

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High Court, Kimberley)

Case no:	1150/09
Date heard:	2009-08-07
Date delivered:	2009-08-14

In the matter of:

NATIONAL MINISTER OF SOCIAL DEVELOPMENT

1ST APPLICANT

**THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF SOCIAL DEVELOPMENT,
NORTHERN CAPE PROVINCE**

2ND APPLICANT

versus

JANNETJIE CAROLUS AND OTHERS

RESPONDENTS

Coram: **MAJIEDT J**

JUDGMENT

MAJIEDT J:

1. The Applicants apply on an urgent basis for the following relief:

“That the First Applicant be ordered to take steps to ensure compliance with paragraph 1 of the Order of Court dated 8 May 2009 in the matter Jannetjie Carolus and Others/The Member of Executive Council, Department of Social Development, Northern Cape Province and Others, case no 363/09 in ninety (90) days from the date of this order.”

The application is opposed by the Respondents. Ms Baloyi appeared for the Applicants and Mr. Quinn SC for the Respondents.

2. On 8 May 2009 under case number 363/09 (“the main application”), Mabuse AJ issued the following order:

“It is ordered that:

1. The First and/or Second Respondents are directed to consider and decide upon the Applicants’ applications for drought relief made on 15 May 2004 within sixty (60) days from date of the order.
 2. In the event the First and/or Second Respondents find that the Applicants are not entitled to drought relief, they are directed to furnish written reasons for such decision to the Applicants’ attorneys of record within 15 days of such decision having been taken.
 3. The First and/or Second Respondents are directed to pay the Applicants’ costs, such costs to include the wasted costs occasioned by the enrolment of the application for the hearing on 3 April 2009.”
3. I must at this early stage point out that the Respondents in the main application were as follows:
 - 3.1 The First Respondent was the Member of the Executive Council, Department of Social Development, Northern Cape Province;
 - 3.2 The Second Respondent was the Disaster Relief Fund Board;
 - 3.3 The Third Respondent was the Upper Karoo Advice and Development Agencies (commonly referred to as “Ukada”);
 - 3.4 The Fourth Respondent was the National Minister of Social Development.

4. The gravamen of the Applicants' case in the present matter is that the First Respondent (the National Minister) requires more time to comply with the order issued by Mabuse AJ in the main application, so as to establish a new Disaster Relief Fund Board, since the previous Board no longer exists. Ordinarily the relief sought in this application would be a relatively straightforward matter to adjudicate upon, but the matter is considerably obfuscated by the sloppy drafting of the Applicants' papers in this application. The difficulties are exacerbated by the terms of the order issued by Mabuse AJ as I shall in due course show.
5. In the main application Mr. Carolus and 99 other applicants sought relief from this Court, since they alleged that their applications for drought relief in 2004 had not been processed by the First and/or Second Respondents in that matter. The matter was initially opposed, but a draft order was sought by agreement between the parties and same was made an order of Court by Mabuse AJ. It is important to note that the Applicants in the main application brought the application in terms of s5 of the Social Assistance Act, 59 of 1992 ("the Act"), read with Regulation 27 of the Act. Section 5(2) of the Act reads as follows:

"The Director General may, subject to the provisions of this Act, make a financial award to a person if he or she is satisfied that such person is in need of social relief of distress."

That application was predicated upon the relief granted in the matters of **Mweza and Barends v MEC Social Services and Population Development and Others** under case numbers 367/06 and 368/06, an unreported judgment delivered in this Court

on 12 December 2008 by myself with Williams J concurring. Those two cases were regarded as test cases for many others which were pending at the time in this Division. Although those applications were unopposed, they were set down and heard before two judges by the direction of then Acting Judge President Bosielo, precisely because they were regarded as test cases. Importantly however, the said judgment did not take cognisance of the regulations passed under the Act to which I shall allude in due course.

6. The applications for drought relief under the aforementioned s5(2) of the Act were brought by the Applicants in the main application as a consequence of two proclamations issued by the President of the Republic of South Africa on 23 January 2004 and 3 March 2005 in terms whereof certain areas in the country, including the areas in which the Applicants are resident, were declared as disaster areas as a result of drought. Some R60 million was made available for drought relief and the Applicants duly lodged applications for the said relief. They alleged in the main application that their applications had not been processed and therefore sought the intervention of this Court. Relief was, as I have stated, granted by Mabuse AJ by consent between the parties.
7. Initially, the deponent to the main founding affidavit in the present application, the Director General of the National Department, Mr. Vusi Madonsela, averred that the order consented to by the Respondents in the main application were made without the knowledge of the Respondents and in their absence. The glaring

contradiction in the aforementioned statement of fact by Mr. Madonsela is self-evident. How could consent have been given to the order issued by Mabuse AJ in the absence of the Respondents and without their knowledge? This contradiction was clarified later after the Respondents had noted their opposition to the urgent application in the present matter and had filed a counterapplication for a postponement of the matter as well as an accompanying answering affidavit. In the answering affidavit the Respondents pointed out that in fact the present Applicants, *qua* Respondents in the main application, were duly represented by Ms Gcilitzana of the local State Attorney's Office. They averred that she had taken telephonic instructions from her clients and that the order was made by agreement which she had obtained on instruction from her clients. Mr. Madonsela in his replying affidavit, confirmed that this was indeed the case and went into some detail, including the disclosure of privileged attorney-client information, to illustrate that his misstatement of fact in the founding affidavit, set out hereinabove, was based on serious miscommunication between him, his officials and the State Attorney's office in Kimberley. I do not deem it necessary to go into any detail with regard to the facts, save to state that Mr. Madonsela's clarification in the replying affidavit to an extent clears up the matter, but leaves a very serious question mark behind the levels of channels of communication between his office and that of the State Attorney's office in Kimberley. To expose the most senior official and accounting officer in the National Department to such serious misstatements of fact is indeed of grave concern. Regardless of the aforementioned problems, it can be safely accepted that the order issued by Mabuse AJ set

out above, was made by consent and that the present Applicants were not only duly represented during those proceedings, but had also properly instructed the attorney acting on their behalf to consent to the order.

8. The Disaster Relief Fund is a juristic person established in terms of s16 of the Fundraising Act, 107 of 1978 ("the Fundraising Act"). Its objective is the rendering to persons, organisations and bodies who or which suffered damages or loss caused by a disaster, such assistance as the Board may deem fair and reasonable. Section 18(a) of the Fundraising Act sets out designated groups for whom assistance is envisaged in terms of the Fundraising Act. A flat sum of compensation of R900,00 per Applicant was fixed in terms of the proclamations in respect of the drought relief which I had alluded to above. These applications for drought relief was to be made to the Disaster Relief Fund through Ukada as its agent in the Karoo. All the Applicants in the main application consequently, on their version, lodged such applications for drought relief with Ukada for processing on behalf of the Disaster Relief Fund. In the present matter the Director General explained on behalf of the First Applicant that the Disaster Relief Fund Board is no longer in existence. Its term expired during 2007 and no Board had been appointed by the Minister to replace it. He also averred that the Board had exhausted the funds allocated to it for disbursement for social relief in the sum of R60 million. However, in an annexure to this same founding affidavit, namely "VM3" which is an internal memorandum requesting the National Minister to approve the appointment of members for the new Disaster Relief Fund Board, the allegation is made that a sum of R38

million remains available for disbursement under the Disaster Relief Fund, although no Board exists at this time. I was informed from the Bar by Ms Baloyi that Mr. Madonsela's averment in his founding affidavit is incorrect and that in fact an amount of R38 million remains available for disbursement for drought relief.

9. At this juncture I must enumerate the various problems in the Applicants' papers:

9.1 Firstly Mr. Madonsela's founding affidavit and his replying affidavit are called "Supporting Affidavits", obviously incorrectly so.

9.2 Furthermore, as Mr. Quinn has correctly pointed out, no order was made in the main application against the National Minister, but was in fact made against the First Respondent (Second Applicant herein) the MEC and/or the Disaster Relief Fund Board (which was the Second Respondent in the main application). The relief sought in the present matter refers only to the First Applicant, namely the National Minister against whom as I have stated, no order was made.

9.3 I have already referred to the serious misstatement of fact contained in Mr. Madonsela's affidavit which was later clarified in reply.

9.4 The contradiction between Mr. Madonsela's averment in his founding affidavit regarding the fact that the funds allocated for disaster relief had been exhausted and the facts

contained in the annexure thereto, namely “VM3”, stating that there is still R38 million remaining for disbursement for drought relief, is also glaring on the papers.

- 9.5 Quite apart from the aforementioned problems there is also the fact of self-created urgency which Mr. Quinn has strongly argued before me. The order was made on 8 May 2009 in the main application. According to Mr. Madonsela’s averments in his founding affidavit, the National Department became aware of the aforementioned order on 13 May 2009 when it was brought to his attention by the State Attorney. On that day the senior management of the Department met to discuss the order and it became apparent that since there is no Disaster Relief Fund Board, another one had to be established, which would of course take some time. Notwithstanding the aforementioned knowledge on 13 May 2009, the present application was only issued on 6 July 2009 and was set down for Tuesday 7 July 2009 at 14:00 on an urgent basis. The terms of the order in the main application made by Mabuse AJ envisaged that the order had to be complied with within 60 days, which would have expired on 7 July 2009, the exact date of setdown of this present application. It would appear therefore that nearly two months after becoming aware of the order, the Department suddenly decided to launch this urgent application on a few hours’ notice to the Respondents. This precipitated the application for postponement of the matter which was granted by Henriques AJ.

10. There is much to be said for Mr. Quinn's submission about this self-created urgency. The Applicants took virtually two months to come to Court to ask for an extension of the time periods set down by Mabuse AJ. Ms Baloyi has pointed out that the Minister was compelled to come to Court to ask for an extension of time to set up a new Board. I have no quarrel with that submission, but my problem is with the timing thereof. It has put great strain on the Respondents in the present matter to produce answering affidavits. Ms Baloyi's stance during her argument was that the Respondents did not have to oppose the relief sought in the present application, since it was obvious that the Minister had to seek an extension of the time limits ordered by Mabuse AJ. The problem that I have with this submission is that not only were the Applicants' papers in a chaotic and disorderly state, but as I have stated, the Minister who is the First Applicant herein, was not one of the parties against whom an order was made in the main application. Mr. Quinn argued quite forcefully that I should, by reason of this fact and also the Applicants' chaotic papers, dismiss the application with costs.
11. As I see the matter, the First Applicant (the National Minister) purportedly approached this Court with this application to establish a new Disaster Relief Fund Board. Plainly, the Board could not itself approach this Court, given the fact that it no longer exists. It seems to me therefore that to simply dismiss the application will defeat the very purpose of assisting the poorest of the poor, namely the Respondents herein (the Applicants in the main application). Dismissing the application would elevate form over substance, which would gravely prejudice the Respondents.

12. A further troubling matter is the fact that Mabuse AJ made an order against the First and/or Second Respondents in the main application. It is trite that the hybrid “and/or” can give rise in law to a myriad of problems. So, in the present instance, it is not clear whether the First or the Second Respondent should have acted. Another troubling factor is the regulations passed under the Act. Regulation 26(2) of the Regulations relating to grants and financial awards to welfare organizations and to persons in need of social relief of distress, published under government notice R418 in Government Gazette 18771 of 31 March 1998 reads as follows:

“26 PERSONS ELIGIBLE FOR SOCIAL RELIEF OF DISTRESS

- (2) Notwithstanding the provisions of subregulation (1), no person shall be entitled to a grant and social relief of distress simultaneously and any amount paid in terms of social relief of distress shall be recovered from any grant payment, including an arrear payment in respect of a grant.”

It is common cause that all the Respondents herein are recipients of social grants under the Act. In terms of Regulation 26(2) they would therefore be disqualified from obtaining social relief for distress such as drought relief under the Act. Ms Baloyi pointed out that the fact that they had proceeded in terms of the Act and not in terms of the Fundraising Act, has the implication that Regulation 26(2) may disbar them from obtaining such relief. I must point out that this particular regulation was never considered in our judgment in the **Mweza** and **Barends** matters referred to hereinabove. It may well be (I put it no higher than this since the point was not argued at all in **Mweza** and **Barends**) that the relief granted under s5(2) for drought relief may be untenable in law due to the terms of Regulation 26(2). Be that as it may, however, Ms

Baloyi correctly alluded to the fact that the Applicants in the main application would be better placed to proceed in terms of the Fundraising Act.

13. I take a robust view of the matter in this application. It seems to me that the First Applicant (the National Minister) is making a genuine effort to assist those most needy members of society, for whom the R900 drought relief will probably be a princely sum. I was informed from the Bar by Ms Baloyi that an advertisement had been placed and that a shortlist has been compiled for interviews during the course of this present week in respect of prospective members of the new Board to be established. In the premises it seems to me that it would hardly serve any purpose at all to dismiss the application.
14. This brings me to the question of costs. Mr. Quinn has forcefully argued that there should be a punitive costs order against the Applicants by reason of the fact of the self-created urgency to which I have already alluded and also the disorderly and chaotic state of their papers. Ms Baloyi on the other hand has urged me to make no costs order, since the National Minister had at all times acted *bona fide* with the genuine intent to assist the Respondents herein. There is merit in both submissions. In exercising my discretion the overriding consideration for me is the fact that the Respondents in the present matter are the poorest of the poor and the most needy in our society. They are all welfare beneficiaries. It is plain that they are people who are in serious need of distress relief and their opposition in the matter cannot be said to be frivolous. In the premises I am of the view that the

National Minister (First Applicant) should pay their costs, notwithstanding the fact that I am going to grant the Minister's application for an extension. I do so purely because, as I have stated, the Respondents are indigent and their legal representatives act herein in public interest litigation. The Applicants' costs on the other hand, are being paid from the public purse and their objective is to establish a juristic person in terms of the Fundraising Act so as to assist the indigent.

15. I consequently issue the following order

15.1 The First Applicant is ordered to take steps to ensure compliance on behalf of the Disaster Relief Fund, cited as the Second Respondent in paragraph 1 of the order of Mabuse AJ dated 8 May 2009 in the matter Jannetjie Carolus and Others/The Member of the Executive Council, Department of Social Development, Northern Cape and Others, case number 363/09, within 90 (ninety) days from date of this order.

15.2 The First Applicant is ordered to pay the Respondents' costs.

FOR THE APPLICANTS : ADV MS BALOYI
INSTRUCTED BY : STATE ATTORNEY

FOR THE PLAINTIFF : ADV R QUINN SC
INSTRUCTED BY : TOWELL AND GROENEWALD ATTORNEYS