FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 052/2004

PARTIES**:** NOKUKU ESLINA MAKALIMA v MEC for Welfare, EC and Others

REFERENCE NUMBERS -

- Registrar: 1601/03

DATE HEARD: 21 OCTOBER 2004

DATE DELIVERED: 27 JANUARY 2005

JUDGE(S): LEACH J

LEGAL REPRESENTATIVES –

Appearances:

- for the State/Applicant(s)/Appellant(s): B HARTLE
- for the accused/respondent(s): O RONAASEN

Instructing attorneys:

- Applicant(s)/Appellant(s): MIKE RANDALL ATTORNEYS
- Respondent(s): STATE ATTORNEYS

CASE INFORMATION -

- *Nature of proceedings*: AS PER SUMMARY

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

CASE NO.: 1601/03

In the matter between:

NOKUKU ESLINA MAKALIMA Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL

OF THE DEPARTMENT OF WELFARE,

EASTERN CAPE PROVINCE Respondent

JUDGMENT

LEACH, J:

[1] Review applications brought against the Member of the Executive Council for what is now known as the Department of Social Development (formerly the Department of Welfare) in the Eastern Cape Province arising from applications for social grants, have become something of a growth industry. While the administrative sloth and inefficiency of officials in the employ of the Department is a matter that has been deprecated in a number of judgments of this Court (see eg. *S v Vumazonke* – unreported case no. 110/04 delivered on 25 November 2004 in which a number of these judgments are collected) the worrying inability of the Department to properly perform its functions continues, seemingly unabated, with hundreds of these applications being heard in our courts every month, at huge financial costs to the fiscus.

[2] But, at the same time, the word has obviously spread, that money is to be made by taking on the Department in regard to its social grants, and it is noticeable that amongst the thousands of genuinely disgruntled applicants there is an increasing number of not so genuine complaints. For example, in a matter recently heard by me, a widow who sued in her capacity as administrator of the estate of her late husband who had died some 3 years previously, sought by way of review an order for the payment of a trifling sum of money. Her claim was based upon the fact that some 5 years before his death the social grant which her husband had received for many years was not paid for 2 months - an administrative glitch which had been resolved some 8 years before the applicant launched her application.

[3] Consequently, while the vast majority of these applications are genuine and are brought to correct grave injustices being done to those who deserve better treatment from officials who are supposed to be servants to the public, it is necessary to be vigilant to ensure that the plethora of these cases does not lead to an abuse of the process of court.

[4] Bearing that in mind, I turn now to consider the issues which arise in the present matter. The applicant describes herself as being “an aged and disabled person” within the meaning of the Social Assistance Act no. 52 of 1992. On 24 June 1996, she applied for a social grant under that Act on the grounds of a lack of good health (she states that she suffers from high blood pressure and diabetes). In May 1997, after the lapse of almost a year, she was eventually awarded a monthly grant which has been paid to her ever

since. However, in September 2003, more than 6 years after this grant had come into effect, she launched the present proceedings seeking the following relief (I quote the notice of motion):

> "1. Directing that the administrative action of the Respondent, in failing to timeously consider the Applicant's application for a disability grant made on 24th of June 1996, with the said application having been only considered by the Respondent during May 1997, be reviewed;
>
> 2. Directing that the Respondent remedy the defect resulting from the administrative action by paying to the Applicant the sum of R4 960.00 which would have been paid to her as a social grant during the period 24th June 1996 to May 1997, in terms of the Social Assistance Act 52 of 1992, as if her grant had been timeously considered and approved;
>
> 3. In the alternative to prayer 2 above, directing the Respondent to pay compensation to the Applicant in the sum of R4 960.00, which would have been paid to her as a social grant during the period 24th June 1996 to May 1997, in terms of the Social Assistance Act 52 of 1992, but for the fact that her grant application had not been timeously considered and approved;
>
> 4. Directing that the Respondent pay to the Applicant interest on the sum R4 960.00 at the legal rate of 15,5% per annum calculated from the date that each monthly amount comprising the total of R4 960.00 which would have been paid to the Applicant if the grant had been timeously considered and approved during or about June 1996, to date of payment;
>
> 5. Directing that the Respondent upon payment as aforesaid inform the Applicant via her attorneys of record in writing of such payment;
>
> 6. Directing that the 180-day period envisaged in terms of Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 be extended;
>
> 7. Directing that the Respondent pays the Applicant's Costs;"

[5] I should immediately mention that once proceedings had been instituted, the respondent paid the applicant R4390,00 in respect of "accrued social grant payments". In proceeding to oppose the application, the respondent stated that this payment was not to be construed as an admission that the application had been at all well-founded, and contended that it had been

fatally flawed from the outset. Be that as it may, the effect of this payment was to reduce the capital amount in issue to R570,00 (the difference between the sum of R4960,00 set out in the notice of motion and the payment of R4390,00). Moreover, during argument the applicant's counsel, Mrs Hartle, stated that a sum in the vicinity of R440,00 included in the balance was probably also not due. She therefore only sought payment of R130,00 in respect of what she termed "back-pay" in respect of the grant.

[6] Notwithstanding the trifling amount in issue, the applicant continues to press for payment of whatever reduced amount she may be entitled to receive, as well as the ancillary relief sought in the notice of motion. In her application papers, she based her alleged entitlement to relief squarely upon the provisions of the Promotion of Administrative Justice Act no.3 of 2000 ("PAJA"). This is readily apparent from her founding affidavit which, *inter alia,* contains the following averments:

> "6. In terms of Section 1 of the Promotion of Administrative Justice Act, 3 of 2000, (hereinafter referred to as PAJA), the Department is an "administrator" and is responsible for taking administrative action, as defined therein.
>
> 7. The above Honourable Court has jurisdiction to entertain the present application in terms of the provisions of PAJA on the following grounds:
>
> 7.1 the administrative action complained of occurred within the area of jurisdiction of the above Honourable Court
>
> (*After having alleged that as a result of her disability she had applied for a social grant which was eventually approved in May 1997 and that although she therefore received regular monthly payments she was not paid any "back pay" for the period up to the date the grant was approved, the applicant continued thus*)

11. My attorneys have calculated the sum owing to me at R4960.00 which sum I submit ought to carry interest at the legal rate of 15.5% per annum, calculated from 24th June 1996 to May 1997, to date of payment. The interest I submit should be capitalised monthly. The aforesaid amount comprises:

1996	7 months @ R440.00 per month	R3 080.00
1997	4 months @ R470.00 per month	R1 880.00
TOTAL DUE		R4 960.00

12. It is respectfully submitted that this matter falls within the ambit of PAJA. The procedures adopted in summarily failing to timeously consider and approve my application were unfair and not in accordance with the procedurally fair administrative action provided for in Section 3(2)(b) of PAJA in that I was not given notice of the nature and purposes of the proposed administrative action, no reasonable opportunity to make representations, no clear statement of the administrative action, no or inadequate notice of any right or review or appeal and no or inadequate notice of the right to request reasons in terms of Section 5 of PAJA.

13. My rights *inter alia* to social assistance both under the Act and the Constitution were materially and adversely affected by the Department's failure to timeously consider my application as was my legitimate expectation that my procedural interests as provided for in Section 3 of PAJA would be protected.

14. I respectfully submit further that the administrator in failing to timeously consider and approve my application failed to follow a mandatory and material procedure prescribed by the Act and Regulations. Alternatively the said omission was otherwise unconstitutional or unlawful.

15. In the latter regard I am advised that the administrative action complained against infringed:

    15.1 my right to lawful administrative action in terms of the provisions of section 33(1) of the Constitution;

    15.2 my fundamental right in terms of section 27(1)(c) of the Constitution to have access to social security including appropriate social assistance;

    15.3 my fundamental right to human dignity enshrined in section 10 of the Constitution;

    15.4 my right to have constitutional obligations by the Department toward me performed diligently and without delay in terms of section 237 of the Constitution; and

15.5 my right to have the Department respect, protect, promote and fulfil my rights as enshrined in the Bill of Rights (section 7(2) of the Constitution).

16. I am advised that the unlawful administrative action of the Respondent's Department falls to be reviewed in terms of the provisions of Section 6 of PAJA and that I am entitled to seek the relief as provided for in section 8 of the said Act. In the latter regard I respectfully submit that it would be appropriate to set aside the administrative action and correct the defect resulting therefrom. This would entail the above Honourable Court ordering that the payments which would have been paid to me had my grant been timeously considered and approved, be paid to me for the relevant period.

17. I respectfully submit that the penury to which the Respondent's Department subjected me to during the period when my grant was not considered, and the crude breach of my fundamental rights in the circumstances described above, constitute "*exceptional*" circumstances as envisaged in terms of the provisions of section 8(1)(c)(ii) entitling the above Honourable Court to come to my assistance by restoring the *status quo ante* (i.e. correcting the defect resulting from the administrative action on the basis described above), alternatively directing the Respondent, as Administrator, to pay such outstanding amounts due to me as "compensation".

18. I respectfully submit further that it would be appropriate, whether by way of correcting the defect resulting from the administrative action, or directing the Respondent to pay me "compensation", to make allowance for interest on the payments which would have been received had my grant been timeously considered and approved, at the legal rate *a tempore morae* to date of payment. I respectfully submit that this would be just and equitable relief as envisaged both by section 8(1) of PAJA and the Constitution and would place me in the position I would have been had my rights aforesaid not been breached by the Respondent's administrative action…….

21. I am advised that in terms of section 7(1) of PAJA, any proceedings in terms of section 6(1) of the Act must be instituted without unreasonable delay and not later than 180 days after the date envisaged in section 7(1). Due to my unsophisticated circumstances, that is that I have little or no formal education, I respectfully request the above Honourable Court to extend the period on the basis that the interests of justice so require."

[7] Any doubt as to whether the applicant relied upon the provisions of PAJA is dispelled by her replying affidavit where in response to the respondent's contention that PAJA did not have retrospective operation and was therefore not applicable in this case, she replied that she had been advised that the provisions of PAJA are retrospective in operation. One can therefore safely

proceed on the basis that the applicant came to court relying upon PAJA and contending that she is entitled to the relief she seeks in terms of its provisions.

[8] The immediate difficulty facing the applicant in this regard is that PAJA came into operation on 30 November 2000, more than 3 years after the administrative actions which the applicant now wishes this Court to review were taken. It was therefore argued on behalf of the respondent that a review under PAJA is not competent and that, on such basis alone, the applicant should not be granted the relief that she seeks.

[9] In *Bullock NO & Others v Provincial Government, North West Province & Another* 2004 (5) SA 262 (SCA) at 267B-D para [7], the Supreme Court of Appeal appears to have held that PAJA did not operate retrospectively - see further: *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) at 29 and *Ntame & Others v Member of the Executive Council, Department of Social Development, Eastern Cape* (unreported judgment of Plasket J in this court in cases numbered 3667/04, 3634/04 and 3635/04, delivered on 11 January 2005). However, *in Jayiya v Member of the Executive Council for Welfare, Eastern Cape & Another* 2004 (2) SA 611 (SCA) at 618, another recent judgment of the Supreme Court of Appeal which involved the review of an administrative decision taken prior to PAJA coming into effect, Conradie JA expressed the view that the applicant should have sought relief under PAJA – which the applicant could only have done if the Act had retrospective effect. However, with due respect to the learned judge of appeal, this comment appears to have been made in passing without it having

been specifically drawn to his attention that the cause of action had in fact arisen well before PAJA came into effect.

[10] In any event, notwithstanding the appplicant's specific contention that PAJA was of retrospective effect, I understood Mrs Hartle to accept on behalf of the applicant, that the Act did not operate retrospectively. Instead, it was her argument that in terms of regulations 9(1), and 10(1) of the regulations under which the applicant had applied for her social grant (published in Government Notice R373 of 1 March 1996) the grant, when approved in May 1997, accrued to her with effect from the date her application had been made *viz* 24 June 1996. However, as the applicant had only been paid her grant from May 1997, the date upon which the application had been approved, she was entitled to receive "back pay" in respect of the period 24 June 1996 to May 1997. As no such "back pay" had been paid to her, her attorney by way of a letter dated 12 June 2003, had demanded payment thereof. This demand had not been met and, accordingly, the administrative conduct complained of embraced withholding of the so called "back pay" from the date of demand in June 2003 as an ongoing administrative action on the part of the respondent which occurred after PAJA became operational. Accordingly, so the argument went, the provisions of PAJA applied thereto.

[11] Ingenious though this argument may be, it is without any valid foundation in the papers before me. Firstly, the attorney's letter was nothing more than a letter of demand. It did not form part of the applicant's cause of action - which was a review of an administrative delay which had taken place before May

1997. The payment the applicant sought flowed from that delay, not from a failure to respond to the letter of demand. Secondly, the applicant was obliged to set out her case in her founding papers which served as both her pleadings and her evidence in regard to the issues she raised. At no stage did the applicant seek to found her entitlement to the relief she seeks in her notice of motion upon any administrative inaction on the part of the officials of the Department after her attorney's letter of 12 June 2003 had been delivered. As I have said, her case was based four-square upon the delay that occurred until her 1996 application for a grant was approved in May 1997. Not only is that abundantly clear from those passages from her founding affidavit to which I have already referred, but it is also apparent from the first prayer in the notice of motion quoted in para [4] above. The applicant cannot now set up a case in argument which was never raised or averted to in her papers. After all, one cannot expect the respondent in the opposing papers to deal with averments which had not been made in the applicant's founding affidavit - see: *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 37 - and one does not know what the respondent's answer might have been to the case counsel for the applicant now seeks to advance in argument if it had been raised in the papers.

[12] The problem seems to be that the applicant's application was not fully thought through before these proceedings were launched. Instead, it would seem, the attorney's word processor churned out a founding affidavit using a precedent commonly used in matters in which applicants complain about delays in processing their welfare applications wherein it is contended that the

prejudice caused by such delays should be corrected by the court ordering payment of an amount under s 8 of PAJA in order to place them in the position they would have been in had their grants been timeously considered and approved. This is the basis of the relief sought by the applicant here as well, as is apparent in particular from paragraphs 17 and 18 of the founding affidavit quoted above. But the wording of the attorney's precedent is inappropriate in the present case as PAJA was not of application at the time the applicant's application for a social grant was made and approved, and reliance thereon was misplaced.

[13] Although the application based upon PAJA was accordingly groundless, that does not necessarily result in these proceedings being visited with failure as, in my view, if under the common law and the right to just administrative action enshrined in our Constitution, the applicant is entitled to the relief she seeks having regard to the facts raised in the papers, this Court should come to her assistance (that appears to have been the approach adopted by Plasket J in the *Ntame* case - see in particular paras [30], [31], and [34] thereof).

[14] In considering whether the applicant is entitled to relief, it is necessary to record that her counsel, recognising the inapplicability of PAJA, did not seek to persuade me to grant an order in the precise terms of the notice of motion in which relief under PAJA was clearly envisaged. Instead, on the basis that under the regulations which pertained at the time, the applicant had become entitled to receive her grant, once approved, from the date she had first

applied for it, counsel sought an order in the following terms set out in draft order handed into court;

> "1: that the administrative conduct of the Respondent in failing to timeously process the Applicant's application for a disability grant from 24 June 1996 to May 1997, and upon approval thereof, the Respondent's failure to pay to the Applicant all the benefits due to her in terms of the Social Assistance Act, No 59 of 1992 ("SAA") from date of accrual of the grant to date of payment thereof, is declared unlawful
>
> 2: that the Respondent is directed to pay to the Applicant the amount which fell due to her upon approval of her application for social grant in terms of the SAA, calculated from the date of accrual of the grant in terms of the 1996 regulations to date of approval thereof, taking into account the payment by the Department of Social Development to the Applicant in January 2004 of the sum of R4 390,00;
>
> 3: that the Respondent is directed to pay to the Applicant interest *a tempore morae* on the accrued social grant benefits payable to the Applicant on the date of approval of her grant, calculated from the date of approval of the grant in May 1997 to date of payment, at the legal rate of 15.5% per annum;"

(I must immediately comment that during the course of argument, applicant's counsel, for the reasons mentioned in para [5] above, conceded that the amount claimed in paragraph 2 of this draft should most probably be reduced to R130,00).

[15] The immediate difficulty that I have with granting this relief is that the review of the delay in approving the grant sought in paragraph 1 of this draft is in no way determinative of the applicant's entitlement to payment claimed in paragraphs 2 and 3 thereof. Under the regulations in force at the time, once her grant had been approved the applicant became entitled to payment

thereof with effect from the date upon which she had applied for it. Whether it took those responsible one month or one year to approve the grant is, at this stage, immaterial. The important thing is that the grant, when ultimately approved, accrued with effect from the date she had applied for it. No purpose whatsoever would therefore be served reviewing the Department's alleged unreasonable delay in considering and then approving the grant as this would clearly be a moot issue which would be academic and of no practical effect. A case is moot and not justiciable if it no longer presents an existing or live controversy which should exist if a court is to avoid giving advisory opinions on abstract propositions of law - see the comment of Ackermann J in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) (SA) 1 (CC) at 18-19 para [21] and footnote 18 thereto; see further the *Ntame* case, *supra* at paras [8] and [9] and the authorities cited in footnote 3 thereto. In the light of this, there is no reason for this court to consider whether the department's delay in approving the grant should be reviewed or not.

[16] I also have difficulty in regard to the second part of the order proposed in paragraph 1 of the draft, namely, the review of the failure to pay the applicant all the benefits due to her under the Social Assistance Act of 1992 once her grant had been approved. Her entitlement to receive her "back-pay" under the regulations and the Department's failure to pay it did not constitute the basis upon which these proceedings were based - which, as I have repeatedly mentioned, were founded squarely on a purported review under PAJA of the delay in approving her application for a grant. The fact that the applicant

became entitled ***under the regulations*** to receive payment of the sum with effect from the date she had applied for the grant, and the amount of the sum that she should have received in respect of so called "back-pay" were never raised as issues in the papers. As I have attempted to point out, the applicant alleged in paragraph 11 of her founding affidavit that her attorneys had calculated a sum "owing" of R4960,00 in respect of the period 24 June 1996 to May 1997. In doing so, she claimed for seven months at R440,00 per month for the year 1996 (which presumably means that she claimed for the entire month of June as well). This amount she claimed as an amount to correct the penury to which the department subjected her during the period when her grant was not considered. One knows that after the institution of proceedings the respondent paid an amount of slightly less than the amount claimed without indicating how it was made up, but its failure in that regard was probably due to the applicant not having specifically couched her claim as being one which lay under the regulations rather than under PAJA. The issue as to precisely what sum she had become entitled to receive on the date her grant was approved in respect of "back-pay" was thus never properly raised as an issue in the papers, and is therefore not something which this court was called upon to decide. One does not know what the respondent's case may have been had the applicant's case regarding her "back-pay" been properly set out from the outset, but it does not seem to me to be permissible to allow the applicant now, for the first time, to make out a case which is not suggested in the papers in order to claim relief which is not set out in the notice of motion and was sought for the first time in argument.

[17] That brings me to the relief in paragraphs 2 and 3 of the draft. An immediate difficulty facing the applicant in that regard is one of prescription. Her entitlement to payment of the amount of the grant in respect of the period from the date from when she applied for it to the date it was approved, arose in May 1997 when it was approved. Payment of the grant during that period was enforceable *ex lege* under the regulations as soon as the grant was approved. The term "debt" in the Prescription Act of 68 of 1969 must be given a wide and general meaning and, for the purposes of s 12(1) of that Act, it includes an obligation to effect payment of a sum of money - see *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at 627-628 para [6]. It seems to me to be clear that the debt for so called "back pay" which became due under the regulations when the applicant's grant was approved in May 1997, was a debt as envisaged by s 12(1) of the *Prescription Act of 1969* and would therefore have prescribed three years later, in May 2000 - compare *Ntame's* case *supra* at [9] - unless of course prescription had been interrupted. It is apparent from the judgement in the *Ntame* case, *supra* that Plasket J would have had little difficulty in non-suiting the applicants in that case had the respondent raised the issue of prescription (which, fortunately for them, the respondent did not). But in the present case, the respondent has specifically alleged that the applicant's claim has prescribed. In reply to this, the applicant alleged that her constitutional rights do not prescribe and that reliance upon prescription was opportunistic in nature. This overlooks the fact that her claim arose in May 1997 and, for the reasons I have already mentioned, was in no way reliant upon this court finding that the administrative action about which she complained *viz* the delay in approving

her grant, offended her constitutional rights. The applicant has not sought to contend that the running of prescription has been interrupted in any way, and this appears to me to be a case in which her claim for payment of her "back pay" under the regulations, (and of course the interest thereon) for the period between the date of her application, and the date such grant was approved, has now prescribed.

[18] But there is further fundamental reason why she should not succeed in these proceedings. As I have said, she now seeks to enforce the department's liability to her under the regulations, a liability which arose *ex lege* in May 1997. It is apparent that the amount of that liability was but a few thousand rand and there is no reason why the applicant could not have instituted action in the Magistrate's Court by way of a simple summons to claim what amounts to a liquidated sum. Not only was her claim in respect of this liability not dependant upon the review in the form it was launched but it is generally inappropriate for an individual to bring a claim for economic loss as a result of administrative action by way of judicial review - see Hoexter *The New Constitutional & Administrative Law Vol:2 at 282 and 294.*

[19] Be that as it may, in the light of what I have set out above, there is no reason for this court to review the delay on the part of the department to consider and approve the applicant's application for a grant. With regard to the question of payment of the amount claimed and interest thereon, claims should not have been brought in these proceedings by way of review but

rather by way of action in the Magistrate's Court. In any event, they appear to have prescribed. For the reasons I have set out, these entire proceedings were ill conceived and show a lack of appreciation of the real issues in this case.

[20] The applicant has therefore failed to make out a case for the relief which she seeks. The application is therefore dismissed, with costs.

_____

L. E. LEACH

JUDGE OF THE HIGH COURT

SUMMARY

Social assistance – delay in processing application for social grant in terms of Promotion of Administrative Justice Act – actions complained of occurred before commencement of Act - Act having no retrospective effect – PAJA therefore inappropriate.

Cause of action under PAJA relied upon - cannot in argument rely on breach of constitutional rights and entitlement to back pay under Social Assistance Act regulations when that not raised as an issue – in any event, review of delay in processing application for a grant serves no purpose if entitlement to back pay flows from regulations .

“Back pay” under the regulations is a debt as defined in Prescription Act and as a result claim prescribed – in any event, generally inappropriate for individual to claim for economic loss due to administrative action by way of judicial review – should have employed action proceedings – Application dismissed with costs.