



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 10448/2016

In the matter between:

NATHANIEL MASHILO MASEMOLA

Applicant

and

SPECIAL PENSIONS APPEAL BOARD

First Respondent

GOVERNMENT PENSIONS ADMINISTRATION

AGENCY

Second Respondent

JUDGMENT ON LEAVE TO APPEAL

MAKHUBELE AJ

Introduction

[1] I heard the main application in this matter in the urgent roll of 22 November 2016.

[2] I delivered an *ex tempore* judgment on 15 December 2016 and granted the following order;

" 1. The decision of the first respondent that was communicated to the applicant in a letter or a report dated 4 October 2016 in terms of which his appeal is dismissed is set aside and replaced with the following:

1.1. The appeal lodged by Mr Masemola dated 6 March 2015 in terms of which he seeks reinstatement of his Special Pension succeeds.

1.2. The special pension is reinstated with effect from the date of expungement of his criminal record which is 21 July 2011.

1.3. The respondents are to pay the costs of this application, jointly and severally, the one paying the other, to be absolved. "

[3] Despite having been notified, none of the parties' representatives were in court when I handed down the judgment.

[4] The respondents filed the notice of application for leave to appeal against the whole of my judgment and orders during January 2017. It is common cause that they had not, at that time, had sight of the judgment or reasons thereof.

[5] After the necessary corrections of the typed record of proceedings, the judgment was subsequently transmitted to the parties in early June 2017, a few before the application for leave to appeal was heard.

[6] The respondents did not supplement or vary their grounds of application for leave to appeal. I took this issue up with their Counsel,

Mr. Matebese during the hearing of this application. He indicated that due to the nature of the grounds of appeal, it was not necessary to have sight of the reasons for judgment.

[7] I do not necessarily agree with him, but this issue is not important because of the stance that I have adopted with regard to what I consider to be the real questions that I should consider in this application.

Grounds of appeal

[8] The grounds of appeal are in the main similar to the arguments that were advanced during the hearing of the main application. The main complaint now (although they did not have sight of my reasons for the judgment and order) is that the order has offended the principle of legality in that the courts are not authorised to interpret a statute to fill in gaps.

[9] It was submitted on behalf of the respondents that since there is no provision for reinstatement of a pension in the enabling statute, the powers of the court are limited to the remedies that are available therein.

[10] During oral argument, Mr. Matebese submitted that the clear intention of the legislature when enacting Section 1(8) of the Special

Pensions Act, Act 66 of 1996 ("the Act") was that, once the pension was revoked, it cannot be reinstated. Furthermore, courts do not have powers to fill in gaps in a statute.

Analysis

[11] I gave reasons for my judgment that the respondents have not dealt with in their application for leave to appeal for reasons indicated above. A copy of the transcript of the record of proceedings is attached herein as Annexure "A".

[12] I am not expected, at this stage to re-write or justify my reasons for the judgment.

[13] The decision of the first respondent with regard to the applicant's application for reinstatement of his special pension is contained in a letter /report dated 04 October 2016. The last paragraph reads as follows:

"11. It is noteworthy that the Act does not enable the SPAB to decide on matters of interpretation of the law.

The question whether expurgation effectively results in conviction, for all purposes, being deemed not to have taken place, can best be decided by a court of law. If the SPAB, in the instant case, were to pronounce on the reinstatement or otherwise of Masemola's pension benefit it would be overstepping its mandate as the Act is silent in this regard." Decision.

"In the result the appeal is dismissed."

[14] My understanding of paragraph 11 was (and still is) that the first respondent is informing the applicant that it does not have powers to decide whether he is entitled to reinstatement of his special pension or not because the issue involves interpretation of the law, which it is not empowered to do. This power (to interpret law), according to the first respondent, rests with the courts.

[15] The argument advanced on behalf of the respondents is that paragraph 11 is not the decision of the first respondent. I do not understand this denial because there is no other document in the entire record that expresses what the actual decision is. In fact what is stated in paragraph 11 of the letter was not new. The erstwhile Appeals Board arrived at the same conclusion.

[16] Mr. Matebese argued that the special pension was terminated by operation of law; therefore, it cannot be reinstated. There is no need for a decision to reinstate it because it was not terminated by a decision.

[17] The first respondent, so the argument goes, cannot decide on applications for reinstatement of a special pension because the Act is silent about the matter. It was also submitted that the courts have no powers to entertain the applications for reinstatement of special pensions.

[18] Should the interpretation that the first respondent seeks to give to the Act in as far as the dispute is concerned be correct, it means that the applicant has no recourse. His dispute cannot be entertained by any forum, be it the first respondent or the courts.

[19] I am convinced that the legislature did not intend such draconian consequences. It (the Act) makes provision for a right to a special pension and circumstances under which a recipient may be disqualified from receiving further payments. The question is whether the disqualification should stand even after the reasons for its imposition no longer exists. For instance, if the basis for the disqualification was a criminal conviction, what happens if the conviction is set aside?

[20] My view (in the judgment) was that the special pension could be reinstated if the reason for the disqualification no longer exists. This view is fortified by the fact that the legislature effected certain amendments to the Act during 2008 and made provision for establishment of the Appeals Board (the first respondent). The amendments also made provisions of the Promotion of Administrative Justice Act (PAJA), Act 3 of 2000 to be applicable to any administrative decision taken in terms of this Act.

[21] The decision to disqualify the applicant from receiving further pension after his criminal conviction was preceded by a letter to him in terms of which he was asked to make representations. Although there is no evidence that he took up the invitation, the special pension was stopped on the expiry of the date indicated in the letter.

[22] Mr. Matebese argued that no administrative action was taken, hence PAJA is not applicable.

[23] In my view, should the respondents be correct, the applicant's constitutional rights to access to justice and a fair hearing in an open forum are in jeopardy.

[24] Despite my confidence that my judgment is correct, I believe that the circumstances of this case are similar to cases where leave to appeal was granted on the basis that the issues involved interpretation of a statute that has a potential to limit the rights of individuals to access to justice.

Zondo J put it as follows in the matter of Links v MEC for Health, Northern Cape¹

“ *Jurisdiction*

[22] This Court has jurisdiction because the matter involves an interpretation of legislation that limits the applicant's right in terms of section 34 of the Constitution. **[14]** That is the Prescription Act. **[15]** The meaning that the court a quo attached to section 12(3) of the Prescription Act had the effect of preventing the dispute between the applicant and the respondent from being resolved by a court of law. The applicant challenges the correctness of that meaning. The provisions of section 39(2) of the Constitution should be borne in mind. Section 39(2) reads:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

The case also implicates the right to security of the person entrenched in section 12 of the Constitution. **[16]**

¹ 2016] ZACC 10

I omitted the footnotes in the judgment

Leave to appeal

[23] It is in the interests of justice that leave to appeal be granted. This matter is about the correct interpretation of section 12(3) of the Prescription Act. ..."

[25] Although there was no evidence before me, I am of the view that the outcome of this matter will not just affect the applicant, but all recipients of the special pension and possibly others whose rights may be taken away by the very statutes that conferred them.


[26] I believe that this application for leave to appeal should succeed because the dispute between the parties involves interpretation of a statute that, on the version of the respondents gives and takes away rights without affording the individual concerned an opportunity for a hearing, and furthermore, denies him/her a right to approach the courts for appropriate relief.

[27] What I have stated above constitute compelling reasons, as contemplated in Section 17(1) (a) (ii) of the Superior Courts Act, 10 of 2013, and for those reasons, I am of the view that this matter deserves the attention of the Supreme Court of Appeal.

[28] Accordingly, I make the following order;

[28.1] The application for leave to appeal is granted to the Supreme Court of Appeal.

[28.2] Costs of this application will be costs in the appeal.



MAKHUBELE AJ

ACTING JUDGE OF THE HIGH COURT

Application heard on: 30 June 2017

APPEARANCES:

APPLICANT:

ADVOCATE FERREIRA

Instructed by:

Norton Rose Fulbright South Africa Inc.

RESPONDENTS:

ADVOCATE ZZ MATEBESE, with

ADVOCATE MX SHIBE

Instructed by:

Msikinya Attorneys and Associates