IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

In the application between:	CASE NO: 25095/2013
JOHAN PIETER HENDRIK PRETORIUS	First Applicant
JOHAN MICHAEL KRUGER	Second Applicant
and	
TRANSNET SECOND DEFINED BENEFIT FUND	First Respondent
TRANSPORT PENSION FUND	Second Respondent
METROPOLITAN RETIREMENT ADMINISTRATORS (PTY) LIMITED	Third Respondent
TRANSNET SOC LIMITED	Fourth Respondent
MINISTER OF PUBLIC ENTERPRISES	Fifth Respondent
MINISTER OF FINANCE	Sixth Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Seventh Respondent

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE that the fourth respondent intends to apply, on a date to be arranged with the Registrar, for leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order of the Honourable Justice Makgoba, which judgment was delivered on 31 July 2014.

BE PLEASED TO TAKE NOTICE FURTHER that the findings of fact and/or rulings of law appealed against and the grounds upon which this appeal is founded are set out more fully below:

1. the learned judge erred in:

    1.1. finding that the applicants had *locus standi*;

    1.2. finding that the class of people which the applicants sought to represent had a constitutional entitlement that enjoined the court to interpret the provisions regarding a class action generously and expansively;

    1.3. finding that the class of members which the applicants sought to represent were victims of official excess and bureaucratic misdirection;

    1.4. finding that the facts of the present case were *"pattern-made"* for class proceedings and, by implication, that a class action is the most appropriate means of determining the claims of class members;

    1.5. finding (by implication) that the members of the class sought to be certified would not be able to vindicate their individual rights in the absence of the certification of a class action;

    1.6. finding that the papers filed of record identified a triable issue;

    1.7. finding that it was in the interests of justice for leave to be granted to the applicants to institute a class action in the present circumstances;

    1.8. granting judgment in favour of the applicants and, in particular, in granting leave to the applicants to institute a class action as

representatives of the members of the first and second respondents respectively against the fourth respondent;

1.9. ordering the fourth respondent to pay the costs of the application jointly and severally with the first and second respondents, the one paying the other to be absolved and for such costs to include the costs consequent upon the employment of three counsel.

2. The learned judge ought to have found that:

2.1. the applicants did not have *locus standi.* In this regard the learned judge should have found that the claims sought to be pursued by the applicants were derivative and not direct in nature and that the applicants had not set out facts or made allegations which would entitle them to pursue such claims. The decisions relied upon by the learned judge in support of his conclusion that the applicants were entitled to bring claims in their own names for the payment of sums of money to the first and second respondents were all cases in which pension fund members sought relief in their own right against the pension fund of which they were members. It is submitted the reliance by the learned judge upon s 38 of the Constitution to found locus standi was also misplaced. The applicants' case against the fourth respondent was not in fact based upon an alleged infringement of a right in the Bill of Rights and its application for the certification of a class action was squarely founded upon our courts' extension of the common law;

2.2. the applicants did not establish any constitutional entitlement on the part of the members whom they sought to represent. Their claims were instead based upon alleged statutory obligations owed to the

first and second respondents by the fourth respondent and misconduct on the part of the trustees of the first and second respondents, who were not joined in the application. In short, the applicants seek payment by the fourth respondent of a debt allegedly due by it to the first and second respondents;

2.3. the facts in the application were not *"pattern-made"* for class proceedings. On the contrary, since the relief sought by the applicants is in the form of declarators which, if successful, will indirectly be to the benefit of all of the members of the class sought to be certified, there is no advantage to the proposed class members in the certification of a class action. The applicants do not seek an order that moneys be paid to them, nor would any of the proposed class members be entitled to bring such claims were they to institute their own actions. Instead the applicants seek orders aimed at enforcing the payment of a debt allegedly due by the fourth respondent to the first and second respondents. For that reason alone, a class action will not be the most appropriate means of determining the claims of class members. If the applicants wish to share the costs of bringing their action against the fourth respondent between the other members or pensioners of the first and second respondents, they may do so by way of an appropriate agreement and without establishing a class. Indeed, since the relief sought by the applicants will not, if granted, result directly in any payment to the applicants or the proposed class, the certification of a class action will be of no assistance in the funding of the proposed action. Indeed, it is clear that a class action will be more expensive to conduct than an action brought by the applicants alone and would not bring any

compensatory benefits;

2.4. it was not common cause that the members which the applicants sought to represent were victims of official excess or bureaucratic misdirection. It is submitted that there was no basis upon which the learned judge could have made that finding on the papers;

2.5. the applicants' affidavits, read together with the draft particulars of claim, failed to identify a triable issue. The claims outlined in the applicants' affidavits were inconsistent with those outlined in the draft particulars of claim and were in any event legally unsustainable on the facts relied upon. It cannot be to the advantage of class members, or in the interests of justice, to certify an unsustainable action.

3. In the circumstances it was not in the interests of justice to have granted leave to the applicants to institute a class action and, the learned judge ought to have dismissed the application together with costs, including the costs occasioned by the employment of three counsel.

4. Leave to appeal is sought to the Supreme Court of Appeal in light of the fact that:

4.1. the decision appealed against involves questions of law and fact of great importance;

4.2. the administration of justice requires that the decision by His Lordship be considered by the Supreme Court of Appeal.

DATED AT SANDTON ON THIS THE 19th DAY OF AUGUST 2014.

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