

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: **07352/2015**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED

Date:

WHG VAN DER LINDE**In the matter between:****Mostert, Antony Louis N.O.****Applicant****And**

**The Registrar of Pension Funds
The Chief Master of the High Court
The Minister of Finance
Hislop, Raymond**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent**

Judgment on the application for leave to appeal

Van der Linde, J:

[1] This is an application for leave to appeal against an order I made on 24 June 2016, dismissing the applicant's application for the review and setting aside of a regulation made by the third respondent on 22 April 2003.

- [2] Applications for leave to appeal are now dealt with under s.17 of the Superior Courts Act 10 of 2013. A reasonable prospect of success on appeal is still the very first requirement. The other two, set out in s.17(1)(b) and (c), need not detain one here; they are met.
- [3] A constitutional interests of justice requirement has however become the overriding consideration; compare *City of Tshwane Metropolitan Municipality v Afriforum and Another*, [2016] ZACC 19 (19 May 2016) at [40]. Although that case concerned an interim order and a previous statute, the present statute is likely to be interpreted similarly.
- [4] This requirement would subsume, I suggest, also the requirement of a reasonable prospect of success. This latter requirement is thus the focus of the present application.
- [5] I held the applicant not-suited for failure to have complied with s.7 of PAJA, the central time-barring provision of PAJA. That was the ratio decidendi of the judgment, and it formed the basis of the dismissal of the applicant's claims. It will be recalled that the applicant applied to review and set aside a regulation made by the third respondent, many years after the regulation was made.
- [6] The application papers did not raise the time-barring issue, but the Minister argued from the Bar that the applicant's application was self-evidently out of time since it was not brought within the 180 day period laid down by s.7 of PAJA. The Minister also argued that the fact that the parties did not on the affidavits engage on the issue, was not a bar to the court deciding it. To the contrary, the submission was that the court had no power to review an administrative act if s.7 had not been complied with.

[7] In upholding the Minister's argument, I held that the applicant was obliged to have dealt with the issue; and ought to have disclosed when he acquired actual knowledge of the regulation. Not having done so, and since the application was self-evidently brought more than 180 days after the administrative act was performed, the applicant's review application could not succeed.

[8] In this application for leave, the applicant argues aspects of that issue which were not raised at the hearing and which I had not considered *mero motu*. Specifically, the correct application of s.7 of PAJA in the context of the review of a regulation now comes into stark relief, and particularly its feature of affecting not one individual but the public at large.

[9] The applicant argues (amongst other things) that in that scenario it cannot be that an applicant for review is non-suited for failing to have brought the application within 180 days of knowledge of the decision and reasons for it, since this may result in an untenable inconsistency where many members of the public are affected. There will be as many knowledge dates as there are members of the public.

[10] On this argument actual knowledge of the applicant is irrelevant. If a respondent were minded to rely on non-compliance with the 180 day period, it was up to it to place facts before the court by means of which it could then fix a deemed date of having acquired knowledge, according to the submission.

[11] The Minister's response, that the public are deemed to have knowledge from the date of publication of the regulation, does not assist, according to the applicant; regulations are subject to proof, and a court cannot take judicial notice of them.

[12]The applicant also attacked my finding on another basis: that it was in any event not a given that asserting and proving compliance with the time-barring provision was, as it were, an essential element of the applicant's cause of action. Parties may validly decide in advance that the time-bar will not be an issue they wish to raise, since they wish the court to decide the merits; in such a case it would not be required to raise the issue at all in the affidavits. If that is right then, in general, an applicant need not raise the issue, and could wait to see whether the respondent raises it. If so, then the applicant could deal with it in reply.

[13]The registrar's argument is that the applicant's case is bad on the merits, and so even if he might succeed on the time-barring issue that does not follow that the appeal has reasonable prospects of success. This submission is, with respect, appealing; but the conceptual difficulty I have with it is that an appeal is about overturning the judgment (in a trial) or order (in an application) of the court a quo. In this matter the order followed the finding on the time-bar. There was by definition no finding on the merits; it was all obiter, engaged in only because counsel had fully argued those. There could therefore be no appeal against those views, and a fortiori no opposition to any supposed appeal against them.

[14]At the end of the day one must assess whether another court could reasonably come to a different result to the one to which I came on the time-bar. I believe there is a reasonable prospect of success, on the basis that weighty propositions were put up now that I did not consider before.

[15]The Supreme Court of Appeal is in my view the appropriate forum. In the result I make the following order:

(a) Leave to appeal is granted to the Supreme Court of Appeal.

(b) The costs of the application for leave to appeal are costs in the appeal.

WHG van der Linde
Judge, High Court
Johannesburg

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Date argued: 18 August, 2016
Date of judgement: 25 August, 2016