Possibly reportable

In the High Court of South Africa
(Eastern Cape Division)

Case No 1241/2006
Delivered: **04/12/06**

In the matter between

NTHABISENG GLADYS MABETHU **Applicant**

and

THE MEMBER OF THE EXECUTIVE COUNCIL
OF THE EASTERN CAPE GOVERNMENT **Respondent**

SUMMARY: Judicial review – an application for a disability grant having been dismissed, the applicant appealed to the Minister and, on appeal, was given a temporary disability grant but not a permanent disability grant – the applicant alleged a statutory entitlement to a permanent disability grant – her application was granted for a review of the decision on appeal.

JUDGMENT

JONES J:

[1] The applicant is an adult woman who lives with her two children in Barkly East, a small rural town in a remote part of the Eastern Cape Province. On 11 July 2005 she applied for a grant for a disabled person in terms of the Social Assistance Act No 59 of 1992. Section 1 of the Act defines a disabled person as 'any person who has attained the prescribed age and is, owing to his or her physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance'. The applicant considered that her ill health qualified her for a grant in terms of this definition.

[2] In December 2005 she was advised that her application had been turned down. She appealed to the respondent in terms of the appeal procedure laid down in section 10(1) of the Act. Her appeal was based on grounds set out in a letter from her attorneys, to which was annexed a report in the form of a letter from her doctor setting out her medical history in some detail and expressing the opinion that the applicant, who has been subsisting since 2002 on regular food parcels, clothing and blankets from a local organization called Thusananga Home Based Care (which I shall call 'Thusananga'), is by reason of her medical condition not fit for work. In February 2006 she was advised that her appeal had been considered and was successful to the extent that the respondent had approved a disability grant for a period of 12 months. This amounted to a finding that the applicant was indeed disabled and that she qualified for a disability grant in terms of the Act and the regulations. The regulations make provision for two kinds of grant – a temporary disability grant where the disability will continue for not less than 6 months and not more than 12 months, and a permanent disability grant where the disability will continue for more than 12 months.[1]

[3] The respondent's decision, then, was that the applicant was entitled to a temporary disability grant, and not a permanent disability grant. The applicant's contention was that she is permanently disabled and that she has a statutory entitlement to a permanent disability grant. She therefore brought the respondent's decision on review. The decision was not made by the

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[1] Regulation 2(3)(i) and (ii) of Government Notice R418 of 31 March 1998.

respondent personally, but by an official to whom she has delegated her appeal jurisdiction, as she is entitled to do under the Act.

[4] The review was brought on a number of grounds. The main ground, and the thrust of the applicant's argument before me, was that the respondent's delegate had made his decision on the basis of incorrect information. The argument was that the Act does not give the delegate a discretion to decide whether or not on the facts an applicant for a grant was permanently disabled. This is an objectively determinable jurisdictional fact upon which the right to a permanent disability grant depends. The information placed before the delegate was that the applicant was not permanently disabled. This was factually incorrect, and it precluded the respondent's delegate from considering the application in the light of the true facts. He could not therefore have applied his mind properly to the matter.

[5] Before dealing with this issue, I believe that it will be useful to clear the air by considering certain other issues. In the first place, the sufficiency of the information placed before me has been called to question. The applicant was criticized for failing to place before the court the initial application for a disability grant which was rejected. Without it, the respondent argued, the court does not have before it all the information which was before the respondent's delegate, and is not in as good a position as he was to consider the matter. Second, the report by one Dr O'Brien, who considered the appeal documents on behalf of the respondent and who made a recommendation to the respondent's delegate, is not part of the application papers. The applicant

delivered a rule 35(12) notice calling for it, but it has not been produced. In my view, these shortcomings, if shortcomings they be, do not preclude me from dealing with the substantive issue. The initial application for a grant is not the subject of the application for review. It is the decision on appeal with which I am concerned. The original application was granted on appeal, but to a limited extent only. There being no suggestion that its contents have bearing on whether the grant should have been temporary or permanent (which is fully canvassed in the papers before me), its contents fall out of the picture. As for the report by Dr O'Brien, her views on the matter were placed before the court in a comprehensive affidavit. The applicant did not seek a postponement for the production of the report. The respondent made nothing of its absence. It need not detain me further.

[6] The second preliminary point arises from a submission by the respondent that the applicant did not make out a case in her founding papers for the relief she now seeks, and that she cannot be permitted to do so in reply. The complaint was that the only reference to the original application for a grant in the founding papers is a cryptic note in the clinical record which stated that application for a grant was made on the strength of three particular medical complaints. The respondent argued that these must be taken as the only three grounds relied upon, and the applicant is not entitled to go beyond them. It was also suggested that the applicant did not make out a case that she cannot work by reason of her medical condition. In addition, the respondent submitted that the application papers fail to satisfy all the requirements of the regulations for the relief sought. These submissions are

without substance. The application before me is not for a review of the initial refusal. It is for a review of the decision of the delegate on appeal. The founding affidavit made all the necessary allegations for such a review. Reference to the requirements of the regulations is a red herring. Whatever the requirements for the original application may have been and whatever shortcomings in the initial application there may have been, they are no longer relevant because it was ultimately common cause that the applicant was entitled to a disability grant.

[7] I now return to the main ground of review. The respondent argued that the application is really an appeal on the facts disguised as a review. That is not so. This is a review based on an incorrect premise relating to the existence of a necessary pre-condition for granting a disability grant. There can be no talk of a *just* administrative decision if it is based upon a fundamentally wrong premise of this nature. In recent times, the cases have referred to this ground of review as a review based on a material mistake of fact (*Pepcor Retirement Fund and another* v *Financial Services Board and another* 2003 (6) SA 38 (SCA) para 47; *Foodcorp (Pty) Ltd* v *Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management, and others* 2006 (2) SA 191 (SCA)). But this does not make it an appeal on fact. It remains a review (see the *Pepcor Retirement Fund and another supra* para 48).

[8] In the *Pepcor Retirement Fund* judgment *supra* Cloete JA said in paragraphs 47 and 48:

'[47] In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, *inter alios*, the functionary who made it - even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure*[2], *Sarfu*[3] and *Pharmaceutical Manufacturers*[4] requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as *ultra vires*.'

[48] Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide. Of course, these limitations upon a reviewing Court's power do not extend to what have come to be known as jurisdictional

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2 [*Fedsure Life Assurance Ltd and Others* v *Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); (1998 (12) BCLR 1458)]

3 [*President of the Republic of South Africa and Others* v *South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); (1999 (10) BCLR 1059)]

4 [*Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); (2000 (3) BCLR 241)]

> facts and, in my view, it will continue to be both necessary and desirable to maintain that particular category of fact. I am therefore, with respect, unable to share the opinion of Professors Wade and Forsyth (quoted in para [39] above) that one can safely 'consign much of the old law about jurisdictional fact, etc, to well-deserved oblivion' if by that statement is meant that the distinction between appeal and review will be eliminated. In the present appeal none of the considerations to which I have referred in this paragraph of the judgment arise. The Registrar was entitled to act on the assumption that the correct facts had been placed before him.

[9] This passage from the Supreme Court of Appeal judgment sets out the approach that I must follow. In my opinion, Mr *Budlender* was correct in his argument on behalf of the applicant that the fact of being permanently disabled is a jurisdictional fact which entitled the applicant to a permanent disability grant. This was not something to be decided upon by the respondent's delegate in his discretion in the light of policy considerations. It is a fact which is established by the evidence. The respondent's delegate was advised by Dr O'Brien that the applicant was not permanently disabled. He made his decision in the light of that advice. If she is in fact permanently disabled within the meaning of the Act, the applicant is entitled to an order on review correcting the decision.

[10] The unchallenged evidence was that the applicant is a single mother with two dependent children. She is the only adult in the household. She is unemployed, and is precluded by defective eyesight (caused by pterygium) from earning an income through doing beadwork and other similar local industries which would otherwise have been available to her. She was diagnosed as HIV positive in May 2002. She has since then been under the

care of Dr Clare Murphy, a registered medical practitioner who is the medical director of Thusananga, a non-profit organisation which operates in Barkly East. She has been totally reliant on regularly food parcels, clothing and blankets which she received from Thusananga. Her medical records since May 2002, which were made part of the evidence, show frequent and regular bouts of ill health, some of which were HIV related. According to Dr Murphy her series of illnesses have caused significant pain and have had a debilitating impact on her ability to function. In her affidavit annexed to the founding papers Dr Murphy expressed the opinion that the applicant was unfit to work and permanently disabled due to her medical problems (including but not limited to her HIV status). In elaboration and in specific reply to the affidavit by Dr O'Brien, Dr Murphy described the applicant as 'a very sickly individual who is always either battling with a medical problem that has left her incapacitated or recovering from a recent episode or attack'. She expressed the following medical opinion:

> 'It is my considered medical opinion based on my observations and experience in treating [the applicant] over several years, that her general state of health is so poor that she should be considered permanently disabled, as her medical problems occur in such succession that she is simply unable to maintain employment. As appears from her clinic record . . . she is under continual treatment, and all I am able to do is to try to assist her to manage her condition of continuing poor health'.

Dr Murphy also testified that the applicant's disability has continued for more than a year, and there is no sign that it is about to come to an end, either now or in the foreseeable future.

[11] The affidavits of the applicant and Dr Murphy proved the lack of employment opportunities in Barkly East, particularly for a person in the position of the applicant who is qualified for manual work only, whose frequent and regular bouts of illness make it impossible to keep ordinary employment hours, and whose medical condition prevents her from participating in community based employment projects such as beadwork, metal work or sewing.

[12] To sum up, the unchallenged evidence on behalf of the applicant established that

(a) the applicant's physical condition renders her totally unemployable,

(b) there are no realistic prospects of improvement;

(c) she is therefore permanently disabled and permanently unemployable;

(d) she is in fact unemployed and unemployable in the area where she lives;

(e) she has been able to subsist only with the help of food parcels and the like received from Thusananga since 2002.

In short, the applicant was shown to be a person who is, owing to her physical disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable her to provide for her maintenance. She is a disabled person as defined in section 1 of the Act. Her disability has endured for more than 12 months and is therefore permanent. Her condition will probably not improve.

[13] In answer to the evidence adduced by the applicant, the respondent relied on an affidavit by Dr O'Brien. This affidavit provided a commentary on the evidence of the applicant and Dr Murphy with respect to the applicant's condition. It was based on theory, and sought to explain the applicant's condition. It did not contradict any of the facts proved by the applicant. It did, however, express opinions which differed from Dr Murphy's views on certain points. These opinions are, so to speak, expressed in a theoretical vacuum and do not carry as much weight as Dr Murphy's opinions because Dr O'Brien did not have the advantage of examining the applicant even for the limited purpose of compiling a medical report. On the other hand, the applicant has been under Dr Murphy's personal care since April 2002, which gives Dr Murphy a decided advantage. I have no alternative but to prefer the views of Dr Murphy, which are backed up by hands on experience and sound reasons, to those of Dr O'Brien where their opinions differ. The conclusion to which Dr O'Brien came, i.e. that the applicant's disability would endure for less than 12 months and was hence temporary and not permanent, was not only based on theory rather than examination, diagnosis and treatment. It was also clearly wrong on the facts. So was the recommendation she made to the respondent's delegate. The result is that the respondent's delegate based his decision on the wrong facts.

[14] The way in which the respondent and Dr O'Brien's affidavits have been worded, and the way in the respondent's case has been conducted and argued, satisfy me that the respondent has attempted to answer the applicant's case by adopting a wrong approach to her allegations. The

applicant's case on review is that since 2002 she has been permanently disabled because of the total effect of her poor state of health, including but not confined to her HIV status. Both Dr O'Brien's affidavit, and Mr *Bloem*'s argument before me, did not deal with her case holistically in the light of her history. They isolated four points, which they suggested were the basis of the application for a grant, and attempted to establish that none of them justified a permanent disability grant. No consideration was given to the real basis of the claim before me. This was that the applicant is an individual person with a unique combination of recurring and developing medical problems over a long period of time, which, taken together as a whole, make it plain that she is in poor health and is permanently disabled and unemployable in consequence. That this, rather than just pterygium, cervical intraepithelial neoplasia and her HIV status looked at individually, is indeed the basis of her case is clear from a reading of the founding papers in the review application as a whole, and is emphasized in reply. On the other hand, the respondent's approach in the opposing papers is piecemeal. It is

(a) that pterygium is a treatable eye condition, and is therefore not permanent;

(b) that the plaintiff underwent a cervical intraepithelial neoplasia in which pre-malignant cells were removed and which resulted in a cure, not a disability;

(c) that the applicant's HIV status is not so bad as to give rise to permanent disability status; and

(d) that, for the rest, the applicant suffers from ordinary day to day ailments from which everybody suffers.

From this, Dr O'Brien concluded and Mr *Bloem* argued that the applicant was not permanently disabled.

[15] The fact of the matter is that whatever the text books may say about pterygium being treatable, in the applicant's case the treatment (eyeglasses, a variety of ocular lubricants, antihistamines and decongestants) has not worked, and the applicant suffered from the debilitating effect of defective vision and pain for a period demonstrably well in excess of the 12 month period that is the yardstick in the regulations for permanent disability. Dr O'Brien's opinion did not and could not disprove this. Dr O'Brien did not go so far as to suggest that the applicant's HIV status is irrelevant because the CD4 count is not yet at critical stage. She did not suggest that it is not permanent, and that it does not impact upon the applicant's general health. But she did not look at the effect of the HIV condition on the applicant's general state of poor health. Dr Murphy explained that the health of a person in the applicant's position is

> 'like being on a 'roller coaster ride' where one experiences significant variations in ability and health that drastically affect one's ability to work.
> The progression and impact of the virus on an individual's llifestyle varies from person to person. It is necessary in any individual case to have regard to how her HIV condition interacts with her general state of health.

The removal of the pre-malignant cervical cells, and the recent tonsillitis and transient ischaemic attacks (the two last mentioned episodes occurred after Dr O'Brien gave the matter her attention) and the whole series of 'ordinary ailments', should be looked upon as illustrative and symptomatic of the applicant's extremely poor general health as described by Dr Murphy. In the

light of the aforegoing, to suggest, from an examination of certain aspects of the applicant's condition viewed in isolation, that she is not permanently disabled is insupportable and patently wrong. So is the suggestion that the applicant suffered from a series of everyday complaints which everybody has. The permanent character of her disability is unquestionably and overwhelmingly established by the evidence of her general state of health. The respondent has not been able to contradict it.

[16] The logic of Mr *Bloem*'s argument and Dr O'Brien's recommendation is also flawed. If, as they would have it, the pterygium was treatable, if the surgery cured the pre-malignant condition of the womb, if her 'body has not been rendered . . . so weak by her HIV illness that she is physically disabled to work to provide for maintenance' (to quote Dr O'Brien), and if the rest of her ailments are ordinary ailments from which everybody suffers from time to time, on what possible basis was the applicant classified as disabled? Dr O'Brien's conclusion is inconsequential. It makes no sense. This carries through to the decision by the respondent's delegate which is based upon her recommendation. It has no rational basis.

[17] Counsel for the applicant argued in the alternative that even if the respondent's delegate had a discretion to decide upon the question of the applicant's state of health, the decision that the applicant was not permanently disabled was so unreasonable that no reasonable decision maker would have taken it (section 6(2)(h) of the Promotion of Administrative Justice Act No 3 of 2000.). I am of the view, for the reasons given above, that this submission is

sound. A reasonable decision maker who looks at the whole picture presented by the applicant's circumstances and her general health in the light of the history of the past few years and the opinion of her doctor, based as it is on 4 years of examination and treatment, could not conceivably come to the conclusion that she is not permanently disabled within the meaning of the Act.

[18] In the result the application for review is granted. The following order will issue:

1. The decision of the respondent taken in February 2006 that the applicant is not entitled to a permanent disability grant in terms of the Social Assistance Act No 59 of 1992 because she is only temporarily disabled is set aside.
2. A declaratory order will issue that the applicant is permanently disabled and entitled to a permanent disability grant in terms of the Social Assistance Act No 59 of 1992.
3. The respondent is directed pay to the applicant a permanent disability grant in terms of the Social Assistance Act No 59 of 1992 with effect from July 2006 (the date of cessation of the temporary disability grant).
4. The respondent is ordered to pay the applicant's taxed party and party costs.

RJW JONES
Judge of the High Court
26 November 2006