

SOUTH AFRICA / JUDGMENT

Koelman and Others v MEC: Social Services & Population Development, Northern Cape (1025/2005) [2006] ZANCHC 6 (1 February 2006)

[2006] ZANCHC 6

COURT

Northern Cape High Court, Kimberley

BEFORE

Kgomo JP

CASE / FILE NUMBER

1025/2005

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IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)
Case Nr: 1025/2005
Case Heard: 09/12/2005
Date delivered: /02/2006
In the matter: SABINA KOELMAN & 60 OTHERS

Applicants versus MEC: SOCIAL SERVICES & POPULATION DEVELOPMENT, NORTHERN CAPE
Respondents
Coram: Kgomo JP
JUDGMENT KGOMO JP: 1.

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JUDGMENT

KGOMO JP:

1.

The 61 matters which were enrolled for the 9

th

December 2005, are all interlocutory applications brought in terms of Rule 6 (11) of the Uniform Rules of Court. In each matter the respective applicants sought an order in the following terms:

“1.1 Compelling or alternatively directing the Respondent to dispatch within 5 days after the granting of the order to the Registrar of the Court the file of the Applicants’ application for a social grant together with such reasons as he is by law required or desires to give.

“

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1.2 In the event of the Respondent failing to comply with the provisions of the paragraph above, allowing the Applicants to approach the court on the same papers, duly supplemented for an order in terms of the notice of motion in the main application.”

2.

Over the last few months judges of this Division and the Registrar brought to my attention that some 350 other similar applications were brought. This prompted me to enquire why a class action was not brought to save time of preparation by applicant’s lawyers and reading through a multitude of applications and concomitantly save costs. Counsel for applicants, Adv Collet, has submitted it would be logistically problematic because of the 54 main applications which were eventually proceeded with:

2.1.

Thirteen (13) applicants sought an order declaring the decision to cancel or suspend a disability grant unlawful;

2.2.

Twelve (12) of them sought an order that their foster care child grants be processed;

2.3.

Fifteen (15) related to orders in respect of which the applicants sought to declare unlawful the decision to cancel, suspend or refuse a disability grant;

2.4.

In nine (9) applications an order was sought directing the Respondent to complete and process the applicants' disability grants;

2.5.

Three (3) applicants sought an order that the Respondent show cause why the failure to consider their application for child support grants should not be reviewed and corrected;

2.6.

One (1) applicant sought an order that arrears be paid; and

2.7.

One (1) applicant sought an order that the Respondent consider the appeal that had been filed.

3.

Amongst the many other variables that were sketched were: That individual applications were made, that they were made at different times, that some matters are settled and others not, that some are postponed and others finally disposed of, that others are unopposed and others not, that each person has his/her own file with copies of documents therein like birth certificates and copies of identity documents etc. Counsel have also sought to persuaded me of the impracticality and perhaps even undesirability of bringing a class action or interlocutory application on behalf of a multiplicity of applicants in the circumstances mentioned above. It appears to me that the main impediment to a class action would be that each applicant is entitled to bring an application in his/her own name and may not be compelled by a Court to bring a class action on behalf of members of same class.

4.

I am unpersuaded by counsel's pedantic fault-finding approach to the invocation of a class-action. In

Permanent Secretary, Department of Welfare, EC v Ngxuza

2001 (4) SA 1184

at para 4 and 5 (pp 1192G-1194A) whereat Cameron JA, writing for the Full Bench (5 judges) had this to say:

"[4] In the type of class action at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it. The class action was until 1994 unknown to our law, where the individual litigant's personal and direct interest in litigation defined the boundaries of the court's powers in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with

them by compliance with the formalities of joinder. The difficulties the traditional approach to participation in legal process create are well described in an analysis that appeared after the class action was nationally regularised in the United States through a Federal Rule of Court more than 60 years ago:

- [4] In the type of class action at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it. The class action was until 1994 unknown to our law, where the individual litigant's personal and direct interest in litigation defined the boundaries of the court's powers in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with them by compliance with the formalities of joinder. The difficulties the traditional approach to participation in legal process create are well described in an analysis that appeared after the class action was nationally regularised in the United States through a Federal Rule of Court more than 60 years ago:

'The cardinal difficulty with joinder . . . is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations such spontaneity cannot arise either because the various parties who have the common interest are isolated, scattered and utter strangers to each other. Thus while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints - they may never come.

What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it.'

- [5] The class action cuts through these complexities. The issue between the members of the class and the defendant is tried once. The judgment binds all and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a small claim that may be difficult or impossible to pursue individually. The mechanism is employed not only in its country of origin, the United States of America, where detailed rules governing its use have developed, but in other countries as well. The reason the procedure is invoked so frequently lies in the complexity of modern social structures and the attendant cost of legal proceedings:

'Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all.'

5.

Significantly, all these applications are brought by the same attorneys. With some initiative and some pro-activity a way can be found by the destitute failure applicants' lawyers to cluster the class actions where practicable and the reduce to a minimum further applications.

Majiedt J

has, for instance, informed me that he had a further Welfare cases on his rill dealt with by the same Bloemfontein instructing attorneys.

6.

I am inclined to agree with Mr Hough, for the Respondent, though that relative to the interlocutory applications, as opposed to the main ones, it was not necessary for applicants to have launched 54 separate proceedings but a single application with one supporting affidavit citing 54 applicants. This could certainly have resulted in a costs saving measure. I will however leave this question open because there has not been any affidavit filed by Respondent questioning the propriety of the procedure adopted by the respective applicants.

7.

On the contrary the parties sought and were granted an order by consent that:

7.1.

In twenty-six (26) of the matters the Respondent be ordered to furnish the applicants with a copy of their respective files within 30 days of the order;

7.2.

In respect of the rest of the applications an order was sought by consent that the applications are withdrawn.

8.

It was further agreed between the parties that the Respondent pay the costs of each separate application. In respect this latter agreement I required counsel to address me on why I should sanction the granting of costs for each one of the applications separately. After some understandable perfunctory argument, as counsel was caught unprepared, I asked for written short Heads to supplement the oral argument.

9.

Counsel are agreed that notwithstanding the parties' agreement on costs a court is not bound thereby because the awarding of costs unless expressly otherwise legislated for are in the discretion of the presiding judicial officer. This discretion, though, must be judicially exercised. See

Kruger Brothers and Wasserman v Ruskin

1918 AD 63

at 69. In

Merber v Merber

1948 (1) SA 446(AD

1948 (1) SA 446

), if I confine myself to the head note, the Court held that a court is entitled to deprive a successful party of its costs if:

9.1.

The party has brought about the litigation; or

9.2.

The party has done something connected with the institution or the conduct of the matter calculated to occasion unnecessary litigation and expense; or

9.3.

The party has done some wrongful act in the course of the transaction of which the opponent complains.

10.

The question that suggests itself is: On what sound and principled bases can the various applicants herein be docked of a portion of their costs notwithstanding their admitted success:

10.1.

In

Texas Co (SA) Ltd v Cape Town Municipality

1926 AD 467

at 488

Innes CJ

held:

“(C)osts are awarded to a successful party presentment of his case are recoverable as costs.”

10.2.

Price Waterhouse Meyernel v Thoroughbred Breeders Association

2003 (3) SA 54(SCA)

2003 (3) SA 54

at 61E in the context of Rule 17 of the Rules of the Supreme Court of Appeal:

“A costs order - it is trite to say - is intended to indemnify the winner (subject to the limitations of the party and party costs scale) to the extent that it is out of pocket as a result of pursuing the litigation to a successful conclusion. It follows that what the winner has to show - and the Taxing Master has to be satisfied about - is that the items in the bill are costs in the true sense, that is to say, expenses which actually leave the winner out of pocket.”

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10.3.

Adv Collet, for all the applicants, has referred me to the unreported judgment by

Froneman J

in

Zola Mjuleni (and 238 Others) v

Case No 8759/2005 (SECLD)

at p whereat the following is stated:

“ ”

.”

11.

I cannot understand the nonchalance of the Department of Health to these applications. Without any explanation forthcoming from the Respondent it is difficult or impossible to appreciate what problems the Department encounters in processing the applications of applicants or dealing with their grievances satisfactorily. What is certain is that the Department is in default in some respect or doing something wrong hence the consent order already granted by consent on 9 December 2005 and the question of costs that has been reserved and are the main subject of this judgment.

12.

The little that can be said in favour of the Respondent is that he and the Department have not unnecessarily opposed the granting of the interlocutory relief sought but it would have been much preferable if the poorest of the poor in our community were not put to the trouble and expense of approaching the Courts for redress. It is worthwhile to re-iterate once again what the Supreme Court of Appeal had to say in

Permanent Secretary, Department of Welfare, EC v Ngxusa

(supra)

(para 15):

“[15] All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticise government's decisions in the area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of State to be loyal to the Constitution and requires that public administration be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it were at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere. We were told, in extenuation, that unentitled claimants were costing the province R65 million per month. That misses the point, which is the cost the province's remedy exacted in human suffering on those who were entitled to benefits. What is more, the extravagant cost of 'ghost' claimants would seem to justify the expense of imperative administrative measures to remedy the problem by singling out the bogus - something the province conspicuously failed to do. It cannot warrant unlawful action against the entitled.”

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13.

Having regard to what has been said hereinbefore I will allow the costs as agreed by the parties. This must in no way be construed as a precedent because I was deprived of the advantage of having the version of the Respondent placed before me on affidavit or otherwise.

14.

In future, in the event of numerous applications of this nature, they must not be enrolled on the ordinary Motion Court roll in terms of Rule 3 of the Rules Regulating the Proceedings of the Northern Cape Division but, instead:

14.1.

The Registrar must be approached for a special arrangement to be made with the Judge President for purposes of the allocation of a convenient date and the assignment a Judge to deal with the matters separately and as expeditiously as the circumstances permit;

14.2.

In matters where agreement or a settlement has been reached a Draft Order or Deed of Settlement must be drawn up timeously and that fact or the document conveyed to the Registrar or the Judge in question or the document availed to them to obviate the unwarranted reading of the relevant files;

14.3.

The Registrar must also be notified without delay of matters which are due to be withdrawn or removed from the roll or postponed. In the current applications I counted that 28 matters were withdrawn for various reasons including that the Department's functionaries have in the interim removed or redressed these applicants' causes of complaint or grievances; yet I was only informed of this fact minutes before the Court was due to start.

14.4.

Relative to matters which are being proceeded with rudimentary Heads of Argument must be submitted which would roughly classify the matters along the lines set out in para 2.1 – 2.7 (above) and to deal with any contentious aspects or matters which would facilitate the expeditious and proper disposal of the applications.

ORDER

The relief, except the costs, in respect of all 58 matters as agreed to between the parties were granted and made an order of Court by consent on the 9

December 2005.

In respect of all the matters referred to in par 1 of this order, it is ordered by consent of the parties that the Respondent (the MEC for Social Services and Population Development, NC) must pay the costs of the applicants on a party and party scale.

That the costs in alluded to in para 2 of his order must be taxed by the Registrar.

F D KGOMO

JUDGE PRESIDENT

NORTHERN CAPE DIVISION

For the Applicants:

Adv S A Collet

Instructed by:

Nonxuba Incorporated

BLOEMFONTEINT

For the Respondent: Adv I P Gough

Instructed by:

Towell & Groenewald

KIMBERLEY

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