

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

Case No: 426/2021

In the matter between:

SAKHINGOMSO TRAINING AND DEVELOPMENT

CENTRE

Applicant

And

THE MEMBER OF EXECUTIVE COUNCIL FOR

SOCIAL DEVELOPMENT

1st Respondent

HEAD OF DEPARTMENT OF SOCIAL DEVELOPMENT

IN THE EASTERN CAPE PROVINCE

2nd Respondent

JUDGMENT

BESHE J:

[1] This is an application for an order declaring second respondent's decision to suspend funds that are due to the applicant on a monthly basis, unlawful, unconstitutional and invalid and setting same aside. Applicant also seeks an order that the respondents be directed to pay R2 145 000.00 being the total of amounts due to the applicant from April 2020 to February 2021.

The Parties

[2] The applicant is described as a non-profit organisation that was established in 2005 and registered with the Department of Social Development (The Department) in 2008. This was done in order for applicant to get funding (financial benefits) from the said department so as to provide social welfare services to disabled children in the Eastern Cape. The deponent to the founding affidavit **Mr Dingalenkosi Wisani** describes himself as the General Manager of applicant.

[3] First respondent is the Member of the Executive Council (MEC) responsible for the department. Second respondent is the Head of Department who is responsible for the management and administration of the department. Second respondent is said to have taken the impugned decision.

Evidence

[4] It appears to be common cause that applicant received a subsidy from the first respondent in order for it to fulfil obligations imposed by the *Non-Profit Organizations Act*¹ and in extension of first respondent's mandate to provide social welfare services to the society, with special attention to disabled children. As pointed out earlier, applicant is a non-profit organization and is registered as such with the Department of Social Development.

[5] A non-profit organization is defined as a trust, company or other organization of persons established for a public purpose.²

[6] *Section 3 of the Act* outlines the state's responsibility to non-profit organizations and provides thus:

“Within the limits prescribed by law every organ of state must determine and co-ordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of the non-profit organization to perform their duties.”

¹ Act 71 of 1997.

² Section 1 of the Act.

[7] According to **Mr Wisani**, the applicant receives a monthly subsidy of R195 000.00 from the Department of Social Department, Eastern Cape. The last such payment was received in March 2020.

[8] As a result of the non-payment of subsidies by the respondents, the applicant has incurred huge debts to *inter alia* Spargs Wholesalers Mthatha, OR Tambo District Municipality. It has been unable to pay its creditors. It has not been able to pay its employees since November 2020. And therefore unable to effectively provide social welfare services to the disabled.

[9] It is contended on behalf of the applicant that the decision by the respondents to cut off payments to it is an unjust administration as it infringes on the Constitutional Rights of children concerned. This is so, so it is contended by the applicant, because the main beneficiaries of the services provided by the applicant to provide education and skills through practical and theoretical training, are vulnerable members of the society who are living with disabilities and are poor. Applicant also uses the funding to provide feeding schemes for the beneficiaries. That applicant is the only institution that provides basic and critical services for the deaf, blind and physically disabled children in Mthatha and surrounding areas.

[10] Enquiries to the department about the non-payment of subsidies was met with a response contained in an undated letter from first respondent. The letter records *inter alia* the following:

“3. Following various enquiries within the Department, the Office of the MEC wishes to advise as follows:

3.1 The Department’s internal investigation as conducted by our Risk Management Directorate is still in process and close to completion. Both the Office of the MEC and the Office of the HoD urgently awaits the outcome of the investigation.

3.2 The above investigation was initiated following the Department’s decision to suspend funding to the organisation for accountability purposes as a result

of allegations of mismanagement of funds. The suspension of funding is still currently in place.

3.3 The Department will review the suspension pending the finalization of the investigation by the Risk Directorate and the recommendations made therein to the Office of the HoD and the Office of the MEC.

3.4 The Office of the MEC was cited as a second respondent in a court application initiated by the Centre and Management in the Mthatha High Court against the Board Members. No relief was sought against the Hon MEC. We are advised that the matter is *sub judice* and that the Mthatha High Court has not granted any order under case no. 263 / 2020.

4. In the circumstances, the Office of the MEC wishes to assure the Centre that the matter is receiving the attention that it deserves, and that the Department's further handling of the matter will be communicated in due course."

[11] The application is opposed. The respondents also raised a number of points *in limine*, to wit:

Lack of urgency;

Lack of *locus standi*;

Non-joinder;

Lis pendens; and

Dispute of facts.

The last point *in limine* seems to be to be a repetition of the complaint relating to lack of *locus standi* and about the deponent to the founding affidavit being complicit in the alleged mismanagement of applicant's funds.

[12] It would appear to me that the department seeks to involve itself in leadership squabbles relating to the applicant. Yet, they seem to acknowledge that there was a change at the helm of the applicant and specifically addressed their communication relevant to this matter to the interim Board of Management. I do not think this complaint has any merit. As far as lack of urgency is concerned, the delay has been adequately explained by the applicant, including *inter alia* the state of affairs brought about by the state of disaster that was declared resulting in a lockdown. As well as attempts that were made to engage the department in regard to the funding and getting by with other sources of funding / donations. Clearly the other matter that is before court does involve the same parties as in this matter nor is it about the same cause of action to amount to *lis alibi pendens*. This point too falls to be overruled.

[13] In the main without regurgitating the contents of the answering affidavit, respondents gripe that led to the suspension of funding to the applicant is disclosed in their letter in response to applicant's enquiries regarding non-payment of funds due to applicant. They alleged mismanagement of funds. As well as, it would seem the propriety or otherwise of the assumption of office by the impugned Board of Management including the deponent to the founding affidavit who described himself as the Acting General Manager and board member of applicant, appears to be the reason for the suspension of funding. The bulk of respondents' answering affidavit deals with the alleged mismanagement of funds. But, they do not tell us how the decision to suspend the funding was arrived at or on what basis the funding was suspended. Hence applicant's contention that respondents' decision to suspend funding to the applicant constitutes an unjust administrative action which adversely infringes the constitutionally enshrines rights of children.³

Discussion

[14] *Section 33 of the Constitution* guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair.

³ See page 30 of indexed papers [22].

[15] The court is required to determine whether the manner in which the decision was taken was acceptable making it just and therefore lawful. The court is to concern itself with the process that led to the decision being taken.

[16] In response to this allegation, respondents retort that the decision to suspend the funds due to the applicant is meant to protect the applicant by extension the disabled children from misuse and mismanagement of funds allocated to the applicant. The letter addressed to the applicant by the respondents referred to earlier makes it plain that the funds were suspended following the department's decision to suspend funding to the organisation due to an alleged mismanagement of funds and its intention to conduct an investigation.

[17] Even though the applicant seeks to have the decision of the respondents reviewed, they did not call upon the respondents to provide reasons why the impugned decision was taken. Granted that respondents' letter makes it plain that the decision is allied to allegations of misuse of funds by the applicant. Other than that we are in the dark as to why the decision was arrived at or what procedure / process was followed in arriving at the decision. It was also argued on behalf of the applicant that the decision to suspend funding for reasons other than those that are usually listed in Service Level Agreement entered into between non-profit organisations and the department. This does not help the applicant because this is not a case that is made out in their papers. Nor is the existence of a Service Level Agreement between applicant and department alleged and proved.

[18] My understanding of applicant's case is that respondents' decision to suspend the funds / subsidy provided by the department to the applicant falls to be set aside because it is unconstitutional in that it violates the fundamental rights of those affected. This is so because it renders the applicant unable to provide the required services to them. Applicant also pertinently draws the court's attention to *Section 28 of the Constitution* which provides that 'a child's best interests are of paramount importance in every matter that concerns the child'. Further that *Section 29 (1) (a) of the Constitution* guarantees the right to basic education to all.

[19] I stated earlier on that the respondent does not tell us how the impugned decision was arrived at. About the process that was followed in arriving at the decision to suspend funding. It appears to have been taken arbitrarily without following any due process. The main thrust of respondents' opposition to the granting of the relief sought by the applicant is as I understand it, that the decision to suspend the funds is meant to protect the disabled children the applicant is supposed to cater for against the mismanagement of funds meant for them.

[20] Be that as it may, the respondent is still required to follow due process and not act arbitrarily. There can be no doubt that the department is duty bound to investigate mismanagement of funds meant for members of vulnerable groups and deal with the wrongdoers. But more importantly, as provided for in *Section 3 of the Act (NPO Act)* the state has a responsibility to promote support and enhance the capacity of non-profit organisations to perform their functions. It is therefore my considered view that by unilaterally and arbitrarily stopping the funding to the applicant, in so doing, adversely affecting the rights of the beneficiaries of the applicant's services, the respondent's decision to do so is unlawful and falls to be reviewed and set aside. The applicant has made out a case for the relief it seeks.

[21] Accordingly, the following order will issue:

- 1. The decision taken by the second respondent to suspend funds due to the applicant is declared unlawful and is reviewed and set aside.**
- 2. The department is ordered to pay to the applicant all amounts due to it by way of subsidies from April 2020 within sixty (60) days of granting of this order.**
- 3. The respondents are to pay costs of this application.**

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Adv: Nyobole
Instructed by	:	MNQAYANA ATTORNEYS 55 Nelson Mandela Drive Unit 6, Block E MTHATHA Ref: Mr Mnqayana Tel.: 078 349 0987
For the Respondents	:	Adv: Mbiko
Instructed by	:	STATE ATTORNEY (MTHATHA) 94 Sission Street Broadcast House Fortgale MTHATHA Ref: 294/21-A2M Tel.: 047 – 531 9900
Date Heard	:	20 January 2022
Date Reserved	:	20 January 2022
Date Delivered	:	14 June 2022