

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

CASE NO. 3719/2016

Heard on: 24 October 2019

Delivered: 05 November 2019

In the matter between:

THEMBINKOSI MXEGO

Applicant

And

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY

1st Respondent

THE MINISTER OF SOCIAL DEVELOPMENT

2nd Respondent

JUDGMENT

ZONO AJ

[1] The applicant launched this application in terms of Rule 53 of the Uniform Rules of this court in terms of which he sought the following relief:

- (1) The 1st respondent's administrative action or decision of refusing or dismissing the applicant's disability grant application be and is hereby reviewed corrected and set aside.

- (2) The first respondent be and is hereby directed to approve the applicant's disability grant application with a temporary status and pay the applicant's social grant for a period of six months commencing on 24 June 2015.
- (3) The first respondent be and is hereby directed to, within one month of the grant of this order, effect payment of the applicant's back pay amount for a period of six months aforesaid or to pay the applicant's grant monies on a monthly basis for a period of six months and to advise the applicant's attorneys in writing that it has done so.
- (4) In the alternative, the applicant's application aforesaid be and is hereby remitted to the first respondent for reconsideration with or without directions.
- (5) The applicant be and is hereby exempted from the obligation to exhaust the internal remedies as laid out in any other law.
- (6) The applicant be and is hereby condoned for the late lodging of this application, should it be necessary.
- (7) The first respondent be and is hereby directed to pay costs of this application with the second 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.

[2] Only first respondent apposed the application. The first respondent filed its Notice to oppose, followed by a Notice in terms of Rule 6(5) (d)(iii) of the Uniform Rules. No answering affidavit was filed by the first respondent to meet applicant's factual allegations contained in applicant's founding affidavit. The meaty part of the Rule 6(5)(d)(iii) Notice is found at paragraph 2 there which reads as follows:

- 2.1 The application is mainly premised on the contention that the applicant is disabled as envisaged in the Social Assistance Act 13 of 2004. The alleged disability is purportedly based on an alleged medical assessment and report by a Dr BJ Mankanku, which is allegedly attached to the applicant's application papers as annexure A.
22. Contrary to applicant's contention, annexure A is neither a medical report by Dr Mankanku nor confirmation or declaration of applicant's alleged disability. It is a report by a Dr Mantlaka which specially certifies that the applicant is in fact according to his assessment not disabled. The finding that the applicant is not disabled and does not qualify for a disability grant as envisaged in the Act is further confirmed by a Dr Lokwe whose finding is also annexed in the application papers.
- 2.3 In the circumstances no proper basis has been laid on these papers for challenging the 1st respondent's rejection of applicant's disability grant application. Such rejection is fully consonant with all the medical reports on record. The decision is not liable to attack on any of the review ground cited by the applicant in the application.

[3] Reference to Dr Mankanku in the founding affidavit has since been corrected and explained in the supplementary affidavit delivered on 9 November 2018 to be a reference to Dr Mantlaka. The matter came for argument on the understanding that the report referred to in the applicant's papers is that of Dr Mantlaka dated 19 February 2014 marked as annexure "A" annexed to the founding affidavit.

[4] The applicant alleges that on 24 June 2014 he applied for a disability grant with the first respondent and in the process of doing that he underwent medical assessment as envisaged in the Relevant Regulations promulgated in terms of the Social Assistance Act. He alleges that he was medically assessed on 14 January 2014 and as a result of that the Medical Assessment: Disability Grant Form was completed by Dr Mantlaka and his findings were recorded in the form. Applicant describes the form as a "foregoing form." The applicant categorically state as follows: "*subsequent the **foregoing assessment**_my application for the grant was considered by the assessment panel of the Agency*". Applicant's application for disability grant was refused by the Agency on the same date of application, namely 24 June 2014. Reasons for rejection of the disability are set out in the letter of rejection as follows: "*your retro viral disease is treatable and can be controlled on regular medication, causing little, if any, permanent functional impairment*".

[5] These facts are common cause. The assessment report by Dr Mantlaka preceded the application and its purpose was to inform by way of recommendation an outcome of disability. It is a common cause that that document is with the first respondent. The applicant makes this pertinent allegation in paragraph 30 of his

founding affidavit *“I was not physically examined by another doctor. Doctor Mankanku (referring to Dr Mantlaka) is the only medical doctor nominated by the Agency who saw me and made his findings sequel the actual medical assessment or examination”*. The applicant makes this assertion after having made reference to the medical assessment report by Dr Mantlaka annexed as Annexure A to the papers. This put paid to any suggestion that there might have been another report that might have probably been with the first respondent when the disability grant in question was being considered. I say this because a lot of argument on behalf of the first respondent sought to suggest that there might have been another report that might have been obtained when the applicant was in the process of making the application. Part of the basis for that argument was that Dr Mantlaka’s report was made long before the application was made and it was referred to as an old report. That was a speculative argument not based on any version of fact.

[6] A failure by a party to deny an allegation was aptly dealt with in the Case of **Makhuva and others v Lukoto Bus Service (Pty) Ltd and Others 1987(3) SA 376 (V) at 386** the learned Judge placed reliance on the Case of **Mc Williams v First Consolidated Holdings (Pty) Ltd_1982(2) SA 1(A) at 10E** stated as follows: *“where it is stated that whilst quiescence is not necessarily acquiescence; a party who does not make a firm repudiation of an allegation when bound to do so incurs the risk of an adverse inference being drawn against him. As the admissions, denials, confessions and avoidance in pleadings, see Rules 22(2) and 25(1) and as to affidavits in Motion proceedings, see Rule 6(4)(d) and 6(4)(e). it is clear that affidavits really constitute both pleadings and the evidence in support of the allegations made and the rules as to pleadings should, to that extent, be applied to*

affidavit. I respectfully agree with the learned Judge that a reply of noting the contents is an admission thereof. Where a litigant wishes to dispute a fact alleged he is under a duty to deny it.” The first respondent had no evidence nor pleading to gainsay what has pertinently been alleged in the applicant’s founding affidavit, accordingly the argument about a possible report that might have been in the possession of the first respondent, when applicant’s application was considered, other than the one of Dr Mantlaka, is bereft of any merit. To the contrary it was submitted on behalf of the applicant that Dr Mantlaka’s assessment report was the only report used to support applicant’s application for disability grant made on 24 June 2014.

[7] In any event if there was any other information or evidence that was in the possession of the Agency when applicant’s application for a grant was being considered, it was the duty of the Agency to bring that information or evidence to the court so that the rationality of its decision may be viewed against what was considered at the time of taking the decision. I find support for this proposition in the case of **Kalil NO and Others v Mangaung Metropolitan Municipality and Others 2014(5) SA 123 (SCA) Para 30** where Leach JA had this to say “.... *This is public interest litigation in the sense that it examines the lawfulness of the exercise by public officials of the obligations imposed upon them by the constitution and National legislation. The function of public servants and government officials at national, provincial and municipal levels is to serve the public and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their action is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the true. On the contrary, it*

*is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interest of the public and good governance. As this court stressed in **Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng**, (Footnote omitted) our present Constitutional Order imposes a duty upon state officials not to frustrate the enforcement by Courts of Constitutional rights.”*

[8] The Agency is doing exactly what it is eschewed from doing. It does not explain anything to the court and its failure to take this court into its confidence is sought to be justified by the fact that it is the applicant who must prove its case. The Agency does not care about proper adjudication of this matter and the search for finding truth. All what appear to be its concern is the dismissal on technical grounds of the case and frustration of the enforcement of a constitutional right enshrined in Section 27(c) of the Constitution. The Agency is quite oblivious of the heightened duty it has to this court, that of fair adjudication of cases to ensure proper service to the public. The stance taken by and the manner in which the Agency has dealt with this matter simply shows a lack of appreciation of the values and principles governing public administration. **Section 195 of the Constitution** obliges the public administration to be accountable and to act transparently. That is the responsibility the respondent has failed to shoulder. Every organ of state is obliged to assist and protect the courts to ensure, inter alia, accessibility and effectiveness of the courts.¹ The effectiveness of the courts can mostly be achieved with the assistance of the

¹ Section 165(4) of the Constitution.

organs of state, like the Agency.² It is unacceptable that an organ of state, especially if it a party in litigation, can be at large to frustrate the attainment of the justice and access to court contrary to what **Section 165(4) read with Section 34 of the Constitution** are enjoining it to do.

[9] Allied to the above is the nature of the proceedings. The applicant invoked Provisions of Rule 53 of the Uniform Rules for the Agency to dispatch within the stated time record of proceedings and reasons that might possibly underpin the decision. No record of proceedings nor reasons were given by and or on behalf of the Agency. Suggestions that there might have been another medical report other than that of Dr Mantlaka is disingenuous and cannot lie on the mouth of the Agency to say that as it is the custodian of the documents relating to social grant applications. In **Hellen Suzman Foundation v Judicial Service Commission**³ the majority observed that:

- (i) *“the filing of the full record furthers an applicant’s rights of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision maker;*
- (ii) *a Rule 53 record is an invaluable tool in the review process which may help (a) to shed light on what happened and why;(b) to give the lie to unfounded ex post facto justification of the decision under review; (c) in the substantiation of as yet not fully substantiated ground of review; (d) in giving support to the decision- maker’s stance; and (E) in the performance of the reviewing court’s*

² Section 14 of South African Social Security Agency Act No. 9 of 2004, Section 239 of the Constitution.

³ 2018(4) SA1 (cc) (d)10-12.

function.” Agency’s failure to file record and reasons thwarts the objective of Rule 53 mechanism. Elsewhere in the judgment the majority⁴ held that “*our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function, with the result that a litigant’s right in terms of Section 34 of the Constitution to have a justifiable dispute decided in a fair public hearing before a court with all the issues being ventilated would be infringed.*” In the light of the aforesaid there can be no dispute that Agency’s effort is contrary to the aspirations of the constitution⁵. The Agency is definitely playing coy or fast and loose with the truth. The Agency has failed in its duty to make available to the court all the documents that might have been used in the application for social grant and is therefore estopped from relying on that failure to succeed in this case.

[10] That having been said I now turn to deal with Annexure A which appears to be the sole substantial document before the Agency at the stage of the application for disability grant. Part C of the medical assessment form deals with history and confirmation of impairment. The doctor records that the applicant is receiving treatment from clinic. Part D discloses that the applicant is suffering from Retro viral disease on HAART. It further appears that there were old clinic cards before the doctor. Undisclosed comments on referral clinical findings were agreed to by the doctor. Part E contains recommendation where severity of impairment is recorded to be none. Under certification the assessing doctor certifies the applicant not disabled.

⁴ Hellen Suzman Foundation v Judicial Service Commission Para 14.

⁵ Section 34, 165(4) and 195.

Under Social Assistance / Grants Recommended; Temporary Disability Grant was recommended for a period of six months.

[11] Faced with this medical assessment report the Agency, without any recommendation from the expert, rejects the application on the basis that his Retro viral disease is treatable and can be well controlled on regular medication. There is no rational connection between the recommendation and the decision. But there is connection between the certification and the decision. The question that arises is whether it is acceptable to choose a part of a contradictory report, and not the other. The answer depends on the powers the Agency reposes.

[12] **Section 14(2) of Social Assistance Act No 13 of 2004** provides that “*in considering an application made in terms of Subsection (1), the Agency may conduct an investigation and request additional information.*” This power corresponds or concurs with the power conferred in **Section 4(1)(b) of South African Social Security Agency Act No.9 of 2004 (SASSA Act)**. The section provides that “*the Agency mustcollect, collate, maintain and administer such information as is necessary for the payment of Social Security.....*” What arises immediately is the question that seeks to ask if it was possible for the Agency to take a decision in circumstances where a medical assessment report was contradictory in every material respect. It is in circumstances like those that the two pieces of legislation enjoins the Agency to investigate a matter. No rational decision could have been taken where the basic underlying document, which is the medical assessment report, is fraught with internal contradictions.

[13] Section 14(2) of Social Assistance Act is equipped with an internal remedial measure. The method and manner of investigation is provided for in the section itself, namely, “*to request additional information.*” The information may be requested from any person who may assist, furnish the required information. That is what I think is meant by a duty to “*collect and collate the information for the payment of social assistance*” as envisaged in Section 4(1)(b) of SASSA Act. The first person to be requested to give additional information clarifying the glaring contradictions in the report was Dr Mantlaka, the assessing doctor. He should have been invited to shed light with a view to eliminate the glaring mutually destructive opinions in one composite report.

[14] Another person who should have been the primary target of request is the applicant himself. The reason for that is not far to seek. Dr Mantlaka refers in his assessment report to old clinic cards. Those cards are in the custody and possession of the applicant. They could offer very good information about the enduring nature of applicant's medical condition. The age of the cards would give beneficial information starting way back to the current period and how the applicant had been responding to the treatment. Once that information is at the disposal of the Agency, the Agency “*collates*” it. To collate information involves critical examination of the information and serious application of mind. It entails weighing up of and comparison between different sets of information. The aforesaid represents the purpose of the empowering provision, to be specific, and in general the legislation. To this end it is safe to find that the impugned decision was not rationally connected

to the purpose of the empowering provision, and accordingly it is rendered assailable. The decision offended doctrine of legality and is therefore irrational.

[15] The Agency did not seek to place before this court circumstances which confronted it which might have caused it not to invoke the imperative provisions of Section 14(2) of Social Assistance Act and Section 4(1)(b) of SASSA Act. There is absolutely no basis for Agency's failure to invoke those provisions especially in compelling circumstances like the present.

[16] There is no basis laid for Agency's choice to align itself with one part of the report over the other. The Agency should not have aligned itself with information under certification in Part E of the report when there is contradictory information under Social Assistance / Grant recommended. It should have sought to reconcile and eliminate the contradiction first and there after take a decision. That is not without statutory recognition. Section 14(3) of Social Assistance Act deals exactly with that. Section 14(3) deals with taking of decision in favour of the applicant⁶ and a decision against the granting of social grant⁷. The statutory set up (sequence or chronology) suggests that Agency must first investigate before taking the decision⁸.

[17] On a conspectus of all the aforesaid I find that the Agency took the decision arbitrarily and or capriciously. In the light of the Agency's failure to observe

⁶ Section 14(3)(a) of Social Assistance Act

⁷ Section 14(3)(b) of Social Assistance Act.

⁸ Section 14(2) and (3) of Social Assistance Act.

provisions of Section 14(2) of Social Assistance Act and Section 4(1)(b) of the SASSA Act I find that it was not authorised to take that decision by the empowering provision. The Agency failed to follow a mandatory, material procedure or at least a condition prescribed by Section 14(2) of the Social Assistance Act read with Section 4(1) (b) of SASSA Act, where it should have. The exercise of the power when the decision was taken is so unreasonable that no reasonable person could have so exercised the power in the manner the Agency did. In the circumstances the decision is liable to be judicially reviewed and set aside⁹.

[18] During argument the applicant asked me to grant an order remitting the matter to the Agency for reconsideration with or without directions. The relief in Paragraph 2 and 3 of the Notice of Motion was abandoned. In any event I would not have had jurisdiction to direct the Agency to approve applicant's disability grant, and as to when that must be paid. That would amount to usurping the administrative functions of the Agency, which conduct is an offence to the doctrine of separation of powers. The Constitutional Court has preferred to refer to this as notion of respect. In **Bato Start Fishing (Pty) Ltd v Minister of Environmental Affairs 2004(4) SA 490(CC)** **Para 48** the Constitutional Court remarked as follows: *"court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power*

⁹ Section 6(2) (a) (1), Section 6(2)(b), Section 6(2)(e)(iv) and Section 6(2)(h) of PAJA.

will identify a goal to be achieved but not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision maker". Those are matters requiring discretion of the administrative functionary.

[19] I find that exceptional circumstances do exist to warrant exemption of the applicant from the obligation to exhaust internal remedies provided for in **Section 18 of the Social Assistance Act**, and I find that it is in the interest of justice to do so¹⁰. The applicant, not only that he is not sufficiently educated and poor, he was tremendously frustrated and inconvenienced by the Agency. The Agency dogmatically insisted that the applicant must apply for a new and or fresh grant instead of pursuing the internal remedies. That intransigent attitude of not wanting to assist a poverty stricken citizen of our country cannot be tolerated and promoted in our courts. This court is for both haves and have nots. It is a home for all. The plight our people are going through cannot be down played any longer. I also find that a proper case has been made out for condonation of late filing of this application. There was no opposition to the granting of the relief referred to herein this paragraph.

[20] Sequel to paragraph 21 above, I find that there is every reason to remit the matter as the proceedings before the Agency are not subject of this review application. I have been asked only to set aside the decision and not the proceedings. The practical effect of setting aside only the decision is that the

¹⁰ Section 7(2) (c) of PAJA.

proceedings are still extant.¹¹ The danger associated with failure to give directions lies with the possibility that the Agency, may take for ever to consider applicant's application. The Agency may stymie the finalisation of the application for grant, regard being had to the intransigent Stance taken so far. It is therefore compelling to remit the matter with directions in terms of **Section 8(1)(c)(i) of PAJA**.

[21] **In the result the following order shall issue:**

- (1) the first respondent's decision dated 24 June 2014, rejecting applicant's application for disability grant is hereby reviewed and set aside.**
- (2) applicant's application for disability grant dated 24 June 2014 is hereby remitted for re consideration by the first respondent.**
- (3) the first respondent is hereby directed to reconsider applicant's application for disability grant dated 24 June 2014 and take a decision within 60 days of this order.**
- (4) that the first respondent is ordered to pay costs of the application.**

A.S. ZONO

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

¹¹ *Matiwane v President of the Republic of South Africa and Others* 2019(3)ALL SA 209 Para 27

Counsel for the applicant : Adv. Matoti
Instructed by : SR MHLAWULI & ASSOCIATES
MTHATHA

Counsel for the 1st Respondent : Adv. P.H. Zilwa S.C.
Instructed by : THE STATE ATTORNEY
C/O POTELWA & COMPANY
MTHATHA