THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 264/02

In the matter between

N E JAYIYA **APPELLANT**

and

MEMBER OF THE EXECUTIVE COUNCIL FOR WELFARE, EASTERN CAPE PROVINCIAL GOVERNMENT **1ST RESPONDENT**

PERMANENT SECRETARY: WELFARE OF THE EASTERN CAPE PROVINCIAL GOVERNMENT **2ND RESPONDENT**

Coram: **HARMS, ZULMAN, FARLAM, CONRADIE JJA and HEHER AJA**

Heard: **14 March 2003**

Delivered: **31 March 2003**

Summary: **Contempt of court - official of provincial government - order *ad pecuniam solvendam* - whether incarceration competent - constitutional relief - remedy given by Promotion of Administrative Justice Act**

JUDGMENT

CONRADIE JA:

[1] In the court *a quo* Ludorf J declined to issue a *rule nisi* calling upon the second respondent to explain, first, why she had not complied with an order of court granted by Moodley AJ on 23 May 2001, second, how she intended to comply with it and, last, why she should not be imprisoned for her contemptuous failure to have done so. The appeal against the refusal to grant the order is with his leave.

[2] For an understanding of how all this came to pass, it is necessary to recount some of the history. The original notice of motion sought relief not only against the second respondent who is the Permanent Secretary: Welfare of the Eastern Cape Provincial Government but also against the responsible Member of the Executive Council who was cited as the first respondent. The case made out by the appellant and not contested by the respondents is that she had in August 1999 applied for a permanent disability grant under the Social Assistance Act 59 of 1992. Nineteen months then elapsed. Despite numerous enquiries she could extract no decision from the Welfare Department. Eventually, like many far too many other welfare applicants in the Eastern Cape, she turned to the Courts. The relief she sought was the following

' 1. That the Second Respondent, or the appropriate official in his Department, be and is hereby ordered to consider and decide upon the Applicant's application for a social grant and to advise Applicant's Attorney of his decision within fifteen days of the date of this Order.

2. That in the event of the Second Respondent approving the Applicant's application for a social grant, the First Respondent be ordered to:

(a) Forward a copy of the terms of the written approval to Applicant's Attorney within

fifteen (15) days of the date of this Order.

(b) Commence payment of the grant within thirty (30) days after the date of the approval with effect from the date of approval and to continue such payments on a monthly basis thereafter for as long as the Applicant qualifies for such payments in terms of the relevant laws.

(c) Pay in a lump sum within thirty days of the date of approval the amounts which would have been paid to the Applicant as a social grant during the period commencing on the date of accrual of the grant, being 25 November 1999 and ending on the date of approval.

3. The First Respondent be ordered to pay the Applicant interest on the amounts which the Applicant became entitled to receive as a Social Grant for the period 25 August 1999 until the date of approval of the Applicant's application, such interest to be calculated at the legal rate of 15.5% per annum from the date such amounts would have been paid to the Applicant if the Applicant's grant had been approved on 25 November 1999, to date of payment.

4. In the event of the Director-General refusing the Applicant's application for a social grant, the Second Respondent is ordered to provide the Applicant's Attorneys with adequate reasons for the decision having been taken, within fifteen days of the date of the decision.

5. Granting Leave to the Applicant to supplement her Founding Affidavit in the event of this application being opposed.

6. That this Order be served on the Respondents care of the State Attorney, Port Elizabeth.

7. That the First and Second Respondent pay the costs of this application jointly and severally.

8. Granting an Order for such further and/or alternative relief as the above Honourable Court may deem appropriate.'

[3] The relief sought in prayers 1 and 4 was directed against the second respondent, that in prayer 2 against the first respondent and that in prayer 7 against both. Since the launch of the application seemed to have produced no result, an order was taken

before Moodley AJ reading as follows-

'1. That the Second Respondent or the appropriate official in his Department, consider and decide upon the Applicant's application for a social grant and to advise Applicant's Attorney of his decision within fifteen days of the date of this Order;

2. That in the event of the Second Respondent approving the Applicant's application for a social grant, the Second Respondent be ordered to:

(a) Forward a copy of the terms of the written approval to Applicant's Attorney within fifteen (15) days of the date of this Order;

(b) Commence payment of the grant within thirty (30) days of the date of the approval with effect from the date of approval and to continue such payments on a monthly basis thereafter for as long as the Applicant qualifies for such payments in terms of the relevant laws;

(c) Pay in a lump sum within thirty (30) days of the date of the approval, the amounts which would have been paid to the Applicant as a social grant during the period commencing on the date of accrual of the grant, being 25 November 1999 and ending on the date of approval.

3. That the Second Respondent pay the Applicant interest on the amounts which the Applicant became entitled to receive as a Social Grant for the period 25 August 1999 until the date of approval of the Applicant's application, such interest to be calculated at the legal rate of 15.5% per annum from the date such amounts would have been paid to the Applicant if the Applicant's grant had been approved on 25 November 1999, to date of payment.

4. That in the event of the Second Respondent refusing the Applicant's application for a social grant, provide the Applicant's Attorneys with adequate reasons for the decision having been taken, within fifteen (15) days of the date of the decision.

5. That this Order be served on the Second Respondent care of the state Attorney, Port Elizabeth.

6. That the Second Respondent pay the costs of this application.'

[4] Despite the papers served on the respondents having claimed an order that the *first* respondent make the lump sum payment envisaged in prayer 2(c) and pay the interest envisaged in prayer 3, the Court, following a draft handed up on the day of the hearing, made an order against the *second* respondent. This order was made without any allegation in the papers that she had been the one responsible for the non-payment and without notice to her that any order in this regard would be sought against her. Looking back on it, one can see how things began to go wrong even at this early stage. The second respondent should not have been cited. Presumably it was thought that the decision-maker had to be brought before the court. The Promotion of Administrative Justice Act 3 of 2000 in s 1 makes it clear that the Welfare Department is, for the purpose of the Act, an 'administrator', that is to say, an organ of State taking administrative action. 'Administrative action' in terms of s 1 of the Act means

'any decision taken, or any failure to take a decision by -

(a) an organ of state when -

(i) …

(ii) exercising a public power or performing a public

function in terms of any legislation;'

Section 6 of the Promotion of Administrative Justice Act dealing with the review of administrative action contemplates an order being granted against an 'administrator', who is not necessarily an individual.

[5] A litigant brings a national or provincial department before court by citing the political head of the department in a representative capacity. In the case of a department of the national government, this would be the responsible minister. In the

case of a provincial department it is the responsible member of the executive council. That is what s 2 of the State Liability Act 20 of 1957 provides. The first respondent should have been the only one. If this had been borne in mind at the outset, some of the procedural mishaps might have been avoided.

[6] We were told from the bar that the second respondent was substituted for the first in the draft order because the appellant's legal advisers had been informed that all the first respondent's responsibilities under the Social Assistance Act had been delegated to her. Section 16 of the Social Assistance Act makes elaborate provision for the delegation of powers by the national minister to officials of the department and to a member of a provincial executive council as well as by the National Director-General: Welfare to officials of that department and to a provincial director-general. The latter may in turn delegate these functions to any other officer of the provincial department. This does not mean, however, that an outsider in search of fair administrative action must follow the line of delegations. A political head of a department cannot delegate himself out of responsibility. Anyway, it does not matter, since, as we have seen, the administrator in terms of the Promotion of Administrative Justice Act is the organ of state, the provincial Welfare Department.

[7] Unbeknown to the applicant service of the application had stirred an otherwise terminally lethargic Welfare Department into action. By the time the order was taken a temporary disability grant for the appellant had already been approved. Had these facts been known, Moodley AJ would not have granted the orders requested in prayers 1, 2(a) and (b) and 4 of the notice of motion. That he did so is of no importance since the appellant did not seek compliance with the paragraphs in the order corresponding to

those prayers. She did, however, in due course, seek to enforce paragraphs 2(c), 3 and 6 of the order.

[8] I should, before continuing with the history of the litigation, make two or three brief and (since the matter was not argued before us) tentative comments about the relief granted in these paragraphs. The lump sum payment and interest thereon (although only characterized as such in the replying affidavit) were claimed by way of 'constitutional damages', that is to say, damages to which the appellant supposedly became entitled for an infringement of her right to lawful administrative action in terms of s 33(1) read with sections 7(2), 10, 27(1)(c) and 237 of the Constitution of the Republic of South Africa Act 108 of 1996. The impetus for this claim (which was added by way of amendment to the notice of motion) was the decision of Leach J in *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE).

[9] As appears from its preamble the Promotion of Administrative Justice Act was passed by Parliament to give effect to the constitutional guarantee of just administrative action. The appellant should accordingly have sought her remedy in this Act. 'Constitutional damages' in the sense discussed in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 826 para [69] might be awarded as appropriate relief where no statutory remedies have been given or no adequate common law remedies exist. Where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used. The Promotion of Administrative Justice Act does not provide for the kind of relief afforded to the appellant in paragraphs 2(c) and 3 of

the order. Instead, it provides in sec 8(1)(c)(ii)(bb) that a court may in proceedings for judicial review, exceptionally, direct an administrator to pay compensation.

[10] The addition of the prayers for what was called 'backpay' and interest thereon had an unintended consequence. They were predicated upon the award of a *permanent* disability grant. The grant made to the appellant was, however, a temporary one for twelve months and then only with effect from 16 May 2001. Since there could be no question of 'backpay' if the grant was temporary, this made the orders based on these prayers latently ambiguous.

[11] Paragraph 2(c) of the order purports to determine judicially the date of accrual of the grant as 25 November 1999. The difficulty with this is that regulation 11(1) of the regulations promulgated under the Social Assistance Act prescribes the date of approval of the grant as the date of accrual. To find the Court by its order changing the plain meaning of the regulation is perplexing.

[12] When the second respondent, despite further prodding by the appellant's attorney, failed to comply with the orders in these paragraphs, an application was launched for a rule *nisi* calling upon both respondents to appear personally before the Court for the purpose of -

'1.1 affording the Respondents an opportunity to present evidence, either orally on that day or by way of affidavit to be delivered no later than five (5) days prior to the date determined by this Honourable Court, on:

(i) why they have not complied with the Court Order issued by Moodley A.J. on 23 May 2001; and

(ii) how they intend complying with the Court Order

(iii) why they should not be committed to prison for contempt of this Honourable Court's Order dated 23 May 2001

2. That this Order be served on the Respondents care of the State Attorney, Port Elizabeth.

3. The State Attorney, Port Elizabeth, is ordered to ensure that a copy of this order is served personally on the two Respondents.

4. The State Attorney is to ensure that Service be effected before 21 September 2001 and an Affidavit of Service must be filed by noon on 25 September 2001.

5. That the First and Second Respondents pay the cost jointly and severally on an attorney and client scale.

6. Further and/or alternative relief.'

[13] This notice of motion suffered from many defects: It asked for relief in respect of the first respondent against whom, as we have seen, no relief had been granted; it sought relief in respect of the second respondent who had (apart from costs) already complied with what she had been required to do; it required the respondents to appear before the Court for a kind of oral examination on how they proposed going about their work in future, and, finally, ordered service on the State Attorney with instructions to see that the order was personally served on the respondents.[1]

[14] It goes without saying that the relief sought against the first respondent was bad. The appellant's advisors realised this and withdrew the contempt application against the first respondent. The contempt application against the second respondent nevertheless proceeded. In her case the application could not succeed because she should not have been a party to the proceedings in the first place and was, on top of

1 Personal service of the order was important. See: *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 para 14 (CC). Whether a court has the power to order an attorney to see to it that an order is personally served on his client is questionable.

that, sought to be incarcerated for transgressions which she was not even alleged to have committed. That it was by the appellant's advisers thought possible in law to obtain an order for her incarceration was no doubt due to certain decisions in the Eastern Cape holding that a money judgment against the State or a provincial government can be enforced by proceedings for contempt of court.

[15] Save for one exception, an order for the maintenance of one whom the judgment debtor is liable to maintain, a money judgment is not enforced by contempt proceedings but by execution. The State Liability Act in sec 3 precludes execution against the property of a provincial administration (now government), so that this avenue of obtaining satisfaction of her debt was not open to the appellant. The appellant's counsel argued that her only remedy was therefore the incarceration of the recalcitrant provincial official and that the Court should, for that reason, treat the failure by the Eastern Cape provincial government to satisfy the judgment *ad pecuniam solvendam,* in the same way as it would contempt of an order *ad factum praestandum*.

[16] The State Liability Act prohibits execution against the State or a provincial government because of the disruption which execution against State assets might cause, not because it intended to introduce civil imprisonment for officials who do not carry out obligations resting upon the State. The tenor of the Act is quite the contrary. Having provided in sec 2 that the minister of the department of state concerned be cited as nominal defendant or respondent and that 'Minister' shall, where appropriate, be interpreted as referring to the responsible member of the Executive Council of a province, sec 3 of the Act then goes on to provide that 'no execution, attachment or

like process shall be issued against the defendant or respondent in any such proceedings or against any property of the State…' The person against whom no 'attachment or like process shall be issued' is, of course, the nominal defendant or respondent. Apart from this, it seems hard that the second respondent should have to go to prison for the non-payment of her employer's debt when the Abolition of Civil Imprisonment Act 2 of 1977 prevents her from suffering the same fate for non-payment of a debt of her own. The truth of the matter is that it just did not occur to the legislators of 1957, or to those who amended the Act in 1993, that the State or a Province might not promptly comply with an order of court.

[17] Wholesale non-compliance with court orders is a distressing phenomenon in the Eastern Cape that has caused the Courts in that province to try to devise ways of coming to the assistance of social welfare applicants whom the provincial government has failed. The first such attempt was made by Jafta J speaking for the Full Court in *Mjeni v The Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk HC). At 453I-454B he reasoned that-

'[T]he common law distinction between orders *ad pecuniam solvendam* and those *ad factum praestandum* regarding contempt of court proceedings would not…make sense in cases where the State is the judgment debtor in the light of the provisions of sec. 3 of Act 20 of 1957. It would simply mean that the judgment creditor cannot enforce the judgment in the event of failure to pay whereas his counterparts would be able to do so against judgment debtors who are private persons. Effectively, it would mean those who sue the State run the risk of obtaining hollow and unenforceable judgments. The State could just ignore such judgments with complete impunity.'

The judgment was followed by Ebrahim J in *East London Transitional Local Council*

v Member of the Executive Council of the Province of the Eastern Cape for Health and others [2000] 4 All SA 443 (Ck) at 449g who thought that

'if the rights of successful litigants cannot be enforced then the process of taking disputes to court for adjudication would be rendered meaningless'.

Justification for this novel approach was said to be the constitutional requirement that the common law be developed so as (in the words of Mohamed CJ in *Amod v Multilateral Motor Vehicle Accidents Funds (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (A) at 1330A-B)) 'to accommodate changing values and new needs'.

[18] I agree with the sentiments of Mohamed CJ but I am not persuaded that the laziness and incompetence which is at the root of the malaise in the Eastern Cape Department of Welfare[2] has created a 'need' that the common law must evolve to meet. The common law cannot evolve in conflict with statute law or basic principles of law. The State Liability Act outlaws the 'attachment' of the nominal defendant or respondent in proceedings against a government department. There is nothing that any evolution of the common law can do about that. Moreover, the common law must evolve in a principled way. One of the fundamental tenets of the common law is that of legality: it cannot evolve in such a way as to (retrospectively) create a new crime or extend the limits of an existing one. This is what the decisions in the Eastern Cape appear to have done. Contempt of court, even civil contempt of court, is a criminal offence (*S v Beyers* 1968 3 SA 70 (A). The way our common law has developed, it

2 See the article by Clive Plashet 'The Exhaustion of Internal Remedies and section 7(2) of the Promotion of Administrative Justice Act 3 of 2000' (2002) 119 SALJ 50; *Permanent Secretary,Department of Welfare, Eastern Cape and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) para [8] p 1194.

can be committed only by deliberately and *mala fide* (see Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed (1997) at 825 - 827) ignoring orders of court *ad factum praestandum*; it cannot by judicial extension be made to embrace orders *ad pecuniam solvendam*. Not even the legislature can make conduct retrospectively punishable. The Constitution forbids it. An accused's right to a fair trial includes, in s 35(3)(l), the right 'not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'.

[19] I explained earlier how those orders that had not been complied with were latently ambiguous in the light of the facts known to the Welfare Department. Even if the order had come to the personal notice of the second respondent, a matter which remains uncertain, (or she had been informed of the grant of the order and had no reasonable ground for disbelieving the information) the latent ambiguity of the order to which I drew attention in paragraph [10] would have saved her from a finding that she had acted *mala fide*. The requirement that *mala fides* must be demonstrated, would in these circumstances have proved another fatal obstacle to the appellant.

[20] It is not necessary to dwell on an application by the applicant to lead further evidence. No factual material in it is relevant for a just resolution of the matter. The application is accordingly dismissed.

[21] The applicant, who had from the outset been dissatisfied with the Welfare Department's assessment of her disability as temporary, lodged an administrative appeal against the decision. The appeal was successful. As a consequence, the second respondent, on 7 November 2002, paid the applicant all the amounts envisaged in the

court order granted by Moodley AJ except the costs. Nevertheless, the contempt of court issue remained a live one so that this was not a proper case for invoking the Court's power under section 21A of the Supreme Court Act 59 of 1959 not to hear matters when the judgment or order would have no practical effect or result.

[22] The application for committal was misconceived in a number of respects. The appeal accordingly fails. The successful respondent does not ask for costs against the appellant. I should like to interpret that as a sign of remorse.

[23] The appeal is dismissed.

_____

J H CONRADIE
JUDGE OF APPEAL

HARMS JA)Concur
ZULMAN JA)
FARLAM JA)
HEHER AJA)