THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 578/09

MEMBER OF THE EXECUTIVE COUNCIL FOR SOCIAL DEVELOPMENT Appellant

and

EUNICE MDODISA Respondent

Neutral citation: *MEC for Social Development v Mdodisa* (578/09) [2010] ZASCA 115 (22 September 2010)

CORAM: Navsa, Ponnan, Shongwe and Leach JJA and K Pillay AJA

HEARD: 9 September 2010

DELIVERED: 22 September 2010

SUMMARY: Summary termination of disability grant – procedurally unfair – orders of court below not precluding the Member of the Executive Council responsible for payment of social grants from terminating a disability grant for valid reason.

ORDER

On appeal from: Eastern Cape High Court (Mthatha) (Miller J sitting as court of first instance).

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

NAVSA JA (PONNAN, SHONGWE AND LEACH JJA AND K PILLAY AJA concurring)

[1] This appeal, with the leave of the court below, is a tale of mal-administration and wasteful litigation. The appellant is the Member of the Executive Council, Department of Social Development of the Eastern Cape, who has been cited in these proceedings in his capacity as the provincial head of the department that is responsible for the payment of social grants in that province. The respondent is Ms Eunice Mdodisa, a quinqagenarian, who resides at Ncambedlana farm, Mthatha, in the Eastern Province. I shall for convenience refer to the appellant as the MEC and to the respondent as M.

[2] M has been treated since 2001 for what she alleges to be chronic asthma. She claimed that this illness has prevented her from being gainfully employed and that its disabling effect persists to this day. In 2002 M applied for a disability grant in terms of s 3 of the then applicable Social Assistance Act 59 of 1992 (the 1992 Act). She was awarded a temporary grant which lapsed on 31 October 2002.

[3] In 2003 a subsequent application for a disability grant received no official response. In 2005 she applied anew and a disability grant was apparently approved. She insisted that she received no documentation which described the nature and duration of the grant but was paid when she called at a local pay point in December 2005 to enquire about her application. In a

supplementary affidavit she stated that she was made to believe that this grant was permanent, subject only to annual review. M received monthly payments from December 2005 until April 2007. In May 2007 payments were stopped abruptly. Upon presenting herself at the pay point during that month she was told by officials there that there was no money for her. They handed her a slip which, inter alia, stated the following: 'CLIENT INFORMATION NOT IN PAY FILE'.

[4] In consequence, M instructed an attorney to launch an application in the Mthatha High Court for an order declaring the action of the MEC, in terminating her grant, to be unlawful and setting it aside. M had also sought payment of the arrears due to her from the time that payments ceased and a further order that the respondent continue paying her the monthly grant.

[5] M contended that the action of the MEC in terminating her grant, without notice to her and without providing her with an opportunity of being heard, was in breach of her right to fair administrative procedure in terms of s 3(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[1]

[6] The deponent to the affidavit filed in support of the MEC's opposition to the application is Ms Mandisa Mpunzi, who described herself as the appellant's senior manager in the Eastern Cape, operating out of an office in East London. The first point taken by Ms Mpunzi was that M's claim for payment of arrears, being a 'debt' within the meaning of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, had to be preceded by a written notice in terms of the provisions of that Act and that her failure to give such notice precluded her from proceeding against the MEC. A person who intends to institute legal proceedings against an organ of

[1] The relevant parts of s 3(2)(b) read:
'In order to give effect to the right to procedurally fair administrative action, an administrator . . . must give a person referred to in subsection (1)─
(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.'

state for the recovery of a 'debt' is obliged to give notice of such intended proceedings within a stipulated time limit.[2] Thankfully, that point was not persisted in.

[7] In respect of the merits of M's complaint that she was the victim of administrative action that was procedurally unfair, Ms Mpunzi's affidavit is singularly unenlightening, contradictory and confusing. The narrative in the paragraphs that follow is my best attempt at making sense of a garbled and non-sequential account of events.

[8] Ms Mpunzi took the view that the termination of M's disability grant was reasonable, procedurally fair and lawful. She sketched the following background. The very first grant awarded to M, in 2002, was temporary and was terminated on 31 October of that year. Insofar as the termination of the presently relevant grant is concerned she stated that it had been intended as a temporary grant of 12 month, duration to commence in November 2004 and conclude in October 2005.

[9] The disability grant was in the amount of R740 per month. According to Ms Mpunzi the monthly amounts remained uncollected for a year. A total of R8 880 was thus due to M for that 12 month period. This amount was collected by M in December 2005. Notwithstanding Ms Mpunzi's protestations that this was a temporary grant for a year, a further amount of R740 was paid to M in December 2005, in addition to the hitherto uncollected amounts. It was not disputed that payments continued from December 2005 until April 2007 and that payment of the disability grant suddenly stopped in May 2007. Ms Mpunzi's explanation for the termination of the grant is that the payments that had been made beyond the 12 month period had been made 'erroneously'. The basis for the error is not provided. Nor are we told when or how the department had first come to realise that an error had been made.

[2] See ss 1 and 3 of that Act.

[10] According to Ms Mpunzi, when it was realised on behalf of the MEC that M had received payments 'erroneously', a letter was written to her in December 2006, informing her of this fact. Yet bafflingly, the letter informed M that payment would cease in March 2007. That letter was allegedly sent by registered post. No proof of receipt by M was provided. In any event, payment continued beyond March 2007. M received her last payment in April 2007.

[11] To confuse matters even further, Ms Mpunzi, in support of her contention that M always knew that the grant she received from 2005 was temporary, alleged that on 4 October 2005 a letter had been handed to M at her local pay point informing her that her application for a disability grant had been approved with effect from 10 November 2004. A copy of the letter allegedly despatched to M indicates that the first payment was due in November 2005. The letter indicated that M's disability is of a temporary nature that would only last for 12 months. There was no affidavit by the official who allegedly handed the letter to M confirming that fact, nor was any proof provided of receipt by her.

[12] As if that was not confusing enough, Ms Mpunzi alleged that a letter had been sent to M advising her that her application for a disability grant, made in June 2005, had been rejected. In this regard, a copy of an undated letter was attached to Ms Mpunzi's affidavit. The reason given in the letter for the rejection of the application is as follows:

'Asthma and hypertension can be well controlled on regular medication, causing little, if any permanent functional impairment.'

It is instructive that Ms Mpunzi does not say when or how this letter was dispatched. Once again no proof of receipt was provided.

[13] Incredibly, yet another letter, dated 24 August 2005, was alleged by Ms Mpunzi to have been sent to M, informing her that her application for a disability grant was unsuccessful. That letter states that a medical assessment indicated that M did not qualify for a grant. This letter and the letter referred to in the preceding paragraph contain a postal address for M.

Similarly, no proof of dispatch or receipt of this letter was provided by Ms Mpunzi.

[14] Following on this remarkable story of administrative mayhem, the deponent on behalf of the respondent, even more remarkably, stated the following:

'The applicant ought to be grateful . . . that respondent has not asked her to repay the money that was not due to her.'

[15] For completeness it is necessary to record that when M applied for her disability grant in 2005, the Social Assistance Act 59 of 1992 was the prevailing regulating statute, but that it has subsequently been repealed. Section 3(a) of that Act provided that any person shall be entitled to an appropriate social grant if she satisfies the Director-General that she is disabled. The Social Assistance Act 13 of 2004 was assented to on 5 June 2004 with 1 April 2006 being the date of commencement. It repealed the earlier Act. Section 33(2) of the latter Act provides that any notice issued, any grant awarded or any moneys paid, under the earlier Act, is deemed to have been issued, made or paid under its corresponding provisions. The statutory change has no substantive effect on the present case.

[16] The court below (Miller J) held that M's belief that the grant was permanent was well-founded in that she had received 29 monthly payments. Miller J correctly took into account the MEC's failure to provide proof of receipt by M of the letter allegedly informing her in October 2005 that the grant was a temporary one. He rightly held against the MEC that there was no explanation why this letter would have been sent one year after the grant had allegedly been approved. The court below cannot be faulted for questioning why payments commenced in December 2005, which was after the date when payment was to have terminated, namely, October 2005.

[17] It was initially contended on behalf of the MEC, that since a temporary disability grant lapses by effluxion of time, a recipient like M cannot insist that fair administrative procedure be followed before it expires or even thereafter.

Regulation 24(1)(c) of the Regulations promulgated under the 1992 Act provides that a social grant, which includes a disability grant, lapses when the period of temporary disability has lapsed. Regulation 2(3), in effect, provides that a temporary grant will continue for a continuous period of six months or for a continuous period of not more than 12 months. Regulation 25(1) provides that the Director-General shall, if he or she approves an application for a social grant, inform the applicant in writing of such approval and the date on which approval was granted. Such letter should also, if applicable, inform the applicant that the grant is of a temporary nature and also when it will lapse. The letter should inform the applicant of the right to reapply after the lapsing and of the right to appeal.

[18] The court below said the following concerning temporary grants:

'A temporary grant lapses by operation of law as it is subject to a resolutive condition. Such lapsing is therefore not brought about by an administrative action and is therefore not subject to review. However, the decision to make a grant a temporary grant is administrative action and once that decision was made the applicant then had the right to receive notification of the decision and to make representations through an appeal procedure. She was denied these rights.'

In this regard the court relied on *Mpofu v MEC Department of Welfare and Population Studies, Gauteng & another* WLD 2848/99 (unreported) and on an article by N de Villiers entitled 'Social Grants and the Promotion of Administrative Justice Act' (2002 18 *SAJHR* 338). The court below concluded that the MEC was not entitled to evoke the automatic lapsing provisions of Regulation 24 referred to above and declared the MEC's decision to terminate the grant to be invalid and of no force and effect. The court below ordered the MEC to pay M's costs. It made further orders the relevance of which is dealt with below.

[19] In my view, the reasoning of the court below in relation to temporary grants, referred to in the preceding paragraph, is not contentious but is not entirely relevant. It is clear that one cannot confidently deduce from what was stated by Ms Mpunzi that any of the actions contemplated in s 3(2)(b) of PAJA to give effect to procedurally fair administrative action were taken by anyone in the MEC's department, either in relation to the initial decision concerning

the nature and duration of the grant or in respect of its termination. On the contrary, one is constrained to accept M's assertion, as the court below did, that she received no communication from the department indicating the nature and duration of the grant and that she was made to believe that the grant was a permanent one subject only to annual statutory review. It is equally clear that there was no communication about its termination nor was an opportunity provided to M to make representations before the grant was terminated.

[20] Having regard to what is set out in the preceding paragraph and the generally chaotic manner in which the disability grant in question was administered, counsel for the MEC properly conceded that the court below correctly declared the decision to terminate the grant to be invalid and of no force and effect. In the light of that concession we enquired from counsel why the MEC persisted in the appeal. Counsel submitted that the MEC was concerned about the effect of the further orders of the court below. It was contended that those orders could be construed as a permanent prohibition against any termination of the disability grant. It was submitted that the MEC was justifiably concerned about whether M's asthma was such as to have a permanently disabling effect and might be minded to take steps to terminate the grant lawfully. It was submitted that the further orders precluded such action. This is a startling submission as scrutiny of the orders in question will reveal.

[21] The further orders of the court below are as follows:

'2. The respondent is ordered to re-instate the applicant's disability grant within a period of three weeks from the date of this order, such re-instatement to be with effect from the date of the termination of payments of the applicant's disability grant, that is 31 April 2007.

3. It is declared that applicant is entitled to payment of all arrears owing under her disability grant from 01 May 2007 to date.

4. The respondent is ordered to pay the applicant all unpaid moneys owed to her as a result of the unlawful termination of the payments of her disability grant, together with interest thereon at the legal rate.'

[22] If the court below had issued only the declaration of invalidity the result would ineluctably be what is set out in the orders referred to in the preceding

paragraph. I am unable to see why they would militate against a termination of the disability grant on the basis of a legally sustainable reason. If, for example, M's asthma is shown to be treatable so that there is no functional impairment and the MEC employs appropriate procedures I can see no reason why the orders set out in the preceding paragraphs would be a bar. But there really could have been no valid objection to those orders. They were consequential upon and ancilliary to the declaration of invalidity. Once it was found that the termination was invalid, it followed that M was entitled to have her grant reinstated with retrospective effect to the date of the unlawful termination. Those orders which flow quite logically from the primary relief, as I have sought to show, do no more than put those aspects beyond dispute. They may well have been superfluous but in issuing them Miller J wisely put paid to any further litigation.

[23] The department for which the MEC is responsible has behaved peculiarly, both in relation to the manner in which the disability grant was dealt with and in the litigation that followed. The present appeal was as unnecessary and unmeritorious as the preceding litigation. Both, it must be added, at huge cost to the South African taxpayer, with no prospect, as the MEC's counsel conceded, of ever recovering any of those costs from a lay litigant who was asserting her right to fair administrative action.

[24] For the reasons set out above the following order is made:
The appeal is dismissed with costs including the costs of two counsel.

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	V S Notshe SC N R Mtshabe Instructed by S Z Jojo Attorneys Mthatha State Attorney Bloemfontein
For Respondent:	S M Mbenenge SC A M da Silva Instructed by Voyi-Nyobole Attorneys Mthatha Bokwa Attorneys Bloemfontein