

SOUTH AFRICA / JUDGMENT

Masemola v Special Pensions Appeal Board and Another (10448/16) [2016] ZAGPPHC 1253 (15 December 2016) [2016] ZAGPPHC 1253

COURT

North Gauteng High Court, Pretoria

BEFORE

Makhubele

CASE / FILE NUMBER

10448/16

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED.

CASE NO: 10448/16

DATE:

2016/12/15

In the matter between

NATHANIEL

MASHILO

MASEMOLA

APPLICANT

and

SPECIAL

PENSIONS APPEAL BOARD

1ST RESPONDENT

GOVERNMENT

PENSIONS ADMINISTRATION AGENCY

2ND RESPONDENT

JUDGMENT

MAKHUBELE (AJ): I heard this matter In my urgent roll of 22 November and I undertook to deliver the judgment at the end of the roll or as soon as possible in this term because there would be no sense in reserving it for longer than two or three weeks. I made a

determination

that the matter was urgent and I subsequently heard the parties.

Both parties were represented by counsel. For the applicant was Mr Ferreira instructed by a firm of attorneys Norton Rose Fulbright

South Africa Inc. For the respondents was Mr Matebese instructed by the State Attorney, Pretoria. I requested my Registrar on Tuesday to advise the parties by telephone that I would be delivering this judgment today at 14:00 and that because it is an ex tempore judgment, somebody should come to note the reasons. It is now 14:00 and there is no appearance for both the parties.

I was informed by my Registrar that he telephoned the office of the applicant's attorneys and he spoke to one Adele. He did not ask her surname. That was on Wednesday. I think that is when he ultimately got hold of them because the instruction, as I indicated, was given earlier. With regard to the office of the State Attorney, he says that he spoke to one Grace. He did not request or ask for further details.

There was counsel (Mr Mothibe), in court earlier, and he indicated that he apparently knew something about the matter. He initially

indicated that he was going to wait and note the judgment but when I look up now he has disappeared. I cannot postpone handing down this judgment because the parties were duly notified.

The relief sought in the notice of motion is for abridgment of rules relating to service and time periods. I have already indicated that I declared the matter to be urgent. The substantive relief sought is only against the first respondent, namely, that the decision that it took on 5 October 2016, that it is not competent to take a decision regarding the reinstatement of the applicant's special pension be aside and replaced with a decision to reinstate his special pension. That is paragraph 2.1 of the notice of motion. In paragraph 2.3, the applicant seeks "further and/or alternative relief". I am mentioning this because there was a submission during argument that in the event that I do not find for the applicant with regard to prayer 2.1, I should grant alternative relief because it is supported by evidence that is in the papers filed. The support for the argument for alternative relief is in paragraph 12.3 of the founding papers. It reads as follows;

"I, therefore, request in terms of section 8 (1)(c)(ii)(aa) of PAJA, that the Honourable Court review and set aside the First

Respondent's latest decision and substitute, in its place a decision reinstating my special pension and/or in terms of section 8 (1)(d) of PAJA declaring my rights in respect of this matter."

The reasons why I am requested to substitute this decision are stated in paragraph 12,4 of the founding affidavit. I will deal with it later,

I must state from the outset that on a reading of the Special Pensions Act, as amended, the second respondent, Government Pensions

Administration Agency (GPAA) and National Treasury are designated institutions as contemplated in section 7. This is important in view of the respondents' contention, as it will appear later in my judgment, that the first respondent is only entitled to hear appeals on decisions made by designated institutions and that in this instance there is no such decision. I must also at this stage state that this submission is wrong as there is a decision that was made by the second respondent and it is that decision that the applicant appealed against to the first respondent. I will refer to this decision later on.

Mr Matebese, counsel for the respondents, argued that since the special pension was terminated by operation of law, the applicant

should not have appealed but simply approached the designated institution with the Presidential pardon and request reinstatement of the pension. Well, on the evidence before me, this is exactly what Mr Masemola did and there was a refusal in the letter that I will refer to later on. He then appealed to the first respondent. With this sequence of events there is no merit in the argument that the first respondent could not hear the appeal because there was no decision of the designated institution.

With that out of the way, now I wish to state the common cause issues or rather the chronology of the matter. The applicant is an 89 year old man. He qualified and was awarded a special pension in terms of the Special Pensions Act, Act 69 of 1996, as amended on December

1997. I will refer to it as the Act. Years later, to be specific in April 2001, he was convicted of several counts of fraud and sentenced to five years imprisonment. He served six months of that sentence.

The Special Investigating Unit that investigated the fraud allegations then wrote a Letter to the Special Pensions Appeal Board.

This letter is dated 8 March 2007 and briefly in this letter the special investigating unit or SIU, informed the Chief Executive

Officer of the Special Pensions Board that it had information that Masemola, or the applicant, is receiving special pension in

contravention of section 1 (8) of the Act. Section 1 (8) of the Act provides, amongst others, that:

"A person who would otherwise have qualified for a pension in terms of the Act is disqualified if after making the sacrifice or serving the public interest in the course of establishing a democratic constitutional order that person either actively engaged

in actions calculated to undermine the efforts to establish a non-racial democratic constitutional order, or was convicted of a

crime after 2 February 1990."

It is common cause that Mr Masemola was convicted of a crime and in terms of section 1 (9) the crime of which he was convicted fell under this prohibition.

The SIU recommended to the CEO of the Special Pensions Board to put this information to Mr Masemola and ask him, or call on him to submit written representations to the Unit (which is the SIU) on behalf of the Board as to why the Board should not find that by virtue of the aforementioned conviction, he was not entitled to a special pension and why he should not be called upon to repay the benefits that he had already received to date, in addition to having his special pension cancelled.

Indeed and in the letterhead of the National Treasury, the acting CEO of the Special Pensions Board wrote to Mr Masemola on 7 April 2008 and basically repeated what the SIU had said, namely, that he had been convicted of a schedule 1 offence for fraud and that this is in contravention of section 1 (8) of the Act and consequently is disqualified from receiving any further special pension payments. He was asked to indicate whether this information was accurate or not by 1 June 2008 failing which his pension would cease immediately. There is no evidence as to whether he took up this call to make submissions, but what is common cause is that indeed his pension was stopped.

Later on and specifically in 2011, he applied and received a Presidential pardon in respect of his convictions on 2 April 2001 on five counts of fraud. The President's Minute pardoning him is dated 21 July 2011. It reads:

"President's Minute 169:

By virtue of section 84 (2)U) of the Constitution of the Republic of South Africa 1996, hereby pardon NATHANIEL MASHILO MASEMOLA in respect of his convictions on 2 April 2001, on five counts of fraud. The convictions shall be expunged from his SAP69 by way of endorsement.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria on this 31st day of July 2011."

It is signed by the President. I cannot make out who the President was at the time, as there is no name. It is also signed by the Minister of Justice and Constitutional Development, J Hadebe.

He then obtained a Clearance Certificate from the South African Police which is undated. I cannot see the date, but it is stamped and simply states that it certifies that there are no convictions that have been recorded for any crime in the Republic of South Africa against NATHANIEL MASHILO MASEMOLA. Armed with this, he then attempted to obtain a re-instatement of his special pension. It appears from the record, as I have already indicated, that there was a request to the GPAA to reinstate the pension and a decision to that request was made.

I do not have the request in the record, but in his notice of appeal he refers to a letter that he received on 23 February 2015 from the second respondent and he quotes a paragraph from that letter. This letter is also referred to in the decision of the first respondent that is now under review. If I may just read that letter from the second respondent:

"The disqualification of Mr Masemola, [Appellant], from receiving special pension occurred prior to him receiving pardon from

the President and as such is legally valid. Section 84 (2)U) of the Constitution of the Republic does not have retrospective effect . and therefore his special pension cannot be reinstated. The expungement is relevant to the removal of records and his future interactions with civic society and cannot affect the past or undo the past. I therefore regret to inform you that the decision to disqualify Mr Masemola [appellant] from receiving Special Pensions was validly taken based on the facts c1t the time, it remains in force and effect because there is no reason in law for a pardon or expungement to operate retrospectively. It does not undo events that happened or invalidate decisions taken prior to the granting of the pardon or expungement"

Having tried to obtain an audience from the second respondent, and even the first respondent, and not getting any joy, he then

c1pproached this Court and on 8 August 2016, my brother Fabricius J issued an order in which paragraph 1 reads as follows:

"The First Respondent is ordered to make a decision regarding the Applicant's appeal for reinstatement of his special pension, and communicate that decision by email to the Applicant's attorneys of record to the email addresspatrick.bracher@nortemrosefulbright .com within 15 days of the Court Order."

In paragraph 2 the respondents were ordered to pay the costs jointly and severally the one paying the other to be absolved. The respondents in that matter were; the Special Pensions Appeal Board, the Government Pensions Administration Agency and the Director- General of National Treasury.

Events after this order of Fabricius J indicate that it took longer than 15 days for the first respondent to make a decision. Part of the reasons given was that the term of office of the Board had ended. This was communicated to the applicant's attorneys by email on 16 September 2016.

But before this email, a letter was. written to the applicant on 8 September 2016 and on a reading of this email, which I am going to read into. the record, it appears that the appeal was actually considered by the erstwhile Board on 2 July 2015. This letter of 8 September 2016 from one Lokanyo Langa advises the applicant certain things. In fact, it actually just gives a history of the matter and the last paragraph reads:

"On the 2nd July 2015 your notice of appeal was placed on the roll of the. SPAB. Upon deliberation of the sitting, the SPAB was of the opinion that a letter dated 7 April 2008 addressed to you was not a decision of the Special Pensions Authority. It was in their opinion a letter informing you of necessary actions taken as a result of information that had come to light long after your special pensions had been approved. The SPAS was further of the opinion that there being no decision of the lower authority made after 10 December 1997, there can be no appeal, refer to the attached email communication between members of the SPAS and Manager: SP Appeals."

The email referred to was that letter written by the then chairperson of the Special Pensions Appeal Board one Mr Sungaree Pather. It is dated 2 July 2015 and addressed to Nndwadkulu and copied to Bongitte Shabalala and Hassen E. The subject matter, "Masemola SP 63193." It actually says what the letter that I have just read says. The last paragraph reads:

"For the record, this is a matter involving an interpretation of the law, which means that the ordinary Civil Court has jurisdiction."

This is the decision of the Special Pension Appeal Board whose term has apparently ended.

In the email of 16 September 2016, the applicant's attorneys were assured by one Esti de Witt, seemingly of second respondent's office that the decision as per the judgment of my brother Fabricius J must be made by 14 October 2016. The new Board was constituted and it met and considered the applicant's application for reinstatement of his pension. I am reading from a document in the letterhead of National Treasury, dated 07 October 2014 the decision of the Special Pensions Appeal Board, which was signed by the Chairperson and countersigned by two members.

Of importance in this decision, is that in paragraph 1, it acknowledges that the appeal before it was considered by the previous

Board on 23 February 2015, but it does not say or state what the decision then was. Also of importance in this report or decision is paragraph 7, which reads:

"On B May 2014, Mr Masemola addressed a letter to GPAA requesting that his special pension, be reinstated."

And in paragraph B it says:

"The GPAA wrote a response to Mr Masemola's letter stating that.."

I have already quoted this letter. In paragraph 10 the Board purports to analyse the application of Masemola and it says:

"The crux of the Appellant's argument is that the expurgation of his criminal record made him eligible to have his Special Pension benefits reinstated. He states that..."

They then quoted what is in the applicant's application or appeal where he had stated that:

"According to the Constitutional Court in the *Citizen 1978 [Pty] Ltd and others v McBride, Johnston and Others as amicus curiae* 2011 JOL 2708 (CC), a pardon expungement (sic) effectively results in the conviction, for all purposes, being deemed not to have taken place. This indicates that the pardon and expungement (sic) expunges the conviction and reason not to pay the Appellant a special pension."

In paragraph 11 of this decision there is no indication of the deliberations that happened except the purported analysis in paragraph 10 which simply states what the issue is. I think it is necessary to read paragraph 11 where the Board stated:

"It is noteworthy that the Act does not enable the SPAS 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 SPAS, 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."

The letter is dated 4 October 2016 and as I have already indicated, it is signed by the Chairperson and two members of the Board.

Mr Matebese in his submissions disagreed with me when stated that it appears that the reasons for this decision are what is stated in paragraph 11. I will deal with this later.

Next issue; the respondent opposes the application and as far as the answering affidavit goes, the grounds of opposition are actually very crisp. There appears to be three main grounds of opposition. The first ground of opposition is that section 8 of the Act makes it clear that the right of appeal to the Board is only limited to an appeal against decisions of the designated institution by a person who disagreed with the decision of the designated institution. This is repeated throughout the answering affidavit. The gist being that section 8 is not applicable.

In paragraph 32.2 again reference is made to section 8. According to the respondents, the Board only possesses the power or authority to decide appeals against decisions of the agency or the designated institution. It is submitted that where no decision has been taken by a designated institution in respect of a certain issue; the Board does not have the power or authority in terms of the Act to decide any appeal. I have already dealt with this ground of opposition, I think a few minutes into my judgment I have already said there is no merit in this argument because in terms of section 7 of the Act, the Government Pensions Administration is a designated institution as well as National Treasury. I have already referred to a letter that was written by this agency to Masemola where he was told that the fact that his criminal record has been expunged does not

entitle him to reinstatement of his pension and that expungement of a record has no retrospective effect.

This letter is also referred to by the Board in their decision and as such, it is clear that there is a decision or there has been a decision by a designated institution. The designated institution, having told Masemola what it thinks about his application for

reinstatement of the pension, he was entitled to note an appeal to the first respondent. So this argument by the respondent that there was no decision to appeal against has no merit.

The second ground of opposition is rather strange, well maybe not strange for the respondent because it deems it to be fit to be a ground to oppose this application. In paragraphs 18 and 19 of the answering affidavit, an argument is made that section 6

- (1) of PAJA provides for review of an administrative action and that only administrative action as defined in PAJA can be reviewed in terms thereof. The argument during oral submissions in this regard was that PAJA has no application in this matter. Again, there is no merit in this ground of opposition.

The third ground is that the Act does not provide for a right of reinstatement of a pension. I will deal with this when I refer to the oral submissions that were made by Mr Matebese. There is no merit in the two grounds that I have already indicated. The question is whether there is any merit in this last standing ground that has been advanced by the respondents.

Counsel for the applicant, Mr Ferreira, relied, firstly, on the amendment to the Act that was effected in 2008. This amendment was to make PAJA applicable to the decisions of the Board or the Special Pensions Board. Refusal to make a decision or failure to act is such administrative action. He referred me to several matters such as *Vulindlela Furniture Manufacturers [Pty] Ltd v MEC, Department of Agriculture* 1998 (4) SA 908 (Tk). The applicant contends that the effect of a Presidential pardon is that once a person is pardoned then there is no reason why the acts for which he has been pardoned should hold him back with regard to benefits that he would otherwise be entitled to. Although there is no indication in the Act that a pension that has been revoked can be reinstated, the applicant contends that when one looks at this 2008 amendment of the Act, PAJA

would be applicable.

A person whose pension has been revoked would be entitled to be heard for the decision maker to consider whether it should be

reinstated or not. He referred me to many other cases that due to time constraints I will not refer to but the issue here is that the Special Pensions Appeal Board has misunderstood its mandate and that its decision in prayer 2.1 that it has no jurisdiction should be reviewed and set aside.

The respondents' counsel on the other hand was happy that there was a concession that what happened in 2008 (stopping of the pension) was not a decision but operation of law and that if you look at prayer, 2.1, which says that the first respondent is not competent to make a decision regarding the reinstatement of the pension, I should dismiss this application.

The last standing ground is whether there is any provision in the Act for reinstatement of a pension once it is revoked. Mr Matebese says his right was taken by the statute. He urged me to interpret the Act in line with the principles enunciated in the Supreme Court of Appeal judgement in the matter of Natal Joint Municipal Pension Fund V Endumeni Municipality 2012 (4) SA 593 (SCA).

According to Mr. Matebese, there is no way I can interpret or should interpret this Act to say anything else other than that once a pension is revoked, there is no way it can be reinstated.

According to Mr Matebese the drafters of the Act did not provide for reinstatement of a revoked pension. So, the Act must be interpreted

to mean that there cannot be a reinstatement. Presidential pardon is a process that was made long before the enactment of this Act and one cannot assume that the drafters of the Act were not aware that there could be circumstances where applicants would want their revoked pensions to be reinstated. With reference to the McBride judgment that the applicant relies on, Mr Matebese's submission is that yes, there can be expungement of a criminal record or a pardon, but, not to the extent of undoing the historical facts and that the first respondent was right when it said it has no jurisdiction.

There was a bit of a dialogue between me and Mr Matebese with regard to the points raised in paragraph 11 of the decision and his view is that those points are not the reasons for the decision. The fact of the matter, he argued, is that the Board has no jurisdiction. On a question as to what is the decision, or reasons for it, Mr Matebese says it is what is stated in the notice of motion, the issue of jurisdiction.

I then enquired from the parties that if I agree with Mr Matebese with regard to prayer 2.1 on the facts, and if I find that indeed the Board has no jurisdiction to entertain the appeal of the applicant, what then happens to the applicant's dispute. Does it mean that the applicant has no remedy and I should dismiss this application? The applicant's counsel, Mr Ferreira, submitted that I should then look at prayer 2.3 which is further and/or alternative relief.

I have already indicated that this submission is based on the allegation in paragraph 12.3 of the founding affidavit to the effect

that because the first respondent has misconstrued its mandate I should then assume the responsibility of making and substituting its decision for reasons that it has failed to take a decision for years despite all his efforts and having been ordered by Fabricius J to do so,, The applicant should not be faced with a situation where he has to go back to the first respondent or the agency (second respondent) as Mr Matebese has suggested that there is no need for an appeal.

Now, having stated all this, and having considered the Act, the various correspondence and decisions that have been taken or communicated to the applicant, the question that I have with regard to prayer 2.1 is whether the first respondent's view that it cannot interpret law is correct, or does it mean that it misconstrues its role and function.

The Act, as I have already indicated, makes provision for termination of a special pension on certain grounds. It also makes provision for appeals to the first respondent on decisions taken by the designated institution. I have already indicated that the second respondent, which is the designated institution, did make a decision on whether Presidential pardon entitles the applicant to reinstatement of his special pension. It is this decision that first respondent was called upon to adjudicate on and in my view, the first respondent is not correct that it does not have jurisdiction to decide on the issue of whether expungement of a criminal record has the effect of, or would entitle the applicant to reinstatement of his special pension. Its agency, which is the second respondent, has already made a decision and all that the first respondent had to do was to decide whether that decision was Correct or not.

I agree with the applicant that the first respondent does not understand its mandate or role or function on whether expungement

would entitle reinstatement. As for Mr Matebese's argument that the Act did not foresee that, I do not agree with him. When one considers the purpose of the Act, or the purpose for which this pension is granted and one also considers the purpose of a Presidential pardon, these two cannot be seen in isolation. With a Presidential pardon, with no criminal record to his name, taking into account the. purpose of the Act, Masemola would be entitled, even on a fresh application to a pension in terms of this Act.

Just to piggyback on the argument of Mr Matebese that the applicant did not have to appeal but simply approach the second respondent,

then if this argument is correct, on the evidence before me Mr Masemola did just that. He approached the second respondent armed

with a Presidential pardon and that is when he met this argument or decision that a Presidential pardon does not entitle him to

reinstatement of his pension.

Under the circumstances, I am of the view that this decision of the first respondent that it cannot interpret law as law can only be interpreted in court cannot be correct. The Act makes provision for revocation of a special pension on certain grounds and , looking on those grounds, one cannot say that there is no law involved. If, after revocation of a pension, one comes back and say that he no longer have a fraud conviction, whether after successfully appealing that conviction or for whatever reason, and with the applicability of PAJA having been introduced into this Act, it means that the Appeal Board must sit and consider the issues that are presented to it. There would be no purpose for the legislature in 2008 long after this Act was passed, to introduce section 29A into this Act.

Consequently, my view is that this decision in as far as it says the Board has no jurisdiction to decide on this issue is wrong and falls to be set aside. The question is, having set it aside what should I do, should I refer this matter back to the first respondent? I have already stated that the applicant has made submissions that I should substitute this decision.

In my view, there exist special circumstances from what has been submitted by the applicant that this Court must or should or can make or substitute this decision. I have referred to the various letters, to and from the second respondent to the previous Board, various officials and no one seems to know what exactly they are doing. The issue in dispute does not require some specialised investigations that only the Board can undertake. The evidence is there. On a proper reading of the Act, its purpose and the subsequent introduction of PAJA in the decision making process, I am of the view that the pension should be reinstated. Even if it were a fresh application Mr Masemola would, in my view, be entitled to this Special Pension.

Accordingly, the decision of the first respondent falls to be set aside. I now make 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 was 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, one paying the other to be absolved.

MAKHUBELE AJ

ACTING JUDGE OF THE HIGH COURT

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