IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA

CASE NO: 1678/12

Heard on: 13/08/13

Delivered on: 26/09/13

NOT REPORTABLE

In the matter between:

NTOMBESIZWE GELEDWANA Applicant

and

MINISTER OF SOCIAL DEVELOPMENT 1st Respondent

THE CHAIRPERSON OF THE INDEPENDENT

TRIBUNAL FOR SOCIAL ASSISTANCE

APPEALS 2nd Respondent

SOUTH AFRICAN SOCIAL SECURITY AGENCY 3rd Respondent

JUDGMENT

NHLANGULELA J:

[1] These are administrative review proceeding in which the applicant seeks a relief, slightly in an amended form that the one originally set out in the notice of motion, that the decision of the second respondent in refusing to grant a permanent physical disability grant in favour of the applicant be declared to be a violation of s 6(2)(e)(iii)and (iv) of PAJA, corrected, altered and/or set aside with costs.

[2] The court urged to grant such an order is empowered under s 8(1) of PAJA to, *inter alia*, set aside the administrative action and remit the matter back to the administrator for re-consideration with or without directions. The applicant was well advised not to seek an exceptional order substituting the decision of the respondent with the one that the court deems appropriate.

[3] The dispute between the parties arises from the following circumstances: In July 2008 and in Mthatha, the applicant, a woman,

applied for a permanent disability grant in terms of s 9 of the Social Assistance Act 13 of 2004 (the Act), which provides that a person is eligible for a disability grant if he/she has attained the prescribed age and is, owing to physical or mental disability is unfit to obtain, by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance. Further, Regulation 3 of the regulations published under GN R898 in GG 31356 of 22 August 2008 framed under the Act provides that an eligible person must have attained the age of 18 years, his/her disability must be confirmed by an assessment which indicates whether the disability is permanent or temporary and he/she is unable to enter the open labour market or to support himself/herself.

[3] On 24 July 2008 the applicant was subjected to medical examination for the purposes of medical assessment by Dr B. J. Mankanku acting on behalf of the first respondent. A medical report was submitted to the third respondent, a duly appointed Agent of the first respondent, for consideration in the application for disability grant. On 15 September 2008 the third respondent addresses a letter (annexure "NB1") to the applicant rejecting the application in the following terms:

> "Your early controlled chronic medical condition is controllable with regular medication from the clinic.
> Your epilepsy is treatable and can be well controlled on regular medication, causing any permanent functional impairment. Take serial blood levels."

[4] On 06 September 2010 the applicant appealed the decision of the third respondent, as advised to do so if aggrieved, to the second respondent (the Independent Appeal Tribunal appointed to assist the first respondent in terms of the Act). The second respondent sat to entertain the appeal on 21 October 2011 and decided, after deliberations based on the medical report of Dr Mankanku, that the appeal succeeds, the decision of the third respondent is set aside and replaced with a new decision granting her a disability grant for a period of 12 months. The applicant was aggrieved by the appeal decision. It appears from the record that the main reason for her dissatisfaction lies in the contents of the medical report by Dr Mankanku in which the doctor found that the applicant was an epileptic patient with severe and frequent seizures; and that she had received anti-convulsant agents and symptomatic management. The doctor concluded that the applicant has a severe permanent impairment which would require her to work, if at all, in a protected and safe environment. The case put forward to the respondents

based on Dr Mankanku's report is that she is eligible for a permanent physical disability grant as envisaged in s 9 of the Act read with Regulation 3.

[5] The documents discovered by the respondents are a source of contradiction between the findings and recommendations made by Dr Mankanku and those of one Dr Ngwilimeni Aaron Funyufunyu on which the appeal decision is based. Dr Funyufunyu is a qualified general medical practitioner who served as a panelist in the independent appeal tribunal and issued an opinion that led to the award of disability grant for 12 months. The doctor gives a summary of medical assessment of the applicant on affidavit. The thrust of his assessment is that the medical report compiled by Dr Mankanku did not meet certain medical guidelines, which I paraphrase below.

[6] Dr Funyufunyu states that the conclusion drawn by Dr Mankanku that the applicant is permanently physically disabled is not predicated on adequate clinical evidence of occasional hospitalization to stabilize the patient's convulsions; the applicant did not complain about frequent convulsions; the taking of blood levels to test the efficacy of drugs

administered to the applicant and therapeutic blood level achieved was not done; it was not ascertained if blood levels were adequate and seizures persist with the result that it cannot be determined if the applicant may be referred for specialist treatment, EEG scan and CT scan; it cannot be determined if further treatment options including general add-on drugs at state formulary can be recommended; no tests have been provided on blood drug levels; and there is no evidence of strict treatment regime for continued frequent seizures having been done and optimal treatment having been given. The doctor also expressed the opinion that there is no evidence of the applicant having associated medical retardation, psychotic behavior and physical abnormality to support the conclusion that the applicant was permanently impaired.

[7] It is common cause that the source of the applicant's objection to the award made on appeal lies on the fact that, on the one hand, Dr Mankanku's report is the medical assessment based on medical examination actually done and, on the other hand, the medical assessment by Dr Funyufunyu is not founded on medical examination to verify his adverse findings with regard to an alleged non-compliance with the guidelines mentioned by him on affidavit. In the circumstances, in my view, there is validity in the

contention advanced on behalf of the applicant that it was improper for the Appeal Tribunal to merely adopt the unverified findings of Dr Funyufunyu and ignore the medical findings by Dr Mankanku that the applicant was permanently disabled.

[8] It would appear from the provisions of Regulation 18 of 19 September 2011 issued by the Minister in terms of the Act that the Appeal Tribunal should not have decided the matter before it as it did where the medical information provided to the Agency was deficient without referring the application to an independent doctor for a second medical examination. Dr Funyufunyu did not utilize this channel which was open to the tribunal but he merely made recommendations as evidenced in the appeal adjudication forms that were discovered in terms of Rule 53. Those forms together with the disability grant advisory form, completed by one Dr Giwu-Mpepo, also a discovered document, were not made pursuant to a fresh medical examination, and they contain abbreviated medical opinions. By comparison the medical evidence contained in Dr Funyufunyu's affidavit is far more extensive than the notes made in the forms. It does not appear from the record if such medical evidence was considered by the tribunal. It seems to me that the detailed medical examination of Dr Mankanku was

disregarded in preference for the scant medical assessment that was not supported by any medical examination. The appeal tribunal committed misdirection in this regard. Consequently, I have no hesitation in finding that the rights of the applicant to a just administrative action were breached.

[9] In *Mnikelo Mnyaka v Minister of Social Development And Others,* ECM Case No: 1637/2012 dated 30 April 2013 (unreported) Lowe J made a similar finding, as I have done, in circumstances where the applicant for a disability grant had been denied an award on appeal by reason that the appeal tribunal failed to obtain a second medical examination to reconcile two mutually destructive medical reports submitted before it. The learned Judge set aside the decision of the appeal tribunal on that basis. I had no reason to do otherwise in this matter.

[10] The applicant also seeks a relief that her failure to bring the application within 180 days be condoned. She has set out facts in the affidavits filed on her behalf that although the appeal decision conveyed to her was made on 21 January 2011, she only became aware of it in December 2011 whereupon she sought advice from the O.R. Tambo Disabled Peoples' Organization. That organization was not of much help until she found an

attorney in April 2011 to assist her. Her relationship with the attorneys went sour, and she was compelled to leave them. Significantly, those attorneys informed her that she had no prospects of success in her intended appeal because she had no good reasons to place before the court to justify a long delay in challenging the appeal decision. She had to move to another firm of attorneys on 31 July 2012 who ultimately assisted her to bring these proceedings on 03 August 2012. The applicant has pleaded poverty and ignorance of the provisions of s 7(1) of PAJA. It was contended on her behalf during arguments that the circumstances placed before the court coupled with the nature of the claim brought against the respondents puts the explanation for delay within the ambit of considerations as dealt with in the cases of *Ntame v MEC for Social Development, Eastern Cape, And Two Similar Cases* 2005 (6) SA 248 (ECD)*;* and *Njanjula v MEC for Social Welfare, Eastern Cape,* SECLD Case No: 1710/2003 (unreported). It was held in these cases that condonation will be granted under PAJA if it appears to the Court that a poor litigant has a least chance of vindicating his/her constitutional right through the legal process; and the period of delay does not work an injustice to the respondent. In my view a dispute about the time of delay in this matter, in the absence of prejudice, should not be allowed to operate as a bar to the application for condonation being granted.

[11] In the result the following order shall issue:

1. **The applicant's failure to institute these proceedings within a reasonable period of time be and is hereby condoned.**

2. **The applicant's application for permanent disability grant be and is hereby remitted back to the second respondent for re-consideration taking into account the provisions of Regulation 18 to the regulations dated 19 September 2011.**

3. **The first and second respondents to pay costs of the application on attorney and client scale jointly and severally, the one paying and the other being absolved from liability.**

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Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv N. Hinana Khaya Nondabula Attorneys c/o L G Nogaga Attorneys MTHATHA.
Counsel for the 1st and 2nd respondents	:	Adv PHS Zilwa c/o State Attorney MTHATHA.