CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 37/07
[2008] ZACC 4

DELIWE MURIEL NJONGI Applicant

versus

MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF WELFARE, EASTERN CAPE Respondent

Heard on : 6 November 2007

Decided on : 28 March 2008

JUDGMENT

YACOOB J:

Introduction

[1] This application for leave to appeal is concerned with the right to receive a disability grant within the context of the socio-economic rights embraced by our Constitution. In particular it concerns the right of grant receivers to lawful administrative action when social grants are cancelled, as well as whether the State can rely on extinctive prescription of its obligation in order to avoid paying these grants.

[2] The specific question raised in the application for leave to appeal is whether prescription runs in favour of a provincial government against a person entitled to claim arrear disability grant payments during the period when an unlawful administrative decision that the grant should not be paid remains in existence and is not disavowed by the State. The Eastern Cape Provincial Government (the Provincial Government), the effective respondent represented by the Member of the Executive Council for Welfare, claims that prescription can run against a person with disability entitled to payment of arrears in these circumstances. The South Eastern Cape High Court (the High Court) concluded that prescription did not run so long as the administrative action that resulted in the termination of the disability grant remained.[1] But a Full Court of the Eastern Cape High Court (the Full Court) on appeal by the Provincial Government concluded that it did.[2] Mrs Njongi, the applicant, having been refused leave to appeal by the Supreme Court of Appeal, seeks to challenge the correctness of the decision of the Full Court.

[3] A second perhaps more important dimension of the case emerged during the hearing. It concerns whether and the circumstances in which the State can legitimately decide to avail itself of the defence of prescription. This question is significant because courts cannot invoke prescription of their own accord. They may decide whether a claim is prescribed only if the debtor (the State in this case) expressly and properly raises it. If it is competent for the State to raise prescription as

[1] *Deliwe Muriel Njongi v Member of the Executive Council for Social Development, Eastern Cape Province* 1281/04 in the South Eastern Cape High Court, 2 June 2005, unreported.

[2] *Member of the Executive Council for Welfare v Deliwe Muriel Njongi* CA: 62/06 in the Eastern Cape High Court, 4 December 2006, unreported.

a defence the more specific question concerns the factors that the State must consider when deciding whether to deprive the disability pensioner of her right to receive disability grant arrears owed to her by pleading prescription.

The facts

[4] The facts are relatively straight-forward. Mrs Njongi, the applicant, was in receipt of a disability grant from 1989 until November 1997 when the payment of the grant inexplicably ceased. The provincial departmental official consulted by the applicant gave no explanation for the stoppage of her grant and simply asked her to re-apply. Regrettably Mrs Njongi was not the only victim compelled mercilessly to suffer the pain, misery and indignity of non-payment. There were literally tens of thousands of others.

[5] Mrs Njongi's re-application was successful in the sense that the Provincial Government resumed payment of the grant during July 2000. At that time she was paid what was referred to as "back-pay" in the sum of R1 100,00. During May 2004 she brought proceedings in the High Court for the setting aside of the administrative action terminating her disability grant. She consequentially claimed payment of the amount of R15 200,00, which, according to her, was due as arrear payments for November 1997 to July 2000. She was paid a further sum of R9 400,00 after proceedings were instituted. As I have already said, the High Court rejected the contention of the Provincial Government that the debt had prescribed but the Full Court upheld the prescription argument and non-suited the applicant.

[6] Two observations must be made at this early stage. One would have expected Mrs Njongi's application to have been finalised with the utmost urgency bearing in mind that Mrs Njongi was obviously a poor woman with little education. Moreover she had, by the time she re-applied, already been without a disability grant for more than a year. Far from it. The disability grant was approved only after 18 months.[3] Secondly the amount of back-pay was small. This payment must be evaluated against the background of the legal developments that had taken place while Mrs Njongi waited.

[7] It will be convenient to set out the High Court order before describing this background—

> "1. The administrative action of the respondent in stopping or suspending payment of the applicant's social grant during the period November 1997 to July 2000 is declared to be inconsistent with the Constitution and invalid, and is set aside.
>
> 2. The respondent is directed to reinstate the applicant's social grant during the period November 1997 to July 2000 by paying the amount of R5 800-00 to the applicant.
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> 3. The respondent is directed to pay interest on each monthly amount that the applicant should have been paid (making up the total of R15 200-00) at the prescribed rate of 15.5% per annum calculated from the date each payment should have been to the date of payment, the calculation of such interest to take into account the payment of R9 400-00 made on 10 March 2005.

[3] This period must be evaluated against the circumstance that was agreed between the representatives of the Eastern Cape Provincial Government and those of the grant receiver, Mrs Kate, in the case of *MEC, Department of Welfare v Kate* 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA) at para 10, that the reasonable period within which a grant ought to have been approved would have been three months.

4. The respondent is directed to advise the applicant's attorneys in writing of the above payment when it is made.
5. The respondent is ordered to pay the applicant's costs.
6. The applicant may in terms of rule 4(9) serve this order on the respondent at the offices of the State Attorney in Port Elizabeth."

The social and legal context

[8] It is necessary first to look broadly at the problem of the unlawful termination of grants in the Eastern Cape, the attitude of the Provincial Government and the approach of the courts before the High Court decided Mrs Njongi's application. It is only in that context that the position taken by the State in Mrs Njongi's case can be properly evaluated.

[9] I can best describe the surrounding circumstances and the extent and cause of this disaster by repeating what was said by our courts in two cases. The first, which may be referred to as the *Ngxuza* High Court judgment,[4] was concerned with an application by the Legal Resources Centre for leave to commence a class action in order to ensure that people who had lost their grants in the way in which Mrs Njongi had lost hers received their grants again as soon as practicably possible. The High Court said—

> "At the end of 1996 a meeting was held between the then incumbent MEC for welfare in the Eastern Cape Province, representatives of the Grahamstown Black Sash Advice Office and representatives of the Legal Resources Centre (the LRC). In a memorandum the deficiencies in the procedure then routinely followed in the cancellation of welfare payments were pertinently drawn to the MEC's attention. The

[4] *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E); 2000 (12) BCLR 1322 (E).

welfare department agreed to implement a number of measures to improve the efficiency of the system. The office of the 'Pensioner's Friend' was created to provide quick and easy redress for welfare grievances.

Prior to 1994 six different administrations had been responsible for social grants in the province. Different Acts and regulations applied to the different administrations. Legislative consolidation came in the form of the Social Assistance Act 59 of 1992 (the Act), which repealed the previous separate Acts. This was accompanied by the amalgamation of the previously fragmented databases into a unified national database known as the SOCPEN 5 system. The objective was to achieve amalgamation during the first quarter of 1996, but in the Eastern Cape this was achieved only by the first quarter of 1997. The amalgamation process showed that the information on record for many of the beneficiaries was incomplete, that there was duplication of payments and that the eligibility of many beneficiaries for grants was suspect. The welfare department accordingly embarked on a process to verify and update the particulars of all beneficiaries.

This was done by effectively requiring each beneficiary to re-apply for grants in accordance with prescribed formalities. This process has since been repeated on three occasions in respect of beneficiaries in the three categories of old age, disability and child support. The re-registration process was accompanied by the imposition of a moratorium on the processing of new applications and the processing of arrear payments to welfare beneficiaries.

These measures resulted in increasing numbers of people reporting to advice offices, churches, social organisations and the LRC that their grants have been terminated. The LRC at first attempted to deal with these problems in co-operation and agreement with the welfare department. In September 1997 a meeting was held with the then MEC, who gave a number of undertakings to redress the situation. An essential feature of the undertakings was the allocation of extra staff to deal with the backlog and the appointment of a senior staff member to liaise with advice offices and to communicate decisions taken by department officials. This task was similar to that of the by now defunct Pensioner's Friend. This initiative failed because the officials were never appointed.

When attempted co-operation proved fruitless the LRC turned to litigation. During the first quarter of 1998 a number of successful individual applications were launched

> against the MEC, 43 in number. Most related to excessive delays in obtaining decisions on, and payment of, social grants. Three applications related to the review of cancelled social grants. The litigation campaign was interrupted when the acting permanent secretary of the welfare department requested the regional director of the LRC in Grahamstown to attend a meeting in an attempt to resolve the remaining applications against the department. The meeting was held in April 1998. A minute of the meeting reveals that the necessity for a fair procedure to be followed when reviewing social grants was again brought to the department's attention. Since August 1998 the details of approximately 2000 erstwhile beneficiaries, all of whom alleged that their grants were terminated without observance of administrative fairness, have been sent to the department. Barely one third of these cases elicited any response from the department. Of these people approximately 20% were re-instated. For more than 1000 no response has been forthcoming. A further meeting was held with officials of the department in November 1999 to discuss the department's poor performance in rectifying matters. It was reiterated that the procedure for the cancellation of grants was defective. Further suggestions were made by LRC lawyers to expedite and alleviate matters. Nothing came of it."[5]

[10] The Eastern Cape High Court granted an order authorising a class action but the State appealed to the Supreme Court of Appeal. The judgment of the Supreme Court of Appeal (the *Ngxuza* appeal judgment)[6] evaluated the approach of the Eastern Cape authorities in relation to the cancellation of grants in the following way—

> "The provincial authorities in the Eastern Cape decided to revoke the welfare benefits of various groups of persons receiving social assistance. They did so unilaterally and without notice to those concerned. . . . [T]he method the authorities chose to deal with the situation was extreme and the consequences for large numbers of needy people savage. They failed to differentiate between the fraudulent and undeserving and unentitled on the one hand, and on the other the truly disabled. These latter were manifestly not ghosts and the mechanism employed left them destitute.

[5] Id at 615I-617A; 1324C-1325D.

[6] *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA); 2001 (10) BCLR 1039 (SCA).

> All without distinction were required to re-apply for their existing entitlements. But the bureaucratic structures and personnel required to expedite the process were lacking, and repeated promises by officials and politicians to improve them failed to materialise. . . . The papers before us recount a pitiable saga of correspondence, meetings, calls, appeals, entreaties, demands and pleas by public interest organisations, advice offices, district surgeons, public health and welfare organisations and branches of the African National Congress itself, which is the governing party in the Eastern Cape. The Legal Resources Centre played a central part in co-ordinating these entreaties and in the negotiations that resulted from them. But their efforts were unavailing. The response of the provincial authorities as reflected in the papers included unfulfilled undertakings, broken promises, missed meetings, administrative buck-passing, manifest lack of capacity and at times gross ineptitude."[7]

[11] It has not been possible to establish the circumstances of the three cases that arose out of cancellation of social grants mentioned by the Eastern Cape High Court in *Ngxuza*.[8] The first case concerning cancelled grants that we do know about is that of *Bushula*,[9] decided about six months before Mrs Njongi received the disability grant for which she had re-applied. When Mr Bushula

> "went to collect his disability grant in June 1997, he [like Mrs Njongi] was verbally advised by the welfare clerk that his grant had been cancelled. His attempts thereafter to have his grant reinstated proved fruitless."[10]

Since the applicant places substantial reliance on *Bushula*, it is appropriate to set out the reasoning in some detail. Mr Bushula, like Mrs Njongi relied on certain of the

[7] Id at paras 7-8.

[8] Above n 4 at 616H; 1325A.

[9] *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2000 (2) SA 849 (E); 2000 (7) BCLR 728 (E).

[10] Id at 851G-H; 730D-E.

Regulations promulgated in terms of the Social Assistance Act[11] (the Act) which provided—[12]

> "21 (2) The Director-General shall review a grant annually and, taking the circumstances of each case into consideration, increase, decrease or suspend a grant from a date which he or she determines including a date in the past and inform the beneficiary of his or her reasons in writing and inform him or her of the 90 day period referred to in subregulation (6) for the application for the restoration of the grant.
>
> . . . .
>
> 21 (6) If an application is made for the restoration of a grant, the Director-General may restore the grant with effect from the date on which the grant was suspended: Provided that the application for restoration is made within 90 days of suspension." [13]

[12] It was held that the cancellation of the disability grant had been prejudicial to Mr Bushula and that it was necessary for him to be heard before an appropriate decision in relation to cancellation was made.[14] The Provincial Government contended that disability grant recipients were indeed informed that their social grants would be reviewed annually and that the reviews would start during 1996. This the Government did en masse by pamphlets distributed at district offices and payout points, through the print media, radio and through certain welfare forums. Mr Bushula was not aware of this.[15] The Court held that this "generalised notice

[11] 59 of 1992.

[12] The Act has now been repealed and replaced by the Social Assistance Act 13 of 2004.

[13] Regulation 21(2) read with Regulation 21(6), Government Gazette 17016 No. 373, 1 March 1996.

[14] Above n 9 at 854E-F; 732J-733B.

[15] Id at 854I-855A; 733E-F.

procedure" could not be considered as the giving of proper notice.[16] It was further held that the completion of the application form and the medical report form handed to Mr Bushula by the welfare clerk could not be regarded as conveying to him that there had been an enquiry concerning the continuation of his disability grant. Mr Bushula had a right to be heard in that regard.[17]

[13] The Court found that Regulation 21(2) had not been complied with either. No notice of the suspension of his grant and of the opportunity to make representations within a period of 90 days had been given to Mr Bushula. In the circumstances the administrative decision cancelling the grant had to be set aside and the grant reinstated. The detail of the reinstatement of the grant ordered by the Court[18] accords with common sense and fairness. It required that all money that would have been paid to Mr Bushula had the unlawful cancellation not occurred should be paid to him.

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[16] Id at 855F; 734A-B.

[17] Id at 855D; 733I.

[18] The order reads—

> "(a) The decision of Van Deventer cancelling the first applicant's disability grant is declared to be invalid and of no force and effect and is set aside;
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> (b) the first respondent is ordered to reinstate the first applicant's disability grant within a period of two weeks from the date of this order, such reinstatement to be with effect from the date of cancellation thereof;
>
> (c) it is declared that the first applicant is entitled to payment of all arrears owing under his disability grant from the date of cancellation thereof up to the present time;
>
> (d) the first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the first applicant all unpaid moneys owed to him as a result of the unlawful cancellation of his disability grant;
>
> (e) the first and second respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved;
>
> (f) the third applicant is ordered to pay the costs of the application to strike out."

[14] There was no appeal against this judgment. It follows that the Provincial Government accepted the reasoning and conclusion in it.

[15] Three important implications of the *Bushula* judgment must be underlined at this stage. The first arises from the fact that the cancellation of the disability grants of Mr Bushula and Mrs Njongi took place at about the same time and in about the same way. The Provincial Government could not therefore be in any better position in relation to the applicant in this case than in Mr Bushula's case. Secondly, at best for the Provincial Government, the communication of information at a generalised level taken together with the filling in of the review forms were the only communication elements in the review process; no specific notice was given to an individual. The same probably happened with Mrs Njongi too. Lastly, the judgment in *Bushula* called for full reinstatement as an inevitable remedy for all improper cancellations of disability grants in the provincial governmental review process. Mrs Njongi was at least morally entitled to full reinstatement.

[16] I would not have been surprised at all, bearing in mind that there had been no appeal against the judgment in *Bushula*, if the Provincial Government had accepted both that their procedure had been wrong and that all grants improperly cancelled ought to be fully reinstated in the sense ordered in *Bushula*. All affected people ought to have been placed in the position in which they would have been absent the unlawful administrative decision. Indeed, the Provincial Government should have taken proactive measures to fully reinstate every improperly cancelled social grant. This is a

necessary consequence of the duty of every organ of State to "assist and protect the courts to ensure the . . . dignity . . . and effectiveness of the courts."[19] It would also be mandated by the constitutional injunction that an order of court binds all organs of State to which it applies. The Provincial Government had every right to appeal the order in *Bushula*. Once it did not do so however, it had the duty in my view to ensure full redress for every person in the position of Mr Bushula. Nothing less would have been acceptable.

[17] This duty to fully reinstate everyone affected is not merely a function of the relationship between the Government and the courts. The vast majority of people who were deprived of their disability grants as a result of the bewildering conduct of the Provincial Government are the poorest people in our society. Sadly they eked out a miserable existence and the unlawful denial of their grants was unthinkably cruel and utterly at odds with the constitutional vision to the achievement of which that Government ought to have been committed. We remind ourselves that the Constitution in its preamble looks to the improvement of the quality of life of all citizens and that the foundational values of our Constitution revolve around "human dignity, the achievement of equality and the advancement of human rights and freedoms."[20]

[19] Section 165(4) of the Constitution.

[20] Section 1(a) of the Constitution.

[18] But the Provincial Government failed dismally in its constitutional obligations. The Legal Resources Centre then launched the *Ngxuza*[21] application in the High Court for leave to institute a class action. The Provincial Government vigorously opposed the application. Its response to the *Bushula* judgment is summed up in the following passage from the *Ngxuza* High Court judgment—

> "The applicants allege that this process is unlawful for want of compliance with the basic principle that they should be afforded a hearing. The respondents do not contend otherwise. The applicants also allege that this unlawful procedure was applied to all suspensions or cancellations of social grants since March 1996. The respondents do not expressly deny the various assertions to this effect made in the founding papers. Nor do they set out exactly what procedure has been followed since the *Bushula* judgment. The closest they come to this is to state that the department has taken note of the judgment and the valuable guidance given in it in respect of the suspension and/or cancellation of disability grants. Department officials 'have been instructed to act accordingly'."[22]

[19] As I have already said, the High Court in *Ngxuza* authorised the class action but the Provincial Government took the case on appeal to the Supreme Court of Appeal. Once again, that Government in effect refused to undertake to act in accordance with the judgment in *Bushula*. The Supreme Court of Appeal judgment says in this regard—

> "That the method the province chose to verify and update its pensioner records was not just undifferentiatingly harsh, but also unlawful, was undisputed in these proceedings. That much was established [in the *Bushula* case]. In its answering affidavit in the present matter the province says that it 'took note' of the judgment 'and the valuable guidance it has given in respect of the suspension and/or

[21] Above n 4.

[22] Id at 617E-H; 1325I-1326A.

> cancellation of disability grants'. Its officials have, it says, 'been instructed to act accordingly'.
>
> The affidavit says no more. Its silence is expressive. At best the statement that officials have been 'instructed' to act 'in accordance with' *Bushula* implies that the province will not in future unlawfully terminate disability grantees' benefits. What it omits to say is more pertinent, which is whether *Bushula* will in fact be implemented for grantees already removed unprocedurally from the system. Though counsel assured us from the Bar that the province has reinstated and is paying so far as possible the categories of claimants at issue in *Bushula*, the province's papers contain no undertaking that the destitute deserving will be reinstated to their lawful entitlements. Without such an undertaking members of the class remain at risk."[23]

[20] The Supreme Court of Appeal was justifiably also critical of the attitude and approach of the Provincial Government in the class action case in the following terms—

> "The circumstances of this particular case – unlawful conduct by a party against a disparate body of claimants lacking access to individualised legal services, with small claims unsuitable for if not incapable of enforcement in isolation – should have led to the conclusion, in short order, that the applicants' assertion of authority to institute class-action proceedings was unassailable. But assail their claim the province did. It did so by recourse to every stratagem and device and obstruction, every legal argument and non-argument that it thought lay to hand. While offering no undertaking to implement *Bushula* in relation to the applicant class, it asserted that because of the decision the relief sought was moot. It then contended, contradictorily, that the applicants' claim was not yet ripe for adjudication. It tendered no evidence to refute the mass of *indicia* the applicants placed before the Court that showed unlawful conduct against huge numbers of disability pensioners, yet argued that the applicants' evidence was inadmissible hearsay. It obstructed the applicant class's entitlement to be spared physical destitution, yet invoked their privacy rights in contending that the disclosure order should not have been granted. It did not flinch even from deriding the first applicant, who adhered to the founding

[23] Above n 6 at paras 9-10.

> papers with his thumb-print. Its deponent thought fit to record his doubt that Mr Ngxuza had read the media articles appended to the papers (a claim the first applicant did not make), while the written argument stated that it 'boggles the mind' that 'a man who never attended school and is presently illiterate' is able to make 'learned submissions'.
>
> All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticise government's decisions in the area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of State to be loyal to the Constitution and requires that public administration be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it were at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere. We were told, in extenuation, that unentitled claimants were costing the province R65 million per month. That misses the point, which is the cost the province's remedy exacted in human suffering on those who were entitled to benefits. What is more, the extravagant cost of 'ghost' claimants would seem to justify the expense of imperative administrative measures to remedy the problem by singling out the bogus – something the province conspicuously failed to do. It cannot warrant unlawful action against the entitled." [24]
> (Footnotes omitted.)

[21] It must be emphasised that counsel had assured the Supreme Court of Appeal from the Bar that the Province "has reinstated and is paying so far as possible the categories of claimants at issue in *Bushula*".[25] Anyone who had read the Supreme Court of Appeal judgment in *Ngxuza* would have had, I think, no doubt whatever that the judgment would have been drawn to the attention of the Provincial Government,

[24] Id at paras 14-15.

[25] See [19] above.

that the Government would have understood the concerns of the Supreme Court of Appeal and that the undertaking by counsel to the Supreme Court of Appeal would have been honoured. The judgment in *Bushula* was delivered on 17 December 1999. It will be recalled that it was during July 2000, more than six months after the judgment in *Bushula*, that Mrs Njongi began to receive her disability grant consequent upon re-application.

[22] She received an amount of R1 100,00 in back-pay. The instruction to counsel in *Ngxuza* that the Provincial Government had reinstated the grants of the categories of people contemplated in *Bushula* was patently incorrect. Mrs Njongi's grant had not been fully reinstated. She had not been placed in the position in which she would have been absent the Provincial Government's unlawful conduct. If this had been done, she would at the very least have received payment of the sum of R16 300,00[26] as claimed. If the members of the public service concerned had regarded the application as a new application, the Provincial Government would have had to pay to Mrs Njongi grant back-pay from the date of her application, 12 January 1999, until the date of approval of the grant, July 2000.[27] The amount of R1 100,00 paid to Mrs Njongi is a pittance even in relation to that lesser entitlement.

[23] All the cases discussed so far are in one important respect different from the case with which we are concerned here. The earlier cases were, like this one, about

[26] This is the calculation of Mrs Njongi's attorney which was not disputed in the High Court. See above n 1 at para 1.

[27] Regulation 9 read with Regulation 10, Government Gazette 17016 No. 373, 1 March 1996.

the unlawful termination of social grants in substantially the same way as the disability grant was terminated in Mrs Njongi's case. The important difference is this: the cases referred to earlier are concerned with people who had not yet received any grant after termination. So their claims were simply for reinstatement. They would, as a consequence, have to be placed in the same position as they would have been in had the social grant not been cancelled. Mrs Njongi on the other hand has had her grant "partially reinstated" only in the sense that she does now receive her grant monthly and that she has received some back-pay. I may mention here that two months before her case was heard in the High Court and 10 months after the case had been started, an additional R9 400,00 was paid to her without any explanation. Mrs Njongi's complaint is that the administrative action cancelling her grant has not been disavowed and her grant has not yet been fully reinstated. She has not yet been put back in the position in which she would have been had the unlawful decision not been taken in the first place.

[24] Something must be said about some of the cases in this category that were decided in the Eastern Cape before reverting to the case at hand. It will be noticed from what is said about these cases later that each of them was brought relatively late; some time after payment of the social grant had been resumed. This is understandable because the people concerned would have been relieved at having received their social grants and would probably not have known that the cancellation of the grants had been unlawful or that they were entitled to the payment of arrears. The *Kate* case,[28]

[28] *Kate* above n 3.

concerned with liability for constitutional damages as a result of belated approval of grant applications makes the point. Mrs Kate applied for her grant on 16 April 1996[29] and was notified that it had been approved three years and four months later in August 1999.[30] She received arrears of R6 000,00 with no explanation about the balance and why it had not been paid. It was only more than three years later in March 2003 that she consulted an advice office where the problem was discussed and she was referred to her attorney.[31]

[25] The first case to which our attention was drawn was that of *Matinise*.[32] Ms Mileka Matinise, whose grant had been cancelled and payment of it was resumed upon re-application, made a claim for payment of arrears. The grant in that case had been terminated in November 1999 and payments resumed in October 2000 following re-application. It is not clear exactly when the case was launched but the case number shows that this happened in 2003, certainly more than two years after the payment. There too, the Provincial Government tried to evade payment. It did so on the basis of a bald unsubstantiated allegation that the applicant had been informed of the suspension in writing. The Court rejected the contention.

[29] Id at para 7.

[30] Id at para 11.

[31] Id at para 12.

[32] *Mileka Matinise v Member of the Executive Council, Department of Welfare, Eastern Cape Province*, 1603/03 in the Eastern Cape High Court, 10 February 2005, unreported.

[26] The next case was that of *Ntame*,[33] launched in 2004. Ms Ntame's disability grant had been unlawfully stopped in December 1996 and payment of the grant had been resumed in June 1999. The case number shows that the case was brought only in 2004, around five years after the payment of grant had resumed. This is almost twice the prescriptive period of three years.

[27] This is the context in which the prescription issue must be decided.

Prescription

[28] I have already said that—

(a) Mrs Njongi's disability grant was unlawfully cancelled in November 1997;

(b) she re-applied for her grant during January 1999 upon the advice of provincial officials;

(c) the grant payments resumed in July 2000;

(d) she was paid R1 100,00 back-pay in July 2000; and

(e) she was paid a further sum of R9 400,00 in March 2005, long after the case had started.

[29] Mrs Njongi's attorneys calculated that she should have received an amount of R15 200,00 if she were to be placed in the same position in which she would have been had the unlawful decision to cancel her grant not been made. The calculation however did not take into account any interest. Payment of this sum before the

[33] *Ntame v MEC for Social Development, Eastern Cape, and Two Similar cases* 2005 (6) SA 248 (E); [2005] 2 All SA 535 (SE).

institution of proceedings would have carried the necessary implication that the cancellation had been acknowledged and disavowed as unlawful. The attorney required payment by letter dated 10 February 2003. Two letters were received from the Provincial Government in response. The first dated 3 March 2003 was to the effect that "the matter [was] receiving attention and [the attorney would] be informed of the progress." The second dated 5 March 2003 said in substance that the "calculation for back pay and interest [had] been referred to [the] Bisho office . . . responsible for the authorisation thereof and . . . [the attorney would] be informed of the progress." No further response was received from the Provincial Government.

[30] I pause here to point out that, if prescription had begun to run during July 2000, the letter of 5 March would arguably have been an admission of liability and served as an interruptor of prescription. This is because it does not deny liability and says that the "calculation for back pay and interest" is the only matter requiring further attention. In addition, the correspondence was followed by a further payment apparently in response to the letters that had been sent on behalf of the applicant. However it must be emphasised that whether this correspondence amounts to an unequivocal disavowal of the cancellation of Mrs Njongi's grant is a wholly different matter.

[31] The application was served upon the Provincial Government on 19 May 2004. But the Government filed no papers in the case until February 2005. The Government

filed, more than nine months after the application had been served, a notice which can generously be described as unusual. It took the prescription point after a fashion.

[32] It cannot be gainsaid that the notice which I discuss later was inspired by the judgment in *Ntame*.[34] Ms Ntame had instituted proceedings about five years after the payment of her grant had re-started.[35] Not only had the defence of prescription not been raised but the case was unopposed. Despite this the judge who decided it characterised the case as being concerned with "whether [Ms Ntame's claim] for the payment of a disability grant . . . [had] prescribed".[36] In addition, the Court then went on to conclude that the claims in all the cases before it—[37]

> "would have prescribed . . . if the respondent had opposed and taken this point in answering papers. That would, ordinarily, have rendered the relief claimed in these matters moot because, while the applicants seek the review of the administrative action and inaction concerned, their purpose in doing so is, understandably, to force the respondent to pay them what was unlawfully withheld: if the underlying debts could not be enforced, then the exercise of pronouncing the administrative action and inaction . . . invalid, would have had no practical effect and would have been academic."[38]

[34] Id.

[35] See [26] above.

[36] Above n 33 at para 1.

[37] There were three cases before that Court and only that of Mrs Ntame is relevant for present purposes.

[38] Above n 33 at para 9.

[33] Having pronounced on the prescription issue, the Court went on to acknowledge that "[i]t is not open to a court to take the point *mero motu*"[39] because of the Prescription Act[40] which provides—

> "(1) A court shall not of its own motion take notice of prescription.
>
> (2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings."

The judgment also pointed out that the relevant document in applications will usually be the respondent's answering affidavit.

[34] This approach was ill-advised. The issue of prescription had not been raised. Because it had not been raised, the Court could not be aware whether Mrs Ntame was able to raise any factual averment concerned with the interruption of prescription[41] or whether she had the necessary information that would trigger the running of prescription.[42] It is wrong to suggest that a particular issue is moot and need not be decided because the debt would have prescribed. This is to put the cart before the horse.

[39] Id at para 10.

[40] 68 of 1969 at section 17.

[41] Id at sections 14 and 15.

[42] Id at section 12(3).

[35] The belated notice in this case, filed about a month after judgment in *Ntame*,[43] raised prescription as a "question of law" and echoed that judgment in certain respects. It says—

> "2. The purpose of the Applicant in seeking a review of the administrative action of the Respondent is to force the Respondent to pay her what she contends was unlawfully withheld from her, namely the sum of R15 200.00. This represents the total of monthly payments in respect of her disability grant which were not paid for a period due to the stoppage or suspension of her disability grant."[44]
>
> "3. The debt that is central to the Applicant's case – her disability grant that was not paid for a period – relates to a precisely defined period, namely, November 1997 to July 2000, with a precisely defined endpoint, namely July 2000 when she again started receiving regular monthly payments in respect of her disability grant."[45]
>
> "8. Accordingly the debt underlying the alleged administrative action of the Respondent has prescribed and can no longer be enforced. As a result the exercise of setting aside the alleged administrative action has been rendered moot and would have no practical effect and would be merely academic."[46]

[36] Even if one assumes that prescription runs while the unlawful administrative decision precluding payment remains effective, the notice is irregular. It implies that prescription is a point of law. Prescription raises questions of both fact and law.[47] It

[43] 11 January 2005.

[44] See *Ntame* above n 33 at para 9.

[45] Id at para 8.

[46] Id at para 9.

[47] See *Road Accident Fund v Mdeyide (Minister of Transport Intervening)* 2008 (1) SA 535 (CC); 2007 (7) BCLR 805 (CC) at paras 13-25; *Laurentian Pilotage Authority v Voyageur (The)* [2006] 1 FCR 37 at para 27; *Phasha v Southern Metropolitan Council of the Greater Johannesburg Metropolitan Council* 2000 (2) SA 455 (W) at 461G-474J; [2000] 1 All SA 451 (W) at 460-473; *Standard Bank of SA Ltd v Oneanate Investments* 1998 (1) SA 811 (A) at 823I-824D; [1998] 1 All SA 413 (A) at 422-3; *Drennan Maud & Partners v Pennington Town*

is for this reason that, as pointed out by the judge in *Ntame*, prescription must ordinarily be raised on affidavit.[48] In my view the notice incompetently raises the issue of prescription. In addition the notice quite improperly makes the factual averment (facts are normally stated on affidavit) that the circumstances that would result in the interruption or delay of prescription did not exist. How the State knew so much about Mrs Njongi's state of knowledge is in any event beyond me. The notice cynically relies on the fact that the applicant has not in her founding affidavit raised circumstances that would result in the delay or interruption of prescription. The applicant would need to traverse the factual substratum of any claim of prescription only if and after prescription had been properly raised and the facts supporting it had been put forth on affidavit. The notice asks the Court not to decide the lawfulness of the administrative action on the basis that the case had prescribed in circumstances where the prescription was not properly before the Court. It must be emphasised that the Provincial Government persisted in its denial of the unlawfulness of the administrative action.

[37] The High Court however considered the prescription argument advanced by the Provincial Government and dismissed it.[49] The Judge defined the question to be

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Board 1998 (3) SA 200 (SCA) at 204I-205H; [1998] 2 All SA 571 (A) at 575-6; *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 528G-529J, 532F-533B; [1991] 1 All SA 400 (A); *Van Staden v Fourie* 1989 (3) SA 200 (A) at 207F-208C; [1989] 2 All SA 329 (A); *Brand v Williams* 1988 (3) SA 908 (C) at 912E-917B; [1988] 4 All SA 275 (C); *Apex Mines Ltd v Administrator, Transvaal* 1986 (4) SA 581 (T) at 602C-604B; [1986] 4 All SA 298 (T) at 318-320; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 908D-F; [1981] 3 All SA 153 (N); *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 836D-837A; [1980] 2 All SA 40 (A); *Gericke v Sack* 1978 (1) SA 821 (A) at 825C-826D; [1978] 2 All SA 111 (A) at 113-4; *Churchill v Standard General Insurance* 1977 (1) SA 506 (A) at 517H-518D; [1977] 1 All SA 558 (A) at 565-6; *Davies v Du Paver* [1952] 2 All ER 991 at 995, 999-1001.

[48] Above n 33 at para 11.

[49] Above n 1 at para 7.

answered as: "whether it is necessary, before a money claim can arise, to declare administrative action unjust or to set aside administrative action which would otherwise remain effective."[50] He distinguished between the case of *Makalima*[51] on the one hand and those of *Ntame*[52] and *Matinise*[53] on the other. The High Court reasoned that a review had not been necessary in *Makalima* but that it was necessary in *Ntame* and *Matinise*. Accordingly, prescription would run only if the debt had arisen and was enforceable. This would be the case only if the decision not to pay was ineffective in the sense that it did not have to be reviewed and set aside as a precondition to payment. The High Court accordingly rejected the argument of the Provincial Government that it was unnecessary to determine the lawfulness issue because the Provincial Government did not contend that the decision was lawful.[54] The High Court concluded that the applicant was obliged to proceed by way of review,[55] rejected the prescription argument and granted an order in Mrs Njongi's favour.[56]

[38] The decision of the High Court was, however, reversed on appeal to the Full Court[57] which held that prescription had continued to run against the applicant despite the fact that the administrative action concerned had not yet been set aside and that the

[50] Id at para 6.

[51] *Nokuku Eslina Makalima v MEC for Welfare, Eastern Cape and Others* 1601/03 in the South Eastern Cape High Court, 27 January 2005, unreported.

[52] Above n 33.

[53] Above n 32.

[54] Above n 1 at para 7.

[55] Id at para 8.

[56] The order is set out in [7] above.

[57] Above n 2.

applicant's claim had accordingly prescribed. The Full Court concluded that the word "debt" had to be given a wide meaning and found that the obligation to pay a social grant was a debt within the meaning of the Prescription Act.[58] The Court also accepted that the debt had to be immediately enforceable for prescription to run but concluded that the debt had always remained enforceable.

[39] A fundamental premise in the reasoning of the Full Court towards the conclusion that the debt had remained enforceable was the "axiomatic consequence of the principle of legality, an unlawful administrative action is a nullity, devoid of legal effect".[59] Accordingly the grant remained due to Mrs Njongi and was claimable at any stage.[60] The judgment acknowledges however (as it had to), that if the action for arrears had been brought in the Magistrates' Court and the Provincial Government had asserted the lawfulness of the administrative action, the review and setting aside of the administrative action in the High Court would have been a pre-requisite to the finalisation of the claim in the Magistrates' Court. The Full Court was also constrained to distinguish this case from the earlier judgment in *Matinise*. I return to this later.

Application for leave to appeal

[40] There is now no need for authority for the proposition that an application for leave to appeal will be granted only if the appeal concerns a constitutional matter or

[58] See above n 40 at Chapter 3.

[59] Above n 2 at page 5.

[60] Id.

an issue connected with a constitutional matter and if it is in the interests of justice to grant leave. Whether the Provincial Government acted lawfully in this case is a constitutional issue. So too is the question whether the Government complied with the constitutional obligation placed on it by section 27. This case is concerned with the consequences of unlawful administrative action in relation to the administration of social grants and raises at the very least issues connected with constitutional matters. It is in the interests of justice to grant leave first because the matter is important. Secondly, there are prospects of success. I have considered whether it will be in the interests of justice to examine the issue whether prescription had in any event been interrupted[61] or whether prescription had been properly raised on the papers.[62] Although these matters were argued in this Court, it is not in the interests of justice because none of them was argued either in the High Court or before the Full Court.

Was the Full Court correct?

[41] Section 12(1) of the Prescription Act provides: "Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due." The Full Court concluded that the arrears owing constituted a debt within the meaning of the Prescription Act. It was contended in this Court that grant arrears could not be a debt because the Provincial Government had failed to perform an obligation imposed upon it by the Constitution. Therefore, however broadly the term might be defined, it is not a debt for purposes of the Prescription Act. The argument was that an obligation of this kind can never prescribe. Debts arising from

[61] See [30] above.

[62] See [35] - [36] above.

fundamental rights are of a genre different to that envisaged by prescription legislation which was in any event pre-constitutional.

[42] I have doubts whether prescription could legitimately arise when the debt that is claimed is a social grant; where the obligation in respect of which performance is sought is one which the Government is obliged to perform in terms of the Constitution; and where the non-performance of the Government represents conduct that is inconsistent with the Constitution. Despite constitutional concerns, I reluctantly conclude that this important issue should not be decided in this judgment. There are two reasons for this. The first is that the question was not raised before and therefore not considered by either the High Court or the Full Court. Secondly, possible injustice consequent upon a successful plea of prescription can be averted without deciding whether prescription can be raised by the State at all in these circumstances. This case is decidedly not a precedent for the proposition that the defence of prescription is available to the State in these circumstances.

[43] I will therefore assume in favour of the Provincial Government that the obligation at issue is a debt for the purposes of the Prescription Act. The Full Court was correct in the conclusion that a debt must be immediately enforceable before it can be claimed. Accordingly, the only question that needs to be determined on the merits is whether the obligation to pay the arrears had always remained immediately enforceable, in other words, whether it could be said to have been due.

[44] The starting point of the judgment of the Full Court on this issue, that nullity was an axiomatic consequence of the principle of legality, is an essentially theoretical postulate. It is advanced by Professor Baxter[63] as the second sentence of the section on the retrospectivity of unlawful administrative action. Immediately after this sentence the author goes on to say—

> "Thus unlawful administrative acts are generally said to be *'void'*. But the simplicity of this tautology is upset by the complicated constitutional structure within which the principle of legality operates: administrative acts are usually performed by public authorities which *appear* to possess the necessary authority; and the authoritative determination of whether those acts are within their powers can only be made by a court of law. There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled.
>
> These two perspectives on the principle of legality – theoretical and practical – have engendered a dichotomy of opinion as to whether unlawful administrative acts are 'void' or merely 'voidable'. In fact this disagreement is more apparent than real, being the result of confusion caused by the adoption of the misleading terms 'void' and 'voidable' themselves."[64] (Footnotes omitted.)

[45] I agree. But the doctrine of nullity does have important practical implications whenever it becomes necessary to determine the consequences of invalidity. The order in *Bushula* evidently required the applicant to be put back into the position in which he would have been had the administrative decision not been made at all. This is in essence the practical application of the principle of objective invalidity or nullity.

[63] Baxter *Administrative Law* (Juta, Cape Town 1984) at 355.

[64] Id at 355-6.

After a judgment setting this administrative decision aside has been given, the administrative decision is certainly regarded as having been *void ab initio*.

[46] But that is a wholly different question from the one that must be answered in this case. Here we are concerned with administrative action that remains effective. Far from having been a nullity while in operation, the administrative decision with which we are here concerned as well as the thousands of others that were taken at about the same time have caused untold misery and suffering. This case cannot therefore be decided on the basis that the administrative action concerned was a nullity from the beginning. As I have already pointed out, the consequences of the administrative decision must be determined, so far as is possible, in order to achieve the situation that would have existed had the administrative decision been a nullity.

[47] The reasoning in relation to nullity is moreover contradictory. The Full Court judgment claims on the one hand that the arrears were always claimable because of the nullity of the administrative action concerned. On the other hand it is compelled to accept that the claim, if brought in the Magistrates' Court, would not be justiciable in that court until and unless the administrative action concerned had been set aside. One is driven to ask why it would ever be necessary to set aside a decision if it is a nullity and does not stand in the way of the enforcement of a claim.

[48] The Full Court appears to place some reliance on whether the unlawfulness of the administrative action concerned is disputed by the Provincial Government in the

case itself. The approach seen in its essential components amounts to this: the debt was always immediately enforceable because the Provincial Government did not dispute unlawfulness in the proceedings for recovery; the debt must be found to be not immediately enforceable if unlawfulness is challenged during the course of the case. The administrative action is and was always a nullity if the unlawfulness of the administrative action remained unchallenged in court; it is not a nullity but effective and must be set aside if there is a challenge to its lawfulness in court. If these propositions were correct, the debtor (the Provincial Government) would in the way in which it conducted its case determine whether the administrative action was a nullity and whether the debt had been enforceable. This is untenable. Whether a claim is immediately recoverable cannot depend on the attitude taken by defendants in court proceedings. It must be apparent from the circumstances that exist at the time that proceedings are instituted that the debt is immediately claimable, or in other words, that the debt is due.

[49] The Full Court further criticised the High Court judgment on the following basis—

> "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.
>
> 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."[65] (Footnote omitted.)

[50] I am unable to agree that the approach of the High Court creates a situation in which a creditor by his "unilateral and arbitrary conduct" is able to postpone the commencement of prescription. The reality is that the creditor has little or no control over the date on which prescription commences. She is obliged to make an application to set aside the administrative action concerned within a reasonable time. It is a court, not the creditor, that determines whether the time within which a claim is brought is reasonable or not. Moreover it is the court that decides whether the lateness, if unreasonable, must be condoned. If a court finds that the period is unreasonable and that the delay in bringing the proceedings should not be condoned, the applicant cannot take the matter any further. She would have lost her case and the underlying debt would be unclaimable. This consequence would follow even if the three year period of prescription had not yet expired. If on the other hand the court were to set aside the administrative action, there would be no question of prescription beginning to run again unless an order for payment was not claimed as consequential relief.

[51] This brings me to the argument made on behalf of Mrs Njongi both in the High Court and in this Court based on *Matinise*.[66] Ms Matinise was in the same position as Mrs Njongi. Her grant had been unlawfully terminated in November 1999. She had

[65] Above n 2 at page 7.

[66] Above n 32.

re-applied, on Eastern Cape governmental advice, with the consequence that her grant payments resumed. She too claimed an order setting aside the administrative decision so that she could obtain judgment for payment of certain arrears. The Provincial Government had argued that Ms Matinise should have brought her claim in the Magistrates' Court for payment of an amount of money. In rejecting that argument the Full Court had reasoned that if Ms Matinise had sued in the Magistrates' Court "her claim could have been met by the defence that her grant had been terminated", which would have defeated her claim unless the termination of her grant had been reviewed and set aside. It was accordingly held in that case that a review was necessary as a precondition to the enforcement of that debt.[67]

[52] Accordingly the argument on behalf of Mrs Njongi was that the circumstance that "it was necessary" to review the decision to terminate the grant in *Matinise* meant that the debt there could not be said to have been due in the sense of being immediately enforceable. The contention was that, in the same way, the debt owed to Mrs Njongi could also not be said to have been due. The Full Court was of the view that this argument was based on "a misconception of the effect of what [was] said" in *Matinise*.[68]

[53] The misconception according to the Full Court was that the finding that Ms Matinise "had therefore acted correctly in seeking to review the decision" did not mean that "the monetary claim was not due and recoverable until then. All the Court

[67] Above n 2 at page 13.

[68] Id at page 8.

did in effect was to rule that the money had been due at all times after it had not been paid."[69]

[54] I have not been able to find a statement in the *Matinise* judgment to the effect that the money had been due at all times after it was not paid. Moreover the finding that the applicant had acted correctly in seeking to set aside the administrative action must mean that it was necessary to set aside the decision. Otherwise the applicant would not have been correct in bringing the application. In fact the Full Court judgment is indeed that "it was only during argument that counsel for the defendant had conceded that the termination had been unlawful."[70] As I have already said concessions by counsel during the case can have no effect at all on the question whether it is necessary to set the administrative decision aside. In the circumstances the distinction that the Full Court sought to draw between the circumstances in *Matinise* and the case before it was without a difference.

[55] In any event unlawfulness was never conceded by the Provincial Government before the High Court or before the Full Court for that matter. It is difficult to follow the statement in the Full Court judgment that the Provincial Government has "never contended that the termination of the respondent's disability grant in November 1997 was lawful".[71] The Provincial Government has always contended (and the Full Court has held) that it is not necessary to decide the question of lawfulness. It necessarily

[69] Id at page 9.

[70] Id.

[71] Id.

follows that unlawfulness has always been and continues to be denied. Unlawfulness was not contested in reality because the Provincial Government held the view that it did not have to be decided.

[56] This does not mean however that every administrative action must be set aside before a debt can fall due for the purposes of the Prescription Act, assuming of course that the obligation with which we are here concerned can prescribe. It is always open to the Provincial Government to admit without qualification that an administrative decision had been wrong or had been wrongly taken and consequently to expressly disavow that decision altogether. Indeed Government at every level must be encouraged to re-evaluate administrative decisions that are subject to challenge and, if found to be wrong, to admit this without qualification and to disavow reliance on them. There are literally thousands of administrative decisions of this kind made every day and it would be quite untenable for each decision to be set aside by a court before the underlying obligation can be enforced. Prescription would begin to run (if it is indeed applicable in a case of this kind) as soon as the Provincial Government disavowed reliance on the administrative action concerned. For then the debt would become immediately enforceable.

[57] One more point must be made in relation to *Matinise*. As previously pointed out, the judgment in that case expressed the view that Ms Matinise's grant had been reinstated after the re-application. But all the arrears had not yet been paid to Ms Matinise. Full reinstatement occurs only when all arrears are paid.

[58] Full reinstatement might well have been an indication of the disavowal of the administrative decision. The applicant's grant was never fully reinstated. I accordingly hold that the administrative decision was never disavowed. It follows that prescription had not yet begun to run.

[59] In the circumstances the order of the Full Court must be set aside and that of the High Court restored in substance though not in form.

[60] The order made by this Court deals with the interest obligation somewhat differently from the way in which the High Court did. The effect of the cancellation was that Mrs Njongi received no grant at all for the months of November 1997 until July 2000 inclusive. She would therefore have been entitled to interest at the prescribed rate of 15.5% in respect of each monthly payment from the date it was due until the date of payment. There is however no indication on the papers of the precise date on which the grant became payable in every month: it may have been the first or the last day. It is appropriate that payment be regarded as having been due on the first of each month. I have made the same assumption in relation to the payment that was made during July 2000. The interest must be paid on the balance after the payment of R9 400,00 was made on 10 March 2005. The interest order is made on this basis.

Costs

[61] After the conclusion of argument, the Chief Justice issued further directions dated 6 November 2007, one day after the case was heard, on the issue of costs—

> "1. The Respondent is called upon to show cause by affidavit why, irrespective of the outcome of the application, he should not be ordered to pay the Applicant's costs in the application on the scale as between Attorney and Client *de bonis propriis*.
>
> 2. If the Respondent's affidavit is to the effect that decisions about opposition to the Applicant's case and the way in which the case was conducted on behalf of the province were not taken by him, but by another person or other people, each person identified in the Respondent's affidavit must also show cause by affidavit why, irrespective of the outcome of the application, they should not be ordered to pay the Applicant's costs on the scale as between Attorney and Client *de bonis propriis*.
>
> 3. The costs referred to in paragraphs 1 and 2 of these directions include costs in the review Court, in the appeal before the Full Court, in the application for leave to appeal to the Supreme Court of Appeal, as well as the costs incurred in the proceedings in this Court.
>
> 4. These directions must be complied with by Wednesday 14 November 2007.
>
> 5. The material filed in response to these directions will not be taken into account in the determination of the merits in the proceedings before this Court, but will be considered only in relation to the determination of an appropriate costs order."

[62] Affidavits were filed pursuant to these directions. It is regrettably necessary to examine them closely.

[63] I must at the outset make it plain that I have reluctantly come to the conclusion that it would not be just to make a *de bonis propriis* order for costs against anyone in the circumstances of this case. I do not therefore intend to traverse those averments and contentions aimed at avoiding that result. It must however not be understood that there is any agreement with or sympathy for these averments or contentions.

The affidavit of the present MEC

[64] Mr Ncedani Samson Kwelita (the MEC) was appointed as Member of the Executive Council for Social Development[72] for the Eastern Cape on 3 May 2007. In the circumstances the only decision he made was that the application for leave to appeal to this Court should be opposed. He was guided in this decision by a memorandum that was prepared by Mr Ashley Basson, the senior legal administration officer of the Eastern Cape Department of Social Development (the Department). That memorandum does not raise the moral or policy issue whether the Department should use prescription to avoid paying disability grant arrears that had not been paid as a result of the unlawful administrative decision of the Provincial Government. That much ought to have been clear to Mr Basson and ought to have been included in the memorandum submitted to the MEC. That issue was, after all, pre-eminently a matter for decision by the MEC.

[65] Moreover the memorandum is inaccurate in an important respect. It says—

[72] The Department of Welfare in the Eastern Cape became the Department of Social Development in 2001.

> "The Department raised the issue that her claim had prescribed in that a period in excess of 3 years passed after she were to have become aware of her entitlement to backpay and her instituting the current application."

There has been no evidence to justify the statement that Mrs Njongi ought to have become aware that she was entitled to the payment of arrears. All she knew was that her grant had been stopped, that she had to re-apply, that there had been a resumption of payment and that she had received certain arrears.

[66] More importantly there is no reference in the memorandum to the fact that Mrs Njongi is poor, that she suffers from 100% permanent disability, that she has no other source of income and that the aim of opposing the application would be to avoid paying disability grants that had accrued to her and had not been paid to her as a result of unlawful administrative decision. These matters should have been drawn to the attention of Mr Kwelita so that he could take an informed decision whether to oppose the application for leave to appeal.

[67] The MEC was also misinformed about the amount of the claim. The memorandum says that the claim was for R16 300,00 but fails to mention that a total amount of R10 500,00 had already been paid and the amount outstanding was, at the time of the preparation of the memorandum, a relatively small sum of R5 800,00. The memorandum ought to have brought this factor into the reckoning, and told the MEC how much the litigation had already cost and how much it would cost in the future. The MEC would then have been able to make an informed decision taking into

account the costs, the amount due to Mrs Njongi, her circumstances and the importance of the issue of prescription to the Provincial Government.

[68] Lawyers, in particular senior lawyers, employed by the State must be careful to place accurate and full information in briefing documents to senior office bearers who are required to make policy decisions of great sensitivity.

[69] The other side of this coin is that the MEC himself ought to have requested more information. I would certainly not have found the information in the briefing memorandum sufficient to enable me to make an informed decision.

[70] The MEC asserts that a finding on prescription was important for the Provincial Government in order to ensure certainty for various reasons. That misses the point. As will more fully appear from what is said later, the MEC exhibited a rather one-sided approach to the issue of prescription. It is true that the requirement of certainty is important in certain circumstances. But the counter-weights, ignored by the MEC, were all the personal circumstances of Mrs Njongi, the unlawful action of the Provincial Government and its dire inhumane consequences upon the victim. In particular the provisions of section 27 have also been ignored in making the decision.

[71] The MEC says that he was aware at all times that the issue to be determined was "whether it is necessary to first have an alleged unlawful act set aside before prescription would commence to run in respect of the underlying debt." This

understanding too was fundamentally inaccurate. There was not merely an *alleged* unlawful administrative decision. The decision was unarguably unlawful and had been found to be so by many courts. In fact the Supreme Court of Appeal had criticised the Provincial Government for its shameful response to the thousands of cancellations that had occurred. The understanding of the MEC that there were mere allegations of unlawfulness was wholly inadequate.

[72] The MEC also relies on the number of judgments[73] and the number of judges that had given judgment for the Provincial Government on this issue in Mrs Njongi's and other cases. This is a quantitative approach and unacceptable.

[73] In the final analysis there is insufficient basis upon which to make a punitive order against Mr Kwelita in this case. As I have pointed out above, his affidavit does however reveal much cause for concern. What has been said in relation to Mr Kwelita's affidavit is however relevant to the costs order to be made.

Mr Basson's affidavit

[74] Mr Basson is a man of considerable experience as a lawyer in the Provincial Government sector.

[75] The directions evidently required information on decisions concerning opposition to the case and the way in which the case was conducted to enable the

[73] *Ntame* above n 33; *Makalima* above n 51.

Court to make an appropriate decision in relation to costs. Two situations are advanced that make it quite plain that the information is available to a very limited extent only. The first is that in October 2007 (less than a month before the further directions were issued by this Court) the original file of those responsible for grant payments relating to this case went missing. This was apparently one of 15 000 files that had disappeared. This means that much of the information in his affidavit is provided from memory and inference. The second is that the litigation file of the Department, for some unknown reason, contains only a copy of the notice of motion so that there is no indication of "who had given what instructions to whom." Nor, may I add, why.

[76] From the limited reconstructed information available it would seem that Mrs Njongi's application, after it was served on 19 May 2004, was sent to the Provincial Government for further instructions. On 18 June 2004 the responsible State Attorney, Mr Crozier, sent a fax calling for instructions on the application. He then discussed the matter with two departmental officials on 21 June 2004 when it was decided to oppose the application. Oral instructions were obtained and no-one has an independent recollection about anything concerning the decision to oppose. Everyone involved has forgotten completely.

[77] This account is disturbing to say the least, not necessarily on account of what it says but more importantly because of what it does not say. It is necessary to say something about the nature of the decision to be made by the Provincial Government

when it gave instructions that Mrs Njongi's case should be opposed before examining this scanty version more closely.

[78] I have already said that the Prescription Act requires the debtor to make a decision as to whether it should avail itself of the defence of prescription. It follows from this that the Provincial Government had to make a decision whether to plead prescription or not. There are important reasons why courts cannot by themselves take up the issue of prescription. There is an inevitable and, in my view, moral choice to be made in relation to whether a debtor should plead prescription particularly when the debt is due and owing. The Legislature has wisely left that choice to the debtor. For it is the debtor who would face the commercial, community and other consequences of that choice.

[79] A decision by the State whether or not to invoke prescription in a particular case must be informed by the values of our Constitution. It follows that the Provincial Government too, must take a decision whether to plead prescription to defeat a claim for arrear disability grant payments. This is not a decision for the State Attorney to make. It is an important decision and must not be made lightly. It must be made after appropriate processes have been followed and by a sufficiently responsible person in the Provincial Government who must take into account all the relevant circumstances. It is the duty of the State to facilitate rather than obstruct access to social security. This will be a fundamental consideration in making the assessment.

[80] Some of the circumstances that would inevitably be relevant are listed below.

(a) The applicant was poor and vulnerable.

(b) She lived with a 100% permanent disability.

(c) The disability grant payable to her was constitutionally obligatory, in other words in paying it the Provincial Government was performing an important constitutional obligation.

(d) The arrears had accrued as a result of an unlawful administrative decision made by the Provincial Government.

(e) The Eastern Cape High Courts as well as the Supreme Court of Appeal had already expressed considerable disquiet about the approach of the Provincial Government to the reinstatement and had all but said that the Provincial Government is at least morally obliged to ensure reinstatement.

(f) Mrs Njongi was in all probability not aware of the fact that she was entitled to arrear payments.

[81] All of these factors ought to have been put into the balance and ought to have been evaluated in the context of the harm that the Provincial Government had caused to Mrs Njongi as a result of its unlawful administrative action—

> "To be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation, it reduces a human in his or her dignity. The inevitable result of being unlawfully deprived of a grant that is required for daily sustenance is the unnecessary further endurance of that condition for so long as the unlawfulness continues."[74]

[74] *Kate* above n 3 at para 33.

[82] The following issues and difficulties arise from the analysis of the material in Mr Basson's affidavit about the decision to oppose—

(a) Did Mr Crozier, the State Attorney, understand that a decision had to be taken by the Provincial Government about whether prescription should be relied upon?

(b) If he did, was this communicated to the Provincial Government?

(c) If there had been this communication, was there any advice sought or given in relation to the factors that the Provincial Government should take into account in making that decision?

(d) If so, what was that advice?

(e) When, and by whom was the decision taken? In this regard I must point out that if a conscious decision had been taken it seems highly unlikely that nobody would remember a thing about it.

(f) It is not clear on what basis the decision to oppose the case was taken in June 2004.

(g) If a decision was taken in June 2004 to oppose the matter on the basis of prescription, why was the notice claiming prescription filed only in February 2005 after the judgment in *Ntame*?[75]

(h) Why was the decision taken not to admit the unlawfulness of the action in the light of the jurisprudence that has been set out in this judgment and more particularly in the light of the statement in Mr Basson's affidavit that it was

[75] See [35] above.

"accepted that the applicant's grant was terminated unlawfully and without reason"?

[83] If Mr Crozier did not draw pertinently to the attention of the Provincial Government that it was the decision of that Government whether to invoke prescription and advise the Government on the way in which that decision was to be taken, his conduct and approach were most unfortunate.

[84] The decision not to admit the unlawfulness of the administrative action in the circumstances cannot be said to be unobjectionable. In particular, it must be said that judgments of courts in relation to Provincial Government conduct are not meant simply to be filed away without being read. They contain important information that has a bearing on the conduct of the Provincial Government in issue. It is probable that the legal advisors to the Provincial Government did not read the various judgments which are referred to in this judgment with sufficient care. If they did read them however their conduct is worse. Court judgments were ignored by these lawyers. This is unsatisfactory.

[85] It is not necessary in this case to decide whether the decision of the Provincial Government to invoke prescription was of such a nature that it can or ought to be set aside. That is because the defence of prescription has in any event failed. I am however of the view that, as appears from what I have said earlier, both the decision to oppose as well as the way in which the case was conducted represent unconscionable

conduct on the part of the Provincial Government. I do not need to decide whether the fault lay with the legal advisor, an official in the Department, a political office bearer or with all of them.

[86] I must now examine the rest of the averments and contentions in Mr Basson's affidavit and decide whether they mitigate this unconscionable conduct. Mr Basson says that he discussed the matter at some length with a Mr Webb who is a senior person in the decision-making process concerning grants. He renders the discussion like this—

> "the social issue of making payment of the balance of the [a]pplicant's claim against the principle of prescription. It was clear to me that WEBB agonised over the decision but, in the end, I respectfully submit he made . . . the correct decision."

[87] This does not detract from unconscionability. All the circumstances relevant to the decision which were discussed here are described as "the social issue of making payment of the balance of the [a]pplicant's claim". This description is a grossly insulting understatement of the nature of the problem. We have no idea of the factors he took into account in his agony and on what basis he finally came to his conclusion. Nor do we know why Mr Basson thought Mr Webb was correct.

[88] Mr Basson appears to suggest that he recommended to the Department that costs should not be claimed from Mrs Njongi consequent upon the decision of the Supreme Court of Appeal refusing her application for leave to appeal. Mr Basson gave this information on the basis that it should be taken into account in the costs

decision we make. It seems to suggest that this decision had a moral character which somehow mitigated everything else that had been done to Mrs Njongi. I cannot accept this. The decision not to claim costs was no favour to Mrs Njongi. It was in the interests of the Provincial Government which would have wasted money in the effort of recovery.

[89] Penultimately, Mr Basson says that there are many spurious claims against the Department and that it costs the Department a great deal of money to contest these claims. I do not understand what this has to do with the issue at hand. While the Government has a duty to defend spurious claims Mrs Njongi's claim fell decidedly outside this range.

[90] Finally reliance is placed on certain provisions of the Public Finance Management Act[76] (the PFMA) and it is urged upon us that failure by officials to comply with their responsibilities would expose them to disciplinary charges on the ground of financial misconduct. He says that the failure to raise prescription in the context of legal demands amounts to contravention of a number of provisions of the PFMA—

(a) The first is the obligation to take effective and appropriate steps to prevent fruitless and wasteful expenditure which is defined as expenditure made in vain which would have been avoided if reasonable care had been exercised.[77] This contention is absurd. The contention that it is wasteful expenditure to pay

[76] 1 of 1999.

[77] Id at section 38(1)(c)(ii) read with the definition of "fruitless and wasteful expenditure" at section 1.

arrear disability grants to a poor woman with 100% permanent disability who had been deprived of her money because of the unlawful conduct of the Department boggles the mind. What about the wasteful expenditure incurred by attempting to defend the morally indefensible?

(b) Secondly, reliance is placed on the obligation to manage the liabilities of the Department. They say that not to take the prescription point would have increased the liabilities of the Department.[78] Again this is a cynical position devoid of all humanity.

(c) Reliance is also placed on the obligation to pay all money owing.[79] In this regard it was contended that payment of a debt that has prescribed is payment of an amount that is not owing. One only states this contention to reject it as utterly devoid of any substance. The money remains owing. The State will be excused from paying only if it successfully raises prescription. The decision to be made by the State is whether to take the decision to render the money that is admittedly owing not owing. It may be a contravention of this provision to avail the State of the defence of prescription in circumstances where money is owing by it.

[91] These further contentions, far from mitigating the objectionable conduct of the Provincial Government, compromise that Government even further. In the circumstances there must be an order that the Provincial Government (the respondent) must pay all the costs of the applicant in the High Court, in the Full Court, in the

[78] Id at section 38(1)(d).

[79] Id at section 38(1)(f).

Supreme Court of Appeal and in this Court, on the scale as between attorney and client.

Order

[92] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal succeeds.
3. The order of the Full Court is set aside.
4. The order of the High Court is set aside and replaced by the order set out below.
5. The administrative action of the respondent terminating the applicant's social grant from November 1997 is declared to be invalid and is set aside.
6. The applicant's social grant is reinstated from November 1997.
7. The respondent is ordered to pay to the applicant the amount of R5 800,00.
8. The respondent is directed to pay to the applicant interest calculated at the rate of 15.5% per annum on—
    a) the amount of each separate monthly unpaid grant for the months of November 1997 to July 2000 inclusive from the 1st day of each month until 1 July 2000;

b) the amount of R15 200,00 from 1 July 2000 to 10 March 2005;

c) The amount of R5 800,00 from 10 March 2005 to the date of payment.

9. The respondent is ordered to pay the costs of the applicant in the High Court, the Full Court, the Supreme Court of Appeal and this Court, on the scale as between attorney and client.

Langa CJ, Moseneke DCJ, Madala J, Mpati AJ, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Yacoob J.

For the Applicant:	Advocate A Beyleveld and Advocate B Hartle instructed by Randell-Oswald Inc.
For the Respondent:	Advocate GG Goosen SC, Advocate OH Ronaasen and Advocate R Laher instructed by the State Attorney, Port Elizabeth.