THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 580/04

In the matter between :

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

- and -

NONTEMBISO NORAH KATE Respondent

Before: **HOWIE P, STREICHER, CAMERON, MTHIYANE & NUGENT JJA**

Heard: **2 MARCH 2006**

Delivered: **30 MARCH 2006**

Summary: **Constitutional right to social assistance – denial of by unreasonable delay – whether an award of damages an appropriate remedy.**

Neutral citation: **This judgment may be referred to as Member of the Executive Council: Welfare v Kate [2006] SCA 46 (RSA)**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] Section 27 of the Constitution obliges the state to achieve the progressive realisation of the right that everyone has to social security – including, if they are unable to support themselves and their dependants, appropriate social assistance – by taking reasonable legislative and other measures within its available resources towards that end.

[2] On 1 March 1996 the Social Assistance Act 59 of 1992 was brought into effect. The administration of the Act, appropriately adapted, was simultaneously assigned to the provincial governments in terms of s 235(8) of the interim Constitution.[1] Presumably the President and the Premier of the Eastern Cape Province were satisfied that the government of that province had the administrative capacity to administer the Act because the assignment was permitted only if that capacity existed.[2] The Act, as adapted for purposes of the assignment, obliges the provincial government (subject to the provisions of the Act and the concurrence of the Member of the Executive Council responsible for the provincial budget) to make social grants to disabled persons, amongst others, out of moneys appropriated by the provincial legislature for that purpose.[3] The MEC has indeed concurred in the making of social grants by the government of the Eastern Cape and moneys have been duly appropriated.

[3] The establishment by the state of a legislative and administrative structure for the making of social grants and the appropriation of moneys for that purpose together go a long way to fulfilling the state's constitutional obligation but by themselves they are not enough. What is required in addition are reasonable

[1] Constitution of the Republic of South Africa, 1993. The assignment, with effect from the date that the Act came into operation, was effected by Proclamation R.7 published in Government Gazette 16992 dated 23 February 1996. On 6 September 2004 the proclamation was declared to be invalid in *Mashavha v President of the Republic of South Africa* 2005 (2) SA 476 (CC) but the order of invalidity was suspended until 6 March 2006.

[2] Section 235(8) of the interim Constitution.

[3] Section 2(a) of the Act read with the assigning proclamation.

measures to make the system effective. On that score there has been conspicuous and endemic failure in the Eastern Cape for a considerable time.[4]

[4] Why that has been so is not altogether clear because the government has failed to explain it at all in the present case. But the result has been a plethora of litigation in the High Court between the poor of that province and the provincial administration. In some cases the failure of the administration lies in not expeditiously considering applications for social grants. In other cases it lies in not paying what is due to beneficiaries once their applications have been approved. At times it lies even in disregard of court orders for the payment of moneys that are due. (One such case – *Jayiya v Member of the Executive Council for Welfare, Eastern Cape*[5] – ultimately reached this court and I will refer to it again later in this judgment.)

[5] What is particularly distressing is that there seems to be no end in sight. An affidavit deposed to by the attorney for the Black Sash (which was admitted as *amicus curiae* in the present appeal) records that in a period of six weeks during the latter part of 2005 there were almost 2 000 such cases on the roll of the High Court. On one occasion Plasket J noted that there were 102 cases relating to social assistance on his motion court roll for that week and he went on to say the following:

> 'If this volume of social assistance cases had been unique to one week's motion court roll, it would have been cause for concern. Unfortunately, it is a phenomenon that is now common: the judges of this division, as well as those in the other two divisions in the Eastern Cape, have grown accustomed to the depressing tales of misery and privation contained in an ever-increasing volume of cases that clog their motion court rolls in which applicants complain about administrative torpor in the processing of their applications for social

[4] The endemic nature of the failure appears from the judgments in a number of cases that have been decided in the high court of that province and is commented upon more generally by Clive Plasket 'The Exhaustion of Internal Remedies and Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000' 2002 (119) *SALJ* 50.

[5] 2004 (2) SA 611 (SCA).

assistance. To make matters worse, this situation is not new. Over the last four or five years, judges have commented, often in strident terms, about the unsatisfactory performance of the respondent's department in the administration of the social assistance system in the province.'

[6] The litigation that has been spawned by this administrative failure, with adverse implications for the public purse, ought to be capable of being avoided in most cases at least, because the rights that are in issue are usually not in dispute. Typically what seems to be occurring is that when a demand upon the administration is ignored an application to court spews from a word processor, with adaptations to meet the particular case, which then induces the administration to do something, probably through the intervention of the State Attorney. The administration then does what it ought to have done at the outset leaving it for the court merely to order the government to pay costs that were avoidable.[6] Another consequence of litigation on that scale – which has a bearing on the case that is now before us – is that cases are often commenced without adequate thought being given to the formulation of the claim. Instead a burst of shrapnel is fired in the general direction of the government in the hope that somewhere something will strike home.[7]

[7] The case that is now before us is but one in that war of attrition. Mrs Kate lives in the Govan Mbeki settlement near Port Elizabeth. She was 54 years old and disabled when the Act came into operation and it is evident that she had no means of support. Quite how she survived is not apparent from the record but it is safe to assume that she lived in poverty. On 16 April 1996, soon after the Act came into operation, she applied for a disability grant.

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[6] Examples are *Ndevu v Member of the Executive Council: Welfare* SECLD Case No. 597/02 undated; *Sikutshwa v Member of the Executive Council: Social Development* SECLD Case No 847/04 dated 12 May 2005.

[7] Examples are *Mfubu v Member of the Executive Council of the Department of Welfare, Eastern Cape Province* SECLD Case No 3900/04 dated 3 March 2005; *Nyumbana v Member of the Executive Council: Welfare* SECLD Case No 3902/04 dated 3 March 2005; *Makalima v Member of the Executive Council: Welfare* SECLD Case No. 1601/03 dated 27 January 2005.

[8] A person who desires social assistance must apply for it to the Director-General of the Department of Welfare[8] in the manner prescribed by regulation. If the Director-General is satisfied that the applicant is disabled then the applicant is entitled to a disability grant,[9] and the provincial government is obliged to make the grant from the funds that have been appropriated for that purpose.[10]

[9] Regulations were promulgated on the day that the Act came into operation (the 1996 regulations).[11] The 1996 regulations required an applicant for a grant to complete and sign an application form in the presence of an attesting officer,[12] and the date upon which that was done was deemed to be the date upon which the application was made.[13] If an application for a disability grant was approved it accrued from the date of attestation (Regulation 10(1)). The 1996 regulations were replaced on 1 March 1998 (the 1998 regulations).[14] The 1998 Regulations are material only in so far as Regulation 11 purported to change the date of accrual of an approved grant from the date of attestation of the application to the date of approval.[15] That regulation, and the purported repeal of the earlier Regulation 10, were declared to be invalid and were set aside by the High Court at Pretoria with the consent of the Minister, and regulation 11(1) of the 1998 regulations was subsequently amended to restore the earlier position.[16] Thus at all times that are material to this appeal Kate's disability grant, once approved, accrued from 16 April 1996.

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[8] That official, and the relevant department, are referred to throughout this judgment by their nomenclature at the time the Act was assigned.
[9] Section 3.
[10] Section 2.
[11] Regulations Regarding Grants, Social Relief Of Distress And Financial Awards In Terms Of The Social Assistance Act, 1992, promulgated under Government Notice R.373 in Gazette No. 17016 dated 1 March 1996.
[12] Regulation 8 of the 1996 regulations.
[13] Regulation 9 of the 1996 regulations.
[14] Regulations Regarding Grants And Financial Awards To Welfare Organisations And To Persons In Need Of Social Relief Of Distress In Terms Of The Social Assistance Act, 1992, promulgated under Government Notice R.418 in Gazette No. 18771 dated 31 March 1998.
[15] Regulation 11 of the 1998 regulations.
[16] Government Notice R.1233 published in Gazette No. 22852 dated 23 November 2001.

[10] What constitutes a reasonable time for an administrator to process and approve or reject an application – whether for a social grant or otherwise – is necessarily relative. Much will depend upon the nature of the particular application, the enquiries that need to be made, the volume of similar applications that need to be dealt with, the administrative capacity that is available for processing such applications, and other matters of that nature. It would be unrealistic to expect the ideal from an administration that is no doubt confronted with complex administrative problems inherited from the fractured administrative history of the Eastern Cape, while simultaneously being called upon to administer a vast new system of social assistance. A court is bound to take account of those realities when determining what ought reasonably to be expected of the administration. But what is expected of an administration that has justifiable reasons for what appears to be unacceptable delay in carrying out its functions are full and frank explanations that will enable a court to assess their adequacy when determining whether the administration has acted reasonably. In the case that is now before us there has been no explanation at all for the delay in considering Kate's application. On the contrary, it was not disputed that it ought reasonably to have taken no more than three months. Yet it took forty months before Kate was advised in August 1999 that her application had been approved, with no explanation at all for the thirty seven month delay.

[11] Once Kate was notified in August 1999 that her grant had been approved it was thereafter paid to her monthly.[17] By that date an amount had accrued to her from the date of her application. Simultaneously with her first monthly payment Kate received part of that accrual – R6 000 – leaving a balance that

[17] We were advised by counsel for the appellant that the grant was approved on 25 February 1999 though Kate was only advised of this in August 1999. Counsel were agreed that on a proper construction of the regulations the date upon which the grant accrued to Kate was the date that she was notified that it had been approved, rather than on the date that it was approved, and I have accepted for purposes of this appeal that that is correct, without deciding the question. The precise date upon which she was notified of the approval does not appear from the record and I have assumed in favour of the appellant that she was notified on 31 August 1999.

was payable. No explanation has ever been given for why that shortfall was not paid.

[12] It was only in March 2003 – after she consulted an advice office of the Centre for Human Rights and was referred to her present attorney – that Kate became aware that she had been underpaid. On 19 March 2003 her attorney wrote to the Regional Director of the Department of Welfare drawing attention to the shortfall and demanding its payment together with interest on the accrual from 16 April 1996 to date of payment. Receipt of the demand was formally acknowledged but there was no further response.

[13] On 15 October 2003 an application was launched in the High Court at Port Elizabeth in which declaratory relief was sought together with orders for the recovery of the balance of the accrual (the amount claimed was erroneous) and interest on that amount. No purpose is served by repeating the bewildering formulation of the interest claim. What was meant to be conveyed by the claim (and by the order that was made, the terms of which are capable of being misunderstood) – and that is the basis upon which the matter was argued in this court – was that Kate should be paid an amount equivalent to interest at the prescribed rate of 15,5 per cent per annum on each monthly amount that accrued to her once the application was approved, calculated in each case from the date that the particular amount accrued, and on the assumption that the first monthly grant accrued on 15 April 1996, the second on 15 May 1996, and so forth, until the relevant amount was paid.

[14] In December 2003 the State Attorney wrote to Kate's attorneys advising that the outstanding balance of the accrual was R13 015 and that it would be paid to her when next she collected her monthly grant. (The outstanding balance was indeed paid to her the following month and it was accepted before us that

the accrual was thereby discharged.) She was also invited to withdraw the application but she declined to do so. Thus the principal issue that remained in dispute when the matter came before the court below was whether Kate was entitled to the interest that she had claimed on the accrual.

[15] The court below (Froneman J) granted certain declaratory relief and also ordered the appellant to pay the interest that had been claimed.[18] (A further order for payment to Kate of R805 was erroneously sought and granted and has now been abandoned.) This appeal against those orders is before us with the leave of that court.

[16] It is not disputed that the declaratory order was properly made and I need say no more about it. It is also not disputed that Kate became entitled to interest at the prescribed rate on the amount of the accrual, calculated from the date that it became payable (which I have accepted for present purposes was the date that Kate was notified that the grant had been approved)[19] in accordance with ordinary principles relating to unpaid debts. The submission on behalf of the appellant in that regard was that the claim for payment of the accrual, and for interest on it from the date that it became payable, ought to have been pursued by ordinary action in the magistrates' courts and not by review proceedings in the High Court.[20] Those claims could indeed have been pursued and recovered in that manner, and were not properly susceptible to proceedings for review, but the allegations that were made in the founding affidavit were nonetheless sufficient for that relief to have been granted on ordinary principles of law. The court below had concurrent jurisdiction with the magistrates' court to entertain and to grant that claim and there are no grounds for us to interfere with the order that it made in that regard.

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[18] Reported as *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SECLD).
[19] See footnote 17.
[20] Cf *Makalima v Member of the Executive Council: Welfare* SECLD Case No 1601/03 delivered on 27 January 2005 paras 18 and 19.

[17] The real dispute in the present appeal – which the parties regard as a test case – relates to the remainder of the interest that was awarded by the court below i.e. interest during the period from the date the application was made to the date that Kate was notified that it had been approved. (During that period interest did not accrue to Kate on ordinary principles because the debt was not yet payable.) Interest during that period was claimed and awarded as a measure of constitutional damages for the unreasonable delay that Kate was constrained to endure. Kate's case, put simply, is that the unreasonable delay in considering her application deprived her during that period of her constitutional right to receive a social grant, and for that deprivation she ought to be recompensed by an order for damages.

[18] The judgment of the court below is mainly a riposte to this court's judgment in *Jayiya* and traverses issues that did not arise in the case that was before it, which the learned judge freely acknowledged. He said that he felt compelled to traverse those issues because, he said, this court itself went beyond the issues that were before it in *Jayiya*, with the result that doubt and confusion has been thrown on what until then had been incremental and cautious progress by the High Court in what he described as 'a kind of dialogue' between it and the provincial government to find a way out of the impasse. Indeed, one of the reasons that he granted leave to appeal was 'to allow for the widest consideration of all the issues raised in the judgment [in *Jayiya*]'.

[19] Much of what was said in *Jayiya* was indeed *obiter* and the *ratio* in that case was decidedly narrow. *Jayiya* decided only that a money judgment given against a provincial government (which is the construction that was placed upon the relevant order)[21] is not enforceable by incarcerating for contempt a defendant

[21] Paras 5 and 15 read in the context of the relevant order.

who has been cited nominally for the government if the government fails to comply with the order. (The Permanent-Secretary: Welfare, formerly known as the Director-General, was construed as having been cited nominally for the government, although incorrectly.)[22] But I do not think we should accept the invitation extended by the court below to reconsider that decision or what was said in the course of deciding it where it is not material to the case that is now before us. To add to the non-binding statements that were made in that case and in the court below will only add to any uncertainty.

[20] To the extent that the court below dealt in its judgment with the question that is now in issue – whether Kate became entitled to 'constitutional damages' – the learned judge followed earlier decisions of that court (Leach J) in *Mahambehlala*[23] and *Mbanga*.[24] (Those two cases were heard simultaneously.) *Mahambehlala's* case was materially on all fours with the present case. In that case it took the administration nine months to approve Ms Mahambehlala's application for a social grant when it ought reasonably to have taken no more than three. As in the present case the grant, once approved, accrued to Mahambehlala from the date of the application, but became payable only on the date of approval. Holding that the delay 'resulted in an unlawful and unreasonable infringement of [Mahambehlala's] fundamental right to just administrative action as set out in s 33(1) of the Constitution'[25] Leach J awarded damages equivalent to interest for the period of the delay, after saying the following:[26]

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[22] Para 16: 'The person against whom no 'attachment or like process shall be issued' is, of course, the nominal defendant.' Para 18: 'The State Liability Act outlaws the 'attachment' of the nominal defendant or respondent in proceedings against a government department. There is nothing that any evolution of the common law can do about that.' The court also observed, incidentally, that the citation of the Permanent-Secretary was in any event irregular, in that the only nominal defendant permitted by the State Liability Act was the relevant Member of the Executive Committee.
[23] 2002 (1) SA 342 (SE).
[24] 2002 (1) SA 359 (SE).
[25] At 353D-E.
[26] At 357G-I.

'…[I]t seems to me that, in order to attempt to place the applicant in the position in which she would have been had her constitutional rights not been breached by the tardy manner in which her application for a social grant was processed, it is appropriate to order the respondents to pay interest on the amounts that she should have been paid as a social grant had it been approved with effect from 7 June 2000 [three months after the application was made] until date of payment. It was common cause during argument that if interest was to be awarded, it should be at the current prescribed rate of 15,5 % per annum. It will be so ordered.'

A similar order was made in *Mbanga* on the same grounds.

[21] In *Jayiya* Conradie JA commented disapprovingly on the decision in *Mahambehlala*, though he made it clear that the matter had not been argued and his views were no more than tentative.[27] (The comments were also *obiter*, directed as they were at the order that had been made by Moodley AJ, which was not the order that was on appeal.) Conradie JA was of the view that the appellant in *Mahambehlala* should have sought her remedy in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) rather than in the Constitution,[28] and he was also of the view that PAJA does not allow for the recovery of constitutional damages.[29] It is not necessary to consider the correctness of those tentative views in the present case because it is common cause that PAJA has no application. (Although reliance was placed on PAJA in the founding affidavit that was no doubt because the relevant word-processor was not aware that it only came into operation long after the material events had occurred.)[30] But the shrapnel that founded the case encompassed far more than that and included allegations that were sufficient to dispose of this case on the grounds to which I now turn.

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[27] Para 8.
[28] PAJA came into operation on 30 November 2000. Whether it was applicable to events that had occurred before then was not pertinently considered in *Jayiya*.
[29] *Jayiya*, para 9.
[30] PAJA came into operation on 30 November 2000.

[22] In the case that is now before us, following *Mahambehlala* and *Mbanga,* the constitutional breach was held to lie in the denial to Kate of the process that is promised by s 33(1) of the Constitution[31] and was promised before that by s 24 of the interim Constitution.[32] In my view that is to approach the matter too narrowly. The realisation of substantive rights is usually dependant upon an administrative process. Rights that protect that process, like those that are embodied in s 33(1) and s 237[33] of the Constitution and in PAJA, are essentially ancillary to the realisation of those substantive rights. For without protection being given to the process the substantive rights are capable of being denied. Where, as in this case, the realisation of the substantive right to social assistance is dependant upon lawful and procedurally fair administrative action, and the diligent and prompt performance by the state of its constitutional obligations, the failure to meet those process obligations denies to the beneficiary his or her substantive right to social assistance. What has been denied to Kate is not merely the enjoyment of a process in the abstract, but through denial of that process she has been denied her right to social assistance, which is dependant for its realisation upon an effective process. It is the denial of that substantive right that lies at the centre of her claim.

[23] That the administration of the welfare department of the Eastern Cape Government acted in breach of its constitutional obligations and thereby denied to Kate her right to social assistance is not contentious. What is contentious is only whether an award of monetary damages is an appropriate remedy for the admitted constitutional breach. *Fose v Minister of Safety and Security*[34] recognised that in principle monetary damages are capable of being awarded for

[31] Section 33(1) of the Constitution, which came into operation on 4 February 1997, read together with s 23(2)(b) of the Sixth Schedule, conferred on every person the right to lawful and procedurally fair administrative action.
[32] Section 24 of the interim Constitution conferred the same rights on every person.
[33] Section 237: 'All constitutional obligations must be performed diligently and without delay.'
[34] 1997 (3) SA 786 (CC).

a constitutional breach. In that case Ackerman J made the following general but important observation in the context of the interim Constitution:[35]

'I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'

Earlier the learned judge said the following:[36]

'It seems to me that there is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed.'

[24] Monetary damages for a constitutional breach have since been awarded by this court, and endorsed by the Constitutional Court, in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*).[37] In the decision of this court Harms JA said the following:[38]

'Courts should not be overawed by practical problems. They should 'attempt to synchronise the real world with the ideal construct of a constitutional world' and they have a

[35] Para 69.
[36] Para 60.
[37] 2004 (6) SA 40 (SCA) para 43; 2005 (5) SA 3 (CC) paras 65 and 66.
[38] Para 42.

duty to mould an order that will provide effective relief to those affected by a constitutional breach.'

[25] In *Fose* the Constitutional Court emphasised that it was 'not required to answer the question…whether *an* action for damages in the nature of constitutional damages exists in law, nor whether *an* order for the payment of damages qualifies as appropriate relief…*in respect of a threat to or infringement of any of the rights in chap 3*' but was concerned only with the much narrower task of deciding whether an award of damages was appropriate in relation to the particular breach that was there in issue.[39] Similarly in this case we are not called upon to answer those questions broadly and in the abstract – and I do not do so – but only to decide whether the particular breach that is now in issue is deserving of relief in the form of the monetary damages that are now claimed. Whether relief in that form is appropriate in a particular case must necessarily be determined casuistically with due regard to, amongst other things, the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned.

[26] Counsel for the appellant submitted that Kate has delictual remedies that are sufficiently restorative of any loss that was caused to her by the failure of the administration to perform its constitutional duties and that in those circumstances a remedy of constitutional damages is not required, a submission foreshadowed in the following observation by Ackerman J in *Fose*:[40]

'The South African common law of delict is flexible and under s 35(3) of the interim Constitution should be developed by the Courts with 'due regard to the spirit, purport and objects' of chap 3. In many cases the common law will be broad enough to provide all the relief that would be 'appropriate' for a breach of constitutional rights. That will of course depend on the circumstances of each particular case.'

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[39] Para 20.
[40] Para 58. See, too, the observations of Kriegler J at para 98.

[27] The question that submission raises is not so much whether the remedy that is now proposed is an appropriate one to remedy Kate's loss but rather whether a constitutional remedy should be granted at all. No doubt the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly.[41] And no doubt delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations. But the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative – and indirect – means of asserting and vindicating constitutional rights. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct s 38 remedy it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights is required. Where that is so the further question is what form of remedy would be appropriate to remedy the breach. In my view the breach in the present case warrants being vindicated directly for two reasons in particular. First, I see no reason why a direct breach of a substantive constitutional right (as opposed to merely a deviation from a constitutionally normative standard) should be remedied indirectly. Secondly, the endemic breach of the rights that are now in issue justifies – indeed, it calls out for – the clear assertion of their independent existence.

[28] With regard to the form of remedy, counsel for the appellant urged us to confine it to a declaration that Kate has been constitutionally wronged. A declaration of rights is essentially remedial and corrective and it is most appropriate where 'it would serve a useful purpose in clarifying and settling the

[41] Cf. *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 17; *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA) para 34 and 37.

legal relations in issue.'[42] As pointed out by Kent Roach:[43] '[D]eclarations are well-suited to provide legal and practical guidance to resolve an underlying dispute and to prevent new ones from arising'[44], and 'can promote a non-coercive dialogue between courts and government'[45] in preference to an injunction. But he adds the following important reservation:[46]

> 'An important limitation, however, is that they will only be successful in obtaining compliance with the Constitution if governments and officials comply with them voluntarily, promptly and in good faith.'

[29] There is not, and never has been, any doubt that the conduct of the administration that is now complained of is constitutionally unlawful, and the High Court has all but exhausted its lexicon of epithets in its attempts to drive that point home so that the impasse can be ended. I see no purpose in yet another pronouncement to that effect.

[30] What does warrant serious consideration is whether the remedy of *mandamus,* which was available to Kate to avoid the delay occurring at all, was sufficient to protect her rights. Section 6 of the Act properly construed, read together with the procedural guarantees in ss 33(1) and 237 of the Constitution, obliges the Director General to consider and decide upon an application for a social grant, and to do so lawfully, procedurally fairly, and with due diligence and promptitude. It goes without saying that a public functionary who fails to fulfil an obligation that is imposed upon him or her by law is open to proceedings for a *mandamus* compelling him or her to do so. That remedy lies against the functionary upon whom the statute imposes the obligation, and not against the provincial government. If *Jayiya* has been construed as meaning that

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[42] Edward Borchard *Declaratory Judgments* 2 ed 299 quoted in Kent Roach *Constitutional Remedies in Canada* 12-3.
[43] Kent Roach *Constitutional Remedies in Canada*.
[44] Roach, footnote 29, 12-11.
[45] Roach, above, 12-20.
[46] Roach, above, 29, 12-5.

the remedy lies against the political head of the government department, as suggested by the court below, then that construction is clearly not correct. The remarks that were made in *Jayiya*[47] related to claims that lie against the state, for which the political head of the relevant department may for convenience be cited nominally in terms of s 2 of the State Liability Act 20 of 1957, though it is well established that the government might be cited instead.[48] Moreover, there ought to be no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act and fails to do so is liable to be committed for contempt in accordance with ordinary principles and there is nothing in *Jayiya* that suggests the contrary.

[31] The remedy of *mandamus* thus has the capacity to be effective where there is a breach or a threatened breach by a public official of a duty that is imposed upon him or her by a statute or by the Constitution and in most cases that ought to be sufficient without an additional remedy in damages. But there are two considerations in particular that militate against confining Kate to that preventative remedy. The first is that it is a remedy that requires prompt action if the wrong is to be averted before any loss occurs. The rights that are now in issue are directed towards the very poorest in our society, who have little or nothing to sustain them, and who can be expected to have little or no knowledge of where their rights lie nor the resources readily to secure them. It is most unlikely that Kate had the capacity or the means that were required to act swiftly once the delay set in and it would be quite unrealistic to expect the remedy to have been effective in her hands. The second relates to broader considerations. I pointed out earlier in this judgment that the problem that was faced by Kate is one that is endemic in the Eastern Cape. The pattern that emerges from cases that have been brought in the High Court is that an application that has been

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[47] Para 5.

[48] See, for example, *de Klerk v Union Government* 1958 (4) SA 496 (T); *Swart v Union Government* 1948 (3) SA 149 (T); *Muller NO v Government of the Republic of South Africa* 1980 (3) SA 970 (T);

made by an individual and is being delayed usually rises to the surface only when legal proceedings are brought, which must necessarily mean that at least for the moment similar applications by others move a step down in the pile. There is no reason to think it will be otherwise if the individuals concerned seek to enforce their rights by proceedings for a *mandamus*, raising the spectre of even more litigation, with each applicant attempting to leap-frog over others in order to secure their benefits. Anything that is conducive to that occurring is in my view most undesirable. There is no doubt that the proper resolution lies in the administration getting its house in order so that all applications are dealt with expeditiously rather than in encouraging yet more litigation.

[32] There is one further matter. It is indeed troubling, as pointed out by counsel for the appellant, that the public purse, upon which there are many calls, should be depleted by claims for damages. If the provincial administration must seek further funds, in addition to those that have been appropriated for providing social assistance, in order to meet claims for damages, hopefully its accountability to the legislature will contribute to a proper resolution. But the cause for that is the unlawful conduct of the provincial administration and it does not justify withholding a remedy.

[33] In my view the only appropriate remedy in the circumstances is to award constitutional damages to recompense Kate for the breach of her right. What remains is how to measure that loss in monetary terms. It has not been shown that Kate suffered direct financial loss and it is most unlikely that she did, for the grant was destined to be consumed and not invested, but the loss was just as real. 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. That is the true nature of the loss that Kate suffered. There is no empirical monetary standard against which to measure a loss of that kind. Counsel for Kate submitted that in the absence of such a measure she should be awarded an amount equivalent to the interest that is recognised in law to be payable when money is unlawfully withheld. Counsel for the appellant was unable to suggest any more appropriate measure and I think we ought to adopt it. Counsel were agreed that the damages ought not to accumulate such as to exceed the capital amount.

[34] I intend altering the order that was granted by the court below, so that the damages will run only from the date that the unlawful delay commenced and to remove other possible ambiguity, but Kate has been substantially successful in resisting the appeal and is entitled to her costs.

[35] The following orders are made:

1. Paragraph 3 of the order of the court below is deleted and the following paragraphs are substituted:

   '3.1 The respondent is ordered to pay the applicant interest on the sum of R13 015 at the prescribed rate of 15,5 per cent per annum calculated from 1 September 1999 to the date that the amount was paid, provided that the total amount of interest shall not exceed the capital.

   3.2 The respondent is ordered to pay to the applicant damages equivalent to 15,5% per annum on the amount that had accrued to her by 15 July 1996, and on each amount that accrued to her monthly thereafter, calculated from the date that the respective amounts accrued until 31 August 1999, provided that the damages in each case shall not exceed the capital amount upon which they are calculated.'

2. Subject to paragraph 1 above the appeal is dismissed with costs including the costs of two counsel.

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R.NUGENT
JUDGE OF APPEAL

CONCUR:

HOWIE P)

STREICHER JA)

CAMERON JA)

MTHIYANE JA)