HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Not reportable

Not of interest to other Judges

CASE NO: 60870/2016

22/12/17

VINTA WORKMAN GQIRANA First Applicant

AND 39 000 OTHERS Second Applicant

and

GOVERNMENT EMPLOYEES PENSION FUND First Respondent

SANLAM Second Respondent

Summary: Class action – certification application – requirements restated – whether applicants have satisfied such requirements – no particulars of claim attached – no triable issue raised in the papers – application dismissed.

ORDER

Application for class certification:

1. The application is dismissed.
2. There is no order as to costs.

JUDGMENT

MAKGOKA, J

Introduction

[1] This is an application by the applicants for the first applicant to be granted leave to institute a class action against the first respondent, the Government Employees Pension Fund (the GEPF), as the representative of the members of former Ciskei Civil Servants Pension Fund. The applicants also seek an order declaring that the following groups of persons each constitute a class:

(a) Former members of the erstwhile Ciskei Civil Servants Pension Fund, who are now members of the GEPF (the first class);

(b) the dependants of the former members of the erstwhile Ciskei Civil Servants Pension Fund who passed away (the second class).

[2] The applicants seek a further order for the first applicant to act as a representative of the first class and second class in the further conduct of the class action. Also, the applicants seek an order declaring the first applicant to have the requisite standing to bring a class action on behalf of the two groups mentioned above, in the intended claims. The intended claims are stated to be 'for the

reimbursement and correct calculation of their benefits towards their contribution to the Ciskei Civil Servants Pension Fund since 1981 until 1996.'

[3] Finally, the applicants also seek ancillary and consequential procedural relief which flows from the certification of a class action, including certain declaratory orders. The relief sought by the applicants is opposed by the GEPF on various grounds, including that the application falls short of the requirements for certification, and that the intended claims have prescribed.

The parties

[4] The first applicant, Mr Vinta Gqirana, describes himself as 'the chairperson of the ex-Ciskei Defence Force.' The second applicant is cited as 'the 39 000 other Ciskei civil servants.' The first respondent, the GEPF, is a pension fund established in terms of the Government Employees Pension Law 21 of 1996. As its name suggests, the purpose of the Act is to make provision for the payment of pensions and certain other benefits for government employees. The application against the second respondent, Sanlam, was withdrawn by a formal notice on 18 November 2016.

Class actions and certification

[5] Before I consider the merits of the application, I set out briefly, the jurisprudential basis for class actions, as well as the requirements for certification applications such as the present. With regard to the former, there is an express provision for class actions in s 38*(c)* of the Constitution, which provides that:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

...

(c) anyone acting as a member of, or in the interest of, a group or class of persons.'

[6] The overriding consideration whether certification of class action should be granted, is that of the interests of justice. In *Mukaddam v Pioneer Foods (Pty) Ltd and others* 2013 (5) SA 89 (CC) several factors were set out as necessary to determine whether it is in the interests of justice to certify a class action. They include: a class that is defined with sufficient precision and permits of an objective determination of who qualifies as a member; a cause of action that raises a triable issue; common issues of fact or law; an identified representative in whose name the class action would be brought and whose interests must not conflict with those of the members of the class and who has the capacity to prosecute the class action, including funds necessary for litigation; and whether, given the composition of the

class, class action is the most appropriate means of determining the claims of class members.

See also *Permanent Secretary, Department of Welfare, Eastern Cape & another v Ngxuza & others* 2001 (4) SA 1184 (SCA); *Children's Resources Centre Trust v Pioneer Foods (Pty)* 2013 (2) SA 213 (SCA); *Nkala and others v Harmony Gold Mining Company Ltd and others* [2016] 3 All SA 233 (GJ).

[7] In *Children's Resources Centre Trust* at para 39 it was laid down as a procedural requirement that the party seeking certification will have set out in a draft pleading and in affidavits the basis for the proposed action. The court explained:

'In so doing the court will probably have more material available to it in regard to the cause of action than would be the case with a normal exception. That will enable the court to make a proper assessment of the legal merits of the claim. Unless it is plain that the claim is not legally tenable, certification should not be refused. The court considering certification must always bear in mind that once certification is granted the representative will have to deliver a summons and particulars of claim and that it will be open to the defendant to take an exception to those particulars of claim. The grant of certification does not in any way foreclose that or answer the question of the claim's legal merit in the affirmative.'

[8] While the factors mentioned above ought not to be treated as conditions precedent or jurisdictional facts which must be present before an application for

certification may succeed, the courts have said that they serve as important guides for determining where the interests of justice lie. See *Mukaddam* at para 34.

Background facts

[9] The following background facts are stated as being relevant for the application. During 1981 the former homeland of Ciskei received 'independence' from South Africa and all administrative duties were entrusted to the Ciskei government. The pension fund of the members of Ciskei civil servants was administered by Sanlam. When Ciskei was re-incorporated into South Africa in 1994, the Ciskei civil servants were given the option to either accept a voluntary severance package or to be incorporated into the new government, and register as members of GEPF.

[10] The gravamen of the application is set out in paragraph 7 of the founding affidavit as follows:

'7.5 During [the] incorporation the members of the Ciskei Civil Servants [were] given the following options:

7.5.1 A voluntary severance package including all relevant benefits;

7.5.2 To be incorporated into the new government structure;

7.6 Due to the options mentioned in paragraph 7.5 and the fact that Sanlam was no longer the administrator of the Ciskei Pension Fund, Sanlam had two options:

7.6.1 The members as mentioned in paragraph 7.5.1 were paid out their contributions towards the pension fund from 1981 to 1994;

7.6.2 The members as mentioned in paragraph 7.5.2 will continue as registered members of the GEPF and that the contribution towards Sanlam for the mentioned period will be paid over to the GEPF.

7.7 With reference to the members in paragraph 7.5.1 it is alleged that they received only a portion of their benefits that they contributed to Sanlam;

7.8 With reference to the members in paragraph 7.5.2 it is alleged that Sanlam paid their contribution over to the GEPF.'

[11] It is then alleged that the ex-civil servants have since 1995 made several requests to various bodies, including the Public Protector, the Military Ombudsman, the Chief of Defence and the South African National Government 'to recover their contributions.'

Discussion

[12] One of the key factors to consider whether it is in the interests of justice to certify a class action is the presence of a triable issue, as already explained. To make a determination in that regard, it is inevitable that one has to some extent examine the merits of the intended action. In this regard, the following was said the following was said in *Children's Resource Centre Trust* para 43:

'It is desirable to say something about the procedure to be adopted in certification applications. The appeal was complicated by the absence of a clear statement by Mr Solomon of the cause of action that the appellants intended to advance. It was unclear whether the claim was based on the breach of the Act's provisions or was a constitutional claim seeking constitutional damages. In the appellants' heads of argument it was said to be a delictual claim, with an alternative claim based upon a breach of the constitutional right to sufficient food. This confusion would have been avoided if the application had been accompanied by a draft set of particulars of claim in which the cause of action was pleaded, the class defined and the relief set out. The affidavit or affidavits filed in support of the application would then have set out the evidence available to the appellants in support of that cause of action and the further evidence that they anticipated would become available to them to sustain the pleaded case and the means by which that evidence would be procured. That procedure should be followed in future applications. That will enable those opposing certification to respond meaningfully and the court to decide the application with a clear understanding of the nature of the case.' (My underlining for emphasis)

Two hurdles in the applicants' case

[13] In the present case, the applicants have two hurdles, one procedural and the other substantive. The procedural aspect is that the applicants have failed to attach draft particulars of claim in their papers. In its answering affidavit the GEPF pointed out this omission as being fatal to the application. In the replying affidavit, delivered on 6 March 2017, the first applicant contended himself with a statement that the relief sought at this stage is purely procedural. This ostensibly suggested that the

applicants deemed it unnecessary to attach a draft particulars of claim. In other words, he did not deal at all with the GEPF's complaint regarding the failure to attach a draft particulars of claim.

[14] However, on 10 March 2017, the applicants' attorneys served the draft particulars of claim on the GEPF's attorneys, and filed it with the registrar of this court on 22 May 2017. This is clearly in direct response to the GEPF's answering affidavit, and an implicit acknowledgment that the GEPF's point about the draft particulars of claim, was well-taken. The procedure adopted by the applicants is an impermissible one. It also has the effect of defeating the whole purpose of attaching draft particulars of claim to the certification application, which was explained in *Children's Resource Centre Trust* as being to 'enable those opposing certification to respond meaningfully and the court to decide the application with a clear understanding of the nature of the case.' Clearly, the GEPF was not afforded an opportunity to meaningfully respond to the nature of the applicants' case. This, in my view, is an insurmountable hurdle for the applicants.

[15] So much for the procedural aspect. Substantively, the applicants have to establish the 'potential plausibility' of the claim sought to be launched by way of class action, as discussed in *Mukaddam* at paras 53 to 55. That entails a consideration of the prospects of the claims' success on the merits.

[16] I had difficulty in understanding the cause of action in the intended class action. The legal basis on which the ex-Ciskei civil servants intend to reclaim the contributions paid to the GEPF has not been set out in the founding affidavit.

[17] First, in the case of civil servants who were paid benefits after they opted for a severance package, it is not clear on what basis it is contended that they did not receive all their benefits, and the basis on which they are entitled to more. In any event, it is not clear how the GEPF is said to be liable in respect of those civil servants, because the allegation is that it was Sanlam who did not pay out their full benefits to them. As already pointed out, the application against Sanlam has been withdrawn.

[18] Second, in respect of those civil servants whose contributions were paid over to the GEPF, it is not clear what the applicants' complaint is. Is the complaint that their contributions were not supposed to be paid over to the GEPF, and that on that basis they are entitled to a reimbursement of those contributions? If that be the complaint it is not explained on what basis the contributions were not supposed to be paid to the GEPF because, as already explained, the ex-Ciskei civil servants were given two options: a pay-out or transfer to the GEPF. It is therefore inconceivable that, having voluntarily opted for the latter, the self-same civil servants would now complain that their contributions should not have been paid to the GEPF.

[19] In his written submissions and during the hearing, counsel for the applicants suggested that the real complaint in respect of those whose contributions were paid over to the GEPF is that the GEPF system does not reflect their contributions prior to 1994. But this is not the case the GEPF was called to in the founding affidavit. I have fully set out the thrust of the applicants' case in para 10 above. No such case is made out in the founding affidavit.

[20] The 'sneaked in' draft particulars of claim does nothing to elucidate the applicants' cause of action. Instead, the obfuscation is further compounded. There, reliance is placed on a government 'pension redress program' in terms of resolution 7 of 1998 and resolution 12 of 2002 of the National Public Service Coordination Bargaining Council (NPSCBC). This aspect of the applicants' claim was never mentioned in either of their founding or replying affidavit.

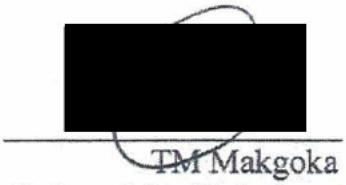
[21] The sum total of the above considerations is that the applicants have failed to establish two key requirements for class certification. Given the conclusion I have arrived at, it is not necessary to consider the other requirements and the GEPF's argument on prescription.

Costs

[22] There remains the issue of costs. In the exercise of this court's discretion, I consider the following. Although the right sought to be vindicated in this case is not per se constitutional, and therefore falls outside the purview of *Biowatch*,[1] I am of the view that it is close enough. There is no denying that the first applicant purports to act in the public interest rather than being motivated by self-interest. I therefore conclude that he should not be mulcted in costs.

[23] In the result the following order is made:

1. The application is dismissed.
2. There is no order as to costs.



TM Makgoka
Judge of the High Court

[1] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) where the general principle with regard to costs in constitutional litigation was laid down by the Constitutional Court, namely that in constitutional litigation between a private party and the state, if the private party is successful, it should have its costs paid by the state, while if unsuccessful each party should pay its own costs.

APPEARANCES

For the Applicants:	CD de Klerk
Instructed by:	Botma Attorneys, Pretoria
For the First Respondent:	V Ngalwana SC (with him F Karachi)
Instructed by:	Mohulatsi Attorneys, Pretoria

No appearance for the Second Respondent