

SOUTH AFRICA / JUDGMENT

Ngalo v South African Social Security Agency (SASSA) (2740/11) [2013] ZAECMHC 4; [2013] 2 All SA 347 (ECM) (14 February 2013)

[2013] ZAECMHC 4

COURT

Eastern Cape High Court, Mthatha

BEFORE

LP Pakade

CASE / FILE NUMBER

2740/11

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION: MTHATHA)

REPORTABLE

CASE NO: 2740/11

In the matter between:

ZUKISWA NGALO

.....APPLICANT

And

THE SOUTH AFRICAN SOCIAL SECURITY
AGENCY (SASSA)

.....RESPONDENT

JUDGMENT

PAKADE ADJP:

INTRODUCTION

- [1] An important feature of the Constitution is the express recognition of socio-economic rights in a justiciable Bill of Rights. These include the right to basic education, access to adequate shelter and housing, adequate health care services, the right to sufficient food, water and social security.¹

As Albie Sachs once said:

“It is no accident that constitutions usually come into being as a result of bad rather than good experiences. Their text or subject is almost invariably: “never again”. In the case of South Africa the new constitution arises out of the need to escape the profound humiliation and oppressions created by apartheid. Through the constitution we affirm something from our dolorous history.

It is worth repeating: all constitutions are based on mistrust. If we could trust our rulers, our parties, ourselves, we would not need constitutions.

Power not only corrupts, it intoxicates, it confuses. Like nature it abhors vacuum, like water it follows the path of least resistance. Oppression is oppression but in some ways oppression in the name of the good is worse than oppression in defence of the bad, since it tarnishes the very ideas it seeks to protect and deprives people even of the image of a better society”²

[2] The concern of the public is how these rights can be converted from paper guarantees to reality. Herein below this

judgment

will try to show the continual commitment of the Eastern Cape High Courts to vindicate the constitutional rights of the indigent applicants for social security and thus protecting socio-economic rights.

APPLICANT’S CASE

- [3] In this application, the Applicant seeks to vindicate her constitutional right of access to social security which is guaranteed by section 27(1) (c) of the Constitution³.
- [4] Section 27(2) of the Constitution enjoins the state to take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right. In conformity with this Constitutional obligation, the state promulgated the Social Assistance Act, No.13 of 2004 on 05 June 2004, which came into operation on 01 April 2006 (the Act) and the regulations, published in Government Notice No. 162 dated 22 February 2005 which repealed the Social Assistance Act No. 59 of 1992 and its regulations.
- [5] The objects of the Act are to provide the administration of social assistance and payment of social grants; make provision for social assistance; determine the qualification requirement thereof and to ensure that minimum norms and standards are prescribed for the delivery of Social Assistance⁴. The South African Social Security Agency (SASSA) (the Respondent) was established by the South African Social Security Agency Act 9 of 2004⁵, to ensure the efficient and effective management, administration and payment of social assistance. The Social Assistance Act assigns to the Agency a duty to make available, out of monies appropriated by parliament, a child support grant; a care dependency grant; a foster child grant; a disability grant; an older persons grant; a war veterans grant; and a grant in aid⁶.

- [6] The socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom⁷. This view was fortified by Yacoob J in *Government of the Republic of South Africa and others v Grootboom and others*⁸ that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of people living in deplorable conditions throughout the country. It must provide access to housing, health care, sufficient food and water, and social security to those who are unable to support themselves and their dependents. Yacoob J further stressed that all the rights in the Bill of Rights are interrelated and mutually supporting. With regard to the Constitutional requirement of legislative measures, Yacoob J

opined that by themselves they are not enough to achieve constitutional compliance. The state must act to achieve the intended

result. The legislative measures have to be supported by appropriate well-directed policies and programs implemented by the Executive. The programs must be reasonably implemented⁹.

- [7] This application concerns the enforcement of these interrelated rights, in particular, the right to social security.

- [8] The applicant, Ms Zukiswa Ngalo is the mother of Inathi Duba, a disabled minor child born on 21 July 2002. Ms Ngalo is a semi-illiterate unemployed South African Citizen. Inathi is suffering from septic arthritis and hip deformity which resulted in her leg being shorter than the other. As a result of her deformity, she walks with a noticeable limp although she uses crutches and orthopedic shoe. The doctor who examined her on the 27 September 2010 in Nelson Mandela Academic hospital opined that Inathi “qualified for a care dependency grant because she will have a long term disability”.

- [9] Section 7 of the Act provides that a person is eligible for a care dependency grant if he or she is a parent, primary care giver or foster parent of a child who requires and receives permanent care or support services due to his or her physical or mental disability. Section 6(1) of the regulations provides that “a parent, primary care giver, or foster parent is eligible for a care dependency grant in respect of a care dependant child if a medical officer certifies the child as a care dependent child as defined in the Act”. A care dependent child is a child who requires and receives care due to his or her severe mental or physical disability. The South African Oxford Dictionary¹⁰ defines the operative word “disability” as a person who is made to be unable to do something because of illness or injury. No doubt Inathi falls in the category of disabled person and is entitled to a grant in terms of the Social Assistance Act.

- [10] On the 27 January 2009, Miss Zukiswa Ngalo applied, on behalf of Inathi, for a care dependency grant to the South African Security Agency. A year lapsed without a response to that application. She again made another application for care dependency grant on 20 January 2011 but still no response came from the South African Social Security Agency. She then resorted to the machinery of the law and on 01 September 2011 her Attorneys wrote a letter to the Regional Executive Manager of SASSA requesting the outcome of the

application. There was no response received from SASSA.

- [11] Finally on 04 November 2011 Miss Ngalo brought this application seeking a mandamus directing the Respondent to consider and decide the application for a care dependency grant and that having so decided, to inform the Applicant's Attorneys of the outcome thereof within 15 days from the date of the decision but also to furnish reasons for refusing the grant in the event of such a refusal.
- [12] The application papers were served on the State Attorney in Mthatha on the 7 November 2011 at 08h40.

THE RESPONDENT'S CASE

- [13] On the 17 November 2011 the Respondent filed a notice to oppose the relief sought by the Applicant. Thereafter the answering affidavit was filed on the 08 December 2011 together with a letter to the Applicant's Attorneys dated 22 November 2011 from

"the reconsiderator" of the Respondent. The letter informed the Applicant's Attorneys that Miss Zukiswa Ngalo's "application for a reconsideration of the agent's decision is upheld". In my view, the matter collapsed at that stage, namely, on the date the Respondent informed the Applicant of the outcome of her application.

The issue that remains for consideration is one of costs on which my discretion has to be informed by the merits of the application and the law.

- [14] The letter of approval was written on the 22 November 2011 when the litigation was already in progress, having been commenced with on the 04 November 2011. The Respondent conceded in the answering affidavit that the approval of the grant was communicated to the Applicant on the 22 November 2011.
- [15] The only basis on which the Respondent resists the payment of costs is that the application was instituted prematurely before the expiry of the ninety day period. The Respondent further contends that the approval of the application was communicated to the

applicant before the expiry of ninety days from the date of the Applicant's letter requesting the outcome of the application.

There was no reason for the Applicant to launch the application before the expiry of ninety days from 01 September 2011, so avers the Respondent. The Respondent denies that there had been an undue delay in the processing of the application. The Respondent has, however, not referred to any authority in support of the contention relating to the alleged ninety day period which had to be given or allowed for the processing of an application for a grant after requesting an outcome of the application.

THE LEGAL POSITION

[16] It is crucial at this stage to consider the provisions of the Act and regulations pertaining to the processing and notification of the outcome of the application for a grant. Regulation 12 deals with the obligation of the Agency to notify the Applicant of the outcome of the application. The full text of the regulation reads as follows:

“12(1) The Agency must, on approval of a grant application, inform the applicant in writing in the language of preference of the applicant, of such approval and the date on which such approval was made .

- (2) The Agency must, upon refusal of a grant, or within a reasonable period thereafter, inform the applicant of such refusal in writing and in the language of preference of the applicant, and give reasons for such refusal.
- (3) The Agency must, when informing the applicant of refusal of a grant application, also inform the applicant of his or her right to lodge an appeal in terms of section 18 of the Act.
- (4) Whenever the Agency informs the applicant of an outcome of an application, the Agency must ensure that the applicant fully understands the decision of the Agency, the reasons thereof and the procedures to be followed thereafter.”

[17] Clause 12(1) imposes a duty on the Agency to notify the Applicant of the approval of his/her application for a grant¹¹ every time there is such an approval. There is no time frame prescribed in the regulation nor in the Act. If a statute proclaims that something should be done without providing time frame within which it has to be done, the courts usually interpret such a provision to mean that it has to be done within a reasonable time¹². In *S v Mohammed*¹³ the court had to consider whether the application for leave to appeal was made timeously having regard to the fact that section 21(2) (a) of the Supreme Court Act 59 of 1959 did not, before its amendment, prescribe time limits for bringing an application for

leave to appeal to the then Appellant Division. Trollip JA reasoned that in the absence of a prescribed time limit, the applicant had to apply for leave to appeal within a reasonable time after the judgment or order. Again, section 15(2) of the Prescription Act 68 of 1969 provides that the running of prescription shall not be deemed to have been interrupted if the creditor does not successfully prosecute his claim under the process in question to final judgment, without specifying a time limit within which a claim has to be prosecuted.

Munnick CJ, in *Titus v Union & SWA Insurance Co Ltd*¹⁴, dealt with this problem and said at 740 F-H:

“It is not unreasonable to assume that what the Legislature had in mind was the following: It is necessary that there should be finality in litigation. The plaintiff is given a reasonable time within which to institute his action thereafter he is in the hands of the administration of the Courts.”

This dictum was applied by Harms DP in *Cadac (Pty) Ltd v Weber Stephen Products Co and others*¹⁵.

- [18] I therefore find that the Respondent was obliged to notify the Applicant of the outcome of her application for care dependency grant within a reasonable time from the date of its approval. This brings me to the next issue namely, whether the notification was made within a reasonable time from the date of its approval or not.
- [19] I have already said above that while the application was made on the 27 January 2009 and again on the 20 January 2011, the notification of its outcome was delivered to the Applicant's Attorneys on the 22 November 2011. There is no indication, however, in the notification document when the approval was made. But what is patently clear from this document is that it is an approval of an application for a reconsideration for a care dependency grant which was never made because, as said by the Applicant, a second application had to be made on the 20 January 2011 after SASSA had failed to process the first application and had also failed to notify the applicant of the outcome thereof.
- [20] In *Mbanga v MEC for Welfare and Another*¹⁶ it was held that it was reasonable for a decision on an application for a social grant to be taken within three months and that it was unreasonable for SASSA to have taken thirty two months to approve the application. Accordingly Leach J held that failure to take a decision on a social grant application constitute an infringement of the applicant's constitutional right to lawful and just administrative action (see also *Mahambehlala v The MEC for Welfare, Eastern Cape Provincial Government and Another*¹⁷). I agree.
- [21] Therefore a reasonable time within which an application for social grant is to be processed and the Applicant informed of the outcome thereof is three months. It is wholly unreasonable and unacceptable for such an approval and notification thereof, as in this case, to take a period of two years.
- [22] The individual's entitlement to enforce the social security rights was confirmed by Chetty J in *January v MEC for Welfare, Eastern Cape Provincial Government and Another*¹⁸ when he stated:

"It is common cause that when the applicant attained the age of sixty, she qualified for a social grant for the aged popularly referred to as an old age pension in terms of the Social Assistance Act 59 of 1992. The applicant nonetheless, only applied for such grant when she reached the age of 64. She forwarded her application to the department. It is not in issue that she qualified for assistance under the Act and that her application complied fully with the terms of the Act and the regulations promulgated thereunder.

Three years elapsed. During that period the applicant made regular enquiries concerning the fate of her application. Her efforts produced no tangible results. She was ultimately compelled to employ the machinery of the law to enforce her constitutionally entrenched rights"

- [23] The authorities are legion on the unreasonable delay in the processing of social grant applications and failure to comply with court orders in the Dept of Welfare in the Eastern Cape Provincial Government. In *Mbanga v MEC for Welfare*¹⁹ and *Nomala v Permanent*

Secretary Dept of Welfare²⁰ the court emphasized that state provided social assistance grant must be made within a reasonable time of application. In other cases²¹ the courts also emphasized that the unilateral suspension or termination of grants without proper adherence to the administrative law principles of natural justice and the rights which accrued in terms of the statute, is unlawful and invalid.

[24] In *Mahambehlala v MEC for Welfare*, Leach J opined that the applicant should be entitled to a constitutional relief where common law relief of an award of damages will be insufficient to remedy effects of unreasonable delay in the processing of the application for social grant. For such violation of a person's right to social security, C. Plasket²² suggests that the Courts should consider awarding punitive orders against public officials, not in their public capacity but in their personal capacity. This suggestion followed the judgment of *Njongo Booï and others v Nomsa Jajula & others*²³ in which the Member of Executive Council for Welfare was cited personally for contempt of Court together with her Permanent Secretary and two officials. This prompted an urgent response from that Department which led to the settlement of the orders which have remained outstanding for 14 months. I agree that punitive orders should be extended to unreasonably delayed outcomes of applications for a social grant.

[25] In the present application, the delay of over two years in processing the application is unacceptable as it prejudices the Applicant. As alluded to above, the Applicant was notified of the outcome of her application on 22 November 2011 for an application

which was made on the 27 January 2009. The notification does not indicate the date of the approval of the grant as required by

regulation 12(1). Regulation 13(1) provides that a grant, if approved, must be paid from the date on which the application is deemed to have been made in terms of regulation 10. The applicant's care dependency grant was therefore approved with effect from the 27 January 2009, the date when the application was launched to the Respondent and she is entitled to payment with effect from that date. The approval was notified on the 22 November 2011 when the litigation was already serving in this Court. There is no explanation for the delay. All that is apparent from the answering affidavit is a misconceived blatant denial of the delay.

[26] Treating human beings with dignity requires of the state to act in a reasonable manner towards those claiming social security rights, such as the right to social grant. Human dignity, as a fundamental constitutional value and a fundamental right enshrined in the Bill of Rights, is an important catalyst to alleviate poverty of the historically deprived. Hence Chaskalson J said in *Soobramoney v Minister of Health, KwaZulu- Natal*²⁴,

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security and many do not have access to clean water or to adequate health services. These conditions already existed when the constitution was adopted and a commitment to address them and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our

new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring’ (emphasis supplied)

COSTS

[27] In the circumstances the view I hold is that the Applicant is entitled to the costs of the application. The Applicant has, understandably so, urged the Court to award costs against the Respondent on an attorney and client scale. This is the example of such a case suggested by C. Plasket 25 as deserving punitive costs.

[28] The Applicant has not only achieved substantial success but has been successful in the present application in that the Respondent was moved, upon service of the application papers, to process and approve the grant.

ORDER

[29] In the circumstances, the Respondent is directed to pay the costs of the application and such costs to be taxed on the scale applicable between Attorney and own Client.

LP Pakade

ACTING DEPUTY JUDGE PRESIDENT

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Heard on : 15 June 2012

Delivered : 14 February 2013

1Act 108 of 1996

2A Sachs: The Constitution is Natural Justice Writ Large in H. Corder and Mc Lennan (eds) Controlling Public Power (Dept of Public Law, UCT: Cape Town 1995) 51

3S 27 (1)(c) of Act 108 of 1996 provides that everyone has a right to have access to -social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

4Section 3 of Act 13 of 2004

5Section 2 of the South African Security Agency Act 9 of 2004

6Section 4 of Act 13 of 2004

7Section 1 of the Constitution, referred to by Justice Mokgoro in *Khoza and others v Minister of Social Development and Others* 2004(6) SA 504 (CC) at paragraph[40]

82001(1) SA 46 (CC)

9Footnote 8

10The South African Shorter Oxford English Dictionary on historical principles, Sixth Edition Volume 1 at par [42]

11Section 10 of the Interpretation Act, 33 of 1957

12S v Mohammed 1977(2) SA 531 (A)

131977(2)SA 531 (A)

141980(2)SA 701 (TKS)

152011(3) SA 570 (SCA); See also *Camps Bay Rate Payers President Association & Others v Minister of Planning, Culture & Administration, Western Cape & Others* 2001(4) SA 294 (c) 306 H-307 G

16 2001

(8) BCLR 821 (SE)

17SECLD Case no:2127/00

18[2002] 4 ALLSA 606 SE at par 3

19(2001)8 BCLR 821 (SE)

20 (2001) 8 BCLR 844 (E)

21Mbanga v MEC for Welfare (2001) 8 BCLR 821 (SE). Nomala v Permanent Secretary, Dept of Welfare (2001) 8 BCLR 844 (E); Mahambehlala v The MEC for Welfare, E/C Provincial Govt & Another, SELD Case No: 2127/00; January v MEC for Welfare E/C Provincial Govt [2002] 4 All SA 606 (SE); Mjeni v Minister of Health & Welfare 2000(4) SA 446 (Tk); Ngxuza & Others v Permanent Secretary, Dept of Welfare,

E/C Provincial Govt & Another 2000(12) BCLR1322(E)

22Protecting the Public Purse: Appropriate Relief and Court Orders against officials (2000)117 SALJ 151, now Plasket J

23ECD Case no. 431&433/99

241998(1) SA 765 (CC)

25Protecting the Public Purse: Appropriate Relief and Court Orders against officials (2000)117 SALJ 151

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