

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

CASE NO: 1679/14

In the matter between:

NONGCINUMZI TRYPHINA BOTIYANA

Applicant

And

THE MINISTER OF SOCIAL DEVELOPMENT

Respondent

JUDGMENT

PAKADE J:-

[1] This is yet another application seeking to enforce a person's right to social security brought under section 27(1)(c) and (2) of the Constitution of the Republic of South Africa¹. The relevant part of this section provides that:

" Everyone has the right to have access to - social security , including , if they are unable to support themselves and their dependents, appropriate social assistance ".

¹ Act 108 of 1996

[2] The State is enjoined to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the rights enshrined in section 27(1)(c)². In compliance with this constitutional principle, the Legislature enacted Social Assistance Act, 13 of 2004 together with regulations to regulate the grant and payment thereof to deserving qualifying persons. The purpose of the Social Assistance Act (the Act) is to enhance the effective provisioning of social assistance by providing norms and standards, standardised delivery mechanisms and a national policy to the efficient, economic and effective use of the limited resources available for social assistance and for the promotion of equal access to government services.³

[3] The Courts have had occasion to interpret s 27(1)(c) in line with the Constitution⁴ and have observed that the socio-economic rights are closely related to the founding values of human dignity, equality and freedom⁵, referred to by Justice Mokgoro in **Khosa & Others v Minister of Social Development & Others...**; **Mahlaule and Another v Minister of Social Development**⁶.

[4] The applicant, an indigent person who is also semi illiterate with poor socio economic status, applied for disability grant to the third respondent on 23 October 2013. She completed the prescribed form duly assisted by the officials of the third respondent. Her application complied with the provisions of the Social Assistance Act, No. 13 of 2004.

² S 2 of the Constitution

³ Preamble to the Social Assistance Act 13 of 2004

⁴ Ngalo v South African Social Security Agency 2013 [2] SA 347 (ECM)

⁵ S 1 of the Constitution

⁶ 2004(6) SA 505 (CC)

[5] She was then subjected to medical assessment by a doctor who diagnosed her to be suffering from diabetes (but was non- insulin dependent), high blood pressure and surgical hernia. The doctor opined that she was disabled as a result of which she could not enter open labour market. He opined that the applicant qualifies for a temporary disability grant for a period of twelve months.

[6] Subsequent to medical assessment, the third respondent conveyed its decision to the applicant by letter (dated 24 October 2013) informing her of the rejection of her application with the following reasons:

" Require a detailed Specialist Report as well as Further Management /Treatment for your no recommendation Treating Physician".

The third respondent further apprised her of a right to appeal the decision to the Minister (first respondent) within ninety days from the date of the letter. The applicant exercised her right of appeal but the Appeal Tribunal appointed by the first respondent heard the appeal and dismissed it, thus confirming the decision of the third respondent.

[7] In this application, which is a sequel to the adverse decision of the third respondent, confirmed by the second respondent, the appeal tribunal, the applicant seeks review of the decision of the appeal tribunal together with ancillary relief. She has advanced the following grounds:

- (a) The appeal tribunal failed to apply its mind, alternatively, it misconstrued the law and the facts of the matter ;(b) It failed to comply with the mandatory procedural provisions of the empowering legislation, being that for one to qualify for disability grant, one must undergo an

assessment to establish whether the disability is permanent or temporal and that if disabled whether or not she can enter the labour market.

[8] At the commencement of the hearing of this matter I raised *mero motu*, a point as to whether or not the review should not have been directed at the decision of the third respondent instead of at the appeal decision of the second respondent. Mr Mhlawuli who appeared for the applicant and Ms Ali who appeared for the respondents were *ad idem* that the review was sought correctly against the appeal decision of the second respondent. Mr Mhlawuli cited the judgment of the Constitutional Court in **Bato Star Fishing (Pty) Ltd v Environmental Affairs and Tourism and Others**⁷.

[9] Although this judgment of the Constitutional Court was *orbiter* on this point I agree that the provision of the Social Assistance Act in permitting internal appeal to the Minister intends to replace the decision of the decision maker in the department to be that of the Minister so that it becomes the final decision of the Minister's appeal tribunal that is appealable .

[10] It is therefore the decision of the Minister which is appealable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It is desirable for litigants who seek review of an administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action. Those grounds are set out in paragraph [7] above.

[11] The applicant relies on the assessment report marked NB2 to the founding affidavit which discloses that she is a known diabetic non-insulin dependent patient with high blood pressure and surgical hernia. But that assessment, save for making a finding of disability, does not go further to analyze the extent of

⁷ 2004(4)SA 490(CC); 2004(7)SA BCLR 687 (CC)

disability so as to find that the applicant cannot enter the open labour market. The finding made by the doctor that she cannot enter the open labour market has been made in the abstract without supporting jurisdictional facts.

[12] In my view the third respondent could not have been able to make a decision rejecting the application on that assessment report. The reasons given by the third respondent point at the direction the second respondent should have taken, namely, to refer the applicant to a second and independent medical examination to obtain an informed opinion. Section 18(1) of the Regulations are permissible in this respect. It provides that the tribunal must, where it is unable to make a decision due to insufficiency, inconclusiveness or contradictory nature of the information contained in a medical report provided by the Agency on the applicant, beneficiary or a person acting on his or her behalf, refer the applicant, beneficiary or a person acting on his or her behalf to a second and independent medical examination or opinion. It is clear in my view that the second respondent overlooked this regulation thus making its decision reviewable under section 6 (2)(a) of PAJA. This provision empowers the court to judicially review an administrative action if the administrator who took it was not authorised by the empowering provision or acted under a delegation of power which was not authorised by the empowering provision ; was biased or reasonably suspected of bias ; a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; the action was procedurally unfair; because irrelevant considerations were taken into account or relevant considerations were not considered - the list is not exhaustive . The provisions of regulation (18(2) were not considered by the second respondent.

[13] In my respectful view and as already alluded to above, the decision of the second respondent is reviewable in terms of the Promotion of Administrative Justice Act, No. 3 of 2000.

[14] In the circumstances, the following order is made:

(a) That the decision of the appeal tribunal in applicant's disability conveyed to the applicant by letter dated 13 May 2013 confirming the decision of the third respondent is hereby reviewed and set aside as invalid.

(b) That the applicant's appeal is referred back to the appeal tribunal with directions that it must act in accordance with the provisions of section 18 of the Regulations of 19 September 2011 and apply insofar as is applicable the whole of the regulation 18(1) to 18(10).

(c) That the second respondent must order that the applicant be referred by the third respondent, to a second and independent medical examination or opinion as contemplated in those regulations.

(d) That on receipt of the medical report on the second and independent medical examination, the second respondent must consider anew the appeal and finalise it.

(e) That the respondents are to pay the applicant's costs jointly and severally the one paying the others to be absolved.

LP PAKADE

JUDGE OF THE HIGH COURT

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Date heard : 14 April 2015

Date delivered : 23 April 2015