IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

REPORTABLE

CASE NO: 493/2000

In the matter between:

THE PERMANENT SECRETARY, DEPARTMENT OF WELFARE,

EASTERN CAPE PROVINCIAL GOVERNMENT First Appellant

MEMBER OF THE EXECUTIVE COUNCIL FOR WELFARE, EASTERN CAPE

PROVINCIAL GOVERNMENT Second appellant

and

MN NGXUZA First Respondent

NM MELTAFA Second Respondent

S MBOYIYA Third Respondent

BEFORE: Hefer ACJ, Harms, Streicher, Cameron and Mpati JJA

HEARD: 15 August 2001

DELIVERED: 31 August 2001

Class action under Constitution — quintessential requisites for action and requirements for definition of class set out — Jurisdiction — inclusion of class members outside jurisdiction of forum court cannot impede progress of action — Provincial government's conduct of litigation criticised

JUDGMENT

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, 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. On their behalf, aiming to secure the reinstatement *en masse* of their cancelled pensions, the applicants sought to institute representative, class action and public interest proceedings in terms of s 38(b), (c) and (d) of the Constitution. Froneman J, in a judgment now reported, granted them leave to proceed.

[2] The applicants decided to proceed with a class action under s 38(c), with the result that the order as to the other bases of standing is not at issue before us. The order has three essential features. First, it permitted the applicants, assisted by the Legal Resources Centre, to litigate as representatives on behalf of anyone in the whole of the Eastern Cape Province whose disability grants were between specified dates cancelled or suspended by or on behalf of the Eastern Cape government ("the class definition"). Associated with this was an order requiring the Eastern Cape government to provide the Legal Resources Centre with the details of the members of the class kept on computer or physical file in governmental records ("the disclosure order"). The order lastly required the applicants to disseminate through various print and radio media in the Eastern Cape and (with the assistance of the provincial government) by notices at pension pay points information about the class action ("the publication order"). The object of publication was to give members of the class the opportunity if they wished to opt out of the proceedings envisaged on their behalf.

[3] In the appeal, brought with the leave of Froneman J (who ordered in terms of rule 49(11) of the Uniform Rules of Court that the disclosure and publication orders be implemented pending the appeal), the Eastern Cape government attacked both the grant of leave to institute the class action and the disclosure order. The original grounds of attack were expressed in far-ranging terms. Senior counsel who appeared for the province at the hearing of the appeal, who did not draw the written argument, told us that he was not instructed to abandon all the original grounds of attack, but he refrained from advancing submissions in support of them. Given the ill-considered nature of many of them, to which I return later, this was a prudent approach. What he relied on was two contentions: (i) that the order did not adequately define the class; and (ii) that it wrongly and without jurisdictional warrant included in the class residents of the Eastern Cape province outside the domain of the Eastern Cape Division of the High Court. Counsel rightly conceded that the disclosure order — in effect a form of discovery adjunct to, and necessary for, the applicants' claim to relief — was an inevitable concomitant of the class definition order. The critical question before us is therefore the terms of that order.

[4] In the type of class action at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it. The class action was until 1994 unknown to our law, where the individual litigant's personal and direct interest in litigation defined the boundaries of the court's powers in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with them by compliance with the formalities of joinder. The difficulties the traditional approach to participation in legal process creates are well described in an analysis that

appeared after the class action was nationally regularised in the United States through a federal rule of court more than sixty years ago:

"The cardinal difficulty with joinder ... is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations such spontaneity cannot arise either because the various parties who have the common interest are isolated, scattered and utter strangers to each other. Thus while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints — they may never come.

What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it."

[5] The class action cuts through these complexities. The issue between the members of the class and the defendant is tried once. The judgment binds all, and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a small claim that may be difficult or impossible to pursue individually. The mechanism is employed not only in its country of origin, the United States of America, where detailed rules governing its use have developed, but in other countries as well. The reason the procedure is invoked so frequently lies in the complexity of modern social structures, and the attendant cost of legal proceedings:

"Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all."

[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 and the Constitution 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".

[8] All this bears directly on the case before us. The background is set out in the judgment of Froneman J. It is not in issue before us and need not be repeated. The main points are these. The provincial authorities in the Eastern Cape decided to revoke the welfare benefits of various groups of persons receiving social assistance. They did so unilaterally and without notice to those concerned. The applicants do not contend that the authorities' motives were bad. It is notorious that inaccurate claimant records — including large numbers of "ghost

pensioners" — cost the province tens of millions of rands every month. The problem is a relic of the fragmented governance in the Eastern Cape Province that preceded the democratic transition in 1994, where no fewer than six different administrations were responsible for social grants. But the method the authorities chose to deal with the situation was extreme, and the consequences for large numbers of needy people savage. They failed to differentiate between the fraudulent and undeserving and unentitled on the one hand, and on the other the truly disabled. These latter were manifestly not ghosts, and the mechanism employed left them destitute.

[9] All without distinction were required to re-apply for their existing entitlements. But the bureaucratic structures and personnel required to expedite the process were lacking, and repeated promises by officials and politicians to improve them failed to materialise. While re-applications clogged the existing structures, a moratorium was placed on both new applications and on processing arrear payments to those entitled to them. 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.

[10] That the method the province chose to verify and update its pensioner records was not just undifferentiatingly harsh, but also unlawful, was undisputed in these proceedings. That much was established by *Bushula and others v Permanent Secretary, Department of Welfare, Eastern Cape and another*. In its answering affidavit in the present matter the province says that it "took note" of the judgment "and the valuable guidance it has given in respect of the suspension and/or cancellation of disability grants". Its officials have, it says, "been instructed to act accordingly".

[11] The affidavit says no more. Its silence is expressive. At best the statement that officials have been "instructed" to act "in accordance with" *Bushula* implies that the province will not in future unlawfully terminate disability grantees' benefits. What it omits to say is more pertinent, which is whether *Bushula* will in fact be implemented for grantees already removed unprocedurally from the system. Though counsel assured us from the Bar that the province has reinstated and is paying so far as possible the categories of claimants at issue in *Bushula*, the province's papers contain no undertaking that the destitute deserving will be reinstated to their lawful entitlements. Without such an undertaking members of the class remain at risk.

[12] 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 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.

[13] 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. 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."

[14] The Constitutional Court has not dealt with the class action specifically. But it has pronounced pertinently on the ambit to be accorded all the standing provisions of the interim Constitution, which in material respects are identical to those of the Constitution. In *Ferreira v Levin NO and others* the majority held that these provisions must be interpreted generously and expansively, consistently with the mandate given to the courts to uphold the Constitution, thus ensuring that the rights in the Constitution enjoy the full measure of protection to which they are entitled.

[15] The circumstances of this particular case — unlawful conduct by a party against a disparate body of claimants lacking access to individualised legal services, with small claims unsuitable for if not incapable of enforcement in isolation — should have led to the conclusion, in short order, that the applicants' assertion of authority to institute class action proceedings was unassailable. But assail their claim the province did. It did so by recourse to every stratagem and device and obstruction, every legal argument and non-argument that it thought lay to hand. While offering no undertaking to implement *Bushula* in relation to the applicant class, it asserted that because of the decision the relief sought was moot. It then contended, contradictorily, that the applicants' claim was not yet ripe for adjudication. It tendered no evidence to refute the mass of indicia the applicants placed before the Court that showed unlawful conduct against huge numbers of disability pensioners, yet argued that the applicants' evidence was

inadmissible hearsay. It obstructed the applicant class's entitlement to be spared physical destitution, yet invoked their privacy rights in contending that the disclosure order should not have been granted. It did not flinch even from deriding the first applicant, who adhered to the founding papers with his thumb-print. Its deponent thought fit to record his doubt that Mr Ngxuza had read the media articles appended to the papers (a claim the first applicant did not make), while the written argument stated that it "boggles the mind" that "a man who never attended school and is presently illiterate" is able to make "learned submissions".

[16] All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticise government's decisions in the area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution, and requires that public administration be conducted on the basis that "people's needs must be responded to". It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere. We were told, in extenuation, that unentitled claimants were costing the province R65 million per month. That misses the point, which is the cost the province's remedy exacted in human suffering on those who were entitled to benefits. What is more, the extravagant cost of "ghost" claimants would seem to justify the expense of imperative administrative measures to remedy the problem by singling out the bogus — something the province conspicuously failed to do. It cannot warrant unlawful action against the entitled.

[17] It remains to deal with the two arguments in which counsel for the province persisted. Neither has substance and can be disposed of briefly. The complaint that the class was not adequately defined in the order of the court below is difficult to appreciate. There can be no conceptual complaint about the clarity of the group's definition. From the point of view of practical definition, it is beyond dispute that (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class. The quintessential requisites for a class action are therefore present.

[18] That the applicants' averments about the predicament of other members of the class to some extent rest on hearsay evidence is obvious. Few class actions could be maintained without some element of hearsay. Indeed, if first-hand

evidence could be obtained from all those sought to be included, they could as readily be joined, and the need for class proceedings would fall away. Hearsay evidence in any event varies in its import and quality. That produced in this case — from district surgeons, advice offices, civic and political organisations and public authorities — left little doubt that the province's methods were causing widespread misery and injustice. Even assuming that the hearsay evidence was inadmissible, sufficient admissible evidence to define the class was tendered.

[20] It is in any event clear from the judgment of Froneman J that the class definition encompasses only those whose social benefits have been unlawfully discontinued in the same manner as those of the applicants. It is equally clear that temporary grantees, whose entitlements have lapsed with time, are not included. Counsel for the province, as a last resort, suggested an amendment to the order granted to make clear that temporary grantees whose entitlements have expired and those whose grants were cancelled without procedural impropriety are excluded. But the Eastern Cape government retains against all members of the class any defences it might have to their claims. The court below did not purport to pronounce upon those. There can in my view therefore be no complaint about the manner in which the order defines the class.

[21] In so far as the judgments in *Lifestyle Amusement Centre (Pty) Ltd and others v The Minister of Justice and others* and *Maluleke v MEC, Health and Welfare, Northern Province* may question the availability of the class action in our law, or suggest different criteria for constituting and defining a class for the purposes of a class action, I am unable to agree with them, and to the extent that they are inconsistent with this judgment they must be regarded as over-ruled.

[22] The complaint about extra-jurisdictional applicants has more superficial warrant. The original applicants were entitled to sue the province in the Eastern Cape Division, which has its seat at Grahamstown, since they received their disability pensions within the domain of that court. Such intra-jurisdictional receipt of a pension created a similar jurisdictional tie (*ratio jurisdictionis*) between a significant portion of the envisaged class and the provincial government. However, non-residents of the Eastern Cape Division's jurisdictional area could not ordinarily have sued the provincial government in that Division, since the seat of government is at Bisho, within the jurisdiction of the Ciskei High Court. Between such non-residents and the Eastern Cape Division there would be no jurisdictional tie.

[23] There are two reasons, however, why the provincial government's complaint about jurisdiction is unpersuasive. Before referring to them, it is necessary to observe that the objection to which the province has taken recourse is itself a relic of the pre-transitional past, in which High Courts situated at Grahamstown, Bisho and Umtata still have jurisdiction over fragmented portions of the Eastern Cape Province. Though the Constitution empowered all courts to continue to function with their existing jurisdiction, that was subject to amendment or repeal

of the relevant legislation, and to the requirement of consistency with the Constitution, which specifies that "as soon as practical" all courts, including their jurisdiction, should be rationalised "with a view to establishing a judicial system suited to the requirements of the new Constitution". The situation the province invokes is precisely the sort of anomaly that these provisions required to be eliminated. That the necessary rationalisation has not yet occurred within the Eastern Cape Province can hardly be laid at the door of the applicants or the class they seek to represent. That the province should seek to exploit the situation is a further miserable reflection on the way it has conducted itself in this litigation.

[24] The objection in any event has no substance. First, this is no ordinary litigation. It is a class action. It is an innovation expressly mandated by the Constitution. We are enjoined by the Constitution to interpret the Bill of Rights, including its standing provisions, so as to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom". As pointed out earlier we are also enjoined to develop the common law — which includes the common law of jurisdiction — so as to "promote the spirit, purport and objects of the Bill of Rights". This Court has in the past not been averse to developing the doctrines and principles of jurisdiction so as to ensure rational and equitable rules. In *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd*

1. this Court held, applying the common law doctrine of cohesion of a cause of action (*continentia causae*), that where one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. The partial location of the object of a contractual performance (a bridge between two provinces) within the jurisdiction of one court therefore gave that court jurisdiction over the whole cause of action. The Court expressly left open the further development and application of the doctrine of cohesion of causes. The present seems to me a matter amply justifying its further evolution. The Eastern Cape Division has jurisdiction over the original applicants, and over members of the class entitled to payment of their pensions within its domain. That in my view is sufficient to give it jurisdiction over the whole class, who subject to satisfactory "opt-out" procedures will accordingly be bound by its judgment.

[25] In any event, even if a strict approach would weigh against permitting inclusion of extra-jurisdictional applicants in a plaintiff class, it is plain that the Constitution requires adjustment of the relevant rules, along sensible and practical lines, to ensure the efficacy of the class action mechanism. As O'Regan J pointed out in *Ferreira v Levin NO*, the constitutional provisions on standing are a recognition of the particular responsibility the courts carry in a constitutional democracy to ensure that constitutional rights are honoured:

"This role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact."

[26] There can in my view be no doubt that the Constitution requires that, once an applicant has established a jurisdictional basis for his or her own suit, the fact that extra-jurisdictional applicants are sought to be included in the class cannot impede the progress of the action. This is the position also in the United States of America, to the laws of which, together with other foreign countries, the Constitution permits us to look when interpreting the Bill of Rights. There in a plaintiff class action (which is in this sense materially different from a defendant class action) the presence of a large preponderance of out-of-state plaintiffs does not impede the proceedings once the original litigants have established jurisdiction in the forum court.

[27] There is no suggestion that the applicants were engaged in impermissible forum-shopping. It is therefore unnecessary to consider what effect on jurisdiction in a class action, if any, tactical location of a suit by a litigant could have. It is manifest that a significant proportion of the class envisaged in fact resides and receives pension payments within the domain of the Eastern Cape Division. In relation to them, the Eastern Cape Division has undoubted jurisdiction. This is in my view sufficient warrant, from both a common law and constitutional point of view, to confer on that Division jurisdiction in respect of the remaining members of the class.

[28] A further reason why the jurisdictional complaint is devoid of merit is its utter lack of practical import. Counsel for the province observed, correctly, that the applicants were free to initiate the proceedings in the Ciskei High Court. That undoubtedly would have tied the entire class to the forum court through the location or residence (*situs*) of the party against whom they were invoking legal process. But when pressed in argument to explain why being sued in Bisho rather than Grahamstown (where the Legal Resources Centre is located) would have made any difference to the legitimate interests and convenience of the provincial government, counsel was unable to give an answer.

[29] As was pointed out during argument, the Supreme Court Act provides for a matter to be relocated from one division to another if it "may be more conveniently or more fitly heard" in that division. Any complaint of convenience or fitness on the part of the province will properly be accommodated under that provision. The dismal truth is that the province's objection was of a piece with the rest of its filibustering approach to the litigation as a whole, and as devoid of substance.

[30] There remains a question the Court raised during the hearing of the appeal, namely the extensive nineteen-volume record placed before us. This voluminous assemblage was unnecessary to the determination of the appeal and in ordinary circumstances I would have been inclined to make the party responsible for its inclusion pay the costs relating to it. But Mr van der Riet, who appeared in this Court and the court below on behalf of the applicants, took personal responsibility for the length of the record, pointing to the tenor and ambit of the province's objection to the class action, which included the contention that the class had not been sufficiently proved. This answer was not strictly adequate, but the province in the court below undertook should it succeed in the appeal that it would not seek costs against the applicants. In view of this undertaking, and all the other circumstances, I am disinclined to punish the applicants' legal advisors for erroneously burdening the Court (and the taxpayer, who will eventually be encumbered with the costs) in this manner. It would however be appropriate to deprive the applicants' attorneys of their perusal fee in respect of three-quarters of the record.

[31] The class action order is interlocutory, and counsel informed us that since the judgment in the court below further interlocutory hearings have been held. There is therefore no need for this Court to amend the dates specified in the original order. As indicated earlier, it requires no further consequential amendment.

[32] The appeal is dismissed with costs, including the costs of two counsel, but excluding the attorneys' perusal fee in respect of three-quarters of the record.

E CAMERON

JUDGE OF APPEAL

HEFER ACJ)

HARMS JA)

STREICHER JA) CONCUR

MPATI JA)