

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT
PRETORIA
(REPUBLIC OF SOUTH AFRICA)

- (1) REPORTABLE: YES / NO *6*
(2) OF INTEREST TO OTHER JUDGES: YES/NO *6*
(3) REVISED.

09/05/2014

[Signature]

In the matter between:

9/5/14

CASE NO: 59864/2012

DATE OF HEARING: 9/5/14

G M THOMPSON

APPLICANT

AND

THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA

FIRST RESPONDENT

SPEAKER OF PARLIAMENT OF THE
REPUBLIC OF SOUTH AFRICA

SECOND RESPONDENT

MINISTER OF FINANCE

THIRD RESPONDENT

MINISTER OF PUBLIC ENTERPRISES

FOURTH RESPONDENT

MINISTER OF SOCIAL DEVELOPMENT

FIFTH RESPONDENT

TRANSNET SECOND DEFINED BENEFIT

SIXTH RESPONDENT

FUND ("THE TSDBF")

TRANSNET LIMITED

SEVENTH RESPONDENT

TRANSPORT PENSION FUND

EIGHTH RESPONDENT

JUDGMENT

BAQWA J

[1] This is an application for joinder of the eighth respondent as a further respondent in the main application under case number 59864/2012 and for leave to supplement the papers in order to set out the cause of action and the facts upon which the applicant relies against the eighth respondent in more detail.

[2] Further, applicant seeks leave to institute a class action under section 38(c) of the Constitution, alternatively under the common law, as a representative of the pensioners of the sixth and eighth respondents in the main application.

[3] Joinder is permitted under Uniform Rule 10 which provides as follows;

"Joinder of parties and causes of action

(1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom anyone or

more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.

(2) A plaintiff may join several causes of action in the same action.”

See Ndlambe Municipality v Lester and Others [2012] 3 All SA 441 (ECG) at (6)

- [4] Further, where a party has a direct and substantial interest in any order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and ought to be joined in the proceedings unless the court is satisfied that he has waived his right to be joined. The term “direct and substantial interest” means an interest in the right, which is the subject matter of the litigation, and not merely an indirect financial interest in the litigation, where a party is a necessary party, the Court will not deal with the issues until joinder has been effected.

See Harms, Civil Procedure in the Supreme Courts B10.2

- [5] The applicant in the main application seeks an order under section 38 of the Constitution that the policy of the sixth respondent alternatively the rule of the sixth respondent, limiting the increases granted to pensioners of the sixth respondent to 2 percent per annum, be set aside and that the pensioners of the sixth respondent be paid certain amounts and increases in accordance with a motion adopted by the National Assembly.

A prayer for the same relief was incorporated into this application but it was abandoned at the commencement of these proceedings. Upon such abandonment, the respondents, with the exception of sixth and eighth respondents withdrew their opposition to the application for joinder.

- [6] The applicant is a pensioner of the sixth respondent and on that basis he only sought relief in the main application against the sixth respondent. In this application, he seeks to join the eighth respondent to the main application on the basis that the legal relationship between members of the eighth respondent and the eighth respondent on the one hand are identical to that between the applicant and the sixth respondent on the other.
- [7] In a report by the Portfolio Committee on Public Enterprise addressed to the National Assembly, it was recommended as follows:

"4. Recommendations

The task team of the Committee tabled a report with recommendations to the Portfolio Committee on 2 February 2010. The Committee deliberated on the report and adopted the following recommendations:

Transnet and the National Treasury should make a cash injection of R1,963 billion into the Fund which will be a funding solution for TSDBF and TPF:

- (a) An ex gratia payment of 5 months' pension;*
- (b) A base upliftment of 3,21%; and*
- (c) A 75% of CPI annual increase going forward on the 3,21% uplifted base.*

5. Conclusion

Both Transnet and National Treasury participated in the process that led to the recommendations, and the figures above were derived from presentations

of both TSDBF and TPF combined. They agreed that the funding solution was affordable.”

“TSDBF” is an abbreviation for Transnet Second Defined Benefit Fund alternatively sixth respondent.

“TPF” is an abbreviation for Transnet Pension Fund alternatively eighth respondent.

- [8] The report was tabled on 9 November 2010 for consideration by the National Assembly, and the report was adopted by the National Assembly on 18 November 2010.
- [9] Eighth respondent does not deny that the reference to the TPF in the report is a reference to the eighth respondent. It is however denied that the TPF incurred any obligations as a result of the report adopted by the National Assembly.
- [10] Applicant submits that the TPF has a direct and substantial interest in the order the Court might make in respect of firstly, the motion adopted by the National Assembly regarding the payments and benefits to be made by the TSDBF and the TPF to the pensioners and secondly, the amount to be injected into the TSDBF and the TPF which will be a funding solution for the TSDBF and TPF.
- [11] Mr Antonie SC who represents the sixth and eighth respondents submits that applicant seeks to utilise the procedure under Rule 10 to introduce an action which did not exist at the launch of the main application.

In reply applicant's counsel Mr Pelser SC (with Mr Basson) have referred me to the response by third respondent in paragraph 66 of his answering affidavit where he states as follows:

"AD PARAGRAPHS 36-38

Save to point out that the recommendations of the Portfolio Committee provided for the payment of the amount of R1,963 billion to both the TSDBF and the TPF, and not just the TSDBF as alleged by the applicant the contents hereof are admitted."

What is clearly in the contemplation of the third respondent is that the injection of the cash amount cannot be considered separately with regard to the two entities, TSDBF and TPF but jointly. By necessary implication in my view, joinder of the eighth respondent becomes inevitable even though applicant was initially proceeding against sixth respondent only. Common sense and logic necessitates that eighth respondent be before Court.

- [12] Upon a reading of paragraph 4 of the Recommendations in the report by the Portfolio Committee (supra) it does not appear that the mentioning of the TPF in that report was incidental. The simultaneous cash injection into both the TSDBF and TPF as a funding solution implies that both institutions were facing the same or similar challenges. This view is bolstered by the concluding remarks in that report which refer to the fact that both Transnet and National Treasury participated in the process that led to the recommendations and that the recommended figures were derived from presentations of both TSDBF and TPF combined and that they agreed that the funding solution was affordable. On this basis I find that the TPF is a necessary party and that it must be joined as a party to the litigation.

- [13] Applicant has indicated his intention to amend the relief sought in the Notice of Motion to seek the same relief against the TPF as that sought against the

TSDBF once the eighth respondent is joined as a party to the main application. He submits in this regard that the rules of the TPF contain a similar rule as that of the TSDBF in that the increases granted to pensioners annually is limited to 2 percent. Even though this submission is denied by the eighth respondent, the latter does not set out the grounds on which this denial is made. In the circumstances joinder of the TPF would be permitted in terms of Rule 10 of the Uniform Rules since the right to the relief sought “depends upon the determination of substantially the same question of law or of fact.”

[14] In the main application applicant has only made out a case against the sixth respondent and if the eighth respondent is joined, it follows that applicant would have to supplement its papers to set out the cause of action against the TPF with reference to its rules and the reasons why the TPF should be compelled to give effect to the terms of the motion adopted by the National Assembly.

[15] The eighth respondent, if joined, would be, like all the respondents, entitled to respond or make submissions regarding these issues.

[16] In the result I have come to the conclusion that the following order be granted.

16.1. Prayers 5 to 13 of the notice of motion are postponed **sine die**.

16.2. The eighth respondent is joined as the eighth respondent in the main application under case number 59864/2012.

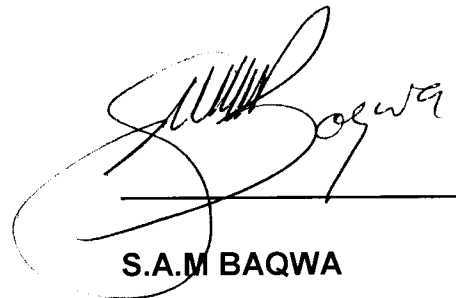
16.3. Leave is granted to the applicant to supplement his papers within 30 days from the date of this order, in order to set out in more detail his cause of action and the facts upon which he relies against the eighth respondent;

16.4. The eighth respondent shall deliver its notice of opposition to the main application within 5 days from the date of delivery of the supplemented papers, should it wish to oppose the relief sought against it in the supplemented papers; and

16.5. The eighth respondent shall deliver its answering affidavit within 15 days from notifying the applicant of its intention to oppose the application.

16.6. The first to seventh respondents are granted leave to respond to the supplemented papers as provided for in the Rules of Court.

16.7. The costs of this application are reserved for determination by the Court hearing the main application.

A handwritten signature in black ink, appearing to read 'S.A.M. Baqwa', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

S.A.M BAQWA

**(JUDGE OF THE HIGH
COURT)**

Counsel for the applicant:

Adv Q Pelser SC

Adv JL Basson

Instructed by:

Hurter Spies Inc

Counsel for the third respondent:

Adv PM Mtshaulana

Instructed by:

State Attorney

Counsel for sixth and eighth respondents:

Adv M Antonie SC

Instructed by:

Wersmans Attorneys