FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1719/2010

In the matter between:-

NATIONAL ASSOCIATION OF WELFARE ORGANISATIONS AND NON-GOVERNMENTAL ORGANISATIONS	1st Applicant
N G SOCIAL SERVICES FREE STATE	2nd Applicant
FREE STATE CARE IN ACTION	3rd Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR SOCIAL DEVELOPMENT, FREE STATE	1st Respondent
HEAD OF THE DEPARTMENT OF SOCIAL DEVELOPMENT, FREE STATE	2nd Respondent
MINISTER OF SOCIAL DEVELOPMENT	3rd Respondent

JUDGMENT BY: KRUGER, J

HEARD ON: 22 MARCH 2013

DELIVERED ON: 28 MARCH 2013

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[1] This is the extended report back day of a structural interdict granted on 24 June 2010 and expanded upon on 9 June 2011. The question before the court now is whether the second

revised policy filed on 7 September 2012 complies with the respondents' constitutional obligations as expounded in the first and second judgments.

[2] The first applicant can be described as the umbrella body of organisations that provide welfare services without profit in the Free State. The second and third applicants are members of the first applicant. The first respondent is the Member of the Executive Council for Social Development in the Free State and the second respondent is the head of that department. No relief was claimed against the third respondent, the national Minister of Social Development and the third respondent did not oppose the application.

[3] A structural interdict is overseen by the court. The court puts its hand on the matter and controls it. A central aspect of the present litigation is how the respondents (the department) allocates its budget. In this respect paragraph [22] of this court's second judgment is important:

> "[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. There is therefor no reason for the senseless procedures of approval of service plans that cannot be fully funded (albeit with the assistance of reasonable contributions by NPO's) and payment of palpably insufficient amounts to all approved NPO's".

In argument Mr Gauntlett stressed the last sentence in paragraph [22] from which it is clear that the department must fully fund the services it prioritises. The department should not get involved in senseless procedures of prioritising services and then paying palpably insufficient amounts to approved non-profit organisations. The difficulty the applicants have with the policy of the department is that it keeps holding on to the limitation of budgetary control, whereas the second judgment made it clear that prioritised services must be fully funded.

[4] The department's policy on the financial assessment of service plans is set out in paragraph 11.6. The first revised paragraph

11.6 is quoted in full in the second judgment of this court. In their affidavit filed on 7 September 2012 the respondents state as follows regarding the problems which the second judgment had with the policy of the department:

> “4. In the judgment handed down on 9 June 2011 (‘the second judgment’) this Court, whilst recognising that any revised policy must contain a mechanism which enables it to deal with an insufficient budget, was of the view that the mechanism contained in the proposed revised clause 11.6.9 of the policy then presented for approval, to reduce the amount required by service providers in order to render the relevant service (having taken into account their own contribution) by what was termed ‘*an appropriate percentage*’.
>
> (a) Was not a reasonable measure [16];
>
> (b) Was an irrational way of dealing with an inadequate budget [23];
>
> (c) Was not fair, equitable and transparent, as it:
>
> (i) Was not possible to ascertain from the policy how the downward adjustment would be done [24];
>
> (ii) Intended to differentiate between NPO’s in a manner that was altogether vague and uncertain [24];
>
> (d) may culminate in NPO’s being unable to provide the services that the Department requires them to provide properly, or indeed at all [25].

5. It is respectfully submitted to be clear from the second judgement that the Court:

   (a) accepted that the Department would of necessity have to allocate an insufficient budget [15, 16, 22 and 23];

   (b) accepted that it was reasonable to expect NPO's to contribute what they were reasonably able towards the benchmark amount needed to render the particular service [13 and 14];

   (c) held that a prioritisation model rather than a model allocating a deficit to bring the awards within the budget amount, would be more in line with its constitutional and statutory obligations and the national policy [22];

   (d) held the view that, even though it would require some tough decisions, the Department could justify the effective funding of prioritized services in a manner consistent with the Bill of Rights [22];

   (e) was of the view that no reason existed for what it termed the senseless approval of service plans that could not be fully funded [22];

   (f) accepted that the Department, which must approve all service plans that comply with the objective requirements stated in the policy, would invariably be confronted by a budget which was insufficient to defray the cost attendant upon the proper execution of approved service plans [15]."

[5] The respondents state:

> "10. Having duly considered the information presented to it by KPMG, the Department decided, in principle, to adopt the costing model developed by them and to apply allocation model 4 with a variation that would involve taking into account what service providers can reasonably contribute from their own funds and any sources of income other than State funding."

[6] The department has now drawn up a second revised policy which it filed in these proceedings on 7 September 2012 in a 150 page document which has the following parts:

1. Revised Policy (the new paragraph 11.6).
2. Schedule 1: level of prioritisation allocation to each service programme.
3. Schedule 2: necessity levels of programmes.
4. Schedule 3: benchmark costs.
5. Schedule 4: flow chart according to method 4: programme and necessity levels.

The second revised policy reads as follows:

> "11.6 **Financial assessment of service plans**
>
> 11.6.1 Applications for state funding of social welfare service programmes (service plans) will only be considered if they pertain to one of the

recognized social welfare service programmes 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 prioritization allocated to each social welfare service programme which the Department is Constitutionally and statutorily obligated to render, as contained in the first schedule;

11.6.2.3 The necessity level allocated to each item of expenditure which could be incurred in order to deliver the relevant programme, as contained in the second schedule;

11.6.2.4 The reasonable unit cost ('benchmark cost'), as contained in the third schedule, of each item of expenditure that could be incurred in providing the recognized social welfare service programmes;

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 extent of 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 the budget will allow, which may be set at the minimum level, average level or maximum level, depending upon the amount of funds available in the budget.

11.6.3 The allocation of available funding to approved programmes will be done in accordance with the allocation model contained in the fourth schedule, the Department's objective being to allocate available funds in a manner which ensures that as many programmes as is possible are funded at a quality level which the budget will allow.

11.6.4 The financial appraisal of service plans will be conducted in phases.

11.6.5 During the first phase, service plans will be evaluated against the Department's service specifications, based upon which they will either be approved provisionally, subject to the availability of funds, or rejected.

11.6.6 In the second stage the Department will apply the benchmark cost of each item of expenditure that could be incurred in providing the applicable social welfare service programme, as contained in the third schedule, in order to determine the standardized cost, at a quality level which the budget will allow, of rendering the services which are to be delivered in terms of the provisionally approved service plans ('the required funding').

11.6.7 In the third phase the Department will determine the amount that each service provider is reasonably able to contribute towards the cost 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), 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. Service providers may, as part of their service plan, make written representations regarding the amount they are reasonably able to contribute.

11.6.8 During the fourth phase the department will deduct the amount which the service provider is reasonably able to contribute from the funding required to fund the provisionally approved programme at a minimum level.

11.6.9 In the final phase the Department will allocate the funds made available to it by the provincial legislature for the funding of social welfare service programmes in order to defray that portion of the funding still required after the deduction of the service providers' contribution, in accordance with the allocation model contained in the fourth schedule, having regard principally to the level of prioritization allocated to each social welfare service programme, as contained in the first schedule, which it utilizes in conjunction with the necessity level allocated to each item of expenditure which could be incurred in order to deliver the relevant programme, as detailed in the second schedule.

11.6.10 The financial award so determined will then be submitted for approval.

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 realization of the applicable socio-economic rights, which it must fulfill by striving to progressively increase the resources available for the provision of social welfare services.

11.6.13 It is recognized that whilst the Department strives and will continue to strive to fund the provision of social welfare services to the maximum extent possible, its objective being to ensure that its financial awards will eventually cover the full cost of all the social welfare service programmes required within the province, the limited resources at its disposal presently preclude it from covering the full cost thereof.

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 benchmark costs contained in the second schedule to this policy will be reviewed, and if necessary revised, from time to time by the

> Department, pursuant to it having considered inputs received from relevant stakeholders."

[7] There are basically three reasons why the applicants contend that the second revised policy does not comply, namely: (i) there was no meaningful consultation; (ii) paragraph 11.6 retains undefined discretion to the department; (iii) the costing model does not finally and fully determine what expenses the department will pay. The applicants' contention is that once the department has a constitutional obligation to provide a service, it cannot pay what is described in the second judgment as palpably insufficient amounts. Spreading the budget over too many services, as the department is trying to do, leads to the vicious circle of less and less money for more and more qualifying non-profit organisations providing the services, as set out in paragraph [15] of the second judgment. The mechanism used to allocate an insufficient budget must be reasonable, as required in paragraph [16] of the second judgment.

[8] Mr Singh, for the respondents, contends that the respondents have complied with the two judgments. He says the second revised policy improved on the first. (The question is of course not whether there is an improvement, but whether the second revised policy complies with the department's constitutional obligations as set out in this court's two judgments.) Mr Singh pointed out that the second judgment was concerned about the allocation model used by the department. In the light of the

second judgment the department provided a bench mark costs model. The second revised policy does away with the deficit sharing model. The focus is on the concept of prioritization.

[9] KPMG provided the department with a report where the allocation of funds is dealt with in chapter 4. These allocation methods are defined as follows in paragraph 4.1 of the report:

> " 1 Prioritisation by Programme Only, i.e. Adoptions, Protective Workshops, Drop-in centres, etc.
>
> 2 Prioritisation by Programme and Responsibilities, i.e. including a second dimension of Nutrition, Accommodation, Medical Care, etc.
>
> 3 Prioritisation by Programme and Expense Type, i.e. including a second dimension of Beneficiary related costs (direct), Personnel costs as well as Overheads.
>
> 4 Prioritisation by Programme and Necessity Level, i.e. including a second dimension of costs that are Necessities, Partial Necessities and those that are Non-Necessities.
>
> 5 *X-factor* Only."

The department opted for method 4, programme and necessity level. This means that firstly the priority of a programme is determined, and then the funds in the budget are allocated to the expenses in that programme according to the necessity levels, of which there are three: necessity, partial necessity and non-necessity.

[10] The reason why the department prefers this allocation method is because if money is spent according to programme only, it could happen that, if children are for instance priority level 1 and older persons level 33, it could mean that the costs for recreation of children are paid out of the budget whereas not even electricity is paid for the older persons programme. If you use solely the programme as criterion, then everything is paid, food, shelter and recreation. For that reason the department decided to rather look at each programme and see what necessities there are, and fund them and not the full programme. On this basis the department will look at Schedule 1 attached to its policy and determine the priority of the programme according to that list. The next step is then to determine what parts of that programme are necessities, partial necessities or non-necessities. In Schedule 2 every expense is listed and accorded a ranking: 3 = necessity, 2 = partial necessity and 1 is a non-necessity. There are fixed and variable expenses (e.g. number of beneficiaries at each item). The overheads are fixed costs. Two inputs are required, firstly the number of beneficiaries and the amount which the service provider can pay. That is a multi-stage process. Mr Singh says this process is vastly different to the first revised policy, which was a deficit-sharing model. This new prioritisation model ensures that the service provided will have the full cost of certain items according to the necessity level ranking given in Schedule 2, which comprises a prioritisation of expenses. Mr Singh stresses that although in the programme there may be

errors in the detail, the model is not bad. During his address Mr Singh handed up a five page draft order which lists proposed changes to the respondents' second revised policy.

[11] Regarding the criticisms raised against the content of the policy in paragraph 11.6, Mr Singh says that the legislative and statutory standards for the provision of services are repeatedly engraved in the policy. It was never the intent of the department to drop the quality of services provided. The policy is not directed at under-funding.

[12] Mr Gauntlett had no problems with paragraphs 11.6.2.1, 11.6.2.4, 11.6.2.5 of the second revised policy. He did however raise objections to paragraph 11.6.2.7:

> "The quality of service that the budget will allow…"

and 11.6.3, in terms whereof programmes will be:

> "funded at a quality level the budget will allow".

and the proviso in paragraph 11.6.5:

> "approved provisionally subject to the availability of funds…"

The applicants object to the allocation of funds in accordance with the necessity level (paragraph 11.6.9) and to the use of the budget as an open discretion.

[13] Mr Gauntlett points out that in the draft order handed in by the respondents, 13 deficiencies in the second revised budget are pointed out and attempts are made to correct them. State bodies, like the respondents, must fulfill their constitutional obligation and comply with court orders:

> "[80] Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That in my view means at the very least that there should be strict compliance with court orders.
>
> [81] The State's function is to execute its duties in terms of the relevant legislation. The failure of the State to edify its functionaries about the very legislation which governs their duties is unacceptable. It may be true that the problem lies with the officials who do not know what their responsibilities are, and regrettably with legal representatives who do not know who the responsible functionaries are. However, this ignorance is no justification for their failings. It may explain

> the cause of the problem, but it constitutes neither a good excuse nor a justification thereof and cannot serve to protect the State from being held responsible."

See **Nyathi v MEC for Department of Healty, Gauteng and Another** 2008 (5) SA 94 (CC) at paras [80] and [81].

[14] The second judgment ordered the first and second respondents to consult with the applicants. It is not in dispute that to date no meaningful engagement between the parties has taken place. Public participation provides vitality to the functioning of representative democracy. Public participation promotes a spirit of democratic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. Public participation strengthens the legitimacy of legislation in the eyes of the people. (**Doctors for Life International v Speaker of the National Assembly and Others** 2006 (6) SA 416 (CC) par [115]). The applicants represent the public in this case. Their participation and engagement with the representatives of the executive provides a voice to the public. The fact that the applicants have been heard may cause the public to have greater faith in the State institutions they deal with.

[15] Meaningful engagement is a minimum required for formulating social welfare policy – see **Occupiers of 51 Olivia Road,**

Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others 2008 (3) SA 208 (CC) par [13]. Meaningful engagement requires the State to pay particular attention to its constitutional responsibilities. The right to participation is implicit in the Constitution. See "'Meaningful engagement' in the realisation of socio-economic rights: The South African Experience" by Lilian Chenwi (2011) 26 SAPL 128 – 156 at 129. Engagement is a process of constant interchange between citizens and the State in the design and implementation of socio-economic programmes (Chenwi at 130).

[16] The respondents do not deny that there has not been consultation: the prayer at the end of the replying affidavit is that the court "grant an order directing the parties to engage in consultations on the second revised policy and the costing and model…". In the draft order handed in by Mr Singh during argument there is an attempt to rectify a number of errors in the second revised policy. The respondents cannot seriously contend that the second revised policy complies with the department's constitutional obligations as expanded in this court's judgments.

CONCLUSIONS:

[17] The allocation model using Schedules 1 and 2 remains a deficit-sharing model. Because the department determines the content of each programme, in that determination it can leave

out whatever it regards as non-essential. The non-profit organisations must know what they are funded for, their funds cannot be determined by a discretion in relation to budget. The content of the item covered must be clearly and unambiguously spelled out.

[18] Looking at the programme ranking used in Schedule 1 to the department's policy, as set out in paragraph 11.6, one gets the impression that all the programmes listed therein are funded. That is not the case. There may be no funding left after the first few projects have been funded. Not one of the programmes is fully funded if one has regard to the expenses listed in Schedule 2. What is worse is that the non-profit organisations do not know what funding, if any, they will receive from the department for any specific programme. The level of funding, according to the policy, depends on how the department chooses to spread the budget. If the department does not want to or cannot list all the expenses it will cover for a particular programme, it must at the very least record the items it will not pay for.

[19] The department must approve a service plan and then fully fund it. Of the 40 items listed in Schedule 1, the department must determine which programmes it will fully fund. The department wants to provide services provisionally depending on the allocation of its budget. The department must decide which programmes it can fund. Then it must determine which

costs of that programme it will fund. If, for instance, it is not willing to fund the electricity costs of the Substance Abuse Training Services, the item listed as No 34 on the priority list, Schedule 1, then it must spell that out in its description of the programme. In the application of Schedule 2 the department does a second form of prioritisation. The department again assesses the programme in the application of Schedule 2. The people who work with these social welfare programmes are mainly social workers who need reasonable clarity. The policy cannot use an undefined discretion.

[20] As to costs, Mr Gauntlett requested a punitive order against the respondents because of their procedural delays and failure to comply with the court order. He also sought an order that the second and third respondents, being the member of the executive council and the head of the department be directed to be present at court at the next hearing so as to be examined under oath on the department's failure to participate in an meaningful consultation process with the applicants. In my view the respondents have made efforts to improve upon the first revised policy the first revised policy and progress has been made. At this stage there is no basis for these orders.

<u>ORDER:</u>

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.

4. Any party hereto may enroll the matter after a revised policy has been filed.

5. The first and second respondents jointly and severally are ordered to pay the costs of this application incurred after 24 May 2012, including the costs of two counsel.

A. KRUGER, J

On behalf of the applicants: Adv. J. Gauntlett SC
With him:
Adv. F. Pelser
Instructed by:
Phatsoane Henney Inc.
BLOEMFONTEIN

On behalf of the first
and second respondents: Adv. N. Singh SC
With him:
Adv. H. Murray
Instructed by:
The State Attorney
BLOEMFONTEIN

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