

SOUTH AFRICA / JUDGMENT

Nqukuthu v The Minister of Social Develpoment and Others (2465/2012) [2013] ZAECMHC 26 (26 September 2013) [2013] ZAECMHC 26

COURT
Eastern Cape High Court, Mthatha

BEFORE
F.B.A Dawood

CASE / FILE NUMBER
2465/2012

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT : MTHATHA

NOT REPORTABLE

CASE NO: 2465/2012

In the matter between :

KROMZA NQUKUTHUAPPLICANT

and

THE MINISTER OF SOCIAL DEVELOPMENT1ST RESPONDENT

THE CHAIRPERSON ON THE INDEPENDENT TRIBUNAL

FOR SOCIAL ASSISTANCE APPEALS (P.P TSOMELE)2ND RESPONDENT

SOUTH AFRICAN SOCIAL SECURITY AGENCY

(SASSA)3RD RESPONDENT

REASONS

FOR DISMISSAL OF APPLICATION

DAWOOD J :

1. This Application came before me and was dismissed with each party to pay their own costs save that the Respondent was directed to pay the reserved costs in respect of the matter being enrolled on the uncontested opposed roll on the 14th of February 2013.
2. The Applicant sought reasons for the dismissal of the Application. I shall briefly set out the reasons for the dismissal.
3. FACTUAL BACKGROUND

3.1. The Applicant herein sought the following relief as set out in the notice of motion:-

The applicant's failure to institute these proceedings within a reasonable period of time be and is hereby condoned in the interests of justice.

The 1st and 2nd respondents be and are hereby called upon to show cause why the said respondents' administrative action of awarding applicants' social disability grant as a six month temporary disability grant cannot be corrected, reviewed and set aside.

That the 1st and 2nd respondents be and are hereby directed to approve applicant's disability grant as a 12 month temporary disability grant with an appropriate back pay of all the monthly disability grant monies with effect from the 21 February 2011 until the grant of the orders sought herein.

In the alternative, that the 1st and 2nd respondents be and are hereby directed to award applicant a six month temporary disability grant, it being a difference from the six month disability grant that was not paid to her.

That the respondents be and are hereby directed to effect payment of applicant's six month disability grant monies within one month from the grant of the orders sought herein.

The 1st and 2nd respondents be and are hereby directed to advise applicant's attorneys when they have complied with the order sought in the preceding paragraph and to do so in writing within 15 days of having complied with the above orders.

- 7) That the 1st and 2nd respondents be and are hereby directed to pay the costs of this application jointly and severally the one paying for the other to be absolved with the 3rd respondent paying costs hereof only in the event of opposing the grant of the relief sought herein.
- 8) That the Honourable Court grants such further and/or alternative relief."

3.2. The Applicant inter alia made the following averments in his affidavit in support of the relief sought:-

That he is a semi-literate adult male whose highest level of education is standard 2.

He is disabled with the meaning of the Act in that he is suffering from HIV/AIDS and various other opportunistic diseases, however no support for this averment with regard to opportunistic diseases is found in his medical records.

He is physically weak and cannot engage in any kind of manual labour in order to produce an income for him and those whom are dependant on him.

He has sought employment from different places but due to his condition it has not been offered to him.

All employers have stated that there is absolutely nothing he can do in their places of employment on account of his disability, no supporting affidavits have been filed by any person purporting to be a prospective employer that he approached to confirm this allegation.

He accordingly submitted that owing to his disability he is unemployed.

Owing to his disability and the fact that he is poor he has no means to support himself and has dependants and accordingly applied for social assistance with the local office of the 3rd respondent.

He applied for a social grant on the 21st of February 2011 at Port Saint Johns and the same was refused.

The written reasons for the refusal were that it was rejected because it “was not recommended by Medical doctor. Your retroviral disease is treatable and can be controlled on regular medication”.

Doctor Bara noted the following when he examined the Applicant on 26th of January 2011, in the medical report for Disability Grant Application. He noted that the Applicant had a standard 2 level of education and that he never worked.

He noted further that:-

“The findings clinical examination was known HIV/AIDS stage IV patient on ART. Fairly stable, weak and needs nutritional support. Test results – CD 4 – 66 on 22 November 2010.

His diagnosis was HIV/AIDS, Stage IV, very weak to function

Treatment ART

His suggestion for further investigation/treatment/management was:-

Alleviate poverty

He indicated that the chronic condition was severe because it was difficult to treat without food.”

The Independent Appeal Tribunal set aside the decision of SASSA declining the Applicant's Application and awarded him a

Temporary Disability grant for 6 months on the basis that the medical officer confirmed that he has a medical condition: “Retroviral Disease, complications of his medical condition were however, found to be of a temporary nature and therefore rendered him disabled only for a temporary stipulated duration...”

He was informed further in the letter dated the 9th of May 2012 by the chairperson that should there be any significant changes in his medical condition he should approach his nearest

SASSA local office with comprehensive and recent medical reports to re-apply for social assistance, in this regard.

3.3. The applicant alleged further that the awarding of the 6 month disability grant constitutes unfair discrimination and is condemned by the constitution, for the following reasons:-

- a) A female person Nondima Bukiwe applied for social assistance on the 29th of July 2010 and was refused and on appeal she was she was awarded a 12 month temporary disability grant on the 29th of July 2011.
- b) She had also gone for a medical assessment to DR Bara on the 24th of June 2010.
- c) He noted that she had a standard 2 level of education and that she was not working.

He noted under clinical findings:-

HIV/AIDS Previous PTB

Known as HIV/AIDS patient in Stage 4 with previous history of PTB looks chronically ill, emaciated and weak, under nourished.

CD4= 251 on 04 August 2008

Diagnosis HIV/AIDS

Stage 4

Very weak

Treatment ART reg Ib(b)

Previous treatment efforts TB

Suggestions

Alleviate poverty

Needs nutritional support

Illiterate and unskilled

Chronic condition severe – improve food security”

- d) According to the applicant the said Nondima Bukiwe was found to suffer from HIV/AIDS and previously had pulmonary tuberculosis.
- e) According to him they were similarly situated and the Constitution requires them to be treated similarly.
- f) He further alleged that the 1st and 2nd Respondents failed to keep up this standard by allowing the Appeal of Bukiwe as a 12 month temporary grant and allowing him a 6 months disability grant when their medical condition are the same.
- g) He alleged that there are no reasonable basis that can result in his appeal being awarded as a six months disability grant when that of Bukiwe was awarded as a 12 month disability grant.
- h) He alleged it is the degree of disability and not the type of ailment which should determine whether one qualifies for a grant or not.
- i) The 1st and 2nd Respondents have failed to keep up with consistency and proportionality in their determinations and in the circumstances their decision is unconstitutional and falls to be reviewed.
- j) The first and second Respondent were biased or reasonably suspected of bias in their decision in that a female person who was found to be similarly situated with him was awarded a 12 month grant on appeal whilst he was awarded a 6 month grant.
- k) Consequently the action purportedly taken by the first and second Respondents is unreasonable to an extent that no reasonable person could have so exercised the power or so performed the function.
- l) The action at issue aims to differentiate between people or categories of people of same circumstances on unfair grounds.
- m) The differentiation does not bear a rational connection to a legitimate government purpose.
- n) The 1st and 2nd Respondents are not at liberty to determine appeals 'willy nilly' and without having recourse to the impact of their decisions on those that will be affected.
- o) He has a right to equal treatment and equality before the law and that right may not be infringed without justifiable reasons.
- p) The conduct of the 1st and 2nd Respondents unjustifiably infringes section 9 of the Constitution and falls foul of the standards set out in section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and is therefore unconstitutional and unlawful.
- q) Had the Respondent properly taken into account the provisions of section 9 of the constitution when making their determination, his appeal would have been allowed as a 12 month grant and he would have been awarded a 12 month social disability grant.

- r) The decision should be revised because it was improper, irregular, unfair, unconstitutional, unreasonable, not rationally connected to the information before the administrator at the time of taking the decision, irrelevant considerations were taken into account and relevant considerations were not taken into account when the same was arrived at.
- s) The evidence shows that he is an eligible candidate for a 12 month grant.
- t) The Respondent failed to properly apply their minds to the facts presented and they discriminated against him unfairly.
- u) It is clear that he was differentiated from a person of identical medical conditions in terms of degree of disability as envisaged in the regulations.

3.4. The third respondent filed a notice to abide by the decision of the court.

3.5. An affidavit was filed by a Doctor Jan Harm Olivier on behalf of the 1st and 2nd Respondents, wherein he stated inter alia that:-

- a) He was the medically qualified member of the 2nd Respondent panel that considered the Applicant's Appeal.
- b) He denied that the medical report annexed to the Applicant's application papers showed that the Applicant was disabled to the extent of entitling him to a 12 month temporary disability grant.
- c) According to him he had perused the report of Dr Bara and J.B Mkwanaazi as well as the various clinical outpatient records that were filed with the Applicant's appeal papers and it became clear to him that there was no indication that the Applicant was in fact disabled to the extent of qualifying for a 12 months temporary disability grant, the Applicant has only annexed Dr Bara's report to these papers.
- d) According to him the antiretroviral treatment was initiated from 30 December 2010 and the medical examination took place on 26th January 2011 showing the Applicant as being stable but still weak and unable to function and in need of nutritional support.
- e) According to him this made it obvious to him that the applicant was at that stage too weak to function in the open labour market and that a temporary disability grant of 6 months duration was appropriate.
- f) The applicant was already on anti-retrovirals at that stage and with the necessary nutritional support, it was reasonably expected

that the applicant would return to normal functional activity within a period of 6 months.

- g) This took into account the fact that the examining doctor had found that applicant to be "fairly stable" on examination.

- h) He indicated that from his extensive experience the above prognosis held true for the majority of cases, hence his recommendation to the second respondent tribunal that a temporary disability grant of 6 months duration was indicated.
- i) In any event, the appellant always had the option of reapplying for a further disability grant in the unlikely event that 6 months duration proved inadequate.
- j) He accordingly denied that the medical reports referred to shows any disability on his part that warranted a disability grant in excess of the 6 months duration.
- k) He stated with regard to the alleged discrimination that the applicant is comparing two different scenarios.
- l) Each situation has to be adjudged and determined on its own merits.
- m) The situation from that in the Nondima report is different from that in the applicants report.
- n) A mere reading and comparison of the two reports show that.
- o) In any event the medical officer in Nondima's appeal tribunal did not recommend a disability grant in her case but the

chairperson, of that tribunal, Mr M Malabye, decided that a temporary grant should be awarded to enable the Appellant to recover and look for employment to earn income.

- p) The medical report annexed to the Applicant's papers does not disclose that he is disabled and such disability has resulted in the applicant not being capable of engaging in gainful employment to provide for his own living for longer than 6 months, hence the 6 months temporary disability grant was properly awarded.
- q) There is no basis for the court to interfere with such outcome.
- r) The alleged discrimination against the Applicant is also without basis or merit.

4. ISSUES TO BE DETERMINED

4.1. The issues here are:-

- a) Did the Respondent's conduct fall foul of the provisions of section 9 of the Constitution, that is, was the Applicant

discriminated against on the basis of gender when he was awarded a 6 months grant whereas a female person was awarded a 12 month temporary disability grant.

- b) Did the Respondents fail to comply with the provisions of PAJA

4.2. VIOLATION OF RIGHTS

- (i) The Applicant alleges that the Respondents have breached Section 9 of the Constitution¹ and Section 6 of PAJA² has not been complied with.

(ii) An examination of the relevant provisions and the legal position pertaining to the actions of the Respondents is necessary to determine whether or not the Applicant has established that these rights have indeed been violated.

(iii) Under the new constitutional order the control of public power is always a Constitutional matter. The Court's power to review administrative action no longer flows from common law but from the Promotion of Administrative Justice Act and the Constitution itself.

(iv) Section 9 of the Constitution reads as follows:-

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief,

culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

(v) Section 33 of the Constitution³ read as follows:

(1) “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written

reasons.

(3)”

(vi) Section 6 of PAJA identified the circumstances in which the review of an administrative action might take place. The said provisions divulge a clear purpose to codify the grounds of judicial review of administrative action.

(vii) Section 6 of PAJA reads as follows:-

“Judicial review of administrative action

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- (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
 - (2) A court or tribunal has the power to judicially review an administrative action if-
 - a) the administrator who took it-
 - i) was not authorised to do so by the empowering provision;
 - ii) acted under a delegation of power which was not authorised by the empowering provision; or
 - iii) was biased or reasonably suspected of bias;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action was procedurally unfair;
 - (d) the action was materially influenced by an error of law;
 - (e) the action was taken-
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;
 - (f) the action itself-
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
 - (g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.”

(viii) In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*⁴, O’ Regan J, remarks as follows:

“The court’s power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, it derives its force from the latter. The extent to which the common law remains relevant to administrative law will have to be developed on a case-by-case basis as courts interpret and apply the provisions of PAJA and the Constitution.”

The learned Judge went further at page 705, para [25]:

“The provisions of section 6 [PAJA] divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from common law as in the past.”

Skweyiya J in *Joseph v City of Johannesburg*⁵ held that: -

“The right to administrative justice is fundamental to the realisation of these constitutional values, and is at the heart of our transition to a constitutional democracy. The scope of the s 33 right to just administrative action and the associated constitutional values, as given effect to under PAJA, must cover the field of public administration and bureaucratic practice in order properly to instrumentalise principles of good governance. It is plain that the reach of administrative law would be unjustifiably curtailed if it did not regulate administrative decisions which affect the enjoyment of rights, properly understood, at least for the purposes of procedural fairness.”

(x) The Applicant in this case has alleged that he has been discriminated against because a female Appellant was granted a 12 month temporary disability grant whereas he was granted a 6 months disability grant despite their circumstances being the same or at very least similar.

(xi) The Applicant makes this allegation of being discriminated against, despite the following factors:-

- a) that the decision made in respect of Nondima was not, or rather it is not alleged that it was, before this tribunal when they considered his appeal;
- b) That it was made by a differently constituted Tribunal;

- c) That Nondima's decision was made a year prior to his and based on facts peculiar to her case which even on the face of the medical report, even to a non-medical person like myself, appears to be different from that of the Applicant, having regard to the following:-
- (i) Her condition just on the face of the medical records were not the same, she is described as emaciated, which means according to the shorter oxford dictionary "become abnormally thin or wasted";
- (ii) Nondima had had pulmonary tuberculosis;
- (iii) She is described as very weak and chronically ill;
- d) That someone who is chronically wasting away and very weak and already had an opportunistic disease of TB attack her would be regarded as more serious than someone who is fairly stable but weak and needs nutritional support and does not appear to have any complications or attacks from any opportunistic diseases.
- e) That the degree of her disability appears to be far more severe despite the fact that they both have the same ailment, HIV/AIDS, having regard to the impact it has on her physical body.
- f) That Nondima's CD4 count was reflected as 251 as at 04 August 2008 almost 2 years prior to her examination by the Doctor on 24 June 2010. That most certainly could not have been a factor that would have determined her Appeal since it could not have been a proper reflection of her CD4 count at the time of her examination.
- g) The Applicant's CD4 count of 66 was taken on 22 November 2010 closer to the examination on 26 January 2011 but there is also no indication what his CD4 count was at the time of the examination and whether or not his commencement of ARV treatment in December had improved his CD4 count, or not.

The Applicant accordingly cannot rely on the differences in their CD4 count to aver that he was weaker than her since it is unclear what her CD4 count actually was at the time of the examination, or in that year even. The allegation that he was weaker based on their respective CD4 counts accordingly is untenable in the circumstances of this case.

The Applicant's condition clearly is not the same as that of Nondima.

The Doctor who formed part of the panel which dealt with the Applicant's appeal explained his reasons for arriving at

their decision and there is nothing in his explanation that can be construed as improper, biased, irregular or unreasonable nor did he appear to have considered irrelevant factors or failed to take into account relevant factors peculiar to the Applicant's case.

The Applicant failed to elicit any facts that demonstrate that Nondima being female was the reason that she got a 12 months

disability grant whereas him being male caused him to be awarded a 6 months disability grant because their situations are not the same, especially in circumstances where the decision of her matter was not even before this tribunal for them to even distinguish or discriminate between the two of them.

On the face of her medical reports her condition appears to demonstrate that the disease had a more serious impact upon her

functionality and caused additional complications for her, that is, her being emaciated, in a very weak state and the attack of the opportunistic disease TB.

The Applicant has failed to adduce any cogent facts or reasons to support his allegation of discrimination, of violation of his section 9 rights, presumably based on gender. The difference, in the awards, even though Nondima's case was not before this tribunal, appears to be justifiable and reasonable.

The Applicant accordingly has failed to establish that he has been discriminated against and accordingly that his Constitutional

rights as set out in Section 9 have been infringed.

4.3. Failure to comply with PAJA.

- (i) The Applicant has further alleged that the Respondents have not complied with their obligations in terms of Section 6 of PAJA and is thus reviewable.
- a) In *Bangtoo Bros and Others v National Transport Commission and Others*⁶, the Court held that:

'It is clear from the cases that a body constituted by statute is obliged "honestly to apply its mind to the matter" for decision. I am for the moment concerned with what is meant by the expression "apply its mind to the matter", certain aspects of which have already been covered by this judgment. It seems to me essential that the tribunal is essentially obliged to consider all relevant and material information placed before it. To pay mere lip-service to this obligation is not sufficient, just as it would be a dereliction of duty to hear representations which are pertinent, and then to ignore them. The problem arises whether the Court is concerned with the degree of importance which the tribunal attaches, in the exercise of an honest judgment, to the relevant considerations. Take a case, for example, where a factor which is obviously of paramount importance is relegated to one of insignificance, and another factor, though relevant, is given weight far in excess of its true value. Accepting that the tribunal is the sole judge of the facts, can it be said that it has in the circumstances postulated properly applied its mind to the matter in the sense required by law? After much anxious consideration I have come to the conclusion that the answer must be in the negative.'

- b) In *Makhanya NO and another v Goede Wellington Boerdery (Pty) Ltd*⁷ Erasmus AJA held that section 6(2)(h) of PAJA requires a simple test:

“an administrative decision will be reviewable if it is one a reasonable decision-maker could not reach. In the instant case, where the administrator was faced with a balance to be struck, it is constitutionally endorsed and opportune to ask: did the administrator strike a balance fairly and reasonably open to him?”

- c) In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*⁸, Chaskalson P instructively expounded the rationality requirement in the following terms at paragraphs [85] and [90]: D

[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not it falls short of the standards demanded by our Constitution. . .

[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions

as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of the power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.'

- d) Whether the decision of a tribunal will be reviewable will depend on whether the decision is lawful, complies with the principle of legality is fair and reasonable. In order to see whether it meets these requirements the Court will evaluate the reasoning of the Tribunal to determine how it arrived at the decision and whether the decision maker properly exercised the powers entrusted to him or her, and duly applied its mind to the matter, not whether or not it has followed the decision of another independently constituted tribunal in a different matter pertaining to that matter.
- e) In this case the Applicant has failed to advance any cogent facts that demonstrates bias or reasonable suspicion of bias on the part of the Respondent.
- f) The Applicant seeks to demonstrate that the Respondents was biased in circumstances where that they were not even aware of the existence of Nondima or what was held in her Appeal or how it is relevant to the Applicant's Appeal.

- g) Having regard to the facts of this case no bias has been established nor can a reasonable suspicion of bias be inferred.
- h) The Applicant has failed to demonstrate that the decision of the Respondent in awarding the Applicant a 6 months temporary grant was unreasonable or irrational or that they did not apply their minds appropriately.
- i) The Applicant has failed to demonstrate on their papers why the Applicant is or was a candidate for a 12 month temporary grant.
- j) The doctor, who deposed to the affidavit on behalf of the Respondent, has set out his reasons for them granting the Applicant a 6 months temporary grant, and their decision as appears from the papers does not appear to be arbitrary or irrational and objectively

viewed appears to have been properly exercised in terms of the purpose for which the power was given.

- k) In applying the trite legal position when considering applications I am inclined to accept the doctor's reasons and the Applicant in any event has not been able to gainsay it in any meaningful manner.
- l) The Tribunal accordingly, objectively viewed, appears to have duly considered the merits and demerits of the facts peculiar to the Applicant and arrived at a decision after honestly and properly applying its mind to all the relevant and material information before it prior to arriving at its decision.
- m) I am accordingly satisfied that the Tribunal discharged its obligation and properly exercised the power entrusted to them and

have accordingly complied with the provisions of section 6 of PAJA, in the circumstances of this case and properly exercised its powers.

4.3) The Tribunal appears to have discharged its obligations both in terms of the constitutional imperative and the provisions of PAJA in dealing with the Applicant's Appeal.

4.4) There is in light of the foregoing no need to in any detail address the unreasonableness, let alone practical difficulties and delays of expecting a tribunal to consider the decisions of every other Tribunal, which is based on the facts peculiar to that

particular Appellant, in considering the merits or demerits of the Appeal of the person whose appeal it is considering, particularly in this case having regard to the following:-

- a) The Applicant sought to rely on a decision taken by the Respondent, a year earlier where they had accorded a female candidate

a temporary grant of 1 year.

- b) The information given does not illustrate

What factors were considered by that Tribunal;

Whether this Tribunal was even aware of that decision;

Whether the facts of that Appellant were placed before this Tribunal or whether or why it needed to be;

Why the Tribunal had to have regard to Nondima's decision, whose circumstances just on the reading of the report were not the same as that of the Appellants when determining the merits or demerits of his Appeal;

How an unrelated case, which was not considered by the members constituting this panel, can possibly be seen to justify reviewing

their decision or saying that it was improperly arrived at.

How the decisions of previous tribunals who have dealt with facts peculiar to those Appellants, can be said to be binding on this Tribunal dealing with the Appellant where they are required to apply their minds to the facts and in the circumstances of the Appellant in this case in determining whether or not he is eligible for a grant and if he is for what duration.

Where the facts of the two Appellants distinguishable even on the face of the doctor's report.

Where their specific mandate appears to be to consider the merits or demerits of the Appeal before them and the circumstances of that Appellant.

5. BRIEF SUMMARY

5.1) The Applicant:-

- a) Failed to establish that the Respondent's decision fell foul of the provisions of PAJA and the Constitution;
- b) Failed to establish that he was discriminated against since his situation:-
 - i) Is different from that of Nondima with regard to the effect that HIV has had upon them, she had been attacked by an opportunistic disease pulmonary tuberculosis whereas he had not;
 - ii) He was described as fairly stable whereas she was not;
 - iii) She was described as being emaciated and very weak whereas he was not;
- c) Cannot rely on Nondima's CD4 count which was taken 2 years prior to her examination as a basis to suggest he was in a worse position than her especially having regard to the description of her physical condition at the time of the examination.
- d) Failed to establish that the Respondent deliberately discriminated against him by arriving at a different decision to that of the tribunal dealing with Nondima's application in circumstances where:-

- (i) The tribunal dealing with this matter did not have Nondima's file before it when arriving at its decision.
- (ii) Dealt with the merits of the Appeal on the medical information of the Appellant before it.
- (iii) Based its decision on facts and circumstances peculiar to the Applicant and applied its mind to those facts.
- (iv) The Tribunal's decision based on the facts as set out in the doctor's affidavit appears to be lawful, rational, and reasonable and appears to have been based on relevant considerations.
- e) Failed to establish any discrimination nor has he demonstrated that there has been non-compliance with the requirements of PAJA or the Constitution.
- f) Failed to satisfy the court that the decision of the Respondent should be reviewed and set aside in the circumstances of this case, or that any cogent grounds for review exist or that there has been any bias or reasonable suspicion of bias or any form of discrimination.
- 6) It was for these reasons that the Application was dismissed.
- 7) I, in the exercise of my discretion, felt that it would be unjust and inequitable to mulct the indigent Applicant in costs and accordingly ordered each party to pay their own costs.
- 8) I did not know the reason for the reservation of the costs on the uncontested opposed roll and the Respondents counsel was unable to advance any cogent reasons for why they should not pay those costs when it appeared from the Applicants heads that the adjournment was occasioned by the Respondents failure to file their affidavit timeously and accordingly the adjournment was sought at the instance of the First and Second Respondents.
- 9) It was for that reason that I awarded the reserved costs, of the 14th of February 2012 when the matter was enrolled on the uncontested opposed roll, to the Applicant.
- 10) ORDER
- 10.1) The order I made accordingly was:-
 - a) That the Application is dismissed;
 - b) Each party is to pay their own costs save that the 1st and 2nd Respondents shall pay the Applicant's cost of the 14th of February 2013 when the matter was enrolled on the uncontested opposed roll.

F.B.A DAWOOD

(JUDGE OF THE EASTERN CAPE HIGH COURT)

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1The Constitution of RSA act no 108 of 1996

2Act No. 3 of 2000

3The Constitution of RSA Act 108 of 1996

4[2004] ZACC 15; 2004

(7) BCLR 687 (CC) at page 702 – 703 paragraph [22]

5 2010

(4) SA 55 (CC)

6 1973

(4) SA 667 (N) at 685A - D Bato Star Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others [2004] ZACC 15; (2004

(7) BCLR 687) at para [99]

7 [2013] 1 All SA 526 (SCA)

8[2000] ZACC 1; 2000

(2) SA 674 (CC) (2000 (3) BCLR 241)

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