IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED.

DATE 22/3/2018 SIGNATURE

22/3/18

Case Number: 31082 /2015

In the matter between:

VUSI ELGIEN NDHLOVU	Plaintiff
And	
ESKOM PENSION AND PROVIDENT FUND	First Respondent
PENSION FUNDS ADJUDICATOR	Second Respondent
HOPE MIRRIAM SHABANGU	Third Respondent
GABISILE PRECIOUS MAKHOBA	Fourth Respondent

GZANELE UNIVERSE MAKHOBA Fifth Respondent

JUDGMENT

NOWOSENETZ AJ

[1] This is a review application brought by the applicant to set aside the second allocation of pension benefits made by the first respondent dated 24 June 2015. The first allocation was set aside and remitted to the first respondent in a determination by the second respondent. The applicant requests the court to make an equitable determination of pension benefits to him rather than remit the matter back to the first respondent. In his founding affidavit the applicant states that part of the relief sought is a declaration that the pronouncement by the second respondent that it could no longer entertain any further correspondence with the applicant was premature and that it should have issued an interim order. Reference is made to part B of the applicant's notice of motion which does not exist. Only the first respondent actively opposed the application. The applicant sought condonation for the late period of 180 days for the filing of the review as provided in s7 (1) of the Promotion of Access to Administrative Justice Act 3 of 2000 (PAJA).

Background

[2] The applicant's father (the deceased) was a member of the first respondent. The deceased divorced the applicant's mother who was excluded from any pension benefits in the divorce. The third respondent was the wife of the deceased by customary law and the deceased nominated her in his pension as a 100 % beneficiary. The fourth and fifth respondents were the daughters of the sister of the deceased who according to the investigations of the first respondent received cash support from the deceased for their schooling. The first respondent was unaware of the applicant's existence until he challenged its first allocation. The first respondent purporting to exercise its functions in terms of section 37 C of the Pension Funds Act 24 of 1956(PFA) made an allocation of pension benefits of the deceased on 13 March 2012 as follows:

Third respondent	60%
Fourth respondent	20%
Fifth respondent	20%

[3] At the time of the death of the deceased the applicant was incarcerated. Upon his release and upon finding out about this allocation of the benefits by the first respondent, the applicant objected and expressed his dissatisfaction to the first respondent. He was advised that on the facts available it had acted fairly and equitably, that the benefits had been paid out and it could not change its decision. He then lodged a complaint with the second respondent. A determination was made by the second respondent in which it set aside the allocation by the first respondent and remitted the matter for reconsideration. A further

investigation was then conducted by the first respondent and it made a second allocation as follows:

Applicant	20%
Third respondent	60%
Fourth respondent	10%
Fifth respondent	10%

[4] The first respondent objected to the condonation application and also raised a point in limine that the applicant had failed to exhaust his remedies.

Extension of time limits and condonation

[5] Condonation is only sought in respect of the review application against the first respondent Section 7 (1) of of the Promotion of Access to Administrative Justice Act 3 of 2000 (PAJA) prescribes the time limits and requirements for bringing a review in terms of section (6) (1) . It is not in dispute that PAJA is applicable to this review and indeed this so. Both the first second respondents are public bodies exercising a public function and their decisions constituted administrative action. The review proceedings in terms of section 7(1) must be instituted without unreasonable delay and within a period of 180 days either (a) from the conclusion of internal remedies or (b) where no such remedies exist from the date when the party was informed or should reasonably have been

expected to be informed of the administrative action. This application was served on the first respondent on 2 June 2016. The applicant stated that he first became aware of the letter notifying him of the outcome of the second allocation on 17 August 2015. The application is in excess of 100 days late. He said that he first approached the first respondent for an explanation but was sent from pillar to post. He approached his attorneys in October 2015 but was required to pay a deposit for fees. He had already received funds from the first respondent but he says he was reluctant to use them. He was only able to pay apportion of the fees on 1 April 2016. The first respondent submitted that he made no effort to apply to extend the period by agreement between the parties for bringing the review as contemplated in section ((1) of PAJA. He also did not explain what circumstances changed to enable him to make a payment in April 2016.

[6] Condonation is a discretion to be exercised according the interest of justice. This is succinctly elucidated as follows:

> 'The standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.' *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC);

Exhaustion of remedies

[7] Section 7 (2) (a) and (b) of PAJA are stringent in providing that a court must direct a person to first exhaust any internal remedy before instituting review proceedings. There are two aspects to the remedies in terms of the PFA. The first remedy lies in terms of section 30A whereby a party can lodge a complaint with the board of a fund and if the complainant is not satisfied with the response to the complaint, to be given in 30 days, the complainant may lodge a complaint within 30 days for adjudication by the Pension Funds Adjudicator (second respondent). Furthermore the adjudicator can condone non compliance with any time limit or extend the period for filing the complaint. It was submitted by Mr Khumalo on behalf of the first respondent that the applicant was entitled to file a complaint to the adjudicator against the second allocation of the first respondent. Indeed the applicant was well aware of this remedy because he had previously utilized it to successfully set aside the first allocation. He gave no explanation why he disregarded what is a much simpler, quicker cheaper and more accessible option.

[8] The second aspect relates to a complaint against a determination of the adjudicator. In the covering letter to the second respondent's determination it was stated:

> 'We advise that once a final determination has been handed down in a matter we can no longer entertain further correspondence with the parties.
>
> Should a party feel aggrieved with the outcome of the determination, we suggest that the party refer to section 30 P of the Pension Fund Act 24 of 1956.'

[9] This section provides that any party who feels aggrieved by a determination of the adjudicator may within six weeks after the date of the determination apply to the division of the High Court which has jurisdiction for relief. The court may make any order it deems fit. The applicant did not pursue this option either.

Findings

[10] The failure of the applicant to comply with section 30 A remains unexplained. He used this self same procedure to challenge the first allocation by the first respondent. The second respondent was functus officio in making its determination and cannot be criticised by the applicant in refusing to enter into any further correspondence. It properly advised the applicant of his remedy which he failed to exercise. Purely on the basis of section 7 (2) the application cannot succeed. The first respondent is a specialist body with investigative powers and is par excellence suited to adjudicate pension benefits.

[11] The applicant's explanation for his delay is unconvincing. Nor can the condonation application be viewed in isolation from his wilful failure to follow the internal remedies and the lack of prejudice to him in being non suited in this court. Without assessing the prospects of success it suffices to say that the grounds of review were vague and unspecified as to the irregularities or misdirections committed by the first and second respondents. He contends that the nieces of the deceased were not dependants whereas he, as the son of the deceased, is entitled to a greater share. The merits do not assist him in outweighing the above factors.

The following order is made:

1. The application is dismissed with costs.

L. NOWOSENETZ

ACTING JUDGE OF THE HIGH COURT

CASE NO: 31082/16

HEARD ON: 16 MARCH 2018

FOR THE PLAINTIFF: SSE SAMBO (ATTORNEY)

INSTRUCTED BY: G MALATJI INC

FOR THE DEFENDANT: ADV S KHUMALO

INSTRUCTED BY: LEKHU PILSON ATTORNEYS

DATE OF JUDGMENT: 22 MARCH 2018