THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 923/2018

In the matter between:

RAJAN RAMNATH SEWPERSADH **APPELLANT**

and

THE MINISTER OF FINANCE **FIRST RESPONDENT**

SPECIAL PENSIONS APPEAL BOARD **SECOND RESPONDENT**

Neutral citation: *Sewpersadh v Minister of Finance* (923/2018) [2019] ZASCA 117 (23 September 2019)

Coram: Ponnan, Leach, Saldulker, Mbha and Dambuza JJA

Heard: 26 August 2019

Delivered: 23 September 2019

Summary: Interpretation – meaning of 'full-time service' of an organisation in s 1(1) of the Special Pensions Act 69 of 1996 – appellant's employment during the relevant period not resulting in him failing to be in the full-time service of a political organisation at the same time.

Practice – time bar – necessity of party seeking to rely on a time bar to plead the issue and place relevant facts before court.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Khumalo J sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

'(a) The review succeeds with costs, including the costs of two counsel.

(b) The order of the Special Appeal Board of 16 October 2013 is set aside and substituted with the following:

"(i) The appeal succeeds.

(ii) The determination of the Designated Institution of 4 November 2009 is set aside and replaced with the following:

'The applicant, Mr Rajan Ramnath Sewpersadh, is awarded a special pension under s 1(1) of the Special Pensions Act 69 of 1996, payable monthly with a commencement date of 1 June 1995 and determined under s 1(5) of the Act as it read immediately before Part 1 of the Act lapsed on 31 December 2006.'"

JUDGMENT

Leach JA (Ponnan, Saldulker, Mbha and Dambuza JJA concurring)

[1] Many people made substantial sacrifices, both personal and financial, in the struggle to rid this country of the scourge of apartheid. That found

recognition and expression in s 189 of the Interim Constitution,[1] which mandated Parliament to pass legislation providing for the payment of special pensions to those who had made such sacrifices or served the public interest in establishing a democratic constitutional state, and the conditions on which such pensions would be granted. Pursuant thereto, the legislature passed the Special Pensions Act 69 of 1996 (the Act), which came into operation on 1 December 1996.

[2] Several years later, the appellant applied for a pension by submitting a duly completed prescribed form to the Special Pensions Board (also referred to in the Act simply as 'the Board', a title which for convenience I shall use in this judgment). The Board was at the time the body established to process pension applications under the Act. In the circumstances more fully detailed later in this judgment, his application was refused, as were internal appeals to the Special Pensions Appeal Board[2] (the Appeal Board) and a review application brought in the Gauteng Division of the High Court, Pretoria under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The appellant now appeals to this court with its leave.

[3] Presumably in recognition of the fact that persons contributed to the struggle in a variety of ways and to differing degrees, the Act cast the net wide in specifying a number of categories of persons entitled to receive a pension. The appellant limited his claim to s 1(1)*(a)*(i), which provided:

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[1] Constitution of the Republic of South Africa Act 200 of 1993. Section 189, headed 'Special pensions', provides:

'(1) Provision shall be made by an Act of Parliament for the payment of special pensions by the national government to-

(a) persons who have made sacrifices or who have served the public interest in the establishment of a democratic constitutional order, including members of any armed or military force not established by or under any law and which is under the authority and control of, or associated with and promotes the objectives of, a political organisation; or

(b) dependants of such persons.

(2) The Act of Parliament referred to in subsection (1) shall prescribe the qualifications of a beneficiary of a special pension referred to in subsection (1), the conditions for the granting thereof and the manner of the determination of the amount of such pension, taking into account all relevant factors, including, *inter alia*, any other remuneration or pension received by such beneficiary.'

[2] Established under s 8AA after it had been inserted into the Act as set out in para 17 of this judgment.

'**1 Right to pension**

(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*.'[3]

[4] The appellant was more than 35 years of age at the commencement date[4] of the Act, 1 December 1996, and thus satisfied the requirement in *(a)* above. He also satisfied the requirement in *(b)* namely, that for at least the prescribed minimum period of five years he had been a member of a political organisation envisaged in subsec *(b)*(i). In that regard, the phrase 'political organisation' has a special meaning defined in s 31 of the Act, and included both the African National Congress (the ANC) and its armed wing, Umkhonto WeSizwe (MK). It is accepted that the appellant was a member of both those organisations and that, operating under the alias of 'Jimmy', he performed underground work for them for more than a period of five years prior to their unbanning on 2 February 1990. The principal dispute between the parties, however, is whether the appellant had been 'engaged full-time' in their service as envisaged by the subsection during that period.

[5] In regard to that issue, the respondents did not dispute the appellant's allegations as to how he had gone about serving both those organisations. He alleged that he underwent intense political education, involving the attendance of night classes in regard, inter alia, to political theory and social transformation. He was then given various tasks in furtherance of the liberation struggle, most of them clandestine. These included servicing dead letterboxes,

[3] The words italicised by the legislature were specially defined in s 31 of the Act.

[4] Defined in s 31 of the Act as being the date on which the Act came into operation as set by the President in a proclamation in the Government Gazette.

distributing ANC and MK newsletters and pamphlets, as well as secret reconnaissance work. Acting as a courier, he also conveyed banned literature and other ANC materials to and from Swaziland, and serviced so-called ‘safe houses’, protecting cadres engaged in political and military activities.

[6] As a cover for his activities, the appellant took up menial employment at a jewellery workshop in Durban that was not demanding of his time but paid a veritable pittance. He did so as it provided a safe environment from which he could conduct activities on behalf of the ANC and MK, especially as he could use terminology associated with the jewellery industry as a code to pass on secret messages. As he puts it, he ‘stole time’ from his employment in order to carry out his undercover operations, and the workshop where he worked was ‘very much a front for the activities of the ANC and MK’. Although the income from his work allowed him to support himself and his dependents at an extremely basic level, he was not in any way able to provide for a pension. Despite this, he continued to work at the jewellery workshop on instructions from his ANC commander as it provided a safe and legitimate cover for his clandestine activities.

[7] In these circumstances, the appellant felt that he had become entitled to a special pension under s 1(1) of the Act. As a result, after having fallen on hard times, he decided to apply to the Board for such a pension. His application was dated 22 December 2006, but precisely when it was submitted or received is not clear from the papers. I shall return to this later in this judgment.

[8] It is necessary at this stage to deal in some detail with the statutory matrix relevant to the appellant’s application. As already mentioned, it was clearly the intention of the legislature in framing the Act to cast the net wide in providing for special pensions. Thus, when the Act first came into operation on 1 December 1996, it extended benefits not only to those who met the requirements in s 1(1) already quoted above, but:

(a) Section 1(1)*(b)*(ii) provided benefits to persons who had been prevented from leaving a particular place or area within the country, or from being at a particular place or area, as a result of an order issued under various pieces of apartheid legislation including the Suppression of Communism Act 44 of 1950, the Terrorism Act 83 of 1967 and the Internal Security Act 74 of 1982.

(b) Section 1(1)*(b)*(ii) provided benefits to persons who had been imprisoned or detained in terms of any law or for any crime mentioned in Schedule 1 of the Act.

(c) Section 1(3) entitled certain persons to receive pensions if they had been prevented from providing for a pension prior to 2 February 1990 as a result of suffering a permanent and total disability arising out of certain circumstances specified in s 1(1)*(b)*.

(d) Section 2 went on to provide for benefits to surviving spouses of persons who would have been entitled to benefits had they not died before 2 February 1990.

(e) Section 3 provided for payment of benefits to the surviving spouse or dependant of a person who had been awarded a pension under s 1 and who had received monthly payments.

[9] There was, however, an age limitation upon those who were entitled to be paid a pension in terms of s 1(1). In terms of s 1(4) they were entitled to receive a pension payable monthly, commencing only on the first day of the month during which they attained the age of 60 years. This limitation was to some extent ameliorated by s 11 which provided that those who were at least 50 years of age were, at their discretion, entitled to begin receiving their monthly pension, albeit in an amount reduced by a formula taking account of their age.

[10] The provisions I have dealt with thus far related to the entitlement to a pension. Other important provisions relating to the administration of the Act and the pensions or benefits awarded thereunder were the following:

(a) Section 6(1) provided that any person who applied for a benefit under the Act should complete an application form in the prescribed manner, and submit it to the Board[5] for its determination under s 7.

(b) Section 6(1)*(c)* prescribed that an application under s 6(1) was to be submitted 'on or before the *closing date*'.[6] In s 31 of the Act, the phrase 'closing date' was defined as meaning 'the date 12 months after the "*commencement date*"' which in turn was defined as being the date on which the Act came into operation.[7] As the Act commenced on 1 December 1996, the closing date was therefore the last day of November 1997. Simply put, any person seeking a pension under s 6(1) therefore had a window of a year commencing on 1 December 1996 in which to submit his or her application.

(c) Section 7 required the Board to consider applications for benefits submitted to it under the Act and to determine, inter alia, whether the applicant qualified for a pension and, if so, to determine the benefit payable.[8]

(d) Under s 8 of the Act, any applicant who disagreed with the decision of the Board was entitled to request a review of that decision by way of the submission of a prescribed form to a Special Pensions Review Board established by s 28(1) of the Act (the Review Board). It was to consider every appeal or review[9] submitted to it and either confirm the decision of the Board or replace it with another decision.

[11] The Act was amended on various occasions after it came into operation. First, the categories of persons entitled to receive a pension were thrown yet wider by the Special Pensions Amendment Act 75 of 1998, which extended pensions to persons who were suffering from a terminal disease (subject of course to other criteria being met). At the same time, the age restriction in s 1(4)

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[5] Established under s 15 of the Act and referred to in para 6 above.

[6] The phrase '*closing date*' was italicised by the legislature to emphasize that it was a concept defined in s 31 of the Act.

[7] This is confirmed by s 2(2) of the Special Pensions Amendment Act 75 of 1998 which specifically provided that s 6(1) 'must be regarded as having taken effect on 1 December 1996'.

[8] Subsections 7*(b)* and *(f)*.

[9] The words appeal and review were used interchangeably – the heading of s 8 referred to a right to appeal the Board's decision while the section itself referred to the decision being reviewed.

was relaxed to entitle a pensioner to receive a pension upon attaining the age of 35 years rather than at 60 years as initially provided. This rendered nugatory the provisions of s 11 under which a pensioner was entitled to apply for an early pension at 50 years of age, and that section was repealed.[10]

[12] These amendments came into effect on 27 November 1998. As the appellant who was born in June 1960 was then 38 years of age, it was at this stage that he became entitled to receive a pension if he otherwise qualified. Of course, the difficulty that he then faced was that the closing date for applications had passed and, at first blush, the window of opportunity for him to apply for a pension had already closed. In any event, the appellant explained he had not applied for a special pension at that time as he had not taken part in the struggle for financial gain. He only did so later when, due to a deterioration in his financial circumstances, he found himself struggling to meet his commitments.

[13] Further changes to the Act were effected by way of the Special Pensions Amendment Act 2 of 2003 (the 2003 amendment). Of importance in regard to the appellant was an amendment to s 6. Limiting applications to those submitted within the 12 month period preceding the closing date was presumably viewed by the legislature as being overly restrictive and unfair, and this was ameliorated with effect from 7 October 2003 by the addition of subsec 6(3) which read:

'Notwithstanding subsection (1)*(a)*(iii), the *Board* may condone any late *application* if the *Board* is satisfied that, for reasons beyond the control of the *applicant*, the *application* could not be submitted on or before the *closing date*.'

Although the commencement and closing dates prescribed by the Act remained the same, and required the prescribed form to be lodged in the 12 month period preceding 1 December 1997, the Board thus became entitled to condone any application submitted after that date. If so condoned, the application would then fall to be determined in the normal course under s 7.

[10] Section 3 of the Special Pensions Amendment Act 75 of 1998.

[14] Further amendments to the Act were thereafter introduced by way of the Special Pensions Amendment Act 27 of 2005 (the 2005 amendment). Commencing with effect from 16 January 2006, these were far-reaching. They widened the scope of the Act yet further by introducing funeral benefits as well as pensions for surviving spouses and orphans. Importantly in regard to the present matter, the 2005 amendment also:

(a) Introduced s 6A which reads as follows:

'**Lapsing of Part 1, and certain savings**

(1) Part 1, except for this section, lapses on 31 December 2006.

(2) Subsection (1) does not affect any *benefit* payable under this Part in respect of which the Board has made a determination in terms of section 7 before 31 December 2006.

(3) Any *application* for *benefits* in terms of this Part which has been submitted to the Board before 31 December 2006, but on which the Board has not made a determination by that date, must be finalised as if this Part had not lapsed.'

(b) Amended s 27 to oblige the Minister to dissolve the Board by no later than 60 days after 31 December 2006 and to provide that, upon such dissolution, the Head of Pensions Administration in the National Treasury was to become responsible for the performance of the functions of the Board in terms of the Act.

(c) Introduced s 28(6) to oblige the Minister to dissolve the Review Board within 90 days of dissolving the Board under s 27.

(d) Introduced s 28(7) to provide that upon dissolution of the Review Board under s 28(6), responsibility for the performance of the functions of the Review Board would vest in the Minister.

[15] The appellant had still not applied for a special pension when these amendments were effected. He was running out of time. Section 1(1) fell within Part 1 of the Act and, in the light of the new s 6A, this meant he had until 31 December 2006 to submit his special pension application to the Board. It was only if he had done so and a determination had either been made in his favour

under s 7 or his application had not been finalised, that his right to a pension under s 1(1) would not have lapsed on that date.

[16] Due to a deterioration in his financial position, the appellant finally decided to apply for a pension before his right to do so lapsed. But he cut things fine. The prescribed form that he completed in so applying was dated 22 December 2006, and there is nothing on the papers to indicate how or when it was sent or delivered to the Board. But by the same token there is nothing to indicate that it was rejected by the Board. Indeed as appears from what follows, the Board clearly regarded it as being in proper form and accepted it for determination.

[17] One must presume that after the appellant submitted his application to the Board, the Minister indeed dissolved both it and the Review Board pursuant to the 2005 amendment of ss 27 and 28(6), which came into operation on 1 January 2006. In addition, the Act was again amended with effect from 12 January 2009 by the Special Pensions Amendment Act 13 of 2008 (the 2008 amendment) which, inter alia:

(a) Deleted references to the Board (which presumably had been dissolved) and replaced them with references to the 'designated institution' – defined in s 31 as being either the National Treasury or another institution designated by the Minister of Finance.

(b) Repealed the powers of the Board set out in s 7 and vested the administration of the Act under that section in the Director-General of the National Treasury (the Treasury), with the Minister being given the power to also designate certain institutions to administer the Act to ensure its effective and efficient implementation.

(c) Repealed s 28 of the Act under which the Review Board (also dissolved by then) had been established. It also repealed s 28(7) which had bestowed upon the Minister responsibility for all functions of the Review Board upon its dissolution under s 27(1).

(d) Introduced s 8AA, which established the Appeal Board in place of the Review Board, to hear appeals against decisions of a designated institution.

[18] These further amendments were effected before the appellant's application, submitted more than two years earlier, had been determined. Indeed, processing the application proceeded at the pace of a snail, probably due in part to the dissolution of the Board to which it had been submitted and the subsequent delay until the Treasury was established as a designated institution. It was only in November 2009, almost three years after it had been submitted, that the Treasury informed the appellant that his application had been rejected.[11] The reason it gave for doing so was that, in its view, he had provided insufficient evidence of having been in full-time service of his political organisations for the relevant period.

[19] Disgruntled, the appellant proceeded under s 8 of the Act to appeal to the Appeal Board. The appeal was lodged on 30 November 2009 and thereafter supported by further documentary evidence. However, despite the appellant's efforts, on 8 April 2011 the Appeal Board rejected his appeal and confirmed the decision of the Treasury. The reason given for doing so was that since the appellant had been gainfully employed at the jewellery workshop, he could not have been engaged full-time in the service of the ANC and MK.

[20] The appellant did not give up. In January 2012, he instituted review proceedings in the Gauteng Division of the High Court, Pretoria. Citing the Government and the Appeal Board, respectively, as first and second respondents, he sought an order setting aside the Appeal Board's decision. For some reason he did not challenge the initial decision of the Treasury. It would

[11] Pursuant to the amendments I have detailed, the Treasury as designated functionary had replaced the by then dissolved Board as the body charged with the determination of the appellant's application and had assumed its functions set out in s 6.

probably have been better had he done so. It was pointed out in *Wings Park*[12] that when an applicant has suffered an unfavourable decision at first instance which is confirmed on an internal appeal, both decisions must usually be taken on review in order to have the decision set aside. This is because if just the appeal decision is set aside, the first decision that was the subject of the internal appeal will continue to stand should it, too, not be set aside on review. The failure to target the original decision is, however, not necessarily fatal to a review in such circumstances, and much depends upon the nature of the decision at first instance and the remedy sought on review.[13] Here the proceedings before Appeal Board do not amount to a simple rehearing as in the case of a true appeal but, rather, are akin to proceedings de novo in as much as the Appeal Board can receive further evidence and make further enquiries.[14] In my view, this is a case where a failure to target the original decision does not preclude relief. Certainly if the Appeal Board's decision is substituted on review with an order which overturns the Treasury's initial decision, no harm can be done.

[21] In any event, the review application was opposed. Unfortunately, the respondents dragged their feet and it was necessary for the appellant to bring various interlocutory applications to compel them to comply with their obligations, inter alia, to file a proper record of the proceedings before the Appeal Board. Eventually, the respondents consented to an order setting aside the Appeal Board's decision, with the latter undertaking to reconsider the appellant's appeal. An order in those terms was granted by consent on 6 August 2013.

[22] Any flush of success on the part of the appellant was to be short lived. On 25 October 2013, his attorneys were informed that the Appeal Board had

[12] *Wings Park Port Elizabeth (Pty) Ltd v MEC Environmental Affairs, Eastern Cape & others* 2019 (2) SA 606 (ECG) para 34.
[13] *Wings Park* paras 39-46.
[14] Section 8(3) of the Act.

reconsidered his appeal and, by a majority, had again rejected it for reasons to be provided in due course. Such reasons were not immediately forthcoming. It was only on 21 February 2014, after the appellant had threatened court action to compel compliance, that the Appeal Board delivered them. As appears therefrom, the majority decision was again based on the fact that the appellant had been employed full-time at the jewellery workshop which, so it reasoned, precluded him being engaged in the full-time service of the ANC and MK. The Chair of the Appeal Board reached the contrary conclusion. She reasoned that:

'. . . private employment as a means of providing cover for an underground operative, implies that more often than not, such a person would be unable to market his/her skills on the open labour market to secure decent employment with reasonable benefits. To do otherwise would surely attract unnecessary attention, and therefore run the risk of having his/her cover revealed.'

[23] The appellant is obviously a person of determination. Despite this further setback, he once more proceeded to seek the assistance of the courts. In August 2014 he instituted proceedings in the court a quo, seeking to review the Appeal Board's decision of 25 October 2013. Citing the Minister of Finance as first respondent and the Appeal Board as second respondent, he sought the following relief:

'(a) Reviewing and setting aside the decision of the second respondent, of which the applicant was first notified on 25 October 2013, refusing the applicant's application for a special pension in terms of the Special Pensions Act, 69 of 1996.

(b) Substituting for the decision of the second respondent a decision that the applicant is entitled to a special pension in terms of section 1(1) and 1(4) of the Special Pensions Act, with effect from 05 June 1995.

(c) Alternatively to (b) above, referring the applicant's application for a special pension back to the second respondent, and ordering the second respondent to summon such witnesses to appear before it as will clarify the so-called contradictions identified by the second respondent in the reasons received by the applicant on 21 February 2014.'

[24] These proceedings, too, proceeded at no haste. Although the answering and replying papers of the parties were filed by January 2015, it took two and a

half years until judgment was given on 25 August 2017 dismissing the application. In doing so the court a quo adopted similar reasoning to that of the Appeal Board, holding, inter alia, that the appellant's full-time employment at the jewellery workshop precluded him from being in the full-time service of his political organisations. It also dismissed an application for leave to appeal. In July 2018, such leave was granted by this court.

[25] The respondents sought to support the correctness of the decision of both the Appeal Board and the court a quo by arguing, first, that the appellant's application for a special pension had been out of time and that for this reason alone he was not entitled to such a pension; and, secondly, that the application had correctly been rejected on its merits by both the Board and the Appeal Board. For the reasons that follow, the argument must fail on both counts.

[26] In regard to the first issue, the respondents contended that the appellant's application had been submitted both after the closing date in s 6 (ie after the end of November 1997) and after Part 1 of the Act had lapsed by virtue of the provisions of s 6A introduced by the 2005 amendment (ie after the end of December 2006).

[27] It is indeed so that the appellant's application was submitted after the closing date of 1 December 1997 but, as I have pointed out, s 1(4) initially imposed an age limitation of 60 years upon those entitled to a pension under s1(1). It was only after the 1998 amendment came into operation on 27 November 1998 (after the closing date), that he became entitled to receive a pension under that section.[15] And it was only with effect from 7 October 2003, when s 6(3) was introduced, that he acquired the right to seek condonation for failing to apply before the closing date.[16] Of course his right to receive a pension had only accrued after the closing date, and respondents' counsel was

[15] See para 12 of this judgment.
[16] See para 13 of this judgment.

driven to concede that it could not have been expected of the appellant to have submitted his application before then, any application for condonation on his part would probably have had to succeed.

[28] One does not know if the appellant in fact applied for condonation at any stage. The papers are silent on this issue, and it was never raised at any stage in any of the proceedings I have detailed. Moreover the issue of the appellant's application being out of time was never an issue until the respondents filed their heads of argument in this court. And therein lies the rub. What the respondents essentially seek to argue is that the appellant was time-barred. But in terms of the well-known adage that the party who alleges must prove, it was incumbent upon the respondents, if they had wished to argue that the appellant's claim had been out of time, to have raised the issue and pleaded the facts upon which they relied in support of their contention, including that condonation was necessary and had never been obtained. In this regard, the matter is similar to a plea of prescription.[17] However, that issue and whether the appellant had been granted condonation, were never canvassed in these proceedings (nor before the Board, the Treasury, the Appeal Board or the high court in either review). In these circumstances, the respondents are precluded from relying on a defence they never properly raised.

[29] The same considerations apply in respect of the respondents' argument based on s 6A. The appellant's application was duly processed with nary a whisper that it might have been out of time and if the respondents wished to contend that it had only been submitted after Part 1 of the Act had lapsed, it was incumbent on them to have alleged so and established the facts upon which they relied. They did not attempt to do so, and on a similar basis of reasoning to that set out above, they are precluded from now seeking to rely on a special defence never previously raised.

[17] *Gericke v Sack* 1978 (1) SA 821 (A) at 827G-828C.

[30] I turn to consider the respondents' second main contention, namely, that the appellant had failed to make out a case for a special pension. On this issue it was argued on their behalf that the appellant had failed to show that he had been prevented from providing for a pension on account of his having been in the full-time service of his political organisations.

[31] The reasoning of the court a quo in regard to this issue is somewhat confusing, but the finding appears to have been that, because the appellant was in the full-time employment of the jewellery workshop, he could have provided for a pension – and was thus not entitled to receive one under s 1(1). This does not appear to have been the basis of the reasoning of either the Treasury or the Appeal Board, nor was it raised by the respondents in their papers opposing relief in the court a quo. It is thus surprising that it was raised in that court, and ventilated again in the respondents' heads of argument in this court.

[32] It is, in any event, a matter that need not detain us. The appellant states that the measly salary he obtained from his work was sufficient only to allow him to support his family at an extremely basic level, and was insufficient to provide for a pension. This has never been challenged, nor was his contention, supported as it was by affidavits from his seniors in his organisation, that he had been instructed to continue working at the jewellery workshop as it provided a safe and legitimate cover for him to conduct his clandestine operations. For no good reason the court a quo rejected these allegations, despite them having been accepted by the Appeal Board.

[33] In these circumstances, the court a quo clearly misdirected itself in concluding that the appellant had not shown that his activities on behalf of the ANC and MK had prevented him from providing for a pension. Clearly they had, and although the respondents presented a contrary argument in their heads of argument, their counsel was obliged to concede the point during the hearing.

[34] I therefore turn to the sole issue relied upon by both the Treasury and the Appeal Board, namely, whether the appellant's full-time employment with the jewellers meant he could not have been in the full-time service of the ANC and MK. In interpreting the meaning of 'engaged full-time in the service of a political organisation' set out in s 1*(b)*(i), it must be remembered that the Act is a so-called 'remedial statute,' having as its aim the extension of rights for the benefit of persons that they would not otherwise enjoy. As mentioned at the outset of this judgment, parliament had been mandated by the Interim Constitution to provide for the payment of pensions to those who had made sacrifices or served the public interest in establishing a democratic constitutional state, and the preamble to the Act reflects this laudable intent. The Act is therefore designed to ameliorate the financial suffering of those who fought for freedom, and it is trite that in the interpretation of remedial provisions such as those, a statute should be construed liberally in order to afford the greatest measure of relief which its language may fairly allow. The phrase 'engaged full-time in the service of a political organisation' must be construed in that light.

[35] The Act must also be interpreted in the light of its surrounding circumstances. As I have attempted to show when detailing the history, the various amendments to the Act demonstrate an ever-widening class of persons entitled to receive special pensions. This is a clear reflection of the legislature's intent to bestow such pensions liberally rather than restrictively and, in itself, indicates the necessity of interpreting the phrase widely rather than narrowly.

[36] In my opinion, in placing a restrictive interpretation upon the phrase, the majority of the Appeal Board lost sight of the reality that those engaged in the struggle against apartheid faced in this country. Prior to the unbanning of the ANC and MK on 2 February 1990, it was a criminal offence to be a member of those organisations. The so-called 'security forces' of the apartheid state operated tirelessly and brutally against their opponents. It is no exaggeration to

say that those involved in the struggle were daily at risk of being detained without trial, brutally assaulted or killed. The reach of the security police was long, relentless and determined, and it was impossible for members of the ANC and MK to operate in the open. Instead, they were obliged to operate covertly, as the appellant did.

[37] There is nothing in the Act which indicates any legislative intent to exclude from its operation members of such organisations who were obliged to act covertly within this country. Nor are there any surrounding circumstances that give reason to think that such exclusion was intended. Certainly none were suggested in the respondents' papers nor any suggested by their counsel. The only argument advanced was that persons who were in full-time employment could not be said to have been in the full-time service of their political organisations at the same time.

[38] To me this would be an unduly restrictive connotation of what was meant by 'full-time service' envisaged by the section. A distinction must be drawn between the concepts of 'employment' on the one hand and 'service' on the other. Although the former connotes service for a salary, the latter has a wider connotation, not necessarily associated with the payment of a wage or salary. Fowler records that the verb 'service' was a late addition into the English language, used first only in the sense of 'to be of service to, to provide with a service'[18] neither of which necessarily connotes a sense of acting in order to earn a wage or salary. Whilst the noun 'service' has been defined as being 'the action or process of serving', the verb 'serve' has been defined as meaning to 'perform duties or services for' and to 'be of use in achieving something or fulfilling a purpose' (which again perfectly describes the appellant's activities). By a similar token, the phrase 'be at someone's service' bears the meaning 'be ready to assist whenever required'.[19] Interestingly, the act of volunteering has

[18]R W Burchfield *Fowler's Modern English Usage* rev 3 ed (2004) at 704.
[19] See in this regard the *Concise English Oxford Dictionary* (12 ed).

been defined as 'where an individual or group provide *services for no financial or social gain* to benefit another person, group or organisation (my emphasis)'[20] – which aptly describes how the appellant assisted his political organisations.

[39] Bearing that in mind, as well as the purpose of the legislation, the necessity to interpret it liberally rather than narrowly, and the connotation of 'service' being far wider than that of 'employment', there seems to me to be no reason why a person such as the appellant in full-time employment of the kind encountered here, cannot be said to be at the same time in the full-time service of a political organisation, especially if such employment was used as a cover for their activities on behalf of that political organisation. That being so, both the court a quo and the majority of the Appeal Board erred in finding that the appellant's action in working for the jewellery workshop precluded him from being in the full-time service of the ANC and MK, and the minority of the Appeal Board reasoned correctly on this issue.

[40] In this case, the Appeal Board made the cardinal mistake of deciding that the appellant's employment precluded him from receiving a pension for which he was otherwise entitled. For the reasons I have given, its approach in construing both the facts and the Act was clearly wrong. Its conclusion that the appellant did not qualify for a pension therefore plainly cannot stand.

[41] It follows that the Appeal Board ought to have set aside the Treasury's decision and substituted in its place an order determining the appellant's entitlement to a special pension under s 1(1) of the Act. By the same token, the court quo clearly erred in not reviewing the Appeal Board's decision and granting the appellant relief. This appeal must therefore succeed.

[42] That brings me to consider what would be the appropriate relief for this court to grant on allowing the appeal. There seems to me to be no purpose in

[20] *Wikipedia* online dictionary - en.wikipedia.org/wiki/Volunteering.

referring the matter back to the Appeal Board to re-consider as the appellant is quite clearly entitled to his special pension, and the terms of his entitlement are largely prescribed by the statute itself. Furthermore, years have passed since the appellant applied for his pension, and it seems to be unjust to delay the matter any further when he is so obviously entitled to relief. This court is in any event in this particular instance in as good a position as the Appeal Board to make a decision, all the relevant information being available. That seems to be the best approach, as it does away with the difficulty that I mentioned earlier in this judgment of the original order standing until it is reconsidered by the Appeal Board, and serves to avoid both further delay and unnecessary costs – see *Trencor Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) paras 58, 59, 74 and 78. When this was drawn to the attention of the parties, they were agreed that if this court should find for the appellant, we should direct that he be paid his pension.

[43] As the appellant's right to a pension must be considered on the basis of his application having been submitted but not determined before Part 1 of the Act lapsed on 31 December 2006, s 6A(3) provides for it to be finalised as if Part 1, including s 1(4) had not lapsed. Substituted by s 2 of the 2005 Amendment, s (1)(4) at that time provided:

'A *pensioner* who qualifies for a *benefit* in terms of subsection (1) is entitled to receive a *pension*, payable monthly, commencing on 1 April 1995 or the first day of the month during which that person attains the age of 35 years, whichever is the later date.'

[44] In s 31, *benefit* is defined as meaning 'a sum of money payable in terms of [inter alia] Part 1 of the Act', *pensioner* is defined as meaning 'a person entitled to a pension' (which includes the appellant), *pension* is defined as meaning 'a right to the monthly payment of a pension determined [inter alia] in terms of section 1'. Albeit that these concepts are somewhat tortuously framed, they result in the appellant, a pensioner, who is entitled to receive a pension under s 1(1) – and who therefore qualifies for a benefit under that section –

having become entitled to receive such pension from the first day of the month on which he attained the age of 35 years, which was after 1 April 1995. As he was born in June 1960, the appellant therefore became entitled to receive his pension commencing from 1 June 1995. This will be reflected in the order set out below.

[45] Finally there is the issue of costs. In regard to the costs of the litigation both a quo and in this court, there is no reason for those not to follow the event. Counsel were also agreed, correctly in my view, that any order for costs should embrace the costs of two counsel.

[46] The following order is made:

1 The appeal is upheld with costs, such costs to include the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

‘(a) The review succeeds with costs, including the costs of two counsel.

(b) The order of the Special Appeal Board of 16 October 2013 is set aside and substituted with the following:

“(i) The appeal succeeds.

(ii) The determination of the Designated Institution of 4 November 2009 is set aside and replaced with the following:

‘The applicant, Mr Rajan Ramnath Sewpersadh, is awarded a special pension under s 1(1) of the Special Pensions Act 69 of 1996, payable monthly with a commencement date of 1 June 1995 and determined under s 1(5) of the Act as it read immediately before Part 1 of the Act lapsed on 31 December 2006.”’

L E Leach

Judge of Appeal

Appearances

For the Appellant:	B Morris (with him B Meyersfeld and M Nxumalo)
Instructed by:	Viren Singh Attorneys, Durban
	M A Martins Attorneys, Bloemfontein
For the Respondent:	Z Z Matebese SC (with him M X Shibe)
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein