

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

**Case No: CA 74/16**

**REPORTABLE**

In the matter between:

**NOKHOLEKILE MWELASE**

Appellant

and

**THE MINISTER OF SOCIAL DEVELOPMENT**

First Respondent

**THE CHAIRPERSON OF THE INDEPENDENT  
TRIBUNAL FOR SOCIAL ASSISTANCE  
APPEALS**

Second Respondent

**SOUTH AFRICAN SOCIAL SECURITY  
AGENCY (SASSA)**

Third Respondent

---

**JUDGMENT**

---

**TOKOTA J:**

[1] Section 27 of the Constitution of the Republic of South Africa Act 1996 (the Constitution) provides that;

1.1 everyone has the right to have access to sufficient food and water (s.27 (1) (b));

1.2 everyone has the right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance (s.27 (1) (c));

1.3 the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights(s.27(2)).

[2] In order to fulfil its Constitutional obligation to assist in securing the well-being of the people of the Republic and to provide effective, transparent, accountable and coherent government in respect of social assistance for the Republic as a whole Parliament enacted the Social Assistance Act No.13 of 2004(the Act) which commenced on 1 April 2006.

[3] Prior to the commencement of the Act the appellant applied, and, was granted a social assistance grant for permanent disability in terms of the then Social Assistance Act No. 59 of 1992. She enjoyed the benefit of the grant until May 2012.

[4] In February 2012 appellant was invited via an undated letter to present herself for medical assessment at Libode clinic/hospital on 24 February 2012 and to complete medical review documents on or before the 29<sup>th</sup> of February 2012. She attended the assessment where she met a medical doctor. She alleges that the medical doctor did not examine her but simply looked at her and informed her that there was no reason for her to receive the grant as she 'looked healthy'. The doctor remarked that people who got grants in 2002 through a certain doctor Mafanya got it fraudulently.

[5] Subsequent to the review referred to above she was personally served with an undated letter notifying her that in view thereof that it has been found that she no longer qualified for the disability grant her social grant would be suspended within 90 days from the date of the letter. In this letter she was advised that she had a right to make representations in person, within 30 days from the date thereof, at her local SASSA

office giving reasons as to why the suspension should not be implemented. She was further advised that if she failed to make such representations within the stipulated time frame her social grant would be suspended on 17 April 2012.

[6] The appellant did not make representations as advised. The grant was then suspended. According to the assessment report of the second respondent, which is not challenged, the appellant received payment of the grant until May 2012 and the grant was cancelled in June 2012. When the grant was stopped the appellant approached the office of the third respondent to enquire as to what was happening. She was advised to re-apply for the restoration of the grant. Instead of re-applying she approached lawyers to attend to her complaint. Her lawyers made representations on her behalf seeking the reconsideration of the decision to terminate her grant.

[7] It is not clear from the papers as to when exactly all these events took place and the application for reconsideration has not been attached to the papers. After considering the representations the third respondent dismissed the application for reconsideration of its earlier decision to terminate the grant on 14 November 2012. The outcome is recorded in

the application form for reconsideration dated 14 November 2012. In this form the appellant was advised of her right to appeal to the first respondent within 90 days of receipt thereof.

[8] On 18 March 2013, outside the 90 day period, she lodged an appeal to the first respondent in terms of section 18(1A) of the Act against the refusal of the application for reconsideration. The first respondent appointed an Independent Appeal Tribunal, of which the second respondent was the chairperson, to hear the appeal in terms of section 18(2)(b) of the Act. Henceforth the second respondent will be referred to as the Tribunal.

[9] The Tribunal considered the appeal and decided to dismiss it on the grounds set out hereunder as contained in a letter dated 16 August 2013. These were the grounds.

*“1 The medical officer confirmed that you do have the following medical condition(s) Hypertension. Arthritis and Peptic Ulcer.*

*2 On the basis of medical records available it was found that you are able to enter the open labour market and to be gainfully employed*

3     *Procedure followed by SASSA during the review and suspension of your grant was found to be within the parameters of the Regulations.”*

The manner in which the appeal was considered and the documents which were before it are recorded in its Appeal Adjudication and Finding report. For the assessment of the medical condition of the appellant the Tribunal relied on the findings of the Tribunal Medical Practitioner (as per medical assessment report and supporting medical evidence and records).

[10] The appellant approached the court *a quo* seeking an order reviewing and setting aside the decision of the Tribunal in dismissing her appeal. The Court *a quo*, per Griffiths J, dismissed the application with costs. This appeal is with leave of the Supreme Court of Appeal.

[11] It was submitted at the hearing of this appeal by Mr Matoti, who appeared for the appellant, that the review was directed at the procedure followed by the third respondent. He submitted that the letter which invited the appellant to attend medical assessment on 24 February 2012, which was the same day that she received it, did not give her

enough opportunity to prepare for the review. The review in the Court *a quo* was pegged on this letter principally on two grounds. First, it was argued that the letter gave the appellant a short notice and for this reason the appellant was not afforded sufficient opportunity to prepare herself for the examination by the doctor. Second, the letter was written in English, a language which was not understood by the appellant.

[12] During the debate at the hearing of this appeal Mr Matoti had difficulty in explaining what preparations were needed for the person to present herself for medical examination. He contended that the appellant had to prepare medical documentation. The letter, which is the subject of complaint, was not attached to the founding affidavit. It was pointed out to him, however, that according to the assessment report of the Tribunal the letter recorded that the appellant had a week within which to prepare the documents in that she had to submit them on or before the 29<sup>th</sup> of February 2012. He correctly conceded that in the light thereof it cannot be said that she did not have sufficient opportunity to prepare the documentation, if she so wished. That then takes care of the insufficient time.

[13] Mr Matoti argued further that, as the letter explaining her right to make representations was written in English, the appellant could not understand the contents thereof. Accordingly, so the argument ran, the Tribunal ought to have found that the process was irregular. Again, during the debate, Mr Matoti was constrained to concede that there is no averment in the record that this was ever raised with the Tribunal or that the Tribunal was advised of the appellant's inability to understand English. The record did not contain the document which contained the grounds of appeal and for this reason he could not argue that the Tribunal had a duty to consider this complaint. He conceded that this point also fell into the cracks of the first point and therefore he could not persist with it.

[14] A further problem that the appellant had was that the process that was challenged was done by the third respondent. In the founding affidavit the appellant expressly disavowed any relief against the third respondent. For this reason the third respondent was not part of the proceedings as it elected, quite correctly, in the light of the stance of the appellant, to abide the decision of the Court.



[15] In the light of the above the appeal collapsed at the debate stage as no blame could be placed at the door of the Tribunal. In any event, as I see it, this letter, which was the subject of the complaint, was a preliminary step taken to review the grant in order to ascertain whether or not the continuation thereof was still warranted.<sup>1</sup> This invitation was made by the third respondent and not by the Tribunal. When the appellant was told by the doctor that she 'looked healthy' and therefore did not deserve the grant she ought to have been worried immediately. She did nothing about it. Thereafter, she received a letter informing her that her grant was likely to be suspended within 30 days unless she made representations within 30 days. A man whose rights are threatened should act swiftly to protect them and not wait for others to do so for himself/herself.<sup>2</sup>

[16] In the undated letter that was handed to her she was informed that her grant was going to be suspended on 17 April 2012 should she fail to make representations. The letter was given to her in person. She signed for it by affixing her thumb print. It is highly improbable that when she

---

2.Regulation 27 of the regulations published under the Act provides :

- “(1) The Agency must, within 90 days of the date on which a social grant will be reviewed, inform the beneficiary in writing of the date of such review.
- (2) The Agency must review the social grant-
  - (a) at any time where it has reason to believe that changes in the beneficiary's financial circumstances may have occurred;

<sup>2</sup>See Cape Town Municipality v Abdulla 1974 (4) SA 428 (C) at 438

was handed the same no explanation was made about it. However, her case is not concerned about this letter as highlighted above.

[17] If regard is had to the record, the Tribunal considered all the information that was placed before it including the medical report made by Dr Mzamane relating to the disability of the appellant. Procedurally and legally I find no fault on the part of the Tribunal.

[18] Although, in the light of the above concessions it is not necessary to deal with the complaint relating to the language of the letter I deem it expedient to express my view about it. I will also deal briefly with the procedure because it seems to me that there was confusion in the founding affidavit. The appellant made submissions that she was not given sufficient opportunity to make representations.

[19] As far as I am aware in terms of the Constitution it is the accused person in a criminal trial who has a right to be tried in a language that he/she understands or, if that is not practicable, to have the proceedings interpreted in that language. Without saying it should not be done, in my opinion it would be onerous to require the State whenever it writes

correspondence to members of the public to check which language the person understands. The appellant, according to her, is illiterate and cannot read any language. She would therefore require somebody in any event to read the letter for her.

[20] Furthermore in my view as far as the procedure relating to sufficient opportunity is concerned, a routine review of the grant is not necessarily a threat to the rights of the beneficiary of a grant as this is a normal review in terms of regulation 27 of the regulations published under the Act. It is the letter which was handed to her inviting her to make representations to show cause why the grant should not be suspended which was likely to affect her rights adversely. This letter informs her of the likelihood of a suspension and invites her to make representations as to why this should not be done. She is given thirty days to do so.

[21] Once it becomes apparent from the review assessment that the grant may be cancelled the person to be affected by that decision must be afforded a procedurally fair process. The procedure for suspension or cancellation is set out in regulation 29. The regulation is quoted hereunder in full because in my view this is where the process which

requires procedural fairness begins before a grant can be suspended or cancelled.

***“29. Procedure to be followed for suspension or cancellation of social assistance***

- (1) The Agency may suspend or cancel social assistance if the social assistance was-*
  - (a) obtained fraudulently or through misrepresentation by any person contemplated in section 21 of the Act; or*
  - (b) approved and granted in error.*
- (2) Except for the circumstances contemplated in subregulation 1(a) the Agency must before suspending or cancelling social assistance give a beneficiary 90 days written notice of its intention to suspend or cancel the social assistance, and provide the beneficiary with the following information-*
  - (a) the effective date of the intended suspension or cancellation;*
  - (b) the reasons for the intended suspension or cancellation;*
  - (c) the right to make a representation contemplated in sub regulation (5); and*

- (d) *the right and procedure for appealing against the decision of the Agency.*
- (3) *The notice of suspension or cancellation of social assistance contemplated in sub regulation (2) must be delivered to the beneficiary or the procurator by hand or sent by registered post to the last known address of the beneficiary or procurator.*
- (4) *The Agency must, prior to suspending or cancelling any social assistance, investigate, obtain and verify all the facts and circumstances surrounding the social assistance.*
- (5) *The Agency must afford a beneficiary an opportunity to show cause why the social assistance should not be suspended or cancelled by-*

  - (a) *requiring the beneficiary to appear in person before the Agency or a person designated by the Agency;*
  - (b) *requiring the beneficiary to submit any reports or certificates as the Agency may direct; and*
  - (c) *ensuring that the beneficiary obtains the necessary assistance to make representations to the Agency including, but not limited to, referring the beneficiary to any*

*organisation or institution that may assist the beneficiary to make representations.”*

[22] It is clear from the above that the process of suspension or cancellation commences at the time when the beneficiary is called upon to make representations as to why the grant should not be suspended or cancelled. The question that arises now is whether or not the third respondent complied with regulation 29 before the grant was cancelled. If it did not comply, it failed to comply with a mandatory legislation. On the other hand if it complied with the procedure set out in the regulation, then the process was lawful *cadit quaestio*. However the grounds of review were not based on failure to comply with these regulations.

[23] It has been held that not every step in the decision making process need be communicated to the person to be affected by the final decision.<sup>3</sup>The administration cannot be expected to share with the individual every phase of its final decision-making process.<sup>4</sup>In any event in this case I find that the intention to suspend only came to light when the third respondent became aware that the appellant no longer qualified

---

<sup>3</sup>See *Minister of Environmental Affairs & Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) para.18

<sup>4</sup> *Baxter Administrative Law* p.548

for the grant. Before that, suspension or cancellation could not have been contemplated.

[24] Accordingly, it seems to me that even if the review was directed at the decision of the third respondent, without reference to the Tribunal, the likelihood is that it would have failed. Judicial review is concerned with determining whether the impugned acts were made within the ambit of the empowering legislation, and in accordance with the precepts of such law, in particular, and the Constitution, in general. The merits are only relevant to the extent that they establish procedural failure. It is immaterial whether or not the decision was wrong.<sup>5</sup>In my view the third respondent complied with the regulation.

[25] The primary function of the Courts is to ensure that those who are charged with the duty to perform public functions in terms of legislation act within the parameters of the law. **Baxter Administrative law** p. 305 puts it thus: *“Without statutory authority, the court may not venture to question the merits or wisdom of any administrative decision that may be in dispute. If the court were to do this, it would be usurping the authority*

---

<sup>5</sup>See MEC for Environmental Affairs & Dev Planning v Clairison's CC 2013 (6) SA 235 (SCA) para.18; JH v Health Professions Council of SA 2016 (2) SA 93 (WCC) para.23

*that has been entrusted to the administrative body by the empowering legislation.”<sup>6</sup>*

Mr Matoti did not contend that the Tribunal acted outside the law or that its decision was procedurally unfair. It was only the actions of the third respondent that were impugned.

[26] The Tribunal dismissed the appeal on the basis that the procedure followed by the third respondent was lawful and that on the records available it was found that the appellant was able to enter the open labour market and to be gainfully employed. I am unable to find fault in the Tribunal’s decision. I also agree with the Learned Judge in the Court *a quo* that the procedure which was followed by the third respondent was fair.

[27] In conclusion there is one aspect which calls for comment. This relates to the manner in which the papers were drawn by both parties. There was a tendency to leap-frog the facts. What was predominant was the presentation of argument in the founding and the answering affidavits as well as a farrago of unnecessary annexures. In the founding

---

<sup>6</sup>National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) para.44; EFF v Speaker, NA 2016 (3) SA 580 (CC) para.92



affidavit six pages were dedicated to legal submissions. In the answering affidavit no less than six pages are dedicated in setting out the legal framework of the Act and the PAJA quoting in full certain sections and regulations. This approach in drafting papers tends to obfuscate the real issues rather than to put a true picture of the events.

[28] Drafting papers is a matter of style. However, each party is expected to draw papers in such a manner that they afford easy reading and understanding of its case and/or defence. Authorities in support of a party's case are usually reserved for inclusion in the heads of argument.

The legal conclusions, set out in the founding affidavit, were in the nature of arguments which may be addressed in the heads of argument. They do not set out clearly and concisely the elements of her cause of action. Nor do they adequately draw conclusions of law from the facts.

[29] In motion proceedings affidavits constitute evidence in support of the relief sought and/or the defence raised. They form the foundation upon which each cause of action or defence is anchored. The affidavits must therefore include;

- (a) full description and the identity of the applicant clearly establishing his/her *locus standi* to bring the application;
- (b) facts from which a cause of action can be gleaned in a clear, concise and chronological manner;
- (c) the basis upon which it is claimed that the Court has jurisdiction to entertain the matter; and,
- (d) if the cause of action is based purely on statutory provisions, a reference to such specific statutory provision, without presenting argument. This is necessary in order to enable the other party and the Court to know precisely what case is the respondent expected to answer;
- (e) Before the respondent can respond to the allegations in the founding affidavit paragraph by paragraph it must, *mutatis mutandis*, follow the above chronology and set out clearly the basis of defence. If the background facts have not been accurately stated by the applicant it must set out those facts.

[30] The above scenario is not intended to say that argument may not be advanced in the affidavit but this must be kept to the minimum and be

preserved for inclusion in the heads of argument. Both the founding affidavit and the answering affidavits in this case were replete with legal argument. Affidavits should not be unnecessarily burdened by legal argument.<sup>7</sup> The deponent is merely a witness. Witnesses are not required to argue the case but simply to adduce evidence in support of a party's case.

[31] While it is sometimes necessary to refer to the legal position and/or statutory provision in order to make a particular point or factual assertion, an affidavit should not be used to advance argument which rightfully belongs to heads of argument. Speaking for myself I think it is not unfair to say Judges have easy access to the South African law reports and legislation.

[32] In this case there were gaps in the affidavits which left more questions than answers. The review was brought under Rule 53 and the Tribunal duly delivered the record of their proceedings to the Registrar. The appellant elected not to include this record in her papers thus giving rise to the gaps. The grounds of appeal to the Tribunal were not stated in the founding affidavit. There was no document reflecting them

---

<sup>7</sup>Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at78I;

attached to the papers. The dates on which events leading to the appeal took place were not clearly stated. The list is not exhaustive.

[33] The purpose of Rule 53 is to facilitate access to records of the proceedings of the impugned decision. A litigant who chooses to bring a review under Rule 6 loses this opportunity. **In Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others**<sup>8</sup> it was stated:

*'Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.'*

[34] Furthermore, the replying affidavit dealt with virtually all the paragraphs of the answering affidavit in some cases by simply admitting or denying the allegations. The purpose of the replying affidavit is primarily to deal with new matters that have arisen in the answering affidavit or to clarify those assertions in the founding affidavit which might have been misunderstood by the respondent. Where the respondent simply denies the allegation it is not necessary to respond

---

<sup>8</sup>2012 (3) SA 486 (SCA) ([2012] 2 All SA 345; 2012 (6) BCLR 613; [2012] ZASCA 15) para 37

thereto by another denial or repetition of what was said in the founding affidavit.

**In Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) ([2003] 2 All SA 616) at 439G - H Schutz JA remarked:**

*'There is one other matter that I am compelled to mention -replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest - and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.'*<sup>9</sup>

[35] The papers were also unnecessarily prolix as a result of annexures attached to the affidavits. There is a plethora of authorities to the effect that parties should make specific references to the portions of annexures

---

<sup>9</sup>See also *Van Zyl v Govt of the RSA* 2008 (3) SA 294 (SCA) para.46.; *Wingaardt v Grobler* 2010 (6) SA 148 (ECG) para.19

attached on which reliance is placed for their respective cases.<sup>10</sup>The respondent raised a point *in limine* and attached the notice of motion and founding affidavit of a different case without reference to any portion thereof as supporting its defence. There was in my view no need to attach this application. A reference to a case number would have served the purpose. That application concerned a *mandamus* compelling the Tribunal to attend to the appeal. It was contended that the review application was premature in that the earlier application had not been disposed of. The *mandamus* application was unrelated to the review application and therefore attaching such application in these proceedings was unnecessary. Although the appeal has to fail the respondent must therefore be deprived of the cost of perusing such application.

[36] In all the circumstances, I conclude therefore that there is no merit in the appeal.

In the result I would make the following order.

1. The appeal is dismissed with costs excluding the costs of annexure **DL1** of the answering affidavit.

---

<sup>10</sup> These include *Swissborough Diamond Mines (Pty) Ltd v Govt of the RSA* 1999 (2) SA 279 (T) p.324G-I; *Derby-Lewis v Chairman, Amnesty Committee of the TRC* 2001 (3) SA 1033 (C); *NDPP v Zuma* 2009 (2) SA 277 (SCA) (2009 (1) SACR 361; 2009 (4) BCLR 393; [2008] 1 All SA 197; [2009] ZASCA 1); *Helen Suzman Foundation v President of the RSA* 2015 (2) SA 1 (CC) (2015 (1) BCLR 1; [2014] ZACC 32)

---

**B R TOKOTA**

**JUDGE OF THE HIGH COURT**

I agree

---

**N MSIZI**

**ACTING JUDGE OF THE HIGH COURT**

**EKSTEEN J:**

[37] I have had the benefit of reading the judgment of my brother Tokota herein and I agree entirely with the conclusion to which he has come, however, the judgment does not fully reflect my reasoning in arriving at the conclusion set out therein. For the sake of clarity I set out herein my approach to the matter.

[38] The history of the matter and the material facts leading to the application for review are set out in paragraph 1-9 of the judgment of my brother Tokota and no purpose will be served in repeating the same herein.

[39] Before I turn to consider the merits of the appeal a few preliminary observations which I consider to be of particular significance in the present matter are necessary. Firstly, the review which forms the subject of the present appeal is directed solely at setting aside the “administrative action of refusing (appellant’s) appeal against the reconsidered decision of the third respondent confirming the termination of the applicant’s disability grant”. No relief is sought against the third respondent. In these circumstances the conduct of the third respondent in arriving at its original decision and its reconsidered decision are, in my view, irrelevant, save to the extent that such conduct formed part of the appeal which served before the Tribunal. The decision of the Tribunal could hardly be assailed on grounds of information which was not placed before them and of which they had no knowledge.

[40] Secondly, the review application was brought in terms of the provisions of rule 53 of the Uniform Rules of Court. On 13 September 2013, within the period stipulated in the notice of motion, the second respondent duly lodged with the registrar the record of the appeal which served before it. The appellant, however, did not avail herself of the opportunity to vary the terms of her notice of motion or to supplement her founding affidavit as provided for in rule 53(4) of the Uniform Rules of Court. The appellant has accordingly not incorporated the record filed into her case and, although the notice of filing of the record is included in the papers in the review application the record itself was not placed before the court *a quo* neither does it form part of the record in the appeal currently under consideration. The Tribunal has annexed portions of the record to its answering papers, however, as will appear later herein there are significant documents which have not been placed before the court and which, in my view, present material difficulty for the appellant.



[41] The application for review proceeds in terms of section 6 of PAJA, the appellant contending that:

- (i) the conduct of the Tribunal was procedurally unfair in view of the lack of adequate notice and an opportunity to make representations;
- (ii) the second respondent took into account irrelevant considerations in arriving at his decision and omitted relevant ones;
- (iii) the second respondent failed to apply his mind to the matter;
- (iv) second respondent misconstrued the facts and the law; and
- (v) there is no rational connection between the information before the second respondent and the decision he reached.

[42] The argument in the current appeal proceeds on three legs. Firstly, it is contended that the notice to attend a medical review examination was received on the same date as the examination was conducted and in consequence thereof the appellant had insufficient notification in order reasonably to prepare for the medical review. Secondly, it is contended that the court *a quo* erred in finding that the appellant was given a proper notice to suspend a social grant informing the appellant of her rights to make representations in a language which she understood. Thirdly, that the court erred in finding that the appellant was medically examined during the medical review. I shall deal with these grounds of appeal and the argument advanced in respect thereof consecutively below.

[43] In respect of the first ground the appellant alleged that she received a notification on 24 February 2012 which called upon her to attend a medical review which would be held on the very same day. She accordingly attended the medical review, albeit unprepared. In respect of her lack of preparation she states that she was never given a sufficient opportunity to prepare herself for the review as her disability can only be proved through adequate medical documentation. She was prejudiced by the conduct of the third respondent, so she says, by its failure to allow her sufficient time to prepare and collate all her documents for the review and to effect a diligent search for all her medical documents. Accordingly she did not have her entire medical file when attending the review.

[44] Mr **Matoti**, who appeared on behalf of the appellant, argued that the court *a quo* clearly accepted that there had been insufficient notice for the appellant to attend the medical review and submitted that once the court finds that the appellant was given insufficient notification to attend the review it follows that the procedure employed to cancel the grant was improper and that she was not given an opportunity to make representations.

[45] It is necessary to place these assertions in context. The letter calling upon the appellant to attend to the medical review was not annexed to the appellant's papers, however, it is annexed to the second respondent's papers. The material portion thereof reads:

“The Agency is obliged in terms of Regulation 27(1) to review the social grants periodically.

Subsequently, the Agency wishes to notify you that your social grant is due for a medical on 24/02/12 (date). You are requested to present yourself at Libode, (Clinic/Hospital) for a medical assessment and completion of the medical review documents before **29 February 2012**.

Kindly ensure that you bring the following documentation with you to complete the medical review process:

- Barcoded identity document for yourself and your spouse
- Copies of your recent medical records
- Proof of Marital status (e.g. marriage certificate/divorce **certificate/divorce** certificate) if there has been a change since your last application or review;
- Last three months bank statements of all bank accounts held, including fixed deposits;
- Proof of employment, earnings and date of commencement or discharge of employment;
- Proof of your residential and postal address (electricity or telephone account, letter from landlord, chief or councillor);
- Rates certificate of property owned by not occupied by yourself; and
- Proof of any other income. ...”

[46] The reference to regulation 27 is to the regulations published in GNR898 on 22 August 2008 relating to the application for and payment of social assistance and the requirements and conditions in respect of the eligibility for social assistance. Regulation 27(1) requires of the third respondent to give notice to the beneficiary of a social grant “within 90 days” of the date on which the social grant will be reviewed informing the beneficiary in writing of the date of such review. The notice is required to be less than ninety days by virtue of the provisions of regulation 3 which requires a medical assessment to be not older than 3 months at the time when a decision is

taken. An “assessment” is defined in regulation 1. The material portion of the definition stipulates:

“assessment” means-

- (a) the medical examination by a medical officer of a person ... to determine disability ... for the purposes of recommending a finding for the awarding of a social grant, and “**assess**” has a corresponding meaning; or
- (b) the evaluation of information set out in a medical assessment form or medical report by a medical officer in the absence of the patient.”

[47] The letter of notification draws an unequivocal distinction between the “medical assessment” on the one hand, which was to be carried out on 24 February 2012, and the “completion of the medical review documents” which was to occur before 29 February 2012. The medical assessment, in the context of the letter, having regard to the ordinary grammatical and linguistic construction thereof, as read together with the regulations, was clearly intended to refer to a medical “assessment” as set out in Part (a) of the definition. It entails no more than a medical examination. It is difficult to envisage what possible preparation could be required for a medical examination to be carried out. The appellant’s complaint, which is set out earlier, relates not to the examination but to the collection, preparation and collation of her documents. What is abundantly clear from the letter is that the review documentation had to be completed by 29 February 2012 thus affording the appellant five days more to obtain the documentation required. It is apparent from the letter itself that the medical assessment does not constitute the review, but that the review is a process. This, it seems to me, directly contradicts the assertions of

the appellant that she was required to attend to a “medical review” on the same day as the delivery of the notice.

[48] The court *a quo* accepted, for purposes of the judgment, that the appellant received the notification on the same day that the medical assessment occurred. The judge *a quo* proceeded to state:

“As I have been at pains to indicate, this was only the first step in the procedure towards the review of the award. By way of two subsequent notices the applicant was given at least 90 days within which to deal further with the pending review or, at the very least, 30 days to make a proper and formal approach to a local office of the third respondent. This she did not do.”

[49] These notices referred to by the judge *a quo* are contained in two subsequent undated letters delivered personally to the appellant and which bear her thumbprint as verification of her receipt thereof. The first is headed “REVIEW OUTCOME: SUSPENSION OF YOUR SOCIAL GRANT”. This letter informed the appellant, in Xhosa, that she was no longer eligible for a social grant as a doctor had concluded after a medical examination that she no longer qualified for a disability grant. It proceeded to inform the appellant in English that her grant will be suspended within ninety days from the date of the letter. The letter further informed the appellant that she has the right to make representations within thirty days of the date of the delivery of the letter, in person, at her local SASSA office as to why the suspension of the grant should not be implemented. It further advised her that in the event that she should fail to do so the grant will be suspended on 17 April 2012 and that she may

then apply at the local SASSA office for the restoration of the social grant within ninety days of the suspension of the grant giving reasons for the restoration.

[50] The second notification referred to is headed “NOTIFICATION TO SUSPEND SOCIAL GRANT: INELIGIBLE FOR A DISABILITY GRANT”. This letter too is undated and it too was personally delivered to the appellant bearing her thumbprint as verification of receipt thereof. This letter informed the appellant that her social grant would be suspended within thirty days from the date of the delivery of the letter by virtue thereof that the medical assessment had revealed that she was no longer disabled.

[51] Again the letter provided her an opportunity to make representations within thirty days of the date of receipt of the letter, in person, at her local SASSA office, as to why the suspension of her social grant should not be implemented.

[52] All these letters served before the Tribunal on the consideration of the appeal before it. All three letters were integral to the reasoning of the Tribunal in dismissing the appeal before them.

[53] In **Matiwane v President of the Republic of South Africa and Others** [2014] 2 All SA 419 (ECM) Griffiths J (who is also the judge *a quo*) stated at 428 para [33]:

“Section 3(2)(a)(ii) of the Promotion of Administrative Justice Act requires an administrator to ensure that a reasonable opportunity is given to make representations, within the greater imperative to ensure procedural fairness. The extent of this requirement has been the subject of much judicial debate but it seems to be clear that whether or not this requirement has been complied with will depend largely on the nature of the proceedings. It is also clear that the administrator concerned is enjoined to ensure that, in any given context, such opportunity must be a meaningful one and that paying mere lip service to this requirement will not suffice.”

[54] I agree with these sentiments which are also contained in the judgment of the court *a quo*. It seems to me that these sentiments accord with the authorities (see **Sokhelaand Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal)** 2010 (5) SA 574 (KZP) at para [55]; Hoexter “*Administrative Law in South Africa*” (2<sup>nd</sup>ed) at pages 371-372; and **Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works and Others** 2008 (1) SA 438 (SCA) at para [15].)

[55] In these circumstances neither the argument that the appellant was afforded inadequate notice to attend the medical examination nor the argument that she was afforded inadequate opportunity to make representations and to collate documentation can be upheld. Indeed Mr **Matoti** was constrained to concede that he could not persist in this leg of the argument.

[56] I turn to the second leg of the argument that the appellant was not given proper notice to suspend the social grant informing her of her rights to make representations in a language which is understood. I have set out earlier herein the extended opportunity which was afforded her to make representations. The thrust of the second argument is that all the notices given to her were in English, a language

which she did not understand. The appellant contended further that the officials of the local office of the third respondent “did not precisely inform (her) of what she could do” and they did not tell her that she had a right to make representations.

[57] I have been at pains to emphasise that the conduct of the Tribunal cannot be assailed on grounds of information which was not raised in the appeal nor placed before it. Neither the application for reconsideration nor the grounds raised in the appeal are included in the record before us. The appellant has been suspiciously coy of the grounds raised in her application for reconsideration. In the review proceedings she states only that an application for reconsideration “with sufficient grounds” was lodged. She does not annex the application nor does she disclose the grounds relied upon in the application for reconsideration. Her notice of appeal to the Tribunal was initially contained in a letter from her attorneys dated 18 March 2013. The grounds of appeal are referred to therein as follows:

“The procedure employed to have her grant cancelled was improper as set out in the reconsideration notice sent to the office of SASSA, East London. The said letter is attached herewith for easy reference”.

There is, however, no attachment to the letter contained in the record.

[58] The regulations published under the Act require the application for appeal to be submitted in a prescribed form and appellant’s attorneys were requested to resubmit their appeal in the prescribed form. The prescribed form provides specifically for the reasons for the disagreement with the decision of third respondent



to be set out therein. While it is known that the appeal was resubmitted this document too is not included in the review application. The appellant does not aver in her affidavit that she had contended either in the application for reconsideration or in the appeal to the Tribunal that she did not understand the notices given in English nor that the staff of third respondent did not assist in explaining the nature and content of the notices. There is no indication in the papers that the issue was ever raised either in the application for reconsideration or in the appeal.

[59] The court *a quo* reasoned that the notification to attend the medical assessment, written in English, was handed to the appellant and she responded appropriately thereto. It concluded, accordingly, that she understood such notice albeit that it was recorded in English. Whilst I accept that this cannot be proof of her ability to comprehend the content of the various letters written in English and that her averment on oath must prevail, I do consider that in the absence of any averment in her affidavit to the effect that the Tribunal was alerted to this complaint the *prima facie* impression which the Tribunal would have been left with is that adequate and effective notice was given and that she did understand it. For these reasons I do not consider that the argument in respect of this leg of the case can be sustained. In the circumstances Mr **Matoti** conceded, correctly in my view, that he could not argue that the Tribunal's decision could be impugned in any manner on this ground.

[60] I turn to consider the third leg advanced. The appellant contends that when she attended the medical assessment on 24 February 2012 she was received in a room together with a number of other people where the medical doctor was present. There the doctor asked her why she was receiving a grant to which she replied that it

was in sequel to her disabilities. Upon this response the doctor stated that there was no reason for her to receive a grant and that she looks healthy. The third leg of the argument therefore contends that the doctor who was charged with the obligation to carry out the medical assessment on 24 February 2012 had failed to examine her at all.

[61] The difficulties which face the appellant in respect of this argument are similar to those which arose in respect of the second leg of the argument. Again there is no averment in the papers that she had relied upon this allegation either in the application for reconsideration or in the appeal to the Tribunal. There is no indication in the reasons which the Tribunal have provided for their decision that this complaint was ever raised with them. For these reasons Mr **Matoti**, again correctly in my view, was constrained to concede that the argument was not open to the appellant.

[62] From the perspective of the Tribunal it is common cause that they had before them a medical report by a doctor who purported to have examined the appellant on 24 February 2012. The medical report sets out certain personal particulars relating to the appellant which, *prima facie*, could only have been obtained from the appellant. The form proceeds to record certain clinical findings made by the said doctor on examination of the appellant and it proceeds to record his diagnosis. At the conclusion of the report the following is recorded under the signature of the doctor:

“I hereby acknowledge that I have examined the above client.”

[63] When the appeal came before the Tribunal they referred the assessment by the original doctor to a separate doctor of their own who assessed the findings of the original doctor and concurred with the correctness of his conclusions. This accords with Part (b) of the definition of “assessment” in regulation 1 which is set out earlier. In the absence of an allegation that the grounds of appeal submitted to the Tribunal complained of an inadequate examination by the reviewing doctor I do not think that the conduct of the Tribunal can be faulted.

[64] In all the circumstances I consider that the court *a quo* correctly concluded that the second respondent’s decision to dismiss the appeal cannot in all the circumstances be found to be wanting.

[65] In the result, I agree that the appeal is to be dismissed. I agree too with the costs order proposed by Tokota J. An order is accordingly made in the terms proposed by Tokota J.

**J W EKSTEEN**

**JUDGE OF THE HIGH COURT**

Counsel for the Appellant : Adv Matoti

Instructed by : **SR MHLAWULI & ASSOCIATES**

Suites 318 & 325

ECDC House

York Road

**MTHATHA**

Counsel for the Respondent's: Adv Notshe SC & Adv Mathaphuna

Instructed by **STATE ATTONERY**

No. 94 Sisson Street

Broadcast House

Fort Gale

**MTHATHA**

Date heard : 09 March 2018

Judgment Delivered : 22 March 2018