FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 005/2005

NONGALISE NYUMBANA

AND

THE MEC OF DEPARTMENT OF WELFARE

EASTERN CAPE PROVINCE

REFERENCE NUMBERS -

- Registrar: **3902/04**

DATE HEARD: **18 JANUARY 2005**

DATE DELIVERED: **3 MARCH 2005**
(REPORTABLE)

JUDGE(S): **LEACH J**

LEGAL REPRESENTATIVES –

Appearances:

- for the State/Applicant(s)/Appellant(s)/Plaintiff: **B HARTLE**
- for the accused/respondent(s)/Defendant:

Instructing attorneys:

- Applicant(s)/Appellant(s)/Plaintiff: **MIKE RANDALL ATT.**
- Respondent(s)/Defendant:

CASE INFORMATION –

- *Topic and keywords*: As per summary

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION) **CASE NO: 3902/04**

In the matter between:

NONGALISE ALICIA NYUMBANA

Applicant

And

THE MEMBER OF THE EXECUTIVE COUNCIL

OF THE DEPARTMENT OF WELFARE,

EASTERN CAPE PROVINCE Respondent

JUDGMENT

LEACH, J

As is all too often the case at the moment, the applicant seeks to review administrative inaction on the part of functionaries of the Department of Social Development in the Eastern Cape (wrongly referred to in the papers as being the Department of Welfare). The applicant is the mother and natural guardian of a

child, S., who was born on [day/month] 1986. On 6 April 1997, the applicant applied for a maintenance grant for S. under the provisions of the Social Assistance Act No. 59 of 1992. She states that she thereafter made numerous enquiries as to the outcome of her application at the Port Elizabeth offices of the Department of Welfare, now known more correctly as the Department of Social Development ("the Department") but without success. At some stage she was informed that her application had been "*cancelled*". Apart from that, she states that she heard nothing further from the Department. She goes on to state the following:

> "17. I am informed that if my application for the maintenance grant had been approved, it would have accrued on the date of the application therefore (*sic), i.e.* on 6 April 1997.
>
> 18. I am advised that maintenance grants were abolished by the Welfare Laws Amendment Act No. 106 of 1997 ("WLAA"), but I am informed that where such grants were payable before the WLAA was first published in the Gazette as a law, those grants remained payable until 1 April 2001, by which date they were to be finally phased out. Obviously if in the phasing out period the child attained the age of 18 years, then the grant would lapse for that reason, but this did not apply in respect of S..
>
> 19. I understand further that the amount of the maintenance grant payable at the time was quite nominal and was reducing annually as prescribed by regulation during the period that such grants were to be phased out.
>
> 20. In the case of S., his grant would have lapsed on 1 April 2001. I believe, therefore, that if the maintenance grant had been approved, I would have been entitled to receive the monthly payments in respect thereof from the date of accrual of the grant to 1 April 2001.
>
> 21. I believe further that despite the fact that maintenance grants were abolished after the date of my application for such a grant on behalf of S., this was no justification for the Department failing to consider my application at all.

……..

30. The administrative action of the Respondent which I challenge and seek to have judicially reviewed consists of:

31.1 the department's failure to date to have considered my application for a maintenance grant in respect of S.;

31.2the Department's ongoing failure, now that it is aware that it had an obligation to consider my application, to deal therewith at my request or on the demand of my attorney; and

31.2it's failure to pay to me the social assistance benefits which I believe I qualified for in respect of the application for a maintenance grant.

……

33. In consequence of the infringement of my rights …. I respectfully submit that it would be just and equitable to direct the Department, within a period of 30 days from the date of service of the Order which I seek herein, to consider my application for a maintenance grant for S. and, in the event of it being approved, to pay to me such amounts as are due to me in respect thereof from date of accrual of the maintenance grant on 6th April 1997 to the date of the lapsing thereof on 1 April 2001."

In consequence of all of this, the applicant seeks on order in the following terms (I quote from her notice of motion):

"1. Directing that the administrative action of the Respondent in failing to consider the Applicant's application for a maintenance grant made on 6th April 1997, be judicially reviewed, and declared unlawful.

2. Directing that the Respondent, within 30 days of the service of the Order granted herein, consider the Applicant's application for a maintenance grant in respect of her son S.N. dated 6th April 1997.

3. Directing that in the event of the Applicant's application being approved, the Respondent shall pay to the Applicant the amount which fell due to her upon approval of the grant, calculated from the date of accrual of the maintenance grant on 6 April 1997 to the date of the lapsing of the grant, on 1 April 2001.

4. Directing the Respondent to pay to the Applicant interest on the sum

> contemplated in paragraph 3 above at the legal rate of 15.5% per annum calculated from the date that each monthly amount comprising the total arrears would have been paid to the Applicant if the grant had been paid from date of accrual to date of lapsing thereof, to date of payment."

It is apparent from this that, in a nutshell, the applicant's case is that she applied for a maintenance grant for her child in April 1997, that as she heard nothing further from the Department it must not have been considered, and that, consequently, despite the legislature having abolished maintenance grants, this Court should review the failure to consider her application for such a grant, direct the respondent to consider such application and, in the event of it being approved, to pay her the amount that she would have received for the period 6 April 1997 until 1 April 2001, together with interest thereon.

The immediate problem I have is whether this Court could order the respondent to consider awarding a maintenance grant merely because the applicant's grant application had been lodged before such grants were abolished. Prior to the implementation of the Welfare Laws Amendment Act No. 106 of 1997, s 2 of the Social Assistance Act No. 59 of 1992 provided for a number of different types of grant including, in terms of s 2(d) thereof, a "*maintenance grant to a parent for the maintenance of a child in his custody*". Section 4 of the Social Assistance Act at that time provided for the payment of a maintenance grant in certain circumstances. However, maintenance grants payable under s 4 were abolished when s 21 of the Social Assistance Act (which came into effect on 19 December

1997) was inserted by s 4 of the Welfare Laws Amendment Act of 1997. Section 21 specifically provided that any maintenance grant payable in terms of s 4 of the Social Assistance Act, 1992 "*is hereby abolished*", and s 21(2) went on further to provide:

> "Notwithstanding the abolition of a maintenance grant or similar grant in terms of subsection (1), any such grant payable immediately before the date on which the Welfare Laws Amendment Act, 1997, is first published in the Gazette as law, is payable until the date immediately before the date of commencement of sections 2(d) and 4, and from that date it is, subject to subsection (3), payable during such period as the beneficiary concerned qualifies for such grant in terms of the provisions governing that grant or for a period of three years, whichever period is the shortest."

My *prima facie* view on the effect of this legislation is that maintenance grants were abolished and were replaced by child-support grants (which were introduced by the Welfare Laws Amendment Act by way of amendments to s 2 (d) and s 4 of the Social Assistance Act) – and the only maintenance grants which could thereafter be paid were those "*payable*" immediately before the date on which the Welfare Laws Amendment Act was first published in the *Gazette* as law, which grants would continue but for no more than three years at most. That also appears to be the import of the regulations published under Government Notice no R 417 of 31 March 1998 in regard to the phasing out of maintenance grants under the Social Assistance Act, regulation 2 of which provides that :

> "Any maintenance grant …. which was payable in terms of s 21(2) of the Act …. continues to be payable …. in accordance with these regulations".

In the light of these provisions, as the applicant was not in receipt of a ***maintenance grant*** for her minor child which was ***payable*** in terms of s 2(2) of the Social Assistance Act (as amended by the Welfare Laws Amendment Act, 1997) when such grants were abolished with effect from 19 December 1997, she was thereafter not entitled to receive such a grant – instead she had the right to apply for a ***child-support grant,*** a grant which superseded a maintenance grant. Accordingly, even if there was an unreasonable delay in processing the applicant's application for a maintenance grant, I do not see how this Court can now direct the respondent to consider an application for such a grant which the respondent no longer has the power to award.

But it is unnecessary to reach a final decision in that regard as there is a more fundamental reason why this application cannot succeed. Although the underlying *causa* of the present application is an alleged failure to consider her application for a maintenance grant, *ex facie* the applicant's papers her grant was in fact approved and was probably thereafter cancelled as it had not been collected. I say this as on 3 December 2003, the applicant's attorney wrote to the Department (the letter is "Annexure C" to the papers). After stating that the applicant had applied for a maintenance grant on 6 April 1997 for her minor son, he went on to allege the following:

> "When she went to enquire at your local offices in Port Elizabeth as to the progress of the application, she was told that her grant had been "*cancelled*".
>
> After she was informed by your officials in Port Elizabeth that the grant had been cancelled, she went to her children in Johannesburg. After 1 year she relocated back to Port Elizabeth and she consequently applied for a disability grant as a result of her being terminally ill with cancer. When she went to enquire to the progress of her disability grant application she was informed, that the State Maintenance Grant that she applied for had been approved according to the information on the computer. Furthermore, your officials informed our client that the grant was unpaid, thus creating the impression that she willfully failed to collect her monthly payment at her monthly pay point. Our client received no formal communication whatsoever from your Department indicating whether he (*sic*) application for a State Maintenance Grant was rejected or approved".

From this it appears that the applicant was in fact informed that her maintenance grant had been approved but that it had been cancelled as she had failed to collect her monthly payments. This is a far cry from the case which she sets out in her papers. It may well be that she may have been entitled to relief arising out of the cancellation of her grant, but I do not see how I can make an order directing the officials of the Department to consider and take a decision on her application for a maintenance grant on the basis that no such decision has been taken when I know, from her own mouth (or more properly from that of her attorney) that she has been informed that a decision was taken in her favour but that the grant which had been awarded to her was cancelled as she had not collected it.

It seems to me that the difficulty which has arisen in this case is due to a lack of care having been taken in the preparation of the applicant's founding papers –

which are virtually identical, save for the names of the *dramatis personae* and the relevant dates, to the papers issued by the same attorney in a similar case on the same day and which was argued together with the present matter. It appears from this that the applicant's attorney probably fell into the all too common trap of using a precedent stored in a word processing package on a computer, without carefully considering the real thrust of the applicant's complaint and whether the precedent was appropriate to deal with the exigencies of the case.

Be that as it may, the true facts appear to be substantially different from those alleged by the applicant in her founding affidavit, and do not support the cause of action she mistakenly set out in her papers. The application is therefore the product of the careless use of precedent and the failure to properly consider the relief which should have been claimed on her behalf.

For the reasons set out above, the application is defective and must be dismissed. It is so ordered.

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L E LEACH

JUDGE OF THE HIGH COURT

SUMMARY

Applicant seeking a review of an alleged failure to process an application for a maintenance grant under Act No 59 of 1992 lodged before such grants were abolished by Act No 106 of 1997 – Court doubting whether it had the power to direct the respondent to consider the award of a maintenance grant after the abolition thereof – but in any event, applicant had failed to make out a case as it appeared that her maintenance grant had been approved but thereafter cancelled as it had not been collected.