGUMENT

INDEX

A. Introduction

1. The applicants seek the enforcement of a clause in a collective agreement at a cost to the fiscus of R37.8 billion. The agreement however is invalid and unenforceable. This for non-compliance with a mandatory statutory requirement imposed by law to ensure fiscal affordability and sustainability. But even were that not so, and the clause had been agreed in compliance with the rigorous statutory requirements applicable to it, the remedy sought – specific performance – is itself not supportable, given vastly changed circumstances in the wake of the Covid-19 pandemic.

2. The Minister of Finance opposes the enforcement of the clause. He seeks – only *conditionally*, to the extent that this may be necessary – declaratory relief that the clause in question is indeed unlawful, invalid and unenforceable. The Minister's declaratory relief is unopposed. Conversely, the validity of the clause sought to be enforced by the applicants has neither been alleged nor established; and the clause's *invalidity* – invoked and established by the Government respondents (to the extent that there may have been any burden on them to do so) – has not been disputed by the unions in a way which is legally competent.

3. It follows that the main application for enforcement cannot be granted, but must be dismissed; and that – to the extent that any declaratory relief regarding validity and enforceability is even necessary – the Minister's conditional counter-application, unopposed as it is, should be granted. But as we have said, in any event, even had there been any tenable contractual claim advanced by the applicants, specific performance is to be refused, in the Court's discretion. It does not qualify as just and equitable relief.

Especially not amid Covid-19 conditions; the history of year-on-year increments, outstripping inflation and outperforming private-sector increases. This while the rest of the country's workforce (including higher-echelon public servants, Cabinet and Parliament) have accepted salary cuts or freezes as a consequence of the economic climate and Covid-19 crisis.

4. In what follows we demonstrate that the clause cannot in law be enforced, and that its enforcement violate Government's constitutional obligations to fulfil constitutional rights entrenched in the Bill of Rights. Our submissions follow the scheme set out in the above index.

B. Factual and procedural background

5. This case concerns the largest claim against Government ever to be raised in any labour forum. Its importance and consequences warranted this Court being approached – not by the *dominus litis*, but by the Government respondents (after obtaining the support of the union parties) – to sit as court of first instance. This after protracted procedural complexities arose from the unions purporting to litigate in different *fora*: the Labour Court and the bargaining council.[1] The various factions accuse each other of pursuing incompetent procedural approaches.[2] Some claim that Government's successful consolidation and expedition of the litigation before this Court is somehow a delaying tactic.[3] What all parties accept, however, is the fiscal impact of the relief the unions seek.

[1] Record p 1076 para 155.
[2] Record p 21 para 45.
[3] Counter-application Record p 58 para 9.

6. Hence the Minister of Finance is indeed a necessary party to these proceedings, as the founding affidavit itself accepts.[4] The conceded "implications for the fiscus"[5] are vast. They concern the national economy and every citizen and resident.[6] Whereas the terse founding affidavit fails entirely to address these "implications",[7] the comprehensive answering affidavits filed separately on behalf of the Minister of Finance and the Minister of Public Service and Administration explain extensively the far-reaching consequences of the relief for which the applicants contend.[8]

7. Government has disclosed the full fiscal situation and budgetary deficit.[9] In reply none of this has been challenged, and no factual dispute – which in any event would have had to be resolved on the basis of the respondents' papers – has even been attempted.[10] It is common cause that clause 3.3's implementation would (as we demonstrate below) precipitate a fiscal crisis directly detracting from Government's ability to alleviate the plight of the poorest of the poor.[11] It also strains fiscal survival.[12] It is a matter of notoriety justifying judicial notice[13] that this week Zambia (a close neighbour and fellow Southern African Development Community member) has recently triggered

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[4] Record p 14 para 14, which records the reason for citing the Minister of Finance specifically as "an interested party".
[5] Record p 14 para 14.
[6] Record p 1048 para 75.
[7] It spans Record pp 10-22, and – shorn of formal recordals – comprises six pages.
[8] See particularly the Minister of Finance's answering affidavit at Record pp 1036-1062 paras 42-109. See particularly the Minister of Public Service and Administration's answering affidavit at Record pp 151-172 paras 26-59.12, Record pp 180-198 paras 82-111, Record pp 203-205 paras 128-131.
[9] Record p 1062 para 110, not denied at Record pp 1348-1349 paras 40-42.
[10] The applicants' replying affidavit comprises Record pp 1337-1351. The highwater mark is a bald denial, padded only by the contention that "[i]t is too early to establish anything more than the potential impact of the Moody's downgrade and Covid-19"; arguing that "until the actual impact is confirmed, these two events do not find an impossibility of performance defence", and that this proposition will be "expanded on in argument" at the hearing. The problem for the unions is that the budgetary deficit is a matter of fact. It has not been denied competently and cannot be "expanded" upon in legal argument beyond the limits of the pleadings. Repeating the same mantra *verbatim* throughout the same affidavit (Record p 1345 para 27 and Record p 1348 para 37) does not improve the applicants' position.
[11] Record p 1025 para 7.
[12] Record p 1025 para 7; Record p 1054 para 91; Record p 1056 para 96.
[13] See e.g. *Gavric v Refugee Status Determination Officer* 2019 (1) SA 21 (CC) at paras 87-88.

Africa's first sovereign default during Covid-19.[14] Sovereign default is a threat the Minister of Finance's answering affidavit already apprehended *apropos* South Africa itself.[15]

8. Such limited factual averments as the founding affidavit puts up show, furthermore, that Government proactively approached the unions in an attempt to address the fiscal difficulties affecting the implementation of clause 3.3.[16] However, the applicants "insisted" (as they put it) that clause 3.3 be implemented without qualification.[17] They elected to refuse to engage.[18] Indeed, their own founding affidavit repeatedly and categorically reiterates that election, "rejecting *any* renegotiation of clause 3.3".[19]

9. The only other material factual aspect reflected in the founding affidavit is the legal incompetence of the purported parallel arbitral proceedings on which some of the unions (cited as respondents, but aligning themselves with the applicants) purportedly embarked.[20] Government had to resort to intensive proceedings before the bargaining council and the Labour Court to enable the expeditious consideration by this Court of the actual issues involved in this matter.[21] They concern legal questions of contractual

[14] As reported on 15 November 2020 in the BusinessDay article available at https://www.businesslive.co.za/bd/world/africa/ 2020-11-15- africas-first-sovereign- default-during-covid-19-triggered-in-zambia/ (last accessed on 18 November 2020).
[15] Record p 1048 para 74; Record p 1053 para 90.
[16] Record p 18 para 34; Record p 18 para 36; Record p 19 para 38; Record p 19 para 39. Record pp 199-202 paras 112-123. The applicants' replying affidavit indeed concedes the DPSA's repeated attempts, prior to 1 April 2020 to renegotiate; and also acknowledges that the unions refused "to renegotiate [the] collective agreement" (Record p 1350 para 48). This constitutes a binding election: *Chamber of Mines v National Union of Mineworkers* 1987 (1) SA 668 (A) at 690E-691B.
[17] Record p 19 para 38.5; Record p 20 para 39.6; Record p 20 para 40.
[18] Record p 20 para 39.5.
[19] Record p 21 para 44, emphasis added.
[20] Record p 21 paras 43-45.
[21] Record p 1076 para 155; Counter-application Record pp 294-295 para 5.

validity, legality, and the constitutionality of the remedy for which the applicants contend.

10. Thus the anterior legal question – entirely absent from the founding affidavit, and which had to be raised in the answering affidavits – involves the validity of the collective agreement. It concerns compliance with the empowering provision, which precludes Government from entering into collective agreements unless certain fiscal requirements have been met. These are addressed in section C below. The founding affidavit fails so much as refer to the empowering provision. It does not even aver that the collective agreement complies with the explicit fiscal jurisdictional facts.[22] Those were essential to making out the case. Yet, as mentioned, the founding affidavit itself explicitly accepts the unavoidable fiscal implications of the relief sought.

11. The replying affidavit, for its part, also fails to engage with the enormous fiscal consequences and non-compliance with the empowering provision.[23] The same defect affects each of the affidavits filed by the other unions cited as respondents, but which align themselves to the applicants' cause of action.[24] It is expressly *not* disputed that National Treasury "rejected the request for more money".[25]

[22] Record p 1025 para 9.
[23] Record pp 1338-1350, comprising the replying affidavit.
[24] Counter-application Record pp 55-102 (comprising the ninth, eleventh and fourteenth respondents' answering affidavit); Counter-application Record pp 232-242 (comprising the tenth respondents' answering affidavit); Counter-application Record pp 270-284 (comprising the twelfth respondents' answering affidavit); Counter-application Record pp 427-445 (comprising the tenth respondents' supplementary answering affidavit).
[25] Record p 167 para 55, read with Record p 1343 para 18.

12. Crystallising from these multiple affidavits as matter to be treated either as common cause facts or in any event to be determined on the basis of Government's papers are *inter alia* the following:

(1) The statutory provisions empowering the entry into collective agreements have not been complied with.[26]

(2) No available funding exists in the budget to pay the R37.8 billion demanded by the unions.[27]

(3) The unions and their members demand a third year-on-year increase of salaries above inflation, despite the fiscal crisis caused by Covid-19 and despite many other employees either having lost their jobs, or stare unemployment in the face, or foregone salary increases, or accepted salary decreases.[28]

13. The above common-cause facts are dispositive at every level: the purely common-law contractual level at which the applicants purport to pitch their case; the constitutional level which subsumes all law, including the common law of contract; and even the realm of remedy, should it be reached. We deal below with each of these in turn.

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[26] Record pp 1028-1031 paras 15-27, not addressed at all in the applicants' bald denial (which piggybacks on the traversal of the DPSA's answering affidavit). The latter traversal does not dispute the non-existence of any approval as required under Regulations 78 and 79 (Record p 1341 para 10). Instead, it expressly concedes this (Record p 1343 paras 18-18.1). See similarly Record p 1028 para 14, not denied at Record pp 1346-1347 paras 32-33. Similarly, the other unions also fail signally to address the palpable non-compliance with Regulations 78 and 79. See e.g. the tenth respondents' traversal of this issue (Counter-application Record pp 430-434 paras 12-24), which entirely elides this dispositive issue.

[27] Record p 1052 paras 87-88; Record p 1054 para 92; Record p 1055 para 95. This the applicants purport to traverse by a bare denial, after admitting the absence of knowledge and attempting to put Government "to the proof" (Record p 1348 para 40). This despite the multiple affidavits and extensive corroboratory annexures already filed by Government. The other unions either do not traverse the Minister of Finance's affidavit at all, or do so in terms which do not raise a genuine dispute of fact (which, in any event, if raised, has to be determined on the basis of the Government respondents' extensive affidavits).

[28] Record p 1024 para 6, not traversed by the applicants at Record p 1346; not denied by the ninth, eleventh and fourteenth respondents (Record pp 89-90 paras 108-111); not traversed or addressed at all by the tenth respondent (Counter-application Record pp 232-241 and 427-445) or twelfth respondent (Counter-application Record pp 278-284).

C. Invalidity and unenforceability *quo* contract

14. The cause of action on which the unions rely is – explicitly, exclusively and "simply"[29] – contractual.[30] For an industrial or collective agreement to have any legal force "compliance with the statute is essential".[31] The contract in question may *only* be concluded if specific fiscal requirements are met.[32] Yet the applicants' founding affidavit simply asserts an entitlement to the enforcement of clause 3.3,[33] without establishing that the applicable requirements had indeed been met.[34] This despite the onus resting squarely on the applicants *in casu* to establish the validity and enforceability of the clause they seek to enforce,[35] especially in the light of the fiscal constraints brought to their attention in advance.[36]

15. The pre-constitutional common-law position was that "[i]n the absence of any particular enabling statutory provision, the source of this power [to conclude government

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[29] As the replying affidavit reiterates (Record p 1346 para 31). Similarly, the answering affidavit by the ninth, eleventh and fourteenth respondents specifically uses the same terminology, reiterating that all parties seeking the enforcement of clause 3.3 do so purely on a contractual basis – invoking "the principle that is always applied against all contracting parties.

[30] Record p 16 para 24; Record p 18 para 32; Record p 21 para 45; Record pp 21-22 para 46. This is pointed out in the Minister's answering affidavit (Record p 1026 para 11), and correctly not contested in the replying affidavit (which does not traverse this part of the Minister's answering affidavit: see Record p 1346).

[31] *South African Association of Municipal Employees (Pretoria Branch) v Pretoria City Council* 1948 (1) SA 11 (T) at 17. See similarly *Consolidated Woolwashing and Processing Mills Ltd v President of the Industrial Court* 1986 (4) SA 850 (D) at 858H-859H.

[32] These are contained in Part 7 of the Public Service Regulations, 2016 to which we revert below.

[33] Record p 16 para 24.3.

[34] Yet, as *inter alia Quintessence Co-Ordinators (Pty) Ltd v Government of the Republic of Transkei* 1993 (3) SA 184 (TK) at 185G-H confirms, it is well established that

> "[t]he onus is on the plaintiff to prove both the existence, as well as the extent, of the authority of the Prime Minister. The onus is also on the plaintiff to prove that where any agreement is required to comply with any statutory provision, in order to be valid and enforceable, the agreement so complies. *Tuckers Land and Development Corporation (Pty) Ltd v Loots* 1981 (4) SA 260 (T) at 263C-D and 269D-F."

[35] Bradfield *Christie's Law of Contract* 7th ed (LexisNexis, Durban 2016) at 400, citing *Tuckers Land and Development Corporation (Pty) Ltd v Loots* 1981 (4) SA 260 (T) at 266D; *Goldberg v Kroomer* 1947 (4) SA 867 (T); *York Estates Ltd v Wareham* 1950 (1) SA 125 (SR), 1949 SR 197 (SR); *Noffke v Credit Corporation of South Africa* 1964 (3) SA 451 (T). As we shall show, Regulations 78 and 79 clearly preclude the conclusion of a collective agreement if the prescribed requirements are not satisfied.

[36] Record p 1028 para 14; note denied in either of the two attempts at traversing the paragraph containing this fact in National Treasury's answering affidavit (Record p 1346 para 32 and Record p 1347 para 33).

contracts] is the common law prerogative".[37] The position under the Constitution is that common law prerogative powers are now subsumed by the Constitution.[38] Moreover, the legal regime governing this case indeed imposes a "particular enabling statutory provision".[39] It is Regulation 78 read with Regulation 79 of the Public Service Regulations, 2016. They empower the State to enter into a collective agreement.[40]

16. Regulation 78 mandates collective bargaining, and enables the Executive to engage in negotiations and conclude collective agreements. It reads in pertinent part

> "(1) Collective bargaining shall be regulated by the Labour Relations Act.
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> (2) An executive authority may enter into a collective agreement on a matter of mutual interest only if that authority
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> (a) is responsible for managing collective bargaining on behalf of the State as employer in that forum;
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> (b) has authority to deal with the matter concerned; and
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> (c) meets the fiscal requirements contained in regulation 79.

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[37] *Minister of Home Affairs v American Ninja IV Partnership* 1993 (1) SA 257 (A) at 269D, citing *Baxter Administrative Law* (Juta & Co Ltd, Cape Town 1984) at 389.

[38] See e.g. *Mansingh v General Council of the Bar* 2014 (2) SA 26 (CC) at paras 4-5; *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at para 218 (per O'Regan J), holding that the powers of all three arms of government arise from and are limited by the Constitution, referring to previous prerogative powers and citing *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) in paras 8-10. As the Constitutional Court explained earlier in *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) at paras 31-32 with reference to the same judgment (*Hugo*),

> "The position in this country must be considered in the light of the Constitution and the relevant legislation. In *President of the Republic of South Africa v Hugo* this Court came to two important conclusions regarding prerogative powers under the interim Constitution.
>
> First, the powers of the President which are contained in s 82(1) of the interim Constitution have their origin in the prerogative powers exercised under former Constitutions by South African heads of State; second, there are no powers derived from the Royal Prerogative which are conferred upon the President other than those enumerated in s 82(1). This is equally so under the present Constitution and its equivalent provisions and was expressly so held in *Hugo*. The powers of the President under the present Constitution originating from the Royal Prerogative are those in s 84(2). This subsection does not provide for any power to deport an alien.
>
> Accordingly, the State's power to deport, relevant to the present case, can be derived only from the provisions of the Act" (emphasis added).

[39] Thus even the pre-constitutional common law compliance with the empowering provision is required, irrespective of any notional residual prerogative powers to conclude a contract.

[40] Resolution 1 of 2018 is, of course – as is correctly common cause (see e.g. Record p 21 para 45; Record p 140 para 7) – a collective agreement.

(3) In the Public Service Co-ordinating Bargaining Council, which deals only with matters transverse to the public service, the Minister is responsible for negotiations on behalf of the State as employer" (emphasis added).

17. Regulation 79 is headed "matters with fiscal implications". It provides in pertinent part

> "An executive authority shall enter into a collective agreement in the appropriate bargaining council on any matter that has financial implications only if
> (a) he or she has a realistic calculation of the costs involved in both the current and the subsequent fiscal year;
> (b) the agreement does not conflict with the Treasury Regulations; and
> (c) he or she can cover the cost
> (i) from his or her departmental budget;
> (ii) on the basis of a written commitment from the Treasury to provide additional funds; or
> (iii) from the budgets of other departments or agencies with their written agreement and Treasury approval" (emphasis added).

18. The text of these provisions makes it clear that it is a statutory requirement for the entry into a collective agreement by the State that the costs can be covered from the budget of the department concerned, or on the basis of a written commitment from the Treasury to provide additional funds, or from the budget of other departments or agencies with their written consent coupled with Treasury approval.[41] However, in this case it is common cause that

- the costs could *not* be covered by the Department of Public Service and Administration;

[41] See e.g. *Suider Afrikaanse Koöperatiewe Sitrusbeurs Beperk v Direkteur-Generaal: Handel en Nywerheid* [1997] 2 All SA 321 (A) at 326b, holding that "[l]inguistically the paragraph is clear: *only* timeous claims will be entertained. The corollary must be … that late claims will not be entertained" (emphasis in the original). The Supreme Court of Appeal went on to hold that this was a mandatory requirement imposed in the public interest, and could not be departed from or waived (*id* at 327g/h-329i).

- *no* written commitment by National Treasury to provide additional funding had been obtained; and
- *no* written agreement by any other department or agency and no Treasury approval had been procured to fund the deficit from other budgets.[42]

19. It is also correctly conceded by the unions that the collective agreement sought to be enforced has fiscal "implications"[43] and indeed require "fiscal injection".[44] They also accept, quite accurately, that there was indeed no such "injection" (i.e. additional funding). They therefore cannot contend (and do not genuinely attempt to contend) – least of all in the teeth of Government's detailed deposition to the contrary – that there had been compliance with Regulations 78 and 79.[45] Indeed, the applicants explicitly concede that in the light of the Minister of Finance's letter of 14 February 2018 the DPSA should have declined to enter into any agreement which does not give effect to National Treasury's conditions.[46] Thus the conclusion of the collective agreement was quite clearly in conflict with a statutory prohibition. This is fatal to the unions' case, as *inter alia* Supreme Court of Appeal authority confirms.

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[42] Record p 1028 para 14; Record pp 1028-1029 paras 16-17; Record p 1030 paras 22-24; Record pp 1036-1037 para 44. This is not denied at all by the applicants (Record pp 1346-1347 paras 32-33; Record p 1347 para 34, read with Record p 1341 para 10; Record p 1348 paras 37-39). It is not effectively denied by the ninth, eleventh and fourteenth respondents (Counter-application Record pp 90-93 paras 113-121; Counter-application Record p 93 paras 122-124; Counter-application Record p 96 paras 133-136, which only contain bald assertions and denials, and attempt to contend that National Treasury and the Minister of Finance are bound by Cabinet's purported approval of the 25 January 2018 offer; but the correct legal position is that Cabinet is not permitted to usurp the statutory powers of National Treasury, could not purport to do so, and did not in fact or in law bind National Treasury). The tenth respondent does not address any of these paragraphs or the issue of non-compliance with Regulations 78 and 79 at all in either of its two answering affidavits (Counter-application Record pp 232-242 and pp 427-445). Nor does the twelfth respondent (Counter-application Record pp 277-285).
[43] Record p 14 para 14.
[44] Counter-application Record p 280 para 3.1.1.
[45] Record p 1037 para 46. It appears that the only basis for the bald contention (which is advanced by only one of the unions) that there had been compliance with Regulations 78 and 79 is that there had been Cabinet approval. This is addressed in the preceding footnote. In short, the argument is flawed firstly for confusing the identity of the authorised approving entity (National Treasury, not Cabinet), and secondly for failing to aver any approval as required by that entity (namely funding).
[46] Record p 1343 para 18.1.

20. The Supreme Court of Appeal recently reiterated the relevant principles. In *NW Civil Contractors CC v Anton Ramaano Inc* the well-established position has been confirmed and applied.[47] It held

> "One of the earliest cases to consider the consequence for the validity of an act in conflict with a statutory prohibition was *Schierhout v Minister of Justice*, in which Innes CJ said: 'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.' But that will not always be so. Whether that is so, as later cases have made clear, will depend upon a proper construction of the legislation in question.
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> As was explained by Solomon JA in *Standard Bank v Estate Van Rhyn*:
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> > 'The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the [act] null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the [act] invalid, we should not be justified in holding that it was.'"[48]

21. Similarly, in *Jacobs v Baumann NO* the Supreme Court of Appeal summarised the governing principles and precedents by confirming the importance of the *Schierhout* principle.[49] It reiterated that "[i]t is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect."[50] It further referred to more recent caselaw holding that it is the purpose of the legislative provision which is determinative.[51] And it cited well-established authority for the principle that despite

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[47] 2020 (3) SA 241 (SCA).
[48] *Id* at paras 12-13, citing *Schierhout v Minister of Justice* 1926 AD 99 at 109; *Swart v Smuts* 1971 (1) SA 819 (A) at 829C-G (which confirmed that the question whether the validity of voidness of a transaction concluded contrary to a statutory prohibition or requirement depends on the legislature's intention and that generally conduct inconsistent with a statutory provision is considered invalid), and *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274.
[49] [2019] ZASCA 128.
[50] *Id* at para 19, quoting *Schierhout v Minister of Justice* 1926 AD 99 at 109.
[51] *Id* at para 19, citing *Wierda Properties v Sizwe Ntsaluba Gobodo* 2018 (3) SA 95 (SCA) para 17 and *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274 (referring to *Voet* (1.3.16) for the qualification that "that which is

the general "rule of construction that the mere imposition of a penalty for the purpose of protecting the revenue does not invalidate the relative transaction", "the Legislature may prohibit or invalidate the transaction even where the sole object is to protect the revenue. And if that intention is clear effect must be given to it."[52]

22. This is, as the current edition of *Christie's Law of Contract* confirms (referring to the rationale "for holding a prohibited act to be invalid" in the locus classicus: *Pottie v Kotze*) indeed well-established.[53] The rationale is not "the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided."[54] Instead, the rationale is that Courts cannot and should not "bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent."[55]

23. The situation which the statutory scheme governing this case seeks to prevent is incurring fiscal consequences for which no funding exists.[56] This situation is only capable of being prevented by visiting a contract concluded contrary to Regulations 78 and 79 with voidness.[57] This is because "[t]o enter into such a transaction without

done contrary to law is not *ipso jure* null and void, where the law is content with a penalty laid down against those who contravene it." The contrary clearly applies in this case, since no penalty is prescribed by the Public Service Regulations.

[52] *Id* at para 20, quoting *McLoughlin NO v Turner* 1921 AD 537 at 544.

[53] *Pottie v Kotze* 1954 (3) SA 719 (A).

[54] *Id* at 726H.

[55] *Id* at 726*fin*-272*sup*.

[56] See, again, *Suider Afrikaanse Koöperatiewe Sitrusbeurs Beperk v Direkteur-Generaal: Handel en Nywerheid supra* at 329h-i, holding that the provision applicable in that case inherently intended "the protection of state funds", and that a departure of the provision would "thwart these objectives and be contrary to public policy and interest."

[57] Unlike under section 74 of the Labour Relations Act, the option of subsequently approaching Parliament to approve a supplementary allocation to augment the departmental budget (for purposes of financing an arbitral award rendered pursuant to an essential service dispute) does not exist. Thus this Court's judgment in *Public Servants' Association obo PSA members v National Prosecuting Authority* [2012] ZALAC 12; [2012] 8 BLLR 765 (LAC); (2012) 33 ILJ 1831 (LAC) demonstrates by analogy the difficulty confronting the applicants: since there was no departmental budget capable of funding the increase, the power of the Minister of Public Service and Administration was "indeed limited" (*id* at para 15, referring with approval to the arbitrator's reasoning which the Court upheld). He lacked the power to conclude the agreement with fiscal consequences.

Treasury approval is the very mischief that the law intends to prevent."[58] Significantly, there is not even any statutory penalty or other recourse contemplated in the regulations,[59] and demonstrably none could have been effective to achieve the intended fiscal protection.[60]

24. It follows that, even if viewed "simply" from a contractual perspective (as the applicants attempt to advance their cause of action), no enforceable claim exists. The "contract" they seek to enforce is invalid. This is dispositive. Viewed from a constitutional perspective the same applies *a fortiori*, as we show below.

D. Unenforceability under the Constitution

25. The legality principle underlying judgments like *Schierhout* has been applied by the Constitutional Court itself in cases like *Cool Ideas 1186 CC v Hubbard*.[61] As *inter alia*

[58] *Pratt v FirstRand Bank Ltd* [2004] 4 All SA 306 (T) at para 42.
[59] Hence the converse conclusion to the one reached in cases like *Oilwell (Pty) Ltd v Protec International Ltd* 2011 (4) SA 394 (SCA) and *Barclays National Bank Ltd v Thompson* 1985 (3) SA 778 (A), which concern exchange control regulations imposing stiff penalties and criminal sanction, applies. Indeed, in *Oilwell* (*id* at 402F) itself Harms DP referred to De Groot, quoted in Voet (which, in turn, was invoked in *Thompson*), stating that "if someone's ability to performed the act has been curtailed" then "things done contrary to law are … void". This is precisely what Regulations 78 and 79 do. *Oilwell* on the other hand concerns regulations not only imposing penalties, but also provide for the attachment of money or goods in respect of which a contravention had been committed. Such assets may be forfeited to the State to recover the shortfall resulting from the failure to comply with the regulation in question. Coupled with these consequences, so Harms DP held, invalidity would have been "overkill", and "De Groot's test for invalidity" would not have been passed (*id* at para 24). In each respect the regulations governing this case result in the opposite conclusion. In any event, in *Oilwell* Harms DP held that it was only once Treasury granted its consent that enforcement of the agreement could be obtained (*id* at para 25). Thus *Oilwell* confirms *Pratt supra* at para 42, which held that "[n]o such transaction can be carried out lawfully unless and until Treasury approval has been obtained". On the facts of this case, National Treasury already acquitted itself of its powers to grant approval by issuing the 14 February 2018 letter. It effectively refused approval for the agreement in the terms purportedly concluded.
[60] See e.g. *ABSA Insurance Brokers (Pty) Ltd v Luttig* 1997 (4) SA 229 (SCA), which held that the conclusion of an agreement relating to payment of insurance premiums in conflict with the Insurance Act 27 of 1943 was null and void; *Henry v Bradfield* 1996 (1) SA 244 (D), in which the court declared an agreement entered into in conflict with the Exchange Control Regulations null and void; and *Flexichem CC v Patensie Citrus Co-operative Ltd* 1994 (1) SA 491 (E), in which it was held that a sale of chemical substances in contravention of a statutory provision was void because it would in effect further the very evil intended to be avoided.
[61] 2014 (4) SA 474 (CC) at para 57.

Cool Ideas demonstrates,[62] the *Schierhout* principle indeed applies particularly in a constitutional dispensation where the separation of powers must be respected, the rule of law upheld, and the doctrine of legality adhered to (also by Courts in making mandatory constitutional declarations of invalidity,[63] and adjudicating constitutional issues and formulating their orders).[64] Non-compliance with a statutory requirement governing the conclusion of a contract raises, under the common law of contract, the above issues of validity.[65] Under the Constitution it raises the question of legality, particularly where an organ of State is a putative contractant.[66] An organ of State is only permitted to act within the limits of powers conferred by law.[67] And a court is compelled, the Constitutional Court confirmed, under section 172(1)(a) of the Constitution to make a declaration that an agreement is invalid if it infringes a legal requirement.[68]

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[62] See similarly the Supreme Court of Appeal's judgment in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) at para 24, explaining that

> "Section 173 of the Constitution enjoins courts to develop the common law by taking into account the interests of justice. The approach advocated by the learned judge [namely that 'the Court should balance the individual and public interests at stake and decide on that basis whether the operation of estoppel should be allowed in a specific case'], if endorsed, would have the effect of exempting courts from showing due deference to broad legislative authority, permitting illegality to trump legality and rendering the ultra vires doctrine nugatory. None of that would be in the interests of justice. Nor, can it be said, would any of that be sanctioned by the Constitution, which is based on the rule of law, and at the heart of which lies the principle of legality."

[63] Section 172(1)(a) of the Constitution, which provides: "When deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

[64] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) at para 181; *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) at para 57.

[65] In *Cool Ideas* the Court concluded that non-compliance with the requirement that a homebuilder be registered did not render the contract itself invalid, but rendered payment to the homebuilder unenforceable (*supra* at para 47). *Post hoc* compliance in the form of registration was not permitted, the Constitutional Court held (*id* at para 34).

[66] *Ahmed v Minister of Home Affairs* 2019 (1) SA 1 (CC) at para 38, reiterating that the rule of law is a founding value of the Constitution.

[67] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 79; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 56, holding that it is "central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".

[68] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at para 52. Applying *Fedsure*, *Pharmaceutical Manufacturers*, and *Affordable Medicines Trust* the Constitutional Court held (*id* at para 40)

26. Hence, as the Supreme Court of Appeal held in *Prodiba*

> "By concluding the agreement and incurring a liability for which there had been no appropriation, he not only erred, but acted against mandatory statutory prescripts and against the constitutional principles of transparent and accountable governance. For all these reasons the agreement is liable to be declared void *ab initio*."[69]

27. As the Constitutional Court itself held in the specific context of section 23 of the Labour Relations Act (which governs collective agreements), the exercise of public power in concluding a collective agreement must "conform to minimum standards of lawfulness and non-arbitrariness."[70] Furthermore, the Constitutional Court also confirmed that

> "It is the duty of the courts to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power."[71]

28. The reason for this insistence is of considerable constitutional importance. As the Chief Justice explained

> "One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted

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> "the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what s 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review."

[69] *Minister of Transport NO v Prodiba (Pty) Ltd* [2015] 2 All SA 387 (SCA) at para 40. In this matter the Supreme Court of Appeal declared an extension made by a head of a national department of a contract *void ab initio* in circumstances where the review was instituted two years after the decision to extend had been taken.
[70] *AMCU v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) at paras 73 and 84.
[71] *Khumalo v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at para 29.

> accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy."[72]

29. Accordingly the courts' insistence on Government's compliance with legal requirements protects the public interest and funds by ensuring that State resources are applied in a democratically accountable manner.[73] What this means is that the exercise of public power, particularly those with fiscal consequences, must comply with the rule of law. Otherwise members of the Executive can effectively present Parliament with a *fait accompli*, forcing the reallocation of public funds away from constitutional imperatives to which Parliament through national legislation is required to give effect within limited financial resources.[74] Courts are required to refuse to grant orders which have this effect, since "Government officials are slaves to the resources allocated to them" and courts should therefore respect the effect of budget constraints.[75] Difficult funding decisions must be made by other arms of Government at the political level, and courts must be astute not to interfere (even if only in effect) in budgetary allocations.[76]

30. The facts of this case graphically demonstrate the far-reaching national economic consequences of interfering in the allocation of a deficit budget.[77] Doing so in circumstances where a contractual claim is purportedly pursued despite the non-compliance with statutory fiscal requirements is constitutionally impermissible.[78] The

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[72] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 1.
[73] This is indeed the constitutional concern expressed in the Minister's answering affidavit (Record p 1041 para 55).
[74] See e.g. *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) at para 2.
[75] *EFF v Speaker, National Assembly supra* at para 64.
[76] *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at para 29.
[77] See e.g. Record p 1040 para 54; Record pp 1044-1045 paras 63-66; Record p 1047 para 72; Record p 1048 para 74; Record p 1048 para 75; Record p 1049 para 77; Record p 1049 para 78; Record p 1050 paras 79-80; Record p 1053 para 90; Record p 1054 para 92; Record p 1058 paras 100-101; Record p 1060 para 105; Record p 1065 paras 120-121; Record p 1074 para 147.
[78] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) at para 181.

applicants' attempt to cast this case as contractual does not circumvent these constitutional difficulties.[79] This is because, even in a purely contractual setting, the Constitutional Court confirmed that all law, including the common law of contract is subject to constitutional control.[80] And the Supreme Court of Appeal reiterated that even under the common law of contract never recognised agreements that are contrary to public policy.[81] Public policy, in turn, is "now deeply rooted in the Constitution and its underlying values".[82] These include accountability in the allocation of public resources, and compliance with the rule of law.[83]

31. Seeking "simply" (as the applicants put it) to cash in on a contract on the apparent assumption that *pacta sunt servanda* axiomatically so "entitles" a claimant is – particularly in the unprecedented circumstances of this case – inconsistent with the caselaw of the Constitutional Court or the Supreme Court of Appeal.[84] The principle *pacta sunt servanda* is itself subservient to and merely an incidence of public policy.[85] The founding values of the Constitution prevail over it. They include, as the Constitutional Court stressed, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.[86] The cornerstone of the constitutional edifice is the Bill of Rights, the Constitutional Court

[79] See e.g. *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) at para 57, in which Mogoeng J (as he then was) held that "Courts, too, are bound by the Bill of Rights"; that they must in the exercise of their functions ensure that the fundamental rights of vulnerable members of society are protected and respected; and "must acknowledge the policy-drenched nature of the common-law rules", which must now be applied through the prism of constitutional norms."
[80] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 15.
[81] *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) at para 38, confirming *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).
[82] *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA) at para 22.
[83] See, again, *EFF v Speaker, National Assembly supra* at para 1.
[84] See, again, *Barkhuizen supra* at paras 15 and 28.
[85] *Beadica 231 CC v Trustees, Oregon Trust* 2020 (5) SA 247 (CC) at paras 86-87 and 90.
[86] *Barkhuizen supra* at para 28.

further confirmed in the same contractual-cum-constitutional context.[87] It requires the fulfilment of the rights of all people in our country and affirms the democratic founding values of human dignity, equality and freedom.[88]

32. Accordingly courts are required to decline to enforce a contractual term which conflicts with the constitutional values and rights entrenched in the Bill of Rights – even if the parties may have consented to such term in a contract.[89] This is because public policy precludes specific performance of "a contractual term if its enforcement would be unjust or unfair".[90]

33. It is not fair or just to enforce clause 3.3 in circumstances where this would necessarily impede Governments ability to protect the lives and livelihoods of vulnerable people exposed to the severe consequences of the Covid-19 pandemic. The enforcement of clause 3.3 in the current circumstances would infringe section 7(2) of the Constitution and rights entrenched by the Bill of Rights.[91] To this reality the unions provide no answer. Their case for enforcement is inconsistent with Constitutional Court caselaw, and this Court's own confirmation and application of *Barkhuizen*.[92]

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[87] *Ibid*.
[88] *Ibid*.
[89] *Id* at para 30.
[90] *Id* at para 73. See, too, *id* at para 70, holding that notwithstanding the doctrine of *pacta sunt servanda*, courts should be able to decline to enforce a clause if its enforcement would result in unfairness or unreasonableness.
[91] Record pp 1032-1033 paras 31-34.
[92] *Gbenga-Oluwatoye v Reckitt Benkiser South Africa (Pty) Limited* [2016] ZALAC 2 at para 22, summarising the crux of the judgment as follows:

> "In *Barkhuizen v Napier* the Constitutional Court emphasised that all law, including the common law of contract, is subject to constitutional control. While public policy, as informed by the Constitution, in general, requires that parties comply with contractual obligations that have been freely and voluntarily undertaken, a term in a contract that is inimical to the values enshrined in the Constitution is contrary to public policy and unenforceable".

34. Therefore, whether as a matter of merits or remedy, the unfairness and injustice that would result from the enforcement of clause 3.3 renders the union's relief inequitable.

E. Remedy: Enforcement of clause 3.3 not just and equitable

35. This Court is vested with wide remedial powers by the Constitution itself.[93] A compelling case for just and equitable relief, to the extent that any relief is warranted (which, for the reasons provided, is not the case), is established in Governments' answering affidavits, and not addressed at all in the unions' subsequent affidavits. It is for a claimant to make out a case for relief, not to assume an entitlement to it, least of all where, as here, a court has a discretion to exercise in granting it.

36. The Constitutional Court confirmed not only Government's fiscal, constitutional and legal obligation towards human right bearers like the poor and children,[94] but also that "Government officials are slaves to the resources allocated to them" and that courts should therefore respect the effect of budget constraints.[95] It recognised the constitutional responsibility of the other arms of Government "to make decisions about funding and how funds should be spent. These are hard choices requiring difficult determinations to be taken at the appropriate political level, prioritising scarce public resources.[96] Therefore a court will be slow to interfere with rational decisions taken in good faith by the political organs of State.[97]

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[93] *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* (2010) 31 ILJ 273 (CC) at para 32.
[94] E.g. *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 (4) SA 262 (CC) at para 41.
[95] *Id* at para 64.
[96] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) at para 154.
[97] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at para 29.

37. Specifically in the context of applying the principles governing the enforcement of contract in the current constitutional dispensation the Constitutional Court recently confirmed that "[t]he fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country".[98]

38. The economic development of the country in the wake of the Covid-19 pandemic is a constitutional imperative.[99] It is crucial that Government expend maximum financial resources on the recovery of the economy and the protection of the lives and livelihoods of the nation's people. Government's own employees' jobs are secured by it,[100] and their salaries are paid in full.[101] What Government and the South African economy and its people cannot now afford, and what is not just and equitable under the current circumstances, is for civil servants to claim yet further inflation-beating and private sector outperforming salary increases off an already high base.[102]

F. <u>Development of the common law</u>

39. For the reasons set out particularly in the sections dealing with the merits, enforcement of clause 3.3. should be refused on a proper application of the common law of contract, particularly when applied – as it must – in the correct constitutional context.[103] As the Supreme Court of Appeal confirmed in its *locus classicus* on the constitutional infusion of the common law of contract,

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[98] *Beadica 231 CC v Trustees, Oregon Trust* 2020 (5) SA 247 (CC) at para 85.
[99] Record p 1054 para 91.
[100] Record p 1052 para 85.
[101] Record p 1073 para 145.
[102] Record p 1034 para 37.
[103] *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA) at para 22.

> "A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law."[104]

40. As we have shown above, the application of the principle of legality requires – without conferring a discretion or value judgment – that clause 3.3 not be enforced. However, to the extent that the Court should conclude differently, the Constitution requires the development of the common law to give effect to section 7(2) of the Constitution and enable Government to acquit itself of its constitutional obligations towards the many people prejudiced by the pandemic.[105] As mentioned, thousands of people outside the public service have lost their jobs or suffered financial and other deprivation.[106] Assisting them as required by the Constitution cannot be done if clause 3.3 is enforced in the extraordinary world-wide crisis wrought by Covid-19.[107]

41. A bespoke contractual doctrine derived from the good faith foundation underlying also the South African law of contract already exists, and is applied in comparable jurisdictions sharing a Roman and Roman-Dutch legal history with South Africa. It is the *rebus sic stantibus* doctrine (or doctrine of frustration).[108]

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[104] *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) at para 39.
[105] *S v Thebus* 2003 (6) SA 505 (CC) at para 28. For the application of *Thebus* by a full bench of the High Court in the context of workers' rights and the need to protect vulnerable members of society, see *Nkala v Harmony Gold Mining Co Ltd* 2016 (5) SA 240 (GJ) at paras 239-243 in which the common law on the transmissibility of damages was developed.
[106] Record p 1052 para 85.
[107] Record p 1052 paras 87-88.
[108] Literally translated, *rebus sic stantibus* means "matters so standing" (Garner *Black's Law Dictionary* 11th ed (Thomas Reuter, 2019) s.v. "rebus sic stantibus"). It articulates "the principle that all agreements are concluded with the implied condition that they are binding only as long as there are no major changes in the circumstances (*ibid*).

42. The unions do not engage with this potential development of the common law. Some of them merely deny (also in this respect *baldly*) that any development of the common law is required.[109] Yet they simultaneously contend that the South African law as it currently stands does not recognise any exception to the *pacta sunt servanda* principle – on which their case is apparently premised.

43. Also in this respect their stance is not consistent with Constitutional Court caselaw.[110] That court held in *Barkhuizen* that "courts have a constitutional obligation to develop the common law, including the principles of the law of contract, so as to bring it in line with values that underlie our Constitution."[111] In "developing the common law of contract courts are required to … promote the spirit, purport and objects of the Bill of Rights", the Constitutional Court reiterated.[112] It held that the a court is not powerless to do simple justice between the parties, and that the hands of justice can never be tied under our constitutional order.[113] Justice and equity require that a party *not* be held to

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[109] Counter-application Record p 96 para 132.

[110] Already in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 39 the Constitutional Court

> "stressed that the obligation of courts to develop the common-law, in the context of the s 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common-law as it stands is deficient in promoting the s 39(2) objectives, the courts are under a general obligation to develop it appropriately."

More recently and specifically in the context of the law of contract the Constitutional Court held in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para 48 that

> "a given principle of the common law of contract ought to be infused with constitutional values does raise a constitutional issue. The refashioning of the common law in accordance with fundamental constitutional values is mandated by s 39(2) of the Constitution. The common law, like all other laws, must be viewed through the prism of the objective normative value system set by the Constitution and, where it is found to fall short, must be reshaped in order to conform to our supreme law."

The Constitutional Court continued in *Everfresh* (*id* at para 71) by confirming that

> "it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'."

[111] *Barkhuizen supra* at para 35.

[112] *Ibid*.

[113] *Id* at para 73.

a contract requiring it to do what is impossible.[114] If the Court is to conclude that the law as it stands renders it impossible for Government acquit itself of its constitutional obligations in Covid-19 circumstances, then common-law reform authorised by section 39(2) of the Constitution is required.

44. The Law Reform Commission itself envisaged such reform by recommending the adoption of the *rebus sic stantibus* doctrine.[115] In its modern manifestations this doctrine gives effect to contemporary notions of good faith.[116] Good faith is the underlying value of the South African law of contract, and serves a creative function by animating established rules of the law of contract.[117]

45. There is therefore, also for this reason, no contractual straightjacket tieing the Court to compelling the specific performance of the unions' common-law contractual claim under the current Covid-19 circumstances.

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[114] *Id* at para 75.

[115] South African Law Commission *Report Project 47: Unreasonable Stipulations in Contracts and the Rectification of Contracts* (April 1998) at para 2.2.1.8, referring to Prof Reinhard Zimmermann's comments on the *rebus sic stantibus* doctrine; the Roman-Dutch law as a strong and vibrant legal system with a powerful inherent capacity for growth; his concern the demise of doctrines designed to achieve substantive justice (like the *clausula rebus sic stantibus*) resulted in legal deficiencies. See also para 2.2.1.9, referring to proposals by Professors LF van Huyssteen and SF van der Merwe that a change of circumstances may effectively render a contract unenforceable. See in particular para 2.8, which refers to European Community countries, and specifically to the Dutch, German, Greek and Italian law; and proposing the adoption of a doctrine pursuant to which a court may terminate a contract on the basis of changed circumstances after the parties attempts at renegotiation has failed.

[116] For an overview of the history and application of this doctrine in comparable jurisdictions, see Pichonnaz "From *clausula rebus sic stantibus* to hardship: Aspects of the evolution of the judge's role" 17(1) *Fundamina* (2011) at 125-142. This article tracks the development of this doctrine through Roman times to the Middle Ages, its abolition in the French and Austrian Civil Codes of 1804 and 1811, some resurgence after the extreme inflation precipitated by the World Wars, and its more recent manifestation (as "hardship") in the Unidroit Principles on International Commercial Contracts (which provides for the renegotiation, failing which termination or recalibration of the contract by the court).

[117] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at para 27.

G. Unions' arguments

46. The unions' affidavits fail to address the Government respondents' case. They raise, we reiterate, no genuine factual dispute in respect of compliance with Regulation 78 and 79.[118] Nor any factual version as regards budgetary constraints and fiscal impossibility.[119] For their part, the Government respondents have provided a full exposition of the budget,[120] and National Treasury has filed multiple affidavits by senior officials who are experts in the field.[121] Their comprehensive corroborating analyses have not been countered; not by expert or even lay witnesses. In this light the ordinary approach to evidence on motion,[122] coupled with the correct approach to issues involving Government's fiscal affairs,[123] operates with particular force against the unions.

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[118] As mentioned, the only attempt to answer Government's case in this respect is to contend that Cabinet authorised (*post hoc*) the unmandated offer. But this fails, firstly, to address the competence of Cabinet in a statutory context where the approval power is vested in National Treasury. Secondly, it fails to address the actual funding arrangement which Regulation 79 requires to be authorised.

[119] As mentioned, the highwater mark of the unions' affidavits is the flat denial of Governments' extensive evidence, and purporting to put the Government respondents "to the proof".

[120] Record pp 151-159 paras 26-35; Record pp 180-182 paras 82-84; Record pp 183-198 paras 89-111; Record pp 204-205 paras 130-131.

[121] Record pp 1035-1062 paras 42-109; Record pp 1142-1149; Record pp 1180-1193; Record pp 1194-1203; Record pp 1205-1246; Record pp 1313-1318; Record pp 1319-1324; Record pp 1325-1328; Record pp 1329-1333; Record pp 1334-1336.

[122] *Gelyke Kanse v Chairperson, Senate of the University of Stellenbosch* 2020 (1) SA 368 (CC) at para 16, in which Cameron J for a unanimous Constitutional Court yet again confirmed and applied *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

[123] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para 46; *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) at para 44; *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC) at para 88; *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) at para 47; *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) at para 21, all confirming Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484 at 501-502, cautioning courts to respect

> "the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate."

47. The unions appear to advance only three identifiable arguments in response to Government. None has any merit.

48. The first argument contends that it would be the end of collective bargaining unless the unions' application is upheld.[124] This contention raises what the Constitutional Court deprecated as the predictable bogey[125] or slippery-slope spectre.[126] It is directly contradicted by the Constitutional Court's judgment in *Barkhuizen*. As the Constitutional Court held

> "The inquiry is whether in all the circumstances of the particular case, in particular, having regard to the reason for non-compliance with the clause, it would be contrary to public policy to enforce the clause. This would require the party seeking to avoid the enforcement of the clause to demonstrate why its enforcement would be unfair and unreasonable in the given circumstances."[127]

49. Thus the argument advanced by the unions intended to suggest that anything other than the order for which the applicants contend would sound "the death knell" for collective bargaining is untenable.[128] The enforcement of a particular clause in a specific agreement is a matter to be determined *ad hoc* with reference to the circumstances prevailing at the time of enforcement. Where it is not just and equitable to enforce a particular clause in the particular circumstances of a concrete case, then non-enforcement is the constitutionally-appropriate remedy. And where the clause or contract in question does not comply with the law, then enforcement is precluded *per se*. Neither outcome could conceivably negate collective bargaining. Yet this is both

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[124] Counter-application Record p 96 para 154.
[125] *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at para 70.
[126] *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) at para 107.
[127] *Barkhuizen supra* at para 69.
[128] Record p 1345 para 28.

the forepiece[129] and backstop[130] of the unions' answer to Government's case based on the Constitution.[131]

50. The unions' second argument vacillates between waiver and estoppel, variously invoking fragments of both (whether explicitly or only obliquely).[132] It is well-established that estoppel cannot be applied to give legal effect to what is not permitted or recognised by law.[133] Similarly, it is not permissible (or in law possible or effective) to purport to waive compliance with a requirement imposed in the public interest, or to effect something forbidden by law.[134] Waiver cannot viably be invoked where it would affect any public policy, interest or right.[135] In any event, waiver and estoppel (neither of which is readily presumed) has not been established factually by the unions, which bear the full onus in this respect.[136]

51. It is, moreover, of no assistance to the unions to claim that Cabinet had *post hoc* "condoned" the 25 January 2018 offer which the unions concede had indeed been unauthorised. Cabinet had no power to grant the approvals required under Regulations 78 and 79, and did not purport to grant any such approval. Thus their retort

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[129] Record p 1340 para 8.
[130] Record p 1349 para 42.
[131] Counter-application Record p 64 para 23; Counter-application Record p 102 para 154.
[132] Counter-application Record pp 71-72 para 46.1; Counter-application Record pp 283-284 paras 3.8-3.9.
[133] *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) at 148F-G; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) at para 23; *Minister of Transport NO v Prodiba (Pty) Ltd* [2015] 2 All SA 387 (SCA) at para 39.
[134] *Suider Afrikaanse Koöperatiewe Sitrusbeurs Beperk v Direkteur-Generaal: Handel en Nywerheid* [1997] 2 All SA 321 (A) at 326h.
[135] *Portwig v Deputation Street Investments (Pty) Ltd* 1985 (1) SA 83 (D) at 90C, confirmed in *Suider Afrikaanse Koöperatiewe Sitrusbeurs Beperk v Direkteur-Generaal: Handel en Nywerheid supra* at 328i.
[136] *Laws v Rutherfurd* 1924 AD 261 at 263; *Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704F-H; *Powell NO v Van der Merwe NO* 2005 (5) SA 62 (SCA) at para 49; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) at 382F-G: "It is a trite legal principle that waiver of a right is never presumed, that clear proof thereof is required and that it must be shown that the person in question had full knowledge of his rights."

only serves to impale the unions on the legality dilemma,[137] which is destructive of their entire case. Compounding this difficulty, the applicants are driven to the contention that the clause they purport to enforce cannot be "renege[d]" upon, because the clause received Cabinet's blessing as a "policy choice".[138] Policy, it is well-established, cannot trump law.[139] Therefore non-compliance with a legal requirement (approval by the designated authority: National Treasury) cannot be surmounted by resorting to a "policy", "policy determination" or "policy choice" – least of all by an unauthorised entity (in this case Cabinet).[140]

52. The final fallback argument contends that impossibility of performance or the lack of funding or the inappropriateness of the relief for which the unions contend have not been proved, since the Government respondents did not refute the possible staggered implementation of clause 3.3.[141] There is no merit in this argument.

53. It is, firstly, completely inconsistent with the unions' entire case, the basis of this application, and their approach preceding it.[142] They claimed unconditional,

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[137] Even under the common law it has always been inherent in the principle of legality that the actor must be legally empowered to perform the act in question, public power may only be exercised by the lawfully constituted authority, and the act must be performed in accordance with the substantive and procedural prerequisites prescribed by the empowering provision (Baxter *Administrative Law* (Juta & Co Ltd, Cape Town1984) at 301). Under the Constitution the position is as articulated by the Constitutional Court in *Fedsure supra* (see *Hoexter Administrative Law in South Africa* 2nd ed (Juta & Co Ltd, Cape Town 2012) 255*ff*).

[138] Record p 1343 para 18.4.

[139] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at para 7, holding that "[p]olicy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and the executive will disappear."

[140] *Ahmed v Minister of Home Affairs* 2019 (1) SA 1 (CC) at para 38, confirming and applying *Akani Garden Route v Pinnacle Point Casino supra*, and holding

> "If the Directive overrides, amends or conflicts with the provisions and/or scheme of the Immigration Act, then it is unlawful. Similarly, the Directive may not be in conflict or inconsistent with the Constitution. The making of a directive is the exercise of public power, and all public power must be exercised lawfully. The Director-General of the Department can only make directives that fall within the four corners of the empowering legislation (in this case, the Immigration Act). For the Director-General to issue a directive that contradicts or extends beyond the powers given to him by the Immigration Act would be to act without legal authority and violate the rule of law."

[141] Counter-application Record p 89 para 105; Counter-application Record pp 94-95 paras 128-129; Counter-application Record p 99 para 144; Counter-application Record p 101 para 152.

[142] Counter-application Record pp 309-310 paras 51-53.

unmitigated and immediate compliance with clause 3.3 in its terms.[143] The resort to staggering is an implicit acknowledgment that the outright claim is inappropriate. They have persistently and repeatedly repudiated each attempt by Government to negotiate an alternative to clause 3.3.[144]

54. Secondly, the unarticulated staggered approach to which the unions now retreat is unworkable. Resolution 1 of 2018's relevant part operates only until the end of the current three-year cycle.[145] It ends on 31 March 2021, and new negotiations for the next cycle are already underway.[146]

55. Thirdly, there is no prospect that the Covid-19 economic conditions will improve sufficiently during the next five years to enable a delayed implementation of clause 3.3. This the Government respondents have demonstrated, to the extent that this was required at all and possible at this stage, with reference to an independent and objective study by the United Nations.[147]

56. Finally, and in any event, the unions have not suggested any timeline for such staggered implementation.[148] Nor did they amend their notice of motion to provide for any such step-down relief. Accordingly a staggered implementation and its affordability and feasibility is simply not an issue ventilated by the unions or capable of implementation by this Court with any degree of confidence that this is a competent remaking of the contract for the parties.

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[143] Record p 19 para 38.5; Record p 20 para 39.5.
[144] Record p 200 para 113; Record p 201 para 116; Record p 202 para 123.
[145] Record p 24 clause 3.3.
[146] Counter-application Record p 312 para 60.
[147] Counter-application Record p 306 para 41; Counter-application Record p 312 para 60.
[148] Counter-application Record p 312 para 60.

57. It follows that each of the contentions advanced by the unions is flawed.

H. Counter-applications

58. Finally it remains to make brief submissions on the counter-applications.

59. Firstly, the conditional counter-application lodged by the Minister of Finance was lodged contemporaneously with the filing of his answering affidavit on 17 July 2020.[149] There is no complaint that there has been any delay in lodging it.[150] It was served within a mere three and a half months after clause 3.3 purportedly entered into effect.[151] Prior to this date the Minister of Public Service and Administration had still been engaged in ongoing attempts to engage with the unions.[152] Any earlier attempt to review this clause would have been premature.[153] And no opposition has been entered against this application.[154] It follows that, to the extent that such relief is indeed considered necessary, clause 3.3 should be declared invalid on an unopposed basis.

60. The Minister of Public Service and Administration's counter-application will, we understand, be addressed by his own counsel. For the reasons provided in the replying affidavit filed by the latter Minister, we submit that it should be granted to the extent

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[149] Record p 1016-1021.
[150] Indeed, the filing of the Minister's answering affidavit is by consent, and "the time frames within which the Treasury affidavit was delivered" are expressly *not* in placed in "issue" by the applicants (Record p 1350 para 49).
[151] No time limits for the institution of legality review exist (see *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at paras 38-41). In circumstances where the period prescribed under PAJA for administrative review is six months, it is clear that the three and a half month period in this case is more than reasonable.
[152] Record pp 199-202 paras 112-123, the last of which occurred on 25 March 2020.
[153] See e.g. *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 51, confirming – in a tender context, which inherently requires expeditious review proceedings – that an applicant for review cannot be expected to "leap without looking".
[154] Counter-application Record p 321 para 95.

that such relief is considered necessary. The Minister's replying affidavit demonstrably dispels the arguments advanced in the unions' answering affidavits, which – as mentioned – fail to address the merits.[155]

I. Conclusion

61. On any of the bases set out above the relief for which the unions contend should be refused. In summary, enforcing clause 3.3 would infringe the mandatory legal requirements governing the conclusion of collective agreements by Government, and would therefore breach the principle of legality. Simultaneously, this would violate the doctrine of separation of powers, since Parliament did not approve or ratify the resulting R37.8 billion expenditure. Furthermore, enforcing clause 3.3 is also repugnant to public policy, constitutional values, and the public interest, and would impede Government's ability to comply with its section 7(2) constitutional obligations to fulfil fundamental rights. Enforcement also does not qualify as just and equitable relief in the current circumstances, where the Covid-19 pandemic impacts severely on Government's fiscal constraints and further imposes additional demands on Government to alleviate the plight of the vulnerable and save lives and livelihoods.

62. It was not reasonable in the circumstances of this case to persist in this litigation. No constitutional right has been invoked by the unions in this litigation, and they expressly sought "simply" to litigate in the pecuniary interest of their members – who already

[155] As the Constitutional Court held in *Khumalo v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at para 37, it is important in assessing whether a delay should be overlooked to consider the nature of the decision; and this requires "analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge". This inquiry is entirely absent from the unions' approach. They further fail to meet the Government respondents' case by answering what *Khumalo* identified as the pivotal question, namely whether it is in the interests of justice to pronounce on the unlawfulness of clause 3.3.

receive above-inflation, and private sector-outperforming, salaries while also enjoying job security (unlike most of the rest of the country's and world's workforce in these times). It is therefore not reasonable (least of all under the current Covid-19 conditions) to burden the taxpayer with the costs of this litigation, which Government is required to defend in the public interest.[156]

63. The application should accordingly be dismissed with costs. This should include the costs of two counsel, which the importance of this case justifies.[157]

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20 November 2020

[156] Record p 1077-1078 para 159.
[157] Record p 1078 para 160.