

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

CASE NO: 3956/16

In the matter between:

MAKEHLE MPAYIPHELI

Applicant

and

MINISTER OF SOCIAL DEVELOPMENT

First Respondent

**INDEPENDENT TRIBUNAL, DEPARTMENT
OF SOCIAL DEVELOPMENT**

Second Respondent

JUDGMENT

MBENENGE ADJP:

[1] The issue raised in this application can best be understood against the background of the relevant statutory matrix.

[2] Section 18 of the Social Assistance Act¹ sets out the procedure to be followed when a decision by the South African Social Security Agency² is being reconsidered.

¹ 13 of 2004 (the Act).

² The Agency

[3] Of more relevance to this application is section 18(2)(a) of the Act which gives the Minister of Social Development,³ upon receipt of an appeal contemplated in section 18 (1A) of the Act, the power to “*confirm, vary or set aside*” the decision of the Agency on an application lodged by the applicant for social assistance in terms of section 14.⁴

[4] After the applicant’s application for a disability grant had been refused by the Agency, primarily on the ground that it had been “*lodged outside the prescribed 90 day period*”, the applicant lodged an appeal in the prescribed manner, predicated on the following:

“The administrator relied on an evidence or information of an expert nature for its conclusion and no opportunity was given to appellant to make representations in response. The appellant is an unskilled person and can only be accepted in the labour market requiring unskilled labourers.

³ The Minister (NB The Act makes reference to the “*Minister of Welfare and Population Development*”, which appellation has now changed to “*Minister of Social Development*”).

⁴ Section 14 provides:

- “(1) Any person who wishes to apply for social assistance contemplated in sections 6 to 13 must do so in the prescribed manner.
- (2) In considering an application made in terms of subsection (1), additional information.
- (3)(a) If the applicant qualifies for social assistance in terms of this Act, the Agency must render the relevant social assistance.
- (b) If the applicant does not qualify for social assistance in terms of this Act, the Agency must in writing at the applicant’s address or other point of contact stated in the application, inform the applicant -
 - (i) that he or she does not qualify for social assistance in terms of this Act;
 - (ii) the reasons why he or she does not qualify; and
 - (iii) of his or her right to request reconsideration and his or her right of appeal contemplated in section 18 and of the mechanism and procedure to invoke any such right.
- (4) No person may divulge any personal information of an applicant furnished in respect of an application except –
 - (a) to a person who requires it in order to perform a function in terms of this Act;
 - (b) when required to do so by law or by an order of court; or
 - (c) with the consent of the applicant,
- (5) If any information supplied by a beneficiary to the Agency in an application for a grant materially changes after that beneficiary has submitted that application, he or she must as soon as is reasonably possible after that change occurs, inform the Agency thereof.”

Unskilled labourers require a perfect health with all senses functioning. It was unreasonable not [to] grant even a temporary disability grant”.

[5] In the course of time the applicant was invited, by the Acting Chief Director: Legal Services, to furnish the Department of Social Development⁵ with certain outstanding documents.⁶ The applicant was further advised as follows:

“Regulation 19 (1)(7) provides that 90 days period referred to in regulation 16 (2) will only start running from the date of receipt by the Independent Tribunal of all required documents under sub-regulation 3. Please be advised that should you respond [to] this letter after a period of 90 days from the date on which the reconsideration outcome was issued, kindly fill in the attached condonation form.”

[6] His motivation for condonation is worded:

“I am illiterate person let alone being a layman. I grew up in deep rural areas. Upon receipt of the letter of rejection no one explained the contents of the letter. I was not aware that I have a right to challenge what I think is a government entity. All I know if I am offended by a private individual you can enforce your rights through the legal entities. It is the government that is able to deal with disputes. I did not even know that there are time limits that need to be met. I re-iterate that I am an illiterate person as well as a layman. I do not know provision of Section 18 (1).

I was advised of the provisions by my attorney after I approached him for legal assistance. I was referred to the attorney by a friend.”

[7] Approximately three months thereafter, by facsimile letter dated 13 October 2015, the applicant’s attorneys of record, through whom the applicant had been interacting with the Department, were informed:

“Kindly be advised your client’s reconsideration outcomes have been lodged with SASSA outside the 90 day period. Your clients are therefore advised to re-apply for the grant in that SASSA’s legislation does not condone late reconsideration applications.”⁷

⁵ The Department.

⁶ Namely, rejection letter from the Agency, identity document of the applicant and reconsideration outcome from the Agency.

⁷ *Sic*.

[8] The letter referred to in paragraph [7] above was penned by a certain *Tefu Khomotso*, ostensibly a Legal Administration Officer in the employ of the Department.

[9] The instant application was resorted to approximately a year after the letter of 13 October 2015 had reached the applicant. The applicant's principal contention upon which the application is founded, is that when it was, in terms of section 18(2) of the Act, incumbent on the first respondent to either confirm, vary or set aside the decision of the Agency, none of those decisions were taken, hence he now seeks, in the main, an order declaring that the failure to consider and take a decision in relation to his appeal is unlawful. Consequent upon the grant of the main prayer, the applicant seeks a *mandamus* directing the first respondent to decide on the appeal.

[10] The affidavit filed in opposition to the application is deposed to by Mr Nkosinathi Dladla, the Chief Director: Legal Services, he having been allegedly duly authorised thereto by the first and second respondents.

[11] Apart from raising mis-joinder of the second respondent and the non-joinder of the Agency, Mr Dladla dealt with the applicant's contention that there was a failure to take a decision in the following terms:

“The Minister may confirm vary or set aside the decision or appoint an independent tribunal to consider the appeal. It is denied that the respondent failed to respond to the applicant's written appeal. The applicant was notified on 13 October 2015 that he must re-apply for the grant at the South African Social Services Agency as his reconsideration was brought outside 90 day period.”

[12] At hearing stage, the dispute between the parties narrowed itself down to whether the first respondent as the statutory appellate functionary ever took a decision on the applicant's appeal. If she did, so the argument went, the

application should fail; if she did not, the application must succeed. The parties confined themselves to arguing this sole issue. *Ms Langa*, counsel for the respondents, correctly in my view, abandoned the mis-joinder contention, as indeed there is no evidence of the first respondent having appointed an independent tribunal to consider the appeal.⁸ She also did not persist in the non-joinder contention. That, too, was a calculated stance because the decision subject to the instant proceedings is clearly that of the second respondent, and not that of the Agency.

[13] From an analysis of the respondents opposing affidavit what is singularly lacking is reference to a decision as having been taken by the first respondent, either confirming or varying or setting aside the impugned Agency's decision. In his affidavit, Mr Dladla, regurgitates what section 18(2)(a) provides. He goes on to make the point that the applicant was notified to reapply for a grant as his reconsideration application was brought outside of the requisite 90-day period. The relevant annexure also does not take the matter any further. It, too, merely served to advise the applicant to reapply for the grant.

[14] In my view, there is no evidence of any decision having been taken by the first respondent in relation to the appeal that the applicant lodged.

[15] Even prior to the advent of the constitutional dispensation, powers conferred on administrators were inevitably accompanied by an implied duty to exercise the power.⁹ The enactment of the Promotion of Administrative

⁸ Apart from the confirming or varying or setting aside the Agency's decision, it is, in terms of section 18(2)(b), also available to the Minister to "*appoint an independent tribunal to consider an appeal contemplated in subsection (1A) in the prescribed manner and that the tribunal may after consideration of the matter, confirm, vary or set aside that decision.*"

⁹ Baxter L *Administrative Law*, JUTA (1984) at 414; *Chatabai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at 31; and *Luynch v Union Government (Minister of Justice)* 1929 AD 281 at 285.

Justice Act¹⁰ has perpetuated the common-law position by, *inter alia*, rendering a failure to take a decision a ground of review.¹¹

[16] In the circumstances, I find that the first respondent failed to take a decision on the applicant's appeal as contemplated in section 18(2) of the Act. Therefore, the failure to take a decision by the first respondent in relation to the applicant's appeal is unlawful, and thus liable to be set aside. The applicant is further entitled to the consequential relief he is seeking and, as a successful litigant, to an order of costs.

[17] I therefore grant the following order:

- (a) **The first respondent's failure to decide on the applicant's appeal against the decision of the South African Social Services Agency refusing to reconsider the applicant's application for a disability grant is hereby set aside.**
- (b) **The first respondent is directed to –**
 - (i) **consider and decide on the appeal within 30 days of the service of this order on the first respondent; and**
 - (ii) **inform the applicant of her (the first respondent's) decision within 7 days of such decision having been taken.**
- (c) **The first respondent shall pay costs of the application.**

¹⁰ 13 of 2004 (the PAJA).

¹¹ Section 6(2)(g) of the PAJA; the failure to take a decision amounts to a decision in terms of section 1 of the PAJA.

S M MBENENGE
ACTING DEPUTY JUDGE PRESIDENT
HIGH COURT, MTHATHA

Attorney for the applicant:

A S Zono

A S Zono & Associates

MTHATHA

Counsel for the respondent:

S E Langa

Instructed by:

The State Attorney

MTHATHA

Heard on:

07 June 2017

Delivered on:

13 June 2017