

SOUTH AFRICA / JUDGMENT

## National Treasury v Jozana and Others, In Re: Jozana v National Treasury and Others (24969/2014) [2015] ZAGPPHC 847 (23 October 2015)

[2015] ZAGPPHC 847

COURT

North Gauteng High Court, Pretoria

BEFORE

TM Makgoka

CASE / FILE NUMBER

24969/2014

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 24969/2014

Not Reportable

23/10/2015

In the matter between:

NATIONAL TREASURY Applicant

and

CHRISTOPHER JOZANA First

Respondent

GOVERNMENT PENSIONS ADMINISTRATION AGENCY Second Respondent

GOVERNMENT EMPLOYEES PENSION FUND Third

Respondent

SOUTH AFRICAN SOCIAL SERVICE AGENCY Fourth

Respondent

MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT Fifth

Respondent

MINISTER OF SOCIAL DEVELOPMENT Sixth

Respondent

In Re:

CHRISTOPHER JOZANA Applicant

NATIONAL TREASURY First

Respondent

GOVERNMENT PENSIONS

ADMINISTRATION AGENCY Second

Respondent

GOVERNMENT EMPLOYEES

PENSION FUND Third

Respondent

SOUTH AFRICAN SOCIAL SERVICE AGENCY Fourth

Respondent

JUDGMENT (Application for leave to appeal)

MAKGOKA, J

[1] This is an application for leave to appeal against an order of this court granted on 18 May 2015. It is brought by National Treasury, which was the first respondent in the main application. It is opposed by Mr Jozana, the applicant in the main application, who is now cited as the first respondent in this application. The main application concerned the termination of Mr Jozana's special pension.[1] The order sought to be appealed against is in the following terms:

1. The decision of the first respondent made in April 2012 to terminate the applicant's special pension is reviewed and set aside;
2. Should it wish to terminate the applicant's special pension, the National Treasury shall notify the applicant of its intention to do so by registered mail or any other mode of transmission designated by the applicant, and the National Treasury's letter dated 23 March 2012 shall serve as a proper notice to the applicant;

3. The date on which the National Treasury informs the applicant as envisaged in (2) above, shall serve as the effective date of such notice, and the applicant shall have 60 (sixty) court days to make representations referred to in the said letter;
  4. The National Treasury shall allow the applicant a reasonable opportunity to make representations before making the decision to terminate his special pension, as more fully set out in the National Treasury's letter dated 23 March 2012;
  5. Pending finalisation of the above process, the applicant's pension shall be re instated with retrospective effect to 1 May 2012.
- [2] The National Treasury has raised essentially four grounds for appeal. First, that the termination of Mr Jozana's pension happened by operation of law and that no entity took the decision to terminate it. Second, that the letter sent to Mr Jozana dated 23 March 2013 could not have created a legitimate expectation on his part as he did not receive it. Third, that the court erred in finding that the correct address for Mr Jozana at which the letter referred to above, was supposed to be send, was in Durban. Fourth, that the court erred in directing the National Treasury, instead of the second respondent, the Government Pensions Administration Agency (the GPAA) to undertake the procedure laid down in the order referred to in para 1 above.
- [3] I propose to consider the application for leave to appeal under two headings. First, whether the order sought to be appealed against, is appealable. Second, whether National Treasury is the wrong entity to have been directed to undertake the procedure in the court order.

Is the order appealable?

- [4] The appealability of a court order depends, among others, on whether it has a final and definitive effect. In *Zweni v Minister of Law and Order*[2] Harms AJA observed that a non appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[3]
- [5] As explained by Schreiner JA in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*[4]

'[A] preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to "dispose of any issue or any portion of the issue in the main action or suit", or, which amounts, I think, to the same thing, unless it "irreparably anticipates or precludes some of the relief which would or might be given at the hearing.'[5]

- [6] In the present case, it is clear that the order which is sought to be appealed against, is neither final, whether in form or in fact, and does not dispose of any issue of substances between the parties. To make it absolutely clear, the order was preceded by the following remark:

'To state the obvious, the conclusion I have arrived at constitutes no finding on the substantive issues between the parties. The rights of the parties have not been determined in this application. The judgment only relates to the procedural aspects. It might well be that the National Treasury is entitled to terminate the applicant's pension. But that can only be achieved through an administratively fair procedure. '[6]

[6] I therefore conclude that the order as it stands, is not appealable.

Is the National Treasury the wrong entity to be directed to comply with the court order?

[7] The National Treasury contends that it only administers the Act, and the GPAA is the entity designated in terms of the Act to provide for the payment of the special pensions. Accordingly, it is argued, it is the GPAA which should be directed to follow the procedure laid down in the court order, and not the National Treasury. It is further stated that in terms of the Act, the National Treasury 'cannot provide for special pension and thus the order is unenforceable' as against the National Treasury.

[8] This argument is misplaced, and premised on a misconstruction of the court order. The court order does not direct the National Treasury to 'provide for pension' to Mr Jozana, which is a substantive issue between the parties. As explained in para 7 above, the judgment made it plain that no rights of the parties are determined by the order. All what the order directs the National Treasury to do, is to reverse the process started by it in the letter dated 23 March 2013. That letter emanated from the National Treasury, on its letterhead. And so is all the relevant correspondence to Mr Jozana, for example, letters on the following dates:

- (a) 22 September 1999, declining a request by Mr Jozana for a lump sum payment;
  - (b) 7 May 2002, in which Mr Jozana was advised of the 'commencement date for special pensions benefits payment.';
  - (c) 17 January 2011, addressed to "Whom it may Concern" in which it was confirmed that Mr Jozana was a recipient of the special pension;
  - (d) 25 August 2013, in which confirmation is made that an English version of an Afrikaans letter sent to Mr Jozana, had been handed to him on an earlier occasion;
  - (e) 19 September 2013, dealing with the aftermath of the discontinuation of the special pension.
- [9] All these letters were written by the National Treasury, on its letterhead. That it might emanate from a section of the National

Treasury called 'Special Pensions' does not alter the position. At the risk of repetition, it is the National Treasury which advised Mr Jozana of the approval of his special pension, and it is the National Treasury which advised him of the intention to terminate his special pension and called on him to make representations to it why his special pension should not be terminated. Accordingly, the court order does not require of the National Treasury to do something it has not done before. It simply directs it to reverse the process which, overwhelmingly, it initiated and

was very much part of. Whether it was permissible by law to have involved itself to the extent it did, is immaterial at this stage.

[10] Apart from what is stated above, there is a more compelling reason why the National Treasury's contention is untenable and

unmeritorious. In his founding

affidavit, Mr Jozana alluded to an apparent confusion as to who is in control of the special pensions. In paragraph 41 of the founding affidavit he dealt with the issue pertinently:

'[T]here is a great confusion about who is actually in control of special pension. Is it the Government Employees Pension Fund which usually corresponds with me? Or is it the Government Pension Administration Agency which gave me the letters concerning the reinstatement of my Special Pension grant? Or the National Treasury .The question is who really has the powers to cancel my special pension? I would have thought that it is the Government Employees Pension Fund or Government (Pensions) Administration Agency which have the powers and not the National Treasury.

(underlining in the original text).

[11] If ever there was an opportunity for the National Treasury to clarify the issue, and raise the issue it seeks to argue now, there it was. But the National Treasury chose not to avail itself of the opportunity. Responding to the above paragraph in his answering affidavit, the DG simply said:

'I deny the content (sic) of this paragraph.'

It is a strange way of dealing with a pertinent question, because the National Treasury sought to 'answer' a question from Mr Jozana by 'denying' the question. But that is the manner in which the National Treasury elected to conduct its case in the main application.

[12] It is also instructive that the answering affidavit in the main application was deposed to by the DG of the National Treasury, and not by any person on behalf of the alleged real protagonist, the GPAA. It is not difficult to figure out the reason it is the National Treasury which was intimately involved in the handling of Mr Jozana's special pension right from the beginning until the termination thereof. Paragraph 22.5 of the answering is particularly relevant to the point being raised by the National Treasury. The DG says:

'It is important to note that annexure D to the applicant's founding affidavit states that the incorrect letter was provided to the applicant in error and that the correct letter was handed to him. The letter referred to by the applicant is purportedly on a Government Employee Pension Fund letterhead and the letter dated 23 March 2012 as annexure D is from the first respondent (National Treasury) .

(my underlining for emphasis)

[13] The 'incorrect' letter referred to in that paragraph, is the one written to Mr Jozana by the Government Employees Pension Fund (GEPF) advising him of the reinstatement of his special pension. The upshot of the DG's statement is that the GEPF did not have the power to write the letter it did, or even more pertinently, that the GEPF did not have the power to reinstate the pension. It is also what the DG does not say in the affidavit which is important. He does not say that such power vests with the GPAA. It is not difficult to see why he could not say that: it is because the National Treasury had arrogated unto itself that power, and had replaced the letter of the

GEPF with its own, in a way 'reversing' the GEPF's 'decision' to reinstate the special pension. Dealing with the National Treasury's

letter later in his answering affidavit, the DG, in paragraph 33.2, states the following:

'I aver that the letter called upon the applicant to make representations to the National Treasury as to why by virtue of the conviction, he was entitled to special pension.'

[14] The above statement puts it beyond doubt as to who the decisionmaker, to whom representations were to be made, was. It was

the National Treasury. It is therefore clear that the National Treasury's contention that it only 'administers the Act' (whatever

that means) rings hollow in the light of its direct involvement in the actual decisions about the special pension of Mr Jozana. It is clear that the contention of it only being responsible for the administration of the Act, is an afterthought. If ever there is confusion about who should be directed to implement the court order, the National Treasury contributed to that confusion, and cannot now seek to benefit from that.

[15] I therefore conclude that on the papers as they stand in the main application, the National Treasury is the entity which is best suited to implement the interim order. Even if this conclusion is wrong, and it be that the GPAA is the correct entity, that can never be a basis for an appeal. The National Treasury can request the court to vary its order in terms of rule 42(1) of the Uniform Rules of Court on the basis of there being a patent error.

The test whether to grant leave to appeal.

[16] The common law test in an application for leave to appeal has always been whether there are reasonable prospects that another court, given the same set of facts, might arrive to a different conclusion. The approach was restated by the Supreme Court of Appeal in *S v Magadla* 2010 (2) SACR 316 (E). The footnote reads:

"The chief requirement for the granting of leave to appeal was the existence of a reasonable prospect of success on appeal. The mere possibility that another court might come to a different conclusion was not sufficient, nor was it enough that the case was arguable, nor that it would offer solace to the applicant to know that the final decision would be given by a higher court."

[17] That test has been codified by s 17 of the Superior Court Act 10 of 2013, in terms of which leave to appeal may only be given where a judge is of the opinion that the appeal would have reasonable prospects of success. From the above discussion, I conclude that the appeal would not have any reasonable prospects of success, mainly because the order sought to be appealed against is not appealable, being interim in nature.

[18] In the result I make the following order:

1. The application for leave to appeal is dismissed.

TM Makgoka

Judge of the High Court

Date Heard: 20 October 2015

## Judgement

Delivered: 23 October 2015 Appearances

For the Applicant: Adv. A.L. Platt

Instructed by: State Attorney, Pretoria

The First Respondent in Person

- [1] Mr Jozana was a recipient of a monthly pension in terms of the Special Pensions Act 69 of 1996.
- [2] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).
- [3] At 5368D.
- [4] 1948 (1) SA 839 (A).
- [5] At 870.
- [6] Para 19 of the main judgment.

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