IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

REPORTABLE

_____
D. VAN ZYL
Date: _____

Case no: 1685/2010

In the matter between:

NOBONGILE LUNYAWO **Applicant**

and

SOUTH AFRICAN SOCIAL SECURITY AGENCY (SASSA) **Respondent**

JUDGMENT

D. VAN ZYL J:

[1] This matter concerns the provisions of the Social Assistance Act (the "Act")[1] and the regulations issued pursuant thereto.[2] The applicant was the recipient, or as described in the Act, the beneficiary of a disability grant (the "grant") in terms of section 9 of the Act. In September 2009 payment of the grant stopped and the applicant approached this Court for assistance by way of motion proceedings. The applicant contended that the payment of the grant was terminated unlawfully in that the decision of the applicant to discontinue payment infringed upon her right to fair administrative action. The reason, according to her, was the respondent's failure to apply a fair procedure by failing to advise her of the intention to cancel the grant and to afford her an opportunity to make representations. In short, her case was that she was not given an opportunity to influence the respondent before it took a decision to terminate the grant.

[1] Act 13 of 2004. The authorities responsible for the administration of the Act (previously the Department of Welfare and Pensions and now the respondent herein) have in the past come under severe criticism from the Courts in this province. Complaints from litigants were generally related to a failure to consider, or to timeously consider applications for social grants. To this extent the relevant authority was said to suffer from inefficiency and maladministration. (See for example *Vumazonke v MEC for Social Development, Eastern Cape* and three similar cases 2005 (6) SA 229 (SE).) The focus has however since shifted and litigation centers around a challenge to unfavourable decisions taken by the respondent in connection with applications for social grants. The present matter, and several other cases are as a consequence now more concerned with the interpretation of the provisions of the Act, the regulations promulgated in terms thereof, and the legal consequences that flow from its implementation. The positive aspect to this is that it would appear that the agency created by the present Act (the respondent herein) to implement its provisions is not suffering from the same malaise as its predecessor. On the down side, the extent to which adverse decision are contested in the Courts is probably a reflection of the level of poverty that is experienced generally.

[2] R898 of 22 August 2008.

[2] The respondent's answer was that the application is ill-conceived in that the applicant was awarded a temporary grant which had lapsed and that there was as a consequence no decision taken to terminate the grant which can be reviewed. As I shall explain more fully hereinunder[3], a temporary grant is terminated when the period of disability had lapsed. The applicant in reply denied that she was informed that what she was awarded was a temporary grant. It is this denial that became the focus in argument. For reasons that will appear more fully later in this judgment, the main issue which arose for determination was the nature of the legal consequences which flowed from a failure of the respondent to notify a successful applicant for a social grant of the approval of his or her application in the manner as envisaged in regulation 13(3). This regulation reads as follows:

> **"(3) Upon approval of an application for a social grant, the Agency must inform the applicant in writing of such approval and**
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> **(a) of the payment details;**
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> **(b) of the obligations of the applicant to notify the Agency of a change in circumstances;**
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> **(c) in the case of refugees, the date of lapsing of the social grant; and**

[3] See paras [22] and [23] *infra*.

> **(d) in the case of a temporary disability grant, the reasons therefore, the duration of the social grant and the date upon which it lapses"**

[3] It was contended in argument on behalf of the applicant by her attorney Mr Zono, that the failure of the respondent to advise an applicant for a grant, not only that he or she was awarded a temporary grant as opposed to a permanent grant, but also of the other matters contemplated in regulation 13(3), creates a legitimate expectation with the applicant concerned that he or she will continue to receive payment of the grant until such time as it has been lawfully **"reviewed"**. Accordingly, so it was argued, it was not open to the respondent to contend that, because the applicant was awarded a temporary grant, it lapsed by the effluxion of time, and that there was consequently no decision that is capable of being reviewed.

[4] At first glance this proposition may appear rather surprising. The reason for saying this is twofold: firstly, it implies that the payment of a grant for a period of time coupled with the failure of the respondent to notify the applicant as contemplated in regulation 13(3)(d) may create a substantive legitimate expectation, that is, an expectation to, as of right, receive the

payment of a grant[4], as opposed to a legitimate expectation, the purpose of which is to afford no more than a right to a fair hearing before an adverse decision is taken[5]. Secondly, somehow an application for the review of a decision to terminate the payment of a permanent grant is in reply converted into an application for the review of a decision to award the applicant a temporary grant.

[5] However, Mr Zono did not find himself without authority for his submission. Support for it can be found in the case of *Joni v The Member of the Executive Council for Social Development, Eastern Cape*[6] (*"Joni"*) wherein the Court, relying on an earlier judgment in *Mdodisa v The Member of the Executive Council of Social Development*[7] (*"Mdodisa"*) and an article by N. de Villiers entitled **"Social Grants and the Promotion of Administrative Justice Act"**[8], said the following:

> **"However, the learned judge went on to hold that a decision to make a grant a temporary one amounts to an administrative action and once that decision was made the applicant then had the right to receive notification of the**

[4] See for example Steyn **"Substantive Legitimate Expectations"** (2001) JR 244 and Devenish **"Legitimate expectation revisited: An apology for the recognition and application of its independent and substantive application"** 2007 De Jure 113.
[5] See for example *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 758 C-G.
[6] Unreported judgment delivered on 19 November 2009 in case no. 451/2007 (ECM).
[7] Unreported judgment delivered on 16 April 2009 in case no. 1033/07 (ECM).
[8] (2002) SAJHR 320.

> **decision and to make representations through an appeal procedure. Accordingly, the learned judge continued and held that the recipient of a grant in those circumstances has a legitimate expectation that there would be a proper review and hearing before the payments of the grant were stopped. Thus when no such review took place it is not open to the MEC to rely on or invoke the automatic lapsing provision of Regulation 24(1)(c).”**[9]

[6] On a reading of the judgment in *Mdodisa*, it becomes clear that the Court in turn, for the passage relied on in the *Joni* case, placed reliance on a judgment of the Witwatersrand Local Division in *Mpofu v The Member of the Executive Committee for the Department of Welfare and Population Development in the Gauteng Provincial Government*[10] (“*Mpofu”*) and on the article of N. de Villiers referred to earlier.

[7] The matter is however not as straightforward as it may appear to be. On a closer examination of the judgments of this Court where this issue was raised and decided, a conflict of views are revealed, and there exists, what may be described as two schools of thought. These differences in approach were dealt with by Alkema J in a judgment delivered in an application for

[9] At para [22].
[10] Unreported judgment delivered on 18 February 2000 in case no. 99/2848 (WLD).

leave to appeal in *Nyanisa v The Member of the Executive Council for Social Development, Eastern Cape*[11]. He explained it as follows:

> **"On** [the] **one hand, it is often held that even accepting the applicant was not informed that her grant was temporary, it does not distract from the nature of the grant – it remains a temporary grant which lapses by effluxion of time. On the other hand, the second approach suggests that the failure to inform the application that her grant is only of temporary nature, creates a legitimate expectation by her that the grant is of permanent nature. On this basis, so it is said, the review application of the decision to terminate payment of the grant may be treated as a review application of the decision to grant only a temporary disability grant, and not a permanent grant. For this proposition reliance is always put on N. de Villiers, *Social Grants and the promotion of Administrative Justice Act*, SAJHR, Vol. 18 (Part 3) 2002 at 338.**
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> **[6] Following the second line of cases, the decision to grant a temporary grant is then reviewed and set aside, together with further orders which effectively have the result that the grant is changed to a permanent grant coupled with an order to make payment under the (new) permanent grant. Such an order is made nothwithstanding that it is not the relief claimed, or that the issues of temporary grant *versus* permanent grant have not been canvassed or argued."**[12]

[11] Unreported judgment delivered on 11 June 2010 in case no. 1031/07 (ECM).
[12] At paras [5] and [6].

In his judgment the learned Judge also referred to another aspect, namely the different manner in which factual disputes regarding the issue whether the provisions of regulation 13(3) have been complied with, have been dealt with.[13] For reasons that will be more fully explained later, this is an aspect that did not arise in the present matter and it is consequently not necessary to deal therewith in this judgment.

[8] At the risk of adding a third approach to the issue raised I propose to examine and test the validity of the submission that the *Mdodisa* judgment is authority for the proposition put forward on behalf of the applicant, and if so, whether the authorities referred to in that judgment and in subsequent judgments can lend support thereto. However, before doing so, and in order to place the whole enquiry in its proper context, it is necessary to examine more closely the applicant's case as pleaded in the papers filed on her behalf, to set out the essential facts of the matter, and to define the issues that arise therefrom.

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[13] **"The one line of cases apply the *Plascon* rule. This means that unless the facts call for one of the qualifications or exceptions under the *Plascon* rule, the version of the Respondent is accepted and the matter is dealt with on the basis of a temporary grant which lapses by effluxion of time. The other line of cases do not seem to apply the *Plascon* rule; and to the extent that they do, they find (by implication) the absence of corroboration (such as proof of posting) as sufficient ground to constitute an exception to the rule. They therefore find that the Applicant was not informed that her disability grant was only of temporary nature."** (At para [4].)

[9] The facts as set out in the applicant's founding affidavit upon which she placed reliance for the relief sought are briefly the following: She made application for the payment of a disability grant in 2004 at Mqanduli. The application was approved and she started receiving payment in 2004. She continued to receive payment of the grant every month thereafter until September 2009 when she was advised by an official at the relevant pay-point that the grant had been terminated. She then approached the respondent's office in Mqanduli where she was similarly advised that the grant had been terminated. She was not given any reason why the grant was terminated.

[10] The applicant stated that she was not given prior notification of the termination of the grant nor was she given an opportunity to make representations to the respondent before such a decision was taken. The applicant also contended that she **"legitimately expected that I would receive my disability grant until properly reviewed"**. She submitted that in these circumstances the termination of her grant was unreasonable, without just cause and infringed upon her constitutionally entrenched rights.

[11] According to the respondent the applicant made application in June 2004 at Ngqeleni, (as opposed to Mqanduli), for a disability grant which application was approved for a period of twelve months. The said grant lapsed after the expiry of that period and the last payment received by the applicant was during March 2005. Thereafter, in November 2005 and again in August 2006 the applicant made two further applications for a disability grant. Both these applications were refused.

[12] The applicant then in September 2008 at Ngqeleni once again made application for a disability grant. This application was approved for a period of twelve months with effect from September 2008. The applicant was notified of this decision by way of a letter handed to her by an employee of the respondent, a certain Ms Plaatjie. The applicant acknowledged receipt of this letter by appending her thumb print thereto. The said letter was annexed to the respondent's answering affidavit as annexure "MM1". From the contents of the letter it is evident that it was intended to advise the applicant that a temporary grant for a period of twelve months was approved, the reason therefor, and the amounts which were to be paid to her during the existence of the grant.

[13] As stated earlier, in her replying affidavit the applicant denied that she was handed a letter informing her that her application had been approved for a period of twelve months only. Her contention was that she was only verbally advised that her application had been approved. She explained that her thumb print on annexure "MM1" was appended because she was asked to place her thumb print on a number of documents on that particular day.

[14] After it was initially in the heads of argument filed on the applicant's behalf contended that she had made out a case for the relief sought and that the matter should be determined on the papers, in further heads of argument filed shortly before the hearing of the matter, it was submitted that there exists a serious dispute of fact incapable of resolution on the papers. The result of this is that Mr Zono, and in my view quite correctly so, accepted that the respondent's allegations and denials of the applicant's averments cannot be said to consist of bold or uncreditworthy denials, or raising fictitious disputes of fact, or are palpably implausible, far-fetched or are clearly untenable that the Court is justified in simply rejecting them on the papers[14].

[14] See *Peterson v Cuthbert & Co. Ltd* 1945 AD 420 at 428-429; *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T); *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923 G-924D; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 – 635. Also *South African Veterinary Council and Another v Szymanski* 2003 (4) 42 (SCA) at 51B; *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (CPD) at 151A-152B; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para [55];

[15] According to Mr Zono, the dispute that arises on the papers is confined to two issues. The first is the applicant's submission that the respondent failed to notify her of the termination of her disability grant during September 2009. Mr Zono explained the issue in his heads of argument as **"The respondent's failure to communicate** (its) **decision to terminate applicant's disability grant is the one being challenged."** The second issue relates to the applicant's denial of the respondent's contention that she was notified of the temporary nature of the disability grant awarded to her in September 2008. The submission is accordingly that these two issues should be resolved by the hearing of oral evidence and that this Court should make an order to that effect.

[16] In terms of Rule 6 (5)(g) of the Uniform Rules of Court, where an application cannot properly be decided on affidavit, the Court **"may dismiss the application or make such order as it seems meet with the view to ensuring a just and expeditious decision"**. Even before any assessment is undertaken of the probabilities or the prospect of *viva voce* evidence tilting the probabilities in

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Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) at 375E; *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at 222B; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290F; *Point 2 Point Same Day Express CC v Stewart* 2009 (2) SA 414 (W) at 420F.

favour of the party bearing the *onus*[15], the question which immediately arises in the context of the present matter is whether a resolution of the two factual disputes in favour of the applicant, would result in a just and expeditious decision of the issues legitimately raised in the application.

[17] In order to decide this question it is necessary to examine more carefully the legal nature of the applicant's case as set out in the papers filed in support of the application. Before doing so it may be convenient to state some of the rules or principles applicable to motion proceedings and which may be relevant in the context of the present matter. Of particular importance is that the applicant's affidavits take the place not only of the pleadings, but also of the essential evidence. This is not only for the benefit of the Court, but primarily for the parties. The respondent must know the case that must be met and in respect of which evidence must be adduced in the answering affidavits. An applicant in motion proceedings is therefore required to define the relevant issues, make sufficient allegations to establish his or her right, and to set out the evidence upon which he or she relies upon in support of the cause of action on which the relief that is being sought is based.[16] Generally speaking, an applicant must stand or fall by his or her

[15] *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) at 214 D-E.
[16] *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469; *Shackot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 704 F-H; *Director of Hospital Services v*

founding affidavit and the facts alleged therein, and although it is sometimes permissible to supplement the allegations relied on, the main foundation of the application are still the allegations of fact in the founding papers.[17] Where facts alleged in the respondent's answering affidavit reveal the existence of a further ground for relief the Court would more readily allow an applicant in his or her replying affidavit to utilize it and to set up such additional ground for relief as might arise therefrom.[18] However, new matter will not be allowed if the introduction thereof would amount to an abandonment of the existing claim and the substitution therefor of a fresh and completely different claim based on a different cause of action.[19] An applicant will also not be allowed to make out a case in reply where none existed in the founding papers.[20] Further, an allegation which amounts to a conclusion of law must be supported by allegations of fact on which it

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Mistry 1979 (1) SA 626 (A) at 635 H-636F; *Die Dros (Pty) Ltd v Telefon Beverages CC supra* at 217 A-B; *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at 600G; *Minister of Land Affair and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D-E;

[17]*Mauerberger v Mauerberger* 1948 (3) SA 731 (C) at 732; *Director of Hospital Services v Mistry supra*; *Shpepherd v Mitchell Cotts Seafright (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205 E-F; *Ferreira v Premier, Free State* 2000 (1) SA 241 (O) at 254C; *Eagles Landing Body Corporate v Molewa NO* 2003 (1) SA 412 (T) at 423I; *Body Corporate Shaftesbury Sectional Title Scheme v Rippert's Estate* 2003 (5) SA 1 (C) at 6E-F; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at 349A-B.

[18]*Driefontein Consolidated GM Ltd v Schlochauer* 1902 TS 33 at 38; *Registrar of Insurance v Johannesburg Insurance Co. Ltd* (1) 1962 (4) SA 564 (W); *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O) at 568F; *Cohen NO v Nel* 1975 (3) SA 963 (W) at 966F; *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger supra*; *Cowburn v Nasopie (Edms)* 202 (T) at 205F; *Pienaar v Thusano Foundation* 1992 (2) SA 552 (B) at 578C-D.

[19]*Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2) SA 261 (W) at 270A; *Johannesburg City Council v Bruma Thirty Two (Pty) Ltd* 1984 (4) SA (T) at 91F-92F; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2008 (2) SA 448 (SCA) at 453 D-E.

[20]*Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 (D) at 316A.

depends. In the absence of such allegations of fact as would be necessary for a determination of the issue raised, an objection that it does not support the relief claimed may be upheld.[21]

[18] Turning to the nature of the applicant's case in the present proceedings, it is clear from a reading of the notice of motion and the founding papers that it constitutes review proceedings in terms of the provisions of the Promotion of Administrative Justice Act[22] ("PAJA"). The applicant seeks the setting aside of **"…the respondent's action of terminating the payment of applicant's disability grant…"** and **"…to re-instate the applicant's disability grant and to continue until the grant is lawfully terminated."**[23] The applicant's case was therefore that the decision to terminate the grant constituted administrative action which is capable of review in terms of PAJA. Mr Zono quite correctly in argument accepted this to be the position.

[19] I agree with the submission advanced by counsel for the respondent, Mr Bloem, that on a reading of the applicant's papers it is evident that her case was based on the premise that what she received from 2004 until October 2009 was a permanent disability grant, that she was entitled to

[21] *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793 D-F.
[22] Act 3 of 2000.
[23] The relief claimed in paragraph (1) and (2) of the notice of motion.

continue to receive payment thereof, and that the respondent's decision to terminate her grant was unlawful. That this is so, is clear from the nature of the relief sought in the notice of motion and the averments made in support thereof. This however did not remain to be the position. The reason is that the applicant effectively in reply abandoned any reliance on her assertion that she was awarded a permanent grant. As stated earlier, in answer to the applicant's averments in her founding affidavit and the issues raised thereby, the respondent stated that after the applicant's unsuccessful applications for a grant in 2005 and 2006 the applicant once again lodged an application in September 2008. That application was approved for the period of twelve months with effect from September 2008 whereafter it lapsed in September 2009 due to the effluxion of time.[24] The respondent accordingly disputed that the applicant received a permanent disability grant in 2004 and that she continued to receive payment of the grant awarded to her in that year until September 2009.

[20] In her replying affidavit the applicant found herself unable to deny these allegations. Some of the respondent's averments were admitted while others were not addressed or were simply **"noted".** It must accordingly be accepted that the applicant was not in the position to dispute the correctness

[24] By virtue of the provisions of Regulation 28(1)(d). See paras [22] and [23] *infra*.

thereof. That being the position, the respondent's allegations as to the nature of the grant awarded to the applicant in September 2008 must be taken as having been admitted.[25] Accordingly, it must be accepted that the applicant was not given a permanent disability grant in 2004, that it was a temporary grant which lapsed after twelve months, that the applicant subsequently on three occasions again applied for a disability grant, and that her application for a grant in September 2009 was approved on the basis that it would also be temporary grant.

[21] Mr Bloem is correct in submitting that it is clearly unsatisfactory that no attempt was made by the applicant in reply to explain why she had claimed in her founding affidavit to have received continues payment from 2004 until 2009 in support of her case that she was awarded a permanent disability grant in 2004. However, what is important in the context of the present enquiry is that the applicant accepted in reply that she was given a temporary disability grant in 2004 and once again in 2008. The applicant however instead sought to place in dispute the respondent's contention that she was advised of the temporary nature of the disability grant in compliance with regulation 13(3)(d) when it was approved in September 2008.

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[25] *Stellenbosch Farmers' Winery v Stellenbosch Winery (Pty) Ltd* 1959 (4) SA 234 (C) at 235 F-G.

[22] Once it is accepted that the temporary nature of the grant awarded to the applicant in September 2008 is no longer in dispute, then the factual dispute relating to the applicant's allegation that the respondent failed to communicate to her the decision to terminate the grant must fall away. The reason for this is to be found in the provisions of the regulations. A disabled person is defined in section 9(b) of the Act as a person who is **"…owing to a physical or mental disability, 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, in addition to the requirements of section 9:

> **"…a person is eligible for a disability grant if he or she is a disabled person who has attained the age of 18 years and-**
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> **(a) …**
>
> **(b) the disability is confirmed by an assessment which indicates whether the disability is-**
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> **i permanent, .. or**
>
> **ii temporary, …"**[26]

The respondent is accordingly authorised to make one of two decisions, namely that an applicant for a grant is either permanently disabled, or that his or her disability is of a temporary nature. According to regulation 3(b)(i)

[26] Regulation 3(a).

a disability is permanent if **"that disability will continue for a period of more than 12 months"**. It is temporary in terms of sub-paragraph (b)(i) if the disability **"will continue for a continuous period of not less than 6 months or for a continuous period of not more than 12 months as the case may be"**. Sub-paragraph (b)(i) provides for a minimum and a maximum period, that is, it may not be for less than six months, but not more than twelve months. In terms of regulation 28(1)(d) a temporary disability grant lapses **"when the period of temporary disability has expired…"**. A permanent grant by contrast continues until it is reviewed. Regulation 27 (8)(a) *inter alia* authorises the respondent to conduct a review of a social grant **"where evidence exists that changes in the medical or financial circumstances of a permanently disabled person have or may have occurred…"** A review is defined in Regulation 1 as meaning **"…to verify whether or not a grant recipient still complies with the requirements for social assistance."**

[23] What the respondent is therefore instructed and authorised to do by the regulations is firstly to determine whether the person concerned suffers from a disability. Secondly, the respondent must determine the period of the disability, ie. whether it is permanent or temporary, and thirdly, if the disability is to continue for a period of twelve months or less, the maximum period of its duration after which the grant is to lapse in terms of regulation

28(1)(d). This regulation is clearly capable of only one meaning, and that is that a temporary grant is terminated without the necessity to take a decision to that effect. **"A temporary grant lapses by operation of law as it is subject to a resolutive condition. Such lapsing is therefore not brought about by an administrative action and is therefore not subject to review."**[27] As opposed to a permanent grant where a decision is necessary to terminate its payment, a temporary grant therefore simply lapses by the effluxion of time. That this is the legal effect of a temporary grant was in my view correctly accepted in all the cases which followed on *Mdodisa*[28].

[24] In the present case, on the respondent's version as accepted by the applicant, her temporary grant lapsed in September 2009. Accordingly, having effectively abandoned in reply any reliance on a permanent grant as contended in the founding affidavit, the dispute relating to the question whether the applicant was notified of a decision to terminate the grant is irrelevant and the determination thereof is no longer necessary to reach a decision in the matter. Mr Zono found himself unable to argue to the contrary.

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[27] Per Miller J in the *Mdodisa* judgment *supra* at para [11].
[28] See *inter alia* the *Joni* judgment *supra* and *Nyanisa v MEC for Social Development*, unreported judgment in case no. 1031/07 (ECM).

[25] Insofar as the second dispute of fact is concerned, a resolution by way of the hearing of oral evidence would in my view, on the papers as they stand, similarly not contribute anything to a resolution of the issues raised by the applicant in her application. The reason is simply that what the applicant was effectively seeking to do was to make out a new case in reply which she was not entitled to do. As stated earlier, the applicant's cause of action, having regard to the relief claimed in the notice of motion and the allegations contained in her founding affidavit, was that she was awarded a permanent disability grant and that a decision was taken to terminate it. The relief claimed was aimed at a setting aside of that decision and re-instating the grant as a permanent disability grant. The dispute of fact as to whether or not annexure "MM1" was handed to the applicant is in the context of it being accepted that what the applicant was awarded in September 2008 was a temporary grant. As stated earlier, by reason of the fact that a temporary grant lapses by operation of law as opposed to a permanent grant, where a decision is necessary to bring about its termination, the second dispute of fact can only be relevant with regard to the lawfulness of the administrative action taken by the respondent in deciding to make the grant a temporary grant and not a permanent grant. It is evident from the relief claimed in the

notice of motion that the applicant was not seeking to review the respondent's decision to make the grant a temporary grant.

[26] The applicant elected to bring review proceedings by way of notice of motion under Rule 6 as opposed to review proceedings in terms of Rule 53 of the Uniform Rules of Court. The applicant was fully entitled to do so.[29] The result of this is however that the applicant was not in a position, at least not without the leave of this Court, to make use of the provisions of rule 53 (4) to, **"…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."** No such application was made. Accordingly, the relief claimed in the notice of motion is incompatible with the case which the applicant sought to make out in the replying affidavit in response to, and on an acceptance of the respondent's allegations that the disability grant awarded in 2004 lapsed in the following year and that the applicant then re-applied in 2008 when she was once again awarded a temporary grant. The issues raised by the applicant in reply are confined to the application for, and the decision to award a temporary grant in 2008. It clearly constituted a new cause of

[29] See *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A) and *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A).

action, the determination of which would not entitle the applicant to the relief claimed in the notice of motion.

[27] I now turn to consider the remaining question, namely whether the *Mdodisa* and *Joni* judgments and the authorities referred to therein lend support to the submission that the applicant is entitled to the relief claimed. Mr Zono's submission is that in these two cases the Court granted relief similar to what is claimed by the present applicant on the basis that, if there is no proof that the respondent gave notice as contemplated in regulation 13(3)(d), the person concerned has a legitimate expectation that there would be a review accompanied by a hearing before payment of the grant was stopped. Failing a review, he argued that the respondent is not entitled to rely on the automatic lapsing provisions of regulation 28(1)(d).

[28] Mr Zono is quite correct in saying that an order as prayed for in the present matter was granted in the *Joni* case on the basis as contended. The same however does not in my view apply to the *Mdodisa* judgment. Reliance on that judgment in *Joni* as authority for such relief *data venia* is misplaced and based on an incorrect reading of the *Mdodisa* judgment. It is clear from a reading of the latter judgment, and of the judgment of the

Supreme Court of Appeal in *MEC for Social Development v Mdodisa*,[30] that the matter was determined and the relief claimed in the notice of motion was granted, on the version as contended by the applicant (the respondent in the appeal) in her founding affidavit. The case of the applicant was that she believed that the grant she had been awarded was a permanent grant and placed reliance on the fact that she received, which included back payments, twenty nine monthly payments before it was stopped. The respondent denied this stating that it was a temporary grant.

[29] Both Miller J in the Court *a quo* and Navsa JA in the Supreme Court of Appeal were quite clearly not impressed with the respondent's version of it being a temporary grant on the accepted facts. Navsa JA described the affidavit of the appellant's deponent as **"singularly unenlightening, contradictory and confusing"** and failing to provide an acceptable explanation why the grant, if temporary, continued long after it was suppose to have lapsed.[31] The Court held that in those circumstances Miller J was quite correct in finding that the respondent was made to believe that she was awarded a permanent grant subject only to statutory review.[32] Importantly however, is that the reasoning of the Court *a quo* with regard to the legal

[30] 2010 (6) SA 415 (SCA).
[31] At paras [7] to [15].
[32] At para [16].

nature of temporary grants, relied upon in the *Joni* case, was found by Navsa JA to be **"not contentious but … not entirely relevant."**[33] It was therefore not necessary for a determination of the matter to deal with the issues relating to a temporary grant because the applicant's version that she was awarded a permanent grant was accepted on the papers.

[30] What is in my view clear from the aforegoing is that the *Mdodisa* case was not determined in the basis as contended for by Mr Zono, but rather on an application of the exception to the *Plascon-Evans*[34] rule, namely that an applicant who seeks final relief on motion must, in the event of a conflict, accept the version set up by his or her opponent, unless the latter's allegations are, in the opinion of the Court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.[35]

[31] The judgment of Marais J in the *Mpofu* case similarly cannot lend support to the contention that a determination of the second dispute of fact in favour of the applicant would entitle her to the relief claimed in the notice of motion. In that case the Court dealt with a disability pension awarded to the

[33] At para [19].
[34] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd supra*.
[35] See the authorities referred to in fn 14 above.

applicant therein in 1992 under the provisions of the Social Pensions Act of 1973.[36] That Act was replaced in 1996 by the Social Assistance Act of 1992.[37] Otherwise than the regulations promulgated in terms of the 1992 Act[38] and the present Act, the applicable regulations promulgated under the 1973 Act provided that no person shall qualify for a disability pension **"If the degree of disability has been certified as less than 50% in the open labour market."**[39] It further determined that no pension was payable in respect of disability of a temporary nature **"unless the disability has been certified for a period of not less than 12 months."** Nothing in the 1973 Act or its regulations provided for the automatic termination of a pension for a disability of a temporary nature. It also did not authorise the relevant authority to determine a maximum period of validity of such a pension. The only requirement was that the disability had to be certified for a minimum period of twelve months. The only relevant provision relevant to the termination of grants generally was by way of a **"review"** of **"any social pension"** at minimum intervals **"from time to time"**.[40] In 1998 the Gauteng Department of Welfare and Population Development cancelled the applicant's disability pension and placed reliance

[36] Act 37 of 1973.
[37] Act 59 of 1992.
[38] R418 of 31 March 1998 as amended.
[39] Regulation 12(g). At the time there were regulations which applied to **"Bantu in the Republic"** and in which category the applicant in *Mpofu* fell. These regulations were contained in Government Notice R1034 of 21 June 1974.
[40] Regulation 8(e).

for doing so on the provisions of regulations 23(2) and 24(1)(c) promulgated in terms of the 1992 Act. Regulation 23(2) provided for the review of a grant at times and intervals determined by the relevant authority.[41] Regulation 24(1)(c) in turn dealt with the lapsing of a temporary grant.[42] The issue considered by the Court in *Mpofu* was accordingly whether the said Department could lawfully cancel the applicant's pension awarded to him under a previous dispensation by utilizing the provisions of the 1992 Act and its regulations.

[32] The Court considered the provisions of the 1973 Act and the regulations issued in terms thereof and found that **"on a fair reading of the regulations and the affidavits and reasons of the respondents that the 12 month disability period was not an expiry or guillotine date which determined the date on which the pension lapsed. It was a date on or after which it was up to the respondents' officials to review the pension. That was clearly the effect of the regulations, that was the only possible reason for the strange practice of permanently disabled person being classified as temporarily disabled and it was**

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[41] **"(1) ….**
(2) The Director shall review a grant at times and at intervals determined by him or her and, takng the circumstance of each case into consideration, increase, decrease or suspended a grant from a date which he or she determines, including a date in the past, and inform the beneficiary of his or her reasons in writing and inform him or her of the 90-day period referred to in subregulation (6) for an application for the restoration of the grant."

[42] **"(1) A social grant shall lapse-**
(a)…
(b)…

(c) when the period of temporary disability has lapsed in the case of a grant to a disabled person."

what the respondents' officials intended to be the effect of their actions. In short the officials fixed not a termination or lapsing date but a date for a further review process. The regulations only authorized the relevant officials to cancel a pension after review. They did not provide for automatic lapsing of any pension."[43]

[33] Marais J found that the 1992 Act and its regulations could not assist the said Department. The reason was simply that if the lapsing provisions of regulation 24(1)(c) issued under the 1992 Act were to apply to a grant issued in terms of the 1973 Act, that **"would mean that the regulations (not the Act) have retrospective effect and can retrospectively mean that persons have for years been receiving grants now declared to have lapsed. That would be so unreasonable that such regulation could not be upheld. Furthermore the regulation does not clearly indicate that it is intended to have retrospective application and in the absence of such clear indication the regulation will always be interpreted as not being retrospective. For these reasons alone I am of the view that the regulation does not have application to events which occurred in 1992 and 1993."**[44] The learned Judge concluded by saying that **"In my view and for the reasons given in much detail in discussing the 1973 Act and regulations thereunder Regulation 24(1)(c) can have no application to the present situation as there has been no lapsing of "the period of temporarily disability".**[45] It was accordingly held that the lapsing

[43] At page 19 of the judgment.
[44] At page 20.
[45] At page 21.

provisions of regulation 24(1)(c) of the 1998 regulations did not find application and that the only procedure open to the said Department, if it wished to cancel or suspend the pension, was to conduct a review of the pension as authorised in terms of Regulation 23(2) of the 1998 regulations. As no such review had taken place the decision to cancel the grant accordingly had to be reviewed and set aside.

[34] The learned Judge however did not stop there. He added a second reason why the decision to cancel the grant had to be set aside. He proceeded to hold that for, what he described as a completely different set of circumstances, the relevant department was not entitled, before the enactment of the 1998 regulations, to cancel or suspend the disability pension of the beneficiary concerned.[46] He held that in the circumstances of the case the beneficiary had a legitimate expectation that before his pension was taken away he would be informed thereof and he would be afforded the benefit of the *audi alteram partem* principle **"The reason is simply one of fairness and natural justice."**[47] and **"In short I find as a fact that not only was there a legitimate expectation that the applicant would be given a proper review hearing but it was the office practice of the Department to conduct such review and the very object of the determination of the applicant's disability as being temporary for 12**

[46] At page 29.
[47] *Loc cit*.

months was to determine when the necessary review was to take place. I deem my view to be in accordance with that of Kirk-Cohen J in *Rangani v Superintendent General, Department of Health and Welfare* 1999 (4) SA 385 at 392F – 393A and 394F-H and the principles laid down by Corbett CJ in *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 756 E-H. In the circumstances of this case the doctrine of legitimate expectation and natural justice therefore require that the Department should not have terminated the applicant's pension without informing him as above, inviting the applicant to be heard and conducting a proper review."[48] For this further or alternative reason the Court found that the decision to cancel the disability pension had to be set aside. A third reason was added which is not relevant for purposes of the present enquiry.

[35] On a reading of the judgment in *Mpofu* it is evident that it must be distinguished from the present matter. As stated, the applicant therein acquired the right to the payment of a disability pension in terms of the 1973 Act. Otherwise than in regulation 28(1)(a) promulgated in terms of the 2004 Act, which Act and its regulations it is common cause apply to the grant awarded to the applicant *in casu*, the pension was not subject to an automatic lapsing provision. Payment thereof was subject only to a minimum period which meant that it continued to be in force until it was reviewed as

[48] At page 31.

provided for in the relevant regulations.[49] The beneficiary thereof consequently acquired **"… a substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing."**[50] Further, the respondent in *Mpofu* acknowledged on its own version that the pension received by the applicant therein was subject to a review after twelve months and that he was not given notice of such review. In those circumstances, where the said applicant was medically certified to be permanently disabled and there was no change in his status, he was classified as temporarily disabled for twelve months for administrative reasons only and by virtue of a rule of thumb, and he continued to receive his pension for more than five years, the Court held that **"… not only was there a legitimate expectation that the applicant would be given a proper review hearing but it was the office practice of the Department to conduct such review and the very object of the determination of the applicant's disability as being temporary for 12 months was to determine when the necessary review was to take place."**[51]

[36] As stated earlier, in the present matter the applicant accepted in reply that she was awarded a temporary disability grant in terms of Regulation

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[49] **"They had no power in terms of the Act or the regulations to *ab initio* determine a period of validity for the pension."** Per Marais J in *Mpofu* at page 19 of the judgment.
[50] *Administrator, Transvaal, and Others v Traub and Others supra* at 758 D-E.
[51] At page 29 to 31.

3(b)(ii), with the result that it was to **"continue for a continuous period of not less than 6 months or for a continuous period of not more than 12 months as the case may be."** The applicant's disability was accordingly classified as temporary and the period of validity thereof was determined to be twelve months. The grant was, otherwise than in the *Mpofu* case, subject to a maximum period which means that it continued for twelve months after which it lapsed automatically by operation of law. In contrast to *Mpofu*, the provisions of the Act and the regulations do not require a review of the applicant's status before a temporary grant lapses. Further, there is no evidence of any practice by the present respondent to conduct such a review as the Court in *Mpofu* held to have existed on the facts of that matter.

[37] The *Mpofu* case is also certainly no authority for the proposition that a failure to comply with the provisions of regulation 13(3)(d) relating to notification creates an expectation that a temporary grant will continue until it has been terminated by a review process. This contention confuses the right to a hearing with the substantive right created by the relevant Act and its regulations to continue to receive payment of the grant until a specified event has taken place. In *Mpofu* the right to a review did not arise from a failure to comply with a legislative injunction to give notice as required in

regulation 13(3)(d) of the regulations. The grant awarded to the applicant was found, on the legislative provisions applicable to it, to continue until it was subjected to a review process. It could accordingly not be cancelled or suspended until such a review had taken place. The right to a review and the power to cancel the pension therefore arose from the applicable legislative provisions. It constituted administrative action which was subject to review. In *Rangani v Superintendent-General, Department of Health and Welfare*[52], a decision relied on by Marais J in *Mpofu*, Kirk-Cohen J explained this principle as follows: **"A pension, once granted, confers upon the grantee a right to receive that pension until it is terminated in terms of the provision of the …Act and the regulations, read with the provisions of the Constitution of the Republic of South Africa Act 108 of 1996. That right creates a legitimate expectation that the pension will not be terminated otherwise than in terms of statute, and then without a failure by a person (such as the respondent) to observe the rules of natural justice."**[53]

[38] The Court in *Mpofu* therefore quite correctly found that in the circumstances of that case the applicant had a legitimate expectation of a hearing, ie. of procedural fairness, before the termination of his pension was considered by way of a review process. In other words, the review as authorized by the applicable regulations could not be conducted unilaterally

[52] 1999 (4) SA 385 (T).
[53] At 392 F-G.

and without the applicant first having been given the opportunity to make representations with the view of influencing the authority responsible for conducting the review process. In the present matter, once it is accepted that the applicant was awarded a temporary grant, it must follow that its termination was determined by regulation 28(1)(d). In terms thereof it lapsed automatically after the expiry of the maximum period for its duration as determined by the respondent. Because its termination occurred by operation of law and not as a consequence of administrative action as defined in PAJA which presupposes the exercise of a power[54], the issue of procedural fairness does not arise.

[39] That brings me to the article of de Villiers (the "author")[55] to which reference was made in both the *Mdodisa* and *Joni* judgments. In his article the author deals with the provisions of the 1992 Act and its regulations which were issued in 1998.[56] The relevant passage in the article appears under the heading **"The lapsing of temporary grants"** and is preceeded by the statement that the failure to inform a beneficiary that his or her grant is temporary, thereby depriving the beneficiary of an opportunity to make

[54]**"Administrative action"** in section 1 of PAJA is *inter alia* defined as any decision taken or any failure to take a decision by an organ of State when exercising a public power or performing a public function in terms of any legislation.
[55]*Op cit*.
[56] At page 338.

representations on the finding of temporary disability, is unfair and has certain legal implications. These implications, with reliance *inter alia* on the *Mpofu* judgment, are said to be the following:

> **"First a valid determination of temporary disability is jurisdictional event upon which the lapsing depends, and the failure to properly apply the regulations or to properly inform the beneficiary of any limitation on his rights renders the entire condition null and void *ab initio*. A void condition is simply no condition, and the temporary grant continues until stopped on review. Second, in a similar vein, where the incorrect test to determine disability has been applied, no period of disability as envisaged by the SAA can be defined, and there is no period of disability that can lapse. Third the beneficiary who has not been told of the limitation on the grant will have a substantive legitimate expectation – that his or her grant will continue until lawfully stopped."**[57]

[40] What the author proposed to consider in this passage are the legal consequences that flow from a failure to comply with regulation 25(1) issued in terms of the 1992 Act. Regulation 25(1) required the relevant functionary, if an application for a grant was approved, to inform the beneficiary in

[57] *Loc cit*.

writing of the decision.[58] Although differently worded, the equivalent provision in the current regulations, on which the applicant in the present matter placed reliance, is regulation 13(3). As in the case of the current regulations, the 1998 regulations authorised the relevant functionary to firstly determine and decide whether an applicant for a disability grant is disabled as defined in the Act; secondly, whether or not the disability was to continue for a period of more than twelve months, i.e. whether it is permanent or temporary, and if temporary, to then determine the maximum period for which it was to continue.[59] These decisions quite clearly constitute administrative action within the meaning thereof and are subject to review.

[41] Whilst the author proceeded from the correct premise, namely that the failure to notify a beneficiary that his or her grant is temporary may affect the lawfulness or validity of the decision to classify the disability as

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[58] **"(1)The Director-General shall if he or she approves an application for a grant, inform the applicant in writing of such approval and the date on which approval was granted.**

(2) …"

[59] In regulation 2. The relevant portions thereof provided as follows:

"(1)A person shall be eligible for a social grant only if, I addition to being an aged person, a disabled person or a war veteran-

(a) …

(b) …

(c) …

(2) …

(3) A person shall be eligible for a social grant for disabled person only if, in addition to compliance with subregulation (1)-

(a) he or she is a disabled person who has attained the age of 18 years and whose disability is confirmed by a medical report of a medical officer subsequently approved by a pensions medical officer. Provided that the report shall reflect whether, according to the prognosis of the medical officer and the assessment of the medical pensions officer, the disability is-

(i) permanent; or

(ii) temporary in that it will continue for a continuous period of not more than six months or not more than one year, as the case may be;"

temporary, the reason advanced for this and the legal consequences postulated are *contra legem* and do not pass closer scrutiny. Insofar as the underlying reason for invalidity is concerned, if the applicant for a grant was not notified of the decision of temporary disability, it may impact on the lawfulness of that decision for the simple reason that a dissatisfied applicant was not placed in a position to exercise his or her right to appeal the decision. Section 10(1) of the 1992 Act provided that if **"… an applicant is aggrieved by a decision of the Director-General in the administration of this Act, such applicant may within 90 days after the date on which he or she was notified of the decision, appeal in writing against such decision…"**[60] The reason postulated by the author for invalidity cannot be correct as it suggests that the applicant for a grant must be given an opportunity to influence a decision to make a grant temporary after that decision had already been taken. It is clear from a reading of regulation 25(1) that notification followed on the approval or refusal of the grant. The real reason is rather that a failure to inform the applicant for a grant of the nature of the decision reached may frustrate his or her right of appeal.

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[60] Section 18 of the 2004 Act similarly provides that:

"(1) If an applicant disagrees with a decision made by the Agency in respect of a matter regulated by this Act, that person or a person acting on his or her behalf may, within 90 days of his or her gaining knowledge of that decision, lodge a written appeal with the Minister against that decision, setting out the reasons why the Minister should vary or set aside that decision."

[42] In dealing with the legal consequences that result from a failure to give notice as contemplated in regulation 25(1), the author makes two assumptions. The first is that the provisions of regulation 25(1) are peremptory. The relevance of this lies in the fact that whether or not non-compliance with the provisions relating to notification were intended to visit the decision of temporary disability with invalidity, is dependant upon whether the said provisions are mandatory or merely directory. Considerations that may be relevant to this enquiry is the fact that its provisions were created for the benefit of applicants of social grants, and that a failure to comply therewith may affect the exercise of the right of a dissatisfied applicant to timeously and effectively appeal an adverse decision. I do not however intend to decide this issue and shall accept for purposes of examining the correctness of the legal consequences postulated, that the provisions of both regulations 25(1) and 13(3) are mandatory.

[43] The second assumption is that a failure to give notice renders the maximum period for which the temporary grant is to continue, which the author terms a resolutive condition, null and void *ab initio*. Whilst it is correct that the determination of the maximum period for which a temporary grant is to continue depends for its validity on the existence of a decision to classify an applicant's disability as temporary, the suggestion that a failure to

notify an applicant of the decision would render the maximum time period a nullity without further ado, ignores two things: The first is that it has been accepted that even where the formalities required by a statutory provision are peremptory, it is not every deviation from literal compliance that is fatal. Even in that event, the question remains whether, in spite of the defects, there was substantial compliance with the requirements of the statute.[61] The second aspect is that it ignores the fact that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for as long as the unlawful act is not set aside. Unless the substantive validity of the initial act, *in casu* the decision to classify the applicant's disability as temporary, can in the context of a particular statutory instrument be found to be a necessary precondition for the validity of consequent acts, the validity of consequent acts are generally **"… dependant on no more than the factual existence of the initial act…"** with the result that **"…the consequent act will have legal effect for so long as the initial act is not set aside by a competent Court."**[62] The result of this is not only that the validity of the relevant decision/s will only be determined once a Court of law has

[61] See for example *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C-E; *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) [2005] 2 ALL SA 108 para [22]; *Moela v Shoniwe* 2005 (4) SA 357 (SCA) paras [8] – [12] ; *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA) at para [22].

[62] Per Howie P & Nugent JA in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paras [26] and [31]. See also *Queenstown GHS V MEC, Department of Education, Eastern Cape* 2009 (5) SA 183 (CK) at para [20] and *Offit Enterprises v Coega Development Corporation* 2009 (5) SA 661 (SECLD) at 672B-G.

concluded that there had been non-compliance with regulation 25(1) or 13(3), but also that the decision to classify an applicant's disability as temporary continue to produce legal consequences until such time as that decision has been set aside on review. Accordingly, if the time limit determined for the continuation of the temporary grant has expired before a pronouncement on the validity of the decision relating to the classification of an applicant's disability has been made, the effect thereof would be that the grant had effectively ceased to exist as it had lapsed by operation of law. This in turn raises the question whether any purpose would be served in considering the validity of the said decision, and if so what relief, if any, should be granted.[63] For reasons stated hereinunder the relief claimed by the applicant herein would be inappropriate.

[44] The statement by the author, namely that the result of a failure to give notice is that the time period no longer exists and that a **"temporary grant continues until stopped on review"**, unfortunately also presents its own problems. The first is that the judgment in *Mpofu*, on which the author placed reliance in a footnote, does not lend any support for this proposition. As stated earlier, the finding in *Mpofu* that the applicant therein was entitled

[63]*Oude Kraal Estates (Pty) Ltd v City of Cape Town and Others supra* at 246 C-D. See generally **Wade & Forsyth Administrative Law** 7th ed at page 342 to 343; **Baxter Administrative Law** page 712 to 713; *Seale v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) at 50 D-F and *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) at para [11].

to continue to receive payment of the grant until it was reviewed, was reached on the basis of the legislation applicable to the applicant and the grant in question. Marais J found that the applicant's right to receive the grant was regulated by the 1973 Act and not the 1992 Act.[64] As a consequence the lapsing provision in the 1992 could not apply to the applicant's grant and it could only be terminated by a review process as authorized by the applicable regulations. The judgment in *Mpofu* is therefore no authority for the proposition that a grant awarded in terms of the 1992 or any subsequent Act is automatically to be dealt with in a similar fashion. (*da mihi factum, dabo tibi ius*) Secondly, in terms of the relevant legislative provisions a person is temporary disabled if his or her disability will continue for not longer than twelve months.[65] The relevant authority is consequently not authorized to extend the period of temporary disability beyond twelve months. It is accordingly not clear on what basis the Court would be empowered to order that a temporary grant may continue until reviewed. To hold otherwise would mean that the Court would arrogate itself authority where none exists in the empowering legislation.

[64] See paras [31] to [33] *supra*.
[65] Regulation 2(3)(a)(ii) of the regulations promulgated in terms of the 1992 Act and regulation 3(b)(ii) of the current regulations.

[45] This argument further seems to postulate the continuation of a grant independently from the decision relating to the permanent or temporary nature of a disability. However, on a reading of both regulation 2(3)(a) of the 1998 regulations and regulation 3, which finds application in the present matter, it is evident that the eligibility for a disability grant is *inter alia* dependent upon a decision as to the nature of the disability.[66] If a decision that an applicant's disability is temporary is declared to be invalid and is set aside, any order that the grant continues until it is reviewed, as opposed to it being limited to a specific time period, would effectively mean that the decision of temporary disability is substituted with a decision of permanent disability. An order to that effect would be substantially different from the relief claimed by the applicant in this application. The substantive merits of the respondent's decision to classify the applicant's disability as temporary as opposed to permanent was not been raised as an issue in these proceedings and it was not the case the respondent was called upon to meet. Not only would it be prejudicial to the respondent, but this Court, to say the least, will be ill equipped to make that decision on these papers and to substitute its own decision for that of the respondent.

[66] See para [22] and footnote 59 *supra*.

[46] Similarly, the argument that the applicant for a grant may acquire a substantive legitimate expectation that his or her grant will continue until lawfully stopped when not notified of the temporary nature thereof, cannot be sustained.[67] Firstly, the existence of a legitimate expectation that may require a public body to confer a substantive, as opposed to a procedural benefit, has not as yet been recognised as forming part of our law.[68] Secondly, even if it is, the mere fact that an applicant was not advised of the limitation on the grant, cannot in my view on its own form the basis of a legitimate expectation to acquire a grant that will continue until it is reviewed. Reliance on the doctrine of legitimate expectation for any purpose presupposes that the expectation is legitimate.[69] **"The requirements for the legitimacy of such expectation have been formulated thus: (a) the representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications; (b) the expectation must have been induced by the decision-maker; (c) the expectation must be reasonable; (d) the representation must be one which is competent and lawful for the decision-maker to make."**[70]

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[67] In footnote 75 to the article the author explains a substantive legitimate expectation as **"…a state of mind brought about by the prior conduct or promises of the state that create an expectation that a person will enjoy a benefit or privilege, and it thereafter becomes unfair to deprive the person of that benefit or privilege. In the same way, the state can create an expectation that a particular procedure (usually an opportunity to make representations) will be provided, and it then becomes unfair not to follow that procedure."**

[68] See *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at paras [27] and [28]; *Veterinary Council and Another v Szymanski* 2003 (4) BCLR 378 (SCA) at para [15] and *Duncan v Minister of Environmental Affairs and Toursim and Another* 2010 (6) SA 469 (SCA) at paras [13] and [14].

[69] *Duncan v Minister of Environmental Affairs supra* at para [15].

[70] *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W) at para [28] and *South African Veterinary Council v Szymanski supra* at para [19]. *Duncan v Minister of Environmental Affairs and Tourism and Another supra* at para [15].

[47] The representation on which the author places reliance on do not meet these requirements. Any expectation that may exist cannot be said to be based on a clear and unambiguous representation which is devoid of relevant qualification. The failure to notify a successful applicant of the limitation on the grant is in itself not indicative of the nature of the decision reached by the relevant authority. The reason is that both regulations 25(1) and 13(3) require notification in respect of both a permanent and a temporary grant. Further, it is clear from the provisions of the Act and the regulations thereto that an applicant for a disability grant does not apply specifically for either a permanent or a temporary grant. Application is simply made for a disability grant and the nature and duration of the applicant's disability is thereafter determined by an assessment as envisaged in regulation 2(3)(a) of the 1992 Act and regulation 3 of the current Act.[71] It is clear from a reading of these regulations that an assessment may consist of either the medical examination conducted by a medical officer in order to determine disability, or the subsequent evaluation of the information as contained in a medical assessment. Accordingly, any recommendation in a medical report relating to

[71] See footnote 59 *infra*. **"Assessment"** in the current regulations is defined to mean:

"(a)the medical examination by a medical officer of a person or child in order to determine disability or care-dependency for the purposes of recommending a finding for the awarding of a social grant, and "assess" has a corresponding meaning; or

(b) the evaluation of information set out in a medical assessment form or medical report by a medical officer in the absence of the patient;"

the extent of any disability is in itself subject to an assessment. An applicant for a disability grant has therefore no guarantee that he or she will be awarded a permanent disability grant, notwithstanding the fact that it may have been the recommendation in a medical report which accompanied his or her application. The result is that an applicant cannot be said to objectively, as opposed to subjectively, have any expectation as to the nature of the grant that will ultimately be awarded to him or her. An expectation in the absence of any other relevant representation, will be unreasonable and consequently, not legitimate.

[48] To conclude, the granting of substantive relief premised on legitimate expectation cannot arise in the present matter. Further, the findings in the *Mpofu* judgment cannot be taken out of context. It must be understood against the background of the legislative provisions that were applicable to the applicant therein and the disability pension that was paid to him. It therefore does not lend support to the statement in the article on which reliance was placed in both the *Mdodisa* and *Joni* judgments namely that a temporary disability grant must, simply on the basis of a failure to comply with the provisions and the regulations relating to notice, continue until it is terminated by a review process as contemplated in the said regulations.

Consequently the two judgments relied on by Mr Zono cannot support his submission that this Court would be entitled to grant the applicant the relief claimed in the notice of motion on the basis as contended.

[49] For these reasons I am of the view that a determination of the factual disputes as contended for on behalf of the applicant would not contribute anything to the resolution of the issues raised by the papers as they stand. Accordingly, and in the exercise of my discretion in terms of Uniform Rule 6(5)(g), the request for a referral of the disputes identified is refused. In the absence of such a referral, Mr Zono found himself unable to contend that the respondent's submissions are capable of rejection on the papers. In contrast to the applicant's allegations which were vague and lacking in detail, the respondent seriously and unambiguously addressed the facts said to be disputed. Accordingly, and applying the rule in *Plascon Evans*, the application must fail.

[50] In so far as costs are concerned, in his heads of argument Mr Bloem urged the Court to make a punitive costs order on a scale as between attorney and client. Although I agree with the submission that there are serious shortcomings in the manner in which the applicant's case was

presented and that it raises questions concerning credibility, I am not convinced that this is a matter where a punitive costs order is called for. The applicant's submission that she is an unsophisticated and illiterate person cannot in all seriousness be placed in issue by the respondent. That she is illiterate is evident from the fact that she appended her thumb print on annexure "MM1" as opposed to a signature. It must in my view in the circumstances of the case be accepted, not only that the applicant was reliant on advice received from her legal representative, but also on his assistance in the drafting of the papers filed in support of the application. On a reading of the applicant's founding papers one is left with the impression that the factual and legal issues that were relevant to the application were not given proper consideration. An adverse costs order would therefore in my view not be in the interests of justice.

[51] I may finally add that the order which I intend making in this matter certainly does not mean the end of the road for the applicant. There is nothing in the Act or its regulations which prevents an unsuccessful applicant from again applying for a disability grant. It is therefore always open to her to reapply for a disability grant if so advised and, if dissatisfied with the decision of the respondent, to exercise her right of appeal in terms of the Act and/ or to seek a review of the decision on good grounds.

[52] In the result the application is dismissed with costs.

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D. VAN ZYL
JUDGE OF THE HIGH COURT

Matter heard on	**:**	**10 March 2011**
Judgment delivered on	**:**	**7 April 2011**
Counsel for Applicant	**:**	**Mr A.S. Zono**
Instructed by	**:**	**Mr A.S. Zono & Associates** **Suite 319- 3rd Floor** **ECDC Building** **MTHATHA**
Counsel for Respondent	**:**	**Adv G. Bloem SC**
Instructed by	**:**	**State Attorney** **% Potelwa & Co.** **43 Wesley Street** **MTHATHA**