"Annexure WC-9"

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no. 42355\2015

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE: YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED

DATE SIGNATURE

GAUTENG DIVISION, PRETORIA

IN THE MATTER BETWEEN:

JOHAN PIETER HENDRIK PRETORIUS	1st Plaintiff
MONTANA DAVID KWAPA	2nd Plaintiff

and

TRANSNET PENSION FUND	1st Defendant
TRANSPORT SECOND DEFINED BENEFIT FUND	2nd Defendant
TRANSNET LIMITED	3RD Defendant

JUDGMENT

LEGODI J:

HEARD ON: 4 APRIL 2016

JUDGMENT HANDED DOWN ON: May 2016

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[1] 'An exception is a legal objection to the opponent's pleadings. It complains of a defect inherent in the pleadings admitting for the moment that all the allegations in the particulars of claim or declaration, or plea are true. It asserts that even with such an admission, the pleading does not either disclose a cause of action, or a defence, as case may be[1]. It follows that, where an exception is taken, the court must look at the pleading excepted to as it stands[2], no facts outside those stated in the pleadings can be brought into issue, except in the case of inconsistency[3]; and no reference may be made to any other document[4]. This is precisely the difference between exceptions, on the one hand and the pleas in bar, dilatory pleas, and pleas in abatement, on the other; the latter usually introduce fresh matter, which requires to be proved by evidence.[5]

[2] The object of an exception is to dispose of the case or a portion thereof in an expeditious manner or to protect a party against an embarrassment which is so serious as to merit the costs even on an exception[6]. An exception provides a useful mechanism for weeding out cases without legal merit[7]. Thus an exception founded upon the contention that the particulars of claim or declaration disclose no cause of action or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in a whole or in part, and avoid the leading of unnecessary evidence at the trial[8]. If it does not have that effect, the exception should not be entertained.[9]

[3] This case is about an exception. The plaintiffs Johan Pieter Hendrik Pretorius and Montana David Kwapa, pension members of Transport Pension Fund and Transnet Second Defined Benefit Fund (the Funds) respectively, are suing in both their personal capacity and in the interests of the members of the Funds.

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[1] Steward V Botha 2008(6) SA 310 SCA at 313
[2] Burger V Rand Water Board 2007 (1) SA 80 (SCA) at 32 D-E
[3] Soma V Morulane NO 1975 (3) SA 53 (T)
[4] Wellington Court Shareblock v Johannesburg City Council 1995(3)SA 827 (A) at 833 F& 834D
[5] Brown v Vlok 1925 AD 56 at 58
[6] Francis v Sharp 2004(3) SA 230 (C) at 237 C-F
[7] Tellematrix (Pty) t\a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 465 H
[8] Marais v Steyn 1975 (3) SA 479 (T) at 487
[9] Johnson v Leal 1980 (3) SA 927 (A) at 947

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[4] The Funds are the first and second defendants respectively. The third defendant is Transnet Limited (Transnet), a company incorporated in terms of Section 2 of the Legal Succession to the South African Transport Services Act 9 of 1989.

[5] The Plaintiffs instituted an action against the Funds and Transnet based on three causes of action. The averments constituting claim 1 referred to as a 'Promise' are that in terms of the rules governing the Funds, the members of the Funds, were or are entitled to pension increases of 2 %. That during 1989, a promise was made which promise became a practice over years before and after 1989 and executed until 2002, in terms of which the members of the Funds were entitled to pension increase of at least 70 % of the rate of inflation. The promise was made by a person or persons authorised to make such a promise on behalf of the Funds and that the promise was confirmed in subsequent brochures and or other documents.

[6] For claim 1, the relief sought is that Transnet's failure to cause the Funds to keep the promise be declared unlawful and that the Funds be ordered to keep the promise by increasing the pension benefits of all the members of the Funds by an annual rate of not less than 70% of the rate of inflation with effect from 2003 and that the defendants be ordered to pay the arrear increases to the pensioners of the Funds with interest at a temporae.

[7] Claim 2 referred to as 'Legacy Debt', is based on the following set of averments: That SARRH and SATS were obliged by section 12 (13) of the Railway and Harbours Pension Act 35 of 1971 and section 11(3) of the Railway and Harbours Pensions for Non-White Act 43 of 1974, to pay into the White Fund and 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 Succession Act. That in terms of section 16 (2) of the Succession Act, the amount payable to the Funds by SATS was to be determined by state actuary in consultation with an actuary appointed by the Minister of the Public Enterprise and that the state actuary duly determined the legacy debt in consultation with an actuary appointed by the Minister of Public Enterprise and that the amount claimed as so determined is R 17, 1806 billion, payable to the Funds.

[8] The relief sought in Claim 2 is that Transnet be declared indebted to the Funds for payment of the legacy debt of R 17, 1806 billion plus interest as from 1 April 1990 at a rate of not less than 12 % per annum determined by the state actuary. That Transnet be

NVA

ordered to pay the legacy debt to the Funds and that the Funds and Transnet jointly and severally pay the plaintiffs' costs.

[9] Claim 3 referred to as "unlawful donation", is based on the following set of pleaded averments: That on 23 November 2000, the trustees of Transport Fund and Transnet agreed orally and in writing that the Transport Fund would donate 40 % of its members' surplus to Transnet and that the trustees of the Transport Fund will thereafter implement the donation by paying an amount of R309 121 000 to Transnet. The plaintiffs' cause of action is founded on the following averments: That the donation was unlawful and invalid because the trustees did not have the power to make the donation and that the trustees made the donation in breach of their fiduciary duty to act in the best interests of the Transport Fund and or its members.

[10] As a result, the plaintiffs ask that the donation be declared unlawful and invalid and that Transnet be ordered to pay an amount of R309 121 000.00 to the Transport Fund with interest a *tempore morae* and that Transnet and the Transport Fund pay the costs of the action.

[11] The Funds objected to claims 1 and 3 on the basis that the particulars of claim are vague and embarrassing and that they do not sustain a cause of action. Transnet on the other hand, objected to all the three claims as being vague and embarrassing and disclosing no cause of action. For this purpose, I elect to start with the exception noted against claim 2.

Legacy debt (claim 2)

[12] Transnet raised two objections to the legacy debt claim. Firstly, that the plaintiffs do not allege that the Funds were in unsound financial position and what amounts would be required to place them in a sound financial position, I do not think that the fact that the plaintiffs do not allege that for any period under consideration, the Funds were in unsound financial position, requiring to be placed in sound financial position, as contemplated in section 12(2) of the Railways and Harbours Pensions Act 35 of 1971, lacks averments necessary to sustain a valid cause of action. If it happens to be Transnet's contention that an obligation to pay never arose, because the Funds were never in unsound financial position, that is a factor to be raised as a defence to claim 2. In any event that is a factor falling or ought to be falling within the knowledge of the

NVA

Funds and Transnet. Obligation to pay is averred, inter alia, in the particulars of claim as follows:

> *"27. Section 16 of the Succession Act provides expressly or by implication that, Transnet's debt paramount to these obligations (the legacy debt) will be as determined by the state actuary in consultation with an actuary appointed by the Minister of Public Enterprise and will bear interest at a rate of at least 12% per annum determined by the state actuary.*
>
> *28. The state actuary only determined the legacy debt in consultation with an actuary appointed by the Minister of Transport in an amount of R 171 806 billion plus interest from 1 April 1990."*

[13] Firstly, averments of unsound financial position can be implied in the pleaded averments as a whole. Secondly, reference to section 16 and averments of determination of an obligation by the actuaries should be seen to reinforce implied averments of unsound financial position of the Funds requiring financial assistance. Whether or not that is so, would be determined by the issues the defendants may want to join in their plea and subsequent evidence thereto.

[14] I am unable to comprehend the suggestion that the plaintiffs do not allege that Transnet was obligated to pay such debt to the Funds and the Second Fund on calculation by the state actuary. What is pleaded in paragraphs 27 and 28 of the particulars of claim should also be seen in the context of what is averred in paragraph 29 of the particulars of claim. That is:

> *"In Transport Fund and upon its creation, the Second Fund inherited the right to receive the legacy debt in terms of ss 2 and 12 of the Transnet Pension Funds Act:*
>
> *29.1 The Transport Fund 45.1%*
>
> *29.2 The Second Fund 56.9%".*

[15] The suggestion that 'the plaintiffs' reliance on section 16 of the Succession Act is bad in law as that section does not provide for the calculation of the alleged legacy debt, either in the terms pleaded by the plaintiffs or all', should in my view, be seen in context. Firstly, we should be reminded that insofar as there can be an onus on either party on a pure question of law, it rests upon the excipient who alleges that the particulars of claim

or declaration discloses no cause of action, or that the plea discloses no defence. The excipient has the onus to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it.[10] The pleading must be looked at as a whole; no paragraph should be read in isolation.[11] It must be implied that the determination by the actuaries, is in respect of what is required to put the Funds in a sound financial position. If there is uncertainty in regards to a pleader's intention, an excipient cannot avail himself thereof unless he or she shows that upon any construction of the pleadings, the claim is excipiable.[12]

[16] Coming back to reliance on section 16 of the Succession Act as pleaded, I am not persuaded that it is excipiable on every interpretation that can reasonably be attached to it. Section 16(2) of the Succession Act simply provides that the State guarantees all obligations the SATS transferred to Transnet including all obligations of SATS in respects of pension funds. The obligations included payments to the Funds to ensure that their financial positions remain secured for the benefit of its members. The calculation of what must be paid, is as per determination by the actuaries, something which had been averred in the particulars of claim. To suggest otherwise, would in my view, be reading each paragraph of the pleaded averments in isolation. The criticism to the effect that the plaintiffs seek an order that Transnet pay the legacy debt to the Funds, without alleging when the debt became due for payment, would only be valid if one was to ignore what is pleaded in paragraphs 27 and 28 of the plaintiffs' particulars of claim quoted earlier in this judgment. Consequently, I find that there is no merit to the suggestion that claim 2 lacks the averment necessary to sustain a cause of action and or that is bad in law.

Unlawful donation (claim 3)

[17] All three defendants objected to claim 3 either as disclosing no cause of action or as vague and embarrassing. Essential averments regarding claim 3 are set out in paragraphs 37 to 38 of the particulars of claim. The background and allegations to the cause of action are: On 23 November 2000 at Johannesburg the trustees of the Transport Fund and Transnet agreed orally and in writing, in terms of which Transport Fund, through its trustees agreed to donate to Transnet 40 % of its members' surplus. On 7 March 2001 the trustees of the Transport Fund decided to implement the donation

[10] H v Fetal Assesment Centre 2015 (2) SA 193 (CC)at 199 B
[11] Nel and others v Mc Arthur 2003 (4) SA 142 T at 149 F
[12] Klerk N O v van Zyl and Maritz NNO 1989 (4) SA 263 (SE) 263 at 288E

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by paying an amount of R309 121 000 to Transnet. The donation is alleged to have been unlawful and invalid to the knowledge of both the trustees of the Transport Fund and Transnet because, the trustees did not have the power to make the donation and that the trustees of the Transport Fund made the donation in breach of their fiduciary duty to act in the best interest of the Transport Fund and its members.

[18] To these averments, the objection is that the allegation that Transnet became liable for repayment of the donation is a legal conclusion and it is insufficient to plead a conclusion of law without pleading the material facts giving rise to the conclusion. I am unable to understand why it is suggested that the plaintiffs did not plead material facts giving rise to the legal conclusion. To come to this, you need to ignore completely what is pleaded in paragraph 38 and at the risk of repetition is pleaded:

> *"38 The donation was unlawful and invalid because to the knowledge of the trustees and Transnet.*
> *38.1 The trustees did not have the power to make the donation, and*
> *38.2 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] The statement, 'Transnet accordingly became liable for repayment of the donation in March 2001', as averred in paragraph 39 of the particulars of claim inasmuch as it is seen as a legal conclusion, ought to be considered in the context of what is averred in paragraph 38 of the particulars of claim quoted above and the background set out in paragraph 17 above as pleaded by the plaintiffs. There can be no merit to the suggestion that the amended particulars of claim lack averments necessary to justify the conclusion that Transnet became liable for repayment of the donation.

[20] It is suggested that the amended particulars of claim do not identify the source of Transnet's alleged obligation to repay the donation. This postulation will only come into play if one was to ignore what is pleaded in paragraph 38 of the particulars of claim. The donation will only become valid or lawful if it was to be proven that it was lawfully made by Transport Fund through its trustees. In other words, if it was to emerge during trial that the trustees had the power or authority to make the donation and that they did not breach their fiduciary duty towards the members of Transport Fund. I do not have to be involved in the categorisation of the claim at this stage, despite the attempt to do so

by the plaintiffs in their written heads. I am satisfied that the pleaded facts establish a cause of action. I now turn to deal with claim 1.

1989 Promise (claim 1)

[21] The defendants took a swipe at the plaintiffs' lack of particularities regarding the terms of the promise. The objection is that it is not clear from paragraph 14 of the amended particulars of claim whether the plaintiffs allege that it was a term of the promise: (a) that the Fund would continue to increase the pensions as before or (b) that the Funds would continue to increase the pensions "at a rate of at least 70 % of the rate of inflation". It is alleged that the distinction is important because a promise to increase the pensions "as before," is entirely different in formulation to a promise to increase pensions "at a rate of at least 70 % of inflation."

[22] There is no merit to the complaint. To come to the conclusion as suggested, one must ignore what is pleaded in paragraph 13 of the particulars of claim. That is: "Both funds however followed a consistent practice over decades, with the concurrence of SAR&H and SATS, of granting higher pensions increases of at least 70 % of the rate of inflation". It is clear that "as before" in terms of paragraph 14 of the amended particulars, refers to 'a consistent practice over decades' stated in paragraph 13. The complaint is technical without substance. Therefore the suggestion that the uncertainty renders the amended particulars of claim irregular, or vague and embarrassing ought to be rejected.

Failure to identify the terms of the promise

[23] 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:*
>
> *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?*

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

[24] 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.

Legislative regime

[25] The other complaint raised is that the promise as pleaded is inconsistent with the legislative regime. In the summation of the point, it was argued that the promise could not have had binding effect on the Funds because of Rule 24 which dealt with the annual increases and it provided, inter alia:

> *"The pension fund received by the pensioners shall be increased by 2%, compounded annually for each completed year in respect of which the pension has been or is received..."*

[26] Then in paragraph 47 of the Funds' written heads, is contended:

> *"Even if it were to be assumed for the sake of argument that a promise had lawfully been made in 1989 to increase pensions as before, that is, at a rate of at least 70 % of inflation, and that the promise had survived the promulgation of the Transport Fund Rules in 1990, that promise would have been unlawful in 2000 when the Rules and Second Fund were adopted. The promise could not have survived the adoption of Rule 24 of Rules of the Second Fund because it was inconsistent with the Rule."*

[27] For two reasons the exception on this ground cannot be upheld: First, Rule 24 did not prohibit conclusion of the promise. In my view, '... increased by 2% compounded annually,' does not prescribe the maximum percentage of which the pension compounded annually, shall be increased. Rule 24 could be interpreted to mean tha

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annually, pension increases would not be less than 2%. I am expressing no final finding in this regard.

[28] Insofar as the Funds seek to challenge the lawfulness of the promise and enforceability thereof, this is an issue that can appropriately be raised as a defence, than as an exception. Just on this ground alone, the exception based on the alleged unlawfulness and unenforceability of the promise is destined to fail, taking into account also that Rule 24 raises a legal question, which in my view, is uncertain and complex not to be entertained on exception.

Unlawful state conduct

[29] In paragraph 22 of the amended particulars of claim the plaintiffs pleaded inter alia;

"22.4 Transnet's failure to cause the Transport Fund and the Second Fund to keep the promise and their failure to keep it are unlawful at public law because,

22.4.1 Their conduct is legally and constitutionally unconscionable when tested against the constitutional standards of reliance, accountability and rationality;

22.4.2 They impair the rights of the members of the Transport Fund and the Second Fund of access to social security in terms of s27(1)(c) of the Constitution; and

22.4.3They failed to give effect to the legitimate pension benefit expectations they created.

[30] In paragraph 35 of the plaintiffs' written heads, is contended:

"The cause of action is the same as the one the Constitutional Court upheld in the KZN Joint Liaison Committee case. In September 2008, the KZN Department of Education 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. The Constitutional Court held that its conduct was unlawful at public law and that the independent schools were entitled to hold it to its promise."

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[31] What is stated above prompted the Funds to take the point that the amended particulars of claim do not allege that they (the Funds) performed administrative action when they failed to give effect to the *'legitimate pension benefits expectations they created'*. This contention preceded what is articulated in the Funds' written heads as follows:

> *"51. The plaintiffs seek to enforce their "legitimate expectation" as a matter of "public law".*
>
> *52. A legitimate expectation normally arises in the context of administrative action:*
>
> *52.1. The doctrine of legitimate expectation was first incorporated into our law in a case dealing with the review of an administrative decision, namely Administrator, Transvaal v Traub.*
>
> *52.2. The Constitution refers to legitimate expectations only in the context of the right to procedurally fair administrative action.*
>
> *52.3 Similarly, legislation refers to legitimate expectations only in the context of provisions dealing with the right to fair administrative action."*

[32] In KZN Joint Liaison Committee v MEC for Education Committee Froneman J in his minority judgment, inter alia, stated:

> *"[84] According to the main judgment the enforcement of this part of the claim should have been brought under the provisions of the Promotion of Administrative Justice Act."*

[33] The KZN Joint Liaison Committee's case is relied upon by the plaintiffs for their pleaded cause of action based on the promise particularly with regard to "legitimate expectation." In paragraph [31] of the main judgment aforesaid, Cameron J stated:

> *"31.Courts enforce undertaking when parties agree by contract to be bound by their terms; when the undertaking gives rise to legitimate expectation and administrative fairness requires some measures of their enforcement; or when any other legal principle or rule requires enforcement. In its affidavits, the applicant said its case was that it relied purely on a promise or undertaking to pay. It said that it was neither "here nor there" whether this derived from*

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administrative action or "something akin to a contractual obligation". But the form of the applicant's case is important. If enforcement is brought on the basis of administrative action, the proceedings should have been instituted under the Promotion of Administrative Act (PAJA), in the form of a review, and (subject to condonation) within the 180 day period PAJA allows. None of this was done."

[34] The current position in our law is that where a party has legitimate expectation, he or she is entitled to procedural fairness. That is, an opportunity to be heard before any adverse decision is made. Our courts have expressly left opened the question whether a legitimate expectation may give rise to substantive benefit'. (See, Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC), 2002 (9) BCLR 891; [2002] ZAC (2) in para 96; and South African Veterany Council and Another v Szymanski 2003(4) SA SCA).

[35] The next question is whether the plaintiffs' enforcement of the promise in the present case, is sought on the basis of the administration action seen in the light of the pleaded "legitimate expectation" which is founded not on any legislative or regulatory provisions, but rather on the Funds' benevolent to its members. This must be distinguished from KZN Joint Liaison Committee matter in which "the promise" or undertaking was made as a form of subsidy which the Member of the executive Council for Education in Kwa- Zulu Natal granted to the independent schools in the province in accordance with section 48 of the South African Schools Act 84 of 1996 which empowers the MEC to grant subsidies to a registered school from funds approved by provincial legislature for that purpose. Sections 39 and 63 of the Public Finance Management Act 1 of 1999 obliges the heads of department (HOD) and the MEC to ensure that their expenditure is in accordance with the budget vote of the provincial department that should be read together with the provisions of section 29 of the Constitution which provides that everyone has the right to a basic education, including adult basic education. That, in my view, is what made the constitutional court in the Joint KZN Joint Liaison Committee not to deal with the issue as a case based purely on administrative action arising from legitimate expectation created by undertaking to pay the school subsidies for 2009.

[36] In the present case, as contended by the Funds, 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. Then in paragraph 39 of the plaintiffs' written heads, is contended:

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> *"39... If there is any doubt on the applicability of the KZN Joint Liaison Committee case, then the question of the development on the common law arises. In that event, given that the facts and legal norms are complex and uncertain, it would not be appropriate to decide the issue on exception. The Constitutional Court has held that in these circumstances, the legal question ought to be decided only after hearing and the evidence having regarded to all relevant considerations.[13] (My emphasis)*

[37] In my view, the question of, 'the development of the common law arises', was discouraged in the matter of Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae[14] wherein Ngcobo J held:

> *"Our constitutional contemplates single system of law which is shaped by the constitution. To rely directly on Section 33 (1) of the Constitution and on common law when PAJA, which was enacted to give effect to section 33, is applicable, is, in my view, inappropriate. It will encourage the development of two parallel system of law one under PAJA and another under section 33 and the common law. Legislation enacted by Parliament to give effect to a constitutional right, ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the Constitutional provision that is being given effect to by the legislation in question. (My emphasis).*
>
> *It follows that the SCA... erred in failing to consider whether PAJA was applicable. The question whether PAJA governs these proceedings cannot be avoided in these proceedings."*

[38] So, the provisions of PAJA must be found to be applicable to the present proceedings. Attempts to bypass the provisions of PAJA by pleading or contending that failure to keep the promise is 'unlawful at public law' because the Funds' conduct 'is legally and constitutionally unconscionably 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

[13] H v Fetal Assement Centre 2015 (2)SA 193 (CC) paras 11-12, 78
[14] 2006 (2) SA 311 (CC), 2006 (1) BCLR; 2005 ZA CC 14 para 436-438

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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.

[39] It is perhaps worth mentioning that in the original particulars of claim, the plaintiffs pleaded in paragraph 22 as follows:

> "Unlawful administrative action"
>
> 22.1 ...
>
> 22.2 ...
>
> 22.3 ...
>
> 22.4 *Transnet's failure to cause the transport Fund and the Second Fund to keep the promise and their failure to keep it,*
>
> *22.4.1 Constitute administrative action.*
>
> *22.4.2 Are unlawful because they fail to give effect to the legitimate expectation they created; and*
>
> *22.4.3 Are unlawful because their conduct is unreasonable within the meaning of section 33(1) of the constitution and section 6(2) (h) of the Promotion of Administrative Justice Act 3 of 2000." (My emphasis).*

[40] No explanation has been given for the abandonment of the aforesaid paragraph in the amended particulars of claim. I venture to say, it was so abandoned to avoid complying with the provisions of section 7 of PAJA which provides that proceedings for judicial review must be instituted without unreasonable delay and in any event within 180 days. Section 9(2) of PAJA however, provides that a court may extend the 180 days period where the interest of justice so requires.

[41] What was pleaded as quoted in paragraph 38 above, should be seen in the context of what is now pleaded in the amended particulars of claim, part of which is quoted is paragraph 28 above. Firstly, the heading, "*Unlawful administrative action*" in the original particulars of claim has now been changed to "unlawful state conduct." Furthermore, administrative action was specifically pleaded in paragraph 22.4 of the original particulars of claim.

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[41] It must be settled that without having pleaded the cause of action based on the challenge to the administrative action not to fulfil the promise, the exception on this ground ought to succeed. The contention that 'in these circumstances, the legal question ought to be decided only after hearing all the evidence and having regard to all relevant considerations', as postulated in paragraph 39 of the plaintiffs' written heads and quoted in paragraph 35 above, should also be found to have no merit. In my view, a legal question which speaks to an administrative action without specifically pleading administrative action indeed ought to be discouraged as is the case in the present matter. The authority relied upon by the plaintiffs for the legal question not being appropriate to consider on exception, had to be viewed in context. The context is this: In paragraph 11 of the H v Fetal Assement Centre cited in paragraph 39 of the plaintiffs written heads, the constitutional court held that 'on other occasions it considered that the question of the development of the common law would be better served after hearing all the evidence'. However, in the present case, as quoted in paragraphs 33 and 37 of this judgment, such a development ought to be discouraged as to do so, would be to bypass the provisions of PAJA. Secondly, in paragraph 12 of the Fetal Assessment Centre's judgment, the constitutional court indicated that there 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.

[42] In my view, the case of KZN Joint Liaison Committee leaves no uncertainty as to how to deal with a state promise or undertaking. Furthermore, as I said, the constitutional court as per Ngcobo J in New Click's matter, made it very clear that you cannot attempt to avoid the provisions of PAJA by arguing the development of the common law. The exception on "unlawful state conduct" ought to succeed, more so, that the plaintiffs are relying purely on the promise without any legislative obligation on the part of the Funds.

Unfair labour practice

[43] In their amended particulars of claim, the plaintiffs pleaded:

> " *23. Unfair Labour practice*

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Transnet's' failure to cause the transport Fund and the second Fund to keep the promise and their failure to keep it in the aforegoing circumstances also constitute an unfair labour practice of section 23 (1) of the Constitution."

[44] Both Transnet and the Funds took a swipe at the pleaded particulars of claim, the latter alleging that the plaintiffs are not permitted to rely directly on section 23 (1) of the Constitution and that the constitutional court has endorsed the principle of constitutional subsidiary, that is, 'where legislation is enacted to give effect to a constitutional right, a litigant may not by-pass that legislation and rely directly on the constitutional standard.'[15]

[45] In terms of section 23 (1) of the Constitution, everyone has a right to a fair labour practice and a national legislation in the form of Labour Relations Act 66 of 1995, gives effect to this right. The contention on behalf of the Funds is that the principle of constitutional subsidiary is that claims of unfair labour practice must be pleaded and brought in reliance of the Labour Relations Act and that therefore the plaintiffs are not entitled to circumvent the provisions of Labour Relations Act and rely directly on the constitution.

[46] The point raised is a legal question. At hand, 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 issues on exception. See in this regard paragraph 39 of the plaintiffs' written heads quoted in paragraph 35 of this judgment and the authority referred to therein and dealt with in the preceding paragraphs. In my view, the facts of the present case as pleaded and the legal questions raised, are complex and closely interlinked insofar as they relate to what is pleaded as quoted in paragraph 34 above. I think, a distinction can easily be drawn between failure to plead "administrative action" as indicated earlier in this judgment and the pleaded "unfair labour practice". What is pleaded in paragraph 23 of the amended particulars of claim is pleaded in such a manner that it could safely be concluded that it is in the alternative. Therefore to want to refer this matter to the labour court and insulate one related issue from the rest will not be in the best interests of justice. In any event, the point raised as a ground of exception can be pleaded as a special defence to the plaintiffs' claim.

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[15] PEE International v Industrial Development Corporation of SA 2013 (1) SA (CC) para 27; De Lange v Residuary Bishop of the Methodist Church of Southern Africa for the time being and another 2016 (1) BCLR 1 (CC) Para 53; My Vote Counts NPC v Speaker of the National Assembly 2016 (1) SA 132 (CC) para 161.

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Lack of particularities on the unfair labour practice allegation

[47] My finding above does not bring the issue of unfair labour practice to rest. 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. The facts pleaded and sought to be proved during trial, must be pleaded with sufficient clarity, otherwise the particulars of claim would be lacking in substance and in averring facts necessary to establish a cause of action based on unfair labour practice.

[48] In paragraph 69 of the Funds' written heads of argument, the issue is contended inter alia, as follows:

> *"In any event, a cause of action based on an alleged unfair labour practice must plead the existence of a labour relationship between the plaintiff and the defendant. That is implicit in the nature of the alleged wrong, but is also made clear in the wording of the LRA. An unfair labour practice is defined as any unfair act or omission that arises between an employer and employee involving, among others, unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee."*

[49] The same view is expressed by Transnet who in its written heads stated:

> "63 *The Plaintiffs' reliance on an unfair labour practice is bad in law for at least two reasons.*
>
> 64 *Firstly, in order to rely on unfair labour practice, the plaintiffs' must have been employees of Transnet at the time when the promise was not kept. The plaintiffs' 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 erstwhile employees of Transnet,.*
>
> 65 ...

NMA

66 *In the result, Claim 1 of the plaintiffs' amended particulars of claim lack averments that are necessary to sustain a valid cause of action, alternatively are bad in law."*

[50] I have already dealt with the bad in law argument and concluded that, because of other issues connected hereto, which may not have to be dealt with by another court under the Labour Relations Act, and the fact that unfair labour practice is pleaded in the alternative, the exception on this point ought to fail.

[51] However, the objection that the plaintiffs' amended particulars of claim on unfair labour practice lack the averments necessary to sustain a valid cause of action, has merit. The objection on this ground ought to be upheld and the plaintiffs' ought to be given the opportunity to cure the defects.

[52] Whilst I have not specifically dealt with the grounds of exception raised by Transnet regarding claims 1 and 3, such grounds have been dealt with when dealing with the exception grounds by the Funds which in main, are similar to those raised by Transnet.

Costs.

[53] An appropriate order for costs in the circumstances of the case would be that each party to pay his or her own costs. Both parties, in my view, substantially succeeded.

Order

[54] Consequently an order is hereby made as follows:

54.1 The exception by all the defendants with regards to claim 1 is hereby dismissed except as specifically indicated hereunder:

54.1.1 The exception to what is referred to in this judgment as "failure to identify the terms of the promise," and dealt with from paragraph 22 above, is hereby upheld.

54.1.2 The exception to what is referred to as "unlawful state conduct" by the plaintiffs in their amended particulars of claim, and dealt with from paragraph [28] of this judgment is hereby upheld.

NVA

54.1.3 The exception to what is referred to as "unlawful labour practice" by the plaintiffs in their amended particulars of claim, is hereby upheld in part for reasons mentioned from paragraph 47 of this judgement.

54.2 The exception to claim 2 by the third defendant (Transnet) is hereby dismissed.

54.3 The exception to claim 3 by all the defendants is hereby dismissed.

54.4 The plaintiffs are hereby granted leave to amend within 14 days from date hereof their particulars of claim affected by the order of this court as indicated in paragraphs 54.1.1 and 54.1.3 above.

54.5 Each part to pay his or her own costs.

M F LEGODI

JUDGE OF THE HIGH COURT

For the 1st & 2nd Plaintiffs: Adv Wim Trengove SC

Adv Jaap Cilliers SC

Adv L van Kellerman

Adv SJ Coetzee

Adv J Bleazard

Instructed by: GEYSER & COETZEE ATTORNEYS

NVA

Adv I Goodman

Adv N Luthuli

Instructed by: Attorneys Edward Nathan Sonnenberg Inc

For the 3rd Defendant: **Adv CDA LOXTON SC**

Adv MA Chohan SC

Adv B MAKOLA

ADV A PANTAZIS

Instructed by Attorneys: **BOWMAN GILFILLAN INC**

NVA

"Annexure WC-10"

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no. 42355\2015

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE : YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED

04/08/16
DATE SIGNATURE

GAUTENG DIVISION, PRETORIA

IN THE MATTER BETWEEN:

JOHAN PIETER HENDRIK PRETORIUS	1st Plaintiff
MONTANA DAVID KWAPA	2nd Plaintiff

and

TRANSPORT PENSION FUND	1st Defendant
TRANSNET SECOND DEFINED BENEFIT FUND	2nd Defendant
TRANSNET LIMITED	3RD Defendant

JUDGMENT ON LEAVE TO APPEAL

LEGODI J:

HEARD ON: 21 June 2016

JUDGMENT HANDED DOWN ON: 4 August 2016

NvA

[1] The parties herein will be referred to as in the main Judgment. Judgment in this application for leave to appeal was reserved on 21 June 2016. It is an appeal against the orders in paragraphs 54.1.1, 54.1.2, 54.1.3 and 54.5 of the judgment handed down on 18 May 2015 against the first plaintiff (Johan Pieter Pretorius) and the second plaintiff (Mr Montana David Kwapa).

[2] The orders appealed against read as follows:

> *"54.1.1 The exception to what is referred to in this judgment as "failure to identify the terms of the promise," and dealt with from paragraph 22 above, is hereby upheld.*
>
> *54.1.2 The exception to what is referred to as "unlawful state conduct" by the plaintiffs in their amended particulars of claim, and dealt with from paragraph [28] of this judgment is hereby upheld.*
>
> *54.1.3 The exception to what is referred to as "unlawful labour practice" by the plaintiffs in their amended particulars of claim, is hereby upheld in part for reasons mentioned from paragraph 47 of this judgement.*
>
> *54..5 Each party to pay his or her own costs."*

[3] As it would appear from the orders quoted above, this was an application for leave to appeal against an order upholding the defendants' exception noted against the plaintiffs' particulars of claim.

[4] It is not my intention to deal with the present application as if one is rewriting the main judgment. In the main judgment, I dealt with the terms of 'the state promise' and found that the terms as pleaded lack sufficient particularities and that they are vague and embarrassing. Reasons for the conclusion are stated in the main judgment and in my view there are no reasonable prospects of success on appeal. I also do not think that the order made in this regard is appealable.

[5] The other challenge to this court's finding in the main judgment was the findings on the 'unlawful state conduct' *vis–a vis* 'administrative action'. This court is said to have erred in paragraphs 32 to 42 of the main judgment. It is not my intention to restate what was said therein. It suffices to mention that I am not satisfied that there are reasonable prospect of success on appeal.

NVA

[6] More time was spent arguing the grounds of appeal with regard to "unlawful state conduct". When this judgment was reserved, I had initially thought that there was a need to deal with the grounds of appeal in some detail. In hindsight, I do not think is necessary to do so. In the main judgment I dealt with several case law authorities relied upon for the contention on behalf of the plaintiffs. I am not persuaded that there are prospects of success on appeal.

[7] A swipe was also taken against the findings by this court regarding 'unfair labour practice' in particular paragraphs 47 to 57 of the main judgment. I am not satisfied that there are no merits to the grounds of appeal. The plaintiff can do better by clarifying what they now say is pleaded in paragraph 14 to 17 of the amended particulars of claim. Similarly, I am not satisfied that there are prospects of success on appeal with regard to the 'unfair labour practice'.

[8] Regarding the grounds of appeal against a cost order, the contention was that the entire exception by the defendants should have been dismissed. As I said, there are no prospects of success on appeal and in the appeal in this regard is destined to fail.

[9] Before I conclude, it is important to mention that the first and second defendants filed conditional application for leave to appeal. I do not intend to deal with the merits or otherwise of such conditional application. My finding with regards to the plaintiff's application for leave to appeal makes it unnecessary to deal with the conditional application for leave to appeal.

[10] Consequently an application by the plaintiffs for leave to appeal is hereby dismissed with costs, such costs to include costs of two counsel for the first, second and third defendants.

M F LEGODI

NVA

JUDGE OF THE HIGH COURT

For the 1st & 2nd Plaintiffs:	**Adv Wim Trengove SC**
	Adv Jaap Cilliers SC
	Adv J Bleazard
Instructed by:	**GEYSER & COETZEE ATTORNEYS**
For the 1st and 2nd Defendants	Adv M Chaskalson SC
	Adv A Cockrell SC
	Adv I Goodman
	Adv N Luthuli
Instructed by:	Attorneys Edward Nathan Sonneberg Inc
For the 3rd Defendant:	**Adv CDA LOXTON SC**
	Adv MA Chohan SC
	Adv B MAKOLA
	ADV A PANTAZIS
Instructed by Attorneys:	**BOWMAN GILFILLAN INC**

NVA

"Annexure WC-11"

OFFICE OF THE CHIEF JUSTICE
THE REPUBLIC OF SOUTH AFRICA
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Enquiries:	Mr Myburgh	Date: 16 November 2016	Ref: 868/16
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Mr/Ms

APPLICATION FOR LEAVE TO APPEAL
JOHAN PIETER HENDRIK PRETORIUS & ANOTHER v TRANSPORT PENSION FUND & TWO OTHERS

With reference to the application lodged in this office on 16 SEPTEMBER 2016 this Court ordered on 14 NOVEMBER 2016 that the application be dismissed as per attached order;-

Yours faithfully

P S W MYBURGH (Mr.)/SM
REGISTRAR

REGISTERED POST (H/B/D/O)

YOUR REF: 42355/2015 LEGODI J (Court *a quo*)

Registrar of the High Court
Private Bag X 67
PRETORIA
0001

Copy for your information.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 888/16
GP CASE NO: 42355/2015

In the matter between:

JOHAN PIETER HENDRIK PRETORIUS	1ST APPLICANT
MONTANA DAVID KWAPA	2ND APPLICANT
and	
TRANSPORT PENSION FUND	1ST RESPONDENT
TRANSNET SECOND DEFINED BENEFIT FUND	2ND RESPONDENT
TRANSNET LIMITED	3RD RESPONDENT

COURT ORDER

WILLIS JA and SCHOEMAN AJA

ORDERED ON 14 NOVEMBER 2016

1. The application for leave to appeal is dismissed with costs on the grounds that there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard.
2. The application for conditional leave to appeal cross-appeal is dismissed with costs on the grounds that there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard.

By the court

P S W MYBURGH (Mr.)/SM
REGISTRAR

"Annexure WC-12"

Supreme Court of Appeal, Registrar's Office • PO Box 268, Bloemfontein, 9300 • c/o Elizabeth- & President Brand Street, Bloemfontein •
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Enquiries: Mr Myburgh **Date: 23 MARCH 2016** **Ref: 1392/16**

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Mr/Ms

APPLICATION FOR LEAVE TO APPEAL
J P H PRETORIUS & ANOTHER v TRANSPORT PENSION FUND & OTHERS

With reference to the application lodged in this office 14 DECEMBER 2016 this Court ordered on 23 MARCH 2017 that the application be dismissed as per attached order:-

Yours faithfully

P S W MYBURGH (Mr)
REGISTRAR

REGISTERED POST (H/B/D/C)

YOUR REF: 42355/15 Legodi J (Court a quo)

Registrar of the High Court
Private Bag X 67
PRETORIA
8000

Copy for your information

SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 1392/16
SCA CASE NO: 888/16
GP CASE NO: 42355/15

In the matter between:

JOHAN PIETER HENDRIK PRETORIUS	**1st APPLICANT**
MONTANA DAVID KWAPA	**2nd APPLICANT**

and

TRANSPORT PENSION FUND	**1st RESPONDENT**
TRANSNET SECOND DEFINED BENEFIT FUND	**2nd RESPONDENT**
TRANSNET LTD	**3rd RESPONDENT**

COURT ORDER
MAYA P
ORDERED ON 23 MARCH 2016

The application in terms of s 17(2)(f) of Act 10 of 2013 is dismissed for the reason that no exceptional circumstances warranting reconsideration or variation of the decision refusing the application for leave to appeal have been established.

By the court

P S W MYBURGH (Mr.)
REGISTRAR

"Annexure WC-B"
359

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 95/17

In the matter between:

JOHAN PIETER 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

Neutral citation:	*Pretorius and another v Transport Pension Fund and others* 2018 ZACC 10
Coram:	Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ
Judgments:	Froneman J (unanimous)
Heard on:	16 November 2017
Decided on:	25 April 2018
Summary:	Exceptions — pension funds— pension benefits — class action

ORDER

It is ordered that:

1. The applicants are granted leave to appeal.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The High Court's main orders in paragraph 54.1 are replaced with the following:

   "The defendants' exceptions are dismissed with costs including the costs of two counsel."
4. The High Court's order for costs in the applicants' application for leave to appeal to the Supreme Court of Appeal is replaced with an order that the costs of the application, including the costs of two counsel, be costs in the appeal to this Court.
5. The applications for leave to cross-appeal are dismissed with costs, including the costs of two counsel.

JUDGMENT

FRONEMAN J (**Zondo DCJ**, Cameron J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurring):

Introduction

[1] This matter concerns the material livelihood of pensioners who were employed by successive incarnations of the transport enterprise operated by the state. Its origin lies in a promise made to them in 1989 that they would receive the same pension benefits

under a commercial entity, Transnet,[1] as they did under the statutory state institution that employed them until then, namely the South African Transport Services (SATS) and its two pension funds (old pension funds). This promise was kept after the transfer to Transnet in April 1990, but after 2003 it was discontinued.

[2] The applicants instituted a class action against Transnet and its current pension funds (new pension funds)[2] in the High Court. The first claim (1989 promise) was based on a promise made in 1989 and formulated in the particulars of claim as enforceable either in contract, or as an enforceable state promise, or as an unfair labour practice under the Constitution. The second claim (legacy debt) was based on the ground that Transnet was obliged to take over its predecessors' obligation to maintain the old pension funds in a sound financial position. The amount necessary to fulfil that obligation was duly determined. Despite the determination of the amount to be paid in that regard, Transnet has failed to pay it over to the new pension funds. The third and last claim (unlawful donation) is said to flow from an unlawful donation made by one of the new pension funds to Transnet that needs to be paid back.

[3] The respondents filed exceptions to all three claims on various grounds. The High Court upheld three exceptions to the 1989 promise claim, but dismissed all of the others.[3] Leave to appeal to the Supreme Court of Appeal was refused. The applicants seek leave to appeal to this Court against the upholding of the three exceptions relating to the 1989 promise. The respondents seek conditional leave to cross-appeal against the dismissal of some of the other exceptions.

[4] I will deal with the application for leave to appeal against the upholding of the exceptions to the 1989 promise first, before turning to the application for leave to cross-appeal against the dismissal of the other exceptions.

---

[1] Transnet Limited, the third respondent (Transnet).

[2] The Transport Pension Fund (Transport Fund) and the Transnet Second Defined Benefit Fund (Second Fund), who are the first and second respondents.

[3] *Pretorius v Transport Pension Fund* [2016] ZAGPPHC 352 (High Court judgment).

The 1989 promise

[5] The background facts pleaded in the particulars of claim show that the transport enterprise of the state successively vested in the South African Railways and Harbours Administration (SAR&H),[4] SATS,[5] and, since 1990, in Transnet.[6] Transnet inherited two defined pension funds, divided on racial lines, from SAR&H. The Transport Fund is a merger of these old pension funds. It inherited all of the old pension funds' assets, liabilities, rights and obligations. The Second Fund is a new defined benefit fund established in November 2000 to house all of the pensioner-members of the Transport Fund at that date. It inherited all of the assets, liabilities, rights and obligations relating to these pensioner-members of the first respondent.

[6] The rules of the old pension funds entitled their members to increases of their pensions of at least 2% per year. These funds, with the concurrence of SAR&H and SATS, followed a consistent practice, over decades, of granting pension increases of at least 70% of the annual rate of inflation.

[7] In the run-up to the establishment of Transnet, SATS and the old pension funds made a promise to all its employees and members that the funds would continue to increase their pensions as before. The promise was made orally by the general manager of SATS and chair of the boards of the old pension funds, as well as by the Minister of Transport at meetings throughout the country with some 80000 employees in May and June 1989. The promise was repeated in writing in a SATS brochure, distributed to all SATS employees and pensioners later in 1989.

[8] The promise was one of the means by which SATS persuaded its employees to remain in its employ after SATS's conversion to Transnet. Transnet and the new

[4] Railway Board Act 73 of 1962.

[5] South African Transport Services Act 65 of 1981.

[6] Legal Succession to the South African Transport Services Act 9 of 1989.

pension funds kept the promise until 2002 by granting annual pension increases of about 80%, on average, of the rate of inflation. Since then, they have broken the promise in that they have consistently failed to grant any pension increases beyond the minimum of 2% per year.

[9] The applicants pleaded that the failure to keep the promise was unlawful on three grounds: breach of contract, unlawful state action and an unfair labour practice. Exception was taken to the first as being vague and embarrassing and to the other two as disclosing no cause of action and being bad in law.

[10] In the High Court, Legodi J upheld the exception to the contractual claim as vague and embarrassing because it did not contain sufficient particularity regarding: who would decide the rate of the pension increase; when the decision would be made and implemented; who would benefit from the promise; the period that the promise would endure; and, if the promise was in perpetuity, whether it was capable of termination. With regard to the unlawful state action claim, he held that the state action complained of could only be administrative action and should thus have been challenged under the provisions of the Promotion of Administrative Justice Act[7] (PAJA). The exception to the unfair labour practice claim was upheld on the ground that the particulars of claim failed to aver the existence of a labour relationship between the applicants and the respondents.

[11] Applications seeking leave to appeal to the Supreme Court of Appeal failed in the High Court and in the Supreme Court of Appeal.

A constitutional matter?

[12] Whether the 1989 promise binds current state successors is a constitutional matter because it concerns the exercise of public power and its appropriate use. There was no dispute that the unlawful state action and unfair labour practice claims raised

[7] 3 of 2000. See High Court judgment above n 3 at paras 41-2.

constitutional matters within this Court's jurisdiction, but it was contended that the contractual claim did not. This approach is not correct.

[13] The underlying facts for the contractual claim are the same as that of the other two claims, namely the 1989 promise by state functionaries that existing pension benefits will remain the same. All that is added is the allegation that this amounted to a valid offer accepted by the beneficiaries. The formation, implementation and possible termination of the contract all involve contested legal issues relating to whether the state had the legal competence to conclude, implement or terminate the contract and, if so, whether the exercise of those competencies amounted the use of public or private power. Those issues all involve constitutional matters.[8] This Court's jurisprudence shows that the attempted compartmentalisation of public and private power in contractual relations involving the state is one that should not generally be countenanced.[9] This court has jurisdiction.

Leave to appeal

[14] It is in the interests of justice to grant leave to appeal. The upholding of the exceptions is final and dispositive of discrete and important legal issues.[10] It is not only in the parties' interests that this Court determines them, but also in the broader national interest. And, as we will see, there are reasonable prospects of success as well.

Merits

[15] In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has

[8] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) (*KZN*) at paras 37, 48, 52, 57 and 62-5.

[9] *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) at paras 22-5 and *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at paras 63 and 198.

[10] Compare *Baliso v Firstrand Bank Limited t/a Wesbank* [2016] ZACC 23; 2017 (1) SA 292 (CC); 2016 (10) BCLR 1253 (CC) at paras 4-8.

satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.[11] The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception.[12] It is a useful procedural tool to weed out bad claims at an early stage, but an overly-technical approach must be avoided.[13]

Breach of contract

[16] In their particulars of claim the applicants pleaded that the 1989 promise was made orally by the general manager of SATS, who was also the chairperson of the old pension funds, and the Minister of Transport at meetings throughout the country with some 80 000 SATS employees in May and June 1989. The promise was repeated in writing in a SATS brochure distributed to all SATS employees and pensioners later in 1989.

[17] The material terms of the contract pleaded was that in the run-up to the establishment of Transnet, SATS and the old pension funds made a promise to all of their employees and members that the funds would continue to increase their pensions as before. The rules of the old pension funds entitled their members to increases of their pensions by at least 2% per year. These funds, with the concurrence of SAR&H and SATS, followed a consistent practice, over decades, of granting higher pension increases of at least 70% of the annual rate of inflation.

[18] The promise was pleaded as "an offer to contract duly made by and on behalf of SATS, the [old pension funds]", which was "tacitly accepted . . . by [the] remaining

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[11] *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2018 (1) SA 335 (CC); 2017 (12) BCLR 1528 (CC); (*DZ*) at para 29; *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (5) BCLR 127 (CC) (*Fetal Assessment Centre*) at para 10 and *Wellington Court Shareblock v Johannesburg City Council; Aghar Properties (Pty) Ltd v Johannesburg City Council* [1995] ZASCA 74; 1995 (3) SA 827 (A) (Wellington) at 834.

[12] *Barclays National Bank Ltd. v Thompson* [1988] ZASCA 126; 1989 (1) SA 547 (A) at 553F-I and *Kahn v Stuart* 1942 CPD 386 at 391.

[13] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) at para 3.

employees and pensioners of SATS, [and] the [old pension funds] without demur". SATS and the old pension funds "were thus contractually bound to keep the promise" and "Transnet, the Transport Fund and the Second Fund inherited the contractual duty to keep the promise". The failure to keep the promise after 2002 was "thus in breach of contract".

[19] The pleaded contract is simple and straightforward, but its simplicity is elegant, rather than vague. The terms of the contract are expressly and clearly set out and so are the parties bound by those terms. There is nothing vague and embarrassing that prevents the respondents from knowing what case they have to meet.

[20] The respondents also seek leave to cross-appeal against the dismissal of some of the other grounds of exception in relation to the contract based on the 1989 promise. The cross-appeal may not have been necessary to support an order in their favour on appeal,[14] but in the end it makes no material difference by which route it is before us.

[21] The dismissal of an exception is not usually finally dispositive of the legal issue at stake, unlike the upholding of an exception on the basis that the claim is bad in law.[15] This applies to the exceptions raised against the contractual claim based on the legislative regime and Transport Fund rules. In essence the respondents contend that their predecessors either did not have the capacity to enter into a contract on the basis of the 1989 promise or that, in any event, they are lawfully precluded from implementing that promise. There is precedent that for the purposes of deciding an exception contractual capacity is assumed[16] and that reference to rules that do not form

[14] *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43; 2016 (4) SA 432 (SCA) at paras 21-5.

[15] See *Fetal Assessment Centre* above n 11 at para 79. See also *Maize Board v Tiger Oats Ltd* [2002] ZASCA 74; 2002 (5) SA 365 (SCA) at paras 12-4 and *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 at 601 for dismissal of an exception and compare with upholding an exception that is bad in law that is finally dispositive of the legal issue.

[16] *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265 (O) at para 271-2.

part of the particulars of claim offends against the principle that exceptions must not be decided on information or facts extraneous to those pleaded.[17]

[22] Dismissal of the exception on these grounds does not deprive the respondents of the opportunity to raise them as substantive defences in their respective pleas and for their merits to be determined after the leading of evidence at the trial. That is probably, in any event, a better way to determine the potentially complex factual and legal issues involved.[18]

[23] The appeal against the upholding of the exception against the contractual claim based on the 1989 promise must thus succeed.

Unlawful state action

[24] For their unlawful state action claim in relation to the 1989 promise the applicants rely on this Court's decision in *KZN* as its legal foundation. They contend that the principle recognised in that case is that a promise by the state to make a payment is enforceable against the state when it would be legally and constitutionally unconscionable for the state to renege on that promise.

[25] In *KZN* the provincial department of education had issued a written notice to independent schools in September 2008 setting out a table of approximate subsidy funding for these schools under the South African Schools Act.[19] The first payment was promised for April 2009 but was not paid. In May 2009 the department issued a further circular announcing that it had decided to reduce the subsidies with retrospective effect. The schools instituted legal proceedings to enforce payment of the promised subsidies for the whole year. Their efforts were unsuccessful until they eventually obtained partial relief in this Court.

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[17] *Wellington* above n 11 at 834.

[18] Compare *Fetal Assessment Centre* above n 11 at paras 11-2.

[19] 84 of 1996.

[26] In a majority judgment, Cameron J held that the retroactive retraction or reduction of the April payment was unlawful. He held that the reduction in May, a month after the April payment was due, was legally and constitutionally unconscionable when measured against public law standards of reliance, accountability and rationality.[20] The applicants rely on this as establishing a general principle, not restricted to the facts of *KZN*.

[27] The features that they emphasise in their particulars of claim as establishing this unconscionableness include the fact that the promise was made to persuade SATS's employees to remain in its employ after its conversion to Transnet; that this was done by expressly promising that pensioners "need not worry"; that "the conversion will have no influence on pensioners; that 'in addition to the usual annual increase of 2% in pensions, the Transport Services [would], as in the past, continue to grant higher increases to enable them to counter the effects of inflation"; and that Transnet and the new pension funds kept the promise until 2002, which no doubt reinforced the assurance of their predecessors that they could be trusted to keep their promise.

[28] The making of the promise and its implementation for more than a decade created the legitimate expectation for the affected employees that the promise would be kept; they organised their lives and arranged their affairs on the assumption that the promise would be kept; and, as a result of the failure to do so, they "have suffered untold hardship".

[29] The High Court upheld the exception to the unlawful state action ground in relation to the 1989 promise. It held that the claim was founded on administrative action by an organ of state, but no entitlement to protection under PAJA was pleaded. It found support for this in a passage in the *KZN* majority judgment.[21] It concluded that the

[20] *KZN* above n 8 at paras 62-3.

[21] Id at para 31.

applicants were attempting to circumvent the provisions of PAJA, which they may not do.[22]

[30] The applicants contend that the High Court's approach is based on a misunderstanding of the majority judgment in *KZN* and the nature of their claim. The principle established in *KZN* is not based on a breach of the right to just administrative action in terms of section 33 of the Constitution read with PAJA, but on far more fundamental misconduct by the state. That conduct is unconscionable when measured against the constitutional standards of reliance, accountability and rationality. On the pleaded facts the requirements of reliance, accountability and rationality were not met. This conclusion is buttressed by the fundamental right to social security under the Constitution,[23] the reasonable pension benefit expectations of pensioners recognised under statute,[24] comparative law, and the doctrine of substantive legitimate expectation. This claim stands independent of a claim to administrative justice under PAJA.

[31] The respondents' counter that *KZN* cannot assist the applicants. In *KZN* the promise to pay was sourced in legislation, which is absent here. So too, there is no reduction of pensions that were already due. To enforce the 1989 promise would contravene the current legislative scheme for pension payments. The fundamental right to social security has not been implicated. Reasonable statutory pension benefit expectations are irrelevant because the relevant legislation does not apply. And our law does not recognise the doctrine of substantive, as opposed to procedural, legitimate expectation.

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[22] High Court judgment above n 3 at para 38.

[23] Section 27 of the Constitution reads:

> "(1) Everyone has the right to have access to—
>
> . . .
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

[24] Preamble of the Transnet Pension Fund Act 62 of 1990; and generally the Pensions Funds Act 24 of 1956.

[32] From this it appears that a resolution of the appeal against the upholding of the exception in the High Court depends on a number of cascading questions:

(a) Are claims against the state cognisable outside PAJA even if the conduct complained of is administrative action within PAJA?

(b) If so, what are the parameters of these claims, independent and separate from claims under PAJA?

(c) Does the applicants' unlawful state action claim pass muster in accordance with (a) and (b)?

(d) Does the exception procedure have any specific relevance to how the assessment in relation to (a), (b) and (c) should be made?

Administrative action outside PAJA?

[33] In *KZN* it was stated that, "if enforcement is sought on the basis of administrative action, the proceedings should have been brought under [PAJA]"[25] and that it was not possible to consider the claim on the basis of a breach of the right to just administrative action.[26] Nevertheless, Cameron J stated that—

> "the setting in which the 2008 notice promised a payment to its recipients indicates that it was seriously given, in the expectation that it would be relied upon, and that the payment in its terms would indeed be forthcoming, subject only to the possibility of due revocation."[27]

[34] These indications included the learners' right to basic education,[28] the competence of the Minister to determine norms and minimum standards for granting subsidies to independent schools and the Member of Executive Council's (MEC) competence to pay subsidies from the funds so appropriated by the provincial

[25] *KZN* above n 8 at para 31.

[26] Id at para 33.

[27] Id at para 37.

[28] Id at para 38.

legislature.[29] This meant that the payment of subsidies was "plainly acting in accordance with [the state's] duty under the Constitution in fulfilling the right to a basic education of the learners . . . that benefit from the subsidy".[30] Although the subsidy could be revoked, it could not be retroactively revoked in respect of the April subsidy because the date on which the unilateral obligation undertaken by the state became due had already passed.[31]

[35] Because *KZN* was not argued under PAJA it was not necessary to determine whether the decision to reduce the subsidy satisfied all the elements of the definition of administrative action under PAJA. As Professor Cora Hoexter points out, however, the reduction decision seems easily to fulfil those requirements.[32] This Court's decisions in *Premier, Mpumalanga*[33] and *MEC, Education and Training, Eastern Cape*[34] would also lend support to that conclusion. Professor Hoexter is critical of this development:

> "It is a pity that this case was not argued under the PAJA, for it could easily have inspired significant developments under that statute: the introduction of substantive enforcement of legitimate expectations, or at the very least a reconsideration of the law relating to fettering, and perhaps the application of estoppel against administrators. . . . But as things are, the majority judgment effectively adds to the possibilities of enforcing just administrative action without recourse to regular administrative law, and it adds to the advantages of avoiding PAJA in favour of more general and more abstract constitutional principle."[35]

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[29] Id at paras 39-44.

[30] Id at paras 45 and 47.

[31] Id at para 52.

[32] Hoexter "The Enforcement of an Official Promise: Form, Substance and the Constitutional Court" (2015) 132 *SALJ* 207 at 223.

[33] *Premier, Mpumalanga v Executive Committee of the Association of State Aided Schools: Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC).

[34] *Fredericks v MEC for Education and Training Eastern Cape* [2001] ZACC 6; 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC) (*MEC, Education and Training, Eastern Cape*).

[35] Hoexter n 32 above at 233-4.

[36] Before us no one argued that *KZN* was wrongly decided. It is authority for the proposition that a separate claim may lie, based on the same conduct, even though that conduct might also amount to administrative action under PAJA. The reason for upholding the exception in the High Court thus cannot stand. Finding that the conduct relied upon could also be administrative action under PAJA is not dispositive of the issue. One needs to go further and determine whether the pleaded claim outside PAJA in its own terms truly falls outside PAJA's reach.

Claims not falling within PAJA

[37] *KZN* is not the only instance where claims outside PAJA have been recognised by this Court. PAJA's "current main competitor is the constitutional principle of legality".[36] Commentators have been critical of this development on the grounds that its application is sometimes inconsistent;[37] leads to a blurring of the requirements of rationality and reasonableness;[38] undermines the doctrine of subsidiarity;[39] and promotes the avoidance of PAJA.[40] These criticisms also need to be considered carefully where the constitutional principles are not couched in direct terms of legality, but of unconscionable conduct when measured against the constitutional principles of reliance, accountability and rationality as was done in *KZN*.

[38] It is important to remember that in *KZN* the counterpoint made by Profesor Hoexter – that PAJA was as good a candidate within which the law could have been developed to assist the learners – was not raised by the parties. Nor did the respondent MEC raise the argument that the time limits under PAJA were being circumvented. The underlying constitutional principles of reliance, accountability and

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[36] Hoexter above n 32 at 219.

[37] Murcott and van der Westhuizen "The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *My Vote Counts*" (2015) 7 Constitutional Court Review at 45 and 58-59.

[38] Hoexter "The Rule of Law and the Principle of Legality" in Carnelley and Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* 2013 (University of KwaZulu-Natal Press Scottsville 2011) 55 at 59; Price "The Evolution of the Rule of Law" (2013) 13 *SALJ* 649 at 655-656.

[39] Hoexter id at 65.

[40] Kohn L "The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone too Far?" (2013) *SALJ* 810 at 812; and Hoexter id at 66-8.

rationality were sourced in the context of the state's duty under the Constitution to fulfil the right to a basic education of the learners that benefitted from the subsidy,[41] not primarily in any administrative law principle codified in PAJA.[42]

[39] Similarly, here, the facts pleaded and arguments raised are, on their face at least, not based on administrative justice, but on the asserted application of the *KZN* constitutional principle of unconscionable state conduct that is in breach of reliance, accountability and rationality. The pleaded factual context of the 1989 promise being made with obvious intent to make good on it in order to facilitate the transfer of the state's transport enterprise to a commercial entity; the legal support of that being sought in the constitutional right to social security and special legislative protection of pensioners; and the assertion of substantive legitimate expectations, do not on their own show the inevitability of the application of PAJA.

[40] That does not mean that the door is closed to Transnet and the new pension funds to raise defences that show that the application of the *KZN* principle in this case would give the applicants an unfair advantage because applicable PAJA provisions are being circumvented.[43] At this stage of the proceedings all it means is that the potential unfair advantages do not jump in one's face from the particulars of claim.

Is the applicants' unlawful state action claim legitimately outside PAJA?

[41] The last sentence of the previous paragraph already gives the answer. Yes it is.

[42] The respondents' arguments that *KZN* does not apply here may eventually be found to have merit, but they run into the obstacle that exception proceedings are inappropriate to decide the complex factual and legal issues raised by these objections.

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[41] See [34].

[42] Compare *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC), where the minority judgment also relied directly on other fundamental rights, but the majority declined to follow that approach because it was clear on the papers that it was being used to circumvent PAJA time limits.

[43] Id. Also compare *KZN* above n 8 at paras 104-5.

Development of the law on exception

[43] In their written submissions, the applicants readily conceded that the "contours and scope" of the *KZN* principle "have not yet been fully developed". This Court has recently declined to decide on the development of the common law where all the factual issues were not raised in the papers before us and where the legal issues are complex.[44]

[44] Some of the arguments made against the applicability of the *KZN* principle are similar to those rejected earlier in relation to the breach of contract claim. The alleged absence of legislative authority to make the promise and the alleged contravention of the current legislative scheme relate to matters of capacity that lie outside the material pleaded in the particulars of claim and may be pleaded as substantive defences. The legal issues surrounding fundamental social security rights, pensioner expectations and substantive legitimate expectation and their effect on the principles of reliance, accountability and rationality are complex. To decide the possible unconscionableness of state conduct, it will be better to get the full story thrashed out at a trial.[45]

[45] The appeal against the upholding of the exception against the unlawful state action claim must thus also succeed.

The unfair labour practice claim

[46] The third cause of action pleaded as flowing from the 1989 promise was that the failure to pay constituted an unfair labour practice in breach of section 23(1) of the Constitution.[46] The High Court upheld the exception to this leg of the respondents application on the ground that it must be pleaded that there was and is an

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[44] See *DZ* above n 11 at paras 57-8. See also, for example, *Fetal Assessment Centre* above n 11 at paras 12 and 78.

[45] See, for example, *Fetal Assessment Centre* id at paras 11, 26 and 74.

[46] Section 23(1) of the Constitution reads:

> "Everyone has the right to fair labour practices."

employer-employee relationship between the applicants and the respondents and that they failed to do so.[47]

[47] That appears to be unnecessarily restrictive. The section refers to "everyone" having the right and its purpose is to protect persons from unfair labour practices that originated in an employer-employee relationship. Labour law jurisprudence under the Labour Relations Act[48] (LRA) recognises that unfair labour practices under the Act may extend beyond the termination of employment.

[48] Contemporary labour trends highlight the need to take a broad view of fair labour practice rights in section 23(1). Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the "twilight zone" of employment as supposed "independent contractors" in time-based employment subject to faceless multinational companies who may operate from a web presence.[49] In short, the LRA tabulated the fair labour practice rights of only those enjoying the benefit of *formal employment* – but not otherwise. Though the facts of this case do not involve these considerations, they provide a compelling basis not to restrict the protection of section 23 to only those who have contracts of employment.

[49] Two other objections against this part of the claim were raised in argument. The one was that direct reliance on the Constitution rather than on the provisions of the LRA relating to unfair labour practices undermined the principle of subsidiarity. The other was that the new pension funds never employed any of the applicants.

[50] The application of the principle of subsidiarity in relation to the LRA and other labour legislation is complex. The Constitution in some instances, like with the rights

[47] High Court judgment above n 3 at para 51.

[48] 66 of 1995.

[49] "Twilight zones" of employment refer to types of employment wherein there is no clear employer and employee, examples include Uber and Airbnb.

of access to information[50] and just administrative action[51] require national legislation to give effect to these rights. The same requirement is not made in section 23. The LRA itself, however, sets that as one of its objects.[52] Nevertheless there are other pieces of labour legislation that also cover aspects of potential unfair labour practices.[53]

[51] The principle of subsidiarity was recently considered by this Court in *My Vote Counts*.[54] Neither the majority nor minority judgments in that case are directly on point because the issue involved a provision of the Constitution that required Parliament to act. Section 23(1) lacks that requirement. A decision by Parliament *not* to cover the entire field would not fail to fulfil a duty in the Constitution. A fair labour practice claimant may be entitled to rely on the Constitution directly without having to show that the LRA (or patchwork of other statutes) is deficient.

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[50] Section 32 of the Constitution reads:

"(1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

[51] Section 33 of the Constitution reads:

"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

[52] See section 1 of the LRA reads:

"The purpose of *this Act* is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of *this Act*, which are—

(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996."

[53] Consider the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.

[54] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 2015 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) (*My Vote Counts*) at paras 44-74.

[52] The majority judgment in *My Vote Counts* expressly disavowed that subsidiarity was a hard rule:

> "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."[55] (Footnotes omitted.)

[53] This indicates that as in *Fetal Assessment Centre* this is a matter where the "factual situation is complex and the legal position uncertain".[56] Here there is more than enough legal uncertainty to send the unfair labour practice claim to trial.

[54] If it is accepted that in this matter the principle of subsidiarity does not apply, at least at the exception stage, there is no reason to find that a claim against the new pension funds is facially implausible. A claim like this, invoking the fundamental right to fair labour practices under section 23, has not been litigated before. We should not hold – on exception – that the constitutional guarantee against unfair labour practices does not extend to the actions of pension funds taken in concert with an employer.

[55] The appeal against the upholding of the exception to the unfair labour practice claim must also succeed.

The conditional cross-appeals

[56] Dismissal of an exception does not usually involve a final dispositive pronouncement on a legal issue.[57] For that reason, as well as the complexity of the factual and legal issues surrounding all the claims made in the applicants' particulars of claim, it is not in the interests of justice to grant leave to the respondents to cross-appeal.

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[55] Id at para 182.

[56] *Fetal Assessment Centre* above n 1 at paras 11-2, relying on *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (1) BCLR 995 (CC).

[57] See above n 15.

The respondents may raise the issues in substantive defences to the applicants' claim for determination at the trial.

Costs

[57] The High Court dismissed the applicants' application for leave to appeal to the Supreme Court of Appeal with costs, including the costs of two counsel. In view of the outcome, that will have to be corrected. In these proceedings, the applicants sought a costs order for three counsel. That is not normal practice and although the matter is complex and of importance it is not so exceptional as to warrant a deviation from the ordinary order of costs of two counsel to be allowed when such order is reasonable.

Order

[58] It is ordered that:

1. The applicants are granted leave to appeal.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The High Court's main orders in paragraph 54.1 are replaced with the following:

   "The defendants' exceptions are dismissed with costs including the costs of two counsel."
4. The High Court's order for costs in the applicants' application for leave to appeal to the Supreme Court of Appeal is replaced with an order that the costs of the application, including the costs of two counsel, be costs in the appeal to this Court.
5. The applications for leave to cross-appeal are dismissed with costs, including the costs of two counsel.

For the Applicants:	W Trengove SC; J Bleazard and L Zikalala instructed by Geyser & Coetzee Attorneys.
For the First and Second Respondents:	M Chaskalson SC; A Cockrell SC and N Luthuli instructed by Edward Nathan Sonnenbergs. Inc.
For the Third Respondent:	C D A Loxton SC and M A Chohan SC instructed by Bowman Gilfillan.

"Annexure WC-16"

384

Annexure A

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Mrs. Wynanda Coetzee

Geyser & Coetzee

6 February 2020

Dear Mrs. Coetzee,

Revised proposal by Transnet

I have referred to the Transnet Section of the Transport Pension Fund as the TTPF and the Transnet Second Defined Benefit Fund as the TSDBF in my report below.

1. Affordability of the bonus and increases as proposed by Transnet

From the material that you have sent me,

- the assets of the TSDBF at 28 February 2019 were R13 277,6 million
- the membership, split by gender, gives rise to 47127 beneficiaries with annual pensions of R1 514,6 million
- Transnet have proposed increases as set out in the following table:

	2019/2020	2020/2021	2021/2022	31 March 2022 and onwards
Normal increase	2%	2%	2%	Target increases of 70% of inflation subject to a minimum of 2%
Special increase	11%	7%	4%	0%

Rand lump sum	R10 000	R10 000	R10 000	R0

This would ensure that, up to but not including 31 March 2022, the pensioners enjoy a cumulative[1] increase in their pensions of 31% assuming that the increases are applied on 31 March of each year.

I have revised my projection of the membership, using the data as at 28 February 2019, after pruning out the small number of beneficiaries at ages above 110. Please note that I have retained the expected investment return of 8,37% per annum.

From my calculations, as at 31 March 2022, after giving the increases in the table, including a 2% increase as at 31 March 2022, and allowing for increases after 31 March 2022 of 70% of inflation:

TSDBF	As at 31 March 2022 after giving the above increase R'millions
Value of assets as at 31 March 2022 assuming investment return of 8,37% from 1 March 2019 to 31 March 2022.	R 9 770,7
Value of liabilities	R 10 267,1
Deficit (before contingency reserves)	-R 496,4

[1] This assumes that the 11% is applied after the 2% increase was awarded, so the total increase in the first year is (1+ 2%) x (1 + 11%) -1 = 13,22% and so on. The 31% is (1,02)x(1,11)x(1,02)x(1,07)x(1,02)x(1,04)-1.

The TSDBF is expected to be slightly in deficit, before the trustees consider any contingency reserves.

I have not quantified the situation for the TTPF as it had more than enough surplus assets to provide a full base uplift to the pension that the member would have enjoyed if pension increases had been awarded at 70% of inflation and to provide increases of 70% of inflation thereafter, leaving it still comfortably in surplus. If implemented, this revised, lower proposal will leave the TTPF with slightly more surplus than anticipated previously. This surplus will be sufficient to cover the anticipated shortfall in the TSDBF.

The combined TTPF and TSDBF will, therefore, have sufficient assets to cover the combined fund's liabilities after granting the increases in the settlement proposal.

2. **What is required to put pensioners into the situation that they would have been in if they had enjoyed increases of 70% of inflation.**

Pensioners understood that the practice of the Fund prior to 1 April 2003 was to grant increases of approximately 70% of inflation.

There are three aspects to an endeavour to put the pensioners into the situation that they would have been in, if they had enjoyed such increases:

- Compensation for the failure to give such increases in the past.
- An uplift of their current pension to an amount that would reflect increases of 70% of inflation from 1 April 2003.
- Provision for increases of 70% of inflation in future.

I deal with these in turn.

2.1. Compensation for the failure to give such increases in the past.

2.1.1. The TSDBF

The average monthly pension payable to pensioners and spouses in the TSDBF as at the end of February 2019 was R2681 per month. Using the actual history of pension increases, this translates into an average monthly pension of R1992,05 as at 1 April 2003.

Assuming for convenience that the increase occurs 1 April and bonus is payable at 1 April based on the contributions paid for the previous year, Table 1 below shows the "average" pension with increases actually granted, the notional pension assuming increases of 70% of inflation from 1 April 2003 onwards, and the accumulated values of the "average" pension with increases actually granted plus the ad hoc bonuses awarded as shown (at the rates advised to me by the Pensioner Action Group), and the accumulated values of the notional pension assuming increases of 70% of inflation.

Table 1.

As at 1 April of the year:	Pension increase awarded at 1 April	Actual pension	Ad hoc bonuses awarded at 1 April (as provided by the Pensioner Action Group)	Value of actual pension plus ad hoc bonuses, accumulated at 12% per annum compound at year end	70% of inflation increase from 1 April to following 31 March (minimum of 2%)	Notional pension with increases of 70% of inflation (subject to a minimum of 2%) as at year end	Value of notional pension (70% of inflation increases) accumulated at 12% per annum compound at year end
2003		1992,05	0	25 192,46	2,00%	1992,05	25 192,46

2004	2%	2031,89	0	53 911,85	2,00%	2031,89	53 911,86
2005	2%	2072,53	0	86 591,52	2,36%	2072,53	86 591,51
2006	2%	2113,98	0	123 716,95	4,30%	2121,46	123 811,58
2007	2%	2156,26	3%	166 684,48	7,47%	2212,67	166 651,55
2008	2%	2199,39	7,02%	216 535,60	6,52%	2377,92	216 722,15
2009	2%	2243,38	11,92%	274 414,30	3,56%	2532,96	274 761,83
2010	2%	2288,25	15,33%	340 904,52	2,89%	2623,07	340 905,86
2011	2%	2334,02	8,50%	413 944,34	4,21%	2698,81	415 945,08
2012	2%	2380,70	17%	499 057,95	4,15%	2812,37	501 425,1
2013	2%	2428,31	17%	595 093,94	4,26%	2929,07	598 638,55
2014	2%	2476,88	17%	703 377,27	2,81%	3053,78	709 094,85
2015	2%	2526,42	17%	825 392,08	4,40%	3139,58	833 890,97
2016	2%	2576,95	17%	962 800,89	4,28%	3277,70	975 409,28
2017	2%	2628,49	21%	1 118 851,37	2,67%	3418,12	1 135 685,67
2018	2%	2681,06	40%	1 301 150,32	3,16%	3509,34	1 316 348,80

Note: The ad hoc bonus is applied as follows (with the year 2015 as an example): the 1 April 2015 rate is applied to the income earned in the previous 12 months and assumed to be paid as at 1 April 2015. In the accumulation it therefore earns a full year of interest when included in the accumulation as at 31 March 2016.

The accumulated actual contributions and ad hoc bonuses result in a figure as at 31 March 2019 that is 98,85%[2,3] of what notional contributions (increasing at 70% of inflation) would have achieved, both accumulated at 12%[4] per annum compound.

If I use the bonus rates as awarded according to the schedule provided by Transnet, the table reads as follows:

[2] 1301150,32/1316348,80 = 98,85%

[3] If the bonus is awarded at the end of the year (rather than the beginning) but is based on pension paid in that year (rather than the previous year), the figure is 98,15%.

[4] I do not have the actual investment returns achieved by the Fund after 1 March 2011. If I use the actual returns to the extend that I have them and assume the Fund earned the same returns as the Alexander Forbes Global Large Manager Watch median fund, the percentage at 31 March 2019 would be 98,40% and not 98,85%.

Table 2.

As at 1 April of the year:	Pension increase awarded at 1 April	Actual pension	Ad hoc bonuses awarded at 1 April (as provided by Transnet)	Value of actual pension plus ad hoc bonuses, accumulated at 12% per annum compound at year end	70% of inflation increase from 1 April to following 31 March (minimum of 2%)	Notional pension with increases of 70% of inflation (subject to a minimum of 2%) as at year end	Value of notional pension (70% of inflation increases) accumulated at 12% per annum compound at year end
2003		1992,05	0,00%	25 192,46	2,00%	1992,05	25 192,46
2004	2%	2031,89	0,00%	53 911,85	2,00%	2031,89	53 911,86
2005	2%	2072,53	0,00%	86 591,52	2,36%	2072,53	86 591,51
2006	2%	2113,98	0,00%	123 716,95	4,30%	2121,46	123 811,58
2007	2%	2156,26	1,50%	166 258,3	7,47%	2212,67	166 651,55
2008	2%	2199,39	8,50%	216 487,19	6,52%	2377,92	216 722,15
2009	2%	2243,38	15,30%	275 359,2	3,56%	2532,96	274 761,83
2010	2%	2288,25	16,83%	342 415,07	2,89%	2623,07	340 905,86
2011	2%	2334,02	26,67%	421 224,17	4,21%	2698,81	415 945,08
2012	2%	2380,70	8,33%	504 491,64	4,15%	2812,37	501 425,1
2013	2%	2428,31	16,66%	601 070,89	4,26%	2929,07	598 638,55
2014	2%	2476,88	16,66%	709 960,49	2,81%	3053,78	709 094,85
2015	2%	2526,42	16,66%	832 652,11	4,40%	3139,58	833 890,97
2016	2%	2576,95	21,00%	972 290,32	4,28%	3277,70	975 409,28
2017	2%	2628,49	20,00%	1 129 133,19	2,67%	3418,12	1 135 685,67
2018	2%	2681,06	40,00%	1 312 665,95	3,16%	3509,34	1 316 348,80

The accumulated actual contributions and ad hoc bonuses result in a figure as at 31 March 2019 that is 99,72%[5,6] of what notional contributions (increasing at 70% of inflation) would have achieved, both accumulated at 12% per annum compound.

Payment of the bonus at dates during the year is likely to produce a figure between those in footnotes 2 and 3, or 5 and 6.

I have retained the bonus rates as advised by the Pensioner Action Group because these are the figures that were discussed with them when they agreed the settlement.

On both versions of bonus awarded, the value of the increases actually granted plus the ad hoc bonuses is, therefore, very similar to the value of what the members would have enjoyed if pension increases had been 70% of inflation. As footnote 4 shows, there is not a material difference expected if likely actual investment returns are used rather than the 12% assumed.

Therefore, in respect of past history up to 31 March 2019, in terms of value received, the surviving beneficiaries are not materially financially worse off than they would have been if they had enjoyed pension increases of 70% of inflation. This will be true of beneficiaries across the income bands because the ad hoc pension increases have been percentages of pensions being received.

2.1.2. The TTPF

I do not have dates as to when the pensioners in the TTPF retired, but, assuming that TTPF pensioners who retired in any particular year after 2003 retired at the beginning of that year, I tested the accumulated value of the actual pension received plus ad hoc bonuses against what the pensioners would have received if they had had increases of 70% of inflation each year.

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[5] 1312665,95/1316348,80 = 99,72%

[6] If the ad hoc bonus is awarded at year end, based on the contributions paid in that year, the figure is 98,95%.

What they have actually received, including ad hoc bonuses, when accumulated at 12% per annum compound interest, was

- 100% or higher, of the accumulation of pensions assuming increases of 70% of inflation each year at the same rate of interest, for all years of retirement except the first (namely the period from 1 April 2003 to 31 March 2004), using bonus awards as supplied by the Pensioner Action Group or
- 99% or higher, using the bonus awards as supplied by Transnet.

For the particular year 1 April 2003 to 31 March 2004, the figures were 97,1% using the bonus awards as provided by the Pensioner Action Group and 96,2% using the bonus awards as provided by Transnet.

When the effect of the lump sum award is taken into account (see the next section), the average TTPF pensioner should be at least as well off (in terms of the value of income received) after the settlement agreement as he or she would have been if he or she had received increases of 70% of inflation.

2.2. An uplift of their current pension to an amount that would reflect increases of 70% of inflation from 1 April 2003.

The uplift to put the TSDBF pensioners into the position, going forward, that they would have been in if they had enjoyed increases of 70% of inflation each year is 30,9%[7]. See the figures in Table 1.

The TTPF pensioners who retired in the year starting 1 April 2003 require an uplift of 34% (assuming they all retired at the beginning of the year). This drops to approximately 30% for pensioners who retired between 1 April 2004 and 31 March 2008, and then drops significantly for later retirees.

[7] 3509,34 / 2681,06 – 1 as a percentage.

Propagating pensions forward, assuming that inflation is 4,5% per annum, starting with the 2018 position in Tables 1 and 2:

Table 3

Year	Actual pension increase	Resulting pension	Inflation rate	70% of inflation increase	Notional pension assuming increases of 70% of inflation
2018		2681,06			3509,34
2019	13,22%[8]	3035,5	4,52%	3,16%	3620,37
2020	9,14%[9]	3312,94	4,5%	3,15%	3734,41
2021	6,08%[10]	3514,37	4,5%	3,15%	3852,04

The pensioners will then have pensions expected to be some 9,6%[11] short of where they would be if increases were 70% of inflation each year.

For the majority of members, this shortfall is made up by the lump sum award. This is examined in the next section.

2.3. The impact of the lump sum award on members of different earnings levels.

In Table 4 below, I show the distribution of pensioner members and spouses in the TSDBF by income level. I then took the average age for each group, determined an approximate rate to convert a lump sum into a pension for that age, and determined the equivalent increase in pension for a member in the group resulting from a lump sum of R30 000. The final column shows the proportion of the members in each group.

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[8] 1,11 x 1,02 -1
[9] 1,07 x 1,02 -1
[10] 1,04 x 1,02 - 1
[11] 3852,04 / 3514,37 -1 = 9,6%

Table 4						
Range of monthly pension	Number in group	Average age of group	Average monthly pension	Approximate increase in monthly income equivalent to R30 000 lump sum	Approximate percentage increase	Proportion of members in group
	Members					
0 – 999	2579	82	776,65	384,73	49,54%	18,301%
1000 – 1999	2918	77	1435,53	304,28	21,20%	20,707%
2000 – 2999	1901	75	2470,61	280,14	11,34%	13,490%
3000 – 3999	1427	76	3496,38	291,72	8,34%	10,126%
4000 – 4999	1239	78	4509,49	318,07	7,05%	8,792%
5000 – 5999	1417	80	5512,52	348,72	6,33%	10,055%
6000 – 6999	1164	81	6458,52	365,93	5,67%	8,260%
7000 – 7999	550	82	7437,76	384,73	5,17%	3,903%
8000 – 8999	253	85	8447,23	451,59	5,35%	1,795%
9000 – 9999	139	86	9437,48	477,46	5,06%	0,986%
10000 - 10999	72	84	10492,31	427,79	4,08%	0,511%
11000 - 11999	75	83	11445,61	405,58	3,54%	0,532%
12000 - 12999	46	83	12501,60	405,58	3,24%	0,326%
13000 - 13999	22	83	13580,00	405,58	2,99%	0,156%
14000 - 14999	17	83	14453,60	405,58	2,81%	0,121%
15000 - 15999	13	83	15629,22	405,58	2,60%	0,092%
16000 - 16999	24	79	16575,89	332,85	2,01%	0,170%
17000 - 17999	28	81	17543,30	365,93	2,09%	0,199%
18000 - 18999	26	79	18546,94	332,85	1,79%	0,185%
19000 - 19999	22	81	19490,93	365,93	1,88%	0,156%
20000 - 20999	25	80	20449,28	348,72	1,71%	0,177%
21000 - 21999	20	79	21523,85	332,85	1,55%	0,142%
22000 - 22999	12	79	22536,47	332,85	1,48%	0,085%
23000 - 23999	13	79	23469,88	332,85	1,42%	0,092%
24000 - 24999	15	80	24670,31	348,72	1,41%	0,106%
25000 - 29999	46	78	27025,64	318,07	1,18%	0,326%
30000 - 39999	19	81	33268,53	365,93	1,10%	0,135%
40000 and over	10	83	61303,14	405,58	0,66%	0,071%

Total	14092					

Range of monthly pension	Number in group	Average age of group	Average monthly pension	Approximate increase in monthly income equivalent to R30 000 lump sum	Approximate percentage increase	Proportion of members in group
	Spouses					
0 – 999	12657	75	612,42	348,00	56,82%	38,438%
1000 – 1999	6765	72	1409,97	301,97	21,42%	20,545%
2000 – 2999	4289	75	2486,12	348,00	14,00%	13,025%
3000 – 3999	3360	77	3486,66	386,34	11,08%	10,204%
4000 – 4999	2849	77	4465,41	386,34	8,65%	8,652%
5000 – 5999	1504	79	5447,70	433,35	7,95%	4,568%
6000 – 6999	798	81	6426,91	488,00	7,59%	2,423%
7000 – 7999	287	83	7432,24	555,19	7,47%	0,872%
8000 – 8999	154	82	8441,62	519,64	6,16%	0,468%
9000 – 9999	73	83	9504,06	555,19	5,84%	0,222%
10000 - 10999	49	84	10463,81	592,98	5,67%	0,149%
11000 - 11999	27	80	11401,07	459,47	4,03%	0,082%
12000 - 12999	23	84	12415,72	592,98	4,78%	0,070%
13000 - 13999	22	83	13624,81	555,19	4,07%	0,067%
14000 - 14999	11	78	14405,86	409,03	2,84%	0,033%
15000 - 15999	9	83	15580,45	555,19	3,56%	0,027%
16000 - 16999	13	78	16486,47	409,03	2,48%	0,039%
17000 - 17999	8	74	17529,66	331,43	1,89%	0,024%
18000 - 18999	7	73	18530,19	316,18	1,71%	0,021%
19000 - 19999	6	79	19475,65	433,35	2,23%	0,018%
20000 - 20999	3	79	20531,22	433,35	2,11%	0,009%
21000 - 21999	3	68	21786,58	257,15	1,18%	0,009%
22000 - 22999	1	81	22091,16	488,00	2,21%	0,003%
23000 - 23999	1	76	23322,90	366,14	1,57%	0,003%
24000 - 24999	0					

25000 - 29999	1	86	25574,02	676,95	2,65%	0,003%
30000 - 39999	2	81	27863,32	488,00	1,75%	0,006%
40000 and over	6	88	38208,72	778,33	2.04%	0,018%
Total	32928					

I have not quantified a similar table for children in receipt of pensions. They form a very small group in any event.

I would like to stress that

- Firstly, the conversion to income is approximate as I've made a number of assumptions (such as all members are male, and all spouses are female, the age difference between spouses is 5 years [the wife being 5 years younger than the husband] and so on). I've also used annual rates for the conversion to income; and
- Obviously, for a specific individual member, the conversion from lump sum to income will depend upon that member's circumstances (such as the member's actual age and the actual difference in age between the member and spouse).

The second last column of this table shows that, for pensioners earning less than R3 000,00 per month, and for spouses earning less than R4 000,00 per month, the pension increase equivalent to the R30 000,00 lump sum award will take the pensioners and spouses up to the level that they would have enjoyed if they had had increases of 70% of inflation. That is, the lump sum award satisfies the shortfall of 9,6% set out in section 2.2 for 52,5% of pensioners and 82,2% of spouses. The lump sum award makes up much of the shortfall for the higher income pensioners and spouses.

2.4. Targeting for increases of 70% of inflation in future.

This will be incorporated into the pension increase policy and the assumptions used by the valuator when valuing the liabilities of the Funds. I built such assumptions into the model when determining the sustainability of the settlement agreement in future, as reported in Section 1.

3. Pensioners who have died.

The settlement agreement awards lump sums and pension increases only to TSDBF and TTPF pensioners who are still alive, or to the dependants of deceased pensioners who are still in receipt of pensions in terms of the rules. Nothing goes to people who are not still in receipt of pensions from the Funds, i.e. pensioners and their dependants (who became entitled to pensions on the death of a pensioner) who have died.

There were some 94 000 pensioners in 2003, and there are now only some 46 000. The cost to settle on the terms in the agreement would have been very much higher had some compensation been included for the pensioners and dependants of deceased pensioners.

4. Conclusion.

I consider that the settlement agreement puts the vast majority of surviving pensioners in both the TSDBF and the TTPF in a position that is equivalent to, or better than, the position they would have been in if their pensions had increased by 70% of inflation each year. The only pensioners for whom this might not apply are relatively high income pensioners, and then the difference will be small.

The lump sum payments are likely to be appreciated by pensioners because of their age. In awarding a fixed Rand amount, more goes to the lower income members, in proportion to the size of their pensions. The settlement agreement can therefore be viewed as progressive in giving more to the poorest.

For the low income pensioners, a lump sum award will also not impact the means test for the portion of the social old age grant that they would be receiving.

Yours sincerely,

Jeremy Andrew

Appendix 1. Data and Assumptions

A1.1 Bonuses taken into account.

The bonuses awarded have been at various times during the year. I have taken the total bonus awarded during the fund's year (1 April to 31 March) as being awarded at the 31 March ending the year, as a percentage of the pension paid in the year ending on 31 March.

Year beginning	Bonus rates as advised by the Pensioner Action Group	
	Bonus awarded in the TSDBF	Bonus awarded in the Transnet Section of the TPF
01-Apr-03	0,00%	0,00%
01-Apr-04	0,00%	0,00%
01-Apr-05	0,00%	0,00%
01-Apr-06	0,00%	0,00%
01-Apr-07	3,00%	0,00%
01-Apr-08	7,02%	0,00%
01-Apr-09	11,92%	0,00%
01-Apr-10	15,33%	0,00%
01-Apr-11	8,50%	83,00%
01-Apr-12	17,00%	8,50%
01-Apr-13	17,00%	8,50%
01-Apr-14	17,00%	17,00%
01-Apr-15	17,00%	17,00%
01-Apr-16	17,00%	0,00%
01-Apr-17	21,00%	10,00%
01-Apr-18	40,00%	40,00%

In preparation for the Court hearing, Transnet has provided a different schedule of bonus rates awarded, specifying the months in which they were awarded. I have accumulated

these for each year (1 April to 31 March) and treated them as awarded on 1 April based on the contributions paid in the previous year.

	Bonus rates as advised by Transnet	
	Bonus awarded in the TSDBF	Bonus awarded in the Transnet Section of the TPF
01-Apr-03	0,00%	0,00%
01-Apr-04	0,00%	0,00%
01-Apr-05	0,00%	0,00%
01-Apr-06	0,00%	0,00%
01-Apr-07	1,50%	0,00%
01-Apr-08	8,50%	0,00%
01-Apr-09	15,3%	0,00%
01-Apr-10	16,83%	0,00%
01-Apr-11	26,67%	50,00%
01-Apr-12	8,33%	8,33%
01-Apr-13	16,66%	16,66%
01-Apr-14	16,66%	16,66%
01-Apr-15	16,66%	16,66%
01-Apr-16	21,00%	21,00%
01-Apr-17	20,00%	20,00%
01-Apr-18	40,00%	40,00%

In footnotes, I have quantified the impact if the bonus is payable at the end of the year, based on the contributions made in that year. In practice, with the bonuses split often into several tranches, paid during the year, the result will be somewhere between the figures assuming that the bonus is payable at the beginning or end of the year.

A1.2. Investment return has been assumed at 12% p.a. compound.

While investment returns have differed from the 12% p.a. compound, this is a reasonable approximation to the returns earned by the fund up to 2013 (the last date for which I had these returns) and the Alexander Forbes Global Large Manager Watch median thereafter.

A1.3. The CPI table used is that supplied by Statistics South Africa rebased to 100 on 31 December 2016.

"Annexure WC-15" 400

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER 42355/15

In the Ex Parte application of:

JOHAN PIETER HENDRIK PRETORIUS	**FIRST APPLICANT**
MONTANA DAVID KWAPA	**SECOND APPLICANT**
TRANSPORT PENSION FUND	**THIRD APPLICANT**
TRANSNET SECOND DEFINED BENEFIT FUND	**FOURTH APPLICANT**
TRANSNET SOC LIMITED	**FIFTH APPLICANT**

(Application to approve a settlement agreement in respect of a certified class action)

CONFIRMATORY AFFIDAVIT

I the undersigned

JEREMY PETER ANDREW

hereby state under oath as follows:

1.

1.1. I am a consulting actuary resident at 14 Kings Street, Newlands, Cape Town.

1.2. The contents of this affidavit fall within my personal knowledge and are true and correct.

2.

I attach hereto my Curriculum Vitae and respectfully refer the court to the contents thereof insofar as it relates to my qualifications and experience. I further confirm that I have had extensive experience in the pension fund industry and have reviewed the settlement agreement that the parties entered into. I refer the court to my report attached as annexure "A" to this affidavit and confirm my opinions contained therein.

3.

I have read the signed affidavit of **WYNANDA WILHELMINA COETZEE** and confirm the contents thereof as it relates to me.

DEPONENT

I certify that :

1. The deponent has acknowledged that :
   1.1. He knows and understands the contents of this declaration;
   1.2. He has no objection to taking the prescribed oath;
   1.3. He considers the prescribed oath to be binding on his conscience.
2. The deponent thereafter uttered the words: "I swear that the contents of this declaration are true, so help me God."
3. The deponent signed this declaration in my presence at the address set out hereunder on this 7th day of February 2020.

COMMISSIONER OF OATHS

JONATHAN WILLIAM TREVOR MORT
Commissioner of Oaths
Practising Attorney SA
Jonathan Mort Inc.
3A Sir George Grey Str, Oranjezicht
Cape Town 8001

JEREMY PETER ANDREW

Position:	Consulting Actuary
Profession:	Actuary
Years experience:	38 (after qualifying as an actuary)
Nationality:	South African

KEY QUALIFICATIONS

Jeremy is a respected pension fund actuary who has been closely involved with the major legislative and regulatory developments affecting retirement funds in South Africa.

EXPERIENCE

Jeremy was admitted as a Fellow of the Institute of Actuaries in 1981 and as a valuator of retirement funds in 1983. He has held practice certificates for the valuation of all types of retirement fund and as an actuary qualified to sit on a tribunal in terms of section 15K of the Pension Funds Act (dealing with surplus apportionment disputes).

He has had exposure to almost all aspects of employee benefit consulting. Prior to joining the Financial Services Board (FSB), he worked for some 20 years in the division of Liberty Life that provided actuarial and employee benefit consulting advice to clients, ending as General Manager – Specialised Corporate Consulting, in which role he headed the consulting service to large pension and provident funds.
In March 1998 he joined the Financial Services Board (now the Financial Sector Conduct Authority) as Chief Actuary. In this role, and after his retirement at the end of February 2003, he has been closely identified with legislative and regulatory developments affecting retirement funds. He was a member of the government team that negotiated and drafted the surplus apportionment and minimum benefits legislation. He chaired the technical committee drafting the corresponding subordinate legislation and served on the relevant committee of ASSA drafting professional guidance with regard to that legislation.

Subsequent to his retirement as Chief Actuary to the FSB, he has consulted to the National Treasury and the FSB on retirement reform in South Africa, the redevelopment of the Pension Funds Act and on the implementation of risk-based supervision of pension and provident funds in South Africa. He has worked as part of a team designing a national pension fund for Namibia, and, in projects sponsored by the World Bank, on pension fund legislation and supervision for the Pensions and Insurance Authority in Zambia and the Non-Bank Financial Institutions Regulatory Authority in Botswana, where he was heavily involved in writing the new Retirement Funds Act.

Jeremy serves, as an independent specialist trustee, on the boards of various pension and provident funds and retirement annuity funds. This exposure as a trustee has amplified Jeremy's experience because he has become much more focused on the management of risks in both defined benefit and defined contribution funds.

Jeremy also works as a general consulting actuary independent of any of the major service providers in South Africa, advising clients on general matters, such as the

orderly termination of funds, including their liquidation. He has given expert evidence in various disputes involving pension funds. He is an approved liquidator and has liquidated a number of funds.

Jeremy has presented papers to the Actuarial Society of South Africa on the management of risk in defined contribution pension funds, the origin of pension fund surplus in South Africa and the legislation to require its apportionment between stakeholders, limits to actuarial discretion and the communication of actuarial findings. He has also addressed conferences sponsored by the South African Institute of Chartered Accountants, the Pension Lawyers Association, the International Pensions and Employee Benefit Lawyers Association, the Principal Officers Association and the Institute of Retirement Funds. He has served on various committees and the Council of the Actuarial Society of South Africa.

EDUCATION

JMB Matriculation (1964) from St. John's College, Johannesburg
BSc (Hons) from the University of the Witwatersrand (1969)
Admitted as a Fellow of the Institute of Actuaries and the Actuarial Society of South Africa, both in 1981.

EXPERIENCE RECORD

2003 to date: Independent consulting actuary, independent specialist trustee and liquidator of pension and provident funds
1998 to 2003: Chief Actuary to the Financial Services Board (FSB)
1977 to 1998: Liberty Life (all in the employee benefit division), ending as General Manager in charge of the consulting services provided to large retirement funds
1975 to 1976: African Eagle Life
1972 to 1973: Control Data Corporation

OTHER INFORMATION

Jeremy was born on 3 February 1948. He married his wife, Gail, in 1979. They have one son, Jonathan, aged 37. In his spare time, Jeremy enjoys reading, watching films, fly-fishing and gardening.

CONTACT DETAILS

Residential and Postal Address:
14 Kings Street
Newlands
Cape Town
7700

Telephone:
(Home and office) 021 683 0276
(Cell): 082 850 0716

"Annexure WC-16"

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER _____

In the Ex Parte application of:

JOHAN PIETER HENDRIK PRETORIUS FIRST APPLICANT

MONTANA DAVID KWAPA SECOND APPLICANT

TRANSNET PENSION FUND THIRD APPLICANT

TRANSNET SECOND DEFINED BENEFIT FUND FOURTH APPLICANT

TRANSNET SOC LIMITED FIFTH APPLICANT

(Application to approve a settlement agreement in respect of a certified class action)

CONFIRMATORY AFFIDAVIT

I the undersigned

RICHARD WILLIAM CARR

Hereby state under oath as follows:

1.

I am pensioner member of the Third Applicant with address at 10 EMOLWENI ROAD, KLOOF

KwaZulu-Natal Province.

2.

I confirm that the contents of this affidavit are within my personal knowledge, save as where otherwise indicated and are both true and correct to the best of my knowledge.

3.

3.1 I am a member of the executive committee of TPAG (Transnet Pensioners Action Group). TPAG is a voluntary organisation which was formed in 2012 and have approximately 4000 members. Initially TPAG – a voluntary association - was established with the purpose of assisting pensioner members of the Third and Fourth Applicant with information relating to pension matters and later to assist with the class action.

3.2 TPAG communicate via contact via telephone, meetings, social media and whatsup group in order to communicate to our members. The executive of TPAG was closely involved in the class action negotiations and attended regular meetings with the legal team and actuary.

3.4 The executive of TPAG has had various discussions in respect to the settlement agreement and after discussions with our members, actuary and the legal team resolved that the conclusion of the settlement agreement should be supported as being a fair and reasonable settlement of the disputes.

3.3 I have read the signed affidavits of WYNANDA WILHELMINA COETZEE and JEREMY ANDREWS in this application and confirm the contents thereof insofar as it relates to me.

DEPONENT

I certify that the Deponent acknowledges that he knows and understands the contents of this affidavit, that he has no objection to the making of the prescribed oath and that he considers the oath to be binding on his conscience. I also certify that this affidavit was signed in my presence at Hoopstad on this 7th day of February 2020 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of19 August 1977, have been complied with

COMMISSIONER OF OATHS

Warrant Officer
Thembeka Sophie Shange
3 Douglas Road Hoopstad 9360

SOUTH AFRICAN POLICE SERVICE
COMMUNITY SERVICE CENTRE
2020 -02- 07
PINETOWN
KWAZULU-NATAL