

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

Case No: CA 135/16

NOT REPORTABLE

In the matter between:

THE MINISTER OF SOCIAL DEVELOPMENT

First Appellant

**THE INDEPENDENT
TRIBUNAL FOR SOCIAL ASSISTANCE
APPEALS**

Second Appellant

and

MAKEHLE MPAYIPHELI

Respondent

JUDGMENT

TOKOTA J:

Introduction

[1] On 28 August 2014 the respondent submitted an application to the South African Social Security Agency (SASSA), Libode, for disability grant in terms the Social Security Act No. 13 of 2004(the Act). The application was refused. He applied for reconsideration of that decision in terms of s.18 (1) of the Act. This was also dismissed. The respondent subsequently lodged an appeal to the Minister of Social Development (the Minister) in terms of s. 18(1A) of the Act. The respondent was of the view that the Minister had delayed the outcome of the appeal and launched proceedings in the Court *a quo* seeking an order, *inter alia*, directing the Minister to take the decision. The issue in this appeal is whether or not the Minister did in fact take a decision relating to that appeal. The Court *a quo*, per Mbenenge ADJP, as he then was, (now the Judge President) held that she did not, and granted judgment in favour of the respondent with costs. It ordered the Minister to consider and decide on the appeal within 30 days of the order and inform the respondent of her decision within seven days thereafter. With leave of that Court the Minister has now appealed against the whole of the judgment and order.

Factual Matrix

[2] The genesis of the application launched in the Court *a quo* emanated from a refusal by SASSA of an application for disability grant by the respondent. The application was made at SASSA local offices, Ngqeleni, on 28 August 2014. In a letter dated 15 October 2014 SASSA rejected respondent's application on the grounds thereof that he did not qualify as his loss of one eye did not significantly impair his ability to obtain work. He was, at the same time, advised that should he be dissatisfied with the decision he was at liberty to lodge, within 90 days of receipt of the letter of rejection, a written application with SASSA requesting SASSA to reconsider its decision in terms of s. 18(1) of the Act.

[3] On 15 October 2014 the respondent submitted his application for reconsideration. This application was dismissed on the grounds thereof that it was lodged outside the prescribed period of 90 days and legislation did not permit condonation of the late submission thereof. He was thereanent advised to re-apply for any form of social assistance in his local SASSA offices should he so desire.

[4] After the dismissal of the application for reconsideration by SASSA, the respondent appealed the decision to the Minister in terms of s. 18(1A) of the Act. The appeal was delivered on 1 June 2015.

[5] On 29 June 2015 the Acting Chief Director: Legal Services in the department of Social Development (the department) addressed a letter to respondent's attorneys seeking compliance with regulation 14(2) and in particular requesting them to furnish:

- (a) Rejection letter from SASSA;
- (b) Identity document of the respondent and;
- (c) Reconsideration outcome from SASSA. The respondent was further advised that in the event of his appeal being lodged outside the 90 day period he was free to apply for condonation. The application forms in this regard were attached to the letter for his convenience. On 15 July 2015 the requested documents were duly submitted to the department.

[6] On 8 October 2015 respondent's attorneys addressed a letter to the department complaining that up to that stage they had not received

the outcome of the appeal and enquired as to whether circumstances permitted of a response. On 13 October 2015 an email from one Khomotso Tefu, an employee of the department, was addressed to respondent's attorneys in response thereto. The email reads:

"Dear Mr Zono,

Kindly be advised your clients' reconsiderations outcomes have been lodged with SASSA outside the 90 day period. Your clients are therefore advised to reapply for the grant in that SASSA's legislation does not condone late reconsideration applications.

Hope the above is in order.

Tefu Khomotso

Legal Admin Officer

012 342 7106

KhomotsoT@dsd.gov.za"

The effect of this email was that the appeal was dismissed on the basis that SASSA was correct in rejecting his application for reconsideration because it had no power to condone the late submission thereof.

[7] The issues in the Court *a quo* were narrowed down to the question of whether or not the Minister took a decision on appeal. Notwithstanding the grounds of appeal, the appellants' Counsel in this Court correctly confined his argument on this point only. The nub of his argument was that the letter which was written by Tefu dated 13 October 2015 constituted a decision on the part of the Minister. He therefore

contended that the Court *a quo* erred in concluding that the Minister did not take a decision. Accordingly, so the argument went, the appeal should succeed.

[7] Section 18(1A) of the Act provides:

(1A) If an applicant or a beneficiary disagrees with a reconsidered decision made by the Agency in respect of a matter contemplated in subsection (1), that person or a person acting on his or her behalf may, within 90 days of his or her gaining knowledge of that decision, lodge a written appeal with the Minister against that decision, setting out the reasons why the Minister should vary or set aside that decision.

(2) The Minister may-

(a) upon receipt of the applicant's or beneficiary's written appeal and the Agency's reasons for the decision confirm, vary or set aside that decision; or

(b) appoint an independent tribunal to consider an appeal contemplated in subsection (1A) in the prescribed manner and that tribunal may, after consideration of the matter, confirm, vary or set aside that decision."

The Minister is defined in s.1 of the Act as “*Minister' means the Minister of Social Development;*”

[8] The above quoted section confers the power to consider appeals from SASSA on the Minister. In terms of the section, after considering the appeal, the Minister may vary or set aside the decision of SASSA. Furthermore the Minister may, instead of entertaining the appeal himself/herself, at his/her discretion, appoint the Tribunal to perform that function.

[9] One Mr Nkosinathi Dladla of the department has deposed to the appellants' answering affidavit. In the affidavit he states that he has been duly authorised to depose to the affidavit and oppose the application. In paragraph 7.2 of the founding affidavit the respondent states, inter alia, “*As early as on 15th July 2015 I delivered the requested and remaining documents. Seeing that there was no response to my appeal, I caused a letter dated 08th October 2015 requesting an outcome of the appeal. No such outcome had been forthcoming.*”

In response to this paragraph Mr Dladla says:

“*AD PARAGRAPH 7 THEREOF.*”

The Respondent denies receiving the letter dated 08 October 2015, the remaining allegations contained in this paragraph are noted.”

As can be gleaned from above quoted response by Mr Dladla to the founding affidavit, the contents of paragraph 7.2 referred to above, to the extent of this failure to respond thereto by the Minister, have been noted.

[10] The answering affidavit on behalf of the Minister does not even indicate whether at some stage or another, the Minister took a decision. Mr Mathaphuna, who appeared for the appellants, submitted that the letter of 13 October 2015 written by Tefu was a decision as contemplated in section 18(1A). During the debate in Court it was pointed out to him that there was no indication in the letter that it was written on the instruction of the Minister or can it be gleaned therefrom that the decision was that of the Minister. His response was that to require the Minister to write the letter herself was putting form over substance. In this regard he misconceived the debate. It is not necessary that the Minister should write the letter of the outcome of the appeal. What is required is that she must take the decision relating to the appeal.¹

¹ See *Jeewa v Dönges NO and Others* G 1950 (3) SA 414 (A) at 4211.

[11] Mr Mathaphuna, if I understood his argument correctly, further argued that there was no appeal in terms of s.18 (1A) in that no decision was taken by SASSA. He contended that because the application for reconsideration was lodged outside the 90 day period the application was never considered. Therefore, so he argued, there was no decision by SASSA against which an appeal could be lodged. This argument cannot fly. It is recorded in the outcome for reconsideration that the application is dismissed and *“we do not award you the grant. Your application for reconsideration was lodged outside the prescribed 90 day period and since the legislation does not allow SASSA to condone late applications your late is (sic) application is deemed invalid and will not be considered. Kindly contact your local SASSA office should you wish to re-apply for any form of social assistance. If you wish to appeal against the above decision, you may appeal to the National Minister of Social Development in writing against such decision within ninety (90) days after the date on which you were notified of the decision”* The address to which the appeal may be directed is then given. Consequently the argument is not based on facts and must be rejected.

(The underlining is mine.)

[12] Mr Mathaphuna further argued that in terms of the Promotion for Administrative Justice Act No. 3 of 2000 a failure to take a decision is reviewable under s. 6 thereof. I must assume that this is an alternative argument because he maintained throughout that a decision had been taken by the Minister. He contended therefore that the respondent should have followed the route of review. This argument is still-born and has no merit. A party, who has alternative remedies, is, in the absence of an obligation to exhaust such other remedies, entitled to choose which cause of action he wishes to follow.² It is incumbent on the litigant to define the issues he wishes to be determined by Court. The Court must then determine the dispute in accordance with the pleaded facts.³

[13] It is clear from the papers (or at least there is no indication whatsoever to the contrary) that the Minister has never taken any decision in the appeal lodged by the respondent. The letter of 13 October 2015 on which reliance was placed speaks for itself. It does not even purport to have been written on the instructions of the Minister. A functionary, in whose power the legislation has conferred, must himself/herself exercise the power unless such power has been delegated to someone else. She may not abdicate this power to any

² See *Arun Property Dev (Pty) Ltd v City, Cape Town* 2015 (2) SA 584 (CC) ([2014] ZACC 37) para.69

³ See *MEC for Education, GP v Governing Body, Rivonia Primary School* 2013 (6) SA 582 (CC) (2013 (12) BCLR 1365; [2013] ZACC 34) para.100;

other functionary.⁴ The letter from Tefu does not even purport to be the Tribunal's decision. Mr Mathaphuna tried to argue that the Minister works on the advice of the legal advisers. That is all very well. But she has to take a final decision and any letter written by an employee, including the legal adviser, must convey the decision of the Minister.

[14] The nub of the letter relied on is the dismissal of the appeal and advises the respondent to go back to SASSA and re-apply for the grant. I therefore conclude that the decision by Tefu did not constitute a decision as contemplated in section 18(1A) of the Act. As indicated above if the Minister had taken the decision it was not necessary that she should write a letter herself.

[15] The respondent persisted that he did not receive any response from the Minister. Mr Dladla was not only in a position to deny this allegation he had a duty to do so if the decision had been taken. He decided not to do so but merely noted the allegations. If the appellants' affidavit failed to admit, deny or confess and avoid allegations contained

⁴ See *Baxter Administrative Law* (Juta, 1984) at 434 - 44. See also *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C) at 117F - G.; *Minister of Environmental Affairs & Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) ([2005] 2 All SA 239) para.20

in the respondent's founding affidavit the Court was entitled to accept that such allegations were not in dispute and were therefore correct.

[16] In **Makhuva and Others v Lukoto Bus Service (Pty) Ltd and Others 1987 (3) SA 376 (V)** at 386E – F the Learned Judge dealt with this type answer as follows:

“In the course of argument I put it to counsel for applicants that, where a deponent is under a duty to admit or deny or to confess and avoid a direct allegation, a reply that the allegations are 'taken note of' would, in the circumstances, amount to an admission. See in this respect the case of McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (A) at 10E - D 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 to 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 affidavits.” 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.

[17] It is now well established as elementary that the exercise of public power is subject to constitutional control and is clearly constrained by the principle of legality. A repository of power may not exercise any power or perform any function beyond that conferred upon it by law and must not misconstrue the nature and ambit of the power.⁵The Act does not confer any power on a legal Admin Officer to decide appeals of this nature. Tefu’s decision is therefore tainted with illegality.

[18] Courts have a duty to ensure that the limits to the exercise of public power are not transgressed. An official of a department is not entitled to arrogate to himself powers which have not been conferred on him by law. If the Minister had taken a decision herself this would have been transparent in the letter of 13 October 2015 advising the respondent’s attorney of the outcome of the appeal. Section 195 of the Constitution of the Republic of South Africa Act, 1996 (the Constitution) provides:

⁵ See eg *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458; [1998] ZACC 17) paras 56 – 58;

“195 Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) ...*
- (b) ...*
- (c) ...*
- (d) ...*
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
- (f) Public administration must be accountable.*
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.”*

[19] In terms of the Act and the Constitution the Minister is accountable to the public. She is expected to respond to peoples' needs timeously. I emphasise that the Minister need not write the letter of the outcome of appeal herself. It is sufficient if she herself takes the decision. A letter conveying that decision can be written even by her secretary. In **Hofmeyr v Minister of Justice and Another 1992 (3) SA 108 (C) at 117F - G** King J formulated the rule thus:

"It is well established that a discretionary power vested in one official must be exercised by that official (or his lawful delegate) and that, although where appropriate he may consult others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else; he must not, in the words of Baxter Administrative Law

(at 443), 'pass the buck' or act under the dictation of another and, if he does, the decision which flows therefrom is unlawful and a nullity."

[20] . When members of the public exercise their rights of appeal in terms of the Act the Minister must, within the limits of the law, fulfil the obligations imposed on her by the Act. Courts are required by the Constitution to ensure that all branches of government act within the parameters of the law and fulfil their constitutional obligations. I agree with the Court *a quo* that the Minister failed to fulfil her obligations in terms of the Act.

[21] In the circumstances I conclude therefore that the Minister's failure to take a decision was unlawful. The decision of Mr Tefu was also unlawful in that he has no power conferred upon him to entertain appeal from SASSA. Accordingly there is no merit in the appeal.

[22] What remains is a question of costs. The award of costs in litigation between parties is a matter which is within the discretion of the Court considering the issue. It is a discretion which must be exercised judicially, having regard to all the relevant considerations. The general

principle is that costs will ordinarily follow the result. This means that when parties initiate proceedings, they take the risk that if unsuccessful they will have to pay the costs of their opponents. Mr Mathaphuna argued that if the appeal is unsuccessful the costs of the application for leave to appeal should be awarded to the appellants. He contended that they were successful in being granted leave to appeal and are therefore entitled to their costs. The fallacy of the argument advanced by counsel for the appellants is demonstrated by its linkage thereof to the so-called successful application for leave to appeal. The costs of that application were dependant on the success or failure of the appeal. Once the appeal succeeds it follows that there was no merit in the appeal and the appellant must bear those costs.

[23] In the result the following order will issue:

The appeal is dismissed with costs.

B R TOKOTA

JUDGE OF THE HIGH COURT

I agree

Z NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree

R BROOKS

JUDGE OF THE HIGH COURT

For the Appellants: Adv M Mathaphuna

Instructed by the state Attorney Mthatha

For the Respondent

Adv A M Bodlani

Instructed by A S Zono & Associates

Date of Hearing: 15 June 2018

Date Delivered : 26 June 2018.