THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1171/17

In the matter between:

SPECIAL PENSIONS APPEAL BOARD	**FIRST APPELLANT**
GOVERNMENT PENSIONS ADMINISTRATION AGENCY	**SECOND APPELLANT**

and

NATHANIEL MASHILO MASEMOLA	**RESPONDENT**

Neutral Citation: *Special Pensions Appeal Board and another v Masemola* (1171/17) [2018] ZASCA 117 (20 September 2018)

Coram: Navsa, Tshiqi, Swain and Mathopo JJA and Mothle AJA

Heard: 20 August 2018

Delivered: 20 September 2018

Summary: Special Pensions Act 69 of 1996 (the Act) – person in receipt of special pension disqualified in terms of s 1(8) read with s 1(9) the Act if that person was convicted after 30 April 1994 of an offence mentioned in Schedule 1 of the Criminal Procedure Act 51 of 1977 – respondent so convicted – whether entitled to reinstatement of special pension due to Presidential Pardon – lapsing of part of the Special Pensions Act – principle of legality – no statutory provision for reinstatement of special pension – disqualifying provision not to be subverted – Presidential Pardon not having effect contended for.

ORDER

On appeal from: Gauteng Division, Pretoria (Makhubele AJ sitting as court of first instance):

1 The appeal is upheld and no order is made as to costs.

2 The order of the high court is set aside and substituted as follows:

'The application is dismissed and no order is made as to costs.'

JUDGMENT

Mothle AJA (Navsa, Tshiqi, Swain and Mathopo JJA concurring):

[1] The personal history and present difficulties faced by the respondent, Mr Nathaniel Mashilo Masemola, evokes a great deal of sympathy. That having been said, it is necessary to record, at the outset, that because of a more recent event that has legal consequences, such sympathy as is evoked is somewhat diluted.

[2] Mr Masemola is a 90-year old man who had been actively engaged in the anti-apartheid struggle. He had been a member of the African National Congress (the ANC) since 1946 and, at some stage during his life, was forced into exile. Shortly before the dawn of the democratic order in South Africa, he returned and served constructively on the ANC's Legal and Constitutional Committee which participated in processes that ultimately led to the adoption of our first democratic constitution.

[3] Because he had made sacrifices and served the public interest in the course of establishing our democratic constitutional order, he applied for a special pension to which, on the aforesaid basis, in terms of the Special Pensions Act 69 of 1996 (the Act) he was entitled. He was paid that pension

from 1997 and continued receiving it until 7 April 2008, when the second appellant, the Government Pensions Administration Agency (the GPAA), informed him that he was disqualified from continuing to receive it in terms of the provisions of s 1(7) and 1(8), read with s 1(9) of the Act. In terms of those provisions, a special pensioner is disqualified from continuing to receive such pension if he was convicted of an offence, specified in Schedule 1 of the Criminal Procedure Act 51 of 1977 after 2 February 1990. It is common cause that Mr Masemola had been convicted of fraud on 2 April 2001 and that in terms of the aforesaid statutory provisions, he was disqualified from continuing to receive the special pension.

[4] On 21 July 2011, after he had applied, Mr Masemola received a Presidential Pardon in terms of s 84(2)*(j)* of the Constitution.[1] On the basis of the Presidential Pardon, Mr Masemola engaged with the GPAA, seeking reinstatement of his special pension. After a lengthy engagement and after handing the matter over to his attorney, he received a letter on 23 February 2015 from the GPAA which informed him that his request for reinstatement of the pension would not be acceded to. On 6 March 2015, purportedly in terms of s 8(1) of the Act,[2] he filed an appeal with the first appellant, the Special Pensions Appeal Board (the Appeal Board) against the refusal of the GPAA to reinstate his special pension. More than a year later, on 4 October 2016, the Appeal Board communicated that it was not competent to make a decision regarding the reinstatement of his special pension, contending that the disqualification occurred *ex lege*, that is, because of the provisions of the statute and that there was therefore no decision by the GPAA susceptible to an appeal in terms of s 8(1).

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[1] Section 84(2)*(j)* provides:
'(2) The president is responsible for-
(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures.'
[2] Section 8(1) provides:
'(1) Any applicant who disagrees with any decision of the *designated institution* may appeal that decision by sending a written notice in the form determined by the *designated institution* to the Appeal Board within 60 days of the date of the decision.' (Emphasis in original.)

[5] In the dire circumstances alluded to later, Mr Masemola approached the Gauteng Division of the High Court, Pretoria, (Makhubele AJ), which reviewed and set aside the decision of the GPAA and the Appeal Board. The high court granted an order in terms whereof the special pension was reinstated, effective from the date of the Presidential Pardon, which expunged his criminal record, being 21 July 2011. The Appeal Board and the GPAA were ordered to pay Mr Masemola's special pension.

[6] Makhubele AJ reasoned that the written exchanges between Mr Masemola and the GPAA made it clear that the latter had, in fact, made a decision not to reinstate Mr Masemola's special pension and that the decision was communicated to him. The high court held that that decision was susceptible to appeal and that the Appeal Board was obliged to decide whether the refusal to reinstate was correct or not. Thus, the Appeal Board's view, that it had no jurisdiction to decide an appeal, was fallacious and fell to be set aside. Makhubele AJ went on to state that Mr Masemola would, in the light of the Presidential Pardon, 'with no criminal record to his name', be entitled, 'even on a fresh application to a pension in terms of this Act' to receive the pension. The high court concluded that there was no purpose referring the matter back to the Appeal Board. The present appeal by the GPAA and the Appeal Board is directed against these conclusions and the orders referred to and is before us with leave of the high court.

[7] At the time of the litigation before the high court, Mr Masemola was in poor health. He had had three operations for a blocked spinal nerve; a colonoscopy; heart surgery and prostate cancer. His wife had passed on and he had been declared insolvent, losing his assets.

[8] In adjudicating the matter, it is necessary to understand the purpose and structure of the Act. It is to that task that I now turn.

[9] The long title to the Act makes it clear that the Act came into being 'to give effect to section 189 of the [Interim] Constitution;[3] to provide for special pensions to be paid to persons who made sacrifices or served the public interest in the cause of establishing a democratic constitutional order.

[10] The Act, in its original form, provided for the payment of special pensions to applicants who fell within the age group indicated in s 1 of the Act, namely, persons who were at least 35 years of age on the date of commencement of the Act (1 December 1996). Section 1 of the Act, set out the qualifying factors for a special pension for persons in that age group. Section 2 provided for payment of a lump sum benefit to a surviving spouse or a surviving dependant. Section 6 set out the procedure for applying for either of those two kinds of benefits. Section 6 of the Act read with the definition of a 'closing date' in s 31 provided a window period of 12 months from the date of commencement within which an application for benefits could be made.

[11] In 2005, s 6A of the Act was inserted.[4] Section 6A is a material provision to which little attention was paid by any of the parties and the high court. It reads as follows:

'(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.

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[3] The Constitution of the Republic of South Africa, Act 200 of 1993. Section 189 thereof reads:

(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.'

[4] Section 6A was added by s 5 of Act 27 of 2005.

(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 finalized as if this Part had not lapsed.'

The timeline is of special significance and is an aspect to which I will revert in due course. I interpose to record that, before us, the attention of counsel for the parties was drawn to the provisions of this section of the Act. They were afforded an opportunity to reflect thereon and to consider those provisions contextually and make submissions on their effect. They took advantage of the opportunity and made submissions. I shall, in due course, deal with the submissions made. Sections 1 to 6 formed part of Part 1 of the Act.

[12] The apparent motivation for the insertion of s 6A was that a period of more than eight years had passed since the commencement of the Act and the period for applications in terms of the Act – the window period of 12 months from the time of promulgation – had expired. Government apparently took the view that extending the period within which applications could be made was not prudent, presumably because of the risk of fraudulent claims and difficulties experienced in the verification of information so long after the beginning of our new democracy. The lapsing provisions of s 6A meant that a consideration of new applications for a special pension or survivor's lump sum after 31 December 2006 in the indicated age group was no longer possible. Persons who, before the lapsing, had applied for and were in receipt of a pension would continue receiving that pension. Those who fell within the provisions of s 6A (2) and (3), which deals with the finalisation of applications made before the cut-off date, and with pending applications, would of course be able to claim its benefits.

[13] In 2008, Part 1AA of the Act was introduced.[5] Section 6A*bis*, which fell under Part 1AA, set out the category of persons who now had a right to apply for and receive a special pension, namely, persons who were at least 30 years of age or between 30 and 35 years of age on the date of

[5] Part 1AA was inserted by s 2 of Act 13 of 2008.

commencement of the Act (1 December 1996). This was a category distinct from the prior category under Part 1 referred to above.

[14] Part 1AA extended the right to claim a special pension, to persons 30 years of age on 1 December 1996, but not yet 35 years of age. Such persons would, of course, have to meet the qualifying provisions set by the provisions of s 6A*bis*, which were essentially the same as those that previously applied to the category of persons set out in s 1 of Part 1. One has to bear in mind that by the time of the introductions of s 6A*bis* no new applications could be made in respect of the prior category.

[15] The rationale for granting of special pensions for both age groups referred to above was apparently to cater for persons whose full time involvement in the struggle for democracy impacted on their ability to make provision for pensions.

[16] Section 6A*bis* (7) *(a)* which was part of Part 1AA, contained a lapsing provision not dissimilar to the lapsing provision in respect of s 6A of Part 1. In terms of s 6A*bis* (7) *(a)*, Part 1AA lapsed on 31 December 2010. That subsection, like the lapsing provision referred to above, also had a saving provision in relation to pending applications and to those awaiting finalisation.

[17] By 31 December 2010, it was no longer possible to apply anew for either of the two categories of special pensions.

[18] It is now necessary to turn to the disqualifying provisions contained in Part 1 of the Act. Sections 1(8) and 1(9) read as follows:

‘(8) A person referred to in this section is disqualified from receiving or continuing to receive a *pension* if, after making the sacrifice of serving the public interest as referred to, that person –

(a) either actively engaged in actions calculated to undermine efforts to establish a non-racial democratic constitutional order;

(b) or was convicted of a crime committed after *2 February 1990.*

(9) For the purposes of subsection 8*(b)*, **"crime"** means –
(a) at any time between 2 February 1990 and 1 May 1994, an offence mentioned in Schedule 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977), other than treason and sedition; and
(b) at any time after 30 April 1994, an offence mentioned in Schedule 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977).'

[19] As stated earlier, the Act was designed to provide special pensions to those who, at personal cost, had made sacrifices or had acted in the public interest in the cause of establishing a democratic order. The disqualifying provisions were to discourage persons who had acted nobly in the past in pursuit of a democratic state, from acting in a manner that undermined the newly established democratic order and/or engaging in criminal activity. Engaging in either of those activities led to a disqualification which operated *ex lege*. Simply put, ss 1(8) and 1(9) operated as a bar to the continued payment or receipt of the special pension. As noted above, notwithstanding those provisions and before the GPAA became aware of the conviction, Mr Masemola continued receiving his special pension for several years. Because of these subsections the continued payment of the special pension was legally unjustifiable.

[20] In support of the proposition that Mr Masemola was entitled to continue receiving his special pension, counsel on his behalf, made reference to the Constitutional Court decision in *The Citizen 1978 (Pty) Ltd & others v McBride (Johnstone & others amici curiae)* 2011 (4) SA 191 (CC). The Constitutional Court in interpreting the amnesty provisions of the Reconciliation Act[6] held in para 72 of the judgment that s 20(10) of that Act expunged the previous conviction and reinstated the former convict to full civic status, so that he or

[6] The Promotion of National Unity and Reconciliation Act 34 of 1995, s 20(10) thereof which provides:' Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place…'

she is deemed never to have been convicted, but it does no more than that. It further held that the amnesty: 'does not render untrue the fact that the perpetrator was convicted, or expunge the deed that led to his or her conviction. Those remain historically true.'

[21] Counsel could not point to any decision in terms of which the effect of a Presidential Pardon held to be greater than the effect of s 20(10), referred to in the preceding paragraph. Moreover, at the time of Mr Masemola's conviction, the disqualifying provision of the Act was a bar to his continued receipt of his special pension. When the Presidential Pardon was granted, the part of the Act in terms of which special pensions could be paid to the category of persons under which Mr Masemola received his special pension, had lapsed by virtue of the provisions of s 6A of the Act. It will be recalled the relevant part of the Act lapsed on 31 December 2006, approximately five years before the grant of the Presidential Pardon. At the time of the Presidential Pardon, Part 1 and Part 1AA of the Act had lapsed. Counsel on behalf of Mr Masemola, was constrained to accept that the principle of legality presented a formidable if not insuperable obstacle to payment of the special pension. He could suggest no viable way in which the Act could be construed so as to enable Mr. Masemola to either apply anew or continue to receive the special pension. It is necessary to record that no constitutional challenge to the disqualifying provisions was foreshadowed in the papers. Counsel for Mr Masemola accepted this fact.

[22] We enquired of counsel representing the GPAA and the Appeal Board, whether his clients could find no other basis to come to Mr Masemola's assistance, particularly as his present circumstances were so dire. Although expressing sympathy for Mr Masemola's present plight, counsel was adamant that neither the GPAA nor Treasury could find a legal avenue to alleviate his circumstances. He submitted that a decision by this Court on the matter was of importance, as there are a number of cases waiting in the wings for an outcome. He indicated that they involved persons in similar circumstances as Mr. Masemola, namely, persons who had made a valuable contribution

towards the struggle for a just and democratic society, but who had been convicted of an offence as contemplated in the disqualifying provisions referred to above. He rightly emphasized that the Act was designed to ensure that those who committed offences post the establishment of our new democratic order, did not continue to receive the benefits which the Act bestowed. Counsel emphasised that government agencies were obliged to act within the constraints of the law and that the Constitution and a number of statutory enactments demanded fiscal transparency and accountability.

[23] I can find no fault with the submissions set out in the preceding paragraph. There is no means within the structure of the Act through which Mr Masemola can continue to receive a special pension. To find otherwise would be to subvert the disqualifying provisions, which the legislature correctly thought fit to include and would offend against the principle of *legality.*

[24] Counsel on behalf of the GPAA and the Appeal Board, appreciating Mr Masemola's position, did not contend that a cost order should be made against him in the event of a finding against him.

[25] For all the reasons set out above, the following order is made:

1 The appeal is upheld and no order is made as to costs.

2 The order of the high court is set aside and substituted as follows:

'The application is dismissed and no order is made as to costs.'

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S P Mothle
Acting Judge of Appeal

APPEARANCES:

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