



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 260/18

In the matter between:

NATHANIEL MASHILO MASEMOLA

Applicant

and

SPECIAL PENSIONS APPEAL BOARD

First Respondent

**GOVERNMENT PENSIONS
ADMINISTRATION AGENCY**

Second Respondent

Neutral citation: *Masemola v Special Pensions Appeal Board and Another* [2019] ZACC 39

Coram: Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Theron J and Victor AJ

Judgment: Mhlantla J (unanimous)

Heard on: 6 August 2019

Decided on: 15 October 2019

Summary: Special Pensions Act 69 of 1996 — disqualification from receiving special pension — effect of presidential pardon — special pension restored

ORDER

On appeal from the Supreme Court of Appeal the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
 - (a) It is declared that the special pension of Mr Nathaniel Mashilo Masemola is restored from 21 July 2011, being the date on which he received his presidential pardon.
 - (b) The Special Pensions Appeal Board and Government Pensions Administration Agency are ordered to pay Mr Nathaniel Mashilo Masemola his special pension with effect from 21 July 2011 within 14 days from the date of this order.
 - (c) The Special Pensions Appeal Board and Government Pensions Administration Agency are to pay the applicant's costs, jointly and severally, including costs of two counsel where applicable.
4. The Special Pensions Appeal Board and Government Pensions Administration Agency are to pay the applicant's costs in this Court, jointly and severally, including the costs of two counsel where applicable.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Theron J and Victor AJ concurring):

Introduction

[1] Many men and women contributed to the liberation struggle. They were engaged in the service of political organisations in pursuit of one cause – the liberation of the majority of South African citizens from apartheid. As a consequence of the repressive measures adopted by the apartheid regime against its opponents, some struggle activists ended up being imprisoned for many years, others were in exile and engaged in the struggle outside South Africa, and others were prevented by law from being in certain places. As a result, most of these political activists were not gainfully employed and thus unable to provide a pension for themselves. Through the efforts of all those involved, the liberation struggle eventually contributed to the establishment of a democratic government.

[2] In recognition of the sacrifices made by struggle activists, section 189 of the interim Constitution required that legislation be enacted to provide for the payment of special pensions by the national government to persons who had made sacrifices or served the public interest in the establishment of a democratic constitutional order.¹

¹ Section 189 of the interim Constitution states:

- “(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

The Special Pensions Act² (Act) which was enacted in 1996 did just that. It also prescribed rules for determining the persons who were entitled to receive those special pensions.³

[3] This matter comes before us as an application for leave to appeal against an order of the Supreme Court of Appeal that upheld an appeal against a judgment of the High Court of South Africa, Gauteng Division, Pretoria (High Court). It concerns the disqualification of receipt of a special pension and the effect of a presidential pardon in this regard.

Background facts

[4] The applicant, Mr Nathaniel Mashilo Masemola, is a 92-year-old man who was actively engaged in the liberation struggle under the auspices of the African National Congress (ANC), of which he had been a member since 1946. Due to his political activities, he was forced into exile. After returning from exile he served in the ANC's Legal and Constitutional Committee which participated in the processes leading to the adoption of the Constitution. On 26 March 1997, the applicant applied for a special pension, in terms of the Act, in light of his sacrifices and his service in the public interest.⁴ In appreciation of his contribution to the establishment of the democratic constitutional order, the first respondent, the Special Pensions Appeal Board (Board) awarded the applicant his special pension on 10 December 1997.

[5] On 2 April 2001, the applicant was convicted of several counts of fraud and was sentenced to five years' imprisonment. Pursuant to an investigation by the Special Investigating Unit (SIU) in 2007 the Board advised the applicant that, in terms

pension, taking into account all relevant factors, including, *inter alia*, any other remuneration or pension received by such beneficiary."

² 69 of 1996.

³ Long title of the Act.

⁴ His application was lodged in terms of section 6 of the Act which requires a person who applies for a special pension to complete the prescribed form, which must be commissioned by a Commissioner of Oaths and must be submitted before the closing date. The closing date was 1 December 1997.

of section 1(8)(b) of the Act, he was disqualified from continuing to receive a special pension.⁵ Thereafter the applicant did not receive his special pension.

[6] The applicant applied for a presidential pardon in terms of section 84(2)(j) of the Constitution.⁶ This was granted on 21 July 2011. The pardon was in respect of his conviction on five counts of fraud which it expunged. In 2012, he received a South African Police Services (SAPS) Clearance Certificate, certifying that the conviction had been expunged from his record.

[7] The applicant thereafter addressed a letter to the second respondent, the Government Pensions Administration Agency (GPAA),⁷ notifying it of his pardon and requested the reinstatement of his special pension. In February 2015, the GPAA informed the applicant that his disqualification had occurred before his pardon and explained that since pardons do not have retrospective effect, his special pension could not be reinstated. Accordingly, the GPAA did not accede to his request for reinstatement.

[8] The applicant made further attempts to have his special pension reinstated contending that the pardon had eliminated the grounds for his disqualification. In March 2015, the applicant noted an appeal with the Board against the decision of the GPAA. In July 2015, the Chairperson of the Board informed the applicant that the 2008 disqualification letter was not a decision and accordingly no appeal could be lodged against it.

[9] In February 2016, the applicant launched proceedings in the High Court against the failure of the respondents to take a decision. On 8 August 2016, the High Court

⁵ Section 1(8)(b) provides that a special pension recipient is disqualified from receiving or continuing to receive a pension if, after making the sacrifice or serving the public interest, that person was convicted after 2 February 1990. Section 1(9)(b) qualifies the term “crime” in section 1(8)(b) to mean at any time after 30 April 1994, an offence mentioned in Schedule 1 of the Criminal Procedure Act 51 of 1977.

⁶ Section 84(2)(j) states that the President is responsible for pardoning or relieving offenders and remitting any fines, penalties or forfeitures.

⁷ The GPAA administers pensions of the Government Employees Pension Fund and the National Treasury.

ordered the Board to make a decision regarding the reinstatement of the applicant's special pension within 15 days of the order.⁸

[10] By September 2016, the applicant had not received a decision and he threatened urgent litigation. In October 2016, the Board informed the applicant that it was not competent to make a decision regarding the reinstatement of his special pension. The Board explained that the disqualification occurred by operation of law, therefore, there could be no decision by the GPAA susceptible to an appeal in terms of section 8(1).⁹ The Board explained that the interpretation of this legal issue – the effect of his expungement – was best left to be determined by a court as any decision on reinstatement would overstep its mandate.

[11] This prompted the applicant to approach the High Court again. This time he sought to review and set aside the decisions of the GPAA and the Board and an order reinstating his special pension.

Litigation history

High Court

[12] The High Court held that the written exchanges between the applicant and the GPAA made it clear that the GPAA had decided not to reinstate the applicant's special pension and that the decision was communicated to him.¹⁰ The High Court held that this decision was capable of being appealed and the Board was under an obligation to adjudicate the correctness of this decision. Giving effect to the purpose of the Act, the High Court held that presidential pardons and special pensions could not be viewed in isolation. The Court held that the applicant would, in light of the presidential pardon and "with no criminal record to his name", be entitled, "even on a fresh application",

⁸ *Masemola v Special Pensions Appeal Board* (10448/16) [2016] ZAGPPHC per Fabricus J.

⁹ Section 8(1) of the Act states:

"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."

¹⁰ *Masemola v Special Pensions Appeal Board* [2016] ZAGPPHC 1253 per Makhubele AJ.

to receive the special pension.¹¹ The High Court elected not to refer the matter back to the Board and instead, set aside the decision of the Board and ordered the reinstatement of the applicant's special pension, effective from the date of the presidential pardon, 21 July 2011. The respondents were granted leave to appeal.

Supreme Court of Appeal

[13] The Supreme Court of Appeal per Mothle AJA, delved into the legislative development of the Act.¹² It held that the purpose of the Act and its relevant amendments indicate a clear intention by the Legislature to provide for those who made sacrifices, but that there was a cut-off to the time in which those persons could apply for special pensions. The insertion of section 6A meant that no new special pension applications could be made after 31 December 2006.¹³ The Supreme Court of Appeal held that the motivation for this time bar was to guard against the risk of fraudulent claims and those that could not be easily verified. This time bar did not affect benefits already determined, or existing applications that had not by then been determined. The Supreme Court of Appeal explained that the disqualifying provisions too served a purpose: to discourage people from acting in a manner that undermined the new democratic order.

[14] The Supreme Court of Appeal relied on *McBride*,¹⁴ where this Court held that section 20(10) of the Promotion of National Unity and Reconciliation Act¹⁵ expunged

¹¹ Id at paras 19-20.

¹² *Special Pensions Appeal Board v Masemola* [2018] ZASCA 117; [2019] JOL 41630 (SCA) (Supreme Court of Appeal judgment) per Mothle AJA with Navsa JA, Tshiqi JA, Swain JA and Mathopo JA concurring.

¹³ Section 6A, titled "Lapsing of Part 1, and certain savings" provides:

- "(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."

Other amendments were affected, and by 2010 it was no longer possible to apply anew for a special pension.

¹⁴ *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) (*McBride*).

¹⁵ 34 of 1995 (Reconciliation Act).

previous convictions and restored full civic status but “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.”¹⁶ The Supreme Court of Appeal found no reason to give greater effect to a presidential pardon than to section 20(10). The Court noted that when the applicant’s pardon was granted, the part of the Act in terms of which special pensions could be paid to the category of persons under which the applicant received his special pension, had lapsed by virtue of section 6A of the Act. The Court explained that the relevant part of the Act had lapsed approximately five years before the grant of the presidential pardon. It held that this presented “a formidable if not insuperable bar to payment of the special pension”.¹⁷

[15] Ultimately, in upholding the appeal, the Supreme Court of Appeal held:

“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.”¹⁸

In this Court

[16] Aggrieved by the decision, the applicant applied for leave to appeal to this Court. We issued directions requesting submissions from the parties on: (a) the effect or limits of a presidential pardon; and (b) the effect of section 6A(1) of the Act on the reinstatement of special pensions. Upon receipt of the written submissions, the matter was set down for hearing.

Issues

[17] The issues for determination are:

- (a) Should leave to appeal be granted?

¹⁶ Supreme Court of Appeal judgment above n 12 at para 20 quoting *McBride* above n 14 at para 72.

¹⁷ Supreme Court of Appeal judgment *id* at para 21.

¹⁸ *Id* at para 23.

- (b) What is the effect of the applicant's presidential pardon?
- (c) Is the applicant, following his presidential pardon, entitled to the restoration of his special pension benefits?
- (d) If he is entitled, is the restoration automatic following the presidential pardon, or does it require a fresh application?
- (e) Given the changes to the legislative scheme, is the right to a special pension still available? Linked to this, what is the effect of section 6A of the Act?
- (f) Does the Board and the GPAA have the power to reinstate the special pension?

Jurisdiction and leave to appeal

[18] While both parties agree that this Court has jurisdiction and that leave should be granted, this is not determinative. In order for this Court to entertain this matter there must be either a constitutional issue or an arguable point of law of general public importance¹⁹ and it must be in the interests of justice to hear the matter.²⁰ It is axiomatic that the construction of a constitutional provision, such as section 84(2)(j) of the Constitution, as well as the interpretation and application of legislation enacted in order to give effect to section 189 of the interim Constitution, constitute constitutional matters.²¹ In addition, this matter raises questions of considerable

¹⁹ Section 167(3) of the Constitution provides:

“The Constitutional Court—

- (a) is the highest court of the Republic; and
- (b) may decide—
 - (i) constitutional matters; and
 - (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
- (c) makes the final decision whether a matter is within its jurisdiction.”

²⁰ *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 29-30.

²¹ *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 28.

public importance concerning the legal effect of presidential pardons as well as the interpretation of the Act. This is a novel question which clearly implicates significant public interest. The matter is arguable and has prospects of success. The interests of justice dictate that this Court resolve this matter. Accordingly, leave to appeal should be granted.

[19] Before turning to the question of the effect of a presidential pardon, an overview of the construction of the Act is necessary in order to properly ascertain the rights and responsibilities it caters for.

The regulatory framework

[20] The starting point is its purpose. As stated above, the Act, in giving effect to section 189 of the interim Constitution, aims to provide financial support to those involved in the liberation struggle who made sacrifices either in exile or within South Africa. It was enacted to support those who were barred from or who lost opportunities to provide for themselves in retirement as they fought for a democratic state based on human dignity, the achievement of equality and the advancement of human rights and freedoms.²² Ultimately, the purpose of the Act is to recognise the efforts and give financial support to those who deserve it.

[21] With the purpose of the Act in mind, it is necessary to consider the provisions of the Act that give rise to a right to a special pension. The starting point here are the definitions. A “pension” is defined as a right to monthly payment of a pension.²³ A “benefit” is defined as a sum of money payable.²⁴

²² See Long title of the Act above n 3. See further Nevondwe and Tshoose “A Legal Analysis of the Distribution and Payment of Special Pensions under the South African Special Pensions Act” (2011) 16 *Pensions* 224 at 225.

²³ A monthly pension is applicable to sections 1, 6*Abis* and 6D of the Act. Section 1 provides the requirements for being eligible for a special pension. Section 6*Abis* sets out further qualifications including age and the circumstances that would have prevented a person from providing a pension. Section 6D provides for the entitlements of surviving spouses and dependents upon the death of a special pension recipient.

²⁴ A “benefit” is applicable in terms of Part 1 titled: “Right to pension of persons 35 years of age and older on 1 December 1996 and survivor’s lump sum benefit”; Part 1AA titled: “Right to pension of persons 30 years of age or between 30 and 35 years of age on 1 December 1996”; or Part 1A of the Act titled: “Survivor benefits on death of pensioner and funeral benefits”.

[22] A special pension comes from a non-contributory fund and differs from ordinary pensions. A benefit includes, amongst others, a pension, a survivor's benefit, and a funeral benefit. This distinction is important. In the context of the Act a pension refers to a special pension which is a unique type of financial support for a specified group of deserving people, whereas a benefit is the more general concept of receiving financial support through a variety of ways.

[23] Given their text, context and link to other sections, I have interpreted these definitions to mean that a benefit includes a special pension (the same way it includes a funeral benefit), whereas a special pension is the specific monthly payment of a pension received in terms of the Act. Simply put, a benefit is an amount of money received, a special pension is a specific amount of money received by a specific person as a result of their contribution. With this distinction in mind it is necessary to consider other provisions that are pivotal in this matter.

[24] Section 1(1) of the Act affords a "*right to pension*" to a certain category of persons who made sacrifices and served the public interest in the struggle against apartheid. In order to obtain this right and receive the special pension, a person had to make an application in terms of section 6(1) by completing a prescribed form. This section has, however, since lapsed. Section 1(1) could be seen as vesting a right on an individual who has met the criteria for a special pension and whose application was approved.

[25] Section 1(8)(b) of the Act provides:

"A person referred to in this section is disqualified from receiving or continuing to receive a pension if, after making the sacrifice or serving the public interest as referred to, that person . . . was convicted of a crime committed after 2 February 1990."

[26] This section provides for instances where the payment of the special pension will be stopped. Specifically, it provides that a person is disqualified from receiving or continuing to receive a special pension if that person was convicted of a crime committed after 2 February 1990. The contextual reading of the section is that all persons who were convicted of a crime after this date would be disqualified. This means that the accrual of the special pension is suspended during the period of the conviction and disqualification. However, the vested right is not affected during this period. It is clear from this section that a person is disqualified from “receiving or continuing to receive a pension”. In other words, the payment is stopped and that person does not actually receive, nor is he entitled to receive, the monthly payments if he has been convicted of an offence such as fraud.

[27] From a purposive reading of the Act, it is clear that section 1(8) sought to deter and discourage special pension recipients from committing serious offences which offend the constitutional order.²⁵ While this is an important purpose, the disqualification does not affect the right to a special pension in terms of section 1(1). This means that, where the reasons for the disqualification have fallen away, a person will be able to receive their special pension once they have notified the Board of the change in circumstance. The right itself is not terminated; it is the receiving of the monthly payment that can be interfered with.

Effect of the presidential pardon on the applicant's special pension

[28] In 1997, the applicant duly complied with the application procedure as prescribed by the Act and was granted his special pension. It was at this point that he began accessing the benefits that flowed from his right to a special pension. In 2001, the applicant was convicted of fraud triggering section 1(8). From that date he was no

²⁵ This purposive interpretation was also adopted by the Supreme Court of Appeal above n 12 which held at para 19 that:

“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*.”

longer entitled to receive the monthly payment of his special pension, but it was only in 2008 that the respondents became aware of the conviction and ultimately disqualified him from receiving or continuing to receive his special pension. On 21 July 2011, the applicant was granted a presidential pardon in respect of his 2001 conviction. As a result, the conviction was expunged. It is for us to determine what this means for the applicant and his special pension. In doing so, consideration must be given to the effect of presidential pardons.

[29] There has been some consideration by this Court on the issue of presidential pardons.²⁶ But the issue before us is fairly novel. The point of departure is the Constitution. Section 84(2)(j) is a constitutional power conferred on the President who has a function and obligation to decide upon applications for pardon.²⁷ The President is, in terms of this section, authorised to pardon or reprieve offenders and remit any fines, penalties or forfeitures. What is of relevance here is the applicant's pardon and its effect.

²⁶ *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (*Hugo*) dealt with the President's decision to remit the sentences of a special category of prisoners. There, the majority of this Court at paras 45-6 held that there were at least two situations in which the power to grant pardons may be important. First, to correct a mistaken conviction and enhance justice within the legal system, and second, to provide an opportunity to release convicted persons when it is in the public interest, as in *Hugo*, where the exercise of the power to pardon was an act of mercy at a time of great historical significance. See also *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (7) BCLR 725 (CC) where this Court engaged with the basis on which the courts may review the exercise of presidential powers. Affirming *Hugo*, the Court gave historical content to presidential pardons at para 144 and explained that such powers originated from the royal prerogative and were enjoyed by the Head of State. The Court went on to explain that now, all powers conferred by section 84(2) are original constitutional powers. See also *Minister for Justice and Constitutional Development v Chonco* [2009] ZACC 25; 2010 (4) SA 82 (CC); 2010 (2) BCLR 140 (CC) (*Chonco*) at para 16 where this Court considered the relationship between the powers and functions of the President as Head of State, on the one hand, and those that are entrusted to the Executive, on the other, as well as the obligations that accrue to each in terms of section 84(2)(j). See further *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) where this Court determined the scope of the President's power to grant pardons to people who were convicted of offences that were committed with a political motive as part of the special dispensation process. At para 75, Ngcobo CJ writing for the Court, distinguished between pardons through the special dispensation process and ordinary presidential pardons (with which we are concerned here). While that matter did not make explicit determinations regarding ordinary presidential pardons, it distilled the impression that the purpose of amnesty and special dispensation pardons were geared towards national unity and national reconciliation.

²⁷ *Chonco* id at para 30.

[30] The applicant submitted that the effect of his pardon – which was “in respect of his conviction” – constitutes a full and unconditional pardon that requires the conviction to be expunged from his criminal record. He argues that section 84(2)(j) of the Constitution, read with the express wording of his pardon, means he is to be treated as a person who has not been convicted of the pardoned offences, such that his conviction falls away and the pardon makes him eligible and entitled to receive his special pension. During the hearing, the applicant explained that the legal effect of his pardon was that the ineligibility to receive his special pension ceased to exist.

[31] Reliance was placed on *McBride* to illustrate that the legal effects of amnesty are substantially similar to a full pardon in that the conviction is expunged restoring his “unblemished legal and civil status.”²⁸ The applicant contended that *McBride* makes it clear that the effect of expungement – be it as a result of amnesty or pardon – is that the convicted person is restored to full civic status, and all legal disabilities are removed. The applicant took issue with the Supreme Court of Appeal’s interpretation of *McBride*. According to him, the correct interpretation is that although amnesty removes the legal consequences of a conviction it does not absolve its recipient from moral condemnation, nor does it change the facts of history. The fact that the conviction occurred remains true, even though legally, the conviction is erased. On this interpretation, the applicant contends that the effect of his pardon means that he is no longer disqualified from receiving his special pension.

[32] The respondents, on the other hand, submitted that upon the grant of the pardon and expungement of the record, the applicant does not automatically become entitled to a restoration of the special pension that he was receiving before the benefits were discontinued. They contended that there is no provision in the Act for the restoration of a special pension terminated in terms of section 1(8). The respondents rely on *Du Toit* to illustrate that whilst a pardon gives the offender freedom from the consequences of his convictions, it does not undo the past and it operates

²⁸ *McBride* above n 14 at para 71.

prospectively.²⁹ It restores civil status but does not undo collateral consequences of the conviction. The lack of a provision dealing with restoration of rights upon pardon should be understood and interpreted to mean that the Legislature sought not to provide automatic restoration. The respondents further submitted that the Court has no power to afford a benefit to those who have been deemed to be disqualified by the Legislature from receiving the special pension.

[33] The applicant does not dispute the cause of the disqualification and accepts that he was correctly disqualified under the circumstances. The issue is what happens once that disqualification falls away. In *Du Toit*, General Du Toit, who had been convicted of the murder of the “Motherwell Four” and sentenced to 15 years’ imprisonment, was granted amnesty under section 20(10) of the Reconciliation Act.³⁰ However, his amnesty came through some nine and a half years after his murder conviction. In the meantime, the SAPS applied section 36(1) of the South African Police Service Act.³¹ This provides that a SAPS member convicted of an offence and sentenced to imprisonment without the option of a fine “shall be deemed to have been discharged from the Service”. General Du Toit had argued before this Court that by virtue of receiving amnesty, the provisions of the Reconciliation Act had the effect of cancelling the discharge from duty as if it had never occurred.

[34] This Court unanimously held, per Langa CJ, that General Du Toit’s discharge could not be undone. The effect of granting amnesty on civil liability that has already been determined is, the Court noted, “prospective only”.³² This, the Court reasoned, shows that “the granting of amnesty does not obliterate all direct legal consequences of conduct in respect of which amnesty is granted”.³³ This Court also distinguished between the concepts of retrospectivity and retroactivity:

²⁹ *Du Toit v Minister for Safety and Security* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC).

³⁰ *Id* at para 4.

³¹ 68 of 1995 (SAPS Act).

³² *Du Toit* above n 29 at para 44.

³³ *Id*.

“A retrospective provision operates for the future only but imposes new results in respect of past events. A retroactive provision operates as of a time prior to the enactment of the provision itself and changes the law applicable with effect from a past date.”³⁴

[35] This Court concluded that section 20(10) of the Reconciliation Act was, contrary to the finding of the Supreme Court of Appeal in that case, unavoidably retrospective, in that it reached into the past in referring to acts committed before its enactment “and seeks to expunge the record of such acts”.³⁵ However, for General Du Toit’s argument to succeed, it required the provision not just to be retrospective, but also retroactive. This it was not.³⁶

[36] In this matter at the Supreme Court of Appeal, Mothle AJA noted that counsel could not point to any decision in terms of which the effect of a presidential pardon does not operate with the power and vigour of section 20(10) of the Reconciliation Act. The difference between *Du Toit* and the applicant is that General Du Toit’s discharge had occurred as both a legal reality and as a fact in the world. It could not be undone. This is accentuated by the provisions of section 36 of the SAPS Act which permits an applicant to be reinstated to the SAPS if the conviction is set aside or a sentence other than imprisonment is imposed. Likewise, section 36(3) and (4) make provision explicitly for reinstatement. The point is that General Du Toit was not seeking reinstatement. He was seeking expungement of his discharge. That, this Court said could not be. The effect is that, whereas the conviction and the sentence remain factual historical occurrences, the ordinary legal effects or consequences of the conviction and sentence are removed as a result of the presidential pardon. In this regard, presidential pardons cannot be misconstrued as having the effect of setting aside convictions and sentences.

³⁴ Id at para 33.

³⁵ Id at para 34.

³⁶ Id at paras 35-6.

[37] In this case, and given the particular wording of the presidential pardon, the applicant received what is generally referred to as a full pardon. The President also directed that the applicant's conviction be expunged from his criminal record. The result being that for all intents and purposes, the applicant, with effect from 21 July 2011, is legally to be treated as a person who has not been convicted of the offence. The applicant is with effect from the date of the pardon no longer affected by any legal disqualifications that are as a result of his conviction. He is no longer subject to any civil or statutory disabilities that are imposed on a person convicted of the offence.

[38] Here, the applicant is not seeking expungement of his disqualification, he seeks only its expungement from the date of his presidential pardon. If the applicant had sought, retroactively, on the basis of his pardon, to have his disqualification expunged from the date of his conviction to April 2001, his case would have been on all fours with that of *Du Toit*.

[39] But he does not seek that. The applicant only seeks the reinstatement of his special pension from the date that he was pardoned. Therefore, in true fidelity to the reasoning and importance of *Du Toit*, he seeks a retrospective but not retroactive result. Differently put, he acknowledges that he was disqualified from receiving his special pension under the Act between April 2001 and his pardon in July 2011. But, he says, his entitlement to the special pension revived when he was pardoned.

[40] The scope of the disqualification is limited to the receipt of a special pension. It follows that the prior right to a special pension, in terms of section 1(1) which had already been determined, never lapsed due to the disqualification. It continued to exist. The applicant's section 1(1) right remains despite his conviction. He was, however, disqualified from receiving his special pension by virtue of section 1(8). Accordingly, the pardon revived the applicant's entitlement to receive his special pension from the date of pardon. Therefore, the question to be answered is whether

there is anything that stands in the way of the applicant for his special pension to be restored? That is the issue that I will consider below.

Applicability of section 6A – is it an obstacle?

[41] Section 6A, titled “Lapsing of Part 1, and certain savings” reads:

- “(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.”

[42] The respondents submitted that a pardon does not lead to restoration but instead it removes the disqualification and entitlement to apply. They contend that any restoration without the lodging of an application in terms of section 6 of the Act would be legally incompetent. This means that no right to apply for a special pension existed. The respondents argued that the applicant’s determination was made in 1997, and as a result of his conviction in 2001, he was no longer entitled to the benefits, notwithstanding the pardon received. They contended that this termination means that the applicant would have to apply afresh, but unfortunately he would be precluded from doing so because of the introduction of section 6A which rendered this route unattainable as of 31 December 2006, Part 1 of the Act lapsed.

[43] I disagree. A proper interpretation of the section must be given. In doing so, we must have regard to the purpose of the Act and the introduction of section 6A. The purpose of the Act is to give effect to section 189 of the interim Constitution. That section requires that an Act of Parliament shall provide for the payment of special pensions to persons who, in the establishment of a democratic constitutional order, made sacrifices or served in the public interest. The applicant is one of those persons and his application was considered and approved in 1997.

[44] Moreover, the 2005 Memorandum to the Special Pensions Amendment Bill explained the reason for the introduction of section 6A as follows:

“An extension of the period for application, or continued consideration of late applications, is no longer prudent because of the risk of fraudulent claims. The risk is increasing as a result of a lack of information and difficulties experienced in the verification of information, due to the time lapse since 1996.

The Special Pensions Amendment Bill therefore proposes the lapsing of the provisions providing for the qualification for pensions and survivor’s lump sums on 31 December 2006. This means that the consideration of new applications for pension or survivor’s lump sums after this date will no longer be possible.”³⁷

[45] It is clear that this section was introduced to combat fraudulent claims and to overcome difficulties experienced in the verification of historic information so long after the beginning of our new democracy. Its purpose was to prevent the Board and the GPAA from making decisions regarding a person’s eligibility for a special pension based on outdated information that was difficult to verify. It was not intended to affect those persons whose applications had already been verified and approved. The effect of section 6A saw the lapsing of certain provisions in the Act and meant that new applications submitted after 31 December 2006 would not be considered. Those applicants whose applications were already determined or submitted before the cut-off date would continue to receive their benefits.

[46] The applicant does not fall into the category under section 6A(1) since the facts on which his initial application had been made, had already been verified when he applied in 1997 and was allocated the special pension. The applicant was not the intended target of the Legislature when it drafted section 6A. In reinstating the applicant’s special pension, the Board is not supposed to review new facts on which the applicant alleges that he is eligible for the special pensions. Rather, the Board must consider whether the disqualification is still applicable to these old facts (and

³⁷ Memorandum on the Objects of the Special Pensions Amendment Bill, 2005 at paras 1.3-1.4.

application) given that the applicant was pardoned and his criminal record was expunged. There is no rational basis for reading section 6A(1) as preventing the respondents from being able to have his special pension restored.

[47] Section 6A(2) provides that 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 of the Act before 31 December 2006. The Board in this case, is still empowered to restore special pensions.

[48] Here, we are not concerned with a new application. A determination whether the applicant met the criteria for the special pension had already been done. The respondents explained that the applicant would need to complete the prescribed form afresh which is required to be commissioned, and he would, on oath, have to disclose his conviction. Part 3 of the form titled “Imprisonment after February 1990” asks: “were you convicted of a criminal offence after 2 February 1990?” An applicant is required to tick either yes or no. The respondents’ argument disregards the effect of the pardon and expungement of the applicant’s conviction. It is clear that post-pardon the applicant is prospectively deemed not to have been convicted of an offence. It follows that Part 3 of the form is not an obstacle for the applicant. This means that the applicant is covered by section 6A(2) which refers to applications which had already been determined before the lapsing of provisions on 31 December 2006. I now consider whether the Board and GPAA have the power to restore the special pension.

Powers of the Board and GPAA

[49] The Board and GPAA submit that they are creatures of statute and can only exercise their functions in accordance with the Act. Administering special pensions includes the implementation of the disqualifying provisions and excludes the restoration of special pensions. They do not have the power to restore the applicant’s special pension. Interpreting the Act to afford that power would be stretching interpreting to legislating. On behalf of the applicant, this was countered by a submission that the power of the Board and GPAA to restore his special pension is

implicitly authorised by the Act as it is reasonably incidental to the proper carrying out of the express powers of these functionaries.³⁸

[50] Indeed, the Act gives the Board and the GPAA certain express powers.³⁹ However, the Act has not expressly conferred on the Board and the GPAA a power to restore the special pension. But whether the Board and GPAA have implied powers to restore the special pension is not at the heart of this matter. This is because the disqualification under section 1(8)(b) terminates the entitlement to continue receiving a special pension and the effect of the applicant's pardon is to revive the entitlement to continue receiving the special pension. Consequently, payment must then follow as a matter of course; and that is because the entitlement to receive payment has been revived. That is quite distinct from requiring the Board and GPAA to have implied powers to restore the applicant's special pension. Rather, the revival happens by operation of law. And, because the entitlement to continue receiving payment has been revived, the GPAA must pay in terms of section 9 as before.⁴⁰

[51] That this must be so accords with the fundamental maxim *ubi jus, ibi remedium* (where there is a right, there is a remedy). The applicant's right to a special pension cannot be exercised without the reciprocal ability to enforce payment. In *Harris*, Centlivres CJ, with reference to English authorities, stated:⁴¹

“There can to my mind be no doubt that the authors of the Constitution intended that those rights [that is, the rights entrenched in the Constitution] should be enforceable by the courts of law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium*. If

³⁸ See *Road Accident Fund Appeal Tribunal v Gouws* [2017] ZASCA 188; 2018 (3) SA 413 (SCA) at para 27 and Hoexter *Administrative Law* 2 ed (Juta & Co Ltd, Cape Town 2015) at 43.

³⁹ These include the power to receive applications for appeals, to administer oaths and to summon individuals to testify. The Board has in terms of section 8(5) the power to “confirm, set aside and vary a decision of a designated institution”, such as the GPAA. Section 7(2) requires the respondents through their delegated power to ensure the effective and efficient implementation of the Act. The GPAA is empowered to administer the Act. These powers are discretionary and wide.

⁴⁰ Section 9 provides for the payment of benefits.

⁴¹ *Minister of the Interior v Harris* 1952 (4) SA 769 (A) (*Harris*) at 780H-781B.

authority is needed for what I have said, I refer to the following cases. In *Ashby v White* Holt CJ said:

‘If a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.’⁴²

In *Dixon v Harrison*, it was stated that the greatest absurdity imaginable in law is—

“that a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of right, in law, and having no right, are in effect the same.”⁴³

[52] From this, we can gather that all the applicant had to do was to: advise the relevant functionaries that – through the grant of pardon – the impediment to his entitlement to continue receiving the special pension had been removed; and demand that payment be resumed. He has succeeded in doing so. Therefore, the functionaries must resume payment.

Remedy

[53] It follows that the appropriate relief is to declare that Mr Masemola’s entitlement to receive a special pension was restored with effect from 21 July 2011, the date of pardon. Therefore, the respondents are obliged to pay Mr Masemola his special pension. That means the appeal succeeds with costs.

Order

1. Leave to appeal is granted.
2. The appeal is upheld.

⁴² [1703] 92 ER 126 at 136

⁴³ [1823] 124 ER 958 at 964.

3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
 - (a) It is declared that the special pension of Mr Nathaniel Mashilo Masemola is restored from 21 July 2011, being the date on which he received his presidential pardon.
 - (b) The Special Pensions Appeal Board and Government Pensions Administration Agency are ordered to pay Mr Nathaniel Mashilo Masemola his special pension with effect from 21 July 2011 within 14 days from the date of this order.
 - (c) The Special Pensions Appeal Board and Government Pensions Administration Agency are to pay the applicant's costs, jointly and severally, including costs of two counsel where applicable.
4. The Special Pensions Appeal Board and Government Pensions Administration Agency are to pay the applicant's costs in this Court, jointly and severally, including the costs of two counsel where applicable.

For the Applicant:

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