REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 12/5/15

CASE NO: 24969/2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

CHRISTOPHER JOZANA	Applicant
and	
NATIONAL TREASURY REPUBLIC	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

J U D G M E N T

MAKGOKA, J

[1] In his notice of motion, the applicant seeks in the main, an order reviewing and setting aside the decision of the first respondent (National Treasury) to cancel his special pension. The relief sought by the applicant is opposed by the first, second, third and fourth respondents. The applicant seeks ancillary orders, which, in the light of the order I intend to make, it is not necessary to consider.

[2] The applicant was a recipient of a monthly pension in terms of the Special Pensions Act 69 of 1996 (the Act), [1] the purpose of which is defined as follows in its long title as follows:

"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. The Act is aimed at South African citizens who were 'prevented from providing for a pension because, for a total or combined period at least five years prior to 2 February 1990, that person was engaged full-time in the service of a political organization; or was under a banning order, or imprisoned for crime with a political motive."

[3] Section 1(1) of the Act sets out the qualification criteria for receiving special pension, the over-arching one being that referred to in the long title referred to above. Section 1(8), on the other hand, is concerned with disqualification from receiving or continuing to receive a pension. It states that a recipient of special pension is disqualified from receiving or continuing to receive such pension if, after making the sacrifice or serving the public interest, that person-

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

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

[4] Section 8 of the Act provides for a right to appeal against decision of the second respondent. It provides that any applicant who disagrees with any decision of the designated institution (the second respondent in the case) may appeal that decision by sending a written notice a prescribed manner to the Appeal Board within 60 days of the date of the decision.

[5] The applicant qualified for a special pension because of the following circumstances. He abandoned his legal studies at Fort Hare University after political detention, and left the

[1] Section 189 of the Republic of South Africa Constitution Act 200 of 1993 (the interim Constitution) enjoined national government to enact legislation for the payment of special pensions to persons who had made sacrifices or served the public interest in the establishment of a democratic constitutional order, including members of non-statutory armed or military forces. The section further stated that such legislation would prescribe, among others, qualifications and conditions for granting special pensions. The Special Pensions Act 69 of 1996 is the legislation envisaged by section of the interim Constitution.

country in the early 1960's as a member of Poqo, the military wing of the Pan Africanist Congress of Azania (PAC). In exile, he lived in different countries. He spent most of his time in the United Kingdom (UK) and the United States of America (USA) as a political activist. He also furthered his studies, obtaining LLB (Honours) LLM (Human Rights) and LLM (Labour Law). He was admitted as a barrister in the UK in 1977. He returned to the country in 1990, after spending 29 years in exile.

[6] Although the administration of Act is the responsibility of the Director-General of the National Treasury, the second respondent is an entity designated to administer the Act. The applicant's application for a special pension was approved early during 1995. On 14 March 2007 the applicant was convicted of theft. On 23 March 2012 the Senior Manager: Special Pension, in the National Treasury, informed the applicant that it intended terminating the applicant's pension because of his criminal conviction. The letter reads:

1. The Special Investigating Unit (SIU) was mandated to investigate various irregularities in connection with the affairs of the Special Pensions Board.
2. From information at my disposal, it appears that you applied to the Special Pension Board on 7/1/1995.
3. Your application was approved.
4. The Board via National Treasury made the necessary payment to you in *bona fide* and reasonable belief that you qualified for a special pension and same was accordingly due and owing to you.
5. Pursuant to the SIU's investigation, I am in possession of information indicating that you are disqualified in terms of section 1(8) of the Special Pensions No.69 of 1996, as amended from receiving or continuing to receive a pension.
6. Section 1(8) of the Act provides, inter alia, that a person who would otherwise have qualified for a pension in terms of the Act is disqualified if, after making the sacrifice or serving the public interest in the cause of establishing a democratic constitutional order, that person was convicted of a crime after 2 February 1990.
7. Section 1(9) of the Act provides that for the purpose of section 1(8), "crime" means, at any time between 2 February 1990 and 1 May 1994, an offence mentioned in Schedule 1 to the Criminal Procedure Act 51 of 1977 other than treason and sedition and, at any time after 30 April 1994, an offence mentioned in that Schedule including treason and sedition.
8. Information received from SIU indicated that you were convicted of Theft on 14/03/2007.
9. It would appear from the aforegoing that you are disqualified from receiving or continuing to receive a special pension by virtue of the provisions of section 1(8) of the Act with effect from date of commission of offence.
10. This letter calls upon you to submit written representation as to why I should not find that, by virtue of the aforementioned conviction, you are not entitled to special pension.
11. Your representation must reach me by no later than 6 April 2012.
12. Should you fail to respond to this letter, it will be accepted that you do not wish to make representation in the abovementioned regard.
13. This being the case, your special pension will be cancelled forthwith and steps will be taken to recover benefits paid to you from the date of commission of the offence for which you were convicted.

I look forward to hearing from you in due course.'

[7] The above letter was sent to an address in New Brighton, Port Elizabeth. However, the applicant had given notice of change of address over a decade before that letter was dispatched. On 10 April 2001 the applicant had delivered a written notice of change of address to the National Treasury. The letter informed the National Treasury that with effect from December 2000 he had moved permanently to Durban, and furnished a forwarding address in Durban. The National Treasury acknowledged receipt of this letter by way of its date stamp of 10 April 2001.

[8] Unsurprisingly, the applicant avers that he did not receive the letter informing him of termination of his pension. The applicant states that he discovered in May 2012 that his pension had been terminated. After an enquiry at the Port Elizabeth of the second respondent, he was informed that his pension had been terminated with effect from 1 May 2012, because of his criminal conviction. He was later furnished with a copy of the letter referred to above. Upon further enquiry, he was informed by a functionary of the second respondent in Pretoria that the letter informing him of cancellation of his pension had been sent to his old address in Port Elizabeth and had been returned by the post office as 'unclaimed.'

[9] I understood the applicant's main contention to two-fold. First, that he was not given an opportunity to make representation before the decision to terminate his pension was taken. Second, that he was not afforded an opportunity to lodge an appeal once the decision was made. The thrust of the applicant's case is that the first respondent did not have the right to terminate his pension without consultation with him, and affording him an opportunity to make submissions before the decision was taken, and once that decision was made, to be afforded an opportunity to lodge an appeal against the decision.

[10] In an answering affidavit deposed to on behalf of the National Treasury, it is contended that the applicant's review application has to fail mainly on three grounds. First, that the applicant was convicted of a crime 17 years after 2 February 1990. Second, and flowing from the first, it is contended that properly construed, the Special Pensions Board was instructed to disqualify any special pensioner from receiving a special pension once convicted of a crime. Third, that the applicant failed to respond to the request, in the letter dated 23 March 2012, to provide reasons by no later than 6 April 2012, why his special pension should not be cancelled due to the conviction. It is stated that the letter was sent to the address that the National Treasury had on record for the applicant, and that it was the duty of the applicant to collect his mail, and once it is shown that the letter was sent, the letter was assumed to be delivered.

[11] The third contention by the National Treasury needs no further elaboration. I have already pointed out earlier that the applicant had given proper notice of change of address to the National Treasury. Therefore, its assertions with regard to the sending of the letter carry no weight in the light of it having been notified of the applicant's new address. There is no gainsaying the applicant's averment that he did not receive the letter. In fact, on the objective facts before me, there is every indication, and I find, that the applicant did not receive the letter, and became aware of the termination of his pension in May 2012.

[12] That finding is significant for the National Treasury's contentions. It should be borne in mind that in the letter, the National Treasury had invited the applicant to make representations to the Special Pensions Board why his pension should not be terminated because of his criminal conviction. Therefore, an expectation was created in that letter that the applicant's representations would be taken into consideration before his pension was terminated. I have no doubt that had the applicant received the letter, he would have made representations. Whether such representations would have been successful, in the sense that the pension would have been continued, is a different consideration.

[13] What the National Treasury cannot tenably do, is to take a stance that in the ultimate end, lack of notice to the applicant did not matter since it is common cause that the applicant had been convicted of a criminal offence after 2 February 1990. The National Treasury's argument that properly construed, the Special Pensions Board has no residual discretion to continue special pension in the face of a criminal conviction, appears sound. However, that is not the point here. At the risk of repeating myself, the fact is that the National Treasury itself invited the applicant to make representations why his pension should not be terminated following his criminal conviction. It created an impression to the applicant that it retained a discretion whether or not to continue with the pension.

[14] Furthermore, s 8 of the Act, referred to above, provides for an appeal process should the applicant be aggrieved with a decision such as the one in issue. This right has also been rendered nugatory by the National Treasury in a procedurally impermissible manner. The National Treasury cannot summarily deny the applicant a statutorily entrenched right. The upshot of these considerations is that by summarily terminating the applicant's pension, the National Treasury has ignored two important procedural rights due to the applicant. The first being the right to make representations before the decision to terminate his pension was made, and the second being the right of appeal provided for in s 8 of the Act.

[15] A further consideration is that a criminal conviction itself may be subject to an appeal and /or review process. It is a trite principle of our law that until the appeal/review process is finally determined, one cannot be said to have committed an offence. In his founding affidavit, the applicant states that his conviction is subject of a pending review, although it seems that an earlier appeal had failed. The deponent on behalf of the National Treasury did not join issue with this allegation.

[16] It is so that the applicant did not provide much information about this pending 'review'. But it was upon the National Treasury to join issue with that allegation, and challenge the applicant to furnish more and precise particulars in his replying affidavit. It elected not to do so, and instead contended itself with only the mere fact that the applicant had been convicted of a criminal offence. It might well be that there is nothing to this allegation, but at this stage I am bound to accept the uncontroverted allegations of the applicant. Therefore, the result is that by not being notified of the intention to terminate his pension, the applicant has also being denied the right make representation that his pension should not be terminated pending the outcome of the review or further appeal of his criminal conviction.

[17] To sum up. The applicant should be afforded a reasonable opportunity to make representations to the Pensions Special Board as envisaged in the letter dated 23 March 2013, before the decision to terminate his pension in terms of s 1(8) of the Act is made. The applicant is entitled, as a matter of procedural fairness, to make whatever representations he deems necessary. It does not matter how untenable the National Treasury views such representations to be. This is about procedural, more than substantial, fairness.

[18] It follows that the decision by the National Treasury in April 2012 to terminate the applicant's pension in terms of s 1(8) of the Act, was procedurally flawed. It has therefore no effect or force. In the light of the view I take of the matter, it is not necessary to consider the applicant's complaint that the second respondent had failed to place a proper record before this court, as envisaged in terms of rule 53 of the Uniform Rules of Court. No costs are involved as the applicant appeared in person.

[19] 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.

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

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.

TM Makgoka
Judge of the High Court

Date Heard: 12 March 2015

Judgement Delivered: 18 May 2015

Appearances

Applicant in Person

For the opposing respondents : Adv. A.L. Platt

Instructed by: State Attorney, Pretoria