IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

18/5/16

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

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

JUDGMENT

LEGODI J;

HEARD ON: 4 APRIL 2016

JUDGMENT HANDED DOWN ON: May 2016

[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 30 (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

[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 171 806 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 R171 806 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

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

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

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?*

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 that

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.*"

[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:

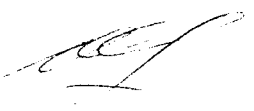
> *"31.Courts enforce undertaking when parties agree by contract to be bound by their terms; when the undertaking gives rise to legitimate expectation and administrative fairness requires some measures of their enforcement; or when any other legal principle or rule requires enforcement. In its affidavits, 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*

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:



> *"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 Curial [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

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[13] H v Fatal 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

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.

[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

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.

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 ...*

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.

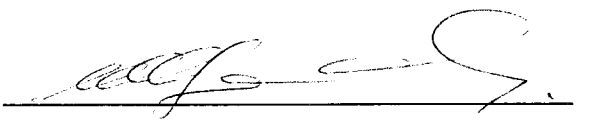
54.1.3 The exception to what is referred to as "unlawful labour practice" by the plaintiffs in their amended particulars of claim, is hereby upheld in part for reasons mentioned from paragraph 47 of this judgement.

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 party 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 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 GILFILLEN INC**

For the 2nd Respondent: No appearance

Instructed by: **BOWMAN GILFILLAN**