


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES
6 May 2019	
DATE	SIGNATURE

CASE NO: 65787/17

In the matter between:

VUYELWA MANDISA TINDLELI

FIRST APPLICANT

FORMER TRANSKEI CIVIL SERVANTS

SECOND APPLICANT

And

GOVERNMENT EMPLOYEES PENSION FUND

RESPONDENT

JUDGMENT

COLLIS J:

INTRODUCTION

1. This is an opposed application wherein the First Applicant is seeking leave in terms of Section 38(c) of the Constitution or alternatively under the common law, to be granted permission to institute a class action as the representative of the members of the Former Transkei Civil Servants Pension Fund against the Respondent.

LAW

2. Section 38(c) of the Constitution provides as follows:

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

(c) anyone acting as a member of or in the interest of a group or class of persons”.¹

3. “A class action is defined as a collective lawsuit in which an individual person or persons are confirmed by the court to bring and resolve the claims of ‘others similarly situated’, in a single proceedings”.²
4. In terms of the Notice of Motion, the Applicant is seeking an order declaring that the following persons each constitute a class of action:

¹ Act 108 of 1996

² The International Comparative Legal Guide to: Class and Group Actions 2015, 7th Edition, Global Legal Group Ltd, 2014, Chapter 28 p.190

- 4.1 members who contributed towards the Transkei Government Service Pension Fund (*the previous fund*) from 1975 until 1996 ("The First Class")
 - 4.2 the dependants of the main member who passed away and who contributed towards the Transkei Government Service Pension Fund (*the previous fund*) from 1975 until 1996 ("The Second Class")
5. Furthermore, the Applicant is also seeking an order to act as representative of the members of –
- 5.1 the "First Class"; and
 - 5.2 The "Second Class"
- In the further conduct of these proceedings ("The class action").
6. In addition to the above the Applicant is seeking an order to declare that the First Applicant has the requisite *locus standi* to bring the class action and to represent the members of –
- 6.1 The "First Class"; and
 - 6.2 The "Second Class"

In claims for damages sustained as a result that they have suffered prejudice due to the Government's mishandling of their exit from the Transkeian Government Service Pension Fund when they were incorporated into the Respondent.

Thousands of the former members of the Transkeian Government Service Pension Fund ("the pervious Fund"), who contributed towards the previous fund from 1975 until 1996, are being affected by the Government's mishandling of

their exit from “the previous fund” when they were incorporated into the Respondent on the 1st May 1996.

7. In the decision of Children’s Resource Centre Trust and Others³, Wallis JA for the court laid down that generally, a successful class certification applications would have to show:

- 7.1 the existence of a class identifiable by objective criteria;⁴
- 7.2 a cause of action raising triable issue;⁵
- 7.3 that the right to relief depends on the determination of issues of fact, or law or both common to all members of the class;
- 7.4 that the relief sought or damages claimed; flow from the cause of action and are ascertainable and capable of determination;
- 7.5 that where the claim is for damages, there is an appropriate procedure for allocating the damage to the class members;
- 7.6 that the proposed representation is suitable to conduct the action and to represent the class;⁶
- 7.7 that given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.

³ 2013 (2) SA 213 (SCA)

⁴ This requires that an applicant must define that class with enough precision for a class member to be identified upon objective consideration.

⁵ The threshold applied here is law. Wallis JA likened it to the test in civil attachment to found jurisdiction and to an affidavit resisting summary judgment.

⁶ The representative plaintiff may, but need not, be a member of the class. The representative must have the capacity to conduct the litigation. This includes the ability to procure evidence, to finance the litigation and to access lawyers. The payment arrangement with the lawyers must be disclosed.

CLASS DEFINITION

8. In defining the class, it is not necessary to identify all the members of the class.
It is however necessary that the class be defined with sufficient precision that a particular individual's membership can be objectively determined by examining their situation in light of the class definition.
9. As per the founding affidavit⁷ the deponent sets out the cause of action that will be pursued by the first class, based on the following elements:
 - 9.1 the members of the class contributed towards the "GEPF" and their contributions towards "the previous fund" was paid over to the "GEPF".
 - 9.2 the respondent owed the member of the first class a statutory and/or constitutional duty to provide them with the correct calculations regarding their pension contributions.
 - 9.3 the respondent breached these duties. The respondent did so wrongly by failing to incorporate the members' contributions that were made to the previous fund.
 - 9.4 as a consequence of these breaches members of the first class pension benefits were wrongfully calculated.
10. The causes of action to be pursued by members of the second class are similar to those to be pursued by members of the first class. The members of the second class suffer harm because they were dependants of a member who would have fallen into the first class had the member not passed away.

⁷ Founding affidavit para 7.6 and 7.8 pg. 25 and 29

11. The primary difference between the first and second class is that the members of the second class did not personally contribute towards the “Transkeian Government Service Pension Fund”, but are dependants of the main member who passed away.
12. In defining the classes, the deponent alleges that each of the members of the previous Transkeian Government Service Pension Fund who exited from 1975 until 1996 and who contributed to the Transkeian Government Service Pension Fund, is clearly identifiable by objective criteria, namely by his or her name and other personal details. Records of these members are currently in the possession of the Respondent.
13. In the founding affidavit the deponent further alleges that she is a former member of the Government Employees Pension Fund (“GEPF”) and during February 2018, an executive committee was established by members of the former Transkei Civil Servants who contributed towards the Transkeian Government Service Pension Fund, wherein at such meeting she was elected the chairperson of the committee.⁸ She further alleges that she herself was formerly employed by the former Transkei Government and also contributed towards the Transkeian Government Service Pension Fund (“the fund”) until the establishment of the Government Employees Pension Law, Proclamation 1 of 1996 (“GEP Law”). This citation of the deponent is repeated in the Draft Particulars of Claim.

⁸ Founding affidavit para 4.1

14. The Practice Manual of this Court⁹ in respect of class actions provides as follows-

“1. A party referred to in section 38 of the Constitution (Enforcement of Rights) which intends approaching the Court for relief whilst acting in terms of section 38(b) and (d) is required to:

1.1 seek prior leave from the Court to embark on such representative basis.

1.2 set out fully its interest to act on a representative basis and where applicable, details of its mandate.

1.3 give sufficient notice to all affected parties so that they can associate or disassociate themselves from the proposed litigation.

First point in limine

15. In its answering affidavit the Respondent challenges the *locus standi* of the First Applicant, contending that she failed to annex any form of authority to launch the present proceedings. In addition to this the Respondent alleges that the First Applicant failed to allege as to when she became a member of the Transkeian Government Service Pension Fund. In challenging the Second Applicant, the Respondent alleges that the deponent failed to identify the organisation which elected her as chairperson purporting to represent members of the Second Applicant; what business and objectives it has and what interest this organisation has in the proceedings. It is on this basis that the Respondent alleges the Second Applicant lacks the necessary *locus standi*.¹⁰

⁹ Gauteng Pretoria Practice Manual Volume 3 para 15.7

¹⁰ Answering Affidavit para 4 & 5 pg. 76 and 77.

16. The mandate of the First Applicant to the instructing attorneys of the applicants was only annexed to the Replying Affidavit as annexure "A".
17. During argument, Mr. Pelser on behalf of the Respondent argued that the failure by the First Applicant to annex to the Founding Affidavit, any supporting documentation upon which her *locus standi* is premised, is fatal.
18. When a court considers the question of a litigants' *locus standi* the question to be answered is whether a person who approaches the court for relief has indeed the right to do so.
19. On *locus standi* the First Applicant alleges that she was formerly employed by the Former Transkei Government and during such employment contributed towards the Transkeian Government Employees Pension Law, Proclamation 1 of 1996.
20. Therefore, in her own personal capacity she alleges that she possesses the necessary *locus standi* to launch these proceedings as she would fall within the "first class".
21. The matter however does not end there. The first applicant must also have the necessary *locus standi* to launch these proceedings on behalf of the Second Applicant. Her *locus standi* to launch these proceedings on behalf of the Second Applicant could only have been established by way of a resolution taken by the Second Applicant mandating her to act on their behalf.

22. In this regard not only was the first applicant required to allege the basis upon which her authority is premised, but she was also required to annex proof in support of such authority. This proof ought to have been annexed to the Founding Affidavit, and not for the first time, to be annexed to the Replying Affidavit as a knee-jerk reaction when her authority was challenged.

23. It is trite law that a person's *locus standi*, must not merely be alleged, but where necessary proof in support of such authority should be annexed.

24. In the present instance the First Applicant has failed to do so and consequently, she has failed to establish that she holds the necessary *locus standi* to launch these proceedings on behalf of the Second Applicant.

25. Consequently, I find the first *point in limine* to have merit.

CAUSE OF ACTION

26. With reference to the envisaged cause of action to be instituted the deponent makes the following allegations;¹¹

26.1 during 1975 the homeland of Transkei received independence from the Republic of South Africa and all administrative duties pertaining to the Government of Transkei was administered by the Transkei Government.

26.2 during 1994 the Transkei Government was incorporated into the Republic of South Africa. This had the effect that the Transkei

¹¹ Founding affidavit para 6 pg. 17

Government was disbanded, and that all Transkei Civil Servants were then employed by the South African Government. In essence, although not applicable at the time, there was a transfer of employment contracts from the Transkei to the Republic of South Africa.

26.3 during the incorporation period there was an obligation on the former Transkei Government to submit all the employee's files of the Civil Servants to the South African Government.

26.4 as all the Former Transkei Civil Servants were now employed by the South African Government, it is submitted that there was an obligation on the South African Government to verify and confirm the employee status of each former Transkei Civil Servant.

26.5 as Government employees during independence, the Transkei Civil Servants contributed towards a Transkeian Government Service Pension Fund ("the previous fund"). The Transkei Government was the administrator of the Pension Fund.

27. In paragraph 6.16 the deponent further alleges that the Respondent, as recipient, was aware that the contributions by the members of the Transkeian Government Service Pension Fund prior to 1996 had to be taken into consideration when the pension benefits were calculated and paid out and/or is still to be paid out.

28. Furthermore, that these duties arose from a statutory duty in terms of the regulations as stipulated by the "GEP Law" and constitutional obligations on the

Respondents arising from the rights enshrined in section 33, 41 and 195 of the Constitution.

29. In the Draft Particulars of Claim more specifically paragraph 35 thereof, the applicants allege that as a consequence of the Respondents' breaches of the "GEP Law", members of the second class sustained damages as a result that they have suffered prejudice due to the Governments' mishandling of them exiting from the Transkeian Government Service Pension Fund, when they were incorporated into the "GEPF".

Second point in limine

30. Now, upon considering the proposed pleaded cause of action it is apparent that the applicants allege that mishandling of their exit from the Transkeian Government Service Pension Fund, was the mishandling by the Government and one or more of its functionaries through which it acts.

31. In the Draft Particular of Claim, no other Department, Minister, or functionary such as the Minister of Finance or National Treasury, has been cited albeit that these functionaries have a direct and substantial interest in these proceedings. No notice was given to them in respect of the present application.

32. Having regard to the allegations set out by the deponent, it is apparent so the Respondent contended, that no cause of action can wholly be established as against the Respondent alone. At the very least these other functionaries of the South African Government should be to have been cited as co-defendants, as they have an interest in the proceedings.

33. During argument on point, Mr De Klerk on behalf of the applicants, argued that these functionaries or interested parties can always be cited prior to the summons being served on them, and as such he thereby conceded that these interested parties should have been cited.

34. Having made the concession that there existed other interested parties and that these parties have a directed and substantial interest in the present proceedings, it follows that they ought to have been cited and notified of the present proceedings.

35. Consequently, this court finds the second point *in limine* to also have merit.

36. Having found in favour of the Respondent on the points *in limine* raised, I conclude that these points are dispositive of the entire application.

ORDER

37. Consequently, the application is dismissed with cost, such cost to include the cost consequent on the employment of two counsel.



COLLIS J
JUDGE OF THE HIGH COURT OF

Appearances as follows:

For the First and Second Applicants	: Adv. C.D De Klerk
Attorney of the First and Second Applicant	: Botma Attorneys
For the Respondent	: Adv. Q Pelsier SC and Adv. T Williams
Attorney for the Respondent	: Mponyana Ledwaba Inc
Date of Hearing	: 01 November 2018
Date of Judgment	: 06 May 2019

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C.J. COLLIS
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