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9 February 2009

Submissions to the Portfolio Committee on Justice and Constitutional Development on the Rules of Procedure for Judicial Review of Administrative Action in terms of the Promotion of Administrative Justice Act 3 of 2000 by Prof Geo Quinot, Department of Public Law, Stellenbosch University

Part B Rule 3: Request for reasons

Submission:

The proposed inclusion of the rules on requesting reasons and the attached forms (Forms A and B) in these Rules of Procedure for Judicial Review of Administrative Action ("the Rules") are highly problematic and in my view unlawful.

Section 7(3) of the Promotion of Administrative Justice Act 3 of 2000 ("the Act") mandates the Rules Board for Courts of Law to make rules of procedure for judicial review. The Rules accordingly made are subject to approval by Parliament (s 7(5) of the Act). The Act clearly contemplates a very specific set of actors in creating these rules – creation by the Rules Board and approval by Parliament. The Act furthermore restricts the subject matter mandate to rules of procedure for judicial review. The proposed Rule 3 (along with Forms A and B) does not deal with rules of procedure for judicial review. The right to written reasons guaranteed in s 33(2) of the Constitution and fleshed out in s 5 of the Act exist completely independent of judicial review. It cannot therefore be argued that rules pertaining to requests for reasons and provision of reasons, such as Rule 3, amount to rules of procedure for judicial review. It follows that Rule 3 is beyond the power of the Rules

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Board as contemplated in s 7(3) of the Act. It further follows that Parliament has no power to approve such rules in terms of s 7(5) of the Act.

The power and indeed obligation to make *regulations* dealing with the procedure for requesting reasons is placed on the Minister in terms of s 10(1)(d) of the Act. These regulations need only be *submitted* to Parliament in terms of s 10(4)(a) and Parliamentary approval is expressly not required (compare s 10(4)(b) where Parliamentary approval is indeed required for regulations made under ss 10(2)(a) & (b)). The Minister has already made these regulations, viz. the Regulations on Fair Administrative Procedures, 2002.[1] Chapter 4 of these Regulations deals with requests for reasons and the procedure to be followed by both the requester and the administrator.

In light of the above, it is inappropriate and indeed unlawful for the Rules to contain procedures on requesting reasons and Rule 3 (along with Forms A and B) should be omitted from the Rules. It should be borne in mind that such omission will also have a knock-on effect on a number of further rules, in particular Rule 4(3). Note also that above submission is not directed at and does not include Rule 6, which deals with applications for reasons and which would be *intra vires* the Rules.

Part B Rules 4 & 7 Disclosure

Submission:
The biggest difference between the procedural regime created by the Rules and the current regime for judicial review applications under Rule 53 of the Uniform Rules of Court ("Rule 53", attached as Annexure A) seems to be the new disclosure mechanism primarily found in Rule 4. It is submitted that disclosure of information pertaining to the relevant administrative action (the record) is indeed a matter of paramount importance in relation to judicial review and one that merits close attention. While it is to be welcomed that this new disclosure mechanism seems to allow for the record of the administrative decision as well as a range of further relevant documents to be made available to the applicant before the

[1] GN R1022 in *GG* 23674 of 31 July 2002.

notice of motion is filed, there are a number of issues that need to be carefully considered in relation to Rule 4 read with Rule 7.

The first issue is one of timing and in particular the 15 day period granted for requesting disclosure (Rule 4(3)). It is not clear how this 15 day maximum time period for requesting disclosure is to be calculated in the absence of a request for reasons. Rule 4(3) simply refers to the 'date on which reasons are furnished' as the starting point of the 15 day period. When will the 15 day period start to run when no request for reasons is made?

Secondly, one may question whether the 15 day period is adequate in the South African context. It is important to bear in mind that significant sections of people affected by administrative action in South Africa live in rural areas with severely limited access to legal assistance and representation and with little or no knowledge of legal technicalities such as the Act and its Rules and procedures. These groups often include those that are most dependent on administrative action, e.g. people living on social assistance, and for who unfavourable administrative action can have dire consequences. It is also unfortunately a reality in South Africa that judicial review is most prevalent in these areas of administration.[2] Against the backdrop of these realities one has to ask whether a maximum period of 15 days is indeed adequate to request disclosure of relevant documents in order to facilitate a judicial review application. In my submission it is not. It is submitted that this time frame will have the effect of denying many meritorious applicants their judicial review remedy. While Rule 8(1) states that an applicant may still pursue judicial review even if she did not request disclosure, one has to be realistic about the chances of success of such an application where the applicant has not had access to the record of the decision. It is in this respect that the proposed Rules depart from the current Rule 53. Under the current Rule 53(1)(b) the authority whose action stands to be reviewed is obliged to provide the court and consequently the applicant with the record of the relevant proceedings, albeit after the notice of motion was filed. The applicant is provided the opportunity to amend her notice of motion after receipt of the record under Rule 53(4). In my understanding of the

[2] See e.g. the extracts from the judgments in *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 (6) SA 229 (SE); *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) and *Cele v The South African Social Security Agency and 22 related cases* 2008 (7) BCLR 734 (D) attached as Annexures B, C and D respectively.

proposed Rules this regime is replaced by the disclosure mechanism in Rule 4 read with Rule 7 of the Rules.[3] In terms of the current time frames for instituting review proceedings read with the current Rule 53 an applicant can launch an application and obtain the record still at 180 days after the internal remedies were exhausted or in the absence of such remedies after being informed of the action and reasons in terms of s 7(1) of the Act. The new 15 day period is indeed a far cry from the current 180 day period. In my view this change puts applicants in a distinct disadvantage and will effectively undermine judicial review in terms of the Act as an effective mechanism for the protection of constitutional rights, in particular for the poor and marginalised. It is submitted that the pre-notice of motion disclosure mechanism created in the Rules is an important addition to the current procedural regime and should be retained; the 15 day period should be extended to a more realistic time frame for the South African context.

The final matter to be considered in relation to Rules 4 & 7[4] is a potential challenge to an administrator's decision to list documents in Part 2 of Schedule A of Form D, which would mean that the applicant is not allowed access to such documents. The Rules, in particular Rule 7, does not currently allow for any challenge to such decision. It seems anomalous that the Rules expressly provide for applications to compel an administrator to furnish a list and to provide access to the documents in Part 1 of Schedule A of Form D, but is completely silent on any remedy in relation to an administrator's decision to list a document in Part 2 of Schedule A of Form D and hence to deny access. While such a decision may amount to administrative action itself and hence be subject to review in its own right this seems a rather burdensome method of scrutinizing a decision to deny access. It is submitted that it

[3] This understanding is premised on the assumption that the Rules will *replace* Rule 53 in relation to judicial review applications under the Act and that an applicant will not be able to rely on Rule 53 in addition to the Rules. If this assumption is incorrect and an applicant can indeed rely on both the Rules and Rule 53, it is submitted that the relationship between these two sets of rules must be set out more clearly in the Rules. In this respect it is in particular not clear whether the provision of the record by the authority in terms of the current Rule 53(1)(b) may be a "matter regulated by the rules of the court in which the proceedings are instituted" and which is not provided for in the Rules as contemplated in Rule 1(4) with the resultant effect that an applicant can still rely on Rule 53(1)(b) to obtain the record after the notice of motion was filed. Likewise it is not clear whether Rule 53 can still be applied in terms of Rule 8(2) as a "rule concerning applications in the court in which the proceedings are instituted". While a reading that would allow reliance on both Rule 53 and the Rules may be possible, it seems rather that the new pre-notice of motion disclosure mechanism in Rule 4 is meant to exclusively facilitate access to the record. If both the Rules and Rule 53 is to apply, it would in my submission result in unduly onerous obligations on the relevant authority regarding disclosure of the record in terms of both the proposed Rule 4 and the current Rule 53(1)(b).

[4] Also note the incorrect reference in Rule 7(3)(b) to s 7(2)(d) of the Act, which should read s 7(2)(a).

would be far more expedient to include a subrule under Rule 7 that would allow for challenges of an administrator's decision to list a document in Part 2 of Schedule A of Form D and hence to deny access.

Rule 8: Application for judicial review

Submission:

The specific attention given to citation of respondents in judicial review proceedings in subrules 8 and 9 is to be welcomed, especially in the light of recent confusion in this regard in the courts.[5] One matter that remains outstanding and that may be usefully expressly addressed in the Rules is the citation of political heads of organs of state as nominal respondents, as envisaged in s 2 of the State Liability Act 20 of 1957.[6] It is submitted that a statement in the Rules as to whether the political head of the relevant organ of state should be cited nominally as suggested by the State Liability Act or whether the organ of state itself should be cited would be particularly useful.

Form C: Request for disclosure of documents

Submission:

In a number of places in Form C[7] statements are made to the effect that a person's rights must be materially and adversely affected before she can bring judicial review proceedings under these Rules. This is most clearly indicated in item 3 of Part A of Form C where the applicant is required to indicate that her rights have been materially and adversely affected and provide details of such impact, ostensibly except if acting in a representative capacity.

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[5] See *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 611 (SCA); *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE); *Sikutshwa v MEC for Social Development, Eastern Cape Province and Others* [2005] JOL 14413 (Tk); *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA).

[6] Section 2 of the State Liability Act reads:

2. Proceedings to be taken against Minister of department concerned.—(1) In any action or other proceedings instituted by virtue of the provisions of section *one*, the Minister of the department concerned may be cited as nominal defendant or respondent.

(2) For the purposes of subsection (1), "Minister" shall, where appropriate, be interpreted as referring to a member of the Executive Council of a province.

[7] Top note, "What this form is about"; Part A item 3; Part D top note "How to fill this part of the Form" item 2.

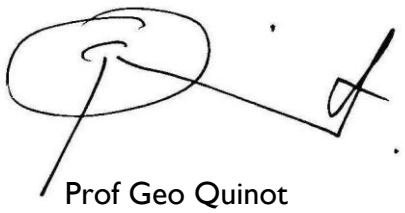
These stated requirements are not in line with the Act or with s 38 of the Constitution that governs standing to enforce fundamental rights and hence apply to judicial review applications under the Act. Section 38(a) that deals with standing in one's own name only refers to an "own interest" with no mention of "rights" and certainly not an "adverse and material impact." In this regard it is relevant to note Froneman J's remarks in his judgment in *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another*[8] in relation to the standing provisions in s 38 of the Constitution: "Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach [to standing] … There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community." Later in the judgment, the judge made the important observation: "What I learn from the Indian experience is that flexibility and a generous approach to standing in a poor country is 'absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective'.[9] Chaskalson CJ accordingly also held in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*:[10] "I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled."

The Act, in s 6(1), also simply states that "any person may institute proceedings … for the judicial review of an administrative action." For action to qualify as "administrative action" under s 1 of the Act it must "adversely affect the rights of any person". There is no requirement that the rights of the applicant specifically must be affected or that such impact must be material. Furthermore, following the judgment of the Supreme Court of Appeal in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*[11] the rights requirement in the s 1 definition of "administrative action" must not be literally understood and simply requires action that "has the capacity to affect legal rights" and that "impacts

[8] 2001 (2) SA 609 (E) at 619.
[9] At 623.
[10] 1996 (1) SA 984 (CC) at par 165.
[11] 2005 (6) SA 313 (SCA) par 23.

directly and immediately on individuals." This reading of the Act, based on an interpretation of s 33 of the Constitution, was subsequently confirmed by the Constitutional Court in *Walele v City of Cape Town and Others*.[12] The Constitutional Court rightly pointed to the inclusion of legitimate expectations (something less than a right) in s 3(1) of the Act and noted that the Legislature clearly envisaged action with an impact broader than only on rights as administrative action. Following these judgments, action that has an impact on legitimate expectations (i.e. action that does not strictly impact on rights) may also qualify as administrative action (even under the Act) and an applicant is able to seek judicial review of such action.

In light of the above it is submitted that the requirements stated in Form C that rights must be materially and adversely affected in order for a person to have standing to bring an application for judicial review (save in instances of representative capacity) are incorrect and unlawful and should be deleted.



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[12] [2008] ZACC 11 par 37.

Annexure A

Uniform Rules of Court

The Chief Justice after consultation with the judges president of the several divisions of the Supreme Court of South Africa has, in terms of paragraph (a) of subsection (2) of section 43 of the Supreme Court Act, 1959 (Act 59 of 1959), with the approval of the State President made, with effect from the 15th January, 1965, the rules contained in the Annexure regulating the conduct of the proceedings of the provincial and local divisions of the Supreme Court of South Africa.

ANNEXURE

53 Reviews

(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

[Para. *(b)* substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

[Subrule (1) substituted by GN R2004 of 15 December 1967.]

(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.

(3) The registrar shall make available to the applicant the record despatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

(4) The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.
[Subrule (4) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(5) Should the presiding officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he shall-

(a) within fifteen days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometres of the office of the registrar at which he will accept notice and service of all process in such proceedings; and

(b) within thirty days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.

[Subrule (5) substituted by GN R2164 of 2 October 1987.]

(6) The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.
(7) The provisions of rule 6 as to set down of applications shall *mutatis mutandis* apply to the set down of review proceedings.

Annexure B

***Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 (6) SA 229 (SE)**

PLASKET J:

[A] INTRODUCTION

[1] During a week of motion court duty from 8 to 12 November 2004, I dealt with 102 matters in which applicants claimed relief in essentially similar terms against the Member of the Executive Council for Social Development in the Eastern Cape Provincial Government. In all of the cases that I dealt with the applicants had applied for social assistance -- in 95 cases, in the form of child support grants, and in the remainder, in the form of disability grants -- and they had either received no response to their applications or only received responses shortly before their cases were to be heard in this court.

[2] 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 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.

[3] In a judgment delivered in 2001, Froneman J, in *Somyani v Member of the Executive Council for Welfare, Eastern Cape and another*,[13] commented that there were 41 cases on his motion court roll in which the failure of officials of the Department of Welfare (as the current Department of Social Development was then known) to do their work was the issue. While most 'had to do with the lack of giving proper attention to the consideration of social grants', three of the cases had 'proceeded to the point where the respondents were called upon to show cause why they should not be committed to prison for contempt of court because of their failure to give heed to court orders'.[14] Of these, agreements had been reached on how to proceed in two

[13] SECLD undated judgment (case no 1144/01) unreported.

[14] The failure, on the part of the respondent's department to obey court orders has been dealt with in a number of matters and is a cause for concern in itself. In *Jayiya v Member of the Executive Council for Welfare, Eastern Cape and another* 2004 (2) SA 611 (SCA), para 17, Conradie JA stated: 'Wholesale non-compliance with court orders is a distressing phenomenon in the Eastern Cape that has caused the Courts in that province to try to devise ways of coming to the assistance of social welfare applicants whom the provincial government has failed.' See too *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk); *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and another* 2001 (2) SA 609 (E)

but, in *Somyani*, the third case, no such agreement had been reached.[15] He described the case as not being an isolated incident of maladministration, stating that other courts had commented 'on the provincial administration's tardiness in complying with its constitutional and legislative duties'.[16]

[4] About a year later, *Ndevu v Member of the Executive Council for Welfare, Eastern Cape Provincial Government and another*[17] was one of 27 similar cases on the motion court roll that week in which all of the applicants had approached the court because, having applied for grants, they had either received no responses or unsatisfactory responses. Erasmus J commented that the fact that the applicants in these matters 'found it necessary to turn to the court for assistance would indicate that the respondents and the public servants under their control have failed to perform their administrative duties properly and timeously'.[18] It would, he said, be unrealistic to assume that 'this is the end of the sorry saga' because there were a further 34 similar matters on the next motion court roll and, in view of the fact that many people do not have access to legal advice and representation, 'the matters that do come to court are probably but the tip of the iceberg'. This raised the 'disturbing likelihood that many persons in this province at this moment are suffering real hardship through the ineffectiveness of the public service at provincial level'[19]

[5] Erasmus J stated further that, in these matters, the respondents tended to file notices of opposition, later withdraw them and then allow the applicants to take orders unopposed. It seemed to him that 'the opposition was merely a manoeuvre designed to allow the respondents time to process the claim; which tactic then occasioned additional costs'.[20] On the issue of the costs in social assistance cases, he said:[21]

> 'I have obtained from the Registrar a copy of a bill taxed in a similar matter. (I attach a copy thereof.) On that basis these matters tax out at about R4 000.00 per case. It would mean therefore that in today's cases alone about R100 000.00 will be paid in legal costs in respect of the fees and disbursements of the legal representatives of the applicants. Clearly, millions of rand in taxpayers' money have been wasted in unnecessary legal costs occasioned by indolence and/or incompetence on the part of public servants.'

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and *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* SECLD undated judgment (case no. 1907/03) unreported. Although this is an issue of considerable constitutional and administrative significance on its own, it is not necessary for me to say anything further about it in this judgment.

[15] At 1.

[16] At 3.

[17] SECLD undated judgment (case no. 597/02) unreported.

[18] At 1.

[19] At 2.

[20] At 5.

[21] At 5-6. I have also seen a number of bills of costs in matters involving social grants. It seems to me that R4 000.00 per application may be a conservative estimate of the 'going rate', and that R5 000.00 per application may be more realistic.

[6] In *Mbanga v MEC for Welfare, Eastern Cape and another*,[22] Leach J stated that while 'patience is a virtue, I venture to suggest that even the patience of Job would have been tested by the inefficiency of officialdom in this case as, notwithstanding regular enquiries being made to the office of the Department of Welfare in Port Elizabeth, time passed without any indication whether the applicant's application had been granted or refused'.[23] And in *Mahambehlala v MEC for Welfare, Eastern Cape and another*,[24] he spoke of the 'administrative sloth and inefficiency which currently bedevils the Department of Welfare in the Eastern Cape'.[25]

[7] In *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and another*,[26] Froneman J spoke of people who worked for organisations that assisted poor and underprivileged people in the province telling 'a tale of a lamentable failure on the part of officials of the department, at virtually all levels, to give proper attention and effort to rectifying and alleviating' the 'intolerable state of affairs' caused by the wholesale and arbitrary cancellation of disability grants.[27] On appeal, in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and another v Ngxuza and others*[28] Cameron JA described the department's inefficiency thus:

> '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 coordinating 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.'

[8] It is, perhaps, not surprising, in the light of this history, that Cameron JA, in *Ngxuza*, also remarked adversely about the respondent's department's conduct. He said that, in the way it dealt with the applicants in that case and conducted itself in those proceedings, it displayed 'a contempt for people and process that does not befit an organ of government under our constitutional dispensation' and that it 'conducted the case as though it was at war with its own citizens, the more shamefully because those it was combating were in terms of secular hierarchies and influence and power the least in its sphere'.[29] In *Jayiya*, Conradie JA was similarly forthright about the cause of the problem: he stated that 'laziness and incompetence' lay 'at the root of the malaise in the Eastern Cape Department of Welfare'.[30]

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[22] 2002 (1) SA 359 (SE).
[23] At 662H-I.
[24] 2002 (1) SA 342 (SE).
[25] At 352C.
[26] 2001 (2) SA 609 (E).
[27] At 617I-J.
[28] 2001 (4) SA 1184 (SCA), para 8.
[29] Para 15.
[30] 2004 (2) SA 611 (SCA), para 18.

[9] Judges have criticised the performance of the Department of Social Development, not because they see themselves as super-ombudsmen or wish to involve themselves in politics, but because the administrative failings of the department have consequences that bring its performance within the heartland of the judicial function: those failings infringe or threaten the fundamental rights of large numbers of people to have access to social assistance, to just administrative action and to human dignity.[31] When rights are infringed or threatened, the impugned conduct becomes very much the business of the judiciary: s38, s165 and s172 of the Constitution make that abundantly clear, placing as they do a duty on the judiciary to remedy such infractions. The problem faced by the judiciary in the Eastern Cape in social assistance cases is, however, of a different order. It relates to the boundaries of the judicial function – to the limits of the institutional competence of the courts to engineer administrative efficiency.

B. Addressing the systemic problem

[10] The problem may be summarised in this way: notwithstanding that literally thousands of orders have been made against the respondent's department over the past number of years, [32] it appears to be willing to pay the costs of those applications rather than remedy the problem of maladministration and inefficiency that has been identified as the root cause of the problem. In the absence of a class action or similar representative litigation (which may have its own difficulties - and limitations - when it comes to forging appropriate remedies to compel administrative reform), the courts are left with a problem that they cannot resolve: while they grant relief to the individuals who approach them for relief, they are forced to watch impotently while a dysfunctional and apparently unrepentant administration continues to abuse its power at the expense of large numbers of poor people, the very people 'who are most lacking in protective and assertive armour' and whose

[31] Note that in *Mashavha v President of the Republic of South Africa and others* 2004 (12) BCLR 1243 (CC), para 51, Van Der Westhuizen J commented that social assistance was 'an area of governmental responsibility very closely related to human dignity'.

[32] The point must be made that the respondent's department hardly ever opposes the applications brought against it and, when it opposes, hardly ever does so successfully. As Erasmus J noted in *Ndevu* (*supra*), the notices of opposition that are filed as a matter of course appear to be part of a stratagem to buy time. This stratagem also drives up the costs that must, at the end of the day, be paid to the applicant when he or she eventually succeeds in being granted the inevitable order. Officials in the respondent's department often appear to blame large-scale fraudulent conspiracies within the system for the large volume of cases but it is noteworthy that this never seems to be raised as a defence in the applications that are brought. It is difficult to see how this would impact on the problem of failing to take decisions timeously, which, after all, is the cause of complaint in most of the cases.

needs 'must animate our understanding of the Constitution's provisions'. [33] What escalates what I have termed a problem into a crisis is that the cases that are brought to court represent only the tip of the iceberg.

[33] *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) (2001 (10) BCLR 1039) at para [12].

Annexure C

***Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA)**

CAMERON JA:

[1] The law is a scarce resource in South Africa. This case shows that justice is even harder to come by. It concerns the ways in which the poorest in our country are to be permitted access to both. In the Eastern Cape Division of the High Court four individual applicants, assisted by the Legal Resources Centre, brought motion proceedings against the Eastern Cape provincial government (represented by, respectively, the departmental and political heads of provincial welfare, who are the first and second appellants). They sought two-fold relief. The first portion was to reinstate the disability grants they had been receiving under the Social Assistance Act,[1] which the province had without notice to them terminated. The province conceded the claims of three of the applicants, with payment of arrears and interest. They are the respondents in the appeal (I refer to them as 'the applicants'). A fourth applicant failed and he plays no further part in the proceedings, in which the contested issue is the immensely more expansive, second portion of the relief the applicants sought. That concerned the plight of many tens of thousands of Eastern Cape disability grantees they alleged were in a similar predicament to themselves in that they, too, had had their grants unfairly and unlawfully terminated

…

[6] It is precisely because so many in our country are in a 'poor position to seek legal redress' and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice that both the interim Constitution[13] and the Constitution[14] created the express entitlement that 'anyone' asserting a right in the Bill of Rights could litigate 'as a member of, or in the interest of, a group or class of persons'.[15]

…

[11] It is against a background of such circumstances that the Legal Resources Centre decided that its only recourse was to institute a class action on behalf of the region's wronged disability pensioners. The situation seemed pattern-made for class proceedings. The class the applicants represent is drawn from the very poorest within our society - those in need of statutory social assistance. They also have the least chance of

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[1] Act 59 of 1992, ss 2*(a)*, 3*(a)*. The Act's reference to 'social grants to . . . disabled persons' has been popularised to 'disability grant'. The Act requires the Minister for Welfare and Population Development amongst other things (with the concurrence of the Minister of Finance) to make disability grants out of moneys appropriated by the Provincial Legislature (s 2*(a)*). Section 3*(a)* creates an entitlement to such a grant if the Director-General of Welfare is satisfied as to conditions specified in the Act and the regulations. The functions of the Director-General were in terms of Proc R7, *Regulation Gazette* 5643 of 23 February 1996, assigned to the Permanent Secretary: hence the first appellant.

[13] Act 200 of 1993 s 7(4)*(b)*(iv).

[14] Section 38*(c)*.

[15] H Erasmus *Superior Court Practice*, commentary on the Constitution, s 38 at A2-4H - 4L.

vindicating their rights through the legal process. Their individual claims are small: the value of the social assistance they receive - a few hundred rands every month - would secure them hardly a single hour's consultation at current rates with most urban lawyers. They are scattered throughout the Eastern Cape Province, many of them in small towns and remote rural areas. What they have in common is that they are victims of official excess, bureaucratic misdirection and unlawful administrative methods.

[12] It is the needs of such persons, who are most lacking in protective and assertive armour, that the Constitutional Court has repeatedly emphasised must animate our understanding of the Constitution's provisions.[18] And it is against the background of their constitutional entitlements that we must interpret the class action provision in the Bill of Rights. Though expressly creating that action the Constitution does not state how it is to be developed and implemented. This it leaves to Courts, which s 39(2) enjoins to promote the spirit, purport and object of the Bill of Rights when developing the common law, and upon which s 173 confers inherent power 'to develop the common law, taking into account the interests of justice'.

[18] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) (1996 (4) BCLR 449) at para [149] (O'Regan J); *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) (1996 (12) BCLR 1559) at para [14] (Didcott J); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (1997 (12) BCLR 1696) at para [8] (Chaskalson P); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para [25] (Yacoob J).

Annexure D

***Cele v The South African Social Security Agency and 22 related cases* 2008 (7) BCLR 734 (D)**

WALLIS AJ:

[1] On Monday 3 March 2008, when I presided in the Motion Court, there were fifteen unopposed applications on the roll in which the respondent was either the Minister of Social Development or the South African Social Security Agency ("SASSA"). When the matters were called counsel appearing for the applicants dealt with them in groups that appeared to correspond to the identity of the firm of instructing attorneys. A representative from the office of the State Attorney appeared, but through no fault of his own he was manifestly unfamiliar with any of the cases and asked that they should stand down. Thereafter in all of the matters some or other consent order was taken frequently accompanied by an order for costs against the relevant respondent. This struck me then as a largely pointless exercise involving significant and probably unnecessary legal costs that would be borne by the taxpayer.

…

[11] I trust that I have said sufficient to indicate that in the field of social assistance in South Africa the primary and secondary legislation is as labyrinthine as it apparently is in the United Kingdom and the entitlement of any applicant to relief flowing from a failure on the part of the Minister of Social Development or SASSA may well be complex. All this can only serve to emphasise the necessity for those lawyers who practise in this area of the law to be thoroughly familiar with the applicable legislation, both primary and secondary, and to ensure that it is properly placed before the court in a coherent form when the need for litigation arises.

[12] The orders sought in the matters that came before me on Monday were all sought by consent and granted accordingly. However, I did take the opportunity of expressing my disquiet over the quality of the papers and whether in any of the applications a proper case had been made for the grant of relief. Thereafter I made enquiries among the other judges stationed in Durban during this month and they confirmed, what I suspected, that the motion roll of this Court and indeed the motion roll of the Natal Provincial Division of the High Court, are cluttered with cases of this type. The pattern of events that played itself out before me is a daily occurrence in these Courts. The Registrar of this Court informs me that in order to provide space on the motion roll for other cases she is constrained to restrict the number of cases relating to social assistance grants to fifteen on each of Monday, Wednesday and Friday in any week and ten on each of Tuesday and Thursday. In other words a maximum of sixty-five cases a week is set down for hearing in the Durban motion court each week. In the result she advises me that she is at present setting down matters of this type for hearing in August of this year. In Pietermaritzburg the position is if anything worse, especially as some attorneys who are aware of the restrictions in Durban now bring their cases in Pietermaritzburg. Whilst it is not always the case that the roll is so congested I have ascertained through other judges that for example on 26 April 2007 there were 67 such matters on the motion roll in that court and on 13 March 2008 there were 75. Pillay J undertook an investigation in the course of preparing his judgment in *Mzimela v Minister of Social*

Development, Case No 1438/07 (NPD), unreported, and ascertained that in the five days 26 and 28 November and 5, 6 and 11 December 2007 no fewer than 152 such matters came before the court in Pietermaritzburg. Of these 84 were adjourned at the expense of the Respondent i.e the State, and in 38 others an order was taken that the costs of the entire application be paid by the Respondent. As Pillay J remarked "the Respondent had agreed in an inordinately large number of cases to pay the costs of the applications or wasted costs".