KEYNOTE ADDRESS AT THE 30TH ANNUAL PENSION LAWYERS' ASSOCIATION CONFERENCE, SANDTON, 24 MARCH 2026

"A JUDICIAL REFLECTION ON WHAT RETIREMENT FUND CASES REVEAL ABOUT OUR CONSTITUTIONAL JOURNEY"

Introduction

Last year, my colleague at the Constitutional Court, Justice Owen Rogers, concluded his keynote address with a discussion of the central issues in *Mutsila v. the Municipal Gratuity Fund,* now the most recent pension law judgment handed down by our Court.[1] This year's keynote address returns to that decision, alongside others, to reflect on their practical consequences for ordinary South Africans and what they reveal about the trajectory of our constitutional jurisprudence in pension law over the last three decades.

Overview of Pension Law and South Africa's Constitutional Journey

Thirty years ago, the Pension Lawyers Association of South Africa was established to promote awareness of the vital role law plays in securing retirement benefits. Interestingly, its founding coincided with our nation's profound constitutional transition. Approximately thirty years ago, South Africa transitioned from the Interim Constitution of 1994 to the present Constitution, which came into force in 1997. This marked a reorientation of South Africa's laws towards human rights, accountability and transformation.

This period signalled the nation's unequivocal commitment to democracy and justice, anchored in the Constitution's founding values. Pension law and retirement funds sit at the intersection of property rights, and the following founding values: human dignity, the achievement of equality and the advancement of human rights

[1] *Mutsila v. the Municipal Gratuity Fund* [2025[ZACC 17; 2025 (10) BCLR 1139 (CC); 2026 (1) SA (1) (CC).

and freedoms, non-racialism and non-sexism, and constitutional supremacy and the rule of law. In that sense, retirement funds ought to operate within the transformative project.

Pension and retirement fund disputes are rarely about money alone. They concern who is seen, who is protected, who must account, and how law mediates vulnerability at life's most precarious moments: divorce, death, disability, unemployment, and old age. It is in these moments that the Constitution's promise becomes either tangible or illusory, because retirement funds translate abstract constitutional values into concrete outcomes.

This perspective is particularly apposite in South Africa's socio-economic landscape. Persistent, pernicious poverty and precarious employment patterns often render households dependent on a single breadwinner. Added to this, limited financial literacy and inadequate retirement planning compound this vulnerability. Pension benefits thus often operate not as luxuries, but as stabilising mechanisms within fragile economic systems.

As the apex court and final arbiter on all constitutional matters, the Constitutional Court bears the responsibility of safeguarding the Constitution as the supreme law of the land. The Court's task is to interpret, protect and enforce the Constitution by scrutinising legislation, government actions, and institutional decision-making for compliance with the foundational constitutional values mentioned earlier. Pension jurisprudence is one of the areas in which this supervisory role has been exercised.

How, then, should we conceptualise the Court's role in ensuring that constitutional promises are delivered within pension law? The answer requires confronting a few truisms. While the Pension Funds Act 24 of 1956 (PFA) lies at the centre of pension jurisprudence, pension regulation in South Africa is dispersed across a dense network of statutes, regulatory instruments and industry codes. These include, among others, the Income Tax Act 58 of 1962, and the Labour Relations Act 66 of

1995, rules promulgated by the Financial Sector Conduct Authority and industry standards developed by the Association for Savings and Investment South Africa. The result is a complex regulatory mosaic, rather than a single, unified code.[2]

Adding to this complexity is the fact that several foundational statutes pre-date the constitutional order. For instance, the PFA was promulgated into law in 1956. This act came into operation during the apartheid era and offered minimal relief to pension fund members, necessitating many subsequent reforms.[3] Although it has undergone significant amendments, the tension between an inherited statutory framework and a transformative constitutional dispensation, persists. Courts are thus required to engage in a gap-bridging exercise of interpreting an old legislative architecture through a new normative constitutional lens.

Pension law forms part of South Africa's post-apartheid project of redistribution, accountability and social protection. This contextual lens is important because, as illustrated, retirement fund regulation does not operate purely within private-law. Decisions regarding the registration, governance and distribution or management of pension benefits must also comply with national legislation.

In this architecture, courts wear multiple hats in ensuring that pension legislation and fund rules comply with constitutional standards. They clarify convoluted statutory schemes to promote legal certainty for ordinary members of society. They also perform a transformative exercise: interpreting new and inherited legislation through constitutional values while honouring the Constitution's limitation principle of separation of powers. This requires vigilance against rights violation, abuse and arbitrariness without straying into legislative re-design. Judicial restraint, in this context, is not passive but disciplined compliance with constitutional boundaries.

---

[2] Bregman Moodley, *Pension Law*, accessed at https://bregmans.co.za/pension-law/.

[3] Lufuno Nevondwe, "South African Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act", 19 March 2010 Vol. 15, 4, 287–296 at page 287.

The following Constitutional Court cases illustrate how pension jurisprudence reflects the ongoing balancing of the foundational constitutional values, the Bill of Rights, and pension legislation. They also address how courts navigate the boundary between interpretation and intervention. Due to the *Mutsila* case's importance and recentness, I will spend more time on it than with the others.

Constitutional Court Cases

Mutsila v Municipal Gratuity Fund and Others

The landmark decision in *Mutsila,* epitomises the complexity of this judicial task. In this case, the Constitutional Court was required to determine who qualifies as a "dependent" of a deceased family member, when dependency must be accessed, and how trustees must exercise their discretion to ensure equitable distribution under section 37C of the Pension Funds Act. At stake was not only statutory interpretation, but the lived realities of families whose survival depended on death benefits.

Ms Mutsila, the widow of the deceased member, claimed the death benefit from the Municipal Gratuity Fund (Fund) on behalf of herself and her five children. A competing claim was submitted by Ms Masete, who alleged that she and her two children were also dependants of the deceased. After its investigation, the Fund recognised both households as dependants and apportioned the death benefit accordingly. Ms Mutsila disputed the alleged customary marriage between the deceased and Ms Masete, and Ms Masete's claims of factual dependency. On the screen you will see a breakdown of the litigation history. As is evident, the case has had a remarkable journey: adjudicated by the Fund, the Adjudicator and no fewer than 4 courts and 18 Judges![4]

Litigation History

This diagram tracks the case's long, arduous journey.

[4] One Judge in the High Court, three in the Full Court, five in the Supreme Court of Appeal and nine in the Constitutional Court.

FUND
● The Fund trustees determined the percentage for equitable distribution for Ms Mutsila and her children and Ms Masete and her children.
ADJUDICATOR
● The Adjudicator issued a determination, finding that the Fund had not conducted a proper investigation as required by section 37C. Thus, the Adjudicator set aside the Fund's decision.
HIGH COURT
● The High Court dismissed the Fund's application with costs on a punitive scale, finding that the Fund had not met its duty to ensure that the information it received was diligently investigated. Ms Masete's factual dependence on the deceased had not been proven and she was neither a spouse of the deceased nor was the deceased the father of her children.
FULL COURT
● The Full Court dismissed the Fund's appeal with punitive costs, agreeing with the High Court.
SUPREME COURT OF APPEAL
● The Supreme Court of Appeal set aside the Adjudicator's decision and in effect upheld the decision taken by the Fund, holding that the Adjudicator failed to afford the Fund an opportunity to respond to Ms Mutsila's complaint and had infringed the Fund's right to *audi alteram partem* (hear the other side).

The facts of the case engaged fundamental constitutional rights and values: dignity, social security, equality and administrative justice. They demonstrate that death benefits function as protective mechanisms against destitution, ensuring dependants are not left reliant on the state for sustenance. The case also navigates complex marriage and family dynamics in the inquiry of who counts as a dependant and the determination of the extent of their dependency. Lastly, the Fund and Adjudicator's investigative obligations implicate the right to lawful, reasonable and procedurally fair administrative action. The Constitutional Court was therefore satisfied that the case engaged its jurisdiction.

On the merits, the Court confirmed that section 37C imposes on a fund an obligation to conduct a proper investigation to identify both legal and factual dependants and to exercise an equitable discretion in distributing the benefit.[5] Since the Fund enjoys a wide discretion under section 37C in the allocation and distribution of a death benefit, their decision may only be reviewed if the exercise of discretion was unreasonable or improper.[6] The Court concluded that the Fund did not carry out a proper investigation to determine dependency in relation to Ms Masete and her children.[7] This omission on their part undermined the integrity of the allocation process.

The Court then considered at which stage a pension fund must make a determination as to who is a dependant for the purpose of distributing a death benefit. Previously, in *Fundsatwork Umbrella Pension Fund v Guarnieri and Others*[8] (*Guarnieri)*, the Supreme Court of Appeal held that the "time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made"[9] The Constitutional Court disagreed, holding that a textual and purposive reading of section 37C suggests that the determination of dependency is made at the time of death of the member, while giving a fund a 12-month period to conduct a proper investigation.[10]

In doing so, the Court overturned precedent set by the Supreme Court of Appeal in *Guarnieri.*[11] Even though precedent provides stability and predictability, overturning it allows for the rectification of errors, elimination of unworkable

[5] *Mutsila* above n 1 at paras 27-44.

[6] Id at paras 47-8.

[7] Id at para 57.

[8] *[2019] ZASCA 78; 2019 (5) SA 68 (SCA).*

[9] *Mutsila* above, n1 at para 104.

[10] Id at paras 89-90 and 108.

[11] *Guarnieri* above n 9.

decisions and the integration of new facts or constitutional values. In *Mutsila*, this Court found the *Guarnieri* approach to be legally flawed from a practical perspective and a departure from settled interpretation regarding the date of determining dependency.[12] The date declared by the Court is more reliable, because it clearly shows who relied on the member while the member was still alive. It provides stability since, once identified at the time of death as a dependant, their status is fixed and does not change based on later circumstances. However, the *Guarnieri* timeline would accommodate situations where post-death circumstances can wrongly alter beneficiary status. The court's deviation was rooted in the purpose of the Pension Funds Act, which is to ensure that benefits are distributed based on historical dependency at the time of the member's passing and not the date of distribution decision.[13]

The Court's decision on the type of relief further illustrates the principle of judicial restraint. The applicants urged the Court to grant a substitution order in respect of the Fund's decision.[14] A substitution order is a remedy under the Promotion of Administrative Justice Act (PAJA)[15] which would have replaced the fund's decision with the Court's own decision.[16] The Court declined this request reasoning that substitution would be an extraordinary remedy and remittal will be the more prudent and proper course.[17] Judicial precedent in *Trencon* provided that "[u]ltimately, the appropriateness of a substitution order must depend on the consideration of fairness to the implicated parties."[18] When applying this rule to this case, the Court acknowledged that dependency determinations are fact sensitive, and therefore the

[12] *Mutsila* above n 1 at para 100.

[13] Id at para 99.

[14] Id at para 112.

[15] 3 of 2000.

[16] Id at Section 8(1) (c)(ii)(aa).

[17] *Mutsila* above n 1 at para 112.

[18] Id referencing *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 53.

Court was not appropriately positioned to make that determination.[19] Remitting the case back to the Fund to conduct that factual inquiry was more appropriate. The Court exercises judicial constraint here by recognising its own limits against factual inquires.

The chosen relief also highlights the Court's sensitivity to systemic delay. The Court directed the Fund to conclude their investigation within three months of the judgment, acknowledging that delayed justice can entrench hardship.[20] The initial decision dated back to April 2014, and the unanimous judgment was handed down in August 2025, more than a decade later.[21] In directing expedition, the Court affirmed that constitutional adjudication must not only clarify legal principles but also alleviate the lived consequences of the justice system.

As can be seen, this was a landmark decision that set a new binding precedent for all retirement funds, adjudicators and courts. It established that the time at which to determine who is a dependant for the purpose of distributing a death benefit is at the time of the member's death. Lastly, it affirmed the social security purpose of death benefits and the duty of retirement funds to protect vulnerable dependants.

The Constitutional Court has also handed down judgments on issues of restitutionary or affirmative justice that help illustrate what remedying past wrongs look like within pension law. The next case addresses the issue of affirmative action using pension law.

Minister of Finance and Another v Van Heerden

This case provides a historical account of who benefitted from the old apartheid order, who was excluded and what redress can legitimately look like in South

[19] *Mutsila* above n 1 at para 112.

[20] Id at para 115.

[21] Id.

Africa's new democracy. It arose within the context of a challenge to the constitutionality of certain rules of the Political Office-Bearers Pension Fund that provided for differentiated employer contributions of parliamentary and other political office-bearers between 1994 and 1999.[22]

The Constitutional Court set aside the High Court's judgment, holding that they erred by failing to properly assess whether the differentiation between old and new Members of Parliament formed part of a restitutionary measure under section 9(2) to achieve substantive equality.[23] The Court ultimately agreed that the pension scheme did not violate the Constitution, because affirmative action measures are constitutionally authorised so long as they pursue equality and do not impose disproportionate burdens inconsistent with a non-racial, non-sexist constitutional order.

Sometimes, despite the Justices' commitment to constitutional transformation, the Constitutional Court is simply not the right forum to adjudicate certain matters. This is evidenced in the next two cases.

Hunter v Financial Sector Conduct Authority

This case concerned a project run by the FSCA which aimed to cancel the registration of pension funds that had effectively ceased to exist due to the FSCA's "cancellations project,"[24]which merged specific funds into umbrella funds. The legal issue at stake was whether the FSCA had a constitutional duty to investigate potentially unlawful cancellation, and, if so, whether they fulfilled that duty.[25]

---

[22] Id at para 1.

[23] Id at paras 26-35.

[24] *Hunter v Financial Sector Conduct Authority* [2018] ZACC 31; 2018 (6) SA 348 (CC); 2018 (12) BCLR 1481 (CC) at para 1 and 12. The cancellation project was a response to a shift from pension funds that were specific to certain employers, to umbrella funds which allowed the contributions from different employers to be merged and managed in a single fund.

[25] Id at para 37.

While the Court granted leave to appeal, the majority dismissed the appeal because the merits of appeal depended on whether the FSCA was under a duty to investigate. They also held that *Khumalo*[26], which was the only legal authority to establish a duty upon a public functionary, did not apply in this case.[27] In the alternative, the Court reasoned that had the applicant wanted to challenge the lawfulness of the cancellation, they had to bring a claim in terms of PAJA which they failed to do.[28]

This case raised important concerns about the integrity of the retirement system and the responsibilities of public administrators authorised to regulate the system. Although the application was ultimately dismissed, it demonstrated that regulatory conduct is not insulated from constitutional scrutiny. Simultaneously, the judgment reveals a more sobering dimension of the country's constitutional journey. There are moments when courts, constrained by doctrine, jurisdiction, and procedural limits are unable to provide immediate relief even when maladministration or regulatory mistakes affects many and leave issues unresolved.

Wiese v Government Employees Pension Fund

This case was about provisions of the Government Employees Pension Law governing the Government Employees Pension Fund that prevented non-member spouses from accessing their allocated share of pension benefits immediately upon divorce or on dissolution of a customary marriage.[29] Instead, it required them to wait until the member spouse became entitled to their pension. This effectively resulted in devaluation over time.[30]

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

[27] Hunter above n 32 at paras 40-1.

[28] Id at paras 49-51.

[29] *Wiese v Government Employees Pension Fund* [2012] ZACC 5; 2012 (6) BCLR 599 (CC).

[30] Id at para 2.

Ms Wiese attained a declaration of unconstitutionality at the High Court.[31] Parliament corrected the defect while the proceedings before the Constitutional Court were pending.[32] The Court unanimously held that, although the absence of a live controversy does not constitute an absolute bar to justiciability, they agreed with the parties that the matter had become moot. [33] This case demonstrates how issues can be remedied even before proceedings at the Constitutional Court have commenced. Here, we see Parliament being proactive to remedy the flaws in the legislation and the violation of rights detected by the judiciary.

Mudau v Municipal Employees' Pension Fund

Mr Mudau was a member of the Municipal Employees' Pension Fund throughout his employment and, upon his resignation on 31 May 2013, became entitled to withdrawal benefits in terms of the fund's rules [34]. In June 2013, the Fund amended its rules for benefit distribution and aimed to retrospectively apply it to Mr Mudau's claim before the amendment was registered.[35] The unregistered rule amendment significantly reduces Mr Mudau's benefit to one and a half times a member's contributions (instead of three times), plus interest. This led him to file a complaint with the Pension Funds Adjudicator.[36]

The Court relied on *Mostert,*[37] where the Supreme Court of Appeal held that, although amended rules may have retrospective effect *after* registration, they do not have binding effect *before* registration[38] (Emphasis added). Further, the Court found

---

[31] Id at paras 13-15.

[32] Id at paras 7-9.

[33] Id at para 22.

[34] *Mudau v Municipal Employees' Pension Fund* [2023] ZACC 24; 2023 (10) BCLR 1165 (CC); [2023] 11 BLLR 1109 (CC); (2023) 44 ILJ 2641 (CC) at para 5.

[35] Id at paras 6-7.

[36] Id.

[37] *Mostert N.O. v Old Mutual Life Assurance Co* (SA) Ltd [2001] ZASCA 104; 2001 (4) SA 159 (SCA); [2001] 4 All SA 250 (A) at paras 59-61.

[38] Id.

that a review of the amended rule was unnecessary since Mr Mudau never had an issue with the amended rule or its retrospective effect, except for the application of the unregistered rule to his withdrawal benefit.[39]

This case crystallises the importance of legality, certainty, and institutional discipline in areas that deeply affect social security rights. The rule of law necessitates creating predictable and stable laws that are applied uniformly as they are necessary conditions for ensuring individuals can foresee the legal consequences of their actions and their dignity is preserved.

Masemola v. Special Pensions Appeal Board and Another

This application concerned whether a pardoned individual is entitled to the restoration of his special pension if he was previously disqualified following a criminal conviction.[40] The Constitutional Court held that, although the Special Pensions Act 69 of 1996 seeks to deter serious criminal conduct by suspending payment to convicted beneficiaries, the disqualification does not extinguish the right to a pension.[41] Where the grounds for the disqualification have fallen away due to the presidential pardon; a person should be able to receive their special pension.[42]

Special pensions were created as instruments of restorative justice, recognizing those who sacrificed for the nation's democracy and the need to provide support due to the apartheid regime's repressive measures.[43] Thus, this judgment reflects judicial sensitivity to accountability and redemption. The Court also distinguished between the existence of a right, when it can be temporarily suspended and permanently extinguished.

---

[39] *Mudau* above n 33 at para 75.

[40] *Masemola v. Special Pensions Appeal Board* [2019] ZACC 39; 2019 (12) BCLR 1520 (CC); 2020 (2) SA 1 (CC) at para 3.

[41] Id at para 27.

[42] Id at paras 40, 43-48.

[43] *Masemola* above n 39 at paras 1-2; Preamble the Special Pensions Act 69 of 1996.

Annual Lawyers'Conclusion

Taken together, these pension law cases tell a story about the country's commitment to creating and maintaining a democratic state that reconciles with past injustices and aims to ensure that the different branches of government work in unison to uphold the foundational constitutional values. Courts play a particularly important role in achieving such a transformative mandate: they serve as guardians of the Constitution and guide the mandate through statutory interpretation, judicial oversight and when necessary, judicial restraint. In this regard, the Constitutional Court has taken the lead to give tangible content to the right in section 27(1)(c) of the Constitution to have access to social security, where possible to do so.

END
