

SOUTH AFRICA / JUDGMENT

Macici v South African Social Security Agency (2234/09) [2011]

ZAECMHC 17 (13 October 2011)

[2011] ZAECMHC 17

COURT

Eastern Cape High Court, Mthatha

BEFORE

I T Stretch, F Dawood, Y Ebrahim

CASE / FILE NUMBER

2234/09

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE HIGH COURT, MTHATHA

CASE NO: 2234/09

In

the matter between :

ZWELIBALELE

MACICI

.....Appellant

and

THE

SOUTH AFRICAN SOCIAL SECURITY AGENCY

.....Respondent

FULL COURT APPEAL

JUDGMENT

STRETCH AJ

[1] During December 2009 the appellant brought a threefold application in this Court:

[1.1] For the respondent's decision to terminate the appellant's disability grant to be declared invalid, of no force and effect, and to be set aside;

[1.2] For the respondent to be directed to reinstate the appellant's disability grant within 21 days from the date of the order sought and that the respondent be directed to continue paying this grant until the grant is "lawfully terminated".

[1.3] That the appellant be declared to be "entitled" to payment of all arrears owing to him as a result of the unlawful termination of his disability grant and that such payments "be" with effect from the date of termination to the date of payment.

[1.4] That the respondent be directed to pay interest on the arrears amount at the rate of 15,5% per annum calculated from the date of default to the date of payment.

[1.5] That the respondent be directed to pay the costs of the application on the scale as between attorney and client.

[2] The application was heard by Ndzondo AJ on 1 June 2010.

[3] On 5 August 2010 Ndzondo AJ dismissed the application and directed Mr Zono (hereinafter referred to as the appellant's attorney) to pay the respondent's costs de bonis propriis on the scale as between attorney and client.

[4] On 19 August 2010 Caps Pangwa Attorneys delivered a notice of application for leave to appeal followed by the withdrawal of attorneys A S Zono and Associates on 15 September 2010.

[5] On 12 November 2010 Ndzondo AJ granted the appellant leave to appeal to the Full Court of this Division. The leave to appeal was granted with respect to the whole of the judgement.

[6] It is common cause that the appellant applied for and was granted a disability grant for a certain period.

[7] The crisp issues for determination are the following :

[7.1] Whether the Court a quo erred in finding that the respondent's agency had duly complied with the provisions of item 13 of the regulations promulgated in terms of section 32 of the Social Assistance Act 13 of 2004 ("the Act") which read as follows :

"NOTIFICATION OF OUTCOME

- (1) The agency must, within three months of the date of the application for a social grant notify the applicant of the approval or rejection of the application for the social grant.
- (2) A notification contemplated in sub-regulation (1) must be delivered to the applicant by-
 - (a) hand, against signature by the applicant, or at the address furnished by the applicant at the time of application; or
 - (b) pre-paid registered post to the address furnished by the applicant at the time of application.

- (3) Upon approval of an application for a social grant, the agency must inform the applicant in writing of such approval and
- (a) of the payment details;
 - (b) of the obligations of the applicant to notify the agency of a change in circumstances;
 - (c) in the case of refugees, the date of lapsing of the social grant; and
 - (d) in the case of a temporary disability grant, the reasons therefore, the duration of the social grant and the date upon which it lapses.”

[7.2] Whether the Court a quo erred in finding that the respondent had substantially complied with its undertaking in terms of the grant.

COMPLIANCE WITH THE REGULATIONS

[8] The appellant admits that :

[8.1] He made an application for a disability grant on 1 December 2008.

[8.2] This application was considered and approved with effect from December 2008.

[8.3] He received the first payment of R1 920-00 (which was made up of R960-00 for December 2008 and R960-00 for January 2009) during January 2009, and he received his last payment during October 2009.

[9] He contends however that the information about the duration of the disability grant (12 months) was not “imparted” to him. This information is set forth in a typed document which the respondent has annexed to its answering papers, marked “MM1”.

[11] When this matter was argued before us, the appellant’s counsel (correctly in my view) abandoned any further reliance on the following :

[11.1] That the appellant had a legitimate expectation of a permanent grant.

[11.2] That the appellant’s temporary disability grant was terminated by way of administrative action. It is now common cause that the grant lapsed by the effluxion of time.

[12] In this regard I refer to MEC for Social Development v Mdodisa 2010 (6) SA 415 SCA at 419 G – H where the following is stated :

“A temporary grant lapses by operation of law as it is subject to a resolute condition. Such lapsing is therefore not brought about by an administrative action and is therefore not subject to review. However, the decision to make a grant a temporary grant is

administrative action and once that decision was made the appellant then had the right to receive notification of the decision and to make representations through an appeal procedure. She was denied these rights.”

[13] The appellant, in his grounds of appeal says that the Court below ought to have found that the respondent failed to draw the appellant’s attention to the contents of “MM1” when the appellant placed his thumbprint on this document on 1 December 2008.

[14] What follows here, is a reproduction of the transcript of “MM1”, the original of which also bears a signature and a thumbprint at the foot thereof :

ANNEXURE “MM1”

Reference

Ref No 1684115

Verwysings Nr

NAME macici, dalton zwelibalele

ID NUMBER 7902215572082

ADDRESS MAMPONDOMISENI A/A

box 46

NGQELENI

5140

RE APPROVAL OF YOUR TEMPORARY DISABILITY GRANT APPLICATION

With reference to your disability grant application dated 12/1/2008. Your application has been approved for a period of 12 months from 12/2008 until 12/2009 for the following reasons:

FOR ASSISTANCE DURING INTRODUCTION TO ARVS.

The amount payable and paypoint details are as follows:

FIRST PAYMENT DUE DURING: January 2008 PAYPOINT:

FIRST AMOUNT PAYABLE: R 1,920.00 BANK DETAILS:

MONTHLY AMOUNT: R 960.00

You are required to inform your local office of any changes of your and/or your spouse’s general, medical and/or financial circumstances. Any person who provides information which is to his/her knowledge untrue in order to obtain a grant makes himself/herself guilty of an offence. Any person convicted of such an offence will be liable to a fine or to imprisonment, or to both a fine and imprisonment. Failure to adhere to the requirements of the Act may lead to the lapsing of your grant. If you fail to collect

If you wish to appeal against the above decision, you may appeal to the NATIONAL MINISTER: SOCIAL DEVELOPMENT in writing against such a decision within ninety (90) days after the date on which you were notified of the decision. The appeal may be sent to:

NATIONAL MINISTER: DEPARTMENT OF SOCIAL DEVELOPMENT

PRIVATE BAG X901

PRETORIA

0001

CHIEF EXECUTIVE OFFICER

SOUTH AFRICAN SOCIAL SECURITY AGENCY

DATE 12/1/2008

[15] The appellant does not dispute having received this document nor does he deny that he affixed his right hand thumbprint thereon.

[16] The appellant also admits the following with respect to this document :

[16.1] That he made his application for a disability grant on 1 December 2008 (the date reflected on “MM1”), which application was considered and approved on that same day with effect from December 2008.

[16.2] That the first payment was made to him during January

2009 (by logical inference the appellant then admits that the “January 2008” reflected at annexure “MM1” is clearly a typographical error and should read 2009).

[16.3] That he received his last emolument in October 2009.

[17] The respondent alleges that this document was given to the appellant on 1 December 2008. The appellant says that he did not only place his thumbprint on a one page document on 1 December 2008. He says the following :

“There were voluminous documents presented to me for the right thumbprint not only one page as it appears in ‘MM1’”.

[18] It was submitted on the appellant’s behalf in the Court a quo that the foregoing did not present a genuine dispute of fact. The appellant also did not argue that the matter should be referred to oral evidence. Indeed, the appellant himself annexed a letter from the respondent to his founding papers wherein the respondent confirms that the applicant not only placed his thumbprint on annexure “MM1” in acknowledgement of receipt, but that he was also advised of the contents of “MM1” on the same day.

- [19] The purpose of regulation 13 is to ensure that the applicant is given notice (written notice suffices) of the nature of and the extent of the grant and to advise him of his options if aggrieved.
- [20] The record being silent on whether the appellant only placed his thumbprint on the respondent's copy or whether he was also given his own notice, the Court below did not err in any event in applying the principles laid down in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 A.
- [21] A proper application of these principles caused the Court below to conclude (correctly in my view), that :
- [21.1] A copy of annexure "MM1" was hand-delivered to the appellant on 1 December 2008 as attested to by the respondent's representative;
- [21.2] The document (annexure "MM1") annexed to the respondent's affidavit is a duplicate of the document which was hand-delivered to the appellant;
- [21.3] The appellant acknowledged receipt and notification by hand delivery by affixing his thumbprint to the respondent's copy.
- [21.4] The respondent subsequently confirmed that the appellant had received "MM1" on 1 December 2008 and that the contents thereof was explained to him.
- [22] Annexure "MM1" also notified the appellant of his right to internally appeal the decision contained therein within 90 days after the date on which he was "notified" of the decision.
- [23] The relevant section of the Act dealing with appeals reads as follows :
- "18. APPEALS*
- (1) If an appellant disagrees with the decision made by the agency with respect to a matter that is regulated by this Act, that person or a person acting on his/her behalf may, within 90 days of his/her gaining knowledge of the decision, lodge a written appeal with the Minister against that decision, setting out the reasons why the Minister should vary or set aside that decision."
- [24] In response to the appellant's attorney's threat of High Court litigation (should the appellant's grant not be reinstated on a permanent basis), the respondent, on 2 December 2009 not only advised the attorney that the appellant had been notified of the nature of and the extent of his grant when he applied on 1 December 2008, but also repeated this information, for the attorney's benefit.
- [25] If the appellant indeed gained knowledge of the respondent's decision for the first time on 2 December 2009, his remedy was to invoke the provisions of section 18 of the Act instead of approaching this Court directly for relief.

[26] The appellant has, on either scenario, not only failed to exhaust his internal appeal remedies, but has prematurely approached this Court for final relief which relief this Court can only grant if the Minister of Social Welfare refuses to vary or set aside the respondent's decision, and then only if this Court finds that the Minister's refusal is clearly wrong. It goes without saying that the only other competent ground upon which the appellant may approach this Court is to request it to compel the Minister to entertain the appellant's internal appeal once evidence has been placed before this Court that the Minister has failed or refused to do so. But this is not the case.

COMPLIANCE WITH THE GRANT

[27] Again, applying the Plascon-Evans test together with the fact that the appellant has been most evasive as to how much money he was paid, when the payments were effected and the number of instalments, the Court a quo correctly accepted the respondent's version that the 12 emoluments due were made and received as follows :

ITEM DATE AMOUNT First and Second Payments 05/01/2009 R1 920-00 (R960-00 x 2) Third payment 02/02/2009 R960-00 Fourth payment 02/03/2009 R960-00 Fifth payment 31/03/2009 R1 010-00 (increase as per GN R286 in GG 34169 of 31/03/2011 effective on 01/04/2011) Sixth payment 04/05/2009 R1 010-00 Seventh Payment 01/06/2009 R1 010-00 Eighth Payment 01/07/2009 R1 010-00 Ninth Payment 31/07/2009 R1 010-00 Tenth Payment 28/08/2009 R1 010-00 Eleventh Payment 29/09/2009 R1 010-00 Twelfth Payment 27/10/2009 R1 010-00

[28] The only other issue which was pursued but not with any serious intent, is the suggestion that because annexure "MM1" appears to contradict itself (it states that the application had been approved for a period of 12 months, but thereafter refers to the period being from December 2008 until December 2009 being 13 months), this Court should give the appellant the benefit of the doubt and direct retrospective reinstatement of the grant to terminate in December 2009.

[29] At the risk of stating the obvious, this submission is frivolous and devoid of logical reasoning :

[29.1] Item 3 of the aforesaid regulations only makes provision for three categories of grants :

[29.1.1] A temporary grant for at least six months;

[29.1.2] A temporary grant for a maximum period of 12 months;

[29.1.3] A permanent grant.

[29.2] Mr Tokota, for the appellant, during the course of argument conceded that the grant was a temporary one. A temporary grant envisages no more than 12 consecutive emoluments calculated at the maximum amount per emolument as determined from time to time by the Minister of Social Development in conjunction with the Minister of Finance.

[29.3] Annexure “MM1” not only says that the grant is temporary but also refers to a maximum period of 12 months to effect these 12 payments.

[30] The somewhat sporadic payment and collection of these 12 emoluments, resulted in the respondent’s undertaking having been complied with over a period of ten calendar months.

[31] This Court is not at liberty to direct the payment of any further emoluments. To do so would theoretically convert a temporary grant into a permanent one in the absence of any justification for doing so. In the premises I am satisfied that the Court below did not misdirect itself in dismissing the application.

THE ISSUE OF COSTS

[32] In its answering affidavit issued on 5 February 2010, the respondent gave notice to the appellant’s attorney of its intention to pursue a punitive costs order against the attorney *de bonis propriis* in the event of the application failing.

[33] In justification thereof the respondent states that the application was instituted on 8 December 2009, despite the respondent having advised the appellant’s attorney in writing on 1 December 2008 that the appellant had previously been informed in writing that his application for a disability grant had been approved for a temporary period of 12 months only, and that he had acknowledged receipt of such notification.

[34] In addressing the respondent’s notification regarding the punitive costs order against the appellant’s attorney, the appellant states that the respondent’s letter of 1 December 2008 for what it is worth, is nothing more than a written resistance to the appellant’s demand for reinstatement of the disability grant.

[35] This is not correct.

[36] On the contrary, the letter in my view reflects a bona fide and clearly explained clarification of what had actually transpired, and advises the attorney that the appellant had not only been issued with an outcome letter (annexure “MM1”) but that he was also advised of its contents. Any prudent attorney would immediately have sought a copy of this vital document, prior to resorting to litigation, particularly when the appellant pleads ignorance of the contents of the document.

[37] The appellant in reply resists a costs order against his attorney on the following grounds :

[37.1] That his legal representative carried out his instructions with due diligence and skill;

[37.2] That there was no evidence of recklessness on the part of the appellant’s attorney causing him to disregard the rules of law;

[37.3] That the claim for punitive costs is motivated by a personal vendetta which the respondent’s attorneys bore against the appellant’s attorneys.

- [38] The Court below found that the launching of the application was unwarranted. This in itself is not sufficient reason to grant punitive costs against the appellant's attorneys.
- [39] The Court below further found that the appellant was guilty of recklessness and abuse of the Court's process as the application was not only unwarranted but meritless and/or bad in law. The Court below motivates this finding by correctly pointing out that the effect of the order sought by the appellant, would be for this Court to compel the respondent to reverse its decision and to substitute it for an order that would entitle the appellant to a disability grant of a permanent nature.
- [40] The Court below correctly found that it would not have been possible for it to grant such an order on the application papers. It correctly held that even if the appellant had succeeded in persuading it to set aside the respondent's decision, the appropriate prayer in the circumstances should have been for the matter to be remitted for internal remedies to be pursued.
- [41] The Court found that the appellant ("or perhaps his attorney") had acted recklessly and maliciously and had failed to apply his mind in bringing a frivolous application which was bound to fail.
- [42] The Court also found that the appellant was ill advised and that he should have applied for another disability grant.
- [43] The Court further found that it was the appellant's attorney who prepared the papers and brought the application on his behalf as the appellant describes himself as unsophisticated and illiterate. I am of the view that not much can be made of this however, as the appellant elsewhere in the same application describes himself as a literate person.
- [44] I am of the view however that the Court had sufficient information before it to support a prima facie view that *de bonis propriis* costs should be awarded against the appellant's attorney.
- [45] Having formulated this prima facie view, the Court below thereafter should have afforded the attorney the opportunity to show cause why this costs order should not be made.
- [46] The failure on the part of the Court below to afford the appellant's attorney this opportunity is in my view a misdirection which compels this Court to set aside and substitute the costs order with the usual order made on a party and party scale when costs follow the result.
- [47] This does not of course mean that this Court is barred from formulating and expressing its own views regarding applications in matters of this nature.
- [48] In the matter of *Ngukela v SASSA* (unreported judgment of Griffiths J delivered on 2 December 2010 in ECD case number 2233/09) the appellant was likewise represented by attorney Zono.

- [49] The relief which was sought in that application duplicates the relief which was sought in the matter before us.
- [50] What is cause for concern is that both applicants in their founding affidavits allege that the respondent is aware of the fact that they are destitute, unsophisticated and illiterate. Thereafter, both applicants in reply on oath, state that they are surprised that the respondent alleges that they acknowledged receipt of these documents by using their right hand thumbprints as they “can read and write”.
- [51] It is highly improbable that two unrelated deponents in two separate applications would both describe themselves in two consecutive affidavits firstly as illiterate and then as literate.
- [52] It seems to me that the appellant’s attorney at the very least in these two applications has embarked on a cut and paste exercise, the product of which has been a standard type affidavit which fails to cater for the independent merits of each case. This seems to have become a practice described by Wallis AJ (as he then was) as “indolent” in *Cele v SASSA* 2009 (5) SA 105 at 115G.
- [53] This practise, if still in use, is an indictment on the legal profession and must cease forthwith.
- [54] I accordingly propose that the following order be made :
- [a] The order made by the Court below, dismissing the application, is confirmed.
- [b] The costs order against the appellant’s attorney is substituted with an order directing the applicant to pay the costs of the application.
- [c] The appellant is directed to pay the costs of the appeal.

I. T. STRETCH

ACTING JUDGE OF THE HIGH COURT

I agree :

F DAWOOD

JUDGE OF THE HIGH COURT

I agree, and it is so ordered :

Y EBRAHIM

Matter heard on : 10 June 2011

Judgment delivered on : 13 October 2011

Counsel for the appellant : B R Tokota S.C.

Z Z Matebese

Instructed by : Caps Pangwa & Associates

Counsel for the respondent : G H Bloem S.C.

K L Watt

Instructed by : The State Attorney

c/o Potelwa & Company

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