FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 031/2006

PARTIES: Thozamile Eric Magidimisi N.O and The Premier of the Eastern Cape & 4 Others

REFERENCE NUMBERS -
- Registrar: 2180/04

DATE DELIVERED: 25/04/2006

JUDGE(S): Froneman J

LEGAL REPRESENTATIVES -
Appearances:
- for the State/Applicant(s)/Appellant(s): WH Trengrove SC and B Hartle
- for the accused/respondent(s): M Donen SC
-

Instructing attorneys:
- Applicant(s)/Appellant(s): Hutton & Cook
  Respondent(s): State Attorneys

IN THE HIGH COURT OF SOUTH AFRICA
BISHO **Case No 2180/04**
Reportable

In the matter between

THOZAMILE ERIC MAGIDIMISI N.O. **Applicant**
and

THE PREMIER OF THE EASTERN CAPE	**First Respondent**
THE MEC FOR FINANCE, EASTERN CAPE	**Second Respondent**
THE MEC FOR SOCIAL DEVELOPMENT, EASTERN CAPE	**Third Respondent**
THE HEAD OF THE DEPARTMENT OF SOCIAL DEVELOPMENT, EASTERN CAPE	**Fourth Respondent**
THE MINISTER OF JUSTICE	**Fifth Respondent**

JUDGMENT

Summary: Constitutional and statutory duty of provincial government functionaries to ensure payment of court orders made against the province – competent and obliged to pay such orders from Provincial Revenue Fund under section 3 of State Liability Act 20 of 1957 – Responsible functionaries ordered to take necessary steps to ensure payment of outstanding court orders and report back to court on how this is done.

Froneman J.

Introduction

[1] In a constitutional democracy based on the rule of law final and definitive court orders must be complied with by private citizen and the state alike. Without that fundamental commitment constitutional democracy and the rule of law cannot survive in the long run. The reality is as stark as that.

[2] Our Constitution contains an array of provisions which buttress this fundamental proposition. It proclaims the rule of law and supremacy of the Constitution to be a foundational value of our democracy.[1] The supremacy of the Constitution means that the Constitution is the supreme law of the Republic; law and conduct inconsistent

[1] Section 1 (c) of the Constitution.

with it is invalid, and the obligations imposed by it must be fulfilled.[2] The Bill of Rights in the Constitution is a cornerstone of our democracy and the state must respect, protect, promote and fulfil these fundamental rights.[3] The Bill of Rights applies to all law, and binds the legislature, the judiciary and all organs of state.[4] The judicial authority of the Republic is vested in the courts,[5] no person or organ of state may interfere with the functioning of the courts,[6] organs of state must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness,[7] and an order or decision issued by a court binds all persons to whom and organs of state to which it applies.[8]

[3] This means that not only private persons or entities must comply with court orders made against them, but also the executive and legislative arms of government and all other organs of state. In the present matter, as will be seen in more detail below, this court has given a number of judgments ordering the provincial government ('the province') to pay certain sums of money to the individuals involved. The province has thus far failed to do so in most instances.

Such a failure to comply with a money judgment would, in the case of private persons or entities, be enforced by attaching the assets of those individuals and selling them in execution so that the proceeds of the sale in execution could be used to satisfy the

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[2] Section 2.

[3] Section 7 (1) and (2).

[4] Section 8 (1).

[5] Section 165 (1).

[6] Section 165 (3).

[7] Section 165 (4).

[8] Section 165 (5).

judgment debt. This procedure is not possible against a state organ like the province.[9] The question then arises whether persons with a money judgment granted in their favour against the province, which the province refuses to pay, have any practical means of ensuring that payment is made.

[4] This judgment deals with an innovative attempt by the applicant to ensure that the first four respondents ('the respondents'), all functionaries of the provincial government, take the necessary steps to ensure that money judgments ordered by the court against the province are paid. The applicant's ground for doing this is that the Constitution and other legislation place such an obligation on each of them, but that thus far they have failed to fulfil those obligations. Accordingly, as a first step, the applicant asks for an order that they take steps within a specified period after this judgment to comply with their obligation to ensure payment of the judgment debts and to report to court within another period how they did so. The applicant also foreshadows taking a second step, namely that if the first part of the order is not complied with, to be allowed to approach the court on the same papers, suitably amplified, for further relief against them. At this stage I am concerned only with the first step, not the second.

[5] By the time the matter was argued it was common cause that the province had, in a number of instances, not complied with court orders to pay money to successful litigants. It was suggested, however, by Mr. Donen who appeared for the respondents, that the orders the applicant sought were 'neither necessary nor necessarily effective' and that an effective order would simply be to make a declaratory order that the amounts required to satisfy the judgments may be paid out of the State Revenue Fund.

[6] The problem with this suggestion is that it merely confirms that the respondents seem to be unaware of their obligations, as well as their competencies, when it comes to giving effect to court orders for payment of money.

[7] It is apparent from the papers that, at least until the oral hearing of the matter, the respondents[10] were under a misapprehension as to the nature and extent of their

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[9] Section 3 of the State Liability Act 20 of 1957 provides:
"No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against the property of the State, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be".

[10] The fifth respondent is the (national) Minister of Justice, cited in her official capacity. The main part of the order sought in theses proceedings do not involve the fifth respondent.

constitutional duty to obey and give effect to court orders. From the opposing affidavit deposed to by Mr. Rasmussen, the director of social security in the department of social health (made on behalf of the third respondent, but confirmed as constituting their defence too, by the first, second and fourth respondents) it is also clear that the respondents are aggrieved by what they see as incorrect perceptions 'also amongst members of the judiciary' about the alleged lack of performance of the department and the causes for that. In the light of this I think it is necessary to clarify not only the duties of the respondents under these circumstances, but also to explain the function and duties that the courts have in adjudicating matters such as these.

[8] In what follows I am greatly indebted to the comprehensive and lucid exposition of the facts and law as set out in the written heads of Mr. Trengove who, with Ms.Hartle, appeared for the applicant. I did not understand Mr. Donen to take any serious issue with their treatment of the facts and the law.

The facts

[9] The applicant approaches the court in three different capacities. The first is that as representative of the estate of his late mother. This court gave judgment in her favour against the province for payment of a disability grant in the sum of R29400,00, interest and costs on 5 December 2002. The costs were duly paid by the fifth respondent, the national Minister of Justice, but the province has not paid the capital and interest. The second capacity in which the applicant claims is as representative of 59 other judgment creditors who claim to be in a similar position, namely that the province had failed to pay them the judgment debts due to them. Lastly the applicant also seeks to act in the public interest. It is, he says, in the public interest that the

province should obey court orders made against it and that the failure to do so on a broad scale in social grant matters should be addressed.

[10] The respondents' opposition to the application (as set out in the opposing affidavits) illustrates the fundamental misconception they appear to have had about their obligation to comply with court orders. The opposing affidavits sought to meet the applicant's case on two levels: a general broader response to meet the allegations of a systemic failure to comply with court orders, and an individualized response to deal with the cases of each of the judgment creditors.

[11] The broader response was dealt with under four headings, namely (1) a history of the difficulties experienced in the amalgamation of the apartheid institutions dealing with social assistance into one provincial system; (2) the increased number of applications for social assistance in the province over the last few years; (3) the workings of the application process itself and especially the communication problems that existed and that to some extent still exists in that process; and (4) the envisaged national system envisaged in the future.[11]

It needs to be acknowledged (and courts have done so in the past) that the respondents faced a tremendous and unenviable challenge in transforming the old system to bring it in line with the demands of our new constitutional dispensation. I accept that there has been a material improvement in the administration relating to the granting and processing of social assistance in the province and that the province deserves judicial recognition for its efforts in this regard. I also trust and hope that the establishment of national agencies in future will make the system ever more efficient. But as far as the present case is concerned these improvements take the matter no further, because it does not address the central complaint made in this application. That complaint is that where judgments are given against the province there is a general reluctance or failure to give effect to those judgments. To the extent that the opposing papers do address this issue directly they tend to strengthen, not undermine, the applicant's case.

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[11] It also alluded to the allegedly dubious role played by private legal practitioners in social grant applications, but for present purposes it is not necessary to comment on that issue, it being completely irrelevant to the issue at stake. The Judge President has recently issued a court notice which is aimed at preventing any possible abuse in social grant applications.

[12] What is missing in the opposing papers is a clear and detailed exposition of the manner or process by which the province deals with judgments granted against it in respect of the payment of social grants. What is admitted is that at the time the various judgments were granted against the province it 'was not geared … to deal with court applications'.[12] Similarly, it is admitted that when some of the court orders which are in issue in the present application was served there was no process in place to deal with such orders.[13] The details of the present process to deal with court orders granted against the province in social grant cases are not stated. What does appear is a statement that an official, Ms Ndenze of the provincial legal services unit, seconded to the department 'would record the order and forward it to the litigation unit'.[14] The manner in which the litigation unit operates and interacts with the department is not spelt out in any detail at all. All that is stated in this regard is that the litigation unit 'now operates in the back-office in East London. This office is in constant communication with the MEC's office in Bisho, which will considerably improve the Department's response to court orders'.[15] Nothing is said about the process used for the actual payment of court orders out of the province's finances. That is a curious and telling omission.

In effect this response amounts to a tacit admission that until the time the present application was launched no formal process existed in the province to deal effectively for the payment of court orders granted against the province in social grant

[12] Affidavit Rasmussen, paragraph 92, page 259 of the papers.

[13] Affidavit Rasmussen, paragraph 269, page 291 of the papers.

[14] Ibid.

[15] Affidavit Rasmussen, paragraph 89, page 258 of the papers.

applications.

[13] Such a process is now said to be in place, but how it works is not explained. If the province's response to the individual cases in this application is the measure by which its effectiveness is to be measured then the process, whatever it may be, is fatally flawed.

[14] As a result of the fact that the department on its own admission was not initially geared to deal with social grant applications the individual orders at stake here were granted by default. This fact appears to have led the province to believe that in the individual cases it was not obliged to make payment in terms of the court orders if the province's assessment of its liability did not agree with what the court had ordered it to pay to those particular individuals. Of course this is no defence or excuse for non-compliance with a court order but, up until the date of filing of Mr. Donen's heads of argument on 16 March 2006, the province steadfastly refused to acknowledge their legal and constitutional obligation to comply with any of the individual court orders, except on the terms it considered proper.

[15] The province's response to the individual cases falls into three broad categories. In one category it objected to payment on the grounds that the judgments were wrongly granted and should be rescinded. A second category related to those instances where 'the judicial process and the administrative process of assessing the applications ran simultaneously'.[16] In most of these instances the department's calculations differed from the court order and it appears that the province preferred to follow its own assessment rather than comply with the exact terms of the court order. The third category related to those instances where the court order was in fact complied with.

[16] It is, or should be, abundantly clear that only the third category – full compliance with the court order – is a proper fulfilment of the province's constitutional and legislative obligations to respect and give effect to court orders. Mr. Donen correctly and properly conceded in his written heads of argument that the province, through the

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[16] Affidavit Rasmussen, paragraph 98, page 258 of the papers.

first four respondents, were bound to satisfy the judgments given against the province or apply for their rescission. He correctly states that '[t]hey have failed to follow the latter course and therefore remain bound. The paramount legal principle applicable is the supremacy of the rule of law. (See section 1 (c) of the Constitution)'.

What is difficult to understand is how and why it took the province so long to make this fundamental and trite acknowledgement of a fundamental principle of our new democracy. It remains unexplained on the papers.

[17] I hope that by now the respondents realize that their response on the papers was misconceived and wrong. On the face of it the response appears to be arrogant and even callous. I can do no better in this regard than to quote from applicant's counsel's heads:

" The respondents show no contrition or even an awareness of the province's shortcomings … They say most of the problems about which Mr. Magidimisi complains are 'perceived rather than real'. They say the criticism of the province by the courts is because its system 'has not been explained to the judiciary' and, insofar as there might still be a problem, they blame it on the interference of the attorneys who act on behalf of the victims…

At the same time, their response to Mr. Magidimise's plight typifies their … disregard, not only for the constitutional and statutory rights of the poorest of the poor, but also for the orders of this court and their constitutional duty to obey these orders. The one thing this application does, is to draw to the attention of all the respondents the fact that Mr. Magidimisi obtained a judgment against the province more than three years ago on 5 December 2002 and that it remains unpaid. If the province and the respondents had any inkling of their constitutional and moral duties, they would immediately have apologised to him and this court for their failure to obey the court order, offered an explanation for their failure to do so and rushed to ensure that they fully complied with it".

The respondents' constitutional and statutory duties

[18] One of the founding values of the Constitution is the rule of law.[17] One of the fundamental principles of the rule of law is that everybody, including the state, is

[17] Section 1 (c) of the Constitution

subject to the law and judgments of the courts.[18] This is emphasized in the Constitution by the provision that an order of court binds all persons to whom and organs of state to which it applies.[19] The Constitution requires all organs of state to assist and protect the courts and to ensure the effectiveness of courts.[20]

[19] The applicant seeks an order that the respondents take all the administrative and other steps necessary to ensure that the provincial government complies with the court orders to the extent that it has not already done so.

[20] The first respondent is the Premier of the province. The Constitution vests her with the ultimate executive authority of the province.[21] The Premier and the Members of the Executive Council are responsible for the implementation of legislation in the province and for the performance of all other constitutional and statutory executive functions of the province.[22] The Premier has taken an oath of office to "obey, respect and uphold the Constitution and all other law of the Republic".[23] This includes the duties to uphold the rule of law in the manner set out in paragraph [18] above. As the ultimate executive authority in the province the Premier thus bears the ultimate responsibility to ensure that the provincial government honours and obeys all judgments of the courts against it.

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[18] *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), para [56] footnote 52.

[19] Section 165 (5).

[20] Section 165 (4).

[21] Section 125 (1).

[22] Sections 125 (2) (a), (b) and (g), read with section 133 (1) .

[23] Section 135 read with item 5 of schedule 2 of the Constitution.

[21] The second respondent, the Member of the Executive Council for Finance, bears the same general Constitutional duties as those of the Premier, except that he does not bear the ultimate executive authority of the Premier.[24] In addition, however, he bears responsibility for decisions of the provincial treasury.[25] This would include decisions relating to the payment of judgments against the province for the payment of money.

[22] The third respondent, as Member of the Executive Council for Social Development, in addition to being subject to the general constitutional duty of upholding, respecting and enhancing the rule of law, bears particular responsibility in that regard as the executive member of the department administering social grants.

[23] So too does the fourth respondent. He is the accounting officer of the provincial department for social development.[26] This means that, amongst other duties, he is responsible for the payment of social grants, including those instances where the province is ordered to pay such grants by the courts.[27]

[24] Each of the four respondents thus bears the constitutional duty to act in accordance with the rule of law, which in the context of this application means that they must ensure that court orders made against the province are paid. That has not been done in a large number of individual cases referred to in this application. This failure, on the papers, is not the result of individual mistakes made by lower ranking officials. It is the result, on the one hand, of a fundamental misconception on the part

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[24] Section 133 (1) and (3).

[25] Section 17 (1) and (2), read with section 20 (2) (c) of the Public Finance Management Act 1 of 1999 ('the PFMA').

[26] Section 36 (2) (a) of the PFMA.

[27] See section 17 (1) of the Social Assistance Regulations, and section 38 (1) of the PFMA.

of the province, represented by the respondents, about their duty to protect, uphold and enhance the rule of law. On the other hand it is a result of the lack of any systematic process of dealing with judgments for the payment of money granted by the courts against the province. The respondents represent the face of the province to the public. Between the four of them they are the state functionaries constitutionally and statutorily responsible for the payment of court orders made against the province in social grant matters.

The judiciary's constitutional duties

[25] All arms of government are subject to the Constitution, and that includes the judiciary.[28] As stated by Justice O'Regan in *Kaunda and others v President of the Republic of SA*:[29]

"The conduct of all three arms of government, the Legislature, the Executive and Judiciary must thus be consistent with the Constitution."

[26] The Constitution has been described as a 'transformative' constitution in that it commits the South African people to achieve a new kind of society in which people have the social resources they need to exercise their rights meaningfully.[30] In this case the constitutional duty of the respondents was to give effect to the fundamental right of the applicant and others to social security and assistance under section 27 of the Constitution, by properly administering the provisions of the Social Assistance

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[28] Sections 2 and 8 of the Constitution.

[29] 2005 (4) SA 235 (CC), para [218].

[30] See, for example, K.Klare, "*Legal Culture and Transformative Constutionalism"* (1998) 14 SAJHR 146; P.Langa , *" The Vision of the Constitution"* (2003) 120 SALJ 670.

Act.[31] This includes reasonable measures to make the system effective.[32] The constitutional duty of the courts in this regard is not to tell the respondents *how* to do this, but merely to ensure that they do take reasonable measures to make the system effective. In this manner the respondents (representing the province), as well as the courts, are enjoined to ensure the realisation of the same goal, albeit in different ways. The respondents do not have a choice but to administer the administration of grants in a reasonable manner making the system effective. The courts have no choice but to give redress when this is not done. And after the courts have made a final pronouncement on the issue in accordance with legal procedures,[33] the respondents have no constitutional choice to disregard the courts' judgments. If they nevertheless do, the courts in turn have no constitutional choice other than to ensure as far as possible that practical effect is given to those judgments.

The remedy

[27] The respondents have been cited as the respective bearers of the constitutional and statutory duties set in paragraphs [18] to [24] above, and in their personal capacities. The applicant alleged that they failed in their constitutional and statutory duties to ensure that the province makes payment to the applicant and others of the sums the province was ordered to pay by the court. These payments, in many cases, have not been made. The respondents have failed to explain why the applicant and

[31] Act 59 of 1992. See *Member of the Executive Council: Welfare v Kate* [2006] SCA 46 (RSA), paras [1] and [22].

[32] *Member of the Executive Council: Welfare v Kate*, above, para [3].

[33] Which includes giving the state the opportunity of challenging any judgment on proper grounds, such as by applying for rescission when the circumstances justify that, and by way of appeal where the judgment is considered to be wrong – none of which was done in this case.

others like him have been deprived in this manner of their fundamental right to social assistance.

[28] Section 38 of the Constitution provides that the applicant is entitled to 'appropriate relief' in a case where there has been a breach of a fundamental right. In *Fose v Minister of Safety and Security*[34] Ackerman J stated the following in respect of a similar provision in the interim Constitution:[35]

"I have no doubt that this court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."

[29] What the applicant seeks in this matter is an order to compel the respondents to fulfil their constitutional and statutory obligation to comply with court orders made against the province, by not only taking all the steps necessary to ensure payment of the sums owing by the province to the applicant and others, but also to report to the court the manner and extent of their compliance. If they fail to do this the applicant seeks leave to approach this court again for further relief. Mr. Trengove called this 'a

[34] 1997 (3) SA 786 (CC).

[35] Para [69].

mandamus with a wrinkle', and Mr. Donen called it a 'structural interdict'. The 'wrinkle' or 'structural' part of the order consists in the added competence of the court to keep a supervisory role over the process of compliance with its order.

Whatever the proper legal pigeonhole may be for this kind of order, it has been sanctioned in appropriate cases by the Constitutional Court.[36] Similar kind of orders have also been made in this province and in my personal experience these orders have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst it has also assisted the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties.[37]

[33] In my judgment the order sought by the applicant is appropriate in the present matter. The failure to take the necessary administrative steps to ensure compliance with court orders has been persistent and lengthy. Even at the hearing of this matter there was no undertaking by any of the respondents to ensure immediate payment to, for example, the applicant, even though it was properly conceded at that stage by Mr.Donen that there was no legitimate excuse not to do so. Nor did the respondents seek to explain their failure by setting out the details of the process in place for payment of judgment debts and why in particular instances the process failed.

[34] Challenged by Mr.Donen for being coy about the ultimate purpose of the applicant, in the next proposed stage of the proceedings, Mr Trengove made it abundantly clear in reply that although he hoped it would not become necessary, the applicant will ask for the respondents to be committed for contempt of court if they do not comply with the part of the order he presently seeks.

I share his hope that things will not get that far. It has taken much too long for a

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[36] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), paras [106] and [113].

[37] *Ngxuza & others v Permanent Secretary, Dept of Welfare, E Cape* 2001 (2) SA 609 (E) at 633 -634; *S v Z and 23 similar cases* 2004 (4) BCLR 410 (E).

proper understanding of the constitutional and other legal duties of public officials administering social grants in this province to be appreciated. I do not know what kind of legal advice they are given, but I hope the latest judgment of the Supreme Court of Appeal in *Member of the Executive Council: Welfare v Kate*[38] finally sets to rest any misconceptions in this regard. Writing for a unanimous court Nugent JA states the following:[39]

"Section 6 of the [Social Assistance] Act properly construed, read together with the procedural guarantees in ss 33 (1) and 237 of the Constitution, obliges the Director General to consider and decide upon an application for a social grant, and to do so lawfully, procedurally fairly, and with due diligence and promptitude. *It goes without saying that a public functionary who fails to fulfil an obligation that is imposed upon him or her by law is open to proceedings for a mandamus compelling him or her to do so. That remedy lies against the functionary upon whom the statute imposes the obligation, and not against the provincial government….Moreover, there ought to be no doubt that a public official who is ordered by a court to do or refrain from doing a particular act and fails to do so is liable to be committed for contempt in accordance with ordinary principles and there is nothing in Jayiya*[40]*that suggests the contrary*." (My emphasis).

[35] The normal way to comply with a judgment debt sounding in money is to pay the money. What has happened in this case, as in many others in this province, is that the province has simply failed to pay judgment debts made against it in the courts. There is no doubt that the applicant seeks to enforce, in a different way, eventual payment of

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[38] [2006] SCA 46 (RSA), note 31 above.

[39] Para [30].

[40] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 611 (SCA).

the judgment debts by the province. But the relief sought is not an impermissible way of circumventing the provisions of section 3 of the State Liability Act[41]. Section 3 does not prohibit the payment of judgment debts sounding in money by the state. To the contrary, it authorises the payment of such a judgment debts out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be.

[36] Earlier in this judgment I made the comment that Mr.Donen's submission that the applicant's cause would be adequately served by a declaratory order that the money judgments may be paid out of the Provincial Revenue Fund was an indication that the respondents not only misunderstood their constitutional obligations, but also apparently misunderstood their constitutional and statutory competence in this regard. The respondents do not need a court order to allow them to pay judgment debts against the province, but if it will assist in the process of bringing their misapprehension in this regard to an end I will include a declarator to that effect in the order.

In terms of section 17 (1) of the Public Finance Management Act ('PFMA')[42] the second respondent and the provincial department of finance under his control constitute the Provincial Treasury. They are in charge of the Provincial Revenue Fund.[43] The provincial treasury may withdraw money from the fund as a direct charge against the Fund when it is provided for in the Constitution or a Provincial Act[44] or in terms of an appropriation by a Provincial Act.[45] The second respondent may also authorise the use of funds from the Fund to defray expenditure of an exceptional nature where this is necessary to prevent serious prejudice to the public

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[41] 20 of 1957.

[42] No. 1 of 1999

[43] Section 21 (1) on the PFMA.

[44] Section 21 (1) (b) (ii).

[45] Section 21 (1) (b) (i).

interest in the province.[46]

A judgment against the province for the payment of money is a direct charge against the Provincial Revenue Fund because, firstly, the Constitution requires the province to honour judgments against it for the payment and, secondly, because the State Liability Act is a provincial act within the meaning of section 21 (b) (ii) of the PFMA insofar as it applies to the provinces. It provides in section 3 that a judgment against a province for the payment of money may in appropriate cases be paid from the Provincial Revenue Fund.

[37] Any court judgment for the payment of money against the province must thus be paid out of the Provincial Revenue Fund as provided for by the provisions of section 3 of the State Liability Act, read with the province's constitutional obligation to obey court orders. But the province is, as stated in applicant's counsel's heads of argument, merely an abstraction and can only function through its officials. The responsible officials here are, as explained above, the fourth respondent as the accounting officer of the department for social development, the third respondent who is the member of the executive council responsible for the workings of that department, the second respondent who is in control of the Treasury and, with the provincial department of finance, also the Provincial Revenue Fund, and finally the first respondent who as Premier of the province bears the ultimate responsibility for the proper functioning of the provincial government. Without them carrying out their constitutional and statutory duties in respect of the payment of court orders those orders will not be complied with. If they fail to do that, as in this case, it is the judiciary's constitutional duty to ensure that they fulfil those obligations.

[38] One last matter remains to be dealt with. On the morning of the oral hearing of this matter Mr. Donen sought to hand in a further affidavit deposed to by a Chief Director at the National Treasury, a Mr. Du Plessis, in support of the respondents' case. Mr.Trengove objected to this on the basis that there was no sufficient and proper explanation for the lateness of the affidavit and that the applicant would be prejudiced by not being able to respond to its contents. I indicated that I would make a decision on its admissibility after hearing full argument on the main application.

The objection founded on the insufficiency of the explanation for its lateness is well taken, but in my view its contents do not prejudice the applicant.[47] In essence it confirms that nothing legally prevents the province from paying court orders from the

[46] Section 25 (1).

[47] Except, perhaps, in relation to the reasons advanced for the constitutional validity of the prohibition of the attachment of state assets in section 3 of the State Liability Act, 20 of 1957, an issue that does not form part of the present proceedings and may be dealt with, if it becomes a live issue, at the next stage of the proceedings.

Provincial Revenue Fund, without the necessity of any further authorisation from a court to do so, although it does not explicitly deal with such orders being direct charges against the National or Provincial Revenue Funds. The affidavit is accordingly allowed

The order

[39]
1. In this order, "the prior orders", mean the following orders of the High Court against the Eastern Cape Government (in its own name or represented by nominal respondents):
   1.1 Paragraphs 1 to 3 of the order of this court made on 5 December 2002 in case 550/02 in favour of Thozamile Magidimisi NO (Annexure A);
   1.2 The orders described in annexure B.

2. It is declared that the first to fourth respondents' failure to cause the Eastern Cape Government to comply with the prior orders constitutes an ongoing violation of their duties under the Constitution.

3. It is declared that the Eastern Cape provincial government has the legal obligation and competence to satisfy the payment of court orders sounding in money made against it from the Provincial Revenue Fund.

4. The first to fourth respondents are ordered:
   4.1 To take all the administrative and other steps necessary to ensure that the Eastern Cape Government complies with the prior orders to the extent that it has not already done so, within 14 days of the date of this order; and
   4.2 To deliver a report in writing to the registrar of this court and to the applicant's attorneys within 21 days of the date of this order, of the manner and extent of their compliance with the order in 4.1 above.

5. If the first to fourth respondents fail to comply with the orders in 3 above, the applicant is given leave to supplement his notice of motion and founding affidavit within 14 days after the expiry of the period of 21 days referred to in 4.2 above, and to enrol this application on reasonable notice to the respondents, for a further hearing on and determination of such further relief as the applicant might then seek.

6. The State Attorney is ordered to ensure that a copy of this judgment is handed personally to each of the first to fourth respondents and to report to the registrar of this court within 7 days of the date of this order that this has been done.

7. The respondents, in their official capacities, are ordered jointly and severally to pay the applicant's costs, including the costs of two counsel.

J.C.Froneman
Judge of the High Court.