# IN THE HIGH COURT OF SOUTH AFRICA

## (GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) REVISED.

22/6/2020
DATE

SIGNATURE

Case number: 42355/2015

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 |

## JUDGMENT

**POTTERILL J**

[1] This application evolves from a class action that was certified, as such, on 31 July 2014. The class is 52 0000 odd strong and represents both active members and pensioners, with only one deceased member that opted out. The class are members of the Third Respondent, the Transport Pension Fund [TPF] and Fourth Applicant, Transnet Second Defined Benefit Fund [TSDBF]. The Fifth Applicant is Transnet SOC Limited [Transnet] the then employer of the pensioners and of the active members.

[2] The class issued summons against the TPF, TSDBF and Transnet in 2015. It is common cause that the first cause of action against the then defendants, now applicants, is novel to South African law in that it was based on a promise made in 1989 by Dr Moolman, the General Manager of the South African Transport Services[SATS] and the Chair of the Boards of Trustees of both Pension Funds and Mr Louw the then Minister of Transport. The promise was to all their employees and

members that the Funds would continue to increase their pensions as before, that is, at a rate of at least 70% of the rate of inflation. The second cause of action was premised on the Funds inheriting the right to receive a legacy debt determined by the State Actuary as an amount of R17 1806 billion. This legacy debt flows from s12(3) of the Railways and Harbours Pensions Act 35 of 1971 and s11(3) of the Railways and Harbours Pensions for Non-Whites Act 43 of 1974 to pay into those Funds such amounts as were necessary to maintain them in a sound financial condition. The prayer was thus that that Transnet pay the legacy debt to the Funds.

[3] The plea of the defendants included a special plea of prescription.

[4] The beginning of protracted expensive litigation started with the certification judgment, after leave to appeal was refused, this judgment was petitioned to the SCA, but leave to appeal was dismissed. An exception and rule 30A against the particulars of claim followed. The judgment on the exception was again petitioned to the SCA, but no leave to appeal was granted. The Constitutional Court was approached and it upheld the appeal and dismissed the exceptions. The litigation continued for a period of close to six years.

[5] Without the Funds accepting liability the parties pursuant to a case management meeting started with settlement negotiations.

[6] This resulted in a settlement agreement that was concluded with the salient terms being:

Special lump sum awards

6.1 In terms of the settlement TPF, which consists of three sub- funds, the TSF, TSDBF and the PRASA sub-funds, in December 2019 paid an amount of R10,000.00 (less tax) to each of their pensioners. The TSF is obliged to pay such an amount to class members who receive their pensions from the SAA sub-fund – subject to SAA approval (which has not yet been obtained). Two further lump sum amounts of R10,000.00 (less tax) will be paid by the TSF, the TSDBF and the PRASA sub-funds to each of their respective pensioners in December 2020 and December 2021 as part of the settlement.

6.2 The boards of TSF and TSDBF may grant additional or greater lump sums awards if their rules are amended to allow them to do so, and subject to affordability.

Pension increases

6.3 The TSF and the TSDBF will continue to grant a minimum of 2% annual increase to pensioners. In addition, the TSF, the TSDBF and the PRASA sub-funds will increase the pensions payable to their pensioners by 11% on or by the end of the second month following the month on which the effective date of the settlement falls, and by 7% and 4% respectively in each of the succeeding anniversaries of the enhancement.

6.4 The SAA sub-fund will increase the pensions payable to each of its pensioners by such amount as will bring such pensioner's current pension to what it would have been had that pensioner received an increase equal to 70% of year-on-year inflation since the pension was first paid. The settlement thus, put differently, provides that SAA sub-fund pensioners will receive a once-off increase in their base pensions to bring their pensions to where they would have been if they had been increased by 70% of year-on-year inflation since each such pension was first paid.

6.5 In subsequent financial years, the TSF and the TSDBF will target an annual increase (inclusive of the of the 2% minimum annual increase) of 70% of inflation. Their trustees will always have a discretion to grant higher increases subject to affordability.

6.6 To give effect to what is set out above and to ensure financial sustainability of the settlement, it has been agreed that it is desirable, and the TSF and TSDBF will as soon as practically possible after the effective date of the settlement agreement, take the necessary steps to consolidate their assets, liabilities and membership and form themselves into a single fund. The settlement thus effectively provides that the pension increases will amount to an improvement of 31% over a period of three years in respect of the base pensions for the members of the TSF, TSDBF and the PRASA sub-fund.

The *ex parte* application and order

[7] This Court was then approached to make the settlement agreement an order of court. In doing so the applicants followed the two stage approach followed in foreign jurisdictions pertaining to class actions settlements and this process was followed by the Gauteng Local Division of the High Court in ***Ex Parte Nkala and Others*** (2018/44060) [2018] ZAGPJHC 657 (13 December 2018) [Nkala 2].[1] ***Nkala and others v Harmony Gold Mining Company Ltd and others (Treatment Action Campaign NPC and another as amici curiae)*** **2016 (5) SA 240 (GJ); 2016 (7) BCLR 881 (GJ); [2016] 3 All SA 233 (GJ)** will be referred to as "*Nkala I*".

[1] *Nkala and others v Harmony Gold Mining Company Ltd and others (Treatment Action Campaign NPC and another as amici curia)* 2016 (5) SA 240 (GJ); 2016 (7) BCLR 881 (GJ); [2016] 3 All SA 233 (GJ) (*"Nkala 1"*)

[8] The Court in the Nkala-matter did not expressly endorse the two stage approach, it followed it and took note thereof, but equated it to the process of rule nisi's in the South African law. In the matter before me there were objectors and the two stage approach emerged as a sound principal for this process affording objectors to the settlement an opportunity to ventilate their objections. It would be prudent to apply this two stage process to all settlements of class actions to be approved and endorsed by a court.

8.1 In following the two stage process this Court on 18 February 2020 granted an *ex parte* order with a rule nisi inviting any class member, and any person with an interest in the Settlement Agreement, to show cause why an order should not be granted:

- Approving the Settlement Agreement and making it an order of court;
- Rendering it binding on all class members; and
- Declaring the class action to be settled and concluded.

8.2 The rule thus afforded every member or interested party to object to the Settlement Agreement and to participate in the proceedings concerning its approval. To ensure that class members and other interested persons were notified of the terms of the Settlement Agreement and afforded a proper opportunity to object the rule required the class representatives:

(a) to publish notice of the settlement and the approval hearing on a prominent notice board at their offices and on their website; and

(b) to make the full agreement and the papers in these proceedings available on their website.

8.3 The Funds were required, within two weeks of the grant of the rule *nisi*, to issue member communications to their respective members, using the e-mail and postal addresses maintained on their databases by their respective administrators.

8.4 The Funds' attorneys also had to by Sheriff serve the application and the rule *nisi* on the Minister of Public Enterprises, the Minister of Finance, and the Business Rescue Practitioners for SAA.

8.5 Transnet was required to publish notice of the settlement and the approval hearing on its website, and to procure its publication as advertisements in the newspapers listed in Schedule 3 of the Settlement Agreement, once a week for a period of two weeks.

[9] 9.1 Ms Coetzee, attorney for the first and second applicants did publish the notice of the settlement and the approval hearing on a prominent notice board at their offices and did on their website publish the full agreement and the papers in these proceedings.

9.2 Mr Beeslaar of Momentum Retirement Administrators – the administrators of both the second applicant (TPF) and the third applicant (TSDBF) – has confirmed that:

9.2 .1 Class notices were distributed by e-mail to those members whose e-mail addresses were available on 28 February 2020;

9.2 .2 Class notices were delivered to the South African Post Office, for postal service, on 2 March 2020, 4 March 2020 and 6 March 2020. Some notices were delivered three days later than the court order required.

9.3 Service on the Minister of Public Enterprises, the Minister of Finance, and the Business Rescue Practitioners for SAA took place on 21 February 2020.

9.4 The order and class notice were uploaded to the Transnet website on 24 February 2020.

9.5 In addition, Transnet procured the services of R and A Strategic Communications (Pty) Ltd to attend to the publication of the advertisements in the relevant newspapers. They arranged for the publication of the notice:

9.5.1 In English, in the *Sunday Times* on 23 February 2020 and 1 March 2020;

9.5.2 In Afrikaans, in *Rapport* on 23 February 2020 and 1 March 2020;

9.5.3 In isiXhosa, in the *City Press* on 23 February 2020 and 1 March 2020;

9.5.4 In isiZulu, in the *City Press* on 23 February 2020 and 1 March 2020, and in the *Sowetan* on 24 February 2020 and 2 March 2020; and

9.5.5 In seSotho, in the *Sowetan* on 24 February 2020 and 2 March 2020.

Procedural requirements of the *ex parte* order

[10] Although Mr Prinsloo as objector claimed that not all the procedural requirements of the order were met, I am satisfied that the order of 18 February 2020 was complied with. Condonation for the three days that some of the class notices were sent late from the South African Post office is granted.

The objectors and interested persons

[11] 11.1 The applicants initially received objections from these Objecting Parties:

Phindile Eric Radasi;

Dambisa Zinobia Sihluku;

Brukwe Daniel Stemele;

Zoleka Stemele;

Hester Maria Magdelina Erasmus;

Barend Phillipus Prinsloo;

Mbaxa Jackson Mbetshu;

Soli Wilson Ntsimango; and

Thembeka Florence Ntsimango.

Eric Vetman

11.2 The Applicants received, some belatedly, further objections from the following Objectors:

Mr Pieter Carl Marais;

Mr John Charles Ridgard;

Mrs Dorothy Archer;

Mrs Benita Johanna Swart;

Mrs Carol Maureen Smith; and

Mr Tobile Majamana.

Tuku Tsotso

Samba Family

On 2 June 2020 an affidavit by Ms Yandiswa Pearl Sintu, purportedly on behalf of her parents, the late Mr Nzimeni Peter Sintu and Mrs Nosisi Nowansar Rabecca Sintu was filed. From the content of the affidavit is does not seem to be an objection but rather a staking of a claim in the settlement agreement.

The reasons advanced why the settlement must not be approved by the court

[12] The Court determined that Mr Barend Phillipus Prinsloo could address the court as his objections encompassed and articulated the nature of the objections of all the objectors and interested persons, he had complied with the procedural requirements

of the ex parte order and he had the necessary locus standi. This determination has the result that even non-compliant objectors, objectors who do not qualify as interested persons, or class members have been heard by this court.

[13] I regulated this process, as set out above, as I found it to be in the interests of justice.[2] I accordingly do not find it necessary in this matter to expand on when an objector will qualify as an interested party and whether condonation could be granted for the non-compliance with the *ex parte* order. It may be highly relevant in other matters, but does not impact on this matter due to the consequences of affording Mr Prinsloo an opportunity to place all the objecting evidence before the Court.

[14] As far as procedure was concerned Mr Prinsloo also raised that due to the COVID 19 pandemic necessitating the use of social and electronic media, with not all pensioners equipped with such devices, it rendered the process inaccessible to all class members. This Court is however satisfied that prior to the lockdown the process was accessible. The *ex parte* order was published and served in every conceivable manner and that the virtual hearing, held as a webinar, afforded the objectors through Mr Prinsloo an opportunity to be heard.

[15] The objections advance four broad categories of complaint:

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[2] S173 of the Constitution

- Objections to the adequacy of the benefit enhancements;
- Objections to the requirement that only pensioners will receive the benefit enhancements; and
- Objections to the manner in which back-pay claims have been addressed.
- Affordability should not play a role in the settlement

[16] 16.1 In a nutshell Mr Prinsloo submitted that the settlement should not be approved because the benefits that it provides to pensioners are simply inadequate. He raised in detail the cost of living and argued for pension increases at a rate of 75% of annual inflation. Mr Prinsloo alleged that a representative of Transnet's predecessor and the predecessors of the Funds made promises to the members of the Funds in 1989. The alleged promise was that pensions will increase each year by 70% of the inflation rate.

16.2 Furthermore, the Settlement Agreement provides for benefit enhancements to pensioners who are in receipt of a pension at the date of the relevant enhancement. It provides no benefits to the estates of class members who die without dependants before the Settlement Agreement is implemented. Mr Prinsloo objected to this and argued that the estates of those deceased pensioners should enjoy some benefit under the settlement.

16.3 A further objection by Mr Prinsloo centres on the fact that the Settlement Agreement provides no specific amount to be paid in respect of alleged

historical under-payments of pensions by the Funds and that the Funds were looted.

16.4 If the Funds were not looted the Funds would have no problem in affording the increases he seeks and thus affordability must not be factored in as a negotiation tool.

The principles to be applied by the court in assessing the settlement agreement.

[17] The approval of the settlement agreement is a non-adversarial process, but despite this fact, a Court has a fiduciary role to play where parties reach a settlement that binds all class members that have not opted out.[3] This assessment of the settlement agreement by a Court ensures that the interests of the class members are paramount and not that of the class representatives and their legal teams.

[18] Class actions instituted and settled are relatively new to South African law. The Courts thus has a duty to develop the common law taking into account the interests of justice.

18.1 Section 33V of the Federal Court of Australia Act, 1975 provides:

*"11.1. When applying for Court approval of a settlement, the parties will usually need to persuade the Court that:*

[3] Newberg on Class Actions, 5ed (2011), Westlaw; §13:40; R Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004), pp 390-396

*(a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who will be bound by the settlement; and*

*(b) the proposed settlement has been undertaken in the interests of group members, as well as those of the applicant, and not just in the interests of the applicant and the respondent/s."*

18.2 In s33V(11.2) of the Federal Court of Australia Act, 1975 the following factors are listed and have been taken into account when a Court has to assess a settlement agreement

18.2.1 the terms of the settlement;

18.2.2 the amount or value offered to each class member;

18.2.3 the cost, complexity, risk and likely duration of the litigation if the settlement were not approved;

18.2.4 the attitude of class members to settlement;

18.2.5 the risk of maintaining and succeeding in representative proceedings;

18.2.6 the risks of further litigation and of recovery;

18.2.7 the views and recommendations of experts or neutral parties; and

18.2.8 good faith and the absence of collusion between the class representatives and the defendants.

18.3 Rule 23(e)(2) of the Federal Rules of the Civil Procedure in the United States of America provides as follows:

*"(2) If the [settlement] proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable and adequate."*

18.4 In Canada the Court found that a settlement must be *"fair, reasonable and in the best interests of the class."*[4]

[19] In Nkala 2 the Court held that a court considering a class settlement must assess whether it is "*fair, reasonable, adequate and that it protects the interests of the class*" before approving it.[5] The Court went further and summarised the approach of our courts to settlements as follows:

*"In the South African context, the overarching consideration must be whether the settlement is in the interests of justice.[6] In Eke v Parsons the Constitutional Court ("the CC") warned against taking a too formalistic approach towards settlement agreements. With reference to Ex parte Le Grange and Another[7] the CC held as follows:*

*'[22] Surely then, an expedited end to litigation may not only be in the parties' interest, it may also serve the interests of the administration of justice. This finds support at common law. Le*

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[4] *Dabbs v Sun Life Assurance Co of Canada* [1998] O.J. No. 1598 (Gen.Div)
[5] Paragraph 10
[6] *Eke v Parsons* 2016 (3) SA 37 (CC) paras 22-24; 33-34 and 36
[7] *Ex parte Le Grange and Another: In re Le Grange v Le Grange* [2013] 4 All SA 41 (ECG); 2018 (6) SA 28 (ECG) paras 34 and 36

*Grange quotes Huber with approval: "A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits."*

*[23] Le Grange says:*

*"(T)he policy underlying the favouring of settlement has as its underlying foundation the benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing overcrowded court rolls, thereby decreasing the burden on the judicial system. By disposing of cases without the need for a trial, the case load is reduced. This gives the court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently.*

*.....*

*If one is then to proceed from the premise that the wider interests under consideration [are those] of the administration of justice, then the court is required, when exercising its discretion whether to make a settlement agreement an order of*

*the court, to give consideration not only to the need to make orders that are readily enforceable, but also to assess.'*[8]

Is the settlement agreement reasonable, fair, adequate, sustainable and in the intersts of justice?

[20] The nature of the first claim is novel to the South African law. Although the Constitutional Court found that the South African law can develop to include the basis of such a claim there is a great risk to the litigation with Transnet and the Funds having raised substantive defences including a special plea of prescription.

[21] This promise was made in 1989, with the class action only being certified in 2014, 25 years later. This renders witnesses herein vulnerable to memory issues and of course of passing away before testimony commences or is finalised. Of the two main witnesses one is already in his eighties and one has passed away. The risk of litigation is thus high.

[22] The average age of the class members is 79 and protracted litigation is not to their benefit. A timely relief to class members for an improved social security is a factor to consider due to the possible high mortality of the class members.

[8] Nkala 2 paras 20 and 21

[23] There is no doubt that the 2% rule on the increase of pensions on these class members had a severe personal impact on their lives. The Court is acutely aware of this, as were representatives for the class members, Transnet and the Funds. No settlement agreement attains perfection precisely because it is a compromise struck between parties. The Court must thus assess what value the settlement offers each member of the class versus that what they have asked for.

[24] Mr Andrew, the actuary, acting on behalf of the Class Legal Representatives, whose evidence the Court accepts as reliable and accurate, sets out that the value of the increases actually granted and the *ad hoc* bonuses is similar to the value that members of the TSF and TDSBF would have enjoyed if pension increases had been 70% of inflation.

[25] He further opined that in respect of past history up to 31 March 2019, in terms of value received, the surviving beneficiaries are not materially worse off than they would have been if they had enjoyed pension increases of 70% of inflation, as promised. This will be true for beneficiaries across the income bands because the *ad hoc* pension increases have been percentages of pensions being received.

[26] In relation to the proposed pension enhancements, the guaranteed pension as at 31 March 2022 is now 90.4% of the pension that would have been payable if the members had enjoyed increases of 70% of inflation.

[27] The average annual pension of a member of the TSDBF will increase from approximately R32 198 per year, to R36 454.58 in the first year after the effective date, R39 786.52 in the second year and R42 205.54 in the third year. The average annual pension of a member of the TSF will increase from approximately R63 594 per year, to R72 001.13 in the first year after the effective date, R78 582.03 in the second year and R83 359.83 in the third year. For members of the PRASA Sub-Fund, their average annual pension will increase from R53 341 per annum, to R60 392.68 in the first year after the effective date of the agreement, R65 912.57 in the second year and R69 920.06 in the third year.

[28] The lump sum awards will, to an extent, compensate for the shortfall in monthly pensions for the average member. The lump sum payments have the added advantage that they will have no impact on the means test for old age social grant that many of the very low-income pensioners enjoy.

[29] Mr Prinsloo advocated for a settlement for a sub-class of deceased members. However, unless a person had an unpaid claim before he or she died, the rules do not permit the Funds to provide benefits to the estates of deceased members or the estates of dependants. Even if this legal difficulty could be resolved, the terms on which such a group of deceased members would have to be included would need to be agreed and then costed. This would be a complex and time consuming task, and in fact, an administrative nightmare. It would have the effect that the full amount that would be required to be reserved by the Funds to administer and fund those compensation payments would reduce the amounts that would otherwise be available to the Funds to provide benefit enhancements to living pensioners. In other words, the budgeted amount would reduce the pot of funds available to pay to pensioners by way of the special lump sum awards, the pension increases and future pension increases. On Mr Pienaar's estimates, that notional settlement would involve administrative and similar expenses of between R15 million and R25 million, as well as following additional amounts:

- a cost to the Combined Transnet Fund of R876.27 million;
- a cost to the Prasa Sub-Fund of R4.36 million;
- a cost to the SAA Sub-Fund of R0.67 million.

This court accepts that this is wholly unaffordable.

[30] Mr Prinsloo also demands a back-pay compensation. Mr Pienaar was instructed to provide an estimate of what it would cost for the Funds to provide back-payment

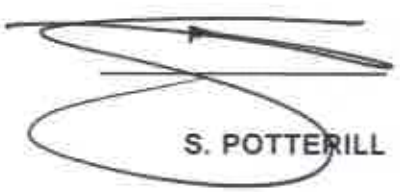


compensation. The Funds would not be able to agree to or implement such a settlement because in the case of the combined TSF and TSDBF, the cost of the additional benefit enhancements would exceed the value of all its assets and in the case of the SAA Sub-Fund, the enhanced benefits would not be affordable and would leave the fund in a substantially unsound financial position.

[31] Mr Pienaar of Alexander Forbes, the appointed actuaries of the TPF and the TSDBF, sets out that it is not affordable for the Funds to have agreed to a settlement on the higher basis contended for by Mr Prinsloo. Such a settlement could not have been funded by the combined TSF and TSDBF, which will be the Fund of the vast majority of class members. The assets and liabilities of the PRASA Sub-Fund, the SAA Sub-Fund and the TSF are ring-fenced from each other and the three sub-funds are underwritten by different employer companies. There is thus no basis or reason for the PRASA Sub-Fund or the SAA Sub-Fund to share their surpluses with the combined TSF and TSDBF. But, even if that could happen, it would not attain what Mr Prinsloo requested because it would lead to the combined TSF and TSDBF Funds remaining in deficit to the tune of more than R2 billion.

[32] The settlement is thus not going to restore the class to a comfortable retirement, but the Court is satisfied that in the circumstances it provides sufficient value to the class members in surrendering their right to litigation. In this matter the general judicial policy favouring settlement for effective administration of justice and the benefits to the elderly, the risks in pursuing litigation and the immense costs involved, renders a less than perfect settlement, as reasonable, adequate, fair and in the interests of justice.

[33] I accordingly mark the draft order "X" and make it an order of Court.



S. POTTERILL

ACTING DEPUTY JUDGE-PRESIDENT OF THE HIGH COURT

CASE NO: 42355/15

HEARD ON: 17 June 2020

FOR THE 1ST AND 2ND APPLICANTS: ADV. J. CILLIERS SC

ADV. L. KELLERMAN SC

ADV. S.J. COETZEE SC

INSTRUCTED BY: Geyser & Coetzee Attorneys

FOR THE 3RD AND 4TH APPLICANTS: ADV. A. COCKRELL SC

ADV. I. GOODMAN

ADV. N. LUTHULI

INSTRUCTED BY: Edward Nathan Sonnenbergs Inc

FOR THE 5TH APPLICANT: ADV. C. LOXTON SC

ADV. M. CHOHAN87 SC

ADV. L. MNQANDI

INSTRUCTED BY: Bowman Gilfillan Inc

DATE OF JUDGMENT: 22 June 2020