



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Pretorius and Another v Transport Pension Fund and Others**

**CCT 95/17**

**Date of Judgment: 24 April 2018**

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#### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

Today, the Constitutional Court handed down judgment in an application for leave to appeal and two conditional applications for leave to cross-appeal arising from a class action instituted in the High Court of South Africa, Gauteng Division, Pretoria (High Court), in terms of section 38(c) of the Constitution.

The applicants, Mr Pretorius and Mr Kwapa, are acting in a certified class action on behalf of approximately 60 000 similarly situated former employees of the third respondent (Transnet) who are now pensioner-members of the first two respondents, the Transport Pension Fund and the Transnet Second Defined Benefit Fund (collectively “the Funds”) in a certified class action. The applicants brought three claims in the High Court.

The first claim related to a “1989 promise” allegedly made during the run-up to the establishment of Transnet. The applicants claim that they were promised that the practice of annually increasing members’ pensions by at least 70% of the rate of inflation, in addition to the annual 2% increase to which they were contractually entitled, would continue. They contended that there had been a breach of contract by the Funds since 2003 because the Funds’ annual increase to the members’ pensions was significantly lower than what they contend had been promised by Transnet’s and the Funds’ predecessors. The applicants also argued that the failure to keep the promise constituted unlawful state action and an unfair labour practice. They asked the High Court to declare that the Funds’ failure to keep this “promise” was unlawful.

The second claim concerned Transnet’s obligations to maintain the Funds in sound financial condition, paying into them if necessary. That obligation was said to have been

inherited by Transnet from its previous transportation bodies. The applicants argued that Transnet did not fulfil its obligation and asked that Transnet be declared indebted to the Funds for the necessary payments.

The third claim related to an alleged “unlawful donation” made by one of the Funds to Transnet. The fund is said to have donated 40% of its members’ surplus to Transnet. The applicants sought to have the donation declared unlawful and invalid and for the Fund to be reimbursed by Transnet.

The respondents raised various exceptions to these in the High Court.

The High Court dismissed some of the exceptions raised by the respondents but upheld three exceptions to the cause of action. The first upheld exception concerned the claim for “unlawful state action” on the basis that the claim ought to have been brought under the Promotion of Administrative Justice Act. The second was that the breach of contract claim was “vague and embarrassing” as the applicants’ amended particulars of claim lacked the particularity necessary to sustain the cause of action based on breach of contract. The last exception related to the cause of action based on an unfair labour practice which was partially upheld on the grounds that it lacked particularity with respect to averring that an employment relationship had existed between the applicants and the Fund. The High Court, however, rejected the argument that such claim could only have been brought under the Labour Relations Act.

The Supreme Court of Appeal refused leave to appeal against the orders upholding exceptions, and refused conditional leave to cross-appeal against the orders rejecting exceptions. It did so on the grounds that there were no prospects of success, nor any other compelling reason to hear the appeals.

In this Court, the applicants sought leave to appeal against the High Court order upholding the exceptions. They argued that the effect of the High Court order was to deprive them of the opportunity to pursue two constitutional causes of action in the class action proceedings as those causes of action were effectively dismissed on exception.

In a unanimous judgment written by Froneman J, the Constitutional Court granted leave to appeal and upheld the appeal against the order of the High Court upholding the exceptions. The Constitutional Court replaced the High Courts’ main orders with an order that the exceptions raised by the respondents are dismissed with costs. The cost order against the applicants in the SCA was replaced with a cost order in their favour in the Constitutional Court.

The second and third applications were conditional applications filed by the Funds and Transnet respectively for leave to cross-appeal against the High Court’s order. The applications concerned exceptions raised by the respondents in the High Court which were not upheld. Those applications were only to be considered in the event that the Constitutional Court granted the applicants’ leave to appeal.

The Constitutional Court did grant the applicants' leave to appeal and the conditional applications were considered and dismissed with costs. They failed on the well-established ground that a dismissal of an exception is not a final dispositive pronouncement of the legal issues in a matter. The dismissal of the conditional applications does not preclude the respondents from raising substantive defences to the applicants' claims to be determined at the trial in the High Court.