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INTHEHIGHCOURTOFSOUTHAFRICA GAUTENG DIVISION, PRETORIA

Case No: 53351/2012

DATE: 8/9/2016

MICHAEL KITSODINGAKE Appellant

and

NATIONAL TREASURY REPUBLIC OF SOUTH AFRICA First Respondent

MINISTER OF FINANCE Second Respondent

CHAIRPERSON OF THE SPECIAL PENSIONS APPEAL BOARD Third Respondent

JUDGMENT

VAN DER WESTHUIZEN, AJ

1. This is an application for the review of the decision of the Special Pensions Appeal Board and the substitution of that decision with an order in terms whereof the applicant is entitled to an award of special pension in terms of section 6 of the Special Pensions Act, No. 69 of 1996 (the Act), for a period of twenty-seven years of full-time service.

2. The relief sought includes an order in terms of the provisions of section 7(1) of Act 3 of 2000 condoning the late institution of these proceedings.
3. In the alternative to the aforementioned relief, the applicant seeks an order remitting the matter back to National Treasury Republic of South Africa.
4. The applicant is Michael Kitso Dingake, a citizen of the Republic of Botswana, eighty-four years of age. He states that he served the African National Congress (ANC) and uMkhonto we Sizwe (MK) since 1952 until 1994, a period of 35 years, and during the struggle years in the fight against Apartheid.
5. The first respondent is the National Treasury Republic of South Africa. The second respondent is the Minister of Finance and the third respondent is the Chairperson of the Special Pensions Appeal Board. Only the first and second respondents oppose the application.
6. The Special Pensions Act came into force during December 1996. Section 1 thereof provides as follows:

“(1) A person who made sacrifices or served the public interest in establishing a non-racial, democratic constitutional order and who is a citizen, or entitled to be a citizen, of the Republic of South Africa, has the right to a pension in terms of this Act if that person-

(a) was at least 35 years of age on the commencement date; and

(b) was prevented from providing for a pension because, for a total or combined period of at least five years prior to 2 February 1990, one or more of the following circumstances applied:

(i) That person was engaged full-time in the service of a political organisation.

(ii) That person was prevented from leaving a particular place or area within the Republic, or from being at a particular place or in a particular area within the Republic, as a result of an order issued in terms of a law mentioned in Schedule 1 of this Act.

(iii) That person was imprisoned or detained in terms of any law or for any crime mentioned in Schedule 1 of this Act, or that person was imprisoned for any offence committed with a political objective."

7. The following qualifications stipulated in section 1 of the Act are to be met before a special pension can be awarded:
- (a) A person had to have made a sacrifice or have served the public interest in establishing a non-racial, democratic constitutional order; and
 - (b) Who **is** a citizen or who is entitled to be a citizen of the Republic of South Africa; and
 - (c) Who was at least 35 years of age at the commencement date of the Act; and
 - (d) Who was prevented from providing for a pension because of a total of combined period of at least 5 years prior to 2 February 1990, providing that person;
 - (i) Was engaged full-time in the service of a political organisation; or

- (ii) Was prevented from leaving a particular place or area within the Republic or from being at a particular place or in a particular area within the Republic as a result of an order issued in terms of a law mentioned in Schedule 1 of the Act; or
 - (iii) Was imprisoned or detained in terms of a law or for any crime mentioned in Schedule 1 of the Act or that person was imprisoned for any offence committed with a political view.
- 8. The applicant alleges that he met the circumstances mentioned in section 1(a) and 1(b)(i) and (ii) of the Act. In this regard, he alleges that he served the ANC and MK in various manners during the Apartheid era and was arrested during 1965 for political activities, charged for sabotage and terrorism and sentenced to 15 years imprisonment on Robben Island. He was released on 5 May 1981. Upon his release, he was repatriated to Botswana.
- 9. In 1992 the applicant entered into Botswana politics and also served in the National Assembly as acting MP. He is a founder member of the Botswana Congress Party and served as its president from 1998 to 2001. The applicant retired from politics in 2004 whereupon he became a weekly columnist for a newspaper in Botswana.
- 10. The applicant states that during his aforementioned trial, it was claimed by the Apartheid regime that he was a South African citizen, for reasons he did not and still does not understand. He still regards himself as a citizen of Botswana. This would disqualify the applicant. Nevertheless, a special pension was awarded to the applicant.
- 11. Sometime during 1999, the applicant applied in terms of section 6 of the Act for a special pension under Special Pensions number [SP0...] His application was partly successful. He received a

pension commencing on 1 July 1999, with arrears back dated to 1 April 1995. That pension was restricted to the period he was incarcerated on Robben Island, i.e. for a period of 15 years. This application for review is restricted to the other periods of service to the ANC and MK.

12. It is conceded by Mr Bishop, who appeared on behalf of the applicant, that the applicant does not comply with the requirement stipulated in section 1(b)(ii) of the Act. Mr Bishop further submitted that the applicant, having been awarded a special pension in respect of the years that he was imprisoned on Robben Island, only relies upon the requirement relating to being engaged full time in the service of a political organisation in respect of the further periods the applicant stipulates. This application is to be considered on that premise.
13. The applicant appealed the award to the Special Pensions Appeal Board, the appeal being restricted to the other periods of service to the ANC and MK. The applicant alleges that the award did not take into consideration his other alleged "full-time" periods of service in respect of the ANC and MK. In that regard, the applicant refers in particular to the services rendered by him whilst he was in Botswana after being repatriated. The applicant specifically relies on letters by one Jele and one Gilder.
14. In a letter dated 10 March 2011, the Special Pensions Appeal Board (Board) confirmed the award and dismissed the appeal. The reasons provided for the dismissal of the appeal were as follows:
 - (a) The appellant's political history does not indicate that he continued serving the **ANC/MK** after his release in 1981. In this regard, the Board relied on a letter from MK that indicates that his service to that organisation ended on his release from prison in 1981;

- (b) In so far as the letter of Gilder, relied upon in support of the allegations post release, the Board found that the service mentioned therein did not constitute full-time service of a political organisation;
 - (c) In respect of the alleged organising of routes for entering the territory of the Republic was found not to be on a full-time **basis**.
 - (d) The 15 years for which a pension was awarded, was found by the Board to have been reasonable in the circumstances.
15. The applicant alleges that the findings of the board were premised upon a misinterpretation of the Act; in particular with reference to what constitutes "engaged full-time".
16. Mr Bishop submitted, with reference to the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹ that the normal meaning of the phrase "engaged full-time" should not apply. He submitted further that the phrase is to be interpreted in the context it appears in the Act and with reference to the provisions of section 189 of the Interim Constitution of the Republic of South Africa.
17. The context in which the phrase "full-time" appears in the Act is to be considered purposively. That phrase appears in section 1 of the Act. Read in that context, the reference to "a sacrifice or have served the public interest in establishing a non-racial, democratic constitutional order", clearly requires an exclusive dedication, i.e. dedicating his/her life to the cause. This is supported by the requirement that the person applying for the pension was prevented from providing for a pension.

¹ 2012(4) SA 593 (SCA) [25] - [26]

18. It follows that once a person had "normal" employment in addition to serving the cause, such person was not prevented from providing for a pension.
19. In view of the foregoing, the phrase "engaged full-time" is to be interpreted to mean that the person applying for the special pension had dedicated his life to the cause and in so doing did not hold other employment that entitled him to provide for a pension. To hold otherwise, would undermine the requirement relating to being prevented from providing for a pension.
20. Considering the findings of the Board and its reasoning, dealt with above, it is apparent that the Board had applied the correct meaning to be ascribed to the phrase "engaged full-time".
21. The applicant bears the onus in proving that he was in full-time employment of a political organisation. The applicant did not provide cogent reasons for his averments in that regard. He failed to supply convincing facts to support his bald averments. Mr Bishop conceded that the letters by Messrs Jele and Gilder do not specifically provide proof that the assistance of the applicant constituted full-time service within the context of the meaning to be ascribed thereto. On the applicant's own version he held other "normal" employment. In this regard the applicant states in paragraph 67.1.2 of the founding affidavit:

"Many people in my position as ANC activists had to secure other forms of "normal" employment as a diversionary tactic during the struggle and also because the ANG paid no "salaries" to people involved in the struggle."
22. The mere listing of positions held, absent any proof that such positions required full-time engagement, is insufficient. Mr Bishop was constrained to submit that it is to be inferred that such positions

inherently required full-time engagement. Absent facts to support such inference to be drawn, it cannot be drawn. At most, it is speculative.

23. The information supplied by the ANC and MK as to the applicant's involvement with those organisations does not support the applicant's contentions. It confirms his membership. Mr Bishop urged me to find that the Board was, of its own accord, obliged to investigate what the true position **was**, the Board having the power to summons any party to testify or supply information to it. It is apparent from the answering affidavit by the first and second respondents that the Board in fact called for additional information. It is submitted on behalf of the applicant that that attempt by the Board was insufficient.
24. First and foremost, the applicant bears the onus of supplying the relevant information. He failed to do so. It is for the applicant to supply sufficient information in support of his application for a special pension. The information supplied by the applicant is insufficient and unconvincing. It lacks the required particularity to support the averments by the applicant.
25. It follows that the applicant has not shown cause to interfere with the Board's decision that is sought to be reviewed.
26. The applicant has further not shown reasons for the matter to be remitted to the Special Pensions Appeal Board.
27. The issue of condonation remains. The application for review of the Board's decision was filed outside the 180-day period prescribed. It was filed almost 18 months after the relevant date. In this regard the following is of importance.
28. On 2 September 2011, the applicant's lawyers addressed a letter to the first respondent requesting a certified copy of the letter indicating

the Special Pension Appeal Board's decisions and proof of postage or delivery thereof. This was required as there was "uncertainty" as to when the applicant received communication of the Board's decision. It is alleged that the respondents were unaccommodating in responding and that contributed to the delay in launching the required application for review within the period prescribed.

29. On 12 September 2012, the applicant launched this application. During July/August 2013 an amended notice of motion was served.
30. Ms Platt, who appeared on behalf of the first and second respondents, submitted that on the applicant's own version he was aware of the Board's decision by 12 April 2011 when the applicant addressed his dissatisfaction with the Board's decision to the Minister of Defence in a letter of that date. By 12 April 2011 the applicant knew of the Board's decision. The applicant did not require the information requested in the letter of 2 September 2011 referred to above to enable him to launch these proceedings. Ms Platt further submitted that when there was no response to the aforesaid request, the applicant could have and should have launched this application. All required information was available to the applicant.
31. When this application was launched on 12 September 2012, the applicant had known for 18 months what the Board's decision was as well as the reasons for that decision.
32. The applicant does not explain the delay other than suggesting that the respondents' unaccommodating conduct contributed to the delay. There is no merit in that contention.
33. It follows that for all of the foregoing it is not necessary to make a finding on the application for condonation. The application on the merits stands to be dismissed.

I grant the following order:

- (a) The application is dismissed with costs.


C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:
Instructed by:

M Bishop
Legal Resources Centre, Cape Town

On behalf of Fifth Respondent:
Instructed by:

A L Platt
State Attorney, Pretoria