

IN THE HIGH COURT

(BISHO)

CASE NO.: 569/2003

DATE: 4 SEPTEMBER 2003

In the matter between:

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KETIWE EVELYN NKOHLISO

versus

MEC FOR WELFARE AND ANOTHER

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EX TEMPORE JUDGMENT

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EBRAHIM J

This matter is before me purely for the determination of the question of costs. Mrs Hartle who appears for the applicant has made various submissions in respect of the question of costs. These are to the effect that the applicant was compelled to institute these proceedings as a result of the first respondent failing to timeously consider the application for an old age grant in respect of the applicant.

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Mr Notshe who appears for the first and second respondents has opposed the application. In essence his opposition is that there had been a misjoinder in respect of the second respondent and in addition that there was no need for the applicant to launch these proceedings.

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Furthermore Mr Notshe contends that the proceedings as stipulated in the Promotion of Administrative Justice Act, No. 3 of 2000 ('PAJA') had not been followed by the applicant and for that reason the applicant should not be entitled to costs in so far as this matter is concerned.

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Mr Notshe, quite correctly, has identified that costs do not

necessarily follow the result. In other words even if a party is successful in an application or in any proceedings it does not follow as of course that costs will necessarily be granted in favour of the successful party. The Court has a discretion in this regard and it is a discretion which the Court is required to exercise judicially. In other words, the Court should not in a capricious manner simply determine that costs should be awarded without having clearly considered the facts of a particular matter.

It is precisely on this basis that I intend to determine whether costs should be awarded in favour of the applicant or not. The applicant, as I have indicated, applied for an old age grant. This application was submitted on 13 May 2002. For reasons which remain unexplained the applicant was informed in September 2002 that her application had been successful and that payments in respect of the old age grant would commence. These then commenced in the same month, namely September 2002. An issue which remained unresolved in that respect was the fact that the Department, at that stage it appears, did not indicate what was to happen in respect of a certain period in respect of which the applicant was clearly entitled to have been paid, but remained unpaid. In this regard the applicant in her founding affidavit set out that she calculated this amount to be R2 480-00 and also requested the Court to grant interest on that amount at the legal rate of 15.5 percent per annum calculated from 13 May to September 2002.

As I have indicated the respondents have not placed before the Court any explanation for the failure or for the delay in paying the additional amount due to the applicant. An amount of R3 360-00 was paid to the applicant in March 2003. It is common cause that this

amount was paid to the applicant after the applicant had launched the present proceedings.

Whatever the position in this regard, the sole basis of the respondents seeking to oppose the question of costs is, firstly, that there has been a misjoinder of the second respondent; secondly, that the application should not have been launched in the form that it was; thirdly, that had it been launched in terms of the provision of PAJA that this matter may well have been resolved at an earlier stage.

As I understand the position in so far as the respondents are concerned, their argument is that if PAJA had been followed this matter would have been resolved at an earlier stage.

That being so, it is not tenable for the respondents to come to this Court and to say well if you had followed PAJA this matter would have been resolved and, therefore, since you instituted the application the matter was not resolved timeously. I find that a contradiction in terms, because it is not suggested that the applicant was not entitled in any manner to bring proceedings in respect of the amount that was outstanding. That, as I understand it, is not the basis of the argument as raised by Mr Notshe.

Mr Notshe contents himself, and perhaps rightly in certain regards, to the fact that it is necessary that when applications of this nature are brought that the provisions of PAJA must be applied. I need to point out in this regard, however, that prior to the decision in the matter of **JAYIYA v THE MEC FOR WELFARE, EASTERN CAPE PROVINCIAL GOVERNMENT AND ANOTHER** 2003 (2) All SA 223 SCA this Court had numerous matters before it of a similar nature. Invariably, and I think almost without exception, in all of those matters the Permanent

Secretary of the Department of Welfare of the Eastern Cape was cited as a second respondent. At no stage prior to the decision in the **JAYIYA** case did the Department ever raise, to my knowledge, this substantive objection that the Permanent Secretary should in fact not be cited. The **JAYIYA** case has now confirmed the position that the correct citation is the Nominal Head of the Department who is the Member of the Executive Council of the Department of Welfare, Eastern Cape Province.

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Having said that, it should be apparent that I am not persuaded that the manner in which the applicant approached the Court is necessarily of such a nature that the applicant should be punished for seeking redress in respect of payments that were rightfully due to her.

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Indeed, if the Department had been as efficient as it contends it would have been if PAJA had been followed, there would have been absolutely no reason for the applicant to have had to resort to an application of this nature. I am left to speculate as to what the reason is for the amount not having been paid earlier and I am faced with the difficulty that this is a person who has applied for an old age grant.

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It seems to me that what the Constitution has prescribed that the rights of individuals should be protected against the unfair actions on the part of Government has been flaunted in this respect. I am at a loss to understand why people who apply for old age grants should even have to contemplate having to go to a legal representative in order to have their grants determined expeditiously and furthermore to have payments effected expeditiously. It flies in the face of what one understands a democratic society to be about, it flies in the face of the responsibility that a democratically chosen Government has to protect the rights of its citizens and to ensure that their rights in terms of the Constitution are

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protected. I find it very regrettable that the Department has chosen to oppose this matter purely on the basis of costs and then to seek to introduce the question of misjoinder as the fundamental reason why it should succeed in that respect.

Assuming even, and I do not determine this specifically, that there has been a misjoinder, I fail to understand on what basis that still permits the Department to say that costs should not be granted against it. I say this with the greatest of respect because the first respondent has not even deemed it necessary to place herself on affidavit to answer the allegations of the applicant. The second respondent himself has not deemed it necessary to place himself on affidavit in order to contest the allegations of the applicant. What has happened is that this has been delegated to some individual who terms himself as a Deputy Director responsible for social services by the Provincial Department of Social Development of the province of the Eastern Cape. I may have been more inclined to accept that the opposition which the respondents have launched to this is an opposition which was taken in all good conscience. I am not persuaded in this matter that this is the case. It seems to me that the relevant Department is literally now seeking to punish some applicant who has been helpless up until now, for trying to obtain what is rightfully due to her; to punish her for having sought the assistance of the Court.

I am not persuaded either that I should determine that the application should have been brought before the Magistrate's Court. There is absolutely no reason why applicant should not approach this Court, because a further problem may arise in this regard that once they have obtained an order in the Magistrate's Court they are precluded from

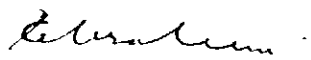
any further action in terms of seeking redress against the Department to enforce the order and then they would still have to approach the High Court.

In all the circumstances of this matter I consider it wholly iniquitous that I should order that the applicant bear the costs of this application. It appears to me at the stage when the application was launched that it was not ill-conceived, nor was it improper and that had payment been made earlier that may have precluded the necessity for bringing this application.

In the circumstances I do not find the opposition to be well founded and accordingly I shall be granting costs in favour of the applicant.

The order of this Court is accordingly the following:

First respondent is to pay the costs of the application on an opposed basis.

  
Y EBRAHIM

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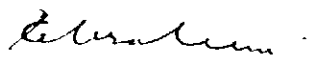
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