

(IN THE HIGH COURT OF SOUTH AFRICA)

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No. 1014/09
Heard on 05/08/2011
Delivered on 21 /10/2011

In the matter between

EMELY WINDVOËL
AND 100 OTHER APPLICANTS DESCRIBED
IN ANNEXURE “A” TO THE NOTICE OF MOTION

Applicants

And

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

First Respondent

THE DISASTER RELIEF FUND BOARD

Second Respondent

UPPER KAROO ADVICE AND DEVELOPMENT
AGENCIES (UKADA)

Third Respondent

NATIONAL MINISTER OF SOCIAL DEVELOPMENT

Fourth Respondent

JUDGMENT

PAKATI AJ

1. The applicant, Emely Windvoël, and hundred others, approached this court seeking relief in the following terms:

“1. *Directing that the failure of the First, Second and/or Fourth*

Respondents to consider and decide Applicants' applications for Drought Relief grants be reviewed and set aside;

2. In the event of the First, Second and/or Fourth Respondent finding that the applicants are not entitled to Drought Relief grants they should furnish written reasons to the Applicants' attorneys for their decision in this regard within fifteen (15) days from the date of the order;

3. Directing that the One Hundred and Eighty (180) day period envisaged in terms of Section 7 (1) of the Promotion of Administrative Justice Act, 3 of 2000 be extended;

4. Directing that the Second and Fourth Respondents pay the Applicants' costs jointly and severally the one paying the other to be absolved;

6. Granting such further and/or alternative relief as to the above Honourable Court may seem meet."

No relief is sought against the third respondent, the Upper Karoo Advice and Development Agency.

2. The first respondent, the Member of the Executive Council (MEC), Department of Social Development, Northern Cape (the Department), is responsible for the acts and omissions of the employees of the Department of Social Services and Population Development. According to s1 of the Promotion of Administrative Act, 3 of 2000 (PAJA) the MEC is an administrator and is responsible for taking administrative action as defined in the Act.
3. The second respondent, the Disaster Relief Fund Board ("the Relief Board"), has been established in terms of s16 of the Fund-raising Act, 107 of 1978, with the objective of rendering relief to persons, organisations and

bodies who or that suffer damage or loss caused by a disaster as the Relief Board may deem fair and reasonable. The Relief Board was mandated to provide a flat rate of R900-00 per household to deserving victims of drought. The amount of R60 million was allocated nationally (not provincially) by the National treasury for this purpose.

4. During 2004 the Relief Board entered into a service level agreement with the third respondent, the Upper Karoo Advice and Development Agency (“UKADA”), a non-governmental organisation based in Hopetown, Northern Cape. UKADA (or the Agent) serviced the Upper Karoo region and was amongst other things contracted by the Relief Board and the Department to distribute application forms in the Colesberg region. The Agent was also tasked to assist the applicants with completing the registration forms in terms of the provisions of the Act and to submit the completed forms to the secretariat of the Relief Board for processing.
5. The fourth respondent, the National Minister of Social Development (the Minister), is in terms of s2 (2) of the State Liability Act, 20 of 1957, responsible for the acts and omissions of the employees in the Department and is the functionary responsible jointly with the Relief Board for the payment of Drought Relief grants.
6. On 23 January 2004 former president Thabo Mbeki declared certain areas in the Northern Cape as disaster areas in Government Gazette No 25940 in accordance with s26 of the Fund-raising Act, 107 of 1978. A similar proclamation was published in Government Gazette No 27349 of 3 March 2005. The Colesberg district in which the applicants are resident falls in the declared areas in respect of both the aforementioned proclamations.
7. In her founding affidavit the applicant, Ms Windvoël, whose situation is a prototype of all applicants for purposes of this application, stated that she is

functionally illiterate. She has never had the opportunity of permanent employment. She has worked as a farm labourer from time to time and depends on social welfare grants. She earned additional income from a modest garden and maize allotment which she conducted as a small scale farmer from her home from which she generated approximately R400-00 per month. Due to the drought she could not carry on that activity anymore and lost the ability to supplement her social benefits. She clearly falls within the designated group envisaged in s18 (a) of the Fund-raising Act.

8. On 15 May 2004 she and her co-applicants (100 of them), members of the community, completed application forms for drought relief at Colesberg Community Hall with the assistance of officials of UKADA and the Relief Board. Ms Windvoël was not issued with a certificate or proof of application. Some members of the community received payment in the sum of R900-00 during 2005. Payments to the community members of Colesberg were staggered over a period of not less than two months. It transpired several months after the (**January 2005**) payment that the applicants have been overlooked or turned down.
9. Ms Windvoël consulted her attorneys on 15 May 2005 who undertook to investigate the matter. On 30 August 2005 the attorneys held a meeting with other applicants who had lodged their applications, but did not receive payment, with a view to lodge a class action. Thereafter there were several meetings between them and a member of the Secretariat of the Relief Board and correspondence between them was exchanged. On 30 August 2005 they gave instructions to their attorneys to proceed with this application.
10. Mr Vusi Madonsela, who responded on affidavit on behalf of the Minister, contended that all the applicants who applied have been paid. He denies that the applicants completed forms and submitted them on 15 May 2004

for drought relief funding. According to him there was an audit of all the applications conducted by UKADA, the Agent. The report, he says, shows that only one person by the name of Ms Thiwe Everlyn registered but did not collect the grant. According to him a person whose name does not appear in the report did not apply for registration. He says that when the Relief Board closed the project there were no outstanding applications for drought relief and no one approached the Relief Board to claim registration or payment. Ms Lerato Hebe, who was at that time contracted by the Relief Board stated in para 13 of her confirmatory affidavit that:

“13. Though I could not give the exact number of applications that we received in the different towns, including Colesberg, I can confirm that every application that we received in the town was sent to the Fund’s office in Pretoria for consideration and processing.”

11. The issue for determination is whether the applicants applied to be considered for drought relief as they claim to have done but no response was forthcoming from the authorities. According to the respondents the Relief Board has now been dissolved and intimate that the appointment of a new Relief Board would entail great expense. Funds would have to be sourced from the National Treasury as all the funds were exhausted. The respondents maintain that if the applicants applied for drought relief they must have filed their applications late. The respondents further take the point *in limine* that this application was brought out of time as the 180 days period as envisaged in s7 (1) of the Promotions of Administration of Justice Act, 3 of 2000, had elapsed.

12. Ms Hebe in one breath denies that the respondents or their representatives attended a meeting in Colesberg on 15 May 2004; yet on the other say she can’t deny that such a meeting took place and can’t even deny that they were there and that the applicants submitted their application forms.

Strangely, Ms Hebe knows the exact date on which they went to Hanover, in another district in the Northern Cape not very far from Colesberg.

13. Mr Madonsela filed his answering affidavit only on 24 July 2009. He outlined the general principles and policies governing the Disaster Relief Fund. He confirmed the applicants' version that the registration for relief was finalised in May 2005. He was not personally involved in this project. He stated anecdotally what he learned from other people, including Ms Hebe. It is only after the applicants filed a notice to strike out paras 9-13, 20.1, 20.2, 22.3 and 23.2 of his answering affidavit on 07 October 2009 that he brought a substantive application on 28 May 2010 seeking an order condoning the late filing of his statement. The order to file further affidavits was granted on 24 July 2010. The applicants had by then (on 09 October 2009) already filed their Heads of Argument, including the argument on the merits and on the application to strike out. Ms Hebe's affidavit was taken down on 19 October 2009. A number of the other affidavits were unsigned and others were signed but not attested. At para 7 of her confirmatory affidavit Ms Hebe said:

"7. I must mention that in all the places that we went to in order to hold these meetings and distribute application forms we got a lukewarm reception from the community members and that includes the town of Colesberg, as we did not get the numbers of people we expected."

14. From this paragraph it is clear that Ms Hebe is trying to cure the hearsay evidence adduced by Mr Madonsela in his answering affidavit. Her affidavit, in my view, is an afterthought and strengthens the applicants' case on this point. Her denial that she has doubts that they were in Colesberg on 15 May 2004 is therefore contradictory. Ms Hebe stated that early in 2004 she and Ms Ester Magugu were contracted by the National Disaster Fund to assist in the drought relief programme in the Northern

Cape. On the other hand in his answering affidavit Mr Madonsela said:

“Registration for relief commenced in February 2004 and was finalised in May 2005. The first run of payments was made in 2004 where a total of 2 508 beneficiaries were paid. The last run of payments was made in July 2005, where 5 247 beneficiaries received payment. A total of 1 074 beneficiaries remain unpaid. This is due to beneficiaries not showing up at the pay points and others being dead.”

15. To the contrary Ms Magdaleen Reed, a ward Councillor at Lowryville Colesberg whose affidavit was filed with the Registrar on 07 October 2009, confirmed that she attended the meeting in the community hall whereat registration was taking place for the Drought Relief grants. She estimated the turn out of the community members at 1200.
16. Mr R. Mogagabe SC for the respondents argued that it could not be true that the applicants handed their application forms to UKADA officials in 2004 as stated in paras 24 and 29 of the founding affidavit. He suggested that UKADA was not contracted to the Provincial or National Department at that time but only in 2005. He referred to the confirmatory affidavit of Mr Abraham Schwarz, on behalf of the respondents, which states that an agreement between UKADA and the National Department of Social Development was concluded on 11 February 2005. He argued further that the applicants rely on the Social Assistance Act and not the Fund-raising Act and that therefore regulation 26(2) of the Regulations under the Social Relief Distress was applicable and contended that this was fatal to the applicants' application.
17. It does not make sense that UKADA could only have been contracted in 2005 when the registration period was over. This is explained by the change of the year in the agreement (Annexure “1”). The “4” in the year

2004 in the agreement has been altered and “5” has been inserted to read 2005. There is no other explanation for the alteration in the year but to suit the respondents’ defence. Mr Madonsela’s evidence unwittingly confirms the version of the applicants on this aspect.

18. Invoking the test set out in **PLASCON-EVANS PAINTS v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A) (SCA) at 634** and **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA 2009 (1) SACR 631 (SCA)** at para 26 I am satisfied that the objective make out a compelling case that the applicants made the requisite applications for Drought relief timeously, for the following reasons:

18.1 It is highly unlikely that 101 indigent people would perjure themselves for R900-00 and make so much effort to vindicate their right even though, in their deprived circumstances, R900-00 is not a fortune.

18.2 The applicant states that on the specific date (15 May 2004) they gathered at no other place than the Colesberg Town Hall. Councillor Reed, who is independent and not an applicant, state that more than 1200 gathered at the Town Hall on the day in question.

18.3 The government officials contradicted themselves in a shameful manner. At least some of them admitted that some drought victims, apart from the applicants, have been paid the fixed amount of R900-00 each.

19. Mr R Quinn SC for the applicants contended that the applicants’ case is based on the Fund-raising Act and that the respondents’ reliance on regulation 26(2) to the now repealed Social Assistance Act, 59 of 1992 was misplaced.

20. The regulation relating to the grants and financial awards to welfare

organizations and to persons in need of social relief of distress, published under Government Notice R418 in Government Gazette 18771 of 31 March 1998 of the Social Assistance Act No, 59 of 1992, is indeed repealed by the Social Assistance Act 13 of 2004. It is common cause that all the applicants in this matter are recipients of social grants under the Social Assistance Act. They have invoked the Fund-raising Act, 107 of 1978. Regulation 26(2) is therefore not applicable to them. This is confirmed by Annexure “B” to the founding affidavit. See also the unreported case of **NATIONAL MINISTER OF SOCIAL DEVELOPMENT AND OTHERS v JANNETJIE CAROLUS AND OTHERS CASE NO 1150/09 p10 (NC)** delivered on 14 August 2009 where Matiedt J said:

“It may well be (I put it no higher than this since the point was not argued at all in Mweza and Barends) that the relief granted under s5 (2) for drought relief may be untenable in law due to the terms of Regulation 26(2). Be that as it may, however, Ms Baloyi correctly alluded to the fact that the Applicants in the main application would be better placed to proceed in terms of the Fundraising Act.”

21. The applicants’ request in this matter is for the respondents to consider and decide their applications and if the respondents find that they are not entitled to the relief sought, furnish them with reasons for their decision. It is worth mentioning that the unreported cases of **NONZAME ELSIE MWEZA (Case No. 367/06)** and **ABRAHAM BARENDSE (Case No. 368/06)** were regarded as test cases as the relief sought in the two matters is similar to that sought in the instant case. See also **MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT V CHONCO AND OTHERS 2010 (4) SA 82 (CC)** where Langa CJ held that the Constitution requires that all constitutional obligations, wherever they lie, ‘must be performed diligently and without delay’. Good governance and social trust are premised at least partly on reasonable and responsive decision-

making.

22. In Annexure “D” to the founding affidavit the people who are supposed to benefit from the government grant are specified as follows:

“WHO WILL BENEFIT?

Vulnerable individuals and households of poverty stricken families who are destitute as a result of the drought disaster in identified districts of the affected provinces;

Those with none or limited employment and/or income-generating opportunities in those areas;

Farm workers who have been laid off work due to the persistent drought;

Persons in farming communities whose livelihood have been severely affected;

Persons and households participating in job creation projects;

Persons and households who rely directly and indirectly on farming.”

23. There is no doubt that the applicants *in casu* are destitute.

Whether they qualify for the drought relief is for the second and the fourth respondents to consider and decide. In **NATIONAL MINISTER OF SOCIAL DEVELOPMENT AND ANOTHER v JANNETJIE CAROLUS AND OTHERS** *supra* this Court ordered the National Minister of Social Development to comply with its direction of 08 May 2009 in case No. 363/09. This court was brought under the impression that the Minister wished to assist the applicants in that matter by payment of a sum of R900-00 per applicant. It was also indicated that the Minister had already placed advertisements to constitute a Disaster Relief Fund Board, had compiled a shortlist of candidates and, as at 14 August 2009 was in the process of interviewing prospective members of the new Board. The averments made on oath by Mr Madonsela in

that matter (similar to the present matter) have not been contradicted. It does not seem, on the evidence presented to me, that the costs of constituting a new Relief Board are prohibitive. In **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v GROOTBOOM AND OTHERS 2001 (1) SA 46 (CC)** Yacoob J stated at para 24 that the State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the State has met its obligations in terms of them. See also **MEC, DEPARTMENT OF WELFARE, EASTERN CAPE v KATE 2006 (4) SA 478 (SCA)** at 493I where Nugent JA held:

“To be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation, it reduces a human in his or her dignity. The inevitable result of being unlawfully deprived of a grant that is required for daily sustenance is the unnecessary further endurance of that condition for so long as the unlawfulness continues.”

24. The applicants further seek an order extending the one hundred and eighty (180) day period envisaged in s7 (1) of PAJA. This section provides as follows:

“(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

- a) Subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or*
- b) Where no such remedies exist, on which the person concerned*

was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”

Section 7(2) in turn provides thus:

- “(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
- b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
- c) 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.”*

The same can be said in the present case where deserving applicants are deprived of a once-off grant of R900-00.

25. Mr Mogagabe argued strenuously that the application was out of time and must therefore be dismissed. The applicants took four years before they approached the Court. The respondents allege that they never received the applicants' application forms and therefore no decision was taken in respect of the alleged applications. Mr Quinn conceded that the application was out of time. However, he submitted that the respondents did not show that they suffered any prejudice during this period and that insult must not be heaped to injury by closing the door to the applicants without regard to the merits of their case.

26. The applicants are not sophisticated to know that they had to bring their applications within a specific period of time. Their delay was wanton. First they waited patiently for their grants to be approved. Then they consulted their attorneys. Getting all the aggrieved destitute people together and having them to pool their resources for a class action is easier said than done. Their delay is therefore excusable. Section 1 of PAJA defines “administrative action” as follows:

“administrative action’ means any decision taken, or any failure to take a decision, by-

a) An organ of state, when-

- i) Exercising a power in terms of the Constitution or a provincial constitution; or*
- ii) Exercising a public power or performing a public function in terms of any legislation; or*

b) A natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(aa) the executive powers or functions of the National Executive,....

(bb) the executive powers or functions of the Provincial Executive,

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal

established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

iii) Any decision taken, or failure to take a decision, in terms of section 4(1),”

27. A failure to take a decision is therefore reviewable. The applicants made out a proper case that the Disaster Relief Fund Board, the MEC of Social Development and/or the National Minister of Social Development failed or refused to consider the applicants' application for drought relief without any reasonable cause.

28. It seems to me that the respondents can process these cases speedily and make payments where it is due. It is understood that the government and its organs cannot make unauthorised and fruitless payment. On the other hand it is a worse evil to pay out huge sums of money to lawyers and deprive destitute citizens who qualify for the grant of a meagre R900-00 each. See **PERMANENT SECRETARY, DEPARTMENT OF WELFARE, EC v NGXUZA 2001 (4) SA 1184 (SCA)** at para 4 and 5 (pp 1192-1194A) whereat Cameron JA, writing for the Full Bench (5 judges) had this to say:

“[4] In the type of class action at issue in this case, one or more claimants litigate

against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it. The class action was until 1994 unknown to our law, where the individual litigant's personal and direct interest in litigation defined the boundaries of the court's powers in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with them by compliance with the formalities of joinder. The difficulties the traditional approach to participation in legal process create are well described in an analysis that appeared after the class action was nationally regularised in the United States through a Federal Rule of Court more than 60 years ago:

'The cardinal difficulty with joinder... is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations such spontaneity cannot arise either because the various parties who have the common interest are isolated, scattered and utter strangers to each other. Thus while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints – they may never come.

What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it.'

[5] The class action cuts through these complexities. The issue between the members of the class and the defendant is tried once. The judgment binds all and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a small claim that may be difficult or impossible to pursue individually. The mechanism is employed not only in its country of origin, the United States of America, where detailed rules governing its use have developed, but in other countries as well. The reason the procedure is invoked so frequently lies in the complexity of modern social structures and the

attendant cost of legal proceedings:

'Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress, either is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all.'

29. The following order is made:

- 1) The first, second and fourth respondents (the MEC for Social Development, the Disaster Relief Fund Board and the National Minister of Social Development, respectively) are directed to consider and decide upon the applicants' applications for drought relief made on 15 May 2004 by not later than sixty (60) ordinary days of this order.**
- 2) In the event of the first, second and fourth respondents finding that that the applicants or some of them are not entitled to drought relief, the first, second and fourth respondents are directed to furnish written reasons for their decision in this regard to the applicants' attorneys of record by not later than thirty (30) ordinary days of such decision having been taken.**
- 3) The one hundred and eighty day period (180) envisaged in terms of section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000, is extended and non-compliance therewith is condoned.**
- 4) The second and fourth respondents are ordered to pay the applicants' costs jointly and severally, the one paying the other to be**

absolved.

BM PAKATI
ACTING JUDGE
NORTHERN CAPE DIVISION

Appearing for the Applicants

Adv R Quinn SC instructed by Towell & Groenewaldt Attorneys, Kimberley

Appearing for Respondents 1, 2 and 4

Adv R Mogagabe SC instructed by the State Attorney, Kimberley