

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 367/06 and 368/06
Date heard: 2008-12-08
Date delivered: 2008-12-12

In the matter of:

**NONZAME ELSIE MWEZA
ABRAHAM BARENDSE**

**APPLICANT IN CASE 367/06
APPLICANT IN CASE 368/06**

versus

**THE MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF SOCIAL SERVICES AND
POPULATION DEVELOPMENT
(NORTHERN CAPE)**

FIRST RESPONDENT

THE DISASTER RELIEF FUND

SECOND APPLICANT

**UPPER KAROO ADVICE AND
DEVELOPMENT AGENCIES**

THIRD RESPONDENT

Coram: **MAJIEDT J et WILLIAMS J**

JUDGMENT

MAJIEDT J:

- [1] These two unopposed applications were set down together and before two Judges by direction of the then Acting Judge President. The reasons for that will appear shortly. Although notices of opposition were filed in both applications by the State Attorney on

behalf of the First Respondent, no answering affidavits were ever filed.

- [2] There are a number of similarities in the applications, but also certain differences. For the sake of expediency, I deal with the similar facts first.
- [3] In both applications the Applicants seek relief in terms of the provisions of the Promotion of Administrative Justice Act, 8 of 2000 (“*PAJA*”). Both applications have as their background the provisions contained in s(5)(2) of the Social Assistance Act, 59 of 1992 (“*the Act*”) which reads as follows:

“2. The Director-General may, subject to the provisions of this Act, make a financial award to a person if he or she is satisfied that such person is in need of social relief of distress.”

In the **Mweza-matter** the Applicant had applied to the authorities for drought relief, while in the **Barendse-matter** the Applicant had applied for “*emergency relief*” in respect of hurricane storm damage.

These applications are regarded as test cases for a host of others, awaiting hearing in this Division.

- [4] Both matters have been characterised by inordinate delays. In **Mweza** the Applicant sought drought relief at the community hall in her home town, Hanover, on 15 May 2004. The Third Respondent, a non-governmental organization known as “*Ukada*”, was tasked with assisting Applicant with registration in terms of the provisions of the Act. The Second Respondent has been established in terms of s16 of the Fundraising Act, 107 of 1978,

(“*the Fundraising Act*”) with the objective of rendering to persons, organizations and bodies who or which suffered damages or loss caused by a disaster, such assistance as the Board may deem fair and reasonable.

- [5] On 23 January 2004 the President declared certain areas in the Northern Cape Province as disaster areas in Government Gazette no 25940 in accordance with s26 of the Fundraising Act. A similar proclamation was published in Government Gazette no 27349 of 3 March 2005. The town of Hanover, in which Ms Mweza is resident, falls in the declared areas in respect of both the aforementioned proclamations. Ms Mweza explained in her founding affidavit, as supplemented later in a supplementary affidavit, that she is functionally illiterate and completely dependent on social welfare grants. Her only additional income was from a very modest vegetable and maize farming business which she conducted on a small scale from her home. She clearly falls within the designated group envisaged in s5(2) of the Act and in s18(a) of the Fundraising Act. Having lodged her application for drought relief on 15 May 2004 at Hanover community hall with employees of the Third Respondent, Ms Mweza was not issued with a receipt in respect of her aforementioned application. Although she was advised by the Third Respondent’s officials who received her application that it would take approximately three months to process, she had no response thereto. Her attorneys of record sought information on 29 August 2005 in respect of her application in terms of PAJA. Thereafter several meetings between her attorney and a member of the Secretariat of the Second Respondent and correspondence between them followed.

All these yielded no positive results, hence the present application. Ms Mweza's application was for compensation in the paltry sum of R900.00 (nine hundred Rand) which appears to be the amount of compensation which the authorities had fixed.

- [6] I now turn to set out the facts and ensuing events in the **Barendse matter**. Mr. Barendse applied for emergency relief, due to a hurricane having wreaked havoc to his home at 17 Van der Walt Street, Noupoot. Mr. Barendse owns two homes, but he has in fact already been compensated for the damage to the other one. The present application therefore only concerns the damage at 17 Van der Walt Street. During September 2004 extensive storm damage was caused at Noupoot to the homes of several residents due to the aforementioned hurricane. In the course of November 2004 officials of the First Respondent's office convened a meeting to register victims of the storm. This registration was done by officials of the First Respondent as well as those of the Third Respondent. At the said meeting, according to Mr. Barendse, storm victims were advised by the said officials to apply for emergency relief funds and that an amount of R900,00 (nine hundred Rand) will be paid to every household as compensation for damage that was caused by the storm. They also indicated that the amount of R900,00 would be paid out at pension pay points within 3 months of the date of application. The reason why Mr. Barendse was compensated in respect of one of his properties only, was because he was handed one application form only. He was unable to fill in a form in respect of the property at 17 Van der Walt Street, because there was a shortage of application forms and he did not receive one in respect of that property. Officials

present there undertook to have more application forms distributed at a future date, but according to Mr. Barendse, this has not happened at all.

[7] Mr. Barendse consulted for the first time on 6 June 2005 with his attorneys, who thereafter addressed a letter of demand to the Regional Office of the First Respondent. Several letters followed between the First Respondent's legal advisors and Mr. Barendse's attorneys, but the matter was not resolved. Mr. Barendse accordingly launched the present application during the course of 2006.

[8] Several aspects which are common to the two applications emerge, namely:

- a) Both these Applicants are in my view entitled to assistance in terms of s5(2) of the Act.
- b) Both Applicants are extremely poor and are dependent on social welfare grants.
- c) In both instances they sought relief along the proper channels as envisaged in the Act, and, in the case of Ms Mweza, in accordance with the declaration of, *inter alia*, Hanover as a drought disaster area, thereby qualifying for drought disaster relief.
- d) In both these instances the Applicants have been shunted from pillar to post and have been waiting for a very long time for assistance from the relevant authorities.

- e) In both applications the Applicants have been compelled to engage the services of a firm of attorneys who also achieved no success in pursuing the matters on their behalf.

[9] In both these cases a curious eventuality which had occurred is a so-called “*settlement agreement*” which is attached to the papers. Both “*settlement agreements*” were signed on 15 May 2008. The Applicant, Mr. Barendse, signed his agreement together with two witnesses. An unknown person signed for the First Respondent and also signed on behalf of the Second Respondent. Ms Mweza’s “*settlement agreement*” was also concluded at Noupoot and was signed by an unknown person for both the First and Second Respondents. The document contains her thumbprint (it will be recalled that she is functionally illiterate) and is signed by two witnesses. Both these “*settlement agreements*” purport to record the following:

- a) It contains an acknowledgement that the First Respondent was incorrectly cited, because he has nothing to do with the administration of emergency relief funds which are in fact administered by the Second Respondent. It consequently records that the Applicant withdraws his/her claim against the First Respondent with each party to bear its own costs.
- b) The Second Respondent, without admission of liability, offered payment of the sum of R900,00 in full and final settlement of the Applicants’ claims. As a *quid pro quo*, the Applicants would withdraw their applications with each party to pay its own costs.

- c) It was recorded that the parties are in agreement that the clauses relating to payment and the concomitant withdrawal of the applications were subject to the approval of the National Department of Social Development (thus a suspensive condition).
- d) It was also agreed between the parties that the settlement amount of R900,00 will be paid directly into the respective Applicants' bank accounts on or before 30 June 2008.
- e) Finally and in conclusion it was agreed that the said "*settlement agreements*" constitute full and final settlement of the respective Applicants' claims.

[10] In both instances the Applicants filed supplementary affidavits in which they declared that the true nature and objective of the "*settlement agreements*" were never explained to them by the officials who had approached them and who appeared to be from the office of the State Attorney. They also indicated that they were not aware of the fact that they were required to withdraw the applications and to bear their own legal costs. Both Applicants pointed out that at that stage the matters were still pending and enrolment dates had indeed been obtained for the hearing of both matters in this Court.

[11] Mr. Dutton for both Applicants has submitted that on the probabilities these explanations are to be accepted. I agree. It seems curious that such "*settlement agreements*" would be concluded in the midst of litigation. This curiosity is compounded further by the fact that in both instances the Applicants purport to

waive any claim that they may have had in respect of their legal costs. I have already indicated that Ms Mweza is functionally illiterate. In Mr. Barendse's instance he too is virtually functionally illiterate having only attended school until standard 1. He has never had permanent employment and has been employed as a farm labourer from time to time. He subsists by reason of social grants and benefits and also in addition receives a small rental income from the second property, to which I have already alluded. In the premises I accept on the probabilities that these Applicants were not fully conversant with the import and meaning of the terms in the settlement agreements. I am of the view that these agreements are not valid and enforceable and in any event have been repudiated under oath by the Applicants to the extent that they may have some validity. This repudiation is acceptable, given the fact that these Applicants were not fully aware of what they were signing. Moreover and in any event, there is no indication at all in the papers as to whether the suspensive condition set out in par. 9(c) above, had been fulfilled.

[12] It is most unusual and quite unacceptable for settlement agreements to be foisted upon functionally illiterate litigants who are in any event, to the knowledge of the State Attorney and the various Respondents, represented by a firm of attorneys. I take a grave view of the matter and believe that this ought to be investigated further.

[13] Like Mr. Barendse, Ms Mweza has applied for compensation in the paltry sum of R900,00. The fact that now, some 4 of 5 years down the line, no payment has been forthcoming and these Applicants

have been treated in the most unsympathetic manner imaginable by the authorities, is an indictment on the authorities charged by legislation with the rendering of social assistance and relief to the poor and to those in distress.

Section 27(1)(c) of the Constitution, Act 108 of 1996 (*“the Constitution”*) guarantees to every citizen the right to have access to social security including the right to appropriate social assistance.

Section 10 of the Constitution enshrines every individual’s fundamental right to human dignity.

Section 7(2) of the Constitution guarantees an individual’s right to have the State respect, protect, promote and fulfil the rights as enshrined in the Bill of Rights.

Section 194 of the Constitution safeguards an individual’s right to fair and just public administration.

Section 33 of the Constitution guarantees to an individual the right to administrative action that is lawful, reasonable and procedurally fair.

Section 237 of the Constitution requires that all constitutional obligations be performed diligently and without delay.

Section 32(1) guarantees to everyone the right of access to information held by the State.

- [14] The Applicants have been denied the plethora of rights in each and every instance set out above. This has occurred due to the absolute inertia of the institutions charged with the duties to ensure that needy persons be granted the relief which they are entitled to in terms of legislation and policy. In **MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA)** at 493l,

Nugent JA had the following to say in respect of the ineptitude and incompetence of the welfare officials in that instance:

“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.:

The same can be said of their failure in the present case to pay to these deserving Applicants the paltry sum of R900,00.

In an earlier judgment, Cameron JA was even more strident in his criticism of the welfare officials in that case, particularly regarding their conduct of the litigation.

See: **Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuzza and others 2001 (4) SA 1184(SCA)** at par [15], 1197 C-F:

“[15] All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticise government's decisions in the area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of State to be loyal to the Constitution and requires that public administration be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it were at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere. We were told, in extenuation, that unentitled claimants were costing the province R65 million per month. That misses the point, which is the cost the province's remedy exacted in human suffering on those who were entitled to benefits. What is more, the extravagant cost of 'ghost' claimants would seem to justify the expense of imperative administrative measures to remedy the problem by singling out the bogus - something the province conspicuously failed to do. It cannot warrant unlawful action against the entitled. “

The remarks there are to some extent apposite to the present

case as well.

- [15] The Applicants are clearly entitled to the relief sought in the Amended Notice of Motion in the respective cases. In the **Mweza matter** I propose shortening the time periods, given the lengthy delays herein. They seek a *mandamus* directing the First and Second Respondents to process their applications and, should same be refused, to furnish reasons therefor. These are, as I have said at the commencement of the judgment, to be regarded as test cases for a number of other cases which are awaiting hearing in this Division. I therefore propose having this judgment forwarded to all the Respondents, even though the matters are at this stage unopposed. The matter has been set down before two Judges, due to the fact that it has important implications in respect of the rendering of social assistance in this province. In addition thereto, as I have stated, these are to be regarded as test cases. I would also request an investigation and report by the State Attorney's office into the conclusion of the "*settlement agreements*".

Finally, I must emphasize that, henceforth, all similar matters which are unopposed and which are presently awaiting to be enrolled in anticipation of this judgment, can be enrolled in the Motion Court.

- [16] I need to comment briefly on two aspects raised in the papers.

[16.1] First, the Applicants seek orders extending the 180 day period envisaged in s7(1) of PAJA and exemption to exhaust internal remedies in terms of s7(2)(c) of PAJA.

Section 7(1) of PAJA reads 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) of PAJA in turn provides that:

- “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.”

Mr. Dutton has submitted that, since no decision has been taken at all in both instances by the authorities, these provisions do not apply and no relief is necessary in that regard. This argument loses sight of the fact that in s1 of PAJA “*administrative action*” is defined as:

“‘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, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;

(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;

[Para. (gg) substituted by s. 26 of Act 55 of 2003.]

(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

(ii) any decision taken, or failure to take a decision, in terms of section 4 (1);"

Thus **a failure to take a decision** is also reviewable. In the premises, such relief must be included and was indeed sought in the Amended Notice of Motion. A case is indeed made out in the papers for such relief.

[16.2] Second, the State Attorney had filed a notice in terms of Rule 6(5)(d)(iii) on behalf of the First Respondent on 24 July 2006. Why this was not contained or repeated in an answering affidavit/s is beyond me. A number of issues are raised, but I do not deem it necessary to burden this judgment with those matters. Suffice to state that none of them bear legal scrutiny. I need to refer to one of them very briefly, however.

It is contended that the Director-General should have been joined as a Respondent, given the provisions contained in s5(2) of the Act, quoted above. It is also contended that for the same reason, there has been fatal misjoinder of the First Respondent. Mr. Dutton is correct in his submission that these contentions fail to pass muster. The Applicants have, correctly in my view, cited the First Respondent in his/her capacity as *“the official who, in terms of Section 2(2) of the State Liability act, 20 of 1957 is responsible in law for the acts or omissions of the persons in the employ of the Department of Social Development, Northern Cape Province.”*

See: **Jayiya v MEC, Welfare Eastern Cape Provincial Government and another [2003] 2 All SA 223 (SCA)** at par [5], 227 e.

[17] One last aspect remains and that is the question of costs. Mr. Dutton has forcefully argued for a punitive costs order against the First and Second Respondents. After careful consideration and in the exercise of my discretion, I am of the view that such an order is justified in the circumstances of this case. The inordinate delay and unbelievable prevarication by officials and employees of the First and Second Respondents require severe sanction in the form of a punitive costs order which I propose to make.

[18] The following orders are issued:

A. In the Mweza matter:

- (i) The First and/or Second Respondents are directed to consider and decide upon the Applicant's application for drought relief made on 15 May 2004 within 15 days of this order.**
- (ii) In the event of the First and/or Second Respondent finding that the Applicant is not entitled to drought relief, the First and/or Second Respondent is directed to furnish written reasons for their decision in this regard to the Applicant's attorneys of record within 15 days of such decision having been taken.**
- (iii) 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, is**

extended to 24 March 2006.

- (iv) The Applicant is exempted in terms of the provisions of section 7(2)(c) of the Promotion of Administrative Justice Act, 3 of 2000, from the obligation to exhaust internal remedies.**
- (v) The First and Second Respondent is ordered to pay the Applicant's costs on a scale as between attorney and client jointly and severally, the one paying the other to be absolved.**

B. In the Barendse matter:

- (i) The administrative action of the First, Second and Third Respondent in refusing the Applicant access to social assistance in the form of emergency relief funds is hereby set aside.**
- (ii) The First, Second and/or Third Respondents are ordered to register and decide the Applicant's application for emergency relief funds within 15 days from the date of this order.**
- (iii) 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, is extended to 24 March 2006.**

- (iv) The Applicant is exempted in terms of the provisions of section 7(2)(c) of the Promotion of Administrative Justice Act, 3 of 2000, from the obligation to exhaust internal remedies.
- (v) In the event of the First and/or Second Respondents finding that the Applicant is not entitled to emergency relief funds, to furnish written reasons for their decision to the Applicant's attorneys of record within 15 days from the date of that decision.
- (iv) The First and Second Respondents are hereby ordered to pay the Applicant's costs on the scale as between attorney and client jointly and severally, the paying the other to be absolved.

C. In respect of both matters:

- (i) A copy of this judgment is to be transmitted to:

 - (aa) the office of the State Attorney, Kimberley;
 - (bb) the office of the MEC for the Department of Social Services and Population Development in Kimberley;
 - (cc) the office of the Disaster Relief Fund Board at HSRC Building 134, Pretorius Street, Pretoria.

- (ii) The Head of the office of the State Attorney in Kimberley is directed to institute an investigation into:
 - (aa) how the “*settlement agreement*” in both these matters came to be concluded with the respective applicants;
 - (bb) who signed the said agreements on behalf of the First and Second Respondents;
 - (cc) why the agreements were concluded with the applicants personally in the absence of their legal representatives; and
 - (dd) generally all matters incidental to the aforementioned three aspects.
- (iii) The Head of Office of the State Attorney in Kimberley is directed to furnish a written report on the said investigation to this Court (i.e. Williams J and myself) by no later than 30 January 2009.

SA MAJIEDT
JUDGE

I CONCUR.

CC WILLIAMS
JUDGE

FOR THE APPLICANTS : ADV IT DUTTON
INSTRUCTED BY : TOWELL AND GROENEWALD ATTORNEYS

FOR THE RESPONDENTS : NO APPEARANCE FOR THE RESPONDENTS