

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
(4) Signature: [REDACTED] Date: 20/05/2022

CASE NO: 53555/17

SOUTH AFRICAN NATIONAL BLOOD SERVICE PROVIDENT FUND

1ST APPLICANT

SOUTH AFRICAN NATIONAL BLOOD SERVICE (SANBS)

2ND APPLICANT

And

PENSION FUND ADJUDICATOR

1ST RESPONDENT

MALUSI SHEPHERD NDEBELE

2ND RESPONDENT

ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD

3RD RESPONDENT

DATE OF JUDGMENT: Judgment is handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 20 MAY 2022

**LEAVE TO APPEAL
JUDGMENT**

N V KHUMALO J

INTRODUCTION

[1] This is an application for leave to Appeal to the full bench of this court or the Supreme Court of Appeal against the Judgment delivered by this court on 14 November 2019 dismissing the Applicant's Application in terms of section 30P of the Pension Funds Act No 24 of 1956 ("the Act") to have the 1st Respondent's ("PFA") section 30M determination set aside. (The parties are referred to as in the main action for ease of reference).

[2] The Application was enrolled for hearing on 04 May 2020, which was to be decided on consideration of the papers or documents filed of record and written argument filed on behalf of the parties, without appearance and oral argument. There was no Application for Condonation consequently the matter could not be finalized. An Application for Condonation was subsequently filed on 19 November 2020 and a Supplementary Affidavit filed on 22 February 2022 in response to a query raised by the court on 3 May 2021 relating to the commissioning in South Africa of the Supporting Affidavit in the Condonation Application deposed to by a deponent that was supposedly pursuing her studies in the USA. A case for condonation has been made and is consequently granted.

[3] Section 30P confers on the division of the High Court the jurisdiction to consider the merits of the complaint that was before the PFA under s 30A (3) upon which her determination was based and to substitute it with any order the court deems fit.

[3] Ndebele 's complaint before the PFA in February 2017 was that he still was not paid his benefits nearly two (2) years following his withdrawal from the Fund, after the SANBS opened a criminal case against him on July 2015 and dismissed him. The criminal case was withdrawn and no civil action was pending at the time, therefore the undue withholding of his benefits without reason or a justifiable cause unreasonable and or not permissible.

[4] The provisions of clause 11 of the Provident Fund Rules read:

11.2 Notwithstanding any other provisions of these Rules, **the Trustees may, where an employer has instituted legal proceedings in a Court of Law and or laid a criminal charge against the member concerned for compensation in respect of damage caused to the employer as contemplated in Section 37D (1) (b) (ii) of the Act, withhold payment of the benefit until such time as the**

matter has been finally determined by a competent court of law or has been settled **or formally withdrawn**; provided that:

- (a) the amount withheld shall not exceed the amount that may be deducted in terms of s 37 D (1) (b) (ii) of the Act;
- (b) the Trustees in their reasonable discretion are satisfied that the employer (1) has made out a prima facie case against the member concerned and (2) there is reason to believe that the employer has a reasonable chance of success in the proceedings that have been instituted.
- (c) The Trustees are satisfied that (3) **the employer is not at any stage of the proceedings responsible for any undue delay in the prosecution of the proceedings**; (my emphasis)

[5] On the merits that were before the PFA, there was no criminal or civil proceedings pending when Mndebele laid the complaint and no reasonable justification for the Applicant's delay in instituting civil proceedings in a matter that started in 2015. The criminal prosecution was withdrawn in May 2016. It was only after Mndebele had on 1 February 2017 laid a complaint with the PFA and the latter had requested responses from the Applicant on 9 February 2017, that a summons was thereafter served on Mndebele on 7 March 2017, a month thereafter. The Applicant's undue delay apparent. The Applicant was well aware that the complaint was about undue delay, which it tried to address by way of summons after the complaint was lodged.

[5] Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 provides, that "Leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success," raising the threshold of the test applicable. In the Land Claims Court Bertelsmann J in the unreported matter of *The Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) held at para [6], albeit obiter, that:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "**would**" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against." [My emphasis]

[11] The Supreme Court of Appeal in *Notshokovu v S* (157/15) [2016] ZASCA 112 (20 September 2016) at para [2], recognized and confirmed the new stringent threshold that an Appellant now faces. Furthermore, in *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015[2015] ZASCA 176 (25 November 2016) the court held at par [17] that: -

"[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[3] Having considered the issues raised by the Applicant in the Notice for leave to appeal and its heads of argument and had regard to the explanation proffered and argument made on the delay, I am not convinced that there are reasonable prospects of another court arriving at a different conclusion.

It is therefore ordered that:

1. the Applicant's Application for leave to appeal is refused.



N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

For the Applicants: T Mangcu

