



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 27742/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

.....
DATE

.....
SIGNATURE

In the matter between:

RFS ADMINISTRATORS (PTY) LTD

First Plaintiff

RFS HOME LOANS (PTY) LTD

Second Plaintiff

And

NATIONAL FUND FOR MUNICIPAL WORKERS

First Defendant

NATIONAL PENSION FUND FOR MUNICIPAL WORKERS

Second Defendant

JOHN RONALD FIELD

Third Defendant

SEAN SAMONS

Fourth Defendant

DUBE TSHIDI	Fifth Defendant
FINANCIAL SECTOR CONDUCT AUTHORITY	Sixth Defendant
INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION	Seventh Defendant
THE SOUTH AFRICAN MUNICIPAL WORKERS UNION	Eighth Defendant
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	Ninth Defendant
SANLAM LIMITED	Tenth Defendant

JUDGMENT

DE WET AJ

Introduction

1. The plaintiffs' application to amend their particulars of claim, is opposed on the basis that the amendment introduces a prescribed debt/claim.
2. This matter raises two prescription questions:
 - 2.1. Firstly, whether a claim based on a statutory provision that enjoins a court to "...make an appropriate order that is just and equitable in the circumstances..." is subject to prescription.
 - 2.2. Secondly, whether a declarator that the termination of administration contracts, is unlawful and null and void, interrupts prescription in respect of a to-be-introduced claim for specific performance and/or damages. Put differently is the claim for specific performance a new debt in terms of the Prescription Act.

3. In order to provide proper context it is appropriate to refer to the import of the particulars and to quote relevant portions of the particulars of claim.

BACKGROUND

The Particulars of Claim

4. The first plaintiff is a pension fund administrator duly registered under the Pension Funds Act, 24 of 1956 (herein after referred to as the “**PFA**”), and appointed to provide administrative services to the first and second defendants.
5. The second plaintiff is also a pension fund administrator and appointed as such.
6. The first defendant, the National Fund for Municipal Workers, and the second defendant, the National Pension Fund for Municipal Workers, are pension funds and juristic persons duly registered in terms of the provisions of the Pension Funds Act.
7. The third defendant is the former chairman of the board of trustees of both the first and second defendants, and the fourth defendant is the former principal executive officer of the first and second defendants.
8. The relevant portions of the particulars of claim are now dealt with.

“MATERIAL PROVISIONS OF STATUTORY AND CONSTITUTIONAL LAW

15. Under the Pension Funds Act 24 of 1956 as amended-

- 15.1. an administrator appointed to administer a fund must, in terms of s 13B:
 - 15.1.1. endeavour to avoid conflicts between its interests and those of the fund;*
 - 15.1.2. manage the fund in a responsible manner;*
 - 15.1.3. have well defined compliance procedures;*
 - 15.1.4. furnish the registrar with the information if it is properly solicited under paragraph (g) of the section;**
- 15.2. a board member must, in terms of s7A(4)(b), on becoming aware of any material matter relating to the affairs of the pension fund which, in the opinion of the board member, may seriously prejudice the financial viability of the fund or its members, inform the registrar thereof in writing:*
- 15.3. a board of trustees must, in terms of s7C(2)-*

- 15.3.1. *take all reasonable steps to ensure that the interests of members are protected at all times;*
 - 15.3.2 *act with due care, diligence and good faith;*
 - 15.3.3. *avoid conflicts of interest;*
 - 15.3.4. *act with impartiality in respect of all members and beneficiaries;*
 - 15.3.5. *act independently;*
 - 15.3.6. *has a fiduciary duty to ensure that the fund is responsibly managed and governed;...*
16. *In terms of s9B of the Pension Funds Act, a disclosure by an administrator to the Registrar in compliance with the Act-*
- 16.1. *is protected;*
 - 16.2. *and so precludes any person, including a board of trustees, from inflicting occupational or other detriment on the administrator for making such a disclosure.*
17. *In terms of the Constitution of the Republic, 1996, common law must be applied and developed to give effect to the rights in the Bill of Rights, which, insofar as are pertinent to this case, encompass:*
- 17.1. *Clause 10 which protects a person's dignity;*
 - 17.2. *Clause 16 which protects freedom of expression;*
 - 17.3. *Clause 22 which protects freedom of trade, occupation and profession;*
 - 17.4. *Clause 25 which protects rights in property; and*
 - 17.5. *Clause 34 which regulates access to tribunals.*

*"ACTS OF MALFEASANCE
Third defendant's acts*

20. *In and during 2010 and at Pretoria, the third defendant, with the connivance of the fourth defendant-*
- 20.1. *sought to terminate his 2008 home loan;*
 - 20.2. *without the sanction and approval of the board of trustees of the applicable defendant, being the second defendant, in breach inter alia s37D(1)(a)(ii)(cc) of the Pension Funds Act;*
 - 20.3. *without otherwise following the procedures necessary for the purpose;*
- and effectuated the termination in the knowledge, common to both the third and fourth defendants, that the termination was unlawful.*
21. *In and during 2012 and at Pretoria the third defendant, with the connivance of the fourth defendant, applied for a loan and was granted one in the amount of R75 300 by the second plaintiff-*
- 21.1. *under a scheme designed to fund loans for housing purposes on*

- behalf of the first and second defendants in the manner sanctioned by s19(5)(a)(i)-(iii) of the Pension Funds Act;*
- 21.2. *when in truth and fact, the loan was irregularly sought, since it was approved by signature, not of the employer, but of the fourth defendant purporting, without authority, to act on behalf of the employer;*
22. *In and during 2015 and at Pretoria the third defendant applied for and was granted a loan of R253 000 by the second plaintiff-*
- 22.1. *under a scheme designed to fund loans for housing purposes on behalf of the first and second defendants in the manner sanctioned by s19(5)(a)(i)-(iii) of the Pension Funds Act;*
- 22.2. *when in truth and fact, the loan-*
- 22.2.1. *was irregularly sought, since it was approved by signature, not of the employer, but of the fourth defendant purporting, without authority, to act on behalf of the employer;*
- 22.2.2. *and was never intended by the third defendant to be used for housing purposes.*
23. *In and during 2015 and at Pretoria the third defendant-*
- 23.1. *was paid a “golden handshake” of R58 000 (after tax) out of the funds of the second defendant;*
- 23.2. *when, to his knowledge, no such payment was at that point lawfully authorized or permitted.*

Third and fourth Defendant's acts

24. *In and during 2015 and at Pretoria-*
- 24.1. *in the course of chairing a meeting dated 18 May, the third defendant, with the connivance of the fourth defendant:*
- 24.1.1. *falsely recorded that the fourth defendant had been the employee of the first and second defendants since August 2011;*
- 24.1.2. *secured a resolution by the second defendant that the fourth defendant should be paid R360 000 by way of additional remuneration for services rendered since his supposed engagement as employee;*
- 24.2. *the sum of R360 000 was paid to the fourth defendant out of the funds of the second defendant:*
- 24.2.1. *without informing the first plaintiff that he was supposedly an employee of the first defendant;*
- 24.2.2. *and without remitting the amount to the first defendant, it having been earned in the course of his employment*

with the first plaintiff, his true employer.

25. *In or about May 2015 and at Pretoria, the fourth defendant was paid performance bonus of R317 000 by the first defendant-*
- 25.1. *supposedly to retain his services as a purported employee, though he was, as averred, actually employed only by the first plaintiff;*
 - 25.2. *without informing the first plaintiff that he was supposedly an employee of the first defendant;*
 - 25.3. *and without remitting the amount to the first defendant, it having been earned in the course of his employment with the first plaintiff, his true employer.*
26. *The additional remuneration and performance bonus, pleaded above, were designed to reward the fourth defendant for facilitating the loans and golden handshake given to the third defendant, pleaded above.*

UNLAWFULNESS OF THE CONDUCT

27. *To the knowledge of at least the third and fourth defendants, the conduct of first four defendants was, by reason of these facts-*
- 27.1. *Irregular, improper and corrupt;*
 - 27.2. *In consequence, unlawful.*

INVESTIGATION AND REPORT

28. *Towards the end of 2015, the first plaintiff, in the due and proper discharge of its duties as the administrator of the funds of the first and second defendants, initiated an investigation into the malfeasance pleaded above.*
29. *The first plaintiff-*
- 29.1. *Submitted two reports on the malfeasance, an original report dated 9 January 2016 and an addendum dated 10 February 2016.*
 - 29.2. *To the Registrar of Pension Funds, the Boards of Trustees of the first and second defendants, the individual trustees of the first and second defendants, and the third and fourth defendants;*
 - 29.3. *and pursuant to s13B(10) of the Pension Funds Act.*
30. *The submission of the said reports constituted protected disclosures within the contemplation of s9B(2) of the Pension Funds Act.*

PURPORTED TERMINATION OF THE AGREEMENTS

31. *By letters dated 26 February 2016 and received on 29 February 2016,*

the first and second defendants notified the first defendant¹ of their intention to terminate their respective administration agreements
31.1. *with effect from a date three months thence.*

32. *The termination was actuated, in part or in whole, by a desire on behalf of the first four defendants or one or more of them-*
- 32.1. *Specifically, to:*
- 32.1.1. *impede, forestall or otherwise frustrate the first plaintiffs' ongoing investigation into malfeasance, committed by the first four defendants or one or more of them;*
- 32.1.2. *retaliate or otherwise take reprisals against the first plaintiff for investigating and then reporting on the malfeasance to the applicable authorities and, in particular, to the Registrar of Pension Funds;*
- 32.2. *Generally, to take control of the first and second defendants so as to facilitate and implement such further acts of malfeasance as the third and fourth defendants might desire to commit.*

UNLAWFULNESS OF THE TERMINATIONS

33. *The termination, by reason of its motivation aforesaid, was-*
- 33.1. *Unlawful since it constituted:*
- 33.1.1. *an unlawful occupational detriment within the contemplation of the Pension Funds Act, and/or*
- 33.1.2. *a juristic act with unlawful intent in breach of contract at common law either per se or as developed to give effect to the rights enshrined in the Bill of Rights;*
- 33.1.3. *accordingly void and of no force and effect.*
- 33.2. *accordingly void and of no force and effect.*

WHEREFORE THE PLAINTIFFS CLAIM-

34. *An order-*
- 34.1. *Declaring that the purported termination of the appointment of the first plaintiff as an administrator is unlawful and so null, void and of no effect;..."*

Notice of Intention to Amend and Notice of Objection

9. On 16 March 2021 the plaintiffs delivered a notice of intention to amend its particulars of claim to provide for the reinstatement of the first plaintiff. Paragraph 34 is re-numbered as paragraph 38 and 38.1 and the following subparagraphs are inserted:

¹ It should read "the first plaintiff"

- “ 38.2.1 The first plaintiff is reinstated in its former position as administrator in the aforementioned agreements retrospectively, together with all rights, entitlements and benefits, as contemplated in the provisions of section 9B(3)(b)(ii) of the Pension Funds Act (supra); alternatively*
- 38.2.2. The first plaintiff is reinstated in its former position as administrator in terms of the aforementioned agreements retrospectively, together with all rights, entitlements and benefits, in terms of principles of the common law; further alternatively*
- .38.2.3. The first plaintiff is reinstated in its former position as administrator in terms of the aforementioned agreements retrospectively, together with all rights, entitlements and benefits, in terms of the provisions of section 172(1)(a) and (b) of the Constitution (supra).”*

10. The first defendant delivered a notice of objection on the basis that the intended amendment:

10.1. *“...introduces a new claim for a debt, being the rights, entitlements and benefits”* arising from the reinstatement of the First and Second Plaintiffs.

10.2. The relief sought in terms of the notice of intention to amend seeks additional relief to the relief sought in paragraph 34 of the particulars of claim, and amounts to a claim for a new debt that has prescribed in terms of the Prescription Act, 68 of 1969, the debt having prescribed on 31 May 2019 as the respective administration agreements were terminated three years prior, on 31 May 2016.

11. The plaintiffs dispute the aforesaid contentions and contend that the reinstatement of the first plaintiff as administrator simply gives effect to the declaratory relief already sought and further that the claim as formulated in the amendment does not constitute a debt as contemplated in the Prescription Act. The plaintiffs lastly contend that prescription should be raised by means of a special plea and not at this stage (The contention is based on an innuendo that prescription commenced to run at a later stage. The plaintiffs' counsel, Adv Vorster SC, did not pursue this aspect during argument. Save to say that the first defendant's counsel, Adv van der Walt SC correctly argued that the malfeasance reports on 6 January and 10 February 2016 referred to in paragraphs 28 – 30 of the particulars of claim are inconsistent with this

argument, I do not deem it necessary to further deal with this aspect).

APPLICABLE PRESCRIPTION PRINCIPLES

12. The first question is whether the Prescription Act finds application in respect of the claim in terms of section 9B(3)(b)(ii) of the PFA and/or in terms of s172(a) and 172(b) of the Constitution. Do these claims constitute a “debt” that is subject to prescription?

13. Section 10(1) of the Prescription Act provides:

“1. Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.”

14. Section 11(d) provides for the prescription period of debts and it is common cause that insofar as the Act is applicable, that the present prescription period is three years.

15. The word “debt” is not defined in the Prescription Act.

16. In **Makate v Vodacom (Pty) Ltd, 2016 (4) (SA) 121 (CC)** (“Makate”), the constitutional court confirmed that the meaning of “debt” in terms of the Prescription Act, is that attributed to it in **Electricity Supply Commission v Stewarts and Loyds of SA (Pty) Ltd, 1981 (3) (SA) 340 (A)** at 344 E-G, namely:

“Something owed or due (as money, goods or services) which one person is under an obligation to pay or render to another.

2. A liability or obligation to pay or render something; the condition of being so obligated.” (para 85; 92 and 93)

17. The constitutional court held as follows at paragraph 92:

“However, in present circumstances it is not necessary to determine the exact meaning of “debt” as envisaged in s10. This is because the claim we are concerned with falls beyond the scope of the word as determined in cases like Escom, which held that a debt is an obligation to pay money, deliver goods or render services. Here the applicant did not ask to enforce any of these

obligations. Instead, he requested an order forcing Vodacom to commence negotiations with him for determining compensation for the profitable use of his idea.” (my emphasis)

18. The court found that a claim to commence negotiations does not constitute a debt and that the claim therefore did not prescribe (par 93).
19. There are other examples of claims that do not constitute a debt(s) in terms of the Prescription Act.
20. A claim for rectification does not alter the rights and obligations of the parties in terms of the agreement. It does not create a new contract, it merely serves to correct the written memorial of the agreement. Prescription does not run against a claim for rectification of a contract: *“Should a claim for rectification of a contract become prescribed after three years the parties may become entitled to rights and subject to obligations wrongly recorded and never intended...That, in my view, is a result never intended by the Prescription Act.”* (see: **Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd 2009 (3) SA 447 SCA** at par 13). The same principle applies to rectification of a deed of transfer (see: **Bester N.O. v Schmidt Bou Ontwikkelings 2013 (1) SA 125 SCA** at par 12).
21. In **Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others, 2017 (5) (SA) 9 (CC)**, (“the **Off-Beat** case”), the Constitutional Court considered whether a claim in terms of section 252 of the Companies Act, 1973 constitutes a “debt” for purposes of section 10 of the Prescription Act. Section 252 (1) and (3) reads:

“252(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company may, make ‘an application to Court for an order under this section.’”

(3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company’s affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to

an end of the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital or otherwise." (par 26) (my emphasis)

22. The majority found that:

22.1. The section confers a wide and unfettered discretion on the court to do what it considers fair and equitable to cure unfair prejudice suffered by the applicant.

" (28) ...*The test of fairness is an objective one. The court will have to balance the interests of both parties in order to make an order that is just and equitable. In doing so, the court has an equitable jurisdiction in the exercise of which the lateness of complaints, including the fact that any sources of complaints may be debts that have prescribed, will be considered. The court has to consider an order that will be appropriate at the time of the hearing*".

" (34) *In my view the correct characterisation of a claim for purposes of the Prescription Act is the characterisation arising from the relevant legal provisions on which the claim is based. 'Here the claim is based on s252 of the Companies Act, the plain text of which discusses an entitlement to an equitable judicial determination...'* "

" (35) *There is also no internal time bar in the Companies Act to the Applicants' s 252 claim. However, s252(3) does make provision for a court to grant relief where it 'considers it just and equitable...'*".

" (38) *A s252 claim affords a claimant the right to seek an equitable, judicial determination of the merits of the complaint about the governance of a company. It is open to a court, in determining a just and equitable remedy, to take into account the history of the company's management and governance. This may include the fact that certain issues that underlie the complaint may have prescribed. This fits with the wide discretion the provision confers on a court. And it is not incongruous with the finding that a s252(2) claim is not invariably a 'debt'* " (my emphasis)

" (39) *The facts here offer a vivid instance. Part of the Clubs' claims against Mr Harri may have prescribed. Yet those prescribed debts themselves form part of the history of the conduct of the company that may make it just and equitable for a court to grant equitable*

relief now. More precisely, even past action in respect of which a debt may have prescribed guides a court into granting a contemporaneous just and equitable order.” (my emphasis)

“(40) The present-tense focus of ss252(1) and (3) is key to this...”.

“(41) The court in granting just and equitable relief cannot of course revive prescribed debts. But it can take them into account in assessing whether governance calls for a just and equitable remedy now. It may be that, in practice, it will be difficult to fashion a remedy that takes these considerations into account. But that is not a reason for barring the court’s power, a priori, on the ground that the debts have prescribed.”

22.2. The court found that the applicant’s claim does not constitute a debt:

“ On the application of this narrow test, I am satisfied that the applicants’ claim under s252 cannot constitute a ‘debt’. The claim is a far cry from something owed or due, or an obligation to pay money, deliver goods or render services to another. If anything, it is the right to seek a judicial determination as to whether the applicants are entitled to a statutory remedy, the entitlement which is determined on equitable grounds, and thus allows the court to consider the applicants’ tardiness, what may or may not have prescribed and whether a just and equitable relief in relation to the operation of the company may be justified.” (par 49) (my emphasis)

EVALUATION

The reinstatement claim based on s9B(3) of the Pension Funds Act

23. The plaintiffs’ claim for reinstatement as administrator is firstly based on s9B(3) of the PFA that provides:

“ 9B Protection of disclosures

(3)

(a) A board member, principal officer, deputy principal officer, valuator or other officer or employee of a fund or an administrator who makes a protected disclosure in accordance with this section, may not suffer any occupational or other detriment.

(b) Any person referred to in paragraph (a) who suffers any detriment, including occupational detriment as defined in the Protected Disclosures Act, may-

(i) seek the remedies provided for in section 4 of the Protected

Disclosures Act, where occupational detriment has been suffered;

- (ii) approach any court having jurisdiction for appropriate relief; or*
- (i) Pursue any other process and seek any remedy provided for in law.”*

24. Section 4(1B) of the Protected Disclosures Act, 26 of 2000 (hereinafter referred to as “the **PDA**”), provides that:

“(1B) If the court or tribunal, including the Labour Court, is satisfied that an employee or worker has been subjected to or will be subjected to an occupational detriment on account of a protected disclosure, it may make an appropriate order that is just and equitable in the circumstances, including-

- (a) payment of compensation by the employer or client, as the case may be, to that employee or worker;*
- (b) payment by the employer or client, as the case may be, of actual damages suffered by the employee or worker; or*
- (c) an order directing the employer or client, as the case may be, to take steps to remedy the occupational detriment.” (my emphasis)*

25. The first plaintiff alleged that the submission of the two reports of malfeasance constituted protected disclosures within the contemplation of s9B(2) of the PFA (paragraphs 28 – 30 of the particulars of claim) and that the termination of the agreements constituted an unlawful occupational detriment (see: paragraphs 31 – 33 of the particulars of claim).

26. The defendants raised an exception amongst others on the basis that the PDA only applies to employees who “blow the whistle” and that the Act does not extend to a service provider or an administrator of a pension fund.

27. On 15 February 2021 Justice Murphy in a reasoned judgment and after an analysis of the relevant provisions of the PFA and the PDA, dismissed the exception. He found that:

27.1. the wording of s9B(2) of the Pension Funds Act, as well as the definition of a disclosure in s 1 of the Act, “*is equally capable of a textual interpretation confining the identified natural persons...to the servants of a pension fund and for administrators to be a stand-alone category. An*

interpretation of this order makes eminent sense in the context of prudential regulation of pension funds where administrators have fiduciary and statutory duties, including a specific duty to make disclosures to the Registrar in terms of section 13B(10).” (par 30);

27.2. “ *The termination of the contracts may be regarded as a detriment as contemplated in s9B(3)(b) of the PFA (albeit not an occupational detriment of the kind that might be suffered by an employee) permitting RFS to approach the court for appropriate relief in terms of s9B(3)(b)(ii) of the PFA.” (par 34); and*

27.3. “ *In the premises, I am persuaded that the first cause of action pleaded by RFS in its particulars of claim is one that can be competently mounted in law and the exception taken to it falls to be dismissed.” (par 35).*

28. The plaintiffs’ averments are accepted as correct at this stage, and I thus accept that the first plaintiff has been subjected to an occupational detriment, on account of a protected disclosure, and that the court can make “*an appropriate order that is just and equitable in the circumstances*”. The court has a wide just and equitable discretion, to make an appropriate order, including an order for payment of compensation, actual damages or to order any remedial steps it deems fit.

29. In the **Off-beat Holiday Club** case the statutory provisions empowered the court to on just and equitable grounds determine whether the applicant is entitled to a statutory remedy and if so, to craft just and equitable relief (par 49).

30. In **Gaffoor N.O. and Another v Vangates Investments (Pty) Ltd and Others, 2012 (4) SA 281 (SCA)** the SCA interpreted s115 of the Company Act that provides that if the name of any person is without sufficient reason entered into or omitted from the register of members of a company, the person concerned may apply to the high court for the rectification of the register.

31. The SCA found that:

31.1. the court's jurisdiction under s115 of the Act "...has been described as unlimited and the exercise of its discretion based on what equity requires", and that the court has the discretion to "...fix with the obligations of membership those persons and those persons only upon whom such obligations should justly and equitably rest." (par 40); and

31.2. the right to apply to rectify the register is not a debt in terms of the Prescription Act:

" This brings me to the appellants' claim, under s115 of the Act, for the rectification of the company's register of members so as to reflect the executors of the deceased estate as the holders of...shares...in the company. I agree with the view of the high court that s115 creates a statutory right to apply to the court for the exercise by it of a statutory power, such right is not a 'debt' within the meaning of that expression in Chapter III of the Prescription Act and there can be no extinction of such right by prescription" (par 36).

CONCLUSION

32. The first plaintiff seeks a judicial determination whether it is entitled to a just and equitable remedy as envisaged in s9B(3) of the PFA read with s4(1B) of the PDA. The plaintiffs' entitlement to a remedy, and if so, the nature thereof, will be determined by the trial court on equitable grounds in the light of all the facts. The first plaintiff is entitled to approach the court to exercise its equitable discretion.

33. In the light of the aforesaid authorities I conclude that such a right is not a debt in terms of the Prescription Act, and the plaintiffs' claim in terms of the PFA and more specifically section 9B(3)(b)(ii) of the PFA is not subject to prescription.

The claim based on section 172 of the Constitution

34. As discussed, the plaintiffs' claims for reinstatement as administrator is *inter alia* based on Section 172 of the Constitution.

35. In its notice to amend the relief in terms of s172 is motivated on the following

basis:

“ The first plaintiff, as a result of the unlawful occupational and other detriment which it has suffered and as a result of the aforementioned unlawful breaches of the agreement, in terms of the provisions of section 9B(3)(b)(ii) of the Pension Funds Act, 24 of 1956, alternatively at common law per se or as developed to give effect to the first plaintiff’s rights enshrined in the Bill of Rights is entitled to the following relief:...

Being reinstated in its former position as administrator in terms of the aforementioned agreements retrospectively, together with all rights, entitlements and benefits, in terms of the provisions of section 172(1)(a) and (b) of the constitution (supra)”.

36. The plaintiffs contend that in the light of the discretionary powers afforded to the court in terms of section 172 of the constitution, the reinstatement claim based on section 172(1)(b) is also not subject to prescription.

37. In **Electoral Commission v Mhlope and Others, 2016 (5) SA 1 (CC)** the constitutional court at par 132, described the import and effect of Section 172(1)(b):

“ Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy, even for exceptional, complex or apparently irresolvable situations. And the operative words in this section are ‘an order that is just and equitable’. This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in s172(1)(b). In this case a just and equitable order is one that would pave the way for the August elections to be held, although our voters’ roll is the product of unlawful conduct. Failure to do so, could indeed lead to constitutional crisis with far-reaching implications”.

38. In **Central Energy Fund Soc Ltd and Another v Venus Rays Trade (Pty) Ltd**

and Others, 2022 (5) SA 56 SCA, the SCA confirmed that s 172(1)(b) confers very wide powers on the court to craft an appropriate remedy and that the court does not have to follow the prayers in the notice of motion, in doing so. It is free to address the real dispute by means of an order that it considers to be appropriate (par 37). The court furthermore alluded two guiding principles “...for crafting an appropriate remedy in cases that entail setting aside a contract...” The first is the corrective principle, which is aligned with the rule of restitution in contract, namely that neither contracting party should unduly benefit from what has been performed under a contract that no longer exists, and secondly that the “no-profit-no-loss” principle applies (par 39-41). The law draws a distinction between parties who are complicit in maladministration impropriety or corruption on the one hand and those who are not on the other. The court continues:

“...Parties who are complicit in maladministration, impropriety or corruption are not only precluded from profiting from an unlawful tender, but they may also be required to suffer losses. On the other hand, although innocent parties are not entitled to benefit from an unlawful contract, they are not required to suffer any loss as a result of the invalidation of a contract.” (par 34)

39. In the **Court a quo**² **Rogers J** (as he then was) found that although s172 of the Constitution does not provide for compensation, “...a compensation order is within the wide language of the section” (par 347), and compensation notionally extend to a loss of profit (par 349). The court in certain instances awarded out-of-pocket expenses (par 488), and the SCA confirmed the said award (par 62 and 63).
40. Although this case deals with the review and setting aside of contracts under s8(1)(a) of the Promotion of the Administrative Justice Act, 3 of 2000 (“PAJA”) or under the principle of legality within the context of constitutional- and statutory procurement, it provides insight into the wide ambit of the court’s remedial discretion in terms of s172.
41. Section 172(1)(a) and (b) of the Constitution reads:

“ 172(1) When deciding a constitutional matter within its power, a court-

² The same case reference: 4305 (18) [2020] ZAWCHC164 (20 November 2020)

- (a) *must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*
- (b) *may make any order that is just and equitable, including-*
 - (i) *an order limiting the retrospective effect of the declaration of invalidity; and*
 - (ii) *an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”*

42. A court can make a just and equitable order when (i) deciding a constitutional matter within its power, and (ii) once it has declared any law or conduct inconsistent with the constitution. The words “...any law...” in s172 include the common law or the application of common law principles. In **Fraser v ABSA Bank Limited 2007 (3) SA 484 (CC)** the constitutional court held that the development of or the failure to develop common law is *inter alia* a constitutional matter (par 38), and that an applicant has to demonstrate the existence of a *bona fide* constitutional question in order to trigger the s172 discretionary remedies (par 40). The adjudication of questions of fact and whether common law principles were correctly applied or not, do not constitute constitutional matter (see: **Phoebus Apollo Aviation CC v The Minister of Safety and Security, 2003 (2) SA 34 (CC)**, at par 9).
43. The common law contractual position has however been dealt with by Justice Murphy during its adjudication of the exception.
44. The defendants raised an exception, namely that the pension fund can at any time without good cause revoke its delegation to the administrator; there is no obligation in law for the defendants to act in good faith towards the plaintiffs, and that the termination was thus not an “*unlawful occupation detriment within the contemplation of the PFA*”. (The defendants terminated the agreements with three months’ written notice as was required in terms of clause 13.2 of the agreements).
45. In his judgment Justice Murphy:
- 45.1. confirmed the principle that trustees who delegated part of their functions can at any time revoke the delegation as a delegation does not release

“...the committee, board of trustees from liability for wrongs committed in the administration of the funds, and the trustees retains their office as controllers, with primary responsibility to members of the fund” (par 40); and

45.2. held that the *“principles of our law on contracts contrary to public policy are well-established”*, and referred to the following case law and principles:

45.2.1. **Barkhuizen v Napier 2007 (5) SA 323 (CC)** where the constitutional court held that courts should be able to decline the enforcement of, in that case, a contractual time-limitation clause, if it would result in unfairness or would be unreasonable (par 70);

45.2.2. **Juglal v Shoprite Checkers (Pty) Ltd 2004 (5) SA 248 SCA** (par 12): The SCA held that where a creditor implements a contract in a manner that is unconscionable, illegal or immoral, the court will refuse to give effect to its conduct; and to

45.2.3. **Combined Developers v Arun Holdings and Others 2015 (3) SA 215 (WCC)**: The high court held that *“...the enforcement of a contractual provision, which may not itself run counter to public policy, may be so oppressive, unconscionable or immoral as to constitute a breach of public policy. If so, public policy can be invoked in justification of a refusal to enforce a provision.”*;

45.2.4. That the court in the **Arun** matter refused to enforce an acceleration clause in the loan agreement where *“the demand made was of doubtful import and the amount of the default was unpaid interest in the amount of R86.57.”* The court held that the implementation of the clause is *“so startling draconian and unfair that in this particular construction the clause must be in breach of public policy.”*;

- 45.3. He held that:
- 45.3.1. clause 13.2 of the administration contracts is on the face of it, neutral and not contrary to public policy (par 45);
 - 45.3.2. *“The motive in implementing or enforcing a contractual term can infect it with illegality and render it void if it results in an unconscionable termination of the contract contrary to public policy. In such instances the termination clause should not be enforced, especially if enforcement will offend against constitutional values.”* (par 47);
 - 45.3.3. administrators assume a position of fidelity in relation to pension funds and their members and they have an oversight role in relation to the proprietary of the pension fund’s dealings; and
 - 45.3.4. *“Where there is evidence that a pension fund has exercised its contractual rights to terminate an administration contract in order to thwart or render nugatory the role conferred on the administrator by public policy, the exercise of those rights must be in breach of public policy, notwithstanding the fact that the clause bestowing the power of termination is neutral and normally interpreted does not require good cause...”*; and
 - 45.3.5. the first plaintiff has demonstrated a cause of action based on its common law contractual rights (par 48).
46. The question is, whether there presently is a constitutional matter that serves before the court and that can give rise to a declaration of invalidity. The common law relating to the termination of the administration agreements do not require development to ensure its constitutionality. The common law principle is that if enforcement of a contractual term militates against public policy (as informed by the spirit, purport and objects of the Bill of Rights), enforcement will be refused. Even if the decision to terminate or the termination of the administration

agreements is unconstitutional as it offends against a specific provision in the constitution, the consequences and remedies can and should be decided on the basis of normal contractual principles as discussed below, and the declaration of invalidity in terms of section 172(1)(a) should in principle be avoided (see: **Zantsi v Council of State, Ciskei, and Others, 1995 4 (SA) 615 (CC)** at par 3).

47. However, if I am wrong and section 172(1)(b) finds application, I am of the opinion that the prescription principles as discussed in the **Off-Beat** case do not apply. The first plaintiff does not approach the court in terms of a statutory provision that entitles it to approach the court to on equitable grounds determine whether a statutory remedy applies and if so, to craft an equitable remedy. It is not a provision for the benefit of the plaintiffs. Section 172(1) of the constitution does not vest a right in the plaintiff to apply to the court for the exercise by it of a statutory discretion. Section 172(1)(b) affords the court wide remedial powers to craft remedies when it declares any law conduct inconsistent with the constitution. It is essentially a public law remedy, not a private law remedy.
48. I find that the question whether the administration contracts were terminated lawfully should be decided in accordance with the normal contractual principles. However, if I am wrong that the termination of the administration agreements was unconstitutional and can be declared invalid, the court's wide just and equitable jurisdiction in terms of s172 of the constitution, does not mean that the declaratory relief cannot prescribe. If the contractual claim is extinguished due to prescription, the constitutional power to craft an appropriate remedy has likewise prescribed.

The contractual claim

49. The next question is whether the plaintiffs' contractual claim for reinstatement in terms of the aforesaid agreements has prescribed.
50. Section 15(1) of the Act provides that prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. The service of a summons constitutes a process that interrupts prescription (see: **Kleynhans v Yorkshire Insurance Company Ltd, 1975 (3) SA 544(A)** at

551(C)).

51. From a procedural perspective amendments operate retrospectively, i.e. from the time of the filing thereof, but from a substantive law/prescription perspective the amendment operates from the date of the amendment (see: **Brandon v Minister of Law and Order and Another, 1997 (3) SA 6886 (CPD)** at 57D – F). The question that often arises is whether an amendment introduced a new cause of action/debt or not. If not, the initial timeous service of the summons interrupted prescription notwithstanding the fact that the amendment was effected after the prescription period has run its course. The opposite holds true, if the amendment introduced a new debt after the prescription period has run, the to-be introduced claim has prescribed and the amendment will not be granted.

Relevant principles

52. The courts have in various judgments discussed the applicable principles to determine whether a claim constitutes a new debt in terms of the Prescription Act. I now deal with some of these cases:
53. In **Sentrachem Limited v Prinsloo, 1997 2 (SA) 1(A)** the court held that the real question is whether the plaintiff was enforcing the same or substantially the same debt in the amendment (p 15J – 16A). It found that the plaintiff claimed damages as a result of the use of the chemical AC 290 – 100 in his citrus orchards. The claim introduced by the amendment is recognisable in the summons and the amendment does not add a new party. The claim was furthermore at all times due and payable. The amendment in effect clarifies a possibly defective or vague claim. As such the plaintiff was still enforcing the same or substantially the same debt or right of action, and the claim has not prescribed (at 15H – 16F).
54. In **Standard Bank of SA v Oeanate Investments (in liquidation), 1998 (1) SA 811 AD** the court found that the concept of “a debt” is wider than the technical term “cause of action” (826J – 827A). In order to determine whether prescription was interrupted “...one looks to see whether in the earlier process the same claim was preferred, not whether the same cause of action (or any

cause of action) was made out in the earlier process. As pointed out in one of the cases, it is inaction, not legal ineptitude, which the Prescription Act is designed to penalise” (826C – D), and “The real question is whether the subsequent pleading is inconsistent with the claim proffered in the initiating summons” (826G). The court found that the three debits which the court a quo held had prescribed “were ‘part and parcel of the original cause of action’ and merely represented a fresh quantification of the original claim ‘or the addition of further items’ to make up the claim based on moneys lent and advanced referred to in the simple summons...” (827B – C).

(See also: **Magnum Simplex International (Pty) Ltd v MEC Provincial Treasury, Provincial Government of Limpopo [2018] ZASCA 78** at par 10), and **Evins v Shield Insurance 1980 (2) SA 814A** at 836D – E: a fresh quantification or the adding of further items of damages under an existing cause of action/debt does not constitute a new debt.

55. In **Rustenburg Platinum Mines v Industrial Maintenance Painting Services [2009] 1 ALL SA 275 SCA** the plaintiff claimed on the basis of enrichment, the *conditio indebiti*. In its proposed amendment the plaintiff relied on a tacit agreement to repay the excess amount as an alternative to the enrichment claim. The court found that if one compares the allegations and the relief claimed in the summons and the allegations and the relief claimed in the amendment, the result is that the plaintiff seeks throughout to recover the same debt, namely the excess amount (par 19). The claim has thus not prescribed. (Contra: **Firststrand Bank v Nedbank (Swaziland) Ltd 2004 (6) SA 713 SCA** where the amendment introduced an enrichment claim against a different entity).

56. In **CGU Insurance Ltd v Rumdel Construction (Pty) Ltd [2003] 2 ALL SA 597 (SCA)** the plaintiff sued its insurer in terms of a contract of insurance. In its later amendment of the particulars of claim the plaintiff relied on a further contract of insurance and alleged that the defendant is liable by reason of the two contracts. The court found that the “debt” in the context of Section 15 bears a “wide and general meaning” and it does not have the technical meaning of a cause of action. The court continued:

“ [7] When a court is called upon to decide whether a summons interrupts

prescription it is necessary to compare the allegations and relief claimed in the summons with the allegations and the relief claimed in the amendment to see if the debt is substantially the same...In this case there is no amendment to the relief claimed.

[8] I accept that the amendment introduces a new insurance contract as the basis for the claim for the loss which occurred in March 1996. But an objective comparison between the original particulars of claim and the particulars of claim as amended leaves in me no doubt that although part of the cause of action is now a different contract, the debt is the same debt in the broad sense of the meaning of that word. The original pleadings convey, in that broad sense, that the debt was payable by reason of a contractual undertaking to indemnify the plaintiff for the loss which occurred in March 1996, a loss which is fully particularized and for which notice was allegedly given after the occurrence as required by the policy. That is also how it is described in the amendment. I can find no grounds for concluding in this case that a change in the contract relied upon means that a different debt was claimed.”

(See also: **Aeronexus (Pty) Ltd v FirstRand Bank t/a Westbank 2011 JOL 271 02 SCA** at par 14 – 16).

57. In **Deez Realtors CC t/a Firzt Realty Company and Others v South African Securitisation Program (Pty) Ltd and Others (175/2016) [2016] ZASCA 194 (2 December 2016)** the plaintiff initially sued the defendants for accelerated payments in terms of an agreement and later sought to amend its particulars of claim to instead sue for damages following cancellation of the agreement. The defendants' contention was that the amendment introduced a prescribed debt. In this regard the Supreme Court of Appeal said as follows:

“ [35] In my view, the effect of the amendment of the plaintiffs' particulars of claim was merely to cure a defective cause of action (namely, mistakenly claiming accelerated rentals when they had already cancelled the contracts) by introducing the correct cause of action for liquidated damages pursuant to the election they had exercised. The nature of the debt claimed remained the same. In substance, the remedies provided for in clause 14.1 both sought to place the plaintiffs in the position in which they would have been, had the breach not intervened. Hence they gave rise to a single debt. As emphasised in this court in GCU Insurers, 'the debt is not the set of material facts' required to sustain the cause of action

but rather 'that which is begotten by the set of material facts' " (my emphasis)

58. In **Cape Town Municipality and Another v Allianz Insurance Co Ltd, 1990 (1) SA 311(C)** (“**Allianz Insurance**”), the question arose whether summonses confined to declaratory relief “...that the plaintiff is liable to indemnify that the defendant is liable to indemnify the plaintiff in terms of the policy for all loss of damage...”, interrupted prescription in respect of a damages claim to be instituted under the insurance policy. The defendant argued that the summonses were not for payment of a debt within the meaning of section 15(1) of the Act, and that the prescription had not been interrupted (p 327I – 328A).

59. Justice Howie (as he then was) found that:

59.1. The sellers are seeking to enforce their right to the indemnity, and that once finalised the issue of liability will be *res judicata*. Further proceedings will be necessary to claim payment: “*But the two actions together will still deal only with one cause of action. Although the relief sought in the present case differs from the relief which will, on the above supposition, be sought in the second action, the precise form of the relief and, if it is monetary relief, the quantum thereof, are not elements of the cause of action. For example, if D commits continuing wrongful acts accompanied by fault and thereby causes damages to P’s property with consequent patrimonial loss, P’s cause of action is fixed irrespective of whether he sues for damages or applies for an interdict: **cf Evin’s case supra at 838E – 839C.**”³ (332J – 333B) (my emphasis)*

59.2. The declarator will be foundational to subsequent litigation to obtain an order for payment (p 334E).

59.3. The learned Judge concluded that s15 must be interpreted as follows:

“ 1. *It is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of the debt.*

³ Evin v Shield Insurance Company Ltd 1980 (2) SA 814(A)

2. *A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also where the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in a supplementary action instituted pursuant to and dependent upon that judgment.*” (p 334H – J) (my emphasis)

60. The court has thus found that prescription was interrupted in terms of s15 of the Prescription Act by the service of the plaintiffs’ summonses for a declarator, and that prescription remains interrupted in respect of any consequential relief whether for damages or an interdict that may be claimed in a second action. The consequential relief does not form part of the cause of action or the “debt” for the purpose of prescription. Applied to the present case: the declaratory relief, namely that the agreements were unlawfully terminated interrupted prescription in respect of all the remedies flowing from such unlawful termination. The introduction of the relief, specific performance, therefore does not constitute a new debt that has prescribed.

Contentions and findings

61. It was contended on behalf of the respondents, with reference to the case **Adbro Investment Co Ltd v The Minister of Interior and Others 1963 (3) SA 283(T)** that a declaratory order without an additional prayer for consequential relief (such as specific performance) rendered the dispute “academic” (at 285B – E). I will accept for purposes of argument that the present summons was defective. The question is however whether the relief claimed in the amendment, introduced a new debt after the prescription period has run its course, i.e. whether the relief has prescribed.

62. I am of the view that the amendment does not introduce a new debt:

62.1. The allegations and the relief claimed in the summons are identical with the allegations and the relief claimed in the amendment, but for the fact that additional relief is claimed in the amendment.

- 62.2. It was throughout the plaintiffs' case that the agreements were terminated unlawfully and the material facts and the grounds foundational to the initial declarator remained the same.
- 62.3. The summons foreshadowed the present relief. The relief based on specific performance is recognisable in paragraph 33.1.2 of the particulars of claim, the termination was allegedly unlawful since it constituted "*...a jurisdic act with unlawful intent in breach of contract at common law either per se or developed to give effect to the rights entwined in the Bill of Rights*".
- 62.4. The relief flows from the declarator that the termination of the administration agreements was unlawful. The unlawful termination of an agreement normally constitutes a repudiation of the agreement, as a notice of termination evinces an unequivocal intention not to be bound by the agreement. If a contract is unlawfully terminated the innocent party has an election whether to claim specific performance or whether to accept the repudiation, cancel the agreement and if so advised, to claim damages.
- 62.5. The amendment cures a possibly defective summons by identifying the first plaintiff's chosen remedy, namely specific performance. The plaintiff is in principle entitled to enforce an agreement and claim specific performance in the event of a breach of contract, but the court has a discretion to decide whether to grant an order or to award damages (see: **Farmer's Co-op Society (Reg) v Berry, 1918 AD 308**).
- 62.6. The claim for specific performance does not constitute a new debt. The Prescription Act does not penalise legal ineptitude. There is in this context no difference between an amendment to replace a legally impermissible claim for specific performance with a claim for cancellation and damages (the **Deez Realtors CC** case supra), and an amendment to rectify a lacuna by claiming for specific performance where no ancillary relief was initially claimed. The plaintiffs correctly contend that the reinstatement relief merely gives effect to the declarator.

Furthermore, a plaintiff can claim a declaratory order to the effect that the defendant is liable and without embarking on a quantification pray for an order that quantification stand over for later adjudication (see: **Cadac v Weber-Stephen Products, 2011 (3) SA 570 SCA** at par 13). I cannot see how the absence of a prayer to stand over the quantification, can give rise to a successful prescription defence when an amendment is filed to provide for quantification and/or other relief.

- 62.7. In the **Allianz Insurance** case the service of the summons interrupted the relief flowing from the cause of action (in the narrow sense). To clarify: a declarator that a defendant is liable to indemnify the plaintiff's loss or damages in terms of an insurance policy, can serve as a basis to claim the remaining elements, the loss or damages, in a later action pursuant to the declarator. Presently the timeous service of the summons for a declarator that the administration contracts were unlawfully terminated, interrupted prescription in respect of the remedies flowing from the said cancellation. The plaintiffs' amendment to claim specific performance based on the unlawful termination, does not introduce a new debt or right of action.
63. The defendant contended during argument that the true purpose of the proposed amendment is to "*introduce a disguised claim for the payment of a substantial amount of money*" as damages. Nothing turns on this argument. Insofar as the plaintiffs' reinstatement is only partially possible or impossible, a court will normally in its discretion award damages. The plaintiffs could also have elected not to claim specific performance, but to only claim damages. A plaintiff may also claim specific performance with an alternative claim for cancellation and damages, should the defendant persist with his breach notwithstanding the court order (see: **Custom Credit Corporation (Pty) Ltd v Shembe, 1972 (3) SA 462 A** at 470D – E). A plaintiff can also in the absence of an alternative claim institute a second action, in lieu of the order for specific performance, and claim for cancellation of the contract and damages (see: **Ras and Others v Simpson, 1904 TS 254** at 256). The various remedies flowing from the unlawful termination are not new debts from a prescription perspective.

64. In the light of the foregoing I find that the plaintiffs' contractual claim for specific performance and its other claims have not prescribed.
65. In the result the following order is made:
- 65.1. The plaintiffs are hereby granted leave to amend their particulars of claim in accordance with its notice of intention to amend dated 16 March 2021.
- 65.2. The first defendant is ordered to pay the plaintiffs' costs, including the costs occasioned by the employment of senior counsel.

HJ DE WET

Acting Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 24 January 2023

Date of judgment: 5 June 2023

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