THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT95/17

In the matter between:

JOHAN PIETER HENDRIK PRETORIUS	First Applicant
MONTANA DAVID KWAPA	Second Applicant

and

TRANSPORT PENSION FUND	First Respondent
TRANSNET SECOND DEFINED BENEFIT FUND	Second Respondent
TRANSNET LIMITED	Third Respondent

APPLICANTS' SUBMISSIONS IN THEIR APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

1. The applicants instituted a class action against Transnet Limited and two of its pension funds ("the Funds").[1] The applicants act on behalf of the members of the Funds. Their particulars of claim[2] advance three claims against Transnet and the Funds. Claim 1 is called The 1989 Promise.[3] Claim 2 is called The Legacy Debt.[4] Claim 3 is called The Unlawful Donation.[5]

2. The Funds and Transnet raised multiple exceptions to all three claims.[6] The High Court upheld three exceptions to Claim 1[7] and dismissed all the other exceptions.[8]

3. Both sides apply for leave to appeal against the High Court's findings. We confine these submissions to the applicants' application for leave to appeal against the High Court's findings against them in upholding three exceptions to Claim 1.

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1 The class action was certified in the High Court on 31 July 2014. The certification judgment is reported as Pretorius and Another v Transnet Second Defined Pension Benefit Fund and Others 2014 (6) SA 77 (GP).

2 Particulars of Claim p 70

3 Paragraphs 12 to 24

4 Paragraphs 25 to 34

5 Paragraphs 35 to 40

6 The Funds' Exception p 111; Transnet's Exception p 85

7 High Court Judgment p 121 at p 128 paras 23, 24, 29 to 42, 47 to 51, 54.1.1, 54.1.2 and 54.1.3.

8 High Court Judgment p 121 at p 128 paras 21, 22, 25 to 28, 43 to 46, 52, 54.1, 54.2 and 54.3.

4. We start with brief submissions on the manner in which our courts determine exceptions. We then describe Claim 1 and deal with the three exceptions the High Court upheld. We conclude with brief submissions on costs, both here and in the High Court.

THE APPROACH TO EXCEPTIONS

5. First, the court must take all the plaintiffs' allegations at face value. The allegations of fact in the particulars of claim must be accepted as true and correct.[9]

6. Second, the court may not have regard to any other extraneous fact or document.[10] This includes gazetted regulations and pension fund rules, the validity of which must be proven.[11]

7. Third, exceptions must be judged on the interpretation of the pleadings most favourable to the plaintiffs:

   7.1. The excipient must show that, read as a whole, the pleading is excipiable on every possible interpretation that can reasonably be attached to it. It is for the excipient to satisfy the court that the cause of action or conclusion of law, for which the plaintiff contends, cannot be supported on every interpretation that can be put upon the facts.[12]

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9 Stewart v Botha 2008 (6) SA 310 (SCA) at para 4; Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd 1990 (4) SA 749 (N) at 755

10 Wellington Court Shareblock v Johannesburg City Council 1995 (3) SA 827 (A) 834; Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd 2006 (2) SA 25 (T) paras 20-22, Serobe v Koppies Bantu Community School Board 1958 (2) SA 265 (O)

11 Id. See also Raad vir Kuratore vir Warmbad Plase v Bester 1954 (3) SA 71 (T) at 74C

12 H v Fetal Assessment Centre 2015 (2) SA 193 (CC) para 10; First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 (SCA) paras 6 and 36

7.2. An over-technical approach must be avoided.[13] The purpose of the exception is not to scrutinise pleadings for every possible flaw and imperfection. It is to protect litigants against claims that are bad in law or where the contents of the pleading are so vague that it is impossible to determine the nature of the claim.[14]

8. Fourth, an exception that the pleadings are vague and embarrassing will be upheld only if it goes to the root of the plaintiffs' cause of action. Such an exception cannot be directed at a particular paragraph within a cause of action; it must be demonstrated that the whole cause of action is vague and embarrassing.[15]

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13 Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) para 3

14 Kahn v Stuart 1942 CPD 386 at 391; Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (A) 553F–I

15 Carelsen v Fairbridge, Arderne and Lawton 1918 TPD 306 at 309; Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 899B-900C

CLAIM 1: THE 1989 PROMISE

The corporate history

9. The transport enterprise of the state successively vested in the South African Railways and Harbour Administration (SAR&H) and the South African Transport Services (SATS). With effect from 1 April 1990, the assets, liabilities, rights and obligations of the enterprise were transferred to Transnet in terms of s 3 of the Legal Succession to the South African Transport Services Act 9 of 1989 ("the Succession Act").

10. Transnet inherited two defined-benefit pension funds from SAR&H and SATS: the New Railways and Harbours Superannuation Fund for white employees ("the White Fund"),[16] and the Railways and Harbours Pension Fund for Non-White Employees for black employees ("the Black Fund").[17]

11. From October 1990, the White Fund and the Black Fund were merged into a single defined-benefit fund, initially called the Transnet Pension Fund and later renamed the Transport Pension Fund ("the Transport Fund"). It is the first respondent. It inherited all the assets, liabilities, rights and obligations of its predecessor funds.[18]

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16 Created under s 3 of the Railways and Harbours Superannuation Fund Act 24 of 1925, and continued under s 2 of the Railways and Harbours Pension Act 35 of 1971.

17 Established under s 2 of the Railways and Harbours Pensions for Non-Whites Act 43 of 1974.

18 In terms of s 2 of the Transnet Pension Fund Act 62 of 1990. Section 2(1) of the Transnet Pension Fund Act was later amended, but originally read as follows:

12. With effect from 1 November 2000, a new-defined benefit fund was established to house all the pensioner-members of the Transport Fund as at that date, called the Transnet Second Defined Benefit Fund ("the Second Fund"). It is the second respondent. All the pensioner-members of the Transport Fund were transferred to the Second Fund in terms of s 14B of the Transnet Pensions Fund Act.[19] The Second Fund succeeded to a *pro rata* share of all the rights and obligations of the Transport Fund.[20]

The 1989 Promise

13. Prior to the creation of Transnet and the respondent funds, the rules of the White Fund and the Black Fund entitled their members to increases of their pensions by 2% per year. However, both funds followed a consistent practice over decades, with the concurrence of Transnet's predecessors, of granting higher pension increases of at least 70% of the rate of inflation.

14. In 1989, in the run-up to the establishment of Transnet, its predecessor, SATS, and its two funds, made a promise to all their employees and members that

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"With effect from the operative date of this Act (which was 1 October 1990) the New Fund (that is, the White Fund) and the Pension Fund (that is, the Black Fund) shall cease to exist, the Transnet Pension Fund shall be established and all the assets, liabilities, rights and obligations of the New Fund (that is, the White Fund) and the Pension Fund (that is, the Black Fund) ... shall vest in and devolve upon the Fund (that is, the Transport Fund) without any formal transfer or cession."

19 Section 14B was inserted by the Transnet Pension Fund Amendment Act 41 of 2000.

20 In terms of s 14B(3), which reads:

"All the assets, liabilities, rights and obligations pertaining to (the pensioner-members transferred from the Transport Fund to the Second Fund) ... shall vest in and devolve upon the Transnet Second Defined Benefit Fund without any formal transfer or cession with effect from the date of publication of such determination in the Gazette by the Minister."

they would continue to increase their pensions as before, that is, at a rate of at least 70% of the rate of inflation. They made the promise both orally and in writing:

14.1. The promise was made orally by Dr Moolman, the general manager of SATS and the chair of the boards of trustees of both pension funds, and by Mr Louw, the erstwhile Minister of Transport, at meetings throughout the country with some 80 000 SATS employees in May and June 1989.

14.2. They repeated the promise in writing in a SATS brochure called "*Our Compass on the Road to Change*"[21] distributed to all SATS employees and pensioners later in 1989. It recorded the promise in the following terms:

14.2.1. *"Benefits will be adjusted only if it is to the advantage of the members. The formation of a company will not change our pension fund benefits".*

14.2.2. "*Increases in pension in addition to the 2% adjustments that are given to pensioners from time to time, will in future still be given to pensioners by Transport Services and are not affected by the formation of the company".*

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21 Particulars of Claim p 73 para 16 read with Brochure PC1 p 17 at pp 20, 21, 27 and 30

14.2.3. *"The transport services will as in the past continue to grant, over and above the usual 2% increases, larger increases, in order to counteract the effects of inflation"*

14.2.4. *"The pensioners of the SA Transport Services need not worry. The conversion of the transport services to a public company will have no influence on pensioners".*

14.2.5. *"In addition to the usual annual 2% increases in pensions, the transport services will, as in the past, continue to grant higher increases to enable them to counter the effects of inflation".*

15. SATS and the pension funds made the promise to persuade SATS' employees to remain in its employ after its conversion to Transnet.

16. Transnet and the Funds kept the promise until 2002 by granting annual pension increases of about 80%, on average, of the rate of inflation.

17. Since 2003, Transnet and the Funds have reneged on the promise. They have consistently failed to grant any pension increases beyond the minimum of 2% per year. This has caused untold hardship to the employees of Transnet and members of the Funds.

The three causes of action

18. In Claim 1, the applicants seek to hold Transnet and the Funds to their 1989 Promise. They found their claim on three causes of action. The first is breach of contract.[22] The second is unlawful state conduct.[23] The third is unfair labour practice.[24]

19. The High Court upheld a ground of exception to each of these causes of action. We shall accordingly address each of them and the ground of exception to it that the High Court upheld.

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22 Particulars of Claim p 75 para 21

23 Particulars of Claim p 75 para 22

24 Particulars of Claim p 76 para 23

BREACH OF CONTRACT

20. The applicants plead[25] that the 1989 Promise was an offer to contract duly made by and on behalf of SATS, the White Fund and the Black Fund. All the employees and pensioners of SATS, the White Fund and the Black Fund, tacitly accepted the promise by remaining employees and pensioners of SATS, the White Fund and the Black Fund without demur. SATS, the White Fund and the Black Fund thus became contractually bound to keep their promise. Transnet and the Funds succeeded to that contractual duty to keep the promise. Their failure to do so was thus in breach of contract. The applicants claim specific performance of their contractual obligation to honour their promise.

21. The High Court held that the applicants' pleading of the 1989 Promise is vague and embarrassing because they do not specify,
    - the period for which the promise will endure;
    - which members of the Funds were entitled to the pension benefits promised; and
    - which members of the Funds are entitled to enforce the promise.[26]

22. We submit with respect that the High Court overlooked the rule that a plaintiff who claims on a contract, need only plead the terms upon which he or she relies. It is a manifestation of the broader principle, in rule 18(4) of the High

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25 Particulars of Claim p 75 para 21

26 High Court Judgment p128 - 129 paras 23 and 24

Court rules, that a party need merely plead *"the material facts upon which the pleader relies for his claim"*. The applicants' particulars of claim comply with this rule. They have pleaded all the terms upon which they found their claim for specific performance.

23. The applicants in any event pleaded all the terms, or at least all the express terms, of the 1989 Promise:

23.1. The background to the promise was that both the White Fund and the Black Fund had over decades consistently granted pension increases of at least 70% of the rate of inflation.[27]

23.2. SATS, the White Fund and the Black Fund promised that they would continue this practice by increasing pensions at a rate of at least 70% of the rate of inflation.[28]

23.3. They also made the promise in writing. The entire promise, that is, all its express terms, are set out in paragraph 16 of the particulars of claim read with the brochure to which it refers.[29]

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27 Particulars of claim p 73 para 13

28 Particulars of claim p 73 para 14

29 Particulars of claim p 73 para 16; *"Our Compass on the Road to Change"* p 17 at pp 20, 21, 27 and 30

23.4. The applicants have accordingly pleaded all the express terms of the promise and all the terms on which they base their claim. The legal implications of those terms are a matter of law.

24. We submit with respect that the High Court was mistaken to suggest that the applicants ought to have pleaded the promise with greater particularity:

24.1. The applicants have pleaded an open-ended promise that Transnet and the Funds "*would continue to increase their pensions as before*".[30] Because the Promise was open-ended, it endures indefinitely as a matter of law.

24.2. The promise was made to all the employees of SATS and the members of the White Fund and the Black Fund.[31] It was tacitly accepted by all the employees of SATS and all the members of the White Fund and the Black Fund.[32] They are thus the people contractually entitled to the promised benefits.

24.3. They are for the same reason the people contractually entitled to enforce the promise.

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30 Particulars of claim p 73 para 14

31 Particulars of claim p 73 paras 14 and 16

32 Particulars of claim p 75 para 21.2

UNLAWFUL STATE CONDUCT

The claim

25. The applicants plead[33] that Transnet's failure to cause the Funds to keep the promise, and their failure to keep it, are unlawful at public law because their conduct is legally and constitutionally unconscionable when tested against the constitutional standards of reliance, accountability and rationality.

26. The claim is based on the principle this court recognised in the *KZN* case.[34] The principle is that a promise by the state, to make a payment, is enforceable against the state if it would be legally and constitutionally unconscionable for the state to renege on the promise.

The facts

27. This claim is in the first place based on the conduct of the respondents and their predecessors, described in paragraphs 14 to 19 of the particulars of claim, in making, implementing and then breaking the 1989 Promise. We emphasize the following features of that history:

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33 Particulars of Claim p 75 para 22

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

27.1. SATS made the promise to persuade its employees to remain in its employ after its conversion to Transnet.[35]

27.2. It did so, *inter alia*, by expressly promising that,

- *"The Transport Services will as in the past continue to grant, over and above the usual 2% increases, larger increases, in order to counteract the effects of inflation."*[36]
- *"The pensioners of the SA Transport Services need not worry. The conversion of the Transport Services to a public company will have no influence on pensioners."*[37]
- *"In addition to the usual annual 2% increase in pensions, the Transport Services will, as in the past, continue to grant higher increases to enable them to counter the effects of inflation."*[38]
- *"The pensioners of the SA Transport Services need not worry. The conversion of the Transport Services to a public company will have no influence on pensioners."*[39]

27.3. Transnet and the Funds kept the promise until 2002.[40] Their conduct in doing so no doubt reinforced the assurance of their predecessors that they could be trusted to keep their promise.

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35 Particulars of Claim p 74 para 17

36 Particulars of Claim p 74 para 16.3

37 Particulars of Claim p 74 para 16.4

38 Particulars of Claim p 74 para 16.5

39 Particulars of Claim p 74 para 16.6

27.4. Transnet and the Funds have since 2003 broken the promise.[41] Their pension increases have not merely fallen further behind inflation but have been consistently reduced to the bare prescribed minimum of 2% per annum.

28. The impact of the respondents' betrayal of their members and pensioners is described in paragraph 22 of the particulars of claim:

28.1. By making the promise and implementing it for more than a decade, the respondents and their predecessors created the legitimate expectation of their employees and members that they would keep the promise.[42]

28.2. The employees of Transnet and the members of the Funds organised their lives and arranged their affairs on the assumption that the respondents would keep the promise.[43]

28.3. As a result of their failure to keep the promise, their employees and members "*have suffered untold hardship*".[44] It must be borne in mind that this claim is made on behalf of the current members of the Funds, that is, those who were persuaded by the promise to throw in their lot

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40 Particulars of Claim p 74 para 18

41 Particulars of Claim p 75 para 19

42 Particulars of Claim p 75 para 22.1

43 Particulars of Claim p 76 para 22.2

44 Particulars of Claim p 76 para 22.3

with Transnet and who continued to serve it. They did so on the strength of its promise to care for them in their old age as its predecessors had always done. Now that they are older and more vulnerable, Transnet and the Funds have cut them off and left them out in the cold.

This court's ratio in *KZN*

29. The facts in the *KZN* case were that the Kwazulu-Natal Department of Education had notified independent schools of the subsidies payable to them the following year. The first portion of the subsidies was payable in April 2009. The Department did not make this payment and in May 2009 announced that it had decided to reduce the subsidies with retrospective effect. This court held that the Department's conduct had been unlawful at public law and that the schools were entitled to hold it to its promise to pay.

30. This court noted that a unilateral promise made by the state may be enforceable at public law:

> *"Before the Constitution, the Appellate Division found 'nothing peculiar' in the notion that the state can unilaterally make a promise to pay that becomes enforceable at the instance of those intended to benefit from it. In fact, the court found it 'strange to think that the government's undertaking in terms of (a) notice can be made enforceable only once it has been accepted and converted into a contract'".*[45]

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45 KZN para 48

31. The court considered the MEC's conduct and concluded that it was *"both legally and constitutional unconscionable"* for the MEC to renege on his promise after the subsidies had become payable. It concluded for this reason that *"the undertaking is indeed enforceable, but on broader public law and regulatory grounds rather than bilateral agreement"*.[46]

32. Justice Cameron explained that the MEC's conduct had been legally and constitutionally unconscionable when measured against the public law standards of reliance, accountability and rationality.[47] Justice Cameron proceeded to evaluate the state's conduct, against these public law standards to conclude that its failure to keep its promise was, in the circumstances, legally and constitutionally unconscionable.[48]

33. This was also how Justice Froneman, in his concurring judgment, interpreted the ratio of the main judgment:

> *"The substantive justification the main judgment gives for preventing a public official from retracting a lawful promise to pay an amount to someone after the date for payment has passed is that it is 'legally and constitutionally unconscionable' when tested against the standards of 'reliance, accountability and rationality'"*.[49]

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46 KZN para 57

47 KZN paras 62 to 65

48 KZN paras 63 to 65

49 KZN para 83

34. This court concluded that the MEC's conduct had been legally and constitutionally unconscionable because he had reneged on his promise after the due date for payment of the subsidies. But the broader principle established by its judgment is that a public official may be held to his promise at public law if it would be legally and constitutionally unconscionable for him to renege on his promise.

35. The dissenting judges in *KZN* neither endorsed nor repudiated the principle established by the main judgment. They dissented on other grounds.[50]

36. We submit that the principle recognised by this court in *KZN* is unsurprising. It is axiomatic that the state may not act in a manner that is legally and constitutionally unconscionable. A rule that requires the state to honour its promises, when it would be legally and constitutionally unconscionable to break them, is a modest rule that gives only limited effect to the most basic of constitutional standards set for state conduct.

37. We shall now apply the ratio of *KZN* to the facts of this case.

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50 Justice Nkabinde's Judgment runs from paragraph 109 to paragraph 149; Justice Zondo's Judgment, in which Chief Justice Mogoeng and Justice Jafta concurred, runs from paragraph 150 to paragraph 182; the judgment of Chief Justice Mogoeng and Justice Jafta, in which Justice Zondo concurred, runs from paragraphs 183 to 190.

Reliance

38. In *KZN*, this court found that the schools' reliance on the first tranche of the promised subsidy payment had "*crystallised*" into an entitlement to that payment because, by that stage, the schools could not counteract the prejudice of non-payment.[51] Conversely, the court reasoned that the schools were able to "*adjust their future outlays*" in respect of the later tranches, which had not yet fallen due, and that the standard of reliance thus did not establish a legal entitlement to the later payments.[52]

39. The pensioners in this case cannot adjust their future outlays to accommodate the reduced payment of their pensions. Their position in respect of the future payments is no different from the schools in *KZN* who had already and finally budgeted in reliance on the first tranche of the subsidy payment, and were unable to change the positions taken in reliance on the promise.

Rationality

40. The ability of the party relying on the promise to "*tailor behaviour and expectations to a promise*" is fundamental to the rationality standard that informs the principle of unconscionable state conduct. This court said that -

> "*it is impossible to tailor behaviour and expectations to a promise made in relation to a period that has already passed. Revoking a promise*

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51 KZN para 63

52 Id

when the time for its fulfilment has already expired does not constitute rational treatment of those affected by it."[53]

41. In her discussion of the *KZN* judgment, Professor Hoexter explains that this court *"seemed to have in mind a very particular kind of 'rationality' here: the rule-of-law idea that official behaviour ought to be capable of guiding citizens and informing their plans, or what one may call reliance-based rationality."*[54] The pensioner-members of the Funds are not able to tailor their behaviour and expectations in response to the retracted promise of payment. They are no longer employed, and so cannot at this stage change their plans or financial positions. Nor can they change their decision to remain in the employ of Transnet, which decision was taken in reliance on the promise that is no longer being fulfilled.

42. The respondents' conduct is especially offensive of "*reliance-based rationality*" in that Transnet and its predecessors made the promise to their employees precisely in order to guide their employees' conduct – i.e., to persuade them to remain in Transnet's employ – only to renege on the promise when those employees are no longer capable of changing their positions and plans.

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53 KZN para 65

54 C Hoexter 'The Enforcement of an Official Promise: Form, Substance and the Constitutional Court' (2015) 132 *South African Law Journal* 207 at 210

Accountability

43. In *KZN*, this court interpreted the accountability standard to require state conduct that is responsive to persons relying on expected payments and that affords them adequate opportunity to ameliorate the impact of state budgeting.[55]

44. In this case, the respondents have reneged on the promise since 2003 after implementing it for a period of 13 years. They have persisted in their failure to make good on the promise notwithstanding the untold hardship suffered by Transnet's employees and pensioner-members of the Funds that has resulted. This conduct falls far short of the constitutional standard of responsiveness and accountability required of the state.

45. The conduct of organs of state, including the respondents, is constrained by the state's constitutional obligations to respect, protect, promote and fulfil the rights in the Bill of Rights. Organs of state and public enterprises are also bound to observe the standards of accountability and responsiveness, which form part of the basic values and principles governing public administration in South Africa.[56]

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55 KZN supra para 64

56 Section 195(1)(e) – (g) and section 195(2).

46. This court has repeatedly held that the state has a special duty to uphold and affirm constitutional rights and values, which must inform all its actions and decisions.[57]

The right to social security

47. In assessing the legality and constitutionality of the respondents' decision to renege on promised pension benefits, the impact of the decision on the Fund's members' right to social security under s 27(1)(c) of the Constitution must be considered.

48. The state is obliged, under s 27(2) of the Constitution, to take reasonable legislative and other measures to achieve "the progressive realisation" of the right to social security and assistance. This obligation entails a duty to take sufficient and appropriate action to realise the right to social security; to respect and protect the existing enjoyment of the right; and not to adopt deliberately retrogressive measures (i.e., measures that downgrade or limit existing levels of enjoyment of the right).[58]

49. The UN Committee on Economic, Social and Cultural Rights ("the CESCR") has described the nature of the right to social security in General Comment 19.[59] The CESCR notes that:

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57 Langa J in S v Makwanyane and Another 1995 (3) SA 391 (CC) para 222

58 Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) at fn 30 and para 105

59 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19 ("General

> *"The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies."*[60]

50. General Comment 19 explains that the right to social security entails a requirement of adequacy, which pertains, *inter alia,* to the amount of the benefit.[61] It specifically recognises that violations can occur when the state party fails to ensure the financial sustainability of state pension schemes.[62]

51. General Comment 19 also emphasises the importance of giving effect to the right to social security for the protection of the right to human dignity.[63] It observes that, in respect of retrogressive measures taken in relation to the right to social security, a weighty onus rests on the state to justify the measure. It states:

Comment 19"). At: http://www.refworld.org/docid/47b17b5b39c.html (accessed 4 September 2017).

The CESCR adopts General Comments to provide authoritative guidance on the provisions of the ICESCR. South Africa signed the ICESCR on 3 Oct 1994 and ratified it on 12 January 2015. The General Comments are based upon the Committee's review of reports from state parties, as well as resolutions, documentation and reports from various UN bodies.

This Court has had regard to these General Comments in interpreting socio-economic rights in the Bill of Rights and legislation. See: Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) at para 40 and fn 31; Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 45.

60 General Comment 19 at para 9

61 General Comment 19 at para 27

62 General Comment 19 at para 65

63 General Comment 19 at para 22

"The Committee acknowledges that the realization of the right to social security carries significant financial implications for states parties, but notes that the fundamental importance of social security for human dignity and the legal recognition of this right by states parties mean that the right should be given appropriate priority in law and policy. States parties should develop a national strategy for the full implementation of the right to social security, and should allocate adequate fiscal and other resources at the national level...

There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the state party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the state party."

52. The CESCR lists the considerations that should inform a determination of whether any retrogressive social security measures are justified. These include: whether there was reasonable justification for the action; whether alternatives were comprehensively examined; whether there was genuine participation of affected groups in examining the proposed measures and alternatives; whether the measures will have a sustained impact on the realisation of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to

the minimum essential level of social security; and whether there was an independent review of the measures at the national level.[64]

53. Transnet and the Funds' failure to honour the Fund members' promised pension benefits constitutes a clear violation of the right to social security. It constitutes a retrogressive measure, as the actual value of the pension benefits the Funds' members received has decreased as a result of this failure. A "weighty onus" rests on the state to justify such a violation.

The protection of reasonable pension benefit expectations

54. That the applicants' claim is a cognisable one in public law is fortified, we submit, by the recognition – in South Africa and in comparative jurisdictions – that the legitimate expectation of pension benefits requires special protection.

55. In South Africa, this principle is evidenced in the Pension Funds Act 24 of 1956, which specifically protects the "reasonable benefits expectations" of members – under sections 14(1)(c)(i), 15B(9)(h), 15I(a), 15K(6C)(d), 28(4)(b)(i) and 29(6A). Pension funds legislation in comparative jurisdictions also recognise legitimate pension fund expectations.[65]

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64 General Comment 19 at para 42

65 For instance: The United States' Employee Retirement Income Security Act of 1974, requires that actuarial assumptions must take into account reasonable expectations (ss 103(4)(B); 303(h)(1)(A); 304(3)(A); 306(3)(A); and 4213(1)). The Canadian Pension Benefits Standards Act, 2012 provides in s 60(2) that pension plan assets must be invested in a manner that is reasonable without undue risk of loss, and with a reasonable expectation of a return on the investments commensurate with the risk. In Australia, the Superannuation Industry (Supervision) Act 1993 (Cth) defines a "prudential matter" that is subject to the jurisdiction and standards set by the Australian Prudential Regulation Authority to include the conduct or affairs of a registrable superannuation entity ("RSE") or a connected entity in such a way as to protect

56. In the United Kingdom, the courts have held that a special duty of good faith enures to members and beneficiaries of pension funds as against their employers. In *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*[66], Browne-Wilkinson V-C first recognised the obligation of good faith in the pensions context, and held that a claim for breach of this obligation need not be founded "in contract alone". For, he said, *"Construed against the background of the contract of employment, ... the pension trust deed and rules themselves are to be taken as being impliedly subject to the limitation that the rights and powers of the company can only be exercised in accordance with the implied obligation of good faith."*[67]

57. The duty of good faith – or "the *Imperial* duty" as it has come to be known – has been recognised and applied by English courts in numerous cases since.[68] Moreover, the duty was recognised and endorsed by the Supreme Court of Appeal in *TEK Corporaton Provident Fund v Lorentz*,[69] where Marais JA held (with reference to the English decision) that *"The employer...owes at least a duty of good faith to the fund and its members and beneficiaries"*.

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the interests of the beneficiaries of the RSE or to "*meet the reasonable expectations of the beneficiaries of the registrable superannuation entity*" (s 34C(4)).

66 Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589

67 Id at 597-598

68 See, most recently, IBM United Kingdom Holdings Ltd, IBM United Kingdom Ltd v Stuart Dalgleish, Lizanne Harrison, IBM United Kingdom Pensions Trust Ltd [2017] EWCA Civ 1212 at paras 27-46. See also, Prudential Staff Pensions Ltd v The Prudential Assurance Co Ltd [2011] EWHC 960 (Ch) at paras 140-150.

69 TEK Corporation Provident Fund and Other v Lorentz 1999 (4) SA 884 (SCA) at para 15.

The High Court's ratio

58. The High Court upheld an exception to this claim in paragraphs 29 to 42 of its judgment.[70] The ratio of its finding appears from paragraphs 36 to 40. It held that the applicants' claim is in truth "*founded on administrative decision or action by an organ of state, without pleading their entitlement to rely on PAJA*".[71] It concluded that the applicants are attempting to circumvent PAJA, which they may not do.[72] The High Court derived support for its conclusion from paragraph 31 of this Court's judgment in *KZN*.[73] We submit for the following reasons however that the High Court was mistaken.

59. We shall assume, for purposes of this debate, that the respondents' conduct on which the applicants rely, constitutes administrative action. On this assumption, their unlawful administrative action recurs every year when they break the promise again and again by increasing pensions by only 2% and not in accordance with their promise. Their recurring unlawful administrative action, in breach of their promise, may indeed give rise to a cause or causes of action under PAJA.

60. But that is not the cause of action on which the applicants rely. Their cause of action is not based on a breach of the right to just administrative action in terms of s 33 of the Constitution read with PAJA. Their claim is based on far more

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70 High Court Judgment p 130 paras 29 to 42

71 High Court Judgment p 132 para 36

72 High Court Judgment p 133 paras 38 to 40

73 High Court Judgment p 132 para 33 and p 135 para 41

fundamental misconduct by the state in that it acted and continues to act in a manner that is unconscionable when measured against the constitutional standards of reliance, accountability and rationality. Because the applicants do not base their claim on the right to just administrative action, their claim is not subject to PAJA at all.

61. The applicants' claim is, on this issue, on all fours with the claims of the independent schools this court upheld in *KZN*. The conduct of the KZN Department of Education, in first promising certain subsidies and then reneging on its promise, also constituted administrative action. The independent schools however did not sue under PAJA. Despite the fact that they had avowedly not proceeded under PAJA, this court upheld their claim precisely because it was not one based on the right to unjust administrative action.

62. The High Court invoked the following statement in paragraph 31 of this court's judgment in *KZN*:

> *"If enforcement is sought on the basis of administrative action, the proceedings should have been instituted under the Promotion of Administrative Justice Act (PAJA), in the form of a review, and (subject to condonation) within the 180-day period PAJA allows."*[74]

63. The High Court, with respect, misunderstood this paragraph. This court said no more than that, if an applicant bases its claim on a breach of the right to just

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74 KZN para 31 cited in the High Court judgment at p 132 in para 33

administrative action, then it is obliged to proceed under PAJA. It did not say, and could not sensibly have said, that any cause of action must be brought under PAJA if the unlawful conduct upon which it is based, happens to constitute administrative action. A claim based on other breaches of the Constitution, for instance for unfair discrimination or unlawful invasion of privacy, do not become subject to PAJA merely because the defendant's unlawful conduct also constitutes administrative action.

64. In *KZN*, it was precisely because the independent schools did not proceed under PAJA for a breach of their right to just administrative action, that this court commenced its enquiry in paragraph 35 by asking, "*On what basis can the applicant claim enforcement of the undertaking?*". It ultimately answered the question by its finding that the independent schools could enforce the promise because the Department's failure to keep it was, in the circumstances, legally and constitutionally unconscionable.

Conclusion

65. We submit with respect that the High Court erred in upholding the exception to this claim on the basis that it should have been brought under PAJA. The claim is squarely based on the principle this court recognised in *KZN* that a promise by the state, to make a payment, is enforceable if it would be legally and constitutionally unconscionable for the state to renege on its promise.

66. We accept that the contours and scope of the principle, upheld in *KZN*, have not yet been fully developed. It is for that reason unwise and inappropriate to

determine this matter on exception. This court held in *H v Fetal Assessment Centre* that it is normally better not to decide matters of this kind on exception:

> *"In Carmichele this court held that, as in some cases on exception, it was also better not to decide issues about the development of the common law by an order granting absolution from the instance at the end of a plaintiff's case in a trial:*
>
> > *"There may be cases where there is clearly no merit in the submission that the common law should be developed to provide relief to the plaintiff. In such circumstances absolution should be granted. But where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial Judge has to refuse absolution. If this is done, the facts on which the decision has to be made can be determined after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors".*[75]

67. We accordingly submit that the High Court ought to have dismissed this exception.

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75 H v Fetal Assessment Centre 2015 (2) SA 193 (CC) paras 11-12, citing Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)

AN UNFAIR LABOUR PRACTICE

68. This cause of action arises from the same facts as the unlawful state conduct claim. The applicants contend that Transnet's failure to cause the Funds to keep the promise, and their failure to keep it, constitute an unfair labour practice in breach of s 23(1) of the Constitution.[76]

69. The High Court held that, for reliance on s 23(1) of the Constitution, "*it must be pleaded that there was and that there is still a relationship between the employer and employee*".[77] We submit that this is an overly narrow and restrictive interpretation of the right protected under s 23(1) of the Constitution and of the applicants' pleadings.

70. Under s 23(1) "*everyone*" has the right to fair labour practices. This right is not limited to current "employees". It must be interpreted generously and purposively. Properly interpreted, the constitutional right protects persons from unfair practices that have their origins in an employer-employee relationship – whether or not the employment relationship persists at the time the claim is made. Were it otherwise, any employer could avoid s 23(1) by simply terminating the employment relationship. This court has already held that what is fair depends on the factual circumstances and involves a value judgment.[78]

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76 Particulars of Claim p 76 para 23 read with para 22

77 High Court judgment p 137 para 47.

78 National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others 2003 (3) SA 1 (CC) at para 33

The restrictive interpretation given by the High Court is inconsistent the purposive and context-sensitive approach required.

71. The Labour Relations Act 66 of 1995 (LRA) recognises that unfair labour practices may be perpetrated beyond the termination of employment. For instance, s 186(2)(c) of the LRA provides that a failure or refusal by an employer to reinstate or re-employ a former employee, in terms of an agreement, constitutes an unfair labour practice. While s 186(2) provides that an unfair labour practice "*means any act of omission that arises between an employer and an employee...*", the Labour Court has found that, what is important, is that the dispute pertains to events that transpired during the employee's employment.[79] This is consistent with a purposive and generous approach.

72. Similarly, the Labour Appeal Court has found that "unfair labour practices" extend to employers' practices that impact on post-employment benefits, including retirement schemes.[80]

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79 Malope v Crest Chemicals (Pty) Ltd (JS286/15) [2017] ZALCJHB 181 (20 February 2017) at para 5 – 6, Van Niekerk J held that:

"...It may well be that in a literal sense, a person whose employment is terminated on account of retirement is not a person who continues to work and who receives or remains entitled to receive remuneration. A literal interpretation of the definition, is contended for by the respondent, is at variance with an interpretation that promotes constitutional values and in particular, the right to equality in employment and the right to fair labour practices (see, for example Wyeth SA (Pty) Ltd v Mangele [2003] 7 BLLR 734 (LAC)). It is not in dispute that the applicant was an employee during the period to which his equal pay claim relates. The fact that he was no longer an employee at the time the claim was referred, in my view, is not fatal. What matters is that he was employed by the respondent for the period during which he contends that other employees, similarly situated, were paid a premium solely on account of their race."

80 Apollo Tyres South Africa (Pty) Ltd v CCMA [2013] 5 BLLR 434 (LAC)

73. There is no good reason to exclude from the ambit of s 23(1), the conduct of an employer who persuades its employees to remain with it by promising them attractive pensions after retirement and then reneges on the promise once they have retired. This is manifestly an unfair labour practice.

73.1. The Labour Appeal Court has followed the English courts in recognising that it is an implied term of an employment contract that an employer owes his or her employees "a duty of trust and confidence".[81] For an employer to renege on promised pension benefits is a clear breach of the employer's duty of trust and confidence.

73.2. Moreoever, in *Protekon*, the Labour Court accepted that a contractual term imposing a duty on the employer to act fairly "will readily be implied in the context of employment benefits", which include pension benefits.[82]

74. The Funds argue that the unfair labour practice claim is bad in law as against the Funds because they were employees of Transnet and its predecessor and were never in an employment relationship with the Funds and their predecessors.[83] It is of course correct that the plaintiff class members were employees of SATS and Transnet and not their pension funds. But, as is plain from the particulars of claim, the pension funds always acted in concert with

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81 South African Revenue Service v CCMA and Another (2016) 37 IJ 655 (LAC); [2016] 3 BLLR 297 (LAC) para 25.

82 Protekon (Pty) Ltd v CCMA (2005) 26 ILJ 1105 (LC) paras 20 and 38, citing TEK Corporation Provident Fund and Other v Lorentz 1999 (4) SA 884 (SCA)

83 Funds' AA p 156 paras 51 to 54

SATS and Transnet in their interaction with their employees.[84] The unfair labour practice was perpetrated by Transnet acting in concert with the Funds. They were complicit in its unfair labour practice, and together they violated the class members' right to fair labour practices in terms of s 23(1) of the Constitution.

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84 Specifically, the Particulars of Claim make clear at paragraphs 17, 18, 21.2, 22.1 – 22.3 that SATS, the White Fund and the Black Fund made the promise to the plaintiff class members to persuade them to remain in Transnet's employ. Transnet and the Funds together kept the promise until 2002. They thus persuaded the class members to remain in Transnet's employ. They together created the legitimate expectation that they would continue to honour the promise. Their joint promise and its implementation caused the class members to organise their lives and arrange their affairs on the assumption that Transnet and the Funds would keep the promise. Transnet and the Funds jointly reneged on the promise and thus caused Transnet's employees and former employees to suffer untold hardship.

CONCLUSION

75. The applicants also appeal against the High Court's costs orders:

75.1. The High Court should have dismissed all the exceptions and should accordingly have ordered the respondents to pay the applicants' costs including the costs of three counsel.

75.2. The High Court dismissed the applicants' application for leave to appeal to the SCA with costs including the costs of two counsel.[85] We submit that the High Court erred for two reasons. It ought to have granted leave to appeal and ordered that the costs of the application be costs in the appeal. Even if it correctly dismissed the application for leave to appeal, the High Court should not have ordered costs against the applicants in accordance with the *Biowatch* principle[86] particularly as the applicants represent a very large class of indigent pensioners.

76. The applicants ask for the following orders:

76.1. The applicants are granted leave to appeal.

76.2. The appeal is upheld with costs including the costs of three counsel.

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85 High Court Judgment on Leave to Appeal p 165 para 10

86 Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC) paras 21-25

76.3. The High Court's main orders are replaced with the following order:

> "*The defendants' exceptions are dismissed with costs including the costs of three counsel.*"

76.4. The High Court's order for costs, in the applicants' application for leave to appeal, is replaced with an order that the costs of the application, including the costs of three counsel, be costs in the appeal to the Constitutional Court.

W Trengove SC

J Bleazard

L Zikalala

Applicants' counsel

Chambers, Johannesburg

20 September 2017

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT95/17

In the matter between:

JOHAN PIETER HENDRIK PRETORIUS	First Applicant
MONTANA DAVID KWAPA	Second Applicant

and

TRANSPORT PENSION FUND	First Respondent
TRANSNET SECOND DEFINED BENEFIT FUND	Second Respondent
TRANSNET LIMITED	Third Respondent

HEADS OF ARGUMENT OF THE FIRST AND SECOND RESPONDENTS IN THE APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INTRODUCTION

1. We shall refer to the parties as they are cited in the action.

2. The plaintiffs sue the first and second defendants (collectively, "*the Funds*") and the third defendant ("*Transnet*") for orders:

   - directing them to increase the pensions of all the Funds' members by an annual rate of not less than 70% of the rate of inflation with effect from 2003 ("*the Promise Claim*");

   - directing Transnet to pay the Funds an amount of R17.1806 billion; and

   - declaring that the first defendant unlawfully donated an amount of R309 121 000 to Transnet and ordering Transnet to repay that amount.

3. The Funds objected to the particulars of claim.[1] The plaintiffs amended their particulars of claim in order to cure some, but not all, of the Funds' objections. The Funds then excepted to the amended particulars of claim.

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1 Notice in terms of Rule 30 and Rule 23(1): volume 2 page 111 to 119

4. The High Court upheld three of the Funds' exceptions, namely:

   - the vague and embarrassing exception to the Promise Claim based on the failure to plead the terms of the contract;[2]

   - the exception to the Promise Claim based on "*unlawful state conduct*";[3] and

   - the exception to the Promise Claim based on an "*unfair labour practice*".[4]

5. The plaintiffs were refused leave to appeal against the upholding of these exceptions by the High Court[5] and by the Supreme Court of Appeal. [6] Their application for re-consideration of the application for leave to appeal was also dismissed by the President of the Supreme Court of Appeal.[7] The plaintiffs now apply for leave to appeal to this Court.

6. The Funds oppose the application for leave to appeal.

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2 Judgment para 54.1.1: volume 2 page 158

3 Judgment para 54.1.2: volume 2 page 158

4 Judgment para 54.1.3: volume 2 pages 159

5 Order: volume 2 pages 161-162

6 SCA order: volume 2 page 171

7 Order: volume 2 page 176

7. For the reasons that follow, we submit that the High Court correctly upheld all three exceptions. We shall consider each of them in turn. in the light of the general principles applicable to exceptions and irregular pleadings as set out in pages 8 to 13 of the Funds' heads of argument filed on 22 September 2017 in the cross-appeal.

THE TERMS OF THE CONTRACT

8. The particulars of claim allege that the promise "*was an offer to contract duly made by and on behalf of SATS, the White Fund and the Black Fund*",[8] which was tacitly accepted by "*all the employees and pensioners of SATS, the White Fund and the Black Fund*",[9] and which thus created a "*contractual duty*" that Transnet and the Funds "*inherited*".[10] The failure of Transnet and the Funds to adhere to the promise was, according to the particulars of claim, a breach of contract.[11]

9. The Funds excepted to this claim on the basis that it did not plead the terms of the contract with sufficient particularity and was consequently vague and embarrassing.[12] That is because the particulars of claim did not aver:

   9.1. who would decide the rate at which pensions would increase;

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8 Amended particulars of claim: volume 1 page 75 para 21.1

9 Amended particulars of claim: volume 1 page 75 para 21.2

10 Amended particulars of claim: volume 1 page 75 paras 21.3 and 21.4

11 Amended particulars of claim: volume 1 page 75 para 21.5

12 Notice in terms of Rule 30 and Rule 23(1): volume 2 page 113 para 4

9.2. when such a decision would be made and when the pensions would be increased;

9.3. what particular obligations Transnet and the Funds owed one another and the employees and members;

9.4. whether those obligations were owed to all employees and members over time, or only to those who were employees and members at the time that the alleged promise was made;

9.5. what the concomitant obligations of the plaintiffs were under the alleged contract;

9.6. how long the alleged contract was to endure; or

9.7. the basis on which the alleged contract could be terminated.[13]

10. The High Court upheld the objection. It found as follows:

> *"In paragraph 21 of the Funds' written heads, a complaint is raised as follows, as is the case in their grounds of objection:*
>
> > *'21. Moreover, the amended particulars of claim do not identify the other terms of the promise. For example, the amended particulars of claim do not allege:*

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[13] Notice in terms of Rule 30 and Rule 23(1): volume 2 page 113 para 4

21.1 Who would decide the rate at which pensions would increase?

21.2 When would such a decision be made and when would the pensions be increased?

21.3 For what period of time would the promise endure?

21.4 Was the promise made in perpetuity? If so, was the promise capable of termination and on what basis?'

There seems to be merit in the complaint raised in 21.1 to 21.4 of the written heads quoted above. Failure to state the period within which the promise will endure is a material omission. For example, when would the members of the Funds be entitled to such pension increase of at least 70% of inflation? Which members of the Funds were or are entitled to receive such benefits? Is it every member of the Funds entitled to enforce the promise irrespective of when each became a member? And if so, the facts upon which it is so alleged. The questions are not exhaustive. Anything short of this, in my view, would be lacking in particularities and would be vague and embarrassing."[14]

This Court does not have jurisdiction to hear the appeal against the vague and embarrassing decision on the terms of the contract

11. The plaintiffs seek leave to appeal against the decision of the High Court holding that the pleadings relating to the alleged contract were

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14 Judgment: volume 2 page 149 paras 23 and 24 (our underlining)

vague and embarrassing. They do not, however, suggest why this Court has jurisdiction to entertain their proposed appeal.

12. The question whether particulars of claim alleging a breach of contract are vague and embarrassing is not a constitutional matter. Nor does the judgment of the High Court in relation to the vague and embarrassing contract exception turn on any point of law of general public importance which ought to be considered by this Court.

13. Accordingly, this Court does not have jurisdiction to entertain the plaintiffs' application for leave to appeal against the judgment of the High Court in this respect.

It is not in the interests of justice to entertain the proposed vague and embarrassing appeal

14. Even if this Court were to find that it did have jurisdiction to hear the application for leave to appeal against the "vague and embarrassing" exception, that application for leave would have to be dismissed summarily on the basis that it cannot be in the interests of justice to allow a litigant leave to appeal to this Court against a finding that its pleadings are vague and embarrassing.

15. Prior to the enactment of the Constitution, it was settled law that no appeal lay against the upholding of an exception that a pleading was vague and embarrassing.[15] The "interests of justice" test for appealability enshrined in the Constitution does not now render the "vague and embarrassing" decisions of the High Court appealable. This Court has repeatedly emphasized that *"it will not often be in the interests of justice for this court to entertain appeals against interlocutory rulings which do not have a final effect on the dispute between the parties."*[16] In circumstances like those of the present case, where the plaintiffs have been given leave to amend their particulars of claim and can cure the pleading problem with an amendment to provide the necessary clarification, it is simply a waste of the valuable time of this Court to require it to consider whether or not the pleadings in their existing form are sufficiently clear to avoid the vague and embarrassing complaint.

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15 See for example *Trope v SA Reserve Bank* 1993 (3) SA 264 (A) and *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A)

16 See for example *International Trade Administration Commission v SCAW South Africa* (Pty) Ltd 2012 (4) SA 618 (CC) at para 19 and *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at para 7.

16. So this Court will reach the merits of the decision of the High Court to uphold the vague and embarrassing exception only if it concludes that it has jurisdiction to do so and that it is in the interests of justice to do so.

The vague and embarrassing complaint and the plaintiffs' approach in this Court

17. The plaintiffs appear to misconstrue the width of the High Court's findings in relation to the vague and embarrassing complaint about the terms of the contract. They suggest that the High Court merely held that they were required to plead the period for which the promise endured, the members who were entitled to the pension benefits promised and the members who are entitled to enforce the promise.[17] But the judgment requires more than that. The plaintiffs have thus not made submissions on the full scope of the findings and order against them.

18. The plaintiffs argue that their particulars of claim are sufficient because, under Rule 18(4), "*a plaintiff who claims on contract, need*

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17 Plaintiffs' written submissions para 21 page 12

only plead the terms on which he or she relies".[18] That requirement is satisfied, they say, because they have pleaded the express terms of the promise and all the terms on which they base their claim,[19] and it is possible to deduce from the particulars of claim that:

- the promise "*was open-ended and endures indefinitely as a matter of law*";[20] and

- all the employees of SATS and the members of the White and Black Funds were contractually entitled to the benefits promised, and they are consequently the claimants entitled to seek enforcement of the contract.[21]

19. We submit, with respect, that the plaintiffs misconstrue the standard to which their pleadings must be held. It is not sufficient that they merely plead the material facts on which <u>they</u> rely for their claim. Rule 18(4) provides that they must do so with *"sufficient particularity to enable the opposite party to reply thereto."*

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18 Plaintiffs' written submissions para 22 page 12

19 Plaintiffs' written submissions para 23.4 page 12

20 Plaintiffs' written submissions para 24.1 page 14

21 Plaintiffs' written submissions paras 14.2 and 14.3 page 14

20. The reasons underpinning the particularity requirement have been repeatedly emphasised by the courts. As the SCA has held, *"the purpose of the pleadings is to define the issues for the other party and the court."*[22] In *Imprefmed (Pty) Ltd v National Transport Commission,*[23] the SCA explained the principle as follows:

> *"At the outset it need hardly be stressed that:*
>
> > *'The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed.'*
> >
> > *(Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) 1082.)*
>
> *This fundamental principle is similarly stressed in Odgers' "Principles of Pleading and Practice in Civil Actions in the High Court of Justice" (22nd ed) 113: 'The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.'*
>
> *The degree of precision obviously depends on the circumstances of each case. More is required when claims are based upon the provisions of a detailed and complex contract, in which numerous clauses confer the right to additional payment in differing circumstances-a contract, moreover, in which such payments are to be determined,*

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22 *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para 11

23 1993 (3) SA 94 (A) at 107E; [1993] 2 All SA 179 (A) pp 188 to 189

calculated and claimed in different ways depending on which clause is relied upon."

21. It is therefore incorrect for the plaintiffs to state that they need only plead the material facts on which they rely. They must plead all the relevant facts in sufficient detail to enable the defendants properly to prepare for trial. What that requires, will depend on the facts of each case.

22. We submit that the particulars of claim do not meet this standard for the reasons that follow.

The vague and embarrassing complaint and the period of the promise

23. The particulars of claim do not allege the period for which the promise was to endure or the terms on which it could be terminated. The particulars of claim are required to make these allegations in order to inform the defendants of the plaintiffs' case as to why the promise endures in the face of (*a*) the termination of the Black and White Funds, (*b*) the establishment of the current Funds and (*c*) the adoption of Rules and a regulatory regime that is at odds with the terms of the promise.

24. In their founding affidavit seeking leave to appeal[24] and in their written submissions,[25] the plaintiffs say that paragraph 14 of the particulars of claim pleads "*an open-ended promise that Transnet and the pension funds 'would continue to increase their pensions as before'.*" According to them, this makes it clear that the promise is alleged to endure indefinitely.

25. But the wording of paragraph 14 does not support this interpretation. It states as follows:

> *"In the run-up to the establishment of Transnet, SATS, the White Fund and the Black Fund made a promise to all their employees and members that the funds would continue to increase their pensions as before, that is, at a rate of at least 70% of the rate of inflation."*

26. The words *"as before"* refer to the rate of the promised increase; they do not refer to the duration of the promise. If the words *"as before"* referred to the duration of the promise, the clarification at the end of the sentence would be meaningless.

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24 Founding affidavit: volume 3 page 195 para 51.1

25 Plaintiffs' written submissions para 24.1 page 14

27. Paragraph 14 of the particulars of claim therefore says nothing about the duration of the promise. If the plaintiffs' case is that the promise endures in perpetuity and cannot be terminated on notice (as they now say on affidavit),[26] then it should be a simple matter for them to allege as much in their particulars of claim. That would enable the Funds to advance a case that such a promise is unlawful and unenforceable. Unless such specificity is included in the particulars of claim, the Funds are prejudiced in their ability to plead thereto.

The vague and embarrassing complaint and members who joined the Funds after the promise was made

28. The particulars of claim allege that the promise was made by SATS, the White Fund and the Black Fund "*to all their employees and members*".[27] The particulars of claim go on to allege that "*all the employees and pensioners of SATS, the White Fund and the Black Fund tacitly accepted the promise by remaining employees and pensioners of SATS, the White Fund and the Black Fund without demur*".[28]

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26 First and second respondents' answering affidavit: volume 3 pages 220 – 221 paras 30 - 32

27 Amended particulars of claim: volume 1 page 73 para 14

28 Amended particulars of claim: volume 1 page 75 para 21.2

29. The pleaded case is therefore that the promise was made to, and was accepted by, all persons who were employees and members at the time when the promise was made in 1989. Those persons are alleged to have accepted the promise "*by remaining employees and pensioners*" after the promise was made.

30. However, the Promise Claim is pursued on behalf of a class comprising all of the Funds' members who have not opted out of the class action.[29] When the class action was certified, the plaintiffs were granted leave to act "*as representatives of all the members of [the Funds]*".[30] The class includes persons who became employees and members after the promise was made in 1989. Relief is sought on behalf of all members for an increase in their pension benefits with effect from 2003, and on behalf of all pensioners for payment of arrear increases.[31]

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29 Amended particulars of claim: volume 1 page 70 paras 1 and 2. see also the First and Second respondents' answering affidavit: volume 3 pages 219 – 220 paras 22 - 26

30 *Pretorius v Transnet Second Defined Benefit Fund* 2014 (6) SA 77 (GP) paras 51.2 and 51.3

31 Amended particulars of claim: volume 1 page 77 paras 24.2.1 and 24.2.2

31. The particulars of claim lack allegations necessary to sustain the conclusion that persons who became employees and members after the promise was made in 1989, are entitled to enforce the promise. Those persons could not have "*accepted the promise by remaining employees and pensioners of SATS, the White Fund and the Black Fund*"[32] because they were not employees or pensioners at the moment when the promise was made. The particulars of claim therefore lack allegations necessary to sustain the cause of action advanced in relation to those persons.

32. The plaintiff's response is that *"[t]he promise was made to all the employees of SATS and all the members of the funds (paragraphs 14 and 16). It was tacitly accepted by all employees of SATS and all members of the funds (paragraph 21.2). They are thus the people contractually entitled to the promised benefit. They are for the same reason the people contractually entitled to enforce the promise."*[33]

33. But this response is not aligned with the pleadings. The particulars of claim allege that the promise was made to, and accepted by, the

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32 Amended particulars of claim: volume 1 page 75 para 21.2

33 Founding affidavit: volume 3 page 195 paras 51.2 and 51.3; Plaintiffs' written submissions paras 24.2 and 24.3

employees of SATS and the members of the White and Black Funds at the time. No basis is laid for allowing persons who became employees of Transnet and members of the Funds after that time to enforce the promise.

The vague and embarrassing complaint and determination of annual increases to pensions

34. The particulars of claim allege that SATS, the White Fund and the Black Fund "*made a promise ... that the funds would continue to increase their pensions as before, that is at a rate of at least 70% of the rate of inflation*".[34] The particulars of claim do not indicate who would decide the rate at which pensions would increase each year and when such a decision would be made.

35. These allegations must be pleaded because the plaintiffs seek to make out a case that situates them outside of the regime contained in the regulations governing the White and Black Funds, and the rules governing the current Funds. As we explain in our written submissions in respect of the cross-appeal,[35] the governing regime provides for annual pension increases of 2% and for any change in

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34 Amended particulars of claim: volume 1 page 73 para 14

35 See Funds' written submissions paras 24 to 42

that rate to be enacted through regulation by particular functionaries. Since the plaintiffs' case is that this regime did not apply, their particulars of claim must identify who was responsible for determining the rate of increase and when that would occur.

Conclusion

36. For the reasons set out above, we submit that

36.1. This Court does not have jurisdiction to entertain the plaintiffs proposed appeal against this aspect of the High Court judgment, and

36.2. Even if this Court had such jurisdiction, it would not be in the interests of justice for it to exercise that jurisdiction.

36.3. In any event, the High Court correctly upheld the Funds' exception to the Promise Claim based on breach of contract.

UNLAWFUL STATE CONDUCT

37. The unlawful state conduct complaint is pleaded in the following terms:

    37.1. By making the promise and keeping it for more than a decade, the defendants created a legitimate expectation on the part of the plaintiffs that they would keep the promise.[36]

    37.2. The plaintiffs organised their lives and arranged their affairs on the assumption that the defendants would keep the promise.[37]

    37.3. As a result of the defendants' failure to keep the promise, the plaintiffs have suffered untold hardship.[38]

    37.4. Transnet's failure to cause the Funds to keep the promise, and the Funds' failure to keep the promise, are unlawful at public law because:[39]

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36 Amended particulars of claim: volume 1 pages 75-76 para 22.1

37 Amended particulars of claim: volume 1 page 76 para 22.2

38 Amended particulars of claim: volume 1 page 76 para 22.3

39 Amended particulars of claim: volume 1 page 76 para 22.4

- "*their conduct is legally and constitutionally unconscionable when tested against the constitutional standards or reliance, accountability and rationality*";
- they impair the plaintiffs' rights "*of access to social security in terms of s 27(1)(c) of the Constitution*"; and
- "*they fail to give effect to the legitimate pension benefit expectations they created*".

38. The Funds excepted to this claim on the basis that it is not clear whether the alleged "*state action*" constitutes administrative action or some other exercise of public power and that, in either event, the particulars of claim lack allegations necessary to sustain the cause of action.[40]

39. The High Court upheld the complaint. It held as follows:

    39.1. The cause of action recognised in *KZN Joint Liaison Committee v MEC for Education Committee*[41] ("*KZN JLC*") was not available to the plaintiffs because:

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40 Notice in terms of Rule 30 and Rule 23(1): volume 2 pages 115 to 117 paras 7 to 12

41 2013 (4) SA 262 (CC)

> *"the plaintiffs' case on the promise is founded on administrative decision or action by an organ of state, without pleading their entitlement to rely on PAJA."*[42]
>
> *"So, the provisions of PAJA must be found to be applicable to the present proceedings. Attempts to bypass the provision of PAJA by pleading or contenting that the failure to keep the promise is 'unlawful at public law' because the Funds' conduct 'is legally and constitutionally unconscionable when tested against the constitutional standards of reliance, accountability and rationality', and that they 'impair the right of the members of the Funds of access to social security in terms of section 27(1)(c) of the Constitution and fail to give effect to the legitimate pension benefit expectations they created', fly in the face of what Ngcobo J sought to discourage."*[43]

39.2. The particulars of claim did not adequately plead a claim based on administrative action since *"if enforcement is brought on the basis of administrative action, the proceedings should have been instituted under the Promotion of Administrative Justice Act (PAJA), in the form of a review, and (subject to condonation) within the 180-day period PAJA allows. None of this was done."*[44]

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42 Judgment: volume 2 page 152 para 36

43 Judgment: volume 2 page 153-4 para 38

44 At para 31, see judgment: volume 2 pages 151-152 para 33

39.3. Relying on the judgment of this Court in *New Clicks*,[45] the High Court found that it was impermissible for the plaintiffs to bypass PAJA to advance a claim of unfair administrative action.[46]

The plaintiffs' approach in this Court

40. In this Court, the plaintiffs disavow any reliance on PAJA. They say that their claim for unlawful state conduct "*is based on the principle this Court recognised in the KZN case . . . that a promise by the state, to make a payment, is enforceable against the state if it would be legally and constitutionally unconscionable for the state to renege on the promise*".[47] They submit that they are entitled to elect to pursue that cause of action instead of one based in PAJA,[48] and that the elements of that claim are adequately pleaded. They argue that the claim is fortified by "*the impact of the decision on the Funds' members' rights to social security under section 27(1)(c) of the*

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45 *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as Amici Curiae)* 2006 (2) SA 311 (CC)

46 At para 437, see judgment: volume 2 page 153 para 37

47 Plaintiffs' written submissions para 26

48 Plaintiffs' written submissions para 60

Constitution"[49] and by "*the recognition . . . that the legitimate expectation of pension benefits requires special protection*".[50]

41. We submit that this answer does not overcome the Funds' complaints for three reasons:

    41.1. First, the approach now adopted by the plaintiffs does not accord with the case pleaded in relation to legitimate expectation.

    41.2. Second, the plaintiffs have misconstrued the cause of action recognised in *KZN JLC* and, as a result, their pleadings do not make out a cause of action under it.

    41.3. Third, section 27(1)(c) of the Constitution as a self-standing cause of action is not an issue in the Funds' exception and the plaintiffs' reliance on section 27(1)(c) does not assist them in building a cause of action based on *KZN JLC*.

42. We elaborate on each of these contentions in turn.

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49 Plaintiffs' written submissions paras 47 to 53

50 Plaintiffs' written submissions paras 54 to 57

The plaintiffs' reliance on a legitimate expectation

43. In their heads of argument, the plaintiffs now confine their cause of action to a claim that it is unlawful for the state to renege on a promise where it is legally and constitutionally unconscionable for it to do so. They say that the reference in the particulars of claim to the plaintiffs' "*legitimate pension benefit expectations*" is intended to do no more than to "*fortify*"[51] their cause of action based on *KZN JLC*. In other words, they say that the reference to legitimate expectation has no independent relevance; it is relevant only for purposes of determining whether the decision to renege from the promise is unconscionable.

44. But that is not the pleaded case. The particulars of claim aver that the defendants "*created the legitimate expectation with their employees and members that they would keep the promise*";[52] that the defendants failed "*to give effect to the legitimate pension benefit*

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51 Plaintiffs' written submissions para 54

52 Amended particulars of claim: volume 1 page 76 para 22.1

expectations they created";[53] and that this was "*unlawful at public law*".[54]

45. On the face of it, this is a claim founded in administrative law:

45.1. The doctrine of legitimate expectation was first incorporated into South African law in a case dealing with the review of an administrative decision, namely *Traub*.[55]

45.2. The Constitution refers to legitimate expectations only in the context of the right to procedurally fair administrative action.[56]

45.3. Legislation refers to legitimate expectations only in the context of provisions dealing with the right to fair administrative action.[57]

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53 Amended particulars of claim: volume 1 page 76 para 22.4.3

54 Amended particulars of claim: volume 1 page 76 para 22.4

55 *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 758C - G

56 See s 23(2)(b) of schedule 6 to the Constitution, dealing with transitional provisions. It provides that until the legislation envisaged by s 33(3) of the Constitution has been enacted, so 33(1) and (2) must be read as entrenching a right to "*procedurally fair administrative action where any . . . rights or legitimate expectations is affected or threatened.*"

57 See, for example, s 3 of the Promotion of Administrative Justice Act 3 of 2000; s 5 of the National Ports Act 12 of 2005; s 14 of the Petroleum Pipelines Act 60 of 2003; s 12 of the Gas Act 48 of 2001; s 96(1) of the Mineral and Petroleum Resources Development Act 28 of 2002

45.4. The SCA has repeatedly characterised the doctrine of legitimate expectation as a feature of administrative law.[58]

45.5. The *KZN JLC* case itself, is authority for the principle that the unlawful state action doctrine applies only to the retroactive withdrawal of a promise and that the prospective withdrawal of benefits can be addressed only with a case based on legitimate expectation and advanced under PAJA.[59]

45.6. When the class action was certified, the High Court understood the plaintiffs' proposed cause of action to be based on a legitimate expectation in administrative law.[60] The High Court was of the view that the question whether South African administrative law has extended the doctrine of legitimate expectation to have substantive effect, "*would*

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58 See, for example, *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) para 24 and *Duncan v Minister of Environmental Affairs and Tourism* 2010 (6) SA 374 (SCA) paras 13-14

59 See *KZN Joint Liaison Committee v MEC for Education, KZN* 2013 4 SA 262 (CC) paras 31-32, 50-53 and 69. Compare the minority judgment of Froneman J on this issue at paras 82-85.

60 *Pretorius v Transnet Second Defined Benefit Fund* 2014 (6) SA 77 (GP) paras 32 to 35

better be argued or deliberated upon more fully at the trial of the action".[61]

46. The plaintiffs are therefore advancing a cause of action based on administrative law when they allege that the failure to keep the promise did not "*give effect to the legitimate pension benefit expectations [the defendants] created*". That cause of action is bad in law:

46.1. Unlawful administrative action can only be challenged through the provisions of PAJA.[62]

46.2. PAJA applies to "*administrative action*" as defined in section 1. It must constitute either (*a*) the decision of an organ of state or (*b*) the decision of a private body exercising a public power or performing a public function. The particulars of claim do not allege that the Funds performed administrative action when they failed to give effect to the "*legitimate pension*

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61 *Pretorius v Transnet Second Defined Benefit Fund* 2014 (6) SA 77 (GP) para 35

62 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 25-27; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), paras 95-97. *KZN Joint Liaison Committee v MEC for Education, KZN* 2013 4 SA 262 (CC) paras 31-32, 50-53

benefit expectations they created".[63] There are, moreover, insufficient facts pleaded to conclude that the Funds' conduct constituted administrative action. The case law suggests that the decisions of a pension fund that has not been established by statute, do not amount to administrative action.[64]

46.3. Section 7 of PAJA requires that review proceedings challenging unlawful administrative action must be instituted not later than 180 days after the decision was taken or the claimant became aware of it, unless this period is extended by agreement or by a court.[65] The particulars of claim do not allege that the parties have agreed to extend the 180-day

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63 Amended particulars of claim: volume 1 page 76 para 22.4.3

64 *Gerson v Mondi Pension Fund and Others* 2013 (6) 162 (GSJ) paras 46-47, relying on *Pennington v Friedgood and Others* 2002 (1) SA 251 (C) paras 40-42. See also *South African Association of Retired Persons and Others v Transnet Limited and Others* [1999] 4 All SA 25 (W) at 52-53. *Government Employees Pension Fund v Buitendag* 2007 (4) SA 2 (SCA), might be read as supporting the proposition that the conduct of the Funds amounted to "administrative action" but it is submitted that Buitendag is clearly distinguishable in that (i) it involved a decision of the Minister of Finance, not an independent board of trustees of a pension fund (see fn 3 of the judgment) and (ii) it dealt with the period prior to the commencement of PAJA (see para 9 of the judgment) and so was not concerned with the definitional questions raised by s 1 of PAJA in relation to the "public" nature of the power or function at issue. In this regard, it is significant that *Buitendag* was decided before *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) which held (at paras 72 to 73 read with paras 142 to 150) that the dismissal of a Transnet employee did not amount to administrative action. See also *Gcaba v Minister for Safety & Security* 2010 (1) SA 238 (CC) at para 64.

65 Section 9(1)(b) and 9(2) of PAJA

period and do not apply for an extension of time. They consequently fail to make necessary averments in order to sustain a cause of action based on PAJA.

46.4. The Courts have accepted that "*[t]he doctrine of legitimate expectation may not be employed so as to place substantive constraints on the power of a lawmaker to enact delegated legislation and in particular could not operate in the present circumstances so as to inhibit the formation of government policy. For good reason the courts are reluctant to fetter governments from implementing changes to policy.*"[66] The amended particulars of claim contain no allegations to support a contention that, notwithstanding the legislative framework governing pension benefit increases and their amendment, a promise made in 1989 to increase pensions annually *"as before"* or *"by a rate of at least 70% of inflation"*

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66 *Durban Add-Ventures Ltd v Premier of the Province of KwaZulu-Natal* 2001 (1) SA 389 (N) at 408, relying on *R v Ministry of Agriculture, Fisheries and Food: Ex Parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714. See also *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 (9) BCLR 891 (CC) para 156, per Mokgoro and Sachs JJ (dissenting, but not on this point).

could be binding in perpetuity as an obligation enforceable in terms of administrative law.[67]

47. The High Court therefore correctly upheld the Funds' exception that the plaintiffs seek to rely on the doctrine of legitimate expectation in circumstances where they have not brought themselves within PAJA.

48. In their heads of argument, the plaintiffs contend that their "*legitimate expectation of pension benefits requires special protection*" outside of the field of administrative law.[68] This contention does not assist them:

48.1. The plaintiffs refer to various sections of the Pension Funds Act 24 of 1956.[69] But those sections are of no assistance because the Funds are not registered in terms of the Pension Funds Act.

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67 See *KZN Joint Liaison Committee v MEC for Education, KZN* 2013 4 SA 262 (CC) at paras 49 and 50.

68 Plaintiffs' written submissions para 54

69 Plaintiffs' written submissions para 55

48.2. The plaintiffs refer to case law in support of the proposition that employers owe a duty of good faith to members of pension funds.[70] Again, that does not assist them to build a cause of action because a duty of good faith is not the same thing as a legitimate expectation.

No cause of action is made out in terms of KZN JLC

49. The particulars of claim lack allegations necessary to sustain a cause of action based on *KZN JLC*. There are two reasons for this.

50. The first reason is that *KZN JLC* recognised a cause of action that renders it unlawful for the State to renege on certain kinds of promises. However, the particulars of claim lack allegations necessary to sustain the conclusion that the conduct of the Funds amounts to "*state action*":

50.1. Although the amended particulars of claim allege that "*the transport enterprise of the state*" was housed in Transnet,[71] they do not allege that the Funds (as opposed to Transnet) perform "*state action*".

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70 Plaintiffs' written submissions paras 56 and 57

71 Amended Particulars of Claim: volume 1 page 71 para 6

50.2. The particulars of claim refer to Transnet's failure to compel the Funds to honour the *"promise"*,[72] but do not allege that Transnet is capable of compelling the Funds to act in any way. Sections 5 and 14B(5) of the Transnet Pension Fund Act make it clear that the Funds are governed in accordance with their respective Rules. The Rules do not vest any powers of control over the Fund in Transnet; they vest control of the Funds in the trustees.

51. The second reason is that the plaintiffs have not brought their case within the cause of action recognised by *KZN JLC*:

51.1. The principle underpinning that judgment is crisply stated in paragraph 52 (our underlining):

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

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72 Amended Particulars of Claim: volume 1 page 76 para 22.4

51.2. *KZN JLC* held that a promise will be enforceable where it relates to payments that have already fallen due. This is evident in all the paragraphs referred to by the plaintiffs in their written submissions:[73]

51.2.1. In paragraph 48 - *"And, once the due date for payment of a portion of the subsidy had passed, this created a legal obligation unilaterally enforceable ..."*

51.2.2. In paragraph 57 - "*When the Department issued its May 2009 letter, it was already obliged, ... to have paid the first term's subsidy as promised in the 2008 notice.*"

51.2.3. In paragraph 62 - "*It cannot be countenanced, legally and constitutionally, that the amount of the subsidy be reduced unilaterally after the date for payment has by regulation already fallen due.*"

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[73] Plaintiffs' written submissions paras 30 to 32

51.2.4. In paragraph 63 (the standard of reliance) - "*The schools budgeted for the whole year in reliance on the 2008 notice. The reduction in subsidy announced in the letter of May 2009 would severely disappoint them. But they could adjust their future outlays. They could not do so in regard to the tranche that had already fallen due.*"

51.2.5. In paragraph 64 (the standard of accountability) – "*It can never be acceptable in a democratic constitutional State for budget cuts to be announced to those whom undertakings have been made after payment has by regulation already fallen due.*"

51.2.6. In paragraph 65 (the standard of rationality) – "*Revoking a promise when the time for its fulfilment has already expired does not constitute rational treatment of those affected by it.*"

51.3. Indeed, the majority in *KZN JLC* found that claims for payment of amounts that had been promised but that had not yet fallen due could only be enforced through the provisions of PAJA under the doctrine of substantive legitimate expectation.[74]

51.4. The phrase *"legally and constitutionally unconscionable"* on which the plaintiffs place heavy reliance, does not form part of the principle established in the *KZN JLC*. The phrase first appears in paragraph 57 of the judgment, where it is stated that *"[i]t seems both legally and constitutionally unconscionable that, more than a month after the first tranche of the promised subsidy had already fallen due under the national Norms and the provincial regulation, the Department should peremptorily reduce it."* The phrase does not establish a principle but is used with reference to the time that had elapsed from the due date of the subsidy when the Department reduced it.

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74 See paras 31 to 33 and 50 of the majority judgment. Compare paras 83-85 of the minority judgment of Froneman J.

52. Confronted with these difficulties, the plaintiffs suggest that *"the contours and scope of the principle upheld by this Court in KZN JLC may have not been fully developed."*[75] The plaintiffs then rely on this Court's decision in *Fetal Assessment Centre*[76] to argue that *"it is for that reason unwise and inappropriate to determine this matter on exception."*[77] We submit that these allegations are unfounded.

53. This Court's reasoning in *KZN JLC* was comprehensive and its ratio is clear. If the plaintiffs wish to rely on *KZN JLC,* they must bring themselves within the four corners of that judgment. There is nothing beyond the judgment that can permissibly be used to "*define the contours*" of the Court's reasoning.

54. If by *"the contours and scope of the principle in KZN JLC not being fully developed"*, the plaintiffs are hinting at the development of the common law, then they must plead the development they contend for. This Court has held that *"there is an obligation on litigants to raise constitutional arguments in litigation at the earliest reasonable*

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75 Founding affidavit: volume 3 page 191 para 40

76 *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at paras 11 and 12

77 Founding affidavit: volume 3 page 191 para 40

opportunity in order to ensure that our jurisprudence under the Constitution develops as reliably and harmoniously as possible."[78]

55. Furthermore, the plaintiffs' reliance on *Fetal Assessment Centre*[79] is misplaced. In *Fetal Assessment Centre* this Court held that

> *"[t]here is no general rule that issues relating to the development of the common law cannot be decided on exception, but where the 'factual situation is complex and the legal position uncertain' it will normally be better not to do so."*[80]

56. To the extent that the plaintiffs plead a cause of action based on *KZN JLC*, there is no development of the common law required (and certainly none is pleaded) and therefore the reasoning relied on in *Fetal Assessment Centre* is not applicable. To the extent that the plaintiffs rely on some principle whose contours are yet to be fully developed, they were required to plead that principle. The courts will then be placed in a position to assess whether the facts pleaded are

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78 *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC) para 41

79 Founding affidavit: volume 3 page 191 para 40

80 At para 12

so complex as to make it inadvisable to decide the development of common law on exception.

57. Put differently, the *Fetal Assessment Centre* judgment will only be applicable if a development of the common law is proposed and if the court decides that the facts informing the proposed development are complex. That is not the case here.

Section 27(1)(c) of the Constitution does not assist the plaintiffs

58. In this Court, the plaintiffs argue for the first time that the constitutional infringement alleged in paragraph 22.4.2 of the particulars of claim[81] is relevant "*in assessing the legality and constitutionality of the respondents' decision to renege on promised pension benefits*".[82] They contend that the failure to honour the promise constitutes a violation of the right to social security because it "*constitutes a retrogressive measure, as the actual value of the pension benefits the Funds' members received has decreased as a result of this failure*".[83]

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81 Volume 1 page 76

82 Plaintiffs' written submissions para 47

83 Plaintiffs' written submissions para 53

59. The particulars of claim apparently rely on a violation of section 27(1)(c) as an independent cause of action rather than in in support of the *KZN JLC* cause of action.[84] That independent cause of action is not challenged in the Funds' notice of exception.[85] It may be good or bad, but that is not an issue that the High Court was called upon to consider. So it was not canvassed at the hearing of the exception or in the High Court judgment and is not an issue which need detain this Court.

60. In so far as the plaintiffs may now seek to rely on section 27(1)(c) of the Constitution as assistance in building a cause of action based on *KZN JLC*, any such reliance is misplaced:

    60.1. First, the *KZN JLC* principle itself, was established in a case where the fundamental right to basic education was at issue.[86] As noted by the majority of this Court in *KZN JLC,* that fundamental right *"is given in unqualified terms and, in contrast to other socio-economic rights in the Bill of Rights, is*

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84 Amended particulars of claim vol 1 p 76 paras 22.4 and 22.4.2.

85 Funds' notice of exception vol 2 pp 115-7 paras 7-12

86 See *KZN Joint Liaison Committee v MEC for Education, KZN* 2013 (4) SA 262 (CC) at paras 14, 20 and 26.

not subject to progressive realisation."[87] The section 27(1)(c) fundamental right now relied upon by the plaintiffs is one of those weaker, qualified socio-economic rights that this Court distinguished in *KZN JLC.*

60.2. Second, the *KZN JLC* case concerned a failure by the State in the form of the provincial government to pay education subsidies to private schools. As we have already submitted, the Funds do not form part of the State. The particulars of claim do not allege any basis on which the Funds are obliged progressively to realise the Section 27(1)(c) right or are precluded from taking retrogressive steps.

61. If the *KZN JLC* principle, with its limitations in relation to State decisions which operate prospectively, emerged in a case which involved clear State action which implicated the unqualified fundamental right to basic education, the plaintiffs cannot overcome those limitations by invoking the qualified section 27(1)(c) right in relation to conduct of the Funds which are not State actors.

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87 *KZN Joint Liaison Committee v MEC for Education, KZN* 2013 (4) SA 262 (CC) at para 38.

Conclusion

62. For all these reasons, we submit that the High Court correctly upheld the Funds' exception to the Promise Claim based on "*unlawful state conduct*".

AN UNFAIR LABOUR PRACTICE

63. The particulars of claim allege that the Funds' failure to keep the promise constitutes *"an unfair labour practice in breach of s 23(1) of the Constitution."*[88]

64. The Funds excepted to this because the particulars of claim do not aver (*a*) that the Funds employed the members, or (*b*) that the Funds' members were in a labour relationship with Transnet at the time the promise was breached. The particulars of claim consequently lack allegations necessary to sustain a cause of action based on an unfair labour practice.[89]

65. The High Court upheld this exception and found that *"for reliance on unfair labour practice, it must be pleaded that there was and that there is still a relationship between the employer and employee."*[90]

66. The plaintiffs criticise the High Court's reasoning on the basis that it is *"an overly narrow and restrictive interpretation of the right*

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88 Amended Particulars of Claim: volume 1 page 76 para 23

89 Notice in terms of Rule 30 and Rule 23(1): volume 2 page 117 paras 13 and 14

90 Judgment: volume 2 page 157 para 47

protected under section 23(1) of the Constitution and of the applicants' pleadings."[91] They submit that:

- *"the claim clearly has its origins in an employer-employee relationship"*;[92]
- *"there is no reason to exclude from its ambit the conduct of an employer who persuades its employees to remain with it by promising them attractive pensions after retirement and then reneges on the promise once they have retired"*;[93] and
- *"the right under s 23(1) of the Constitution extends to erstwhile employees"*.[94]

67. It is unnecessary for the Funds to engage with any of these arguments because, whatever the position may be in relation to Transnet, the particulars of claim do not allege that an employment

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91 Founding affidavit: volume 3 page 192 para 44; plaintiffs' written submissions para 69

92 Founding affidavit: volume 3 page 192 para 45; plaintiffs' written submissions para 70

93 Founding affidavit: volume 3 page 193 para 46; plaintiffs' written submissions para 73

94 Founding affidavit: volume 3 page 193 para 47. See also plaintiffs' written submissions para 72. In support of this, the plaintiffs rely on the decision in *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC).

relationship ever existed between the plaintiffs and the Funds. This excludes the Funds from the purview of the plaintiffs' unfair labour practice claim.

68. In an attempt to meet this problem, the plaintiffs now argue that the Funds *"were complicit in [Transnet's] unfair labour practice, and together [the defendants] violated the class members' right to fair labour practices in terms of section 23(1) of the Constitution."*[95]

69. Where a delictual act is performed by one person, another person may be liable for the delict if it is shown that they "*assisted in any way in the commission of the acts complained of, or that they were done by his command or advice or instigation, or even with his consent*".[96] This principle of delict finds no application in the case of a violation of a constitutional right. But even if the principle does apply, this is not the case pleaded in the particulars of claim. The pleaded case is that "*the promise was the means by which SATS persuaded its employees to remain in its employ after its conversion*

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95 Plaintiffs' written submission para 74

96 *McKenzie v Van der Merwe* 1917 AD 41 at 51. See further *Hamman v Swapo* 1991 (1) SA 127 (SWA) at 138 to 139.

to Transnet",[97] and that Transnet and the Funds have broken the promise since 2003.[98] There is no allegation that the Funds did so at Transnet's bidding, or that the Funds were complicit in any scheme by Transnet.

70. We therefore submit that the High Court correctly upheld the Funds' exception to the Promise Claim based on an unfair labour practice.

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97 Amended particulars of claim: volume 1 page 74 para 17

98 Amended particulars of claim: volume 1 page 75 para 19

RELIEF SOUGHT

71. The Funds ask that the plaintiffs' application for leave to appeal be dismissed, *alternatively* that the plaintiffs' appeal be dismissed. The Funds do not seek a costs order.

72. If this Court were minded to grant the plaintiffs leave to appeal, then we submit that the Funds' cross-appeal should be dealt with at the same time. We have addressed the Funds' cross-appeal in our heads of argument dated 22 September 2017.

MATTHEW CHASKALSON SC

ALFRED COCKRELL SC

ISABEL GOODMAN

NDUMISO LUTHULI

Counsel for the first and second respondents

Chambers
Sandton
6 October 2017

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18.	KZN Joint Liaison Committee v MEC for Education Committee 2013 (4) SA 262 (CC)	20 – 26; 32 - 35
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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT95/17

In the matter between:

JOHAN PIETER HENDRIK PRETORIUS	First Applicant
MONTANA DAVID KWAPA	Second Applicant

and

TRANSPORT PENSION FUND	First Respondent
TRANSNET SECOND DEFINED BENEFIT FUND	Second Respondent
TRANSNET SOC LIMITED	Third Respondent

TRANSNET'S WRITTEN ARGUMENT ON APPLICANTS' APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

1 This application concerns three exceptions that were raised against the applicants' particulars of claim and which were upheld by the High Court.[1]

2 The applicants applied to the High Court for leave to appeal but that application was dismissed with costs including the costs of two counsel for all the respondents.[2]

3 The applicants thereafter applied to the Supreme Court of Appeal ("*the SCA*") for leave to appeal against the High Court decision and the cost orders. The SCA dismissed that application. The applicants then applied under section 17(2)(f) of the Superior Courts Act 10 of 2013 for a reconsideration of their application for leave to appeal. That application, too, was dismissed.

4 In this Court, the applicants seek leave to appeal against paragraphs 54.1.1, 54.1.2, 54.1.3 and 54.5 of the High Court judgment and the costs orders. Transnet in turn seeks conditional leave to cross-appeal the dismissal by the High Court of a number of other exceptions which

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[1] Judgment, Vol 1, p 121

[2] Judgment, application for leave to appeal, Vol 2, p 167

it had taken to the applicants' particulars of claim ("*the conditional application*").

5 On 22 September 2017 Transnet filed written submissions in relation to its conditional application. These submissions, therefore, only address the issues that arise in the applicants' application for leave to appeal.

6 The exceptions that were upheld by the High Court relate to what is described in the applicants' particulars of claim as claim 1 or the 1989 promise. Briefly, the applicants plead that in the run-up to the establishment of Transnet, the South African Transport Services ("*SATS*") and the New Railways and Harbours Superannuation Fund ("*the White Fund*")[3] and the Railways and Harbours Pension Fund for Non-White Employees ("*the Black Fund*")[4] made a promise to all their employees and members that those Funds would continue to increase their pensions at a rate of at least 70% of the rate of inflation. The alleged promise was accepted by the employees and pensioners of SATS, the White Fund and the Black Fund without demur. It was kept until 2002 and thereafter i.e. since 2003, was broken and Transnet, the first respondent ("*the Transport Fund*") and the second respondent

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[3] Created under section 3 of the Railways and Harbours Superannuation Fund Act 24 of 1925 and perpetuated under section 2 of the Railways and Harbours Pensions Act 35 of 1971

[4] Established under section 2 of the Railways and Harbours Pensions for Non-Whites Act 43 of 1974

("*the Second Fund*") have consistently failed to grant any pension increases beyond the minimum of 2% per year.

7 At the heart of the applicants' case thus is a promise now claimed to be binding on Transnet and the Funds in perpetuity. The applicants contend that the failure to keep the promise is unlawful because it constitutes:

7.1 a breach of contract;

7.2 unlawful state conduct;

7.3 an unfair labour practice.

8 Both Transnet and the Funds contend that claim 1 is vague and embarrassing and does not disclose valid causes of action.

9 These submissions are structured as follows:

9.1 firstly, we set out the salient facts including the relevant applicable legislative framework;

9.2 secondly, we discuss the causes of action underpinning the 1989 promise;

9.3 thirdly, we conclude by asking that the application be dismissed with costs because the applicants have failed to make out a case for the relief sought.

BACKGROUND[5]

10 The 1989 promise was not made by Transnet or the Funds. It was allegedly made on behalf of SATS and the White and Black Funds. The applicants plead that Transnet "*inherited*" the White and Black Funds as well as the obligations of SATS, which obligation included the 1989 promise.

11 The 1989 promise was not made in accordance with any of the rules of or legislation applicable to the White Fund or the Black Fund or SATS. It is equally not a promise that can be said to have been made in terms of the Transport Fund or the Second Fund's rules or consistent therewith. It therefore resides outside any legislative regime relating to the Funds.

12 In this regard, the legislative regime that existed at the time that the 1989 promise was made is as follows:

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[5] Transnet's opposing affidavit Vol 4 p 261 para 16-20; para 28 p 266

12.1 historically under the old Railways and Harbours Pensions Act, increases of pensions had to be by means of notices addressed to each annuitant entitled to an increase;

12.2 in relation to the White Fund, the regulations governing its administration stipulate that an annuity payable to an annuitant was to be increased from the first day of the month of the anniversary of his retirement by 2%, compounded annually, for each completed year in respect of which the annuity had been or was received;[6]

12.3 in relation to the Black Fund, the regulations governing its administration did not provide for annual increases;[7]

12.4 in relation to the Transport Fund, its rules[8] provide for an annual income of 2% and amendments thereto may only be made by the Board of Trustees.[9]

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[6] Regulation 32(2) of the Regulations of the South African Transport Services New Superannuation Fund (GN 1102 GG 11333 of 10 June 1988)

[7] Regulations of the Railways and Harbours Pension Fund for Non-White Servants (GN R303 GG 4586 of 14 February 1975)

[8] Section 5(1) of the Transnet Pension Fund Act provides that the benefits due to pensioners and dependent pensioners, and the manner in which the rules of the Transport Fund may be amended, shall be governed by the rules of that Fund. Section 5(4) of the Transnet Pension Fund Act provides that the rules shall be binding on each employer, member, pensioner, dependent pensioner and the Transport Fund. Additionally, rules may only be amended as indicated in section 5(3) and (3A)

[9] Rule 9(1) read with Rule 32(27) set out in GN R2355 GG 12772 of 5 October 1990

12.5 The rules[10] of the Second Fund entitle a pensioner to an annual 2% increase in his or her pension benefits for each completed year[11].

13 The applicants appear to submit that this Court may not consider the rules and regulations governing the administration of either the White and Black Funds or the Transport Fund and the Second Fund because they are extraneous documents, the validity of which must yet be proven.[12] This approach, we submit is wrong for at least three reasons:

13.1 the first is that the applicants themselves have pleaded and relied on the rules of the Black and White Funds;[13]

13.2 the second is that the applicants similarly plead the establishment of the Transport Fund and the Second Fund in terms of their respective Acts and those Acts in turn provide that rules will be promulgated and which will be binding on members and pensioners alike;

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[10] Section 14B of the Transnet Pension Fund Act provides that all benefits due to pensioners and the beneficiaries shall be governed by the rules of the Fund set out in the Schedule to the Transnet Pension Fund Amendment Act 41 of 2000 (section 14B(5)), and the rules may be amended in accordance with certain requirements [section 14B(6)]

[11] Rule 24

[12] HOA: p5, para 6

[13] Record: POC, p8, para 12

13.3 the third is that since the applicants relied on the rules but had not attached them, Transnet requested those documents in terms of Rule 35(12) and (14) and they were subsequently provided by the applicants. They thus formed part of the documents which not only informed the pleadings but which were incorporated in them and can thus properly be relied on. That is because in deciding an exception, "*a court is not playing games, blindfolding itself*."[14]

THE 1989 PROMISE

14 According to the applicants:

14.1 SATS, the White Fund and the Black Fund made a promise to all their employees and members that the White Fund and the Black Fund would continue the past practice of increasing pensions "as before", from which the applicants infer a rate "of at least 70% of the rate of inflation" without substantiating that inference;

14.2 the promise was made orally on behalf of SATS, the White Fund and the Black Fund by Anton Moolman ("*Moolman*"), the General Manager of SATS and the Chairperson of the boards of

[14] Telematrix (Pty) Limited Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 SCA at paras 9 and 10

trustees of the White Fund and the Black Fund, and Eli Louw ("*Louw*"), the former Minister of Transport, at meetings with some 80 000 SATS employees in May and June 1989;

14.3 this promise was repeated in writing in a SATS brochure distributed to all SATS employees and pensioners thereafter in 1989;

14.4 Transnet, the Transport Fund and the Second Fund kept the promise until 2002 by granting annual pension increases of about 80% of the rate of inflation, whereafter they allegedly broke the promise by failing to grant pension increases over 2% per year;

14.5 Transnet, the Transport Fund and the Second Fund's (collectively "the respondents") failure to keep their promise is alleged to be unlawful on three separate grounds:

14.5.1 breach of contract: The promise was a contractual offer which all the employees and pensioners of SATS, the White Fund and the Black Fund tacitly accepted by remaining employees and pensioners of SATS, the White Fund and the Black Fund "*without demur*". The respondents "*inherited*" the contractual duty of SATS, the

White Fund and the Black Fund to keep the promise. Their failure to do so is a breach of contract.

14.5.2 unlawful state conduct: It is alleged that, by making the promise and acting in accordance with it for more than a decade, SATS, the White Fund and the Black Fund, and thereafter the respondents created a legitimate expectation in their employees and members that they would continue to keep the promise. Transnet's failure to cause the Transport Fund and the Second Fund to keep the promise is said to be unlawful at public law:

(a) when tested against the constitutional standards of reliance, accountability and rationality; and because;

(b) it violates the applicants' constitutional right to social security (section 27(1)(c) of the Constitution, 1996); and

(c) it fails to give effect to the legitimate pension benefit expectations created by the respondents.

14.5.3 unfair labour practice: Transnet's failure to cause the Transport Fund and the Second Fund to keep the promise is an unfair labour practice in breach of section 23(1) of the Constitution.

15 The applicants seek an order:

15.1 declaring that Transnet's failure to cause the Transport Fund and the Second Fund to keep the promise is unlawful; and

15.2 directing that the respondents increase the pensions of all members of the Transport Fund and the Second Fund by an annual rate of not less than 70% of the rate of inflation with effect from 2003, including payment of arrear increases.

BREACH OF CONTRACT

16 Transnet excepted to the claim on the grounds that the applicants had failed to plead that the present members of the Funds on whose behalf the relief is sought are the persons to whom the promise was allegedly made and by whom it was accepted.[15] The High Court upheld the exception.[16]

17 We submit for the reasons that follow, that the High Court was correct.

18 A contract is an agreement between parties, entered into with the intention of creating binding obligations, to perform according to the

[15] Transnet's exception, Vol 1, p 88, para 10

[16] Judgment, Vol 2, p 129, para [24]

terms agreed.[17] This Court in *KZN* held that the undertaking (in the 2008 notice) was not extended as part of a bilaterally binding agreement, which is the hallmark of contractually enforceable obligations.

19 The Court also recognised that the extension of an undertaking by the department that it intended to make payments in accordance with its statutory and constitutional obligations was distinct from an intention to enter into legal obligations for the purpose of concluding an enforceable contract.[18]

20 The 1989 promise could not have created any bilaterally binding agreement between SATS, the White Fund and the Black Fund on the one hand and the current members of the Funds on whose behalf the applicants are acting. That is because it is not even clear if the current members of those funds are the same persons to whom the promise was allegedly made in 1989.

21 In their written submissions, the applicants say that "*All the employees and pensioners of SATS, the White Fund and the Black Fund tacitly accepted the promise by remaining employees and pensioners of*

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[17] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 (4) SA 262 (CC) at para 35

[18] *KZN*, para [36]

SATS, the White Fund and the Black Fund without demur."[19] But there are difficulties with this submission. Firstly, once a member became a pensioner, there was nothing to accept without demur. Members who were pensioners when the 1989 promise was allegedly made, cannot conceivably argue that they relied on the promise in order to plan their lives:

21.1 firstly, they were pensioners already and the question of them staying on as employees of Transnet did not arise;

21.2 secondly, they did not remain members of the White or Black Funds on account of the promise;

21.3 thirdly, on their version, when they retired there were indications that their pension would increase by over 2 % annually, albeit that the rules of their pension funds did not say that.

22 The second difficulty with the abovementioned submission is that, as regards those members who were employees, no basis is made out to explain why a failure to act "without demur" (i.e., a failure to resign) must be interpreted as conduct that indicates acceptance of an offer in circumstances where nothing in the offer itself, nor in other communication between the alleged parties, indicates either a

[19] Heads of Argument p12 para 20 and p14 para 24.2

unilateral stipulation or concurrence that failure to act will constitute or be construed as acceptance.

23 The applicant's pleaded case thus does not *bear the* hallmarks of contractually enforceable obligations.

24 Having said that, we submit that the fact that the High Court upheld Transnet's exception against the breach of contract claim, does not leave the applicants without a remedy. The exception was taken on the basis that the pleaded case lacked particularity and was also vague and embarrassing. The applicants were afforded an opportunity to cure these complaints but they have elected not to do so.

UNLAWFUL STATE CONDUCT

25 Initially when the applicants sought certification to institute a class action, they contended that the Transport Fund and the Second Fund had breached established substantive pension benefit expectations by adopting a pension increase policy that was inconsistent with a previous policy and practice.[20] They sought relief only against the Transport Fund and the Second Fund, principally on the basis that their subsequent policy increases be reviewed and set aside and that

[20] Record, draft POC, p331 to 347

the applicants be paid a recalculated pension increase in accordance with a previous established policy.[21]

26 It was on the basis of these allegations that a class action was certified.

27 When they instituted their action however, they reformulated their claim to be one based on the 1989 promise and the legitimate expectation that it created. They contended that Transnet's failure to cause the Funds to keep the promise constituted unlawful administrative action because it failed to give effect to the legitimate expectation it created.[22]

28 Transnet raised an exception to those particulars[23] and the applicants then amended their particulars to then rely on unlawful state conduct thereby abandoning any reliance on an unlawful administrative claim.[24]

29 Transnet excepted to the applicants' amended claim on the basis that the applicants' reliance on unlawful state conduct because of a

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[21] Record, draft POC, p346 to 347

[22] Record, draft POC, p11, para 22

[23] Record, Rule 23(1) notice, p56 to 58, sixth and seventh exceptions

[24] Record, POC, p75, para 22

legitimate expectation allegedly created by Transnet was bad in law for a number of reasons including that:

29.1 the applicants had failed to plead facts which established that the promise was enforceable against SATS or is enforceable against Transnet and the applicants' reliance upon the doctrine of legitimate expectations and unlawful state conduct to enforce the promise is legally unsustainable;

29.2 a reliance on the doctrine of legitimate expectation requires the expectation to be lawful and legitimate and in order for the promise to be legitimate and lawful, it had to be within the power of SATS, the White Fund and the Black Fund, and, later, Transnet and the Funds to give effect to the expectation;

29.3 the applicants failed to allege facts establishing that the promise or the expectation to which it gave rise were or are legally enforceable against Transnet.[25]

The *KZN* case

30 In support of the unlawful state conduct cause of action, the applicants rely exclusively on the decision of this Court in *KZN*. They argue that

[25] Transnet's exception Vol 1 p 88 paras 12-15.

the pensioners cannot adjust their future outlays to accommodate the reduced payments of their pensions and that their position in respect of the future payments is not different from the schools in *KZN* who had already and finally budgeted in reliance on the first tranche of the subsidy payments and were unable to change the positions taken in reliance on the promise.[26]

31 Under the rationality ground, the applicants contend that the pensioners/members of the Funds are not able to tailor their behaviour and expectations in response to the retracted promise of payment and that they are no longer employed and so cannot at this stage change their financial positions, nor can they change their decision to remain in the employ of Transnet which decision was taken in reliance on the promise that is no longer being fulfilled.[27]

32 The applicants say that the respondents' conduct is especially offensive of "*reliance-based rationality*" in that Transnet and its predecessors made the promise to their employees precisely in order to guide their employees' conduct – i.e. to persuade them to remain in Transnet's employ – only to renege on the promise when those

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[26] Applicants' heads of argument (HOA), p 21, para 39.

[27] Applicants' HOA, p 22, para 41.

employees are no longer capable of changing their positions and plans.[28]

33 Under the accountability ground, the applicants say that the respondents reneged on the promise since 2003 after implementing it for a period of 13 years. They have persisted in their failure to make good on the promise notwithstanding the untold hardship suffered by Transnet's employees and pensioner-members of the Funds. This conduct falls far short of the constitutional standard of responsiveness and accountability required of the state.[29]

34 Furthermore, the applicants argue that the conduct of the organs of state, including the respondents, is constrained by the state's constitutional obligation to respect, protect, promote, and fulfil the rights in the Bill of Rights. Organs of state and public enterprises are also bound to observe the standards of accountability and responsiveness, which form part of the basic values and principles governing public administration in South Africa.[30]

35 We submit for the reasons that follow that *KZN* is distinguishable from the applicants' case.

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[28] Ibid, para 42

[29] HOA, p 23, para 44

[30] p23, para 45

36 In *KZN*, the applicant, an association of independent schools in KwaZulu-Natal, sought leave to appeal against a decision of the KwaZulu-Natal High Court, Pietermaritzburg, dismissing its application to enforce payment of certain moneys it claimed to be due to the schools it represents.

37 The MEC for Education in KwaZulu-Natal had granted a subsidy to independent schools in the province in accordance with section 48 of the South African Schools Act ("*Schools Act*").[31]

38 In September 2008, the Department of Education in KwaZulu-Natal issued a notice to independent schools in KwaZulu-Natal setting out "approximate" funding levels for 2009. The notice provided a table to the recipients to determine the level in which their school fell, provided that in order for schools to prepare budgets for 2009, approximate funding levels would be as set out in the notice. The notice concluded by stating that it should be noted that subsidy allocations would be reviewed annually.[32]

39 In May 2009, the Department sent a circular to the independent schools stating that as part of the province's turnaround strategy in

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[31] Para [2]

[32] Para [3]

dealing with the current cash crisis, the recipients had to expect a cut not exceeding 30% in their current subsidy allocation for the financial year 2009/10.[33]

40 Despite the applicants' attempts to secure payment of the full subsidies for 2009, the subsidies eventually paid to independent schools for that year were, on average, 30% less than those set out in the 2008 notice.[34]

41 The applicants brought proceedings to enforce the "*promise*" to pay the amounts set out in the 2008 notice for the whole school year of 2009. The High Court concluded that the applicants were not entitled to the payments they sought.[35]

The sources of the two "*promises*" are different

42 The *KZN* promise, in contrast to the applicants' promise, arose out of a subsidy granted by the MEC to independent schools in terms of section 48 of the Schools Act.

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[33] Para [4]

[34] Para [5]

[35] Paras [9] to [13]

43 In this case, there is no pleaded legislative or constitutional basis on which "*the 1989 promise*" was made.[36]

44 The reduction of the subsidy in *KZN* impacted on the actual grant itself by around 30% of the 2008 subsidy period. Here, neither Transnet nor the Funds have sought to reduce the pensions of the applicants, or the percentage by which the pensions escalated on an annual basis. Since 2003 the pensioners continued to receive pensions which not only escalated at 2% as provided for in the rules of the Funds, but which were enhanced by discretionary increases beyond 2% by the respondents from time to time.

45 The setting in which the *KZN* 2008 notice was made included the provisions of the Schools Act which empower the Minister by notice in the Government Gazette to determine the norms and minimum standards for granting subsidies to independent schools. This Court recognised that the norms were of great importance to the applicant's case and that the granting of state subsidies to registered independent schools was a well-established practice in South Africa.[37]

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[36] Compare amended POC Vol 1 p 73 para 15 and *KZN* at para [2] and [102]

[37] *KZN* at [37] – [42] and at [70]: "When national norms and specific regulations require payment by a particular date, government is legally obliged to pay".

46 In the present case, no comparable setting has been pleaded by the applicants. The alleged promise does not arise out of the applicants' rights in the Bill of Rights or any other statute.[38] In *KZN*, this Court found that a public official who lawfully promises to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for their payment has passed. It found that this did not arise out of a legitimate expectation of payment which related to expected conduct but rather the principle concerns an obligation that became due because the date on which it was promised had already passed when it was retracted. In the present instance, unlike in *KZN* and *Premier, Mpumalanga*,[39] neither Transnet nor the Funds unilaterally diminished, nor discontinued the additional increases after the due date for their payment had passed.[40]

47 No increase in pensions since 2003 has been less than the prescribed 2%.

48 Applying the principle in *KZN*, this Court said that the scheme of the norms and the *KZN* regulations provide for the determination and communication of subsidies on an annual basis so as to enable

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[38] *KZN*, para [45]

[39] Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC)

[40] KZN at [52]

schools to budget and plan for their fee structure for the following year. Also, the scheme does not merely suggest general guidelines for payment of subsidies but in fact set those guidelines.[41]

49 This Court said that once an MEC has, out of funds appropriated by the provincial legislature for subsidies, granted a subsidy to an independent school, his or her department has a legal obligation to pay no later than 1 April. This obligation is enforceable at the instance of those in favour of whom a promise was made to pay a subsidy once the due date for the payment has passed and that obligation is enforceable.

50 In the present instance, the legislative framework that applied at the time of the alleged promise was different:

50.1 in respect of the White Fund, regulation 32(2) provided that an annuity payable to an annuitant was to be increased from the first day of the month of the anniversary of his retirement by 2%, compounded annually, for each completed year in respect of which the annuity had been or was received;

50.2 in respect of the Black Fund, the regulations provided for the calculation of annuities but did not provide for annual increases.

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[41] At [52] and [53]

Instead, in a few of the amendments of the regulations over the years, a percentage increase was legislated for a once-off basis;

50.3 the rules of the Transport Fund provide for an annual increase of 2% and explicitly for amendments by the Board;

50.4 the rules of the Second Fund entitle a pensioner to an annual 2% increase in her or her pension benefits for each completed year.

51 The 1989 promise accordingly contravenes the rules and regulations governing annual increases of pensions. Those rules and regulations are binding on Transnet and the Funds.[42]

52 Therefore, the principle enunciated by this Court in *KZN* to the effect that an obligation that became due because the date on which it was promised had already passed when it was retracted finds no application. In particular, it cannot apply to those who became pensioners after 2002, since on the applicants' own version the promise was retracted in 2003.

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[42] Tek Corporation Provident Fund and Others v Lorentz 1999 (4) SA 884 (SCA) at [15]

53 Finally, the argument that pensioners could not adjust their affairs to meet the prejudice created by the alleged retraction of the promise and thus do not fall into the category of persons denied relief in *KZN* is unsustainable because the facts to underpin it were not pleaded.

The right to social security

54 The applicants claim that Transnet and the Funds' failure to honour the promised pension benefits constitutes a clear violation of the right to social security and a retrogressive measure, as the actual value of the pension benefits the Funds' members received has decreased as a result of this failure.[43]

55 The applicants' reliance on section 27(1)(c) of the Constitution, namely the right of access to social security[44] is also flawed because the applicants' case is not that Transnet and the Funds have not granted pensions or have not increased pensions. Their case is that the increases are not sufficient.[45]

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[43] HOA p 27 para 53

[44] Amended POC p 76 para 22.4.2

[45] See *KZN* at [47]

56 The claim is also flawed because Transnet and the Funds provide pensions to their members in accordance with the rules that regulate the payment of pensions.

57 This Court in *Black Sash Trust* recently said:

> *[2] The Constitution provides that everyone has the right to have access to social security, which includes, if they are unable to support themselves and their dependants, appropriate social assistance. In terms of its obligations to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right, Parliament enacted the Social Assistance Act which makes provision for various forms of social grants. The South African Social Security Act (Sassa Act) provided for the establishment of Sassa as an agent for the administration and payment of social assistance. The chief executive officer (CEO) of Sassa is responsible, subject to the direction of the Minister, for the management of Sassa. Sassa may with the concurrence of the Minister enter into an agreement with any person to ensure effective payments to grant beneficiaries.*[46]

58 This Court in *Black Sash* and *AllPay* affirmed that the Social Assistance Act is the legislation that seeks to give effect to the right to

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[46] Black Sash v Minister of Social Development and others (Freedom under Law intervening) 2017 (2) SA 335 (CC) [2]

access to social security in terms of section 27(1)(c) and 27(2) of the Constitution.[47]

59 In any event, this Court in *Khosa* said:

> *"[43] This Court has dealt with socio-economic rights on four previous occasions. What is clear from these cases is that s 27(1) and s 27(2) cannot be viewed as separate or discrete rights creating entitlements and obligations independently of one another. Section 27(2) exists as an internal limitation on the content of s 27(1) and the ambit of the s 27(1) right can therefore not be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in s 27(1)."*[48]

60 This Court recognised that the steps taken by the State to achieve the progressive realisation of the social security right was enshrined in section 27(1)(c) of the Constitution.

61 In the present instance, the applicants have not pleaded reliance on section 27(1) of the Constitution. Neither have they set out any facts to demonstrate that Transnet and the Funds, are within the rules and

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[47] AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others 2014 (4) SA 179 (CC) at paras [54] and [55]

[48] Khosa and others v Minister of Social Development and others*:* Mahlauleni and others v Minister of Social Development and others 2004 (6) SA 505 (CC) at [43]

regulations and their available resources, able to fulfil the 1989 promise indefinitely.

The protection of reasonable pension benefit expectations

62 The applicants say that their claim is a cognisable one in public law and it is fortified by the recognition in South Africa that the legitimate expectation of pension benefits requires special protection. In this regard, the applicants appear to rely on the Pension Funds Act, 24 of 1956. The Pension Funds Act does not apply to the first and second respondents as they are not registered under the Act. Any reliance thereon is accordingly misplaced.

63 The applicants' case is that the alleged failure to keep the promise by Transnet and the Funds is unlawful at public law because "*they fail to give effect to the legitimate pension benefit expectations they created*".[49] The SCA in *Meyer*[50] declined to incorporate the doctrine of substantive legitimate expectation into our law.

64 The applicants' reliance on a legitimate expectation allegedly created by Transnet is in any event bad in law:

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[49] Amended POC, vol 1, p 76 para 22.3 and para 22.4.3

[50] Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at [27] and [28]

64.1 firstly, our law does not recognise the substantive protection of legitimate expectations. Legitimate expectations have been given only procedural protection in South African law to date. While there have been several instances of what might appear to be substantive enforcement of expectations, particularly in employment matters, some of these have been unconscious and some are explicable on bases other than legitimate expectations.[51] Furthermore, the applicants fail to plead facts justifying the development of the law to recognise the substantive protection of legitimate expectations;

64.1.1 in Duncan, the SCA held that, even if substantive protection of legitimate expectation were to be recognised as part of our law, the appellant had failed to lay the foundation for his claim of a legitimate expectation. The expectation must be legitimate in an objective sense, it matters not whether an expectation exists in the mind of the litigant.[52]

> *"[15] Reliance on the doctrine of legitimate expectation for any purpose [i.e. procedural or substantive] presupposes that the expectation qualifies as*

[51] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 432-3; See too: Duncan v Minister of Environmental Affairs and Tourism and Another 2010 (6) SA 374 (SCA) at 380, paras [13] – [14].

[52] *Duncan* at [14]; *President of the Republic of South Africa v SARFU* 2000 (1) SA 1 (CC) at 96B-G, para [216].

legitimate. The requirements for the legitimacy of such expectation have been formulated thus:

(a) The representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications.

(b) The expectation must have been induced by the decision-maker.

(c) The expectation must be reasonable.

(d) The representation must be one which is competent and lawful for the decision-maker to make." (Duncan, emphasis added)

64.1.2 the fourth requirement for the legitimacy of an expectation – the lawfulness of the representation – has been applied in the following way. Where the person on whose conduct the plaintiff relies as creating her expectation does not have the authority to bind the defendant, the promise is *ultra vires* and cannot found a legitimate expectation.[53] It does not matter that the plaintiff was unaware of the unlawfulness of the representation. The doctrine of legitimate expectation cannot be applied to prevent a public functionary from

[53] Khani v Premier, Vrystaat, en Andere 1999 (2) SA 863 (O) at 869B-I; Van Schalkwyk and Others v Mkiva NO and Others (2009) 30 ILJ 1266 (O) at 1276C-E, para [9]

carrying out his public duties lawfully or to require him to perform an act which is unauthorised or otherwise unlawful. To accept such an expectation as legitimate would in effect lead to a reliance on the functionary's dereliction of duty as being legitimate.[54] It would be an absurd situation if public bodies could simply ignore their statutory duties by making promises which conflict with them.[55] In sum, one can only have a legitimate expectation in relation to a right that is legally sustainable and enforceable.[56]

64.2 secondly, the applicants failed to allege facts establishing that the expectation was or is legally enforceable against Transnet:

64.2.1 in order for the promise to be legitimate and lawful, it had to be within the power of the SATS, the White Fund and the Black Fund and later Transnet, the Transport Fund and the Second Fund to give effect to the expectation;

64.2.2 the rules of these funds do not establish a power or duty to give effect to the legitimate expectation allegedly

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[54] *Van Schalkwyk* at 1276E-G, para [9]

[55] University of the Western Cape and Others v Member of the Executive Committee for Health and Social Services and Others 1998 (3) SA 124 (C) at 134F-G

[56] Gibbs v Minister of Justice and Constitutional Development [2009] 4 All SA 109 (SCA) at 115d, para [26]

created. In addition, the regulations promulgated by the Minister of Transport under the Railways and Harbours Pensions Act and the Railways and Harbours Pensions for Non-Whites Act do not permit the payment of a pension increase on the terms set out under the 1989 promise;

64.2.3 similarly, the Legal Succession of the South African Transport Services Act 9 of 1989 makes no provision for Transnet to give effect to any promises made by Moolman and Louw.

64.3 thirdly, the applicants failed to plead facts which establish that:

64.3.1 the persons to whom the promise was allegedly made are the same persons in respect of whom it was implemented;

64.3.2 the persons who allegedly held the legitimate expectation are the same persons to whom the promise was allegedly made and in respect of whom it was allegedly implemented;

64.3.3 the persons on whose behalf this action is brought are all persons to whom the promise was made, who accepted

it, in respect of whom it was implemented and who as a result held the legitimate expectation pleaded.

65 The applicants refer in their argument to "*the duty of good faith*" or "*the Imperial duty*". But this reliance is in a vacuum given that the applicants have not pleaded the existence of a duty of good faith in their particulars of claim.[57] It is also apparent from the Imperial case that the basis for the duty was the existence of an employment relationship.

UNFAIR LABOUR PRACTICE

66 The applicants contend that Transnet's failure to cause the Funds to keep the 1989 promise and their failure to keep it in the circumstances pleaded in the claim also constitutes an unfair labour practice in breach of section 23(1) of the Constitution.[58]

67 Transnet excepted to the claim on the grounds that the applicants' reliance on an unfair labour practice is bad in law for the following reasons:

67.1 in order to rely on an unfair labour practice, the applicants must be employees of Transnet. Self-evidently, the 1989 promise

[57] Applicants HOA p 28 para 57

[58] Amended POC, vol 1, p 76, para 23

was made to pensioners who were at the time not employees of either SATS or Transnet. The applicants in fact seek an order directing Transnet to increase the pensions of members of the Funds, thereby indicating that the order sought relates to former employees of either SATS or Transnet;

67.2 the applicants have not alleged the basis on which they are entitled directly to rely on section 23(1) of the Constitution, in the absence of any allegation that they are not adequately protected by the Labour Relations Act, 66 of 1995 ("*the LRA")*.[59]

68 The High Court upheld this exception and afforded the applicants an opportunity to cure the defect complained of. The applicants have elected not to do so.[60]

Reliance on section 23(1) of the Constitution

69 The applicants argue that section 23(1) of the Constitution provides that "*everyone has the right to fair labour practice*", and that means that the right is not limited to current employees and it must be interpreted generously and purposively.[61]

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[59] Exception, Vol 1, p 32, paras 28 and 29

[60] Judgment, Vol 2, p 138, para [51]

[61] HOA, p 33, para 70

70 The applicants rely on NEHAWU v University of Cape Town[62] to advance the proposition that the phrase "*everyone*" in section 23(1) is not restricted to current workers.[63] This Court in *NEHAWU* considered, amongst other questions, whether the word "*everyone*" was restricted to workers and not to their employers as well. The debate was not about whether "*everyone*" applied only to current workers in contrast to former employees.

71 The principles enunciated by this Court in *NEHAWU* can be distilled as follows:

71.1 the concept of unfair labour practices does not apply to workers only;[64]

71.2 the crucial question is whether the right to fair labour practices is available to employers who are juristic persons. There is nothing in the nature of the right to fair labour practices to suggest that employers are not entitled to that right;[65]

71.3 fairness applies to both workers and employers;[66]

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62 NEHAWU v University of Cape Town 2003 (3) SA 1 (CC) at [33]

63 Applicants' HOA, p 33, para 70

64 At [36]

65 At [37]

66 At [38]

71.4 the word *"everyone"* refers to every person and it includes both natural and juristic persons. Where the rights in the section are guaranteed to workers or employers or trade unions or employers' organisations, as the case may be, the Constitution says so explicitly. If the right in section 23(1) were to be guaranteed to workers only, the Constitution would have said so;[67]

71.5 the focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both.[68]

72 *NEHAWU* was concerned with whether or not only the workers or the workers and the employers are entitled to the right to fair labour practices. The debate was not whether current employees, in contrast to former employees, are entitled to fair labour practices. The applicants' reliance on *NEHAWU* is accordingly misplaced.

73 In SANDU v Minister of Defence and Another,[69] a case that concerned the question whether it is constitutional to prohibit members of the

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[67] At [39]

[68] At [40]

[69] South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC)

armed forces from participating in public protest action and from joining trade unions, this Court said the following about the section 23:

> *[22] These provisions are primarily concerned with the complementary rights of workers and employers, and trade unions and employer organisations. It is clear from reading s 23 that it uses the term 'worker' in the context of employers and employment. It seems therefore from the context of s 23 that the term 'worker' refers to those who are working for an employer which would, primarily, be those who have entered into a contract of employment to provide services to such employer. Members of the Permanent Force do not enter into a contract of employment as ordinarily understood. They 'enrol' in the Permanent Force. Enrolment carries with it certain legal consequences.*

74 We submit for the reasons discussed above that the applicants' reliance on section 23(1) of the Constitution is misplaced and falls to be rejected. A practice can only constitute a fair or unfair labour practice if it involves a labour relationship.

Malope is distinguishable

75 The applicants argue that, properly interpreted, the constitutional right protects persons from unfair practices that have their origin in an employer/employee relationship, whether or not the employment

relationship persists at the time the claim is made, because otherwise any employer could avoid section 23(1) by simply terminating the employment relationship. They rely on *Malope*[70]to support this proposition.

76 We submit that *Malope* is distinguishable for the reasons that follow.

77 Mr Malope claimed some R18 million for equal pay in terms of section 6 of the Employment Equity Act, 55 of 1998 ("*EEA*"). He had retired, at the time when he referred the claim to the CCMA. The respondent contended that at the time the claimant initiated his claim he was not an employee as defined in the EEA and the court accordingly had no jurisdiction to entertain his claim.

78 The Labour Court held that the definition of "*employee*" in the EEA (which is similar to the LRA) expressly excludes independent contractors, and refers to persons who work for another person or for the state and who receives, or who is entitled to receive, any remuneration or any other person who in any manner assists in the carrying on or conducting the business of the employer, and that it may well be that in a literal sense, a person whose employment is

[70] Malope v Crest Chemical (Pty) Ltd (JS286/15) [2017] ZALCJHB 121 (20 February 2017)

terminated on account of retirement is not a person who continues to work and who receives or remains entitled to receive remuneration.[71]

79 The Court also held that a literal interpretation of the definition, as contended for by the respondent, was at variance with an interpretation that promotes constitutional values, and in particular the right to equality and employment and the right to fair labour practices and that the fact that the claimant was no longer an employee at the time the claim was referred was not fatal. What matters is that he was employed by the respondent for the period during which he contends that other employees, similarly situated, were paid a premium solely on account of their race.[72]

80 The difference between *Malope* and the applicants' case is that Mr Malope's claim arose out his dissatisfaction with his remuneration at the time when he was employed by the respondent. Here, the applicants seek to enforce the 1989 promise allegedly breached by the respondents after those applicants who had been employed by Transnet (not all of them had been) had left the employ of Transnet. The pleaded claim arose, not when the relevant applicants were employees of Transnet, but in 2013, when they had already left

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[71] Para [5]

[72] Para [6]

Transnet's employ. There is thus no employer/employee relationship when the pleaded cause of action arose.

81 The applicants also claim this relief for former employees of SATS who had retired before Transnet was established and before the promise was even made.

82 We accordingly submit that the applicants' case finds no support from *Malope*.

Apollo Tyres[73] is also distinguishable

83 The applicants' reliance on *Apollo Tyres* is also distinguishable for the reasons that follow:

83.1 in *Apollo Tyres,* an employee had referred a dispute relating to an unfair labour practice to the CCMA and the employer argued that the CCMA had no jurisdiction to arbitrate the dispute because there was no employment relationship at the time that the dispute was referred to it. The referral documents were served on 11 November 2008 and came to the employer's attention on 12 November 2008;

[73] Apollo Tyres South Africa (Pty) Ltd v CCMA and Others [2013] 5 BLLR 434 (LAC)

83.2 the employee was requested to leave the company on 13 November 2008.[74]

84 What is clear from the aforegoing is that there was a relationship of employer/employee when the claimant's claim arose. That is not the case in the present instance.

85 The applicants say that there is no good reason to exclude from the ambit of section 23(1) the conduct of an employer which persuades its employees to remain with it by promising them attractive pensions and then reneges on the promise when they have retired.[75] The flaw with this argument is that the 1989 promise was made not only to employees of SATS but also to pensioners who were thus on any version, no longer employees. They could thus not have been persuaded by the promise to remain pensioners because they were already pensioners. The employer/employee relationship had ceased. Moreover, the promise was not only made on behalf of SATS but also on behalf of the Black and White Funds who clearly did not sit in an employer/employee relationship with any of the applicants or the members they currently represent.

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[74] Para [12]

[75] HOA, p 35, para 73

Subsidiarity

86 We have already provided an exposition of the principle of subsidiarity and its content[76].

87 The applicants submit that the LRA recognises that unfair labour practices may be perpetrated beyond the termination of employment. They rely on section 186(2)(c) of the LRA which provides that a failure or refusal by an employer to re-instate or re-employ a former employee, in terms of an agreement, constitutes an unfair labour practice and that while section 186(2) provides that an unfair labour practice "*means any act or omission that arises between an employer and an employee…*", the Labour Court has found that the dispute must pertain to events that transpired during the employees' employment.[77]

88 The applicants do not address the exception raised by Transnet that insofar as the applicants intend to rely on section 23(1) of the Constitution, they have not alleged the basis on which they are entitled to rely directly on such section, in the absence of any allegation that they are not adequately protected by the LRA.[78]

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[76] Paras 65-68 of Transnet's Written Submissions of 22 September 2017

[77] HOA p 34 paras 71 and 72

[78] Transnet's exception, Vol 2, p 59 para 30.3

89 The applicants do not plead that they are not adequately covered by the LRA, nor do they attack the constitutionality of the LRA on the basis that it is inadequate to give effect to their section 23(1) rights. On the contrary their pleadings are confined to a simple allegation that Transnet's failure to cause the Transport Fund and the Second Fund to keep the promise constitutes an unfair labour practice in breach of section 23(1) of the Constitution.[79]

90 This Court has held that once legislation is passed to fulfil a constitutional right, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or a supporting role.[80]

91 We submit for the aforegoing reasons that the applicants' reliance on section 23(1) of the Constitution, without alleging that the LRA is inadequate or that it is unconstitutional, falls to be rejected.

CONCLUSION

92 For all the reasons discussed above we submit that this application falls to be dismissed, with costs, including the costs of two counsel.

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[79] Record, amended POC, p76, para 23

[80] My Vote Counts MPC v Speaker of the National Assembly and Others 2016 (1) SA 132 (CC) [50], [53], [55] and [56]

C D A LOXTON SC
M A CHOHAN SC
B L MAKOLA
Counsel for Transnet
6 October 2017

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.: CCT95/17

In the matter between:

JOHAN PIETER HENDRIK PRETORIUS	First Applicant
MONTANA DAVID KWAPA	Second Applicant

and

TRANSPORT PENSION FUND	First Respondent
TRANSNET SECOND DEFINED BENEFIT FUND	Second Respondent
TRANSNET SOC LIMITED	Third Respondent

TRANSNET'S WRITTEN ARGUMENT: CONDITIONAL APPLICATION FOR LEAVE TO CROSS-APPEAL

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INTRODUCTION

1 These written submissions are filed on behalf of the third respondent, Transnet SOC Limited ("*Transnet*") in compliance with the directives issued by the Chief Justice on 23 August 2017, directing that the parties (Transnet as applicant in the conditional application for leave to cross-appeal) file written argument, including argument on the merits of the appeal on or before 22 September 2017.

2 These submissions therefore address only the conditional application for leave to cross-appeal the dismissal of certain exceptions that Transnet raised against the applicants' claims in the High Court.

3 We submit that the issues that are presented in this conditional application to cross-appeal are:

3.1 firstly, whether in relation to the exceptions that were dismissed by Legodi J, the applicants had pleaded facts necessary to sustain the relief sought;

3.2 secondly, whether Legodi J correctly handed down a cost order in the judgment of 18 May 2016.

4 These submissions are structured as follows:

4.1 we provide a brief background with particular reference to the background as captured in the judgment of Legodi J and to the extent that it is common cause between the parties;

4.2 we then address the history of the matter in the High Court, the two applications in the Supreme Court of Appeal as well as the current application;

4.3 we discuss the test in this Court for the granting of leave to appeal and submit that for the reasons that we discuss, it is in the interests of justice that leave to appeal be granted albeit that it is conditional in nature and Transnet only pursues the application if the applicants are granted leave to appeal;

4.4 we then address the various claims instituted by the applicants in the High Court, the exceptions raised by Transnet against those claims, the findings made by the Court and the grounds of appeal;

4.5 we conclude by asking that to the extent that Legodi J dismissed the exceptions raised against those claims, his decision be set aside and that the exceptions be upheld;

4.6 we conclude by asking for the relief with costs, including the costs of two counsel.

BRIEF BACKGROUND

High Court action

5 The applicants instituted three claims against the respondents: Claim 1 is described as the 1989 promise; claim 2 as the legacy debt and claim 3 as the unlawful donation claim.

6 The claims are summarised below.

7 The New Railways & Harbours Superannuation Fund ("*the White Fund*") was created under section 3 of the Railways & Harbours Superannuation Fund Act 24 of 1925, and perpetuated under section 2 of the Railways & Harbours Pensions Act 35 of 1971. The Railways & Harbours Pension Fund for Non-White Employees ("*the Black Fund*") was established under section 2 of the Railways & Harbours Pensions for Non-Whites Act 43 of 1974.

8 The White Fund and the Black Fund were merged to form the first respondent (the Transport Fund) in terms of section 2 of the Transnet Pension Fund Act with effect from October 1990.

9 The second respondent (the Second Fund) is a defined benefit fund that was established with effect from 1 November 2000 in terms of section 14B of the Transnet Pension Fund Act. All the pensioner-members of the Transport Fund as at that date were transferred to the Second Fund.[1]

Claim 1[2]

10 According to the applicants:

10.1 the rules of the Funds (referred to as the White Fund[3] and the Black Fund[4]) entitled members to increases of their pensions by 2% annually. Both Funds had followed a consistent practice over the decades, with the concurrence of Transnet's predecessors (SAR & H[5] and SATS[6]), of granting pension increases of at least 70% of the rate of inflation;

10.2 a promise was orally made by SATS' General Manager and the then Minister of Transport that that practice would

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1 Transnet's opposing affidavit in the main application for leave to appeal Vol 4 p 256 at paras 16-20

2 Transnet's affidavit in the conditional application for leave to cross appeal Vol 4 p 355 paras 15-17; applicant's amended particulars of claim Vol 1 p 72 paras 12-24

3 The full name is the New Railways and Harbours Superannuation Fund created under section 3 of the Railways and Harbours Superannuation Fund Act 24 of 1925 and continued under section 2 of the Railways and Harbours Pension Act 35 of 1971

4 The full name is Railways and Harbours Pension Fund for Non-Whites Employees established under section 2 of the Railways and Harbours Pensions for Non-Whites Act 43 of 1974

5 The South African Railways and Harbours Administration referred to in the Railway Board Act 73 of 1962

6 The South African Transport Services referred to in the South African Transport Services Act 65 of 1981

continue and that promise was one of the means by which SATS persuaded its employees to remain in its employ after its conversion to Transnet;

10.3 the respondents kept their promises until 2002 by granting annual pension increases of about 80%, on average, of the rate of inflation;

10.4 Transnet and the Funds have since 2003 broken their promise in that they have consistently failed to grant any pension increases beyond the minimum of 2% per year;

10.5 the failure to keep their promise was unlawful on the following grounds:

10.5.1 breach of contract;

10.5.2 the promise was an offer to contract duly made by SATS and the Funds and the employees and pensioners of SATS and the Funds tacitly accepted the promise by remaining employees and pensioners of SATS and the Funds without demur;

10.5.3 the SATS and the Funds were contractually bound to keep the promise and their failure to do so was a breach of contract;

10.5.4 it constituted unlawful state conduct;

10.5.5 the making of the promise created a legitimate expectation on the part of the employees and members that Transnet and the Funds would keep the promise;

10.5.6 Transnet's failure to cause these Funds to keep the promise and their failure to keep it also constituted an unfair labour practice in breach of section 23(1) of the Constitution.

10.6 The applicants accordingly asked for the following relief:

10.6.1 an order declaring that Transnet's failure to cause the Transport Fund and Second Fund to keep the promise and their failure to keep it are unlawful;

10.6.2 an order directing Transnet and the Funds to keep the promise by increasing the pensions of all the members of the Transport Fund and the Second Fund by an annual rate of not less than 70% of the rate of inflation with effect from 2003;

10.6.3 paying the arrear increase to the pensioners of these Funds with interest *tempore morae*.

Claim 2[7]

11 The applicants sought a declarator to the effect that Transnet is indebted to the Transport Fund and the Second Fund for payment of a legacy debt of R17.1806 billion plus interest from 1 April 1990 at a rate of not less than 12% per annum determined by the State Actuary and that Transnet pay the legacy debt to the Transport Fund and Second Fund.

12 This claim is apparently based on an obligation in terms of section 12(3) of the Railways and Harbours Pensions Act 35 of 1971 and section 11(3) of the Railways and Harbours Pensions for Non-Whites Act 43 of 1974 to pay into the White Fund and the Black Fund, such amounts as were necessary to maintain them in a sound financial condition.

13 Transnet inherited these obligations by virtue of section 3(2) of the Legal Succession of the South African Transport Services Act 9 of 1989 ("*Succession Act*").

14 The applicants alleged that section 16 of the Succession Act provided expressly or by necessary implication that on 1 April 1990

[7] Transnet's affidavit in the conditional application for leave to cross appeal p 256 para 18-19; applicant's amended particulars of claim Vol 1 p 72 paras 25-34

Transnet's debt pursuant to these obligations (the alleged, so-called legacy debt) would be as determined by the State Actuary in consultation with an Actuary appointed by the Minister of Public Enterprises and would bear interest at a rate of at least 12% per annum determined by the State Actuary. They aver that the State Actuary determined the legacy debt in consultation with an actuary appointed by the Minister of Transport in an amount of R17.1806 billion plus interest from 1 April 1990.

15 The Transport Fund and, upon its creation, the Second Fund, allegedly inherited the right to receive the legacy debt in terms of sections 2 and 12 of the Transnet Pension Funds Act in the following proportions:

(a) the Transport Fund: 43.1%;

(b) the Second Fund: 56.9%;

15.2 in its 1990 financial year, Transnet issued T011 bonds to the value of R10,394 billion to the Transport Fund, allegedly in partial settlement of the legacy debt;

15.3 on the creation of the Second Fund in 2000, it received its pro rata share of the bonds from the Transport Fund; and

15.4 in or about February 2001 Transnet, the Transport Fund and the Second Fund agreed to cancel the bonds. It is alleged that in the premises the whole legacy debt remains outstanding.

Claim 3[8]

16 The applicants seek an order declaring that the payment of 40% of members' surplus paid by the Transport Fund to Transnet was unlawful and invalid and they seek an order that Transnet pay an amount of R309,121,000.00 to the Transport Fund with interest *tempore morae*.

17 The applicants allege that the trustees of the Transport Fund and Transnet agreed orally and in writing on 23 November 2000 at Johannesburg that the Transport Fund would donate 40% of its members' surplus to Transnet.

18 The trustees of the Transport Fund decided on 7 March 2001 to implement the donation by paying an amount of R309,121,000.00 to Transnet and that later in March 2001 the Transport Fund paid the

[8] Transnet's affidavit in the conditional application for leave to cross appeal p 256 paras 20-22

amount of R309,121,000.00 to Transnet. The donation was unlawful and invalid because to the knowledge of the trustees and Transnet:

18.1 the trustees did not have the power to make the donation; and

18.2 the trustees made the donation in breach of their fiduciary duty to act in the best interest of the Transport Fund and its members.

19 Transnet accordingly became liable for repayment of the donation in March 2001.

20 Transnet and the Funds raised exceptions to the claims made by the applicants. On 18 May 2016, Legodi J upheld some of the exceptions and dismissed others.

21 The applicants applied for leave to appeal against those exceptions that were upheld and the respondents, in turn, conditionally applied for leave to appeal against those exceptions that had been dismissed. On 4 August 2016 Legodi J dismissed both the application for leave to appeal and the conditional counter-applications for leave to appeal.

In the Supreme Court of Appeal

22 On 5 September 2016 the applicants applied to the Supreme Court of Appeal for leave to appeal to it, alternatively to a full bench of the High Court, Gauteng Division, Pretoria, against the exceptions that had been upheld and the order in that regard reflected in paragraph 54.1.1 (the breach of contract), 54.1.2 (unlawful State conduct), 54.1.3 (unfair labour practice) and 54.5 (costs) of the May 2016 judgment of Legodi J, as well as the order for costs made in paragraph 10 of the August 2016 judgment.[9]

23 On 14 November 2016, the Supreme Court of Appeal, per Willis JA and Schoeman AJA dismissed the applicants' application for leave to appeal on the grounds that there is no reasonable prospect of success in the appeal and there is no other compelling reason why an appeal should be heard. Transnet and the Funds' applications for conditional leave to appeal were also dismissed on the same grounds.

24 The applicants then applied to the President of the Supreme Court of Appeal, in terms of section 17(2)(f) of the Superior Courts Act, 10 of 2013, for reconsideration of their application for leave to appeal

[9] Transnet's opposing affidavit Vol 4 p 285 paras 7-9

on the basis that there are exceptional circumstances that warrant reconsideration.

25 On 23 March 2017, the Supreme Court of Appeal, per Maya AP, ordered that the applicant's application in terms of section 17(2)(f) of the Superior Courts Act be dismissed for the reason that no exceptional circumstances warranting a reconsideration or variation of the decision refusing the application for leave to appeal have been established.[10]

In this Court

26 In this Court, the applicants seek leave to appeal against paragraphs 54.1.1, 54.1.2, 54.1.3 and 54.5 of the order of Legodi J in the High Court and have also applied for leave to appeal against the order for costs made by the High Court in dismissing the applicants' application for leave to appeal dated 4 August 2016.

[10] Transnet's opposing affidavit Vol 4 p 259 paras 11 and 12

LEAVE TO APPEAL

27 The interests of justice dictate whether leave to appeal should be granted.[11]

28 The applicants did not oppose Transnet's conditional leave to appeal to the Supreme Court of Appeal, nor do they in this Court. We point to the following factors as indicating the important issues raised by the entire matter but in particular Transnet's decision to seek to conditionally apply for leave to cross-appeal.

29 The issues raised in all three claims are self-evidently of great importance to Transnet and the quantum alone illustrates the significant impact that an adverse order would have on it.[12]

30 The issues that arise under the second claim (the legacy debt) entail the determination of Transnet's and the State's obligations under the Succession Act. The interpretation of this section insofar as these claimed obligations are concerned has hitherto not come before any court for interpretation.[13]

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[11] De Lange v Methodist Church & Another 2016 (2) SA 1 (CC) at [29] where Moseneke DCJ said that the test is by now well settled. The interests of justice dictate whether leave to appeal should be granted.

[12] Transnet's affidavit in the conditional application for leave to cross-appeal Vol 4 p 368 at para 42.1-42.4; applicant's amended particulars of claim Vol 1 p 79 paras 35-40

[13] *Ibid* at para 42.5

31 The applicants' third claim concerns the alleged unlawful donation by the Transport Fund of the sum of R309,121,000.00 of its surplus to Transnet. Although not pleaded, the applicants contend that such claim is premised on the *actio furtiva* and the questions raised by Transnet in its exceptions relate to the reliance of such a *condictio* and the validity of such a claim having regard to the allegations made by the applicants in their amended particulars of claim. This is a matter that similarly raises novel points and issues of public interest and in respect of which guidance and clarity would be beneficial to the parties and to litigants generally.[14]

32 The applicants' first claim, on the applicants' own version, raises constitutional issues. If that is so, then it would equally apply to the exceptions that were dismissed by Legodi J.[15]

33 The second claim involves liability that may affect the State. In the certification application for a class action, the applicants had cited the Ministers of Public Enterprises and Finance and the President. No relief was sought against these parties and thus the applicants were not granted certification as against them.

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[14] *Ibid* at p 369 para 42.6

[15] *Ibid* at para 42.7

34 We submit that if this Court were minded to grant the applicants' application for leave to appeal, it would follow that the constitutional issues and hardship that the applicants say arise in the application would equally be applicable to Transnet's conditional application for leave to cross-appeal.[16]

35 We submit furthermore that it would moreover be convenient, practical and expeditious for this Court to determine all of the exceptions – those that were upheld and those that were dismissed.[17]

36 We submit for the above reasons that it will be in the interests of justice to grant leave to cross-appeal if the applicants are granted leave to appeal.

GROUNDS OF APPEAL

37 Legodi J upheld some exceptions and dismissed others. We focus on only those that were dismissed and that Transnet seeks to pursue. They are the third, sixth and eighth exceptions raised against claim 1; the ninth exception against claim 2; and the thirteenth exception against claim 3. We deal with each in turn.

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16 *Ibid* p 370 para 42.9

17 *Ibid* para 42.10

CLAIM 1

The third exception

38 In paragraph 14 of the amended particulars of claim, the applicants plead that in the run-up to its establishment, Transnet, the White Fund and the Black Fund made a promise to all their employees and members that the Funds would continue to increase their pensions as before, that is, at a rate of at least 70% of the rate of inflation.[18]

39 The applicants seek an order, amongst others, directing Transnet, the Transport Fund and the Second Fund to keep such promise by increasing the pensions of all members of both the Transport and Second Funds by an annual rate of not less than 70% of the rate of inflation with effect from 2003.

40 Transnet excepted because the applicants had failed to plead facts which establish that SATS had the power to increase the pensions of members of the White Fund and the Black Fund when the promise was allegedly made and that Transnet currently has the power to increase the pensions of the members of the Transport Fund and the Second Fund. Moreover, the rules of the White Fund, the Black Fund, the Transport Fund and the Second Fund, made no

[18] Vol 1 p 73 para 14

provision for such power.[19]

41 In paragraph 21.2 of the amended particulars of claim the applicants plead that the promise was allegedly accepted by those employees and pensioners of SATS, the White Fund and the Black Fund by tacitly accepting the promise by the remaining employees and pensioners of SATS, the White Fund and the Black Fund without demur. However, the applicants failed to plead that the present members of the Transport Fund and the Second Fund on whose behalf the relief is sought in paragraph 24.7 are the persons to whom the promise was allegedly made and by whom it was accepted.

42 Transnet accordingly pleaded that the claim was vague and embarrassing, alternatively that it failed to disclose a valid cause of action.[20]

43 The Court dismissed the third and the sixth exceptions and held that:

43.1 Rule 24 of the first respondent did not prohibit the conclusion of the promise in that it did not prescribe the maximum

[19] Transnet's Exception Vol 1 p 87 paras 7-9

[20] Transnet's Exception Vol 1 p 88 paras 10 and 11

percentage by which a pension benefit could be increased annually and that it could be interpreted to mean that a pension benefit increase would not be less than 2% annually;[21]

43.2 the challenge to the lawfulness and the enforceability of the promise could be raised more appropriately as a defence rather than as an exception, and it raised a legal question which was uncertain and complex and could not be entertained on exception.[22]

44 We submit that the Court should have found that:

44.1 the SATS did not have the power to make the promise to the members of the White Fund and the Black Fund when it was allegedly made and Transnet does not currently have the power to increase the pensions of the members of the first and second respondents in accordance with the promise;

44.2 the legislation and rules of the White Fund, the Black Fund and the first and second respondents make no provision for the power to increase the pensions of their members in accordance with the promise;

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[21] Judgment Vol 2 p 129 [27]

[22] *Ibid* p130 [28]

44.3 the object of an exception is to dispose of a case or a portion of it in an expeditious manner by weeding out cases without legal merit, regardless of the complexity of the legal question. For the same reason, the fact that an objection can be entertained as a defence in a plea does not prevent it from being entertained as an exception. Thus, the third and sixth exceptions were properly raised as exceptions.

The applicable legal principles

45 The trustees of a fund are bound to observe and implement the rules of that fund. Their powers and responsibilities and the rights and obligations of members and participating employers are governed by the rules, applicable legislation and the common law. The rules of a pension fund form its constitution and must be interpreted in the same way as all documents.[23]

46 In relation to the White Fund, the Railways and Harbours Pensions Act provided that the Minister of Transport, in consultation with the Railways and Harbours Board, could make and amend regulations in respect of the benefits payable under the White Fund and the manner of calculation thereof [section 4(1)(g) and (3)]. A pension

[23] Sasol Limited v Chemical Industries National Provident Fund (20162/2014) [2015] ZASCA 113 (7 September 2015) para [13]

benefit was to be paid to the beneficiary stipulated in the regulations and such benefit was to be calculated in terms of and effected subject to the provisions of such regulations (section 5). Furthermore, the Administration was permitted to increase the annuities payable by publication of a notice addressed by the General Manager of the South African Railways and Harbours to the staff of the Administration generally and by the Secretary to the Joint Committee on Pension Matters by means of notices addressed to each annuitant entitled to an increase in terms of such decision [section 4(7)].

47 The Minister made the Regulations of the South African Transport Services New Superannuation Fund (GN 1102 *GG* 11333 of 10 June 1988), which fixed the method of calculation of annuities payable to members of the White Fund. Regulation 32(2) in particular provided that an annuity payable to an annuitant was to be increased from the first day of the month of the anniversary of his retirement by 2%, compounded annually, for each completed year in respect of which the annuity had been or was received.

48 In relation to the Black Fund, the Railways and Harbours Pensions for Non-Whites Act also provided that the Minister of Transport, in consultation with the Railways and Harbours Board, could make and

amend regulations in respect of the benefits payable and the manner of calculation thereof [section 3(1)(g) and (2)]. The payment of a pension benefit was also to be calculated in terms of and effected subject to the provisions of the regulations (section 4). There was a similar provision for the increase of annuities relating to the White Fund (section 3(3) of the Railways and Harbours Pensions for Non-Whites Act).

49 The Minister made the Regulations of the Railways and Harbours Pension Fund for Non-White Servants (GN R303 *GG* 4586 of 14 February 1975). The regulations provided for the calculation of annuities but did not provide for annual increases. Instead, in a few of the amendments of the regulations over the years, a percentage increase was legislated for on a once-off basis.

50 In relation to the Transport Fund, section 5(1) of the Transnet Pension Fund Act provides that the benefits due to pensioners and dependent pensioners, and the manner in which the rules of the Transport Fund may be amended, shall be governed by the rules of that Fund. Section 5(4) of the Transnet Pension Fund Act provides that the rules shall be binding on each employer, member, pensioner, dependent pensioner and the Transport Fund.

Additionally, rules may only be amended as indicated in section 5(3) and (3A):

50.1 the rules of the Transport Fund (GN R2355 *GG* 12772 of 5 October 1990) provide for an annual increase of 2% [Rule 32(27)] and explicitly for their amendment by the board [rule 9(1)];

50.2 prior to the Transnet Pension Fund Amendment Act 6 of 2007 from 11 November 2005, the rules could only be amended subject to the approval of the Minister of Mineral and Energy Affairs and Public Enterprises acting with the concurrence of the Minister of Finance (section 5(3) of the Transnet Pension Fund Act before amendment). Thereafter, the general rules have been capable of amendment by the board of trustees, subject to the approval of all the principal employers or a majority of the principal employers and of the Minister responsible for Transnet [section 5(3)]. If, in the opinion of the valuator of the fund, an amendment to the general rules may affect the financial condition of the fund, such amendment shall only be made with the approval of the Minister responsible for Transnet, in concurrence with the Minister of Finance [section 5(3A)].

51 In relation to the Second Fund, section 14B of the Transnet Pension Fund Act provides that all benefits due to pensioners and the beneficiaries shall be governed by the rules of the Fund set out in the Schedule to the Transnet Pension Fund Amendment Act 41 of 2000 [section 14B(5), and the rules may be amended in accordance with certain requirements set out in section 14B(6)]:

51.1 the rules of the Second Fund entitle a pensioner to an annual 2% increase in his pension benefits for each completed year (Rule 24);

51.2 prior to the amendment of section 14B by the Transnet Pension Fund Act by the Transnet Pension Fund Amendment Act 6 of 2007, only the Minister of Mineral and Energy Affairs and Public Enterprises acting with the concurrence of the Minister of Finance could amend the rules (section 14B(6) prior to such amendment). Since 11 November 2005, section 14B(6) provides that the rules may be amended by the board of trustees with the approval of Transnet, provided that an amendment that is likely to affect the financial condition of the Fund shall be of no force or effect unless it has also been approved by the Minister responsible for Transnet acting with the concurrence of the Minister of Finance.

52 The Pension Funds Act 24 of 1956 does not apply to the Transport Fund and the Second Fund, nor did it apply to the White Fund and the Black Fund, because they are not and were never registered under this Act. However, section 13 of the Pension Funds Act and its interpretation are of value in the present case. Section 13 provides for the binding force of the rules of a pension fund on the fund and its members, shareholders and officers and on any person who claims under the rules. The courts and the Pension Funds Adjudicator have often stated that a fund can only pay its members the benefits provided in its rules. The fact that there is the power to change the rules is irrelevant when assessing whether or not the particular exercise of power in question was *intra* or *ultra vires*.[24]

53 The courts have held under the Pension Funds Act that any attempt to pay out benefits in contravention of a fund's rules is unlawful.[25] The fact that a fund has acted in breach of its rules by paying benefits to some members does not mean that it could be compelled to do so again.[26] This is analogous to the present case.

54 Generally, it has been held that, in the absence of any particular enabling statutory provision, the source of the authority of the state

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[24] Tek Corporation Provident Fund and Others v Lorentz [1994] 4 All SA 297 (A) at 309g-310a, para [28]

[25] Abrahamse v Connock's Pension Fund 1963 (2) SA 76 (W); Strydom v Die Land- end Landboubank van Suid-Afrika 1972 (1) SA 801 (A) at 816A-B

[26] Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at 728I, para [16] (*Meyer* (SCA))

and its organs to contract is the common-law prerogative.[27] Should legislation be passed which, while not abolishing the prerogative, deals with an area of law governed by it, then the prerogative has in future to be exercised in accordance with the rules laid down by the legislature rather than in accordance with the pre-existing common-law rules.[28] Since there is/was legislative provision for the calculation of the pension benefits payable in the present case, the applicants cannot rely on common-law prerogative as a basis for the legitimacy of the promise.

55 In terms of paragraph 21.2 of the amended particulars of claim, the promise was allegedly tacitly accepted by the employees and pensioners of the SATS, the White Fund and the Black Fund by their remaining employees and pensioners of the SATS, the White Fund and the Black Fund without demur. However, the applicants have failed to plead that the present members of the Transport Fund and the Second Fund, on whose behalf the relief is sought in paragraph 24.2 of the amended particulars of claim, are the persons to whom the promise was allegedly made and by whom it was accepted.[29]

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[27] Minister of Home Affairs and Another v American Ninja IV Partnership and Another 1993 (1) SA 257 (A) at 268C-D

[28] Laurence Boulle *et al* Constitutional and Administrative Law. Basic Principles 1 ed (1989) 179

[29] Applicants' amended particulars of claim Vol 1 p75 para 21.2

56 The Roman-law *pollicitationes* (one-sided promises) are not actionable in South African law: *pollicitationes* require an acceptance and, until acceptance, create no right which can be enforced.[30] It is therefore not surprising that the applicants allege the promise to have been tacitly accepted "*without demur*" but this single allegation is insufficient for it seeks to create a multitude of contracts of promise between the SATS, the White Fund and the Black Fund on the one hand, and a number of employees and members on the other hand. In order for a contract to be concluded, it must be pleaded and proved that the offer came to the notice of, and was accepted by, the offeree[31] – in this case, each employee and pensioner.

57 Without pleading the facts which show that the promise was made to every present employee and pensioner who then accepted the offer, it cannot be said that a contract came into existence.

58 We submit for the reasons discussed above that the decision of Legodi J dismissing the third exception falls to be set aside for the reasons discussed.

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[30] T B Smith "*Pollicitatio – Promise and offer. Stair v Grotius*" 1958 Acta Juridica 141 at 141

[31] Bloom v The American Swiss Watch Co 1915 AD 100

Sixth exception

59 In paragraph 19 of its claim the applicants allege that in 2003, amongst others, Transnet broke its promise in that it had thereafter consistently failed to grant any pension increases beyond the minimum of 2% per year.

60 Transnet excepted on the basis that the applicants had failed to plead facts which establish either a power or a duty on the part of Transnet to grant pension increases. Accordingly, Transnet pleaded the applicants' amended particulars of claim were vague and embarrassing, alternatively, failed to disclose a valid cause of action.[32]

61 We submit for the reasons discussed under the third exception that Legodi J erred in dismissing Transnet's sixth exception.

Eighth exception

62 In paragraph 23 of its amended particulars of claim, the applicants alleged that Transnet's failure to cause the Transport Fund and the Second Fund to keep the promise constitutes an unfair labour practice in breach of section 23(1) of the Constitution.

[32] Transnet's Exception Vol 1 p 89 paras 21-2

63 The applicants' reliance on an unfair labour practice is bad in law because -

63.1 in order to rely on an unfair labour practice, the applicants must be employees of Transnet. The applicants do not allege that they are employees and in fact seek an order directing Transnet to increase the pensions of members of the Transport Fund and the Second Fund, thereby indicating that the order being sought relates to former employees of Transnet;

63.2 the applicants have not alleged the basis on which they are entitled to rely directly on section 23(1) of the Constitution, in the absence of any allegation that they are not adequately protected by the Labour Relations Act 66 of 1995.[33]

64 The Court erred in dismissing this exception by holding that:

64.1 it was not appropriate to decide a legal question where the facts and legal norms are complex, closely interlinked and uncertain, on exception;[34]

[33] Transnet's Exception Vol 1 p 92 para 28

[34] Judgment Vol 2 p 136 para [46]

64.2 it was inappropriate to consider the development of the common law by exception in such circumstances (para 46 of the judgment);

64.3 the defendants (without specifying which defendants) sought to refer the matter to the Labour Court and to insulate it from the other grounds on which the failure to keep the promise was unlawful;

64.4 the exception could be pleaded as a special defence and therefore impliedly could not succeed as an exception.

65 The Constitutional Court in My Vote Counts NPC[35] held that subsidiarity denotes a theoretical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institutional or higher norm, should be invoked only where the more local institution, or concrete norm or detailed principle or remedy, does not avail. The word has been given a range of meanings in our constitutional law.[36] The Court held that the most frequent invocation of subsidiarity has been to describe the principle that limits the way in which litigants may invoke the Constitution to secure enforcement of a right.[37]

[35] My Vote Counts NPC v Speaker of the National Assembly and Others 2016 (1) SA 132 (CC)

[36] At [46]

[37] At [50]

66 Fundamentally, the principle holds that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation to give effect to that right.[38] Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution place only a subsidiary or a supporting role.[39]

67 In relation to the Labour Relations Act 66 of 1995, the Constitutional Court said the following:

> *"[55] Second, the court has applied the principle to legislation Parliament adopts with the clear design of codifying a right afforded by the Bill of Rights. After Parliament enacted the Labour Relations Act (LRA), the High Court in Naptosa refused to allow a litigant to rely directly on the fair labour practices provision in the Bill of Rights. It had to rely instead on the unfair labour practice provisions in the statute, or challenge the statute itself. Conradie J said he could not 'conceive that it is permissible for an applicant, save*

[38] At [53]

[39] At [54]

by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes'. He also stated that it was inappropriate, in a highly regulated statutory environment like labour law, to ask a court to fashion a remedy 'which the legislature has not seen fit to provide'.

[56] This approach was first quoted with approval in this court in a context unrelated to employment rights, then adopted and endorsed unanimously in a case about labour relations, Sandu. Even though national regulations had been enacted providing for collective bargaining, the applicant sought to rely directly on the provisions of s 23(5) of the Bill of Rights to found a more encompassing duty to bargain. The court disallowed this. It held that where legislation has been enacted to give effect to a constitutional right, 'a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard'. If the legislation is wanting in its protection

of the right, then that legislation 'should be challenged constitutionally'." [40]

68 We submit, for the reasons set out by the Constitutional Court in the abovementioned judgment, that absent a direct challenge of the constitutionality of the LRA, the applicants cannot bypass the provisions of the LRA and seek to enforce the right using the Constitution.

The purpose of an exception

69 With reference to the exception taken by Transnet in relation to the applicants' reliance on section 23(1) of the Constitution, Legodi J held that the point raised is a legal question, "*the question is whether it can be raised as an exception, or whether the facts and legal norms in this case are complex and uncertain to the extent that it would not be appropriate to decide the issue on exception*". He held that the facts of the case as pleaded as the legal questions raised "*are complex and closely interlinked insofar as they relate to what is pleaded*".[41]

[40] See too the majority judgment at [160], [161], [163], [164], [165] and [166]

[41] Judgment Vol 2 p136 para 46

70 We submit that Legodi J erred in his conclusion. The main purpose of an exception that no cause of action has been disclosed is to avoid the leading of unnecessary evidence at trial.[42] We submit that the question of whether the applicants could rely on the Constitution when the Legislature provides for a similar right in the Labour Relations Act is not a matter that requires the leading of evidence at trial and Legodi J should thus have upheld the exception.

CLAIM 2

Ninth exception

71 In paragraphs 25 to 27 of the applicants' amended particulars of claim, the applicants allege *inter alia* that the SAR&H and the SATS were obliged to pay into the White Fund and the Black Fund such amounts as were necessary to maintain them in a sound financial condition, that Transnet inherited these obligations in terms of section 3(2) of the Succession Act and that in terms of section 16 of the Succession Act, Transnet's debt pursuant to these obligations (defined as the legacy debt) would be determined by the State Actuary in consultation with an actuary appointed by the Minister of Public Enterprises.

[42] Barclays National Bank v Thompson 1989 (1) SA 547 (A) at 553F-I

72 In paragraph 28 of the applicants' amended particulars of claim, the applicants allege that the State Actuary determined the legacy debt in an amount of R171,806 billion, plus interest from 1 April 1990 in consultation with an actuary appointed by the Minister of Transport.

73 In dismissing the exception, Legodi J made a series of conclusions which, for convenience sake, are classified under the grounds discussed below:

First ground

74 The fact that the applicants had not alleged that for any period under consideration, the Funds were in unsound financial position did not mean that the claim lacked averments necessary to sustain a valid cause of action.[43]

75 If Transnet contended that an obligation to pay never arose because the Funds were never in an unsound financial position, this had to be a raised as a defence in a plea.

76 This matter fell or ought to have fallen within the knowledge of the respondents.

[43] Judgment Vol 2 p 124 para [12]

77 The averment of an unsound financial position of the first and second respondents, requiring them to be placed in a sound financial position, was to be implied from paragraphs in the particulars of claim in which reference was made to section 16 of the Succession Act.[44]

78 We submit for the following reasons that Legodi J erred:

78.1 the averments that the Black fund, the White Fund, and the first and second respondents were in an unsound financial position and the amounts that were required to place them in a sound position, are material facts upon which the applicants rely for their claim and ought to have been pleaded;

78.2 section 12(2) of the Railways and Harbours Pensions Act provided *inter alia* that, on the last day of each month and after determining the ratio of its contribution to the aggregate of the contributions paid into the White Fund by members during the month, the Administration would pay into the Fund the sum so calculated. Section 12(3) provided *inter alia* that the Administration[45] would also pay into the White Fund from

[44] Judgment *ibid* paras [13] –[16]

[45] The "*Administration*" was defined in section 1 of both the Railways and Harbours Pensions Act and the Railways and Harbours Pensions for Non-Whites Act as the authority which, under the Railway Board Act 73 of 1962, administered and worked the railways, ports and harbours of the Republic. Section 3 of the Railway Board Act provided that the railways and harbours were to be administered under the control and authority of the State President, to be exercised through a Minister of State who was to be advised by the

time to time any further amounts that may be necessary to maintain the Fund in a sound financial condition. Section 11(2) and (3) of the Railways and Harbours Pensions for Non-Whites Act provided in essentially identical terms for the Black Fund;

78.3 section 11 of the Railways and Harbours Pensions Act and section 10 of the Railways and Harbours Pensions for Non-Whites Act provided for the periodical economic valuation of the White Fund and the Black Fund, respectively, at the discretion of the Minister of Transport by an actuary appointed by the Minister. The actuary's report on whether there was a surplus or deficiency in the Fund would be tabled in Parliament;

78.4 the fact that certain facts are within the exclusive knowledge of a party may result in the court requiring less evidence to establish a prima facie case, but this does not alter the onus which remains on the other party;[46]

Railways and Harbours Board; the management and working of the railways and harbours was, subject to the control of the Minister, to be carried on by the General Manager of the railways and harbours. Section 2 of the South African Transport Services Act 65 of 1981 provided that the South African Railways and Harbours Administration referred to in the Railway Board Act should continue in existence under the name, the South African Transport Services. Section 2 further provided that the SATS was to be administered under the authority and control of the State President, exercised through the Minister of Transport Affairs, who was to be advised by the South African Transport Services Board; the management of the SATS was, subject to the control of the Minister, to be carried on by the General Manager of the SATS.

[46] Gericke v Sacke 1978 (1) SA 821 A at 827D-G

78.5 paragraphs 27 to 29 of the particulars of claim (to which the Court referred) do not imply that the first and second respondents were in an unsound financial position. They rely on section 16 of the Succession Act, which does not provide for the calculation of the legacy debt but for the calculation of the State's guarantee and does not create the legacy debt;

78.6 the transfer of the commercial enterprise from the SATS to Transnet was on 1 April 1990, as stipulated by the Minister in GN 578 *GG* 12364 of 23 March 1990, acting under section 3(1) of the Succession Act. On 1 April 1990, section 16 of the Succession Act simply provided that the State guaranteed all obligations of the SATS transferred to Transnet in terms of section 3(2), including all obligations of the SATS in respect of the pension funds. Section 16 did not provide for the calculation of either the State's guarantee or Transnet's alleged legacy debt;

78.7 in 1991, the Transnet Limited Amendment Act 52 of 1991 amended section 16 (date of commencement: 22 May 1991) by adding subsections (2) to (4), the existing section becoming subsection (1). Subsection (2) limits the extent of the State's guarantee to the amounts payable by the SATS immediately prior to 1 April 1990 in terms of section 12(3) of

the Railways and Harbours Pensions Act and section 11(3) of the Railways and Harbours Pensions for Non-Whites Act; and provides for the method of calculation of the amounts guaranteed. Subsection (3) provides for the rate of interest for the purposes of such guarantee. Subsection (4) provides for the reduction of the State's guarantee obligation;

78.8 section 16 in its present form provides for the calculation of the State's guarantee obligation, not for the calculation of the legacy debt as alleged by the applicants. The applicants plead reliance on section 16 for the purposes of calculating Transnet's liability but on any interpretation of the section, it does not do so. To compound matters, the method of calculating the State's guarantee was only introduced one year after Transnet allegedly inherited the legacy debt. This raises the question of what if, in the interim, Transnet's liability had been calculated not exactly in accordance with subsection (2), the effect of subsection (2) would have been on this preceding calculation?

Second ground

79 We submit for the reasons that follow that the Court erred in dismissing this exception by holding that paragraphs 27 and 28 of

the particulars of claim indicated that the legacy debt became due for payment on 1 April 1990:[47]

79.1 the ordinary meaning of a debt is a firm obligation to pay, whether now or later.[48] In the context of the Prescription Act 68 of 1969, a debt is due when a money obligation is presently claimable by the creditor for which an action could be brought by the debtor. The debt must be one that the debtor is under an obligation to pay immediately;[49]

79.2 insofar as the applicants seek to rely on section 16 of the Succession Act, that section does not provide, on any construction, for the due date of the alleged legacy debt. To the extent that the applicants imply that the legacy debt was due on 1 April 1990, there is no foundation for such an implication and in any event, it would be incorrect. The reference in section 16(2) to the date referred to in section 3(1) is to the cut-off date for liability, not the due date of the debt. If it were not so, it would be undesirable that the legislature provided for the calculation of the overdue debt, with interest, approximately one year after it was allegedly

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47 Judgment p125 para [14] and [16]

48 Joint Liquidators of Glen Anil Development Corporation Ltd (In Liquidation) v Hill Samuel (SA) Ltd 1982 (1) SA 103 (A) at 111E

49 Santam Ltd v Ethwar 1999 (2) SA 244 (SCA) at 252

due;

79.3 a further indication against the alleged legacy debt being due on 1 April 1990 is that section 16(4) of the Succession Act contemplates the settlement of the debt over a period of time;

79.4 on the applicants' version the legacy debt was determined pursuant to section 16 of the Succession Act. Prior to the promulgation of the Transnet Limited Amendment, which commenced on 22 May 1991, section 16 of the Succession Act made no provision for the determination of the alleged legacy debt. Yet, according to the applicants, prior to the promulgation of the Transnet Limited Amendment, Transnet partially settled the legacy debt by the issuance of T011 bonds in its 1990 financial year.

80 Accordingly, the Court should have found that claim 2 lacks averments necessary to sustain a valid cause of action and/or is bad in law.

CLAIM 3

Thirteenth exception

81 Claim 3 of the applicants' amended particulars of claim depends entirely upon the allegation that the payment of 40% of the *"members' surplus"* in the Transport Fund constituted a donation.

82 In support of that allegation, the applicants attach to their particulars of claim a minute of the agreement reached between Transnet and a sub-committee of the trustees of the Transport Fund and the minutes of a meeting of the trustees of the Transport Fund.

83 Transnet excepted on the ground that the particulars of claim are vague and embarrassing, alternatively, do not disclose a valid cause of action in that the attached documents do not establish that the payment of portion of the actuarial surplus of the Transport Fund to Transnet constituted a donation, nor do the applicants allege facts from which that conclusion may be reached.

84 The Court dismissed this exception by holding that:

84.1 read in the context of paragraphs 35 to 38 of the applicants' amended particulars of claim, there was no merit in the suggestion that the particulars of claim lacked averments

necessary to justify the conclusion that the third respondent became liable for the repayment of the donation;[50]

84.2 the donation would only be lawful if it was proved to be such at the trial;[51]

84.3 in the interim, it was not necessary for the applicants to categorise their cause of action as they did in their heads of argument (as the *condictio furtiva*).[52]

85 The party who relies on a donation must prove it.[53] A true donation (as opposed to a remuneratory donation) is one where the disposition was motivated by pure liberality or disinterested benevolence. The motive is "*one without obligation*", "*for no return*" or "*without any quid pro quo being given or expected*".[54] The applicants fail to allege this. Furthermore, doubt is cast on any liberality of the Transport Fund's motive by:

85.1 the minute of the agreement reached on 8 November 2000 between Transnet and a sub-committee of the trustees of the

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50 Judgment para [19]

51 Judgment [20]

52 Judgment [20]

53 Kay v Kay 1961 (4) SA 257 (A) at 261G

54 Welch v Commissioner for the South African Revenue Service [2004] 2 All SA 586 (SCA) paras 22, 32

Transport Fund, which states that 40% of the balance of the surplus would revert to Transnet:

> *"On the understanding that Transnet utilise its share of the surplus around the two defined benefit pension funds that are underwritten by Transnet i.e. the Transnet Pension Fund and the Transnet Second Defined Benefit Fund. The intention is to innovatively use Transnet's share of the surplus to enhance these two funds and improve the relationship between Transnet and the members of these funds. The ultimate decision regarding the use of Transnet's share of the surplus will rest with the Board of Transnet."*[55]

85.2 the decision of the trustees of the Transport Fund on 7 March 2001 which states that *"the Administrator must keep the Trustees informed as to how the Company [i.e. Transnet] utilises its share of the surplus."*[56]

86 In addition, the allegation that this constituted an unlawful donation is at odds with the subsequent submission that the claim is in truth one under the *actio furtiva*. The latter is a *condictio* of which one of the requirements is that Transnet must have stolen the amount or

[55] Annexure PC 2.1 Vol 1 p 32

[56] Annexure PC 4.4 Vo, 1: p 41

received it *mala fide* knowing that it had been stolen.[57] A breach of fiduciary duty in making the donation does not equate to a theft or indeed the receipt of the amount *mala fide.*

87 We submit for the reasons discussed that Legodi J ought to have upheld the exception.

Ad Costs

88 Legodi J held that each party must pay its own costs because both parties substantially succeeded.[58] In the application for leave to appeal Legodi J dismissed the application with costs including costs of two counsel in favour of all the respondents.[59]

89 We acknowledge that the issue of costs is one of discretion to be exercised judicially having regard to all the circumstances of the matter. We readily accept that one of those circumstances is whether or not the litigation is constitutional in nature as prescribed in the *Biowatch* matter.[60]

90 The principles related to costs were recently restated by this Court in

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[57] Crots v Pretorius 2010 (6) SA 512 SCA at para 3, 8 and 9

[58] Judgment Vol 2 p 138 para 53

[59] Judgment leave to appeal Vol 2 p 169 [10]

[60] Founding affidavit Vol 3 p 197 paras 57 and 58

Lawyers for Human Rights as follows:[61]

> *"[13] This court in Ferreira endorsed long-standing High Court and Appellate Division principles on costs awards. Costs are in the discretion of the court and, in general, the unsuccessful party must pay:*
>
> *The [High] Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for*

[61] Laws for Human Rights v Minister in the Presidency and Others 2017 (1) SA 645 (CC)

example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.'

[14] The purpose of awarding costs to a successful litigant is —

'to indemnify him for the expense to which he has been put through having been unjustly compelled to either initiate or to defend litigation as the case may be. Owing to the operation of taxation, [however,] such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.'

[15] But in Biowatch, for constitutional litigation, this court substantially adapted this general approach. It held that the general rule is not to award costs against unsuccessful litigants when they are litigating against state parties and the matter is of genuine constitutional import.

[16] And Biowatch makes it clear that this does not apply only to costs orders on the merits in constitutional cases. It applies also to what may be described as ancillary issues and points. For instance, here, LHR may have deserved protection not only in regard to the principal constitutional arguments it sought to advance, but in regard to the procedural means it chose to advance them. This principle is important. The threat of hefty costs orders may chill constitutional assertiveness. It may discourage parties from challenging constitutionally questionable practices of the state.

[17] In both Biowatch and Helen Suzman Foundation this court emphasised that judicial officers should caution themselves against discouraging those trying to vindicate their constitutional rights by the risk of adverse costs orders if they lose on the merits. Particularly, those seeking to ventilate important constitutional principles should not be

discouraged by the risk of having to pay the costs of their state adversaries merely because the court holds adversely to them.

[18] This, of course, does not mean risk-free constitutional litigation. The court, in its discretion, might order costs, Biowatch said, if the constitutional grounds of attack are frivolous or vexatious, or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs. The High Court controls its process. It does so with a measure of flexibility. So a court must consider the 'character of the litigation and [the litigant's] conduct in pursuit of it', even where the litigant seeks to assert constitutional rights."

91 In the present instance, the applicants seek to enforce pecuniary interests for themselves. They have not sought to challenge the constitutionality of the applicable legislative and regulatory instruments. Their challenge cannot be described as constitutional in this context.

92 But even if the applicants were to assert a constitutional challenge or an issue of constitutional significance, it does not follow that Transnet should be deprived of its costs.[62] The exceptions relate to lack of averments necessary to sustain a valid cause of action and to vague and embarrassing particulars. Transnet, having been substantially successful in these procedural issues, should be entitled to its costs.

93 That Transnet and the Funds were substantially successful is evident from the fact that the applicants contend for dire consequences if the exceptions which Legodi J upheld were to remain intact. They claim not to be able to pursue claim 1, which self-evidently is a significant claim.

94 In these circumstances, Legodi J ought to have directed the applicants to pay Transnet's costs, including the costs of three counsel.[63]

CONCLUSION

95 It is accordingly submitted that Transnet's exceptions should be upheld with costs, including the costs of three counsel.

[62] Laws for Human Rights, *supra* at [18]

[63] Transnet's affidavit in the conditional application Vol 4 p 367 paras 39 and 40

C D A LOXTON SC

M A CHOHAN SC

B L MAKOLA

Counsel for Transnet

22 September 2017

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT95/17

In the matter between:

JOHAN PIETER HENDRIK PRETORIUS	First Applicant
MONTANA DAVID KWAPA	Second Applicant
and	
TRANSPORT PENSION FUND	First Respondent
TRANSNET SECOND DEFINED BENEFIT FUND	Second Respondent
TRANSNET LIMITED	Third Respondent

THE APPLICANTS' HEADS OF ARGUMENT IN THE RESPONDENTS' APPLICATIONS FOR LEAVE TO CROSS-APPEAL

TABLE OF CONTENTS

INTRODUCTION

1. We address the applications for leave to cross-appeal filed by the First and Second Respondents (the Funds) and the third respondent (Transnet) in these submissions. The cross-appeals concern some of the exceptions that were dismissed in the High Court. The respondents persist in only some of these exceptions on appeal.

2. The applicants contend that there is no merit in the applications to cross-appeal, but do not oppose the granting of leave to cross-appeal on grounds of convenience.[1]

3. We address the grounds of cross-appeal in relation to each of the three claims pleaded in the Particulars of Claim. Accordingly, we first address the exceptions that the respondents pursue in respect of Claim 1 (the 1989 Promise Claim); then we deal with Transnet's exceptions to Claim 2 (the Legacy Debt Claim); and thirdly, we address the exceptions in respect of Claim 3 (the Donation Claim).

[1] Applicants' Answering Affidavit in the Applications for Leave to Cross Appeal, v 4 p 373 paras 3-4

THE PROMISE CLAIM

4. In Claim 1, the applicants seek to hold Transnet and the Funds to their 1989 Promise.

5. The making and keeping of the promise is pleaded in paragraphs 14 to 16 of the particulars of claim.[2] The applicants plead that:

   5.1. In 1989, in the run-up to the establishment of Transnet, its predecessor, SATS, and its two funds, the White Fund and the Black Fund, made a promise to all their employees and members that they would continue to increase their pensions as before, that is, at a rate of at least 70% of the rate of inflation.

   5.2. The promise was made orally by Dr Moolman, the general manager of SATS and the chair of the boards of trustees of both pension funds, and by Mr Louw, the erstwhile Minister of Transport, at meetings throughout the country with some 80 000 SATS employees in May and June 1989.

   5.3. The promise was repeated in writing in a SATS brochure distributed to all SATS employees and pensioners later in 1989.

   5.4. The promise was kept by Transnet, the Transport Fund and the Second Fund until 2002.

[2] Particulars of Claim v 1 pp 73-4 paras 14-16, 18 read with Brochure PC1 p 17 at pp 20, 21, 27 and 30

The power to make and keep the promise[3]

6. The Funds deny that they are bound by the promise because, they say, the legislation and rules that govern the pension benefits payable by their predecessors and those payable by them, did not and do not allow increases in accordance with the promise at rates higher than the minimum of 2% per year. The promise was thus not competent when it was made[4] and it has in any event not survived the promulgation of the Funds' own pension fund rules.[5]

7. Similarly, its third and sixth exceptions, Transnet contends that it is necessary for the applicants to plead facts that establish that the SATS had the power to increase the pensions of members of the White Fund and the Black Fund,[6] and that Transnet currently has the power to increase the pensions of the members of the Transport Fund and the Second Fund.[7] Transnet also contends that the legislation and the Fund rules do not vest such power in the respondents.[8]

8. We submit for the following reasons that these contentions are misconceived.

[3] Funds' exception v 2 pp 112 – 115 paras 1 – 6; Funds' Heads pp 16 – 22 paras 23 – 31. Transnet's third exception v 1 pp 87-88 paras 7-9; sixth exception v 1 pp 89 – 90 paras 21 – 23; Transnet's Heads pp 17 – 29 paras 38 – 61

[4] Funds' Heads pp 16-22 paras 23-31

[5] Funds' Heads pp 22-25 paras 32-42

[6] Transnet's third exception: v 1, pp 87-88; paras 7-9; Transnet's FA in Application to Cross Appeal ("Transnet's FA"): v 4, pp 358-360 paras 25-27

[7] Transnet's sixth exception: v 1, pp 89-90, paras 21-23; Transnet's FA, v 4, pp 358-360 paras 25-27

[8] Transnet's third exception: v 1, p 88; para 9; Transnet's FA: v 4, pp 359 para 27.2

Contractual competence is presumed

9. The essence of the respondents' argument is that, under the applicable legislation and rules, the White Fund and the Black Fund did not have the power and the Funds do not have the power to contract on the terms of the promise. They say that the Funds are creatures of statute and can only make such contracts as are competent under the legislation applicable to them.

10. While such a lack of contractual capacity may ultimately found a defence, it does not avail the respondents on exception. That is because the law presumes that parties who enter into contracts have the capacity to do so. Wessels *Law of Contract* describes this principle as follows:

> "*All that the law requires a party to prove who alleges a contract is the existence of the agreement. If it contains all the essential elements of a binding contract and is enforceable in our courts, the law will presume that the parties were capable of contracting and that they intended to be bound by their promises. As, therefore, the capacity to contract is presumed, the incapacity to contract is an exception which the person who sets it up must prove ….".*[9]

11. A full bench of the High Court reiterated this principle in *Serobe's* case.[10] The court endorsed Wessels's statement of the principle[11] and concluded as follows:

[9] Wessels *Law of Contract* 2nd ed vol 1 para 693

[10] Serobe v Koppies Bantu Community School Board 1958 (2) SA 265 (O) 271 to 272

"*In the light of these authorities, it seems clear to me that applicant's allegation that he had entered into an agreement of employment with the respondent Board which is alleged to be body corporate with power to sue and be sued, raises the presumption that the respondent Board had the power to enter into the alleged agreement, especially in view of the allegation that there was performance by both parties under the contract. It was therefore not necessary for applicant to allege that the respondent had power under the regulations under which it was incorporated, to enter into the alleged agreement.*"

The Funds must plead illegality

12. The Funds and Transnet contend that they cannot legally implement the promise because the legislation and rules under which they operate do not permit the Funds to grant increases in accordance with the promise in excess of 2% per year. Their defence is, in other words, that they are not bound by their contractual commitments because they cannot lawfully implement them.

13. Although this is again a defence that might ultimately avail the respondents, it is not one open to them on exception. It is for them to plead that they cannot lawfully implement the promise.

[11] At 271

14. The Appellate Division upheld this principle in *Tamarillo*.[12] Miller JA put it as follows:

> "*The dictum of De Villiers JA in Shill v Milner is composed of two elements:*
>
> *(i) that it is for the respondent to raise impossibility as a defence and that he must raise it in his plea (or in his answering affidavit) and*
>
> *(ii) that the onus then rests on him to prove impossibility.*
>
> *While I appreciate that the Court might in certain respects, when considering how to exercise its discretion in regard to a claim for specific performance, approach differently (i) a case in which effective performance is possible only with the consent of a third party and (ii) the more usual type of case in which the consent of another is not necessary for effective performance, I am unable to discern why there should be a difference in approach in respect of the first element of the dictum in Shill v Milner.*
>
> *Ordinarily it is the respondent who is called upon to perform who has peculiar knowledge concerning his ability or inability to do what is required of him. This is generally as true of a respondent who is required to deliver a particular article as of one who is required to perform an act which requires, for effectiveness, the consent of*

[12] Tamarillo v B N Aitken 1982 (1) SA 398 (A)

another. In the latter case, the respondent, having undertaken to perform that act, may in the absence of evidence to the contrary, not unreasonably be taken to have made the arrangements necessary to enable him to perform it, just as the respondent who has undertaken to deliver an article may reasonably be taken to have arranged for the article to be available for delivery. It is generally not for a applicant to anticipate in his declaration the possible defences a respondent might raise."[13]

15. The Supreme Court of Appeal reiterated the principle in *Snow Crystal*.[14] Scott JA put it as follows:

"*It is always possible as a matter of law, for a party to raise the defence of impossibility of performance. The onus of establishing that defence is upon the party raising it …".*[15]

"Save possibly in circumstances where a applicant seeks specific performance, the onus of proving impossibility will lie upon the respondent."[16]

[13] At p 442

[14] Transnet v Owner of the MV Snow Crystal 2008 (4) SA 111 (SCA)

[15] Para 25

[16] Para 28

The rules are not before the court

16. The Funds' defence depends vitally on their rules. They make this clear in their heads in relation to the Transport Fund[17] and the Second Fund.[18] They summarise their point as follows:

> "*The particulars of claim do not allege that the terms of the promise trumped the provisions of the Rules, and do not set out any facts that would support such an allegation."*[19]

17. Likewise, Transnet's case is that *"any attempt to pay out benefits in contravention of a fund's rules is unlawful"*.[20]

18. But the court may not, on exception, have regard to the Funds' rules or indeed any other subordinate legislation. We described this principle in our submissions in the main application. The Appellate Division held in *Wellington* that a court may not on exception have regard to any extraneous material including subordinate legislation:

> "*As far as form is concerned, these exceptions, in a sense, are exceptional. … the court a quo was asked to augment the averments contained in the pleadings before it by having regard to extraneous*

[17] Funds' Heads pp 22-24 paras 32 to 37

[18] Funds' Heads pp 24-25 paras 38 to 42

[19] Funds' Heads p 25 para 42

[20] Transnet's Heads p 26 para 53

material, more particularly the provisions of certain by-laws which in the ordinary course would require proof …".[21]

The respondents implemented the promise

19. Prior to 1989, the White Fund and the Black Fund had followed a consistent practice over decades, with the concurrence of SAR&H and SATS, of granting pension increases of at least 70% of the rate of inflation.[22]

20. Transnet and the Funds honoured the promise from 1989 to 2002, that is, for some 13 years, by continuing the practice of their predecessors, of granting annual pension increases of at least 70% of the rate of inflation. The pension increases they granted over this period were indeed about 80%, on average, of the rate of inflation.[23]

21. In these circumstances, Transnet and the Funds cannot credibly contend that they cannot lawfully implement the promise. They can certainly not say that it is a matter so obvious that it can be decided on exception.

The merits of the argument

22. We submit that the promise was a valid contract binding on SATS, the White Fund and the Black Fund that remains binding on Transnet and the Funds.

[21] Wellington Court Shareblock v Johannesburg City Council 1995 (3) SA 827 (A) 834

[22] Particulars of Claim v 1 p 73 para 13

[23] Particulars of Claim v 1 p 74 para 18

23. The promise was in the first place a contract between SATS, the White Fund and the Black Fund[24] (represented by Dr Moolman, the general manager of SATS and the chair of the boards of trustees of both pension funds, and Mr Louw, the Minister of Transport[25]) on the one hand, and their employees and members on the other.[26] It was competent for them to enter into such a contract:

23.1. SATS had wide statutory powers to operate the transport enterprise of the state. They included the power to promise its employees that it would ensure that their pension funds continued to increase their pensions by at least 70% of the rate of inflation. The Funds do not contend otherwise.

23.2. The White Fund Act[27] permitted the White Fund to implement the promise:

23.2.1. Section 5 permitted the White Fund to pay its members the benefits stipulated in its rules. The rules are not before the court.

23.2.2. Section 4(3) permitted the Minister of Transport (Mr Louw) in consultation with the Railway Board (chaired by Dr Moolman) to amend the rules of the White Fund to allow it to implement the promise.

[24] Particulars of Claim v 1 p 73 para 14

[25] Particulars of Claim v 1 p 73 para 15

[26] Particulars of Claim v 1 p 75 paras 21.1 to 21.3

[27] Railways and Harbours Pensions Act 35 of 1971

23.2.3. Section 4(7) provided that the annuities payable by the White Fund "*may be increased by the Administration (that is, by SATS) from time to time"*. SATS could thus ensure that the White Fund implemented the promise.

23.3. The provisions of the Black Fund Act[28] were materially the same as those of the White Fund Act. The relevant sections are s 4, s 3(2) and s 3(3).

24. The respondents, that is, Transnet and the Funds, did not enter into the contract made by the promise. It was a contract made by their predecessors, SATS, the White Fund and the Black Fund. Transnet and the Funds succeeded to the rights and obligations of their predecessors under the following statutory provisions:

24.1. Transnet succeeded to all the rights and obligations of SATS under the following provisions of the Succession Act[29]:

24.1.1. Section 3(1) provides that, on a date determined by the Minister, Transnet "*shall become the successor"* to SATS.

24.1.2. Section 3(2) provides that, on the transfer date, the whole of the commercial enterprise comprising SATS "*including all*

[28] Railways and Harbours Pensions for Non-Whites Act 43 of 1974

[29] Legal Succession to the South African Transport Services Act 9 of 1989

assets, liabilities, rights and obligations of whatever nature … shall be transferred to" Transnet.

24.1.3. Section 3(3)(d) adds for good measure that Transnet "*shall be substituted as contracting party"* for SATS in all contracts to which SATS had been a party.

24.2. The Transport Fund (initially called the Transnet Pension Fund) was the product of a statutory merger of the White Fund and the Black Fund in terms of s 2(1) of the Transnet Pension Fund Act.[30] The section was later amended but originally read as follows:

> "*With effect from the operative date of this Act (which was 1 October 1990) the New Fund (that is, the White Fund) and the Pension Fund (that is, the Black Fund) shall cease to exist, the Transnet Pension Fund shall be established and all the assets, liabilities, rights and obligations of the New Fund (that is, the White Fund) and the Pension Fund (that is, the Black Fund) … shall vest in and devolve upon the Fund (that is, the Transport Fund) without any formal transfer or cession."*

24.3. All the pensioner-members of the Transport Fund were transferred to the Second Fund in terms of s 14B of the Transnet Pensions Fund Act.

[30] Transnet Pension Fund Act 62 of 1990

The Second Fund succeeded to a *pro rata* share of all the rights and obligations of the Transport Fund in terms of s 14B(3) as follows:

> "*All the assets, liabilities, rights and obligations pertaining to (the pensioner-members transferred from the Transport Fund to the Second Fund) … shall vest in and devolve upon the Transnet Second Defined Benefit Fund without any formal transfer or cession with effect from the date of publication of such determination in the Gazette by the Minister.*"

25. Transnet and the Funds thus succeeded to the contractual rights and obligations of their predecessors by statute, that is, under the provisions of the acts of parliament by which they were established. These statutes cannot be overridden or trumped by the pension fund rules of the Funds. They accordingly remain bound, by statute, to the contractual obligations of their predecessors. It is not an answer for the respondents to say that the pension fund rules of the Funds do not permit them to honour the promise.

26. The Funds' pension fund rules in any event do not preclude the respondents from honouring the promise:

    26.1. Transnet acquired the transport enterprise of the state under the Succession Act. It does not preclude Transnet from implementing an undertaking made by its predecessor to ensure that its pension funds continued to grant increases to its members of at least 70% of the rate of inflation.

26.2. The rules of the Transport Fund do not preclude it from honouring the promise:

26.2.1. Rule 32(27) provides that pensions "*shall be increased by 2% compounded annually"*. But this is merely the minimum increase that must (*shall*) be granted. It is a floor and not a ceiling.

26.2.2. Rule 9(a) provides that the rules may be amended by the Board of Trustees of the Transport Fund with the approval of the managing director of Transnet and the Minister, acting in concurrence with the Minister of Finance. They may accordingly amend the rules if and to the extent that they do not permit implementation of the promise.

26.2.3. In terms of s 5(3)(b) of the Transnet Pension Fund Act, the rules applicable to the Transnet Pension Fund Subfund may moreover be amended by its board acting with the approval of Transnet. They may thus amend the rules, if necessary, to enable them to keep the promise.

26.3. The position of the Second Fund is substantially the same as that of the Transport Fund in terms of rules 22 and 24 of the rules of the Second Fund read with s 5(3)(b) of the Transnet Pension Fund Act.

27. Alternatively, even if we are wrong, that is, even if the rules of the Funds make it impossible for them to implement the promise, their predicament would not release them from their contractual obligations to implement the promise because the impossibility would be self-created by the state. It is trite that a party is not released from its contractual obligations by impossibility of performance for which it is to blame. The SCA held in *York Timbers* that this principle is equally applicable to the state.[31] Brand JA put it as follows:

> "*If, before the actual transfer of the contracts to Safcol, the government were to rely on the impossibility of performance created by its own legislation, it would clearly be open to York to raise the argument that the impossibility was a self-created one. If that response was valid against the government, it could not be avoided by the subsequent transfer of the contracts to Safcol."*[32]
>
> *"The second leg of Safcol's counterargument is based on the supposition that the government can be denied reliance on impossibility created by its own legislation only if the legislation in question amounted to a legal stratagem by the government to avoid its contractual obligations. In my view, the supposition is invalid. Why should the government be allowed to rely on its own legislative enactments to avoid its contractual obligations where the legislation was due, say, to legislative mistake? After all, as a matter of law, the sanction against reliance on self-created impossibility is not limited to*

[31] South African Forestry Co v York Timbers 2005 (3) SA 323 (SCA)

[32] Para 24

situations where the act causing the impossibility could somehow be described as wrongful or reprehensible …".[33]

Summary

28. The Funds and Transnet except to the claim based on the 1989 promise because, they say, the legislative regime and Fund rules do not permit them to increase the pensions in accordance with the promise. These exceptions are unfounded and should be dismissed on the following grounds:

28.1. Contractual capacity is assumed. A respondent who contends otherwise, must plead it. It is not a matter for exception.

28.2. The same is true of the respondents' defence of illegality, that is, their contention that they cannot lawfully implement the promise. It is a special defence they must plead.

28.3. The respondents' defences are vitally dependent on the pension fund rules. The rules are not before the court. It may not have regard to them on exception.

28.4. The respondents and their predecessors implemented the promise. They followed a consistent practice of granting increases of at least 70% of the rate of inflation for decades before 1989 and for 13 years

[33] Para 25

thereafter until 2002. They cannot be heard to say, on exception, that they are unable to do so lawfully.

28.5. There is in any event no merit in the Funds' contention that they cannot lawfully implement the promise. That is so for three reasons. The first is that they inherited their predecessors' obligations under the promise by act of parliament, that is, in terms of the provisions of the Succession Act and the Transnet Pension Fund Act. The duties imposed on them by statute cannot be overridden or trumped by their pension fund rules. Second, the rules of the Funds permit them to implement the promise or may be amended to permit them to do so. Third, if they are unable to implement the promise, it would not avail them because the impossibility would be self-created.

The pleading of the making of the promise

29. Transnet complains that the applicants have not pleaded facts which show that the promise was made to every present employee and pensioner who then accepted the offer.[34] This complaint is unfounded. The applicants plead that –

29.1. SATS, the White Fund and the Black Fund made the promise "*to all their employees and members*";[35]

[34] Transnet's third exception v 1 p 88 para 10; Transnet's Heads p 27 para 55

29.2. the promise was orally made "*at meetings throughout the country with some 80 000 SATS employees"*;[36]

29.3. the promise was repeated in a SATS brochure distributed "*to all SATS employees and pensioners"*;[37] and

29.4. "*All the employees and pensioners of SATS, the White Fund and the Black Fund tacitly accepted the promise."*[38]

29.5. The particulars of claim are thus unambiguous. The offer was made to all the employees and members of SATS, the White Fund and the Black Fund at the time, and all of them accepted the offer.

The applicants' direct reliance on s 23(1) of the Constitution[39]

30. The Funds and Transnet argue that, under the principle of subsidiarity, the applicants may not claim directly under s 23(1) of the Constitution.[40] The principle holds that,

> "*where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the*

[35] Particulars of Claim v 1 p 73 para 14

[36] Particulars of Claim v 1 p 73 para 15

[37] Particulars of Claim v 1 p 73 para 16

[38] Particulars of Claim v 1 p 75 para 21.2

[39] Funds' exception v 2 pp 117 – 118 paras 13 – 16; Funds' Heads pp 28 – 31 paras 48 – 55. Transnet's eighth exception v 1 pp 92 – 93 paras 28 – 29; Transnet's Heads pp 29 – 34 paras 62 – 70

[40] Funds' Heads pp 28-31 paras 48-55; Transnet's Heads pp 29-33 paras 63-68

Constitution without challenging that legislation as falling short of the constitutional standard."[41]

31. The principle however only applies if the legislation purports to give exhaustive effect to the constitutional right, that is, if it "*covers the field"*.[42]

32. The Constitution does not require the Labour Relations Act 66 of 1995 to give exhaustive effect to s 23(1) and it does not purport to do so:

    32.1. Sections 185 to 197B of the LRA protect employees against unfair dismissal but only affords them limited protection against other unfair labour practices. Section 186(2) defines an "*unfair labour practice"* in restrictive terms to discreet forms of unfair labour practice.

    32.2. Other statutes also give effect to the right to fair labour practices such as s 76 of the Local Government: Municipal Finance Management Act 56 of 2003, s 4 of the Protected Disclosures Act 26 of 2000 and s 20 of the Nursing Act 33 of 2005. They illustrate that the LRA does not give exhaustive effect to the right to fair labour practices. It does not "*cover the field"* in respect of the protection of the constitutional right under 23(1). What the LRA does do is provide for the exclusive jurisdiction of the labour courts in respect of the labour matters that it does govern.

[41] South African National Defence Union v Minister of Defence 2007 (5) SA 400 (CC) para 51

[42] Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC) paras 74 to 76; My Vote Counts v Speaker of the National Assembly 2016 (1) SA 132 (CC) paras 126 and 136 to 149

32.3. This is also confirmed by s 210 of the LRA, which provides: "*If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail."* As this Court noted in *Chirwa*, "*This section heralds the LRA as the pre-eminent legislation in labour matters that are dealt with by that Act. Only the Constitution itself or a statute that expressly amends the LRA can take precedence in application to such labour matters."*[43]

32.4. Finally, in *National Entitled Workers Union v Commission for Conciliation Mediation and Arbitration and Others*[44] the Labour Court reiterated the point that the LRA does not give exhaustive effect to section 23(1) of the Constitution. Landman J stated that *"The LRA is not intended to regulate exhaustively the entire concept of a fair labour practice as contemplated in the Constitution 1993 nor the present Constitution. The field is far too wide to be contemplated by a single statute."*[45]

33. The applicants' claim is accordingly not precluded by the subsidiarity principle.

34. However, even if the principle of subsidiarity does apply, this Court has made clear that it is not a hard and fast rule. In *My Vote Counts,* the majority stated:

[43] Chirwa v Transnet 2008 (2) SA 24 (CC) para 50

[44] (2003) 24 ILJ 2335 (LC)

[45] National Entitled Workers Union (supra) page 2340E – F. The judgment was taken on appeal to the Labour Appeal Court (LAC). The LAC did not overturn this reasoning.

"We should not be understood to suggest that the principle of constitutional subsidiarity applies as a hard and fast rule. There are decisions in which this Court has said that the principle may not apply. This Court is yet to develop the principle to a point where the inner and outer contours of its reach are clearly delineated. It is not necessary to do that in this case."[46]

35. This is clearly one of those cases where the interests of justice require the claim to be determined without recourse to the LRA, specifically to avoid protracted and piece-meal litigation.

35.1. On the one hand, should it be found that the LRA provides for the unfair labour practice that the applicants complain of, such complaint would have to be addressed first through the dispute resolution processes mandated by the Act and determined by the Labour Court.[47]

35.2. On the other hand, should the LRA not apply to the unfair labour practice complained of (which at least Transnet appears to accept),[48] the applicants would first have to bring a constitutional challenge to various provisions of the LRA – namely, the definition of "unfair labour practice" in s 186(2),[49] the definition of "employee" under s 213[50], and

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[46] My Vote Counts (supra) para 182

[47] Sections 157 and 191 of the LRA

[48] Transnet Heads p 33 para 68

[49] 'Unfair labour practice' is defined to mean –

"any unfair act or omission that arises between an employer and an employee involving-

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding

to the procedures and remedies provided for under ss 191, 193 and 194 – before being able to pursue their claim at all.

36. The interests of justice favour permitting direct reliance on s 23(1) of the Constitution in the action for at least the following reasons:

36.1. Avoiding protracted and piece-meal litigation is especially important in this case, as the pensioner class members are litigating with very limited means, and face ongoing and serious financial prejudice for so long as their claims are unresolved.

36.2. Given that the pensioner class members are elderly and may not have much longer to live, protracted litigation will result in the total frustration of the constitutional claim for some of the class members.

36.3. The common factual basis of the unfair labour practices claim and the other pleaded claims renders it convenient – for the parties and the

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disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(c) a failure or refusal by an employer to re-instate or re-employ a former employee in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act."

[50] 'Employee' is defined to mean –

"(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have meanings corresponding to that of 'employee'."

court – for the labour claim to be determined in the course of the action proceedings.

36.4. Since the pensioner class members are no longer employed by Transnet, the tailor-made dispute resolution mechanisms and remedies for unfair labour practices under the LRA (in ss 191, 193(4) and 194(4)) do not find application. Thus, allowing direct reliance on s 23(1) of the Constitution would not undermine "the set of carefully crafted rules and structures [that] has been created for the effective and speedy resolution of disputes and protection of rights" under the LRA.[51]

[51] Gcaba v Minister for Safety and Security and Others 2010 (1) SA 238 (CC) paras 56 and 57

THE LEGACY DEBT[52]

37. Transnet's liability for "the legacy debt" that Transnet inherited from its predecessor entities, the SAR&H and SATS, is the basis for the applicants' second claim.[53]

38. SAR&H and SATS were obliged by the governing legislation at the time (s 12(3) of the Railways and Harbours Pensions Act 35 of 1971 and s 11(3) of the Railways and Harbours Pensions for Non-Whites Act 43 of 1974) to pay into the White Fund and the Black Fund such amounts as were necessary to maintain them in a sound financial condition.[54]

39. The applicants plead at paragraphs 25 to 27 of the particulars of claim that:

    39.1. Transnet inherited these obligations under s 3(2) of the Succession Act;[55]

    39.2. Section 16 of the Succession Act provided expressly or by implication that, on 1 April 1990, Transnet's legacy debt under these provisions will be as determined by the State Actuary in consultation with an actuary

[52] Transnet's ninth exception v 1 pp 93 – 94 paras 30 – 33; Transnet's Heads pp 35 – 42 paras 71 – 80

[53] Particulars of Claim v 1 pp 77-79 paras 25-34

[54] Particulars of Claim v 1 p 77 para 25

[55] Particulars of Claim v 1 p 77 para 26

appointed by the Minister of Public Enterprises and will bear interest at a rate of at least 12% per annum determined by the State Actuary;[56]

39.3. The State Actuary duly determined the legacy debt in consultation with the actuary appointed by the Minister of Public Enterprises in an amount of R17,1806 billion plus interest from 1 April 1990.[57]

40. Transnet persist in three objections to this claim.[58]

41. The first objection is that the applicants have not pleaded that the White Fund and the Black Fund were in an unsound financial condition. Transnet contends that this is a material fact that ought to have been pleaded, as the SAR&H and SATS were only obliged to pay the White Fund and the Black Fund such amounts as were necessary to maintain them in sound financial condition. Transnet contends that the applicants have thus not shown that SAR&H and SATS became indebted to the White Fund and the Black Fund at all.[59]

42. This objection is unfounded, as the facts the applicants have pleaded suffice to establish that there was an actuarial determination of indebtedness in accordance with the requirements of the Succession Act. To recap, the pleadings indicate that:

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[56] Particulars of Claim v 1 p 78 para 27

[57] Particulars of Claim v 1 p 78 para 28. The reference to "Minister of Transport" in paragraph 28 of the particulars of claim is a mistake. It should also refer to the Minister of Public Enterprises. The applicants will correct the error.

[58] Transnet's Heads pp 35-42 paras 71-80 (Transnet treats the first two objections under the subheading "first ground"); Transnet's 9th Exception v 1 pp 93-94 para 32

[59] Transnet's Heads pp 36-38 paras 78.1-78.5

42.1. SAR&H and SATS were obliged by s 12(3) of the Railways and Harbours Pensions Act 35 of 1971 and s 11(3) of the Railways and Harbours Pensions for Non-Whites Act 43 of 1974 to pay into the White Fund and the Black Fund such amounts as were necessary to maintain them in a sound financial condition.[60]

42.2. Transnet inherited these obligations in terms of s 3(2) of the Succession Act.[61]

42.3. Section 16(2) of the Succession Act provided, expressly or by necessary implication, that the amount payable by SATS to the two funds (that is, "*the legacy debt*") will be as determined by the State Actuary in consultation with an actuary appointed by the Minister of Public Enterprises.[62]

42.4. The State Actuary duly determined the legacy debt in consultation with an actuary appointed by the Minister of Public Enterprises.[63]

42.5. It follows that the legacy debt was conclusively determined in accordance with s 16(2) of the Succession Act.

[60] Particulars of Claim v 1 p 77 para 25

[61] Particulars of Claim v 1 p 77 para 26

[62] Particulars of Claim v 1 p 78 para 27

[63] Particulars of Claim v 1 p 78 para 28

43. The second objection is that s 16 of the Succession Act was only concerned with the quantification of the state's guarantee of the legacy debt and not with the quantification of the legacy debt itself.[64] But that is not so:

43.1. The language of s 16(2) makes it clear that it is concerned with both. It says in the first place that the state's guarantee of the legacy debt is limited to "*the amounts payable to such funds by (SATS)"*. It then adds that those amounts payable by SATS are "*as calculated by the State Actuary".* It says expressly, in other words, that the legacy debt will be as calculated by the State Actuary and that it will then also be the amount of state's guarantee.

43.2. The state guaranteed the legacy debt in terms of s 16(1). The purpose of s 16(2) was to quantify the amount of both the legacy debt and its guarantee. It would not have made sense to quantify the one without the other. The purpose of s 16(2) would be defeated if it only quantified the amount of the guarantee leaving open the possibility that the legacy debt might be smaller or bigger.

43.3. The fact that s 16(2) was only introduced in 1991 is neither here nor there. It was clearly done to bring certainty to the quantification of the legacy debt and the state's guarantee of it.[65]

[64] Transnet's Heads pp 38 – 39 paras 78.5–78.8

[65] Cf Transnet's Heads p 40 para 78

44. The third objection is that the applicants do not say that Transnet was obliged to pay the legacy debt on its determination by the State Actuary.[66] But this objection is unfounded.

44.1. In terms of s 16(2) of the Succession Act, the State Actuary determined the amounts of the legacy debt "*payable"* on the date of transfer to Transnet, that is, on 1 April 1990. The amount thus fell due on that date.

44.2. The applicants accordingly claim payment of the legacy debt with interest from 1 April 1990.[67]

[66] Transnet's Heads pp 40-42 para 79

[67] Particulars of Claim v 1 p 79 para 34.1

THE DONATION CLAIM[68]

45. The applicants' unlawful donation claim is set out in paragraphs 35 to 40 of the particulars of claim.[69] The Funds and Transnet argue that the claim is excipiable because they are unable to identify the applicants' cause of action, and that the applicants' indication in argument that the cause of action is the *condictio furtiva*, is not supported by the pleadings.[70]

46. The *condictio furtiva* is a delictual action for the recovery of patrimonial loss as a result of theft. It is available to an owner or anyone who has an interest in the stolen thing, against a thief or his heirs. The Supreme Court of Appeal described this cause of action in ***Chetty's*** case as follows:

> "*The condictio furtiva is a remedy the owner of, or someone with an interest in, a thing has against a thief and his heirs for damages. It is generally characterised as a delictual action. It is, of course, required that the object involved be stolen before the condictio can find application. The law requires for the crime of theft –*
>
> > *'not only that the thing should have been taken without belief that the owner … had consented or would have consented to the taking, but also that the taker should have intended to*

[68] Funds' exception v 2 p 118 paras 17 22, Funds' Heads pp 32 – 37 paras 57 - 66; Transnet's thirteenth exception v 1 pp 96 – 97 paras 44 – 47; Transnet's Heads pp 42 – 45 paras 81 – 87

[69] Vol 1, pp 79-80.

[70] Funds' Heads pp 32-36 paras 57-66; Transnet's Heads pp 42-45 paras 81-87. See also Transnet's thirteenth exception v 1 pp 96-97 paras 44-47; and Funds' exceptions v 2 p 118 paras 17-22.

terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership.'"[71]

47. The pleaded facts are that the trustees of the fund caused it to donate an amount of R309 121 000 to Transnet.[72] The donation was however unlawful and invalid because –

47.1. to the knowledge of the trustees and Transnet, the trustees did not have the power to make the donation; and

47.2. the trustees made the donation in breach of their fiduciary duty to act in the best interests of the Transport Fund and its members.[73]

48. On the basis of those facts, the conclusion of law for which the applicants contend is that Transnet became liable to the Transport Fund for repayment of the donation.[74] This conclusion flows from the facts because Transnet knew that the Transport Fund could not and did not lawfully consent to the donation. Transnet's acceptance and retention of the donation accordingly constituted theft at common law. It rendered Transnet liable to the Transport Fund under the *condictio furtiva*.

[71] Chetty v Italtile Ceramics 2013 (3) SA 347 (SCA) para 10. Also see Crots v Pretorius 2010 (6) SA 512 (SCA) para 3

[72] Particulars of Claim v 1 pp 79-80 paras 35 to 37

[73] Particulars of Claim v 1 p 80 para 38

[74] Particulars of Claim v 1 p 80 paras 39 and 40.2

49. The Funds contend that the applicants cannot rely on the *condictio furtiva* because they have failed to plead that the funds were stolen.[75] Transnet similarly contends that the pleadings do not support this cause of action because there is no allegation that Transnet received the funds *mala fide* knowing they had been stolen.[76] These complaints are unfounded.

49.1. The applicants have pleaded that the trustees could not lawfully make the donation on behalf of the Transport Fund, and that this was known by both the trustees and Transnet when the donation was made and received.

49.2. The implication is clear:

49.2.1. When the trustees made the donation of 40% of the members' surplus to Transnet, and when Transnet received the donation, Transnet stole the members' surplus funds, with the complicity of the trustees of the Transport Fund. Transnet took the funds in circumstances where the owner of the Funds, the Transport Fund, could not lawfully give away these assets.

49.2.2. Since Transnet took the funds knowing that it was unlawful to receive them, it did so in bad faith.

[75] Funds' Heads pp 34-35 para 63

[76] Transnet's Heads p 45 para 86

50. Both the Funds and Transnet contend that the claim is excipiable because of the use of the word "donation". The Funds contend that "the essence of a donation is that the owner consents to the act of transfer".[77] Transnet notes that there are two kinds of donation: a "*true donation"* and a "*remuneratory donation"*.[78] The difference between the two is that a "*true donation"* is one motivated by pure liberality. On the basis of this distinction, Transnet complains that the applicants do not allege that the Transport Fund's donation to Transnet was a "*true donation"* motivated by sheer liberality. It adds that the minutes to which the applicants refer, cast doubt on the Transport Fund's motive.[79] These objections are however misguided for the following reasons.

51. First, the SCA described the ordinary meaning of the word "donation" in *Welch's Estate* as follows:

> "*The ordinary meaning of that word in the context of making a disposition includes, I suggest, 'without obligation'; 'for no return'; 'without any quid pro quo being given or expected'."*[80]

The ordinary meaning of the applicants' allegation that the Transport Fund made a "*donation"* to Transnet is thus that it did so without obligation, for no return and without any *quid pro quo* being given or expected.

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[77] Funds' Heads p 35 para 63.3

[78] Transnet's Heads p 44 para 85

[79] Transnet's Heads p 44 para 85.1 and 85.2

[80] Welch's Estate v Commissioner, SARS 2005 (4) SA 173 (SCA) para 42

52. Second, it does not matter for purposes of the applicants' claim whether the donation was a "*true donation"* or a "*remuneratory donation"*. The applicants' cause of action pleaded in paragraph 38 is that the donation was unlawful and invalid because, to the knowledge of the trustees and Transnet,

- the trustees did not have the power to make the donation; and

- the trustees made the donation in breach of their fiduciary duty to act in the best interests of the Transport Fund and its members.

Neither of these grounds of invalidity in any way depends on whether the donation was a "*true donation"* or a "*remuneratory donation"*.

53. Third, the suggestion that the annexed minutes and recorded decision of the trustees cast doubt on the liberality of the Transport Fund's motive, is out of place in an exception.[81] The question in an exception is whether the applicants' particulars of claim disclose a cause of action and not whether they have proven the facts on which they rely. Transnet in any event overlooks the fact that the last word on the matter, recorded in the minute of 7 March 2001, was that,

[81] Transnet's Heads p 44 para 85.1 and 85.2

"*although Transnet indicated the intention to utilise its portion (40%) of the surplus around the benefit of the Fund, legally it may use the surplus in any way as determined by the Board of Directors"*.[82]

CONCLUSION

54. The applicants ask that the Funds' and Transnets cross-appeals be dismissed with costs including the costs of three counsel. Alternatively, if this court should uphold any of the exceptions or application to strike out in whole or in part, the applicants ask,

    54.1. that they be afforded an opportunity to amend their particulars of claim; and

    54.2. that no order for costs be made against them.

55. It would not be appropriate to make an order for costs against the applicants. They are impecunious victims of the wrongs perpetrated by the respondents. They moreover act, not only in their own interests, but in the interests of a class of pensioner-victims like them said to comprise some 60 000 pensioners. They should not be exposed to the risk of losing their claims by the enforcement of claims for costs against the representative applicants.

Wim Trengove SC

Janice Bleazard

[82] Minutes of Transnet Pension Fund Board of Trustees meeting, 7 March 2001, v 1 p 39

Lerato Zikalala

Applicants' counsel

Chambers, Sandton

6 October 2017

LIST OF AUTHORITIES

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