<u>IN THE HIGH COURT OF SOUTH AFRICA</u>
<u>FREE STATE DIVISION, BLOEMFONTEIN</u>

Case No.: 1719/2010

In the matter between:-

<u>NATIONAL ASSOCIATION OF WELFARE ORGANISATIONS AND NON-GOVERNMENTAL ORGANISATIONS</u>	First Applicant
<u>N G SOCIAL SERVICES FREE STATE</u>	Second Applicant
<u>FREE STATE CARE IN ACTION</u>	Third Applicant

and

<u>THE MEMBER OF THE EXECUTIVE COUNCIL FOR SOCIAL DEVELOPMENT, FREE STATE</u>	First Respondent
<u>HEAD OF THE DEPARTMENT OF SOCIAL DEVELOPMENT, FREE STATE</u>	Second Respondent
<u>NATIONAL MINISTER OF SOCIAL DEVELOPMENT</u>	Third Respondent

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<u>HEARD ON:</u>	26 JUNE 2014
<u>JUDGMENT BY:</u>	VAN DER MERWE, J
<u>DELIVERED ON:</u>	28 AUGUST 2014

<u>Background:</u>

[1] This is the fourth judgment of this court that deals with the constitutionality of the Free State Policy on Financial Awards

to the Nonprofit Organisations in the Social Development Sector (the policy).

[2] The applicants are fully described in the previous judgments. The first and second respondents (the department) are responsible for the conception and implementation of the policy. The third respondent did not participate in these proceedings. The full background and history of the matter appear from the three previous judgments and are not repeated herein unless presently relevant.

[3] In a judgment delivered on 5 August 2010 (the first judgment) declaratory orders and a structural interdict were issued in the following terms:

> "1. It is declared that:
>
> 1.1 the Free State Policy on Financial Awards to the Nonprofit Organisations in the Social Development Sector of August 2003 ("the policy") is inconsistent with the constitutional and statutory obligations of the first and second respondents in terms of sections 26, 27 and 28 of the Constitution, section 4(2) of the Children's Act, 38 of 2005, section 3(2) of the Older Persons Act, 13 of 2006 and the provisions in respect of statutory services referred to in this judgment, in that it fails to recognise as a fundamental principle of funding that nonprofit

organisations that care for children, older persons or vulnerable persons in need or provide statutory services, fulfil the obligations of the first and second respondents.

1.2 the policy is not a reasonable measure as envisaged by the aforesaid provisions to the extent that it lacks a fair, equitable and transparent method of determination of the contributions that the aforesaid nonprofit organisations should make from own resources or sources of income in respect of provision of the aforesaid care and services.

2. The first and second respondents are ordered to adopt and to implement a redrafted or revised policy in order to remedy the abovementioned shortcomings.

3. The first and second respondents shall within four months of date of this order deliver a report under oath stating what steps have been taken to comply with this order.

4. The applicants may within one month of delivery of the report, deliver a commentary under oath on the report.

5. The first and second respondents shall within one month of delivery of the commentary, deliver a reply thereto under oath.

6. The matter shall be enrolled on a date to be fixed by the registrar in consultation with the presiding judge for consideration and determination of the aforesaid report, commentary and reply."

[4] In consequence hereto the department filed a revised policy (the first revision). The first revision was dealt with in the judgment of this court delivered on 9 June 2011 (the second judgment). The second judgment declared that the first revision did not comply with the first judgment and directed the department to, after consultation with the applicants, file a revised policy that meets the requirements of the first judgment.

[5] The department accordingly filed a second revised version of the policy (the second revision). The findings of this court in respect of the second revision are contained in a judgment delivered on 28 March 2013 (the third judgment). The order made in the third judgment *inter alia* provides as follows:

"1. It is declared that the revised policy filed by the respondents on 7 September 2012 does not comply with the judgments delivered by this court in this case on 5 August 2010 and 9 June 2011.

2. The respondents (duly represented by appropriately authorised representatives) are to enter into consultations with the applicants within fifteen calendar days after the date of this order, with a view to consider the applicants' comments and recommendations on the department's proposed revised policy. Such consultative process is to be concluded within thirty calendar days from the date of this order.

3. The respondents are to serve and file a revised policy which complies with the structural interdict and which meets the requirements set out in this court's judgments in this matter within sixty calendar days of the date of this order."

The third revision of the policy

[6] In paragraph [22] of the second judgment the following was said:

"[22] The department should therefore be able to do proper planning and prioritisation in respect of publication of service specifications and/or appraisal of service plans. The draft new national policy states in this regard that service specifications will determine priorities for service delivery at either national or provincial level and will be informed by, amongst others, government priorities, relevant research, statistics, relevant community needs and priorities, the relevant demographics, including population, poverty levels, migration patterns and other social development indicators and integrated development plans and that service specifications will therefore determine where, to whom and for what purpose funding will be allocated. The department's

> constitutional and statutory obligations require planning and prioritisation. In so doing, even though this may require some tough decisions, the department could justify in a manner consistent with the Bill of Rights as a whole, the effective funding of the prioritised services required from the NPO's, in accordance with paragraphs 11.6.6.1 and 11.6.6.2 of the revision."

[7] In the second judgment it was therefore held that the policy could constitute a reasonable measure to the maximum extent of or within available resources to achieve the realisation of the rights of children, older persons and other vulnerable persons in need if it prioritises social welfare service programmes and effectively funds the prioritised programmes. The third judgment was to a large extent based on this finding. The further revision of the policy presently before me for adjudication (the third revision), purports to give effect to this finding. The department engaged the services of KPMG Consulting Services (Pty) Ltd (KPMG) for assistance in respect of drafting of the third revision.

[8] What requires consideration is paragraph 11.6 of the third revision. As a result of deliberations during argument, the department filed an amended sub-paragraph 11.6.7 thereof. Paragraph 11.6 as thus amended provides:

> "11.6 Applications for State funding of social welfare service programmes (service plans) will only be considered if

they pertain to one of the recognised social welfare service programs identified in the first schedule.

11.6.2 The financial appraisal of service plans will be performed in accordance with the principles and procedures set out in paragraphs 11.6.3 to 11.6.15 below based upon:

11.6.2.1 The service specifications published annually by the Department;

11.6.2.2 The level of prioritisation allocated to each social welfare service programme as listed in the first schedule which shall be made publicly available;

11.6.2.3 The items of expenditure which the department will fund to deliver the relevant programme, as contained in the second schedule which shall be made publicly available;

11.6.2.4 The reasonable unit cost, being those costs that are reasonably necessary to provide the service, ('core costs') as contained in the second schedule of each item of expenditure that the Department will fund for the relevant social welfare service programmes to be provided, as updated applying CPI to expenses other than salaries and wages and DPSA salary scales to salaries and wages.

11.6.2.5 The need for funding, which is determined by taking into account what service providers are reasonably able to contribute;

11.6.2.6 The number of programmes that may be funded will be dependent on the funding made available to the Department by the Provincial Legislature for the funding of social welfare service programmes;

11.6.2.7 The quality of the service that shall be provided must comply with the applicable legislative and constitutional standards that are prescribed.

11.6.3 The allocation of available funding to approved programmes will be done in accordance with the allocation model contained in the third schedule.

11.6.4 The financial appraisal of service plans will be conducted in stages;

11.6.5 During the first stage service plans will be evaluated against the Department's service specifications, and subject to compliance therewith, may be approved;

11.6.6 In the second stage the Department will apply the costing model for each programme, as contained in the second schedule, in order to determine the standardised costs and other costs of rendering the services which are to be delivered in terms of the approved service plan ('the required funding').

11.6.7 In the third stage the Department will determine the amount that each service provider is reasonably able to contribute towards the costs of the programme it has applied to perform, after consultation with the service provider concerned, taking into account *inter alia* the service provider's service plan (submitted in accordance with clause 10 of this Policy) and any written representations it may make regarding the amount the service provider is reasonably able to contribute, its financial statements for the preceding fiscal year and the Department's service specifications, as well as any further information which the Department may require service providers to provide that is reasonably required for this purpose. In determining what the service provider is reasonably able to contribute the Department will not take into account any funds that the service provider requires for its reasonable operational costs that are not funded by the Department and/or capital expenditure.

11.6.8 In the fourth stage the Department will deduct the amount which each service provider is reasonably able to contribute from the required funding for the service to be provided by that service provider to calculate the amount of the financial award that is required ('the required financial funding').

11.6.9 In the fifth phase the Department determines the distribution of the funds made available to it by the Provincial Legislature to cover the transfer of funding to NPO programmes, in order of their ranking in the first schedule to defray in full the required financial funding, as is described in the allocation model. Once a point is reached where the funds are insufficient to fully fund the core cost items for the next ranked programme applying this approach, then the funds so remaining shall be applied *pro rata* to cover the funding of such programme so that it is partially funded.

11.6.10 In the sixth stage the financial award so determined will then be submitted for approval in terms of clause 12.2.2 and if approved, it shall be allocated and paid to the service provider in the manner as prescribed in this Policy.

11.6.11 The financial appraisal performed in terms of paragraphs 11.6.2 to 11.6.10 will be predicated upon the principles set out in paragraphs 11.6.12 to 11.6.15 below.

11.6.12 The Department has a statutory and constitutional obligation to achieve, within its available resources, the progressive realisation of the applicable socio-economic rights, which it must fulfil by striving to progressively increase the resources available for the provision of social welfare services.

11.6.13 It is recognised that whilst the Department strives and will continue to strive to fund all of the recognised social welfare service programmes to the maximum extent possible, its objective being to ensure that its financial awards will eventually cover the full costs of all social welfare service programmes, the limited resources at its disposal presently preclude it from doing so.

11.6.14 Financial awards will, in order to facilitate forward planning and budgeting, be approved for a minimum period of three financial years, with approval in respect of the second and third years being provisional.

11.6.15 The core costs contained in the second schedule to this policy will be reviewed every three (3) years by the Department pursuant to its having considered input received from relevant stakeholders."

[9] The constitutional foundation of funding in terms of the third revision is found in paragraphs 11.6.12 and 11.6.13. The practical effect thereof is summarised in the following paragraphs.

[10] The first schedule lists 34 social welfare service programmes that may be delivered by nonprofit organisations (NPOs), in order of priority. Schedule 2 contains separate expositions of the core costs of each of the 34 programmes. In respect of each programme schedule 2 sets out specific cost items and amounts for each item. Unless the number of

beneficiaries involved in a programme is important, the total monthly core costs of the programme is specified. Where beneficiaries are involved, the core costs per month are calculated for a benchmark number of beneficiaries. For instance, in respect of the programme children: childline, ranked 15th in schedule 1, the monthly core costs amount to R57 885,64 and in respect of the programme children in youth care centres: children's home, ranked 3rd in schedule 1, the benchmark number of beneficiaries is 60 and the core costs per month per beneficiary amount to R6 436,41.

[11] Core costs are intended to cover the reasonable expenses essential to deliver the services on a sustainable basis. Core costs include the salaries of the number of each staff type necessary to provide the service, such as centre managers, child and youth care workers, social workers, nurses, kitchen cooks, administrative officers, receptionists, drivers and general assistants. Where social workers are involved in a programme, the costs of supervision of the social workers are included on the basis of a supervisor for every six social workers. These costs include employer contributions per employee in respect of unemployment insurance fund, workers' compensation, pension fund, thirteenth cheque, medical aid fund and housing allowance. Further costs items include water and electricity, food supplies, clothing, lease of premises, telephone and other communication costs, stationery, training and staff development, equipment hire, office insurance, security guards and transport. Where possible, cost items were standardised. These amounts

were updated by KPMG to the 2013/2014 financial year in accordance with the Department of Public Service and Administration salary scales in respect salaries and employer contributions and the consumer price index in respect of other expenses. The core costs will be updated annually on these bases and reviewed in three year cycles to provide for possible changed circumstances, after consultation with stakeholders.

[12] The total core costs of all the programmes for which NPOs submit service plans that accord with service specifications, will thus be calculated. The next step is to determine, in terms of para 11.6.7, the amounts that NOPs could reasonably contribute to the core costs of the programmes. The department will then be able to determine which programmes can be funded with the available budget. Unless a NPO can reasonably contribute to the core costs of a programme, the department will fund the full core costs thereof. The department will then fund the full core costs of the programmes, less reasonable NPO contributions thereto, in order of priority up to the point where the funds allocated to the department for this purpose are exhausted.

<u>The test</u>

[13] Against this background it is necessary to briefly reiterate what the present enquiry essentially entails. The power to formulate and implement policy on financing of public projects resides in the government elected by the people of South Africa. This court can only pronounce on whether the

policy complies with the Constitution. In deciding this question the court must therefore be aware of the fundamental principle of separation of powers and be wary of attempting to formulate policy itself. The socio-economic rights in question have no minimum core or threshold. The test is whether the policy is a reasonable measure to the maximum extent of available resources or within available resources to achieve the progressive realisation of the rights. The test is not whether the policy is the best or most desirable measure possible. Availability of resources is therefore an important factor in determining what is reasonable, but lack of funds cannot be used as a lame excuse. Resources must be provided as far as reasonably possible. Reasonableness must also be understood in the context of the Bill of Rights as a whole. Whilst the very nature of progressive realisation of rights entails that full realisation will only be achieved in time, those whose needs are the most urgent should not be ignored in the policy, nor should a significant segment of society be excluded. Progressive realisation means that the rights in question must over time be made accessible to a larger number of people and a wider range of people. The department is obliged to take reasonable measures progressively to eliminate or reduce the deprivation of rights.

[14] In the affidavits that deal with the third revision and in argument before me, the applicants canvassed matters and claimed relief beyond the legitimate boundaries of the present enquiry. In particular the affidavits contained

repeated claims that the department should be ordered to fully fund all the social welfare service programmes provided by NPOs. During argument this was toned down to a request for a declarator that the department did not engage sufficiently with the national Department of Social Development and Treasury, but this claim too cannot be considered.

[15] The objections that were legitimately raised in respect of the constitutionality of the third revision can be summarised as follows:

(i) that no meaningful consultation took place between the parties;

(ii) that in terms of the third revision insufficient funds will be made available to the NPOs, with the result that programmes presently funded (albeit inadequately) will no longer be funded and that needy persons will be deprived of funding;

(iii) that the third revision does not provide for progressive realisation of rights;

(iv) that the prioritisation in schedule 1 of the third revision is unconstitutional;

(v) that the exclusion of certain expenses from core costs is arbitrary and unreasonable;

(vi) that the third revision allows the department to determine the own contributions of NPOs to core costs in arbitrary manner;

(vii) that the third revision unfairly discriminates between beneficiaries of social welfare service institutions of NPOs and those of the department.

No meaningful consultation

[16] It will be recalled that in terms of the third judgment the department was directed to enter into a consultative process with the applicants in respect of the further revision of the policy.

[17] On 9 April 2013 the department provided the applicants with a revised draft policy with proposed schedules 1 and 2 prepared by KPMG. The parties met on 18 April 2013. The draft revision of the policy as well as the applicants' written comments and proposed amendments thereto were discussed. The department considered these comments and proposals and discussed same at a special meeting with the national Department of Social Development. As a result the department provided the applicants with a redrafted working document reflecting the proposals of the applicants that the department was prepared to accede to, as well as a full written response to the applicants' aforesaid documents. These documents were provided to the applicants prior to 25 April 2013.

[18] On 25 April 2013 the parties met again. The focus of the meeting was the finalisation of schedule 2, the list of core costs. A special task team comprised of representatives of the department, the applicants, KPMG and social welfare

experts was established to determine core costs and to finalise schedule 2.

[19] The task team conducted a three-day workshop on 8, 9 and 10 May 2013. The applicants provide the services in respect of 16 of the programmes listed in schedule 1. During the workshop detailed discussions took place in respect of the programmes provided by the applicants. The participants went through the costs of each programme offered by the applicants line item by line item. Numerous issues were resolved in the process.

[20] KPMG compiled a report of the outcomes of the task team workshop. This was discussed at the next meeting between the parties held on 24 June 2013. It was agreed that the applicants will provide a written response to the KPMG summary, which they did on 27 June 2013. The department responded hereto in writing on 2 July 2013.

[21] The parties finally met on 5 July 2013. At that meeting the applicants raised four issues. The applicants said that the parties could agree on these issues or they could be taken to court for decision. These issues were whether the proposed new policy could be implemented during 2014, whether the core costs would be reduced or deducted from, whether the department was constrained by limited funding from Treasury and the differential funding of its own institutions by the department. The department said that the proposed new policy could not be implemented during 2014 and that the

department will only be able to get Treasury to allocate more money in terms of the budget process once the proposed policy has been finalised. The department indicated that the core costs will not be reduced and that only the reasonable NPO own contributions, if any, will be deducted therefrom. In respect of the third issue the department said that it had already been addressed by it and in respect of the fourth issue the department indicated that it stands by its view previously given that the matter is not relevant. The parties then agreed that the consultation process had been conducted in a positive manner and had come to an end.

[22] In the light hereof the assertion that no meaningful consultation took place in respect of the third revision, is factually unfounded. In the final analysis the applicants rely for this assertion on the alleged failure of the department to provide the applicants with the costs structures of the department's own welfare service institutions and of full details of budget submissions and other attempts by the department to secure funding in the past. But apart from whether some of the information was in any event accessible to the applicants, these are all matters extraneous to the issue of compliance of the third revision, to be implemented in future, with the previous judgments of this court.

<u>Inadequate funding</u>

[23] As I have pointed out, it is not possible in this matter to make orders sounding in money or obliging the department to fund all or specific NPO programmes. As I have also said,

however, a policy that excludes the most needy persons could not be said to be a reasonable measure.

[24] The applicants say that the third revision is unacceptable as its implementation will have the result that programmes presently funded (albeit inadequately) will no longer receive funding and that many persons that should benefit from funding by the department will be excluded therefrom. For the reasons that follow I am unable to agree.

[25] First, the fact that as a result of prioritisation certain programmes will in future no longer be funded, cannot in itself render the third revision unreasonable. The real question is whether upon consideration of all the relevant circumstances, including the available resources, it would be reasonable to leave the lower prioritised programmes for later/progressive funding.

[26] Second, the applicants' argument is based on the assumption that the same budget allocation for NPO transfers will be available for implementation of the third revision. This is fallacious. It is true that in terms of the 2013/2014 budget allocation for NPO transfers the core cost of only the first four prioritised programmes could be funded. However, the department explains that Treasury has maintained that it cannot provide increased funding without the motivation of a proper business case. The department states convincingly that the third revision, if approved, would enable it to satisfy Treasury criteria and to present Treasury

with a properly costed and realistic business case for an increased allocation for NPO funding. The department's budget submissions could clearly set out the needs and the core costs thereof. In this manner the extent of denial of rights by inadequate allocation will be clear and Treasury will have to make a decision in this regard that complies with the Constitution.

[27] I cannot imagine that Treasury will not give serious consideration to such properly motivated and costed request for funding and would allocate funds that would not cover the core costs of a reasonable number of NPO programmes. KPMG calculated that on the basis of current NPO programmes and beneficiary numbers, a budget allocation of approximately R572 million would cover the current core costs of all NPO programmes. The budget allocation to the department for NPO transfers for the 2013/2014 financial year was approximately R381million, of which approximately R176 million was allocated to the early childhood development programme. The early childhood development programme no longer forms part of schedule 1 and will in future be funded separately. On this basis, that is excluding the funds allocated to the early childhood development programme, an additional approximately R367 million will cover the core costs of all NPO programmes for 2013/2014. This accords with the department's own calculations of an additional R408 million. In terms of the Free State Appropriation Act of 2014, nearly R28 billion is expected to be appropriated. R400 million represents approximately

1,4% thereof. It hardly seems unattainable for the department to secure a budget allocation that would at least cover the core costs of the majority of NPO programmes. I therefore do not accept that implementation of the third revision will result in an unreasonably inadequate budget allocation for NPO programmes. On the contrary, it seems to me that the third revision provides a realistic prospect of substantially increased NPO funding.

No progressive realisation

[28] In terms of the third revision core costs will be funded and not full costs. Upon acceptance that as a result of limited resources the core costs of the lower ranked NPO programmes will also not be funded, the question is whether the third revision will enable the progressive increase of resources, that is that social welfare services will over time be made available to a larger number and a wider range of beneficiaries.

[29] In terms of paragraphs 11.6.12 and 11.6.13 of the third revision the department is committed to this. It aims at eventually funding the full costs of all NPO social welfare service programmes. Progressive realisation is of course a long term process. The department says that if the third revision is approved now, the benefits thereof will only begin to realise in the 2016/2017 financial year, as a result of government budgetary processes. However, I do not think that there is any sound reason to doubt this commitment or its realisation. The applicants' submission that the third

revision will actually be regressive is to a large extent again based on the incorrect assumption that the budget allocation for NPO transfers will remain the same. The very object of prioritisation of constitutional obligations is to form the foundation of progressive realisation thereof. For the reasons already mentioned, the third revision should enable the department to continue to make a compelling case for increased funding. Progressive realisation will in the long term also be advanced by the early childhood development programme and similar programmes that are intended to educate and/or uplift and to avoid persons becoming reliant on social welfare services.

Priority of programmes

[30] The complaints of the applicants in this regard relate to the early childhood development programme (ECD) and integrated social work services (ISWS).

[31] ECD is a programme for children up to the age of five and is aimed at early childhood development and alleviation of childhood poverty. It is regarded as crucial for the cognitive, emotional and physical development of children, as well as their capacity for social interaction. It is a major prevention and early intervention programme and is a national priority of the third respondent. What is presently relevant is of course the funding of ECD services provided by NPOs.

[32] The applicants do not dispute the value and importance of ECD. They take issue with what they regard as the effective unreasonable prioritisation of ECD funding.

[33] As I have indicated, of the 2013/2014 budget allocation for NPO transfers of approximately R381million, approximately R176 million was allocated to ECD. The applicants believe that this amount represents the full costs of NPOs in respect of ECD, but it appears that it represents only a fraction thereof (R15 per child per day of a calculated full costs of R53 per child per day) and is also subject to progressive realisation.

[34] In any event, because it is a national priority, the government intends to make separate budget allocations for ECD. The department will of course be obliged to utilise the funds so allocated for that purpose. For this reason ECD is not on the list of programmes prioritised in terms of schedule 1 and, as I have indicated, this should not meaningfully affect the implementation of the third revision.

[35] In a previously proposed priority list of NPO programmes, the department listed 40 programmes. These included the programmes children: prevention, early intervention and statutory services (ranked 1), substance abuse: prevention services (ranked 23), disability: social services (ranked 24), families: counselling services (ranked 30) and older persons: social services (ranked 36). These services are provided by social workers and the costs of the programmes essentially

consist of the salaries and other expenses in respect of social workers. The department decided that for purposes of funding, these programmes as well as supervision costs in respect thereof (in the previously proposed list supervision of social workers constituted a separate programme, ranked 36) should be combined to form one programme entitled children: integrated social work services and that it should be ranked as first priority. As a result also, the programmes listed in schedule 1 were reduced to 34. Several of the 33 programmes other than ISWS also involve costs of social workers. The current core costs of ISWS amount to approximately R127 million, whereas those of the programme previously ranked first, would have amounted to approximate R85,7 million. Accordingly some R41,3 million that would, according to the previously proposed priority list, represent the costs of programmes ranked 23 and lower, will be included in the core costs of ISWS.

[36] The applicants complain that ISWS is not a social welfare service programme, but a service delivery model. The department in turn made heavy weather of the operational benefits of such model. The parties also debated whether so-called “must” services and “may” services should be combined.

[37] To my mind these matters are of no moment. The question is whether it is reasonable to fund the combined costs of some of the NPO social workers as first priority. Upon analysis the real objection of the applicants is that

prioritisation of ISWS for purposes of funding will result therein that approximately R41,3 million will be spent on programmes that were previously proposed to be lower ranked programmes.

[38] This involves the kind of detailed scrutiny of government funding that a court is not institutionally equipped for. More than two thirds of the core costs of ISWS are intended for what is indisputably a top priority programme. The department says that it is cost-effective to combine the costs of the social workers involved and I am unable to say that it is not so. But in any event, the applicants' complaint is again based on the fallacious assumption that the implementation of the third revision will not result in increased funding, in this context of only R41,3 million.

Cost items excluded from core costs

[39] As I have said, core costs represent the reasonable essential expenses required to deliver the particular service programme. What the applicants complain about is the exclusion of the costs of the infrastructure of the NPOs from core costs. The costs of infrastructure are capital expenses and costs of the organisational structure of an NPO, that is, the manner in which an NPO chooses to organise itself. The former, for instance, includes replacement costs of vehicles or equipment and the latter management costs and accounting and audit fees.

[40] The first thing that must be said, is that it is clear that funding of core costs in terms of schedule 2 will enable the applicants to render the services that they do. During the consultations between the parties KPMG prepared a list of so-called full costs per programme. This formed a predecessor of schedule 2. Although they say that they did to reluctantly, the applicants in fact agreed that these costs represent the full costs of the rendering of the services. Why they were reluctant to do so, is not easy to fathom. During the consultation process in May 2013 the applicants also revealed the actual costs of their services as at November 2012. In most cases the applicants' actual costs were significantly lower than the KPMG full costs. Some items of KPMG full costs were not included in core costs. As a result of representations made during the consultations, core costs include items not included in KPMG full costs, notably employer contributions in respect of pension funds, thirteenth cheques, medical aid funds and housing allowances. On balance this resulted in core costs being higher than the KPMG full costs that the applicants were prepared to accept. All of this is illustrated by the following. The actual costs of caring for a child in a children's' home, as indicated by the applicants during the consultations, amounted to R3372,20 per month. It is admitted that in a newspaper article published on 26 July 2013 the principal spokesperson of the applicants said that the minimum costs of caring for a child in a welfare centre is R4800,00 per month. KPMG full costs amounted to R6044,59 per month The core costs in terms

of schedule 2 for a child in a children's home are R6436,41 per month.

[41] More importantly, NPOs are established to assist the State to alleviate the needs of society. For this purpose they raise funds from donors and others. The Nonprofit Organisations Act 71 of 1997 is intended to enhance the ability of NPOs to do so. Section 2 thereof sets out the objects of the Act. These include to encourage and support NPOs in their contribution to meeting the diverse needs of the population of the Republic of South Africa and to promote a spirit of co-operation and shared responsibility with the government. NPOs therefore need to and admittedly do have infrastructure to enable them to so assist and to qualify to submit service plans. To require the department to provide all or most of the costs of the infrastructure of NPOs would make nonsense of this notion of partnership in the interest of society. Some NPOs have existed for many years and have a considerable infrastructure. To provide other services only a small infrastructure is required. I do not consider it unreasonable that only NPOs with the necessary infrastructure are funded in respect of core costs to provide the services that they wish to assist with.

<u>Determination of NPO contributions to core costs</u>

[42] The first judgment held that it was not unreasonable to require NPOs to contribute to the costs of provision of social welfare services. This finding has not been challenged. What the first judgment required was a fair, equitable and

transparent method of determination of the NPO contributions. The applicants' case is that in terms of the third revision, the department could arbitrarily determine these contributions by NPOs.

[43] In terms of paragraph 11.6.7 the department is required to determine the amount that an NPO is reasonably able to contribute to the core costs of the particular programme. The objective criterion of reasonableness is therefore the starting point of the enquiry. In order to give effect thereto the department is obliged to consult with the NPO and to take various specific considerations into account. These are the service plan of the NPO, the written representations of the NPO regarding the amount it is reasonably able to contribute, its financial statements for the preceding fiscal year, the relevant service specifications as well as any other information reasonably required for this purpose. As was said in paragraph [13] of the second judgment, an NPO will during the consultation process be able, for instance, to show that certain funds available to it are earmarked for other purposes or for one or other reason not reasonably available to contribute towards the costs of the provision of the particular service. Importantly, in determining what the NPO is reasonably able to contribute towards the core costs of the programme, the department must leave out of account funds required for the reasonable operational costs of the NPO that are not funded by the department and capital expenditure. This element was added by the amendment of the third revision, but was foreshadowed in the department's

affidavits. In my judgment the department is therefore not clothed with an unfettered discretion and the determination of NPO contributions towards core costs in terms of the third revision, will not be arbitrary, but fair, equitable and transparent.

<u>Discrimination</u>

[44] The undisputed evidence in the initial founding affidavit of the applicants was that the department spent between R5000,00 and R6750,00 per month per child in respect of children in its own children's homes, whereas the subsidy for children in NPO institutions then amounted to approximately R2000,00 per month per child. There was also evidence of unequal funding of the department's institutions for residential care for older persons and those of NPOs. In paragraph [51] of the first judgment I did not find it necessary to deal with the question of equality and unfair discrimination. The statement later in the same paragraph of the first judgment that the applicants did not show that the department is in breach of section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, was therefore made *per incuriam*.

[45] The applicants urged that a firm finding should now be made that the department's funding unfairly discriminates between the beneficiaries of its own institutions and those of NPO institutions. In this regard the question is of course not directed at what happened in the past, but what the future position will be in terms of the third revision.

[46] The department appears to accept that the costs of running its own institutions will be higher than those of NPOs. It says that because of the laws and policies that government is subject to, the costs of provision of its own services cannot realistically be compared with those of NPOs. The department, however, refused to comply with the requests of the applicants to divulge the costs structures of its institutions, on the basis that they are irrelevant to the present enquiry. The reality is that there is insufficient evidence before me of the current costs of the department's residential institutions for children or older persons and that it is impossible to judge whether there is justification for differentiation in this regard. The answer of the applicants is that the department should be ordered to make its costs structures available.

[47] I think that the department is correct. The issue before me is whether the third revision is compliant with the constitutional requirements set in the previous judgments. I have found that it is. What the department spends on its own institutions, whether differential funding is justifiable and if not, what remedy is available, is not relevant to whether the third revision passes constitutional muster in terms of the previous judgments. These matters give rise to wide new questions to which there are no easy answers. In the interest of the beneficiaries thereof, the implementation of the third revision cannot be further delayed until they are answered.

[48] I conclude that the department is entitled to the order that it seeks, namely a declarator that the third revision is compliant with the first, second and third judgments. There should be no order as to costs.

[49] Having dealt with this matter over a period of more than four years, I feel the need to express the sincere wish that the parties will be able to take hands and to work together for the real benefit of the needy members of society.

[50] The following order is issued:

1. It is declared that the first and second respondents' third revised Policy on Financial Awards to the Nonprofit Organisations in the Social Development Sector is compliant with the judgments of this court delivered on 5 August 2010, 9 June 2011 and 23 March 2013.

2. There is no order as to costs.

C.H.G. VAN DER MERWE, J

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