FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ. NO 72

MEMBER OF EXECUTIVE COUNCIL FOR WELFARE

And

DELIWE MURIEL NJONGI

(Reportable)

REFERENCE NUMBERS -

- Registrar: **CASE NO: 62/06**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court:

DATE DELIVERED: **Wednesday 6 December 2006**

JUDGE: **Judge Leach**

LEGAL REPRESENTATIVES –

Appearances:

- for the State/Applicant(s)/Appellant(s)/Plaintiff: **Adv Ronaasen**
- for the accused/respondent(s)/Defendant: **Adv Hartle**

Instructing attorneys:

- Applicant(s)/Appellant(s)/Plaintiff**: Mloyeni & Lesele Inc**.
- Respondent(s)/Defendant: **Randall-Oswald c/o Nettletons**

CASE INFORMATION -

- *Nature of proceedings*: As per summary
- *Topic*:

THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CASE NO: CA:62/06

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR WELFARE **Appellant**

and

DELIWE MURIEL NJONGI **Respondent**

JUDGMENT

Applicant's social grant invalidly terminate but subsequently restored – applicant, after a delay of more than 3 years, bringing a review to recover the amount she was not paid after her grant was stopped and before it was reinstated – monetary claim held to have prescribed – review should therefore not be entertained as brought solely to recover the amount due and is, in the circumstances, purely academic.

LEACH, J:

The respondent, who was the applicant in the court *a quo*, suffered the misfortune of having a disability grant withheld from her for a lengthy period.

Although it was re-instated and she was paid a portion of the amount which had been withheld she subsequently brought proceedings against the appellant in which she sought a review of the decision to stop paying her the grant, coupled with an ancillary monetary claim for payment of the balance of amount she should have been paid after it was stopped and before it was reinstated. Both these claims were upheld but, with the leave of the learned judge in the court *a quo*, the appellant appeals to this court, contending that the monetary claim was unenforceable due to prescription, that the lawfulness of the decision to stop payment of the grant was therefore academic, and that the relief sought in the court *a quo* should therefore have been refused.

The material facts and circumstances appear to me to be as follows:

(a) The respondent, who suffers from a disability, successfully applied for a disability grant in 1989 which was thereafter paid to her each month until November 1997 when suddenly, and without notice to her, such payments ceased. When she queried this, officials in the appellant's department told her to re-apply for a grant. She did so in January 1999 and, in July 2000, it was reinstated. At the same time, she was paid R1 100,00 in respect of so called "back pay".

(b) At some stage thereafter, the respondent consulted with an attorney who calculated that the total amount of the grant that she should have been paid during the period November 1997 to July 2000 came to R16 300,00 – so that taking into account the sum of R1 100,00 that had been paid, an amount of R15 200,00 was still due to her. For

convenience I shall refer to the amount owing in respect of her unpaid disability grant as the "arrears".

(c) Accordingly, on 10 February 2003, the respondent's attorney addressed a letter to the regional director of the appellant's department, claiming payment of R15 200,00 together with interest thereon. He also gave notice of his intention to institute proceedings for the recovery of that sum should it not be paid within 10 days. No such payment was forthcoming. However, despite the threat to institute proceedings after 10 days, it took some fifteen months before the respondent's attorney instituted the present proceedings in May 2004.

(d) When the respondent eventually did proceed, and despite her claim being for a relatively small liquid amount, she did not issue a simple summons for the payment of moneys due (which could have been done in the magistrates' court). Instead, she proceeded in the High Court seeking a review of the decision to stop paying the respondent's monthly grant and a further order that she be paid the arrears. In doing so, she relied, incorrectly, upon Act 3 of 2000 (commonly known as "PAJA") which were of no relevance as her cause of action had arisen years before it was promulgated and its provisions are not retrospective in effect.[1]

[1] Despite the respondent's ill-founded reliance upon PAJA, the learned judge in the court *a quo* dealt with the matter as if it was a review under the Constitution and common law and that the references to PAJA were superfluous. As his decision in that regard was not attacked on appeal, I intend to proceed by assuming, but not deciding, that he was correct in this approach.

(e) The appellant limited the presentation of his case to filing a notice[2] detailing a number of legal points to be raised in opposition to the application. These included, in particular, an allegation that the claim for payment of the accrued arrears of R15 200,00 had prescribed and that, in the circumstances, no purpose would be served by reviewing the alleged unlawful administrative action taken in November 1997 as it would have no practical effect.

(f) In addition, the appellant not only drew attention to the irrelevance of PAJA in this notice but also contended that the court should not entertain the review as it had not been brought within a reasonable time. This led to a flurry on the part of the respondent's attorney who filed an affidavit explaining that at least a substantial proportion of the delay after he had written the letter of demand had been due to the fault of a professional employed in his office and was not attributable to the respondent.[3]

(g) Although the opposition to the respondent's claim was based solely on the aforementioned notice, the appellant made a further payment of R9 400,00 to the respondent after the proceedings were instituted.[4] It is accepted that this related to the period during which the arrears had accrued and therefore reduces the amount of those arrears still in issue to R5 800,00.

(h) When the matter was heard, the learned judge in the court *a quo* condoned the respondent's delay in launching the application. In

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[2] Under rule 6(5)(d) (*iii*).
[3] Of course, if the claim has prescribed it matters not for present purposes whether the delay was due to fault on the part of the respondent, her attorney or a member of the latter's staff.
[4] The inference is irresistible that the payment was only made as a result of the respondent having launched proceedings.

addition, as the appellant had at no stage sought to uphold the decision to stop the grant payments to the respondent, and as the respondent's disability grant was terminated without complying with the rules of natural justice, the learned judge declared the appellant's administrative action suspending or terminating such grant to have been invalid. He also dismissed the contention that the claim for payment of R5 800,00 had prescribed, and held the appellant liable to pay that sum to the respondent. With leave of the court *a quo*, the appellant now appeals to this court against that decision.

The first and most important issue to be considered is the learned judge's conclusion that the respondent's claim for payment of the arrears had not prescribed. As an axiomatic consequence of the principle of legality, an unlawful administrative action is a nullity, devoid of legal effect – *quid fit contra legem est ipso jure nullum*[5] - and the decision to stop paying the respondent her monthly grant was therefore void *ab initio.* Consequently, as the grant was not validly terminated, the respondent should have been paid monthly amounts totalling R16 300,00 during the period in question. That sum was due to her in July 2000, and the respondent could have instituted proceedings to claim that sum from the appellant at that stage. She did not do so, and delayed taking action for almost four years.

Extinctive prescription commences to run under s 12(1) of the Prescription Act of 1969 as soon as a debt is "*due".* As the term *"debt"* is not defined in the

[5] See: *Strydom v Die Land en Landboubank van SA* 1971 (2) SA 449 (NC) at 453 and Baxter *Administrative Law* at 355.

Act, it has persistently been held that it must be given a wide and general meaning and includes an obligation to do something, whether by payment or by the delivery of goods or services.[6] It would therefore include an obligation to pay a disability grant.

There is, of course, a vital difference between the existence of a debt and it being recoverable. Prescription begins to run, not necessarily when the debt arises, but only when it becomes due[7]. Thus, in *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty)Ltd* 1991 (1) SA 525 (A) at 532 the court held that for prescription to commence running there had to be a debt immediately claimable by the debtor.[8] Prescription therefore commences to run when a debt is both owing and recoverable.[9]

As the decision to stop the respondent's monthly disability grant was invalid, it ought to have been paid to her in the period November 1997 to July 2000 and was claimable and recoverable on the latter date. Nothing occurred from then until the date upon which proceedings were instituted which altered that position in any way and, indeed, as I have said, the respondent could have brought these proceedings in July 2000. If summons had been issued to claim payment of the arrears and the appellant had pleaded that it had

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[6] See for eg *Electricity Supply Commission v Stewarts & Lloyds of SA* (*Pty)Ltd* 1981 (3) SA 340 (A) at 344, *CGU Insurance Ltd v Rundel Construction (Pty)Ltd* 2004 (2) SA 622 (SCA) at 627-8 para [6] and LAWSA vol.21 at 55 para:142.

[7] *Apalama H v Santam Insurance Company Ltd*. 1975 (2) SA 229 (D) at 232.

[8] Compare further; *Benson v Walters* 1984 (1) SA 73 (A) at 82 and *Desai v Desai* 1996 (1) SA 141(A) at 146-147.

[9] *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA).

lawfully terminated the disability grant, it would have been necessary to decide that issue[10] (albeit, if summons had been issued in the magistrates' court it would have required a stay of these proceedings for a review of the decision to be determined by a higher court). But if no such defence was offered, judgment could have been entered in the respondent's favour in regard thereto and it would not have been necessary to review the decision to stop paying the grant.

Consequently, in my view, a claim for payment for the amount of the disability grant which was not paid to the respondent from November 1997 to July 2000 was "due" in that it was owing and claimable at the instance of the respondent on that latter date when, at the latest, prescription commenced to run. That being so, as more than three years had elapsed before present proceedings were instituted, the respondent's monetary claim had prescribed and become unenforceable by then.

The effect of the decision in the court *a quo* appears to be that prescription could not run against the respondent until the decision to terminate her monthly grant had been reviewed and set aside. If that approach is to be upheld, the date prescription would commence to run would be determined, firstly, by the time the respondent took to launch the proceedings and, secondly, by whether the respondent was in due course able to persuade the court to condone her delay in doing so.

[10] Baxter *op cit* at 355

This proposition really only has to be stated to be rejected. Extinctive prescription begins to run from the date when a debt is claimable, not from when it is claimed, and a creditor cannot by his unilateral and arbitrary conduct postpone the commencement of prescription.[11] Moreover, prescription is a matter of law and not of judicial discretion. While the learned judge in the court *a quo* had the inherent discretion to condone a failure to bring the review proceedings within a reasonable time, he had no power to exercise his discretion in regard as to whether the claim, by operation of law, had prescribed.

The respondent's argument that it was necessary to review the decision to terminate the monthly grant before the debt became due was based upon a misconception of the effect of what I said in *Matinise v MEC Department of Welfare, Eastern Cape Province*[12] in which the facts were remarkably similar to the present in that the applicant in that matter had been in receipt of a monthly welfare grant which had been unlawfully terminated by notice in November 1999 and later, on her having re-applied, was reinstated. She too, claimed a review of the decision to terminate her grant in November 1999 and payment of the arrears relating to the period it was not paid.

In that case, the department also contended that the applicant should merely have sued in the magistrates' court rather than by proceeding by way of review. In rejecting that argument, I said that if she had done so her claim could have been met by a defence that her grant had been terminated, which

[11] *Kotze v Ongeskiktheidsfonds van die Universiteit van Stellenbosch* 1996 (3) SA 252 (C) at 258H and 259D-262C.
[12] Unreported SECLD Case No: 1603/03.

would have defeated her claim unless the termination of the grant had been reviewed and set aside. I therefore held that it had been necessary for the applicant to seek a review of the termination of her grant.

In that case the money was due and owing, although the department denied that to be the case as it contended in its papers that the termination of the grant had been lawful. It was therefore necessary for the court to rule on that issue,[13] and it was only during argument that counsel for the defendant conceded that the termination had been unlawful.[14] The applicant had therefore acted correctly in seeking to review the decision in order to declare the termination as unlawful and invalid. But that does not mean that the monetary claim was not due and recoverable until then. All the court did, in effect, was to rule that the money had been due at all times after it was not paid.

Accordingly, in my view, an order on review was not a pre-condition to the commencement of the period of prescription *in casu* which began to run, at the latest, in July 2000 so that the respondent's claim had prescribed by the time proceedings were instituted by the respondent in the court *a quo*.

In seeking a review of the decision to stop paying her disability grant, the respondent sought to obtain an order obliging the appellant to pay her the amount she contended was unlawfully withheld from her. It was not to achieve

[13] *Cf* Baxter *op cit* at 355-360
[14] This distinguishes the matter from the present where the appellant has at no stage sought to contest that the termination of the grant was lawful, and there is *in casu* no uncertainty which requires elucidation by the court.

the reinstatement of her social benefits which, in any event, had been restored to her by then. A decision in regard to the review would therefore have no practical affect as her monetary claim is unenforceable by reason of prescription. The appellant has also never contended that the termination of the respondent's disability grant in November 1997 was lawful and the question of the lawfulness or otherwise the decision is therefore not even a moot issue between the parties. In these circumstances, no purpose whatsoever would be achieved by granting an order of invalidity.

I am accordingly of the view that the court *a quo* erred in upholding the respondent's claim as her monetary claim had prescribed and, as a review of the administrative action would have had a practical effect, not only should the monetary claim have been dismissed but the review should not have been entertained.

Turning to the question of costs, it is not without significance that although the claim had prescribed, the launching of the proceedings did result in the appellant paying a further R9 400,00 of the capital sum to the respondent. This is a factor relevant to the issue of costs and in the light thereof, although her claim ought to have been dismissed in the court *a quo*, I would not have ordered her to pay the appellant's costs but would have directed the parties to pay their own costs.

In my judgment, accordingly, the appeal should succeed with costs and the order of the court *a quo* set aside and substituted with the following:

"**The application is dismissed. The parties are to pay their own costs**"

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L.E.LEACH
JUDGE OF THE HIGH COURT

CHETTY, J

I agree.

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D. CHETTY
JUDGE OF THE HIGH COURT

MHLANTLA, J

I agree.

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N.Z. MHLANTLA
JUDGE OF THE HIGH COURT