IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION - MTHATHA)

CASE NO. 451/2007

In the matter between :

THELMA NOMAWONGA JONI APPLICANT

And

MEC FOR SOCIAL DEVELOPMENT, EASTERN CAPE RESPONDENT

JUDGMENT

PETSE, ADJP

INTRODUCTION :

[1] In her amended notice of motion dated 11 September 2008 the applicant seeks the following extensive relief from this court, namely :

> "1. That the administrative action of the respondent of summarily stopping payments of applicant's disability

grant from the 31st October 2004 up to date be and is hereby declared *null* and *void* and to have no force of law, and is set aside.

2. That the respondent be and is hereby directed to :

(i) re-instate the applicant's disability grant for the abovementioned period by paying the applicant the sum of R35 380.00.

(ii) pay to the applicant interest on the sum of R35 380.00 at the legal rate of 15,5% per annum calculated from the date that each monthly amount comprising the total of R35 380.00 would have been paid to the applicant if the disability grant had not been stopped during the abovementioned period, to the date of payment.

(iii) inform the applicant's attorneys, in writing, of such payment, when it has been made.

(iv) continue payment of applicant's disability grant until he (sic)is declared well recovered and not eligible for a disability grant in terms of applicable statute.

3. That any future test used to determine whether applicant's

disability grant is temporary or permanent, that is not based on the duration of his medical condition to (sic) be and is hereby declared unlawful.

4. That the 180 day period referred to in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 is hereby extended in terms of the provisions of section 9(1) of the said Act, condoning the late application for a review of respondent's unconstitutional and unlawful action.

5. That the applicant be and is hereby exempted, in terms of the provisions of section 7(2) of PAJA, (sic) from the obligation, if applicable, to exhaust internal remedies.

6. That the respondent pays (sic) costs of this application."

[2] The application is on the papers before this court strenuously opposed by the respondent. I say that the application is "strenuously opposed on paper" advisedly because on the date of hearing of this matter in the opposed motion court on 3 November 2009 the respondent was not represented despite the fact that a notice of set down for the hearing of the matter in the proper manner had been duly given to the respondent on 23 September 2009.

FACTUAL BACKGROUND :

[3] The applicant is, as she avers in her founding affidavit, an adult married female person who is semi-illerate born on 7 March 1970. She suffers from what she describes as "lymphoedema" of her lower limb which she says is an abnormal swelling of her left leg that is accompanied by acute pain which has severely compromised her mobility to the extent that she is virtually unemployable in the open semi-skilled labour market.

[4] Due to her physical impairment she applied for a disability grant in 2003 under the Social Assistance Act 59 of 1992 ("the Act") which

application was approved by or on behalf of the respondent for in due time she commenced receiving monthly payments from a pay-point established under the auspices and administration of the Development of Social Development ("the Development").

[5] It came to pass that sometime in 2004 she received a letter that advised her that the payment of her disability grant was being terminated on the basis that it had been approved for a period of twelve months only. She asserts that she never was advised at the time of the approval of her grant application that it would last for twelve months only and that at the end of that twelve months period it would automatically lapse by exffluxion of time. She thus contends that if she had been advised of that fact the Department would have been obliged in conformity with the principles of fair administrative justice to advise her that she had a right to challenge such decision on the assumption that the Department would also have furnished her with its reasons for making the grant temporary. She says nothing of the sort was ever explained to her by the Department with the consequence, so she asserts, that her rights to administrative action that is, *inter alia*, reasonable and fair were infringed. She concludes by saying that the natural consequence of all these shortcomings and/or administrative bundles on the part of the Department was that the administrative action of the Department was unlawful,

unconstitutional and *null and void* and thus susceptible to review and per force liable to be set aside.

[6] Given the extraordinary delay on her part in approaching this court the applicant, as she was required in terms of the law, also seeks condonation for such delay. She attributes her inaction to, *inter alia,* the fact that she is semi-litterate, and an unsophisticated rural layperson coupled with the fact that she did not know what to do until she met someone (the identity of the person has not been disclosed as also at what stage she met this unidentified person) who recommended to her that she approaches her attorneys of record which she did. She concludes by saying that had she been so enlightened in good time as to what her options were she would have attended to the matter expeditiously.

[7] For the sake of completeness it bears mentioning that there are various extracts of medical records annexed to the applicant's founding affidavit to substantiate applicant's contentions that she has not enjoyed a clean bill of health for quite some time prior to her making her application for a disability grant under the Act.

[8] The respondent resists the applicant's application and has, in an answering affidavit deposed to by a Mr Mzimkulu Mayekiso ("Mayekiso") who describes himself as an adult male attorney in the

employ of the Department of Justice and Constitutional Development and attached to the office of the State Attorney in East London as an Assistant State Attorney, and over and above the points *in limine* raised joined issue with the applicant in relation to the merits of the application.

[9] It is timely at this juncture to say that on a reading of the respondent's answering affidavit there can be no doubt that Mayekiso lacks personal knowledge of the facts about which he testifies despite his assertion to the effect that the facts to which he deposed in his affidavit are "within his personal knowledge". It is evident from the whole tenor and content of Mayekiso's affidavit that he relied on information obtained from Departmental official(s) whose identities he has chosen not to disclose and which official(s) has/have in turn not seen it fit to file confirmatory affidavit(s) vouching for the correctness of the information furnished to Mayekiso. Despite my initial reservations about the propriety of Mayekiso's affidavit I have decided to adopt a benevolent and accommodating approach rather than striking the respondent's affidavit out in its entirety on the ground that it contains facts that constitute inadmissible evidence regard being had to the general rule that hearsay evidence is not permitted in affidavits save in very circumscribed circumstances such as those provided for in, for example, **The Law of Evidence Amendment Act 45 of 1988. See : Pountas' Trustee v**

Lahanas 1924 WLD 67; Levin v Saidman 1930 WLD 256. And compare : **Millward v Glaser 1950 (3) SA 547 (WLD)**. There is sound authority for the proposition that in the absence of urgency (which is the position *in hoc casu)* very cogent reasons must be advanced to justify the admission of hearsay evidence in an answering affidavit. See in this regard : **Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd 1991 (3) SA 276 (SELD)** at **285 D – E.**

[10] The respondent says, by way of points *in limine* taken on his behalf, that the applicant failed to institute these proceedings within a period of 180 days calculated from either the date on which the decision by which the applicant is aggrieved was taken or on which she became aware or could reasonably have been expected to become aware of the impugned decision in compliance with the prescripts of sec 7(1) of Promotion of Administration Justice Act 3 of 2000 ("PAJA"). Also the respondent contends that the applicant should have first exhausted her internal remedies as envisaged in sec 10(1) of the Act.

[11] Apropos the merits of the application it is not without significance to record that Mayekiso states that he has no knowledge of most of the averments contained in applicant's founding affidavit. The significance of this lies in the fact that it tends to re-inforce what I have said earlier in

this judgment that Mayekiso could never have had, by any stretch of imagination, personal knowledge of the facts that he sought to testify to in his answering affidavit. Mayekiso nonetheless refutes that the applicant is, as he puts it, permanently disabled or unfit to work but curiously does not lay any factual basis upon which he refutes the applicant's contentions to the contrary. Mayekiso goes further and asserts that the respondent had through its officials informed the applicant of the temporary nature of the approval of the grant. He nonetheless leaves this court in the dark as to whether the letter aforesaid was ever brought to the attention of the applicant in good time (i.e. upon the approval of her application for a grant) in order for the applicant to exercise her rights, if so advised, in relation thereto.

[12] From the summary sketched above there can be no doubt that the applicant was informed of the temporary nature of the grant only in October 2004 when it was intimated to her that her grant would cease at the end of October 2004 after she had enjoyed it for several months since its approval in 2003. The issue that then arises for determination by this court is whether the applicant was prejudiced by the manner in which the respondent's officials dealt with her in the light of what the applicant has alleged in her founding affidavit.

[13] Before I proceed to consider the issue as I have crystallised it in the preceding paragraph I deem it necessary that the preliminary points taken by the respondent be disposed of first. In this regard it is my judgment, on the view I take of the matter, that the respondent's points *in limine* deserve nothing but short shrift.

[14] The first point that has to do with sec 7(1) of PAJA seems to me to entirely ignore the fact that the applicant is by all accounts an unsophisticated, semi-literate rural person who lacks the sophistication of the more enlightened members of our society. That she cannot be described as "a babe in the wood" has not been disputed by the respondent and regard being had to the fact that the applicant seeks to assert what is essentially her constitutional right this court should be slow to deny her relief. The circumstances obtaining in *hoc casu* in relation to the personal situation of the applicant are comparable to situations in other cases that have served before our courts in the recent past. For present purposes reference may be made to the judgment of the Constitutional Court from which this court is enjoined by judicial authority to take its tune in **Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)** in a passage appearing at **para [69]** in which Ackermann J writing for a unanimous court had this to say :

> "……..... . Particularly in a country such as South Africa, where so few have the means to enforce their rights through the courts, it is essential that those occasions when the legal process does establish that infringement of an entrenched right has occurred, it be effectively vindicated. ……"

[15] Although the aforegoing remarks were made in a different context altogether from what I have to decide in *hoc casu* they apply with equal force to the facts of this case. For the sake of completeness I might add that apart from all else I am, in any event, of the view that the personal circumstances of the applicant are such that they render her situation exceptional to a degree that warrants an exception from the obligation to exhaust internal remedies before approaching this court. This approach commends itself to me because of the view I take of the matter, namely : that taking an objective view of the evidence that has been presented before this court the interests of justice require that the applicant's delay in bringing this application be condoned (See : **sec 9(2) of PAJA**) and so is her failure to exhaust internal remedies.

[16] In **Ntame v MEC for Social Development and 2 Similar Cases 2005 (6) SA 260 (SECLD**) at **para [25]** Plasket J had the following to

say whilst considering a point *in limine* raised in that case in relation to sec 7(1) of PAJA :

> " …….. . Thirdly, I bear in mind that the applicants in these matters are seeking to enforce the fundamental right of access to Social Assistance, and that, consequently, they are 'drawn from the very poorest within our society' and 'have the least chance of vindicating their rights through the legal process' ……..... ……."

[17] The remarks by Plasket J in the **Ntame** case, supra were echoed by Kroon J in an unreported judgment in Case No. 1710/2003 (SECLD) *sub nomine* : **Njanjula v MEC for Social Welfare, Eastern Cape** who expressed himself in the following terms :

> "Should however, an extension of the period have been required by reason of applicant's unsophistication and lack of education (and their implied unawareness of provisions of section 7(1)(b) of PAJA, and the absence of any prejudice to the respondent, the interests of justice required the grant thereof".

[18] Apropos sec 10(1) of the Act I think it needs to be said that it is cold comfort to the applicant to contend that she must have appealed a decision which the respondent failed, for more than twelve months to communicate to her. It is my judgment that the Legislature had obviously contemplated that any adverse decision taken by or on behalf of the Minister would be communicated to the party affected by such decision at the earliest opportunity after such decision has been taken. To allow a period of more than twelve months to elapse after the taking of an adverse decision before communicating it to the affected party could never have been contemplated by the Legislature and such culpable dereliction of duty on the part of respondent's functionaries ought not to be countenanced by this court.

[19] It is therefore my judgment that in the light of the aforegoing the points *in limine* as have been taken by the respondent cannot be sustained. I now turn to deal with the merits of the respondent's answer to the applicant's case. By way of prelude it is necessary to mention that the awarding of the disability grant to the applicant was done in terms of the provisions of the Social Assistance Act, 95 of 1992. Regulation 24(1)(c) made in terms of that Act provides that a social grant shall lapse when the period of temporary disability has lapsed in the case of a grant to a disabled person. Regulation 2 (3) provides that a temporary grant

will continue for a continuous period of not less than six months or not more than a year.

[20] Regulation 25(1) in turn provides that the Director-General shall if he or she approves an application for a grant, inform the applicant in writing of such approval and the date on which approval was granted. Such letter should also, if the grant awarded is a temporary grant, inform the applicant that the grant is of a temporary nature and also when it will lapse, that the applicant may reapply for a grant after the lapsing of the grant and that the applicant has a right to appeal against the decision relating to the period for which the grant has been awarded.

[21] As already alluded to above, the applicant only received the letter informing her that she had been awarded a temporary grant that would expire on 31 October 2004 a few days before the end of October 2004. The applicant states that when payments of her monthly grant commenced in 2003 she had no reason to think that her grant was for a temporary period. The contention therefore that she had a legitimate expectation to receive such payments for an indefinite period subject of course to the normal review procedure of permanent grants has considerable merit and thus commends itself for acceptance.

[22] It bears mentioning that in the nature of things a temporary grant lapses by simple operation of law when the period for which it was to endure has come to an end. In an unreported judgment of this court in Case No. 1033/2007 *sub nominee* **Eunice Mdodisa v MEC for Social Development, Eastern Cape**, Miller J had occasion to consider a case in which an almost identical defence was raised by the MEC as has been raised in *hoc casu* who held that a lapsing of a grant brought about by simple operation of the law is not brought about by an administrative action and is therefore not subject to review. However, the learned judge went on to hold that a decision to make a grant a temporary one amounts to an administrative action and once that decision was made the applicant then had the right to receive notification of the decision and to make representations through an appeal procedure. Accordingly, the learned judge continued and held that the recipient of a grant in those circumstances has a legitimate expectation that there would be a proper review and hearing before the payments of the grant were stopped. Thus when no such review took place it is not open to the MEC to rely on or invoke the automatic lapsing provision of Regulation 24(1) (c). For this proposition the learned judge relied on **Mpofu vs MEC Department of Welfare and Population Studies, Gauteng and Another WL 2848/99** (unreported) and the illuminating article by Nick de Villiers titled '**Social Grants and the Promotion of Administrative Justice Act (SAJHR),**

Vol 18, Part 3, Grants and 2002 at **page 338**)" in which the learned author with some persuasive force states that :

> "[A] valid determination of temporary disability is a jurisdictional event upon which the lapsing depends, and the failure to properly apply the regulations or to properly inform the beneficiary of any limitation on his rights rendered the entire condition *null and void ab initio.* A void condition is simply no condition, and the temporary grant continues until stopped on review".
>
> and
>
> > "…….. the beneficiary who has not been told of the limitation on the grant will have a substantive legitimate expectation that his or her grant will continue until lawfully stopped."

I, with respect, fully align myself with this proposition.

[23] For all the aforegoing reasons I am satisfied that it behoves this court to come to the assistance of the applicant.

[24] In the result the following order shall issue :

1. The respondent's administrative action of terminating the payment of applicant's disability grant is declared invalid and of no force and effect and is hereby set aside.

2. The respondent is hereby directed to re-instate the applicant's disability grant within a period of twenty-one days from the date of service of this order on the respondent and such re-instatement to be with effect from 30 November 2004.

3. It is declared that applicant is entitled to payment of all arrears owing as a result of the unlawful termination of her disability grant and such arrear payments to be with effect from 30 November 2004 todate of payment and to continue until the grant is otherwise lawfully terminated.

4. The respondent shall pay interest on the arrear amount at the rate of 15,5% per centum per annum calculated from the date of default to the date of payment.

5. The respondent shall pay the costs of this application.

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X. M. PETSE

JUDGE OF THE HIGH COURT

HEARD ON	:	03 NOVEMBER 2009
DELIVERED ON	:	19 NOVEMBER 2009
FOR APPLICANT	:	MRS E.N. NYOBOLE
INSTRUCTED BY	:	VOYI-NYOBOLE, ATTORNEYS
FOR RESPONDENT	:	NO APPEARANCE