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

CASE NO. 1094/16

In the matter between:

N. E. L. **Applicant**

And

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **Respondent**

JUDGMENT

GRIFFITHS, J.:

[1] The applicant seeks an order reviewing the decision of the first respondent to terminate a child support grant which was terminated during August 2013. In apparent response to an application for reconsideration of such

termination, and during the course of this application, the second respondent addressed a letter (dated 30 May 2016) to the applicant indicating that the grant would be reinstated in the amount of R350 per month. That letter furthermore made reference to a "First Amount Payable" of R3688, which appears, although it is not at all clear, to be an attempt to pay the arrears spanning the period from the time when the grant ceased, to the date of the letter.

[2] Applicant's case is, essentially, that the grant was unlawfully terminated and that it should be reinstated. The applicant has furthermore indicated that she has not only this child but another one to support and that she is indigent and the subject of abject poverty. The result of this is that the termination of the grant has plunged her into further straits of desperation. She has had to resort to begging on the street in order to support the children who, on some days, go without food. All these factors are not contested by the respondents who have simply filed a notice pursuant to the provisions of Rule 6(5)(d)(iii). Therein, the respondents have pointed to the fact that the applicant has not exhausted her internal remedies. In this regard they have pointed to the fact that the applicant has, such being common cause, made application for reconsideration. Such application was sent to the Minister on 16th February 2016 and the application was launched on 1 April 2016. This is within the 90 day period which is prescribed by the regulations under the Social Assistance Act (No 13 of 2004) which period the Minister is given to consider and advise on the outcome. The respondents have, accordingly, contended that the application was premature in that the Minister had not yet had the full 90 days within which to make his decision before the application was launched.

[3] The respondents have furthermore pointed to the fact that the applicant's attorneys were advised, in writing, of the fact that this point would be raised in this application and that costs de *bonis propriis* would be sought against them

should they proceed with the application. Notwithstanding, the applicant has proceeded.

[4] The applicant has attempted to argue that this matter falls outside the provisions of the Promotion of Administrative Justice Act (No 3 of 2000 – "PAJA") which provides, at section 7(2), that no administrative decision may be reviewed until such time as all internal remedies have been exhausted. In terms of section 7(2)(c) of the Act:

> “A **court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."**

[5] The applicant’s argument in this regard is based on the contention that she has chosen to go to the Constitution directly, as opposed to framing her judicial review under PAJA. This argument is, in my view, entirely misconceived. There are numerous cases which make it clear that where legislation has been passed pursuant to a right, or rights created by the Constitution, that legislation is the vehicle in terms of which relief must be sought and only if such legislation is set aside as being unconstitutional, can direct resort be had to the Constitution itself. In this regard, one merely needs to look at the case of **Batho Star Fishing (PTY) LTD v Minister of Environmental Affairs and Tourism and others (2004 (4) SA 490 (CC) at paragraphs 22 – 26.).** Furthermore, even if the applicant were so entitled the common law requires that she first exhaust her internal remedies.

[6] Mr. Zilwa, who has appeared on behalf of the respondents, has further argued that in view of the fact that the grant has been reinstated, the only remaining question is that of who should pay the costs. This is not so. It is clear from the letter sent by the first respondent in terms of which the grant was reinstated that an attempt was made to pay some of the arrears. However, it is quite clear that the amount offered cannot cover the full amount of the arrears outstanding since the time when the grant was terminated. Indeed, in prayer five the applicant has sought payment of such arrears.

[7] The only question which remains in my view therefore is whether or not the applicant has established "exceptional circumstances" for the purposes of the exemption in terms of section 7(2)(c), and whether it would be in the interests of justice to grant such. On the one hand, there appear to be strong circumstances personal to the applicant relating to her abject poverty which are compelling. As I have indicated, the applicant has two children, has relied extensively on the grant in order to provide food for her children and has been unable to obtain any form of employment. She is clearly a rural, uneducated person who has little or no knowledge of the ways and workings of the respondent or, indeed, of any government institution. She was forced to rely, entirely, on the officials of the first respondent in dealing with this matter which came to naught. All these circumstances cumulatively are, in my view, most compelling.

[8] In addition to this it cannot be forgotten that the respondents, in response to the application for reconsideration, did indeed reinstate the grant. There has been no answering affidavit put up on behalf of the respondents to explain precisely what the position is in this regard but one can only assume that they accepted the unlawfulness of the termination of the grant and accordingly reinstated it. The attempt at "salving" the wounded by way of an offer of some

money presumably in the form of arrears is a further indication that this is so. This is an additional factor which to my mind indicates that there are exceptional circumstances in this case and that it would be in the interests of justice to grant the exemption from exhausting internal remedies, as applied for in the notice of motion pursuant to section 7(2)(c).

[9] On the other hand there is the fact that the respondent took since August, 2013, until 16 February 2016 to bring the application for reconsideration. In my view however, in view of her abject poverty, her illiterate background and her extremely difficult circumstances in trying to support two young children with no help whatsoever, this pales into insignificance.

[10] As regards the question of costs, in my view the applicant is substantially successful. Accordingly, costs must follow the result.

[11] In the circumstances I make the following order:

1. **The applicant is exempted, in the interests of justice and pursuant to the provisions of section 7(2)(c) of Act 3 of 2000, from exhausting any internal remedies which may have been available to her;**

2. **The respondent is ordered to, forthwith, account to the applicant for the arrear payments of the child grant from the time of its termination in August 2013 until it was reinstated and to pay to the applicant the balance outstanding;**

3. **The respondent is ordered to pay the costs of this application.**

R E GRIFFITHS

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	**:**	**Mr Hobbs**
INSTRUCTED BY	**:**	**SR Mhlawuli & Associates**
COUNSEL FOR RESPONDENT	**:**	**Mr Zilwa Sc**
INSTRUCTED BY	**:**	**State Attorney**

HEARD ON	**:**	**22 SEPTEMBER 2016**
DELIVERED ON	**:**	**27 SEPTEMBER 2016**