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	First Applicant
N.G. SOCIAL SERVICES FREE STATE	Second Applicant
FREE STATE CARE IN ACTION	Third Applicant

and

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

HEARD ON: 24 JUNE 2010

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 5 AUGUST 2010

Introduction

[1] The essential question for determination in this application is whether the policy of the first and second respondents in respect of funding of nonprofit organisations ("NPO's") that

provide social welfare services to the needy and the vulnerable in the Free State Province, is in accordance with the constitutional and statutory obligations of the first and second respondents.

[2] The first applicant is a legal person situated in Bloemfontein. Its main object is to influence policy, legislation and practice that impact on the delivery of social services by its members. The first applicant has in the order of 70 members that provide welfare services in the Free State. These members include the second and third applicants. All these members of the first applicant are organisations delivering welfare services without profit and are registered in terms of the Nonprofit Organisations Act, 71 of 1997.

[3] The first applicant acts herein on behalf of its members. The first, second and third applicants also act herein in the interest of children, older persons and other vulnerable members of society in need. It is not disputed that the applicants are entitled to do so in terms of section 38 of the Constitution.

[4] The first respondent is the member of the executive council for social development in the Free State. The second respondent is the head of the department of social development of the Free State. The third respondent is the national Minister of Social Development. No relief is claimed against the third respondent and the third respondent did not oppose the application. For the sake of convenience, the first and second respondents and the officials acting on their behalf, will collectively be referred to as "the department", unless indicated otherwise.

[5] The application was brought in two parts. Firstly, an interim order on urgent basis was sought, pending the determination of substantial relief. The interim relief was aimed at enforcing payment by the department of increased subsidies to some members of the first applicant and payment of allocated subsidies to the other members of the first applicant. The former was referred to as emergency relief. The application for interim relief served before me on 20 May 2010. At the same time another application, no. 2146 of 2010, brought by the department, also served before me. In this application the department sought an extensive order of

discovery in terms of rule 35(13) as well as postponement of the application of the applicants for substantial relief for a substantial period of time, intended to enable the department to compile answering affidavits only after studying the discovered documents. It is fair to say that the discovery sought was mainly aimed at documents reflecting the assets and income of the applicants and the members of the first applicant. On 20 May 2010 the application of the department was dismissed *in toto*, but costs thereof reserved for later determination. Also on 20 May 2010 an interim order was granted for payment of allocated subsidies only, as well as orders that were necessary to direct the future conduct of the application. Costs of the application for interim relief were also reserved. On 24 June 2010 the application for substantial relief as well as the reserved costs were argued.

[6] The substantial relief now sought by the applicants, is set out in a draft order attached to their heads of argument. There was rightly no objection to this procedure, as there could be no prejudice to the department. Essentially the applicants move for what has become known as a structural interdict. Broadly summarised the relief now claimed is as follows.

Firstly, an order is sought declaring that the department is in breach of its constitutional and statutory duties in terms of sections 8, 9, 26, 27, 28, 41(1)(b) and (c), 195(1)(b), (c), (d), (e) and (f) and 237 of the Constitution, section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, sections 4(2), 6(2) and 8(2) of the Children's Act, 38 of 2005, sections 3(1), 3(2), 3(3) and section 8 of the Older Persons Act, 13 of 2006, section 56 of the Child Justice Act, 75 of 2008, section 57 of the Prevention and Treatment of Substance Abuse Act, 70 of 2008 and sections 2 and 3 of the Nonprofit Organisations Act, 71 of 1997. Secondly, an order is sought that the department complies with the aforesaid constitutional and statutory obligations and adopt and implement policies and programmes for the determination and payment of social welfare subsidies which comply with a number of broadly stated requirements set out in the draft order. The third order sought is that the department shall deliver, within four months of date of the order, a report under oath stating essentially what steps have and will in future be taken to comply with its constitutional and statutory obligations referred to above. Finally, orders are sought that the applicants may within one month of delivery of the report of the department, deliver their commentary on the report, that the respondent shall within one month of delivery of the commentary deliver their reply to the commentary and that thereafter the matter be enrolled for consideration and determination of the report, commentary and reply. The applicants also seek the aforesaid emergency interim relief pending finalisation of this process and/or interim relief similar to that granted on 20 May 2010.

Background

[7] As a result of a variety of historic and economical factors, many people and communities in the Republic of South Africa and the Free State are in dire need of care, protection and welfare services. It is not disputed that in the Free State the department is responsible to address and alleviate these needs. What exactly the nature and ambit of the obligations and duties of the department are in this regard, will be addressed shortly.

[8] The work of the department consists of three programmes, namely programme one: administration, programme two:

social welfare services and programme three: research and development. Programme two in turn consists of eight sub-programmes, namely substance abuse, prevention and rehabilitation; care and services to older persons; crime prevention and support; services to persons with disabilities; child care and protection services; victim empowerment; HIV and Aids; and care and support services to families. Child care and protection services are by far the largest sub-programme.

[9] For many years NPO's such as the members of the first applicant assisted in addressing these needs in the Free State. Presently some 1 400 NPO's are involved in this work in the Free State. The department recognises that these NPO's play a major role in providing social welfare services.

[10] In terms of the budget of the department, approved by the provincial legislature on 31 March 2010, the amount of R721 690 000,00 is allocated to the department for the 2010/2011 financial year commencing on 1 April 2010, the amount of R788 510 000,00 for the 2011/2012 financial year and the amount of R829 546 000,00 for the 2012/2013 financial year.

The amounts constitute year on year increases of 7,73% for 2010/2011, 9,26% for 2011/2012 and 5,2% for 2012/2013. Of the amount of R721 690 000,00 the amount of R486 256 000,00 is allocated to the aforesaid programme two: social welfare services. The remainder of the budget allocation of R721 690 000,00 namely R235 434,00 approximately 75% is allocated to programme one: administration and approximately 25% to programme three: research and development. Of the amount of R486 256 000,00 the amount of R283 600 000,00 is allocated to transfers to NPO's. The other major component of the allocation to programme two is compensation for employees in the amount of R153 418 000,00. As will be shown, it is accepted by the department that the amount of R283 600 000,00 is inadequate to cover the costs of the NPO's.

<u>Relevant services provided by NPO's</u>

[11] It is necessary to give an overview of the social welfare services provided by the first applicant's members and the other NPO's involved, that I consider to be material and relevant for the determination of this application.

[12] The services provided by NPO's in respect of children in need, are essentially firstly, the provision and operation of child and youth care centres and the provision of programmes and shelters to street children and other children in difficult circumstances. It is important to note that all children in child and youth care centres are children found to be in need of care and protection by a children's court and placed in the child and youth care centre by order of the children's court. Section 191(2) of the Children's Act provides that a child and youth care centre must offer a therapeutic programme designed for the residential care of children outside the family environment.

[13] The department recognises that approximately 2 000 beds in child and youth care centres are needed in the Free State. Presently approximately 1 085 such beds are available. Only approximately 320 beds in child and youth care centres are provided by the department itself in two children's homes, namely Tshireletsong and Leratong. Approximately 765 beds are provided by NPO's, of which 700 are provided by the second applicant. In line with the department's policies the second applicant moved away from large

children's homes or orphanages to a decentralised care model based on an emulation of a normal family home. The second applicant still operates the Charlotte Theron child and youth care centre in Bethlehem where 135 children are cared for and Our Child and youth care centre in Bloemfontein where 100 children are cared for. The second applicant, however, at the cost of millions of rands established 31 decentralised child and youth care centres in 26 towns in the Free State. Children of all races and cultural groups are cared for in these centres. Between twelve and thirty children of both sexes are cared for per centre and siblings are, where possible, placed in the same centre. All of these centres were approved by and registered with the department. Already in 2004 the department envisaged 50 decentralised child and youth care centres in the Free State. The second applicant, however, is unable to establish further centres without external funds for both capital and operational expenses.

[14] At any given time there are approximately 300 street children in the Free State as well as approximately 300 children in difficult circumstances, accommodated in ten shelters. Two

types of programmes are utilised to care for these children, namely first, outreach and drop-in programmes and second, shelters. Most of these services are provided by NPO's.

[15] The second applicant's programme for the care of older persons entails residential care, community-based care and sub-economic and economic housing projects. The second applicant operates 18 residential centres for older persons, which also provide frail care services. The centres also provide community-based services for older persons. Community services cover a wide spectrum of services aimed at empowering older persons to remain functional within their communities for as long as possible. These projects include feeding schemes, health services and home care and approximately 5 200 people benefit therefrom, 80% of whom are from previously disadvantaged communities. The second applicant cares for approximately 1 000 older persons in residential centres. The third applicant operates 14 homes, 20 sub-economic housing schemes and 13 service centres for older persons. Approximately 760 older persons are cared for in residential care centres and about 3 000 older persons are reached through service centres.

Some of these older persons are unable to make a meaningful contribution to the residential care or other services received. In 2008/2009 the second applicant received subsidies for approximately 290 older persons in residential care. For the sake of convenience older persons that are unable to make a meaningful financial contribution to residential care or services, are hereinafter referred to as older persons in need.

[16] The second applicant operates one care facility for disabled persons as well as day-care centres for adult disabled persons. Some of these persons are in no position to make a financial contribution to the care received. Subsidies are received from the department in respect of only one day-care centre. The second applicant also provides prevention and development programmes in respect of HIV and Aids, sexual molestation and alcohol and drug abuse. For convenience I refer to disabled persons and persons affected by HIV and Aids, sexual molestation and alcohol and drug abuse that are unable to make a meaningful financial contribution to the care and services received, as vulnerable persons in need.

[17] There are many services that by statute are required to be rendered by registered social workers. I will refer to these as statutory services. Statutory services include the safeguarding and placement of children in need of care and protection, recruitment and selection of foster parents as well as placement of children in foster care and foster care supervision services and family reunification services, adoption services and services in respect of alcohol or drug dependants. There are, for instance, more than 50 000 foster children in the Free State, most of whom are orphans.

[18] The department acknowledges that approximately 40% of the statutory services in the Free State are provided by NPO's. The second applicant, for instance, operates in 18 towns in the Free State. In six of these towns the second applicant is responsible for the entire spectrum of statutory services. The third applicant operates 14 social work offices which provide these statutory services in 17 towns.

The department's policy in respect of funding of NPO's

[19] The next question is what the policy of the department is in respect of funding of NPO's that provide social welfare

services to children, older persons and vulnerable persons in need as well as statutory services. In its answering affidavit the department referred to three policy documents. The first is "Policy on Financial Awards to Service Providers" of 2004. The second is "Procedure Guidelines for the Implementation of the Policy on Financial Awards to Service Providers" of 2005. The third is "Policy on Financial Awards to the Nonprofit Organisations in the Social Development Sector" of August 2003.

[20] The first of these policy documents is a national document approved at a Minmec meeting in November 2004. As appears from its title, the purpose of the second document is to provide procedure guidelines for the implementation of the national policy. In the procedure guidelines it is stated that the guidelines are aimed at giving broad direction to the implementation of the national policy, but that provinces may within the context of the guidelines develop more specific guidelines in order to address provincial peculiarities. The third policy document referred to above, is the relevant policy of the department.

[21] The relief claimed by the applicants is that it should be declared that the Free State policy is flawed and should be redrafted or revised. In any event, the Free State policy encompasses the same subjects as both the national policy and the guidelines, in virtually the same terms. Save for briefly indicating the background and main principles of the national policy that informs the Free State policy, I therefore do not find it necessary to go into the detail of the national policy or the guidelines for its implementation. For the sake of convenience the Free State policy will be referred to simply as "the policy".

[22] The national policy commences by stating that historically social welfare services have been a joint responsibility of government and civil society, with the government providing financial support to organisations through subsidisation and that the current realities of the country demand that government review the manner in which it is expending its resources to ensure that there is equitable redistribution to the historically disadvantaged. It is stated that the policy strives to facilitate the achievement of the mission to enable the poor, the vulnerable and the excluded within the South

African society to secure a better life for themselves, in partnership with them and with those who are committed to building a caring society. The critical rule that the NPO sector has played in service provision is acknowledged. It is stated that the objectives of the policy are to:

> “• Establish the funding relationship between the Department and service providers that render developmental social welfare services.
> • Determine the requirements and mechanisms for making financial awards to service providers rendering developmental social welfare services.
> • Provide a tool to facilitate the transformation of social welfare service delivery.
> • Develop the capacity of emerging and previously disadvantaged organisations that do no have the resources but understand and could meet the needs of the communities.
> • Create an enabling environment for new service providers previously excluded from government funding.
> • Provide a basis for the redistribution of resources in a more equitable manner.”

"Department" should be understood as the national or provincial department responsible for providing social development and welfare services directly or indirectly. "Developmental social welfare" has the following meaning:

> "This focuses on social protection, the maximisation of human potential and fostering self-reliance and participation in decision-making. It concentrates on the causes and effects of social vulnerability and marginalisation, and the delivery of integrated services to communities, families and persons affected by there phenomena."

[23] The national policy recognises "a major responsibility and mandate to deliver the best possible service to society, particularly to the vulnerable and poor sectors". It is stated then that specifications will determine priorities for service delivery at either national or provincial level. This policy states that the relevant department recognises that it is not the sole funder of services to the poor and vulnerable sector of the community. It further recognises that in particular, well-established organisations have the capacity and the necessary infrastructure to raise funds. Therefore funding is provided with the understanding that these organisations do

and will raise funds from other sources such as other state departments, donor organisations, corporate social responsibility programmes from the private business sector, through trusts and foundations and the proceeds from lotteries. The relevant department plays a major role in organising the supply of services. It does so either by supplying the service itself, or by outsourcing the supply of services to service providers and that the national policy concerns itself with the latter.

[24] It is then in essence stated in the national policy that in order to be eligible for financing, NPO's must be legal persons that comply with stated requirements, that business plans containing required information must be submitted by the NPO's to show how service specifications will be complied with and that a contract must be entered into between the NPO and the relevant department.

[25] In the procedure guidelines the following is stated in respect of funding criteria and costing:

> "The financial criteria will be based on formulas that are approved by the Head of Department on the recommendation of the Chief Financial Officer. These formulas will include appropriate benchmarks for the calculations of a minimum uniform budget of the business plan to ensure a uniform financial assessment model.
>
> ....
>
> The duration of funding will not exceed the period of 12 months as stipulated in the memorandum of agreement between the Head of Department and the service provider...
>
> The amount of funding will depend on the following:
>
> - The costs of the project, as verified by the Department;
> - the organisation's ability to implement a programme;
> - the income-generating potential of the programme;
> - comparative costs for a similar programme;
> - the purpose for which the funds are requested; and
> - the potential impact of the project in terms of numbers and outcomes."

[26] In the introduction to the policy it is stated that the department acknowledges and appreciates service providers in the Free State Province that have partnered with the department in its commitment to serve the people of the province, especially those who are poor and vulnerable and

from the previously disadvantaged communities, in a committed and accountable manner. Paragraph 2.2.1 of the policy sets out the broad categories of services in respect of which a financial award (transfer payment) for the delivery of social development services may be applied for by NPO's, within the scope of limited resources and the department's priorities and strategic objectives. These categories include services to children and families, services that are aimed at the prevention of HIV and Aids and support to people infected or affected by HIV and Aids, youth development, victim empowerment services, services to people with disabilities, services to older persons, prevention and support services for alcohol and substance abuse. In paragraph 2.3.1 it is stated that the making of financial awards by the department depends on the availability of funds and the need for such a service in terms of the department's strategic objective. The department will make financial awards to support nonprofit organisations in the achievement of its goals and objectives subject to those goals and objectives falling within the priorities, objectives and specifications of the department. Paragraph 2.3.2 sets out the requirements for the service provider to be eligible for a financial award from the department. This includes that the service provider must be a registered nonprofit organisation that provides services or intends to provide services to the people and communities of the Free State.

[27] Paragraph 8 of the policy deals with service specifications. It states that service specifications are based on the determination of need for services. Based on the need for services the department will develop service specifications that aim to meet those needs. The service specifications are published no later than 30 September of each year in order to call for submissions from the NPO sector to assist in addressing these needs.

[28] Paragraph 9 of the policy deals with service plans (also called business plans) that are submitted by NPO's and are regarded as applications for funding for provision of services in accordance with the specific service specification.

[29] Paragraph 11.6 deals with the financial assessment of business plans. It is stated that financial appraisal of the service plan and allocation of financial awards take place in

accordance with the financial assessment criteria of the department. The financial assessment criteria are based on formulae for funding approved by the second respondent. The formulae for funding take into consideration programme funding as the primary basis of funding. Such formulae include appropriate benchmarks for the calculation of a minimum uniform budget for the service plan to ensure a uniform financial assessment model. The final determination of the amount of the financial award is based on the available funds on the budget of the specific sub-programme and service. Due to limited resources the department makes financial awards to support the service provision of the NPO sector and the actual amount of the award does not represent the full costs of the service. Finally, it is stated that the determination of the final award is the prerogative of the department and that applicants for financial awards have the opportunity to accept or reject the award.

[30] Once the financial award is determined by the department in terms of an approved service plan, the NPO is required to enter into a written agreement with the department in respect of the financial award, with a duration of one year. If

agreement cannot be reached or the particular NPO is not willing to sign the agreement, the approval of the financial award to the particular NPO can be withdrawn and the department may enter into negotiations and an agreement with an alternative service provider to ensure that the department achieves its strategic objectives and fulfils its responsibility to provide the service. (Para 12.4.4)

[31] In terms of the policy therefore, NPO's provide social welfare services required by the department, but are funded on the basis of subsidies determined as a prerogative of the department. This is verbalised as follows in the answering affidavits:

> "Sight must not be lost of the fact that whilst the Department has no choice other than to fully fund the facilities operated by it, it funds NPO's on the understanding that:
>
> 42.1 the said funding is merely a subsidy, in other words financial aid intended to supplement its income;
>
> 42.2 they do and will raise funds from other sources such as other state departments, donor organisations, private sector, corporate social responsibility programmes, trusts, foundations and the lotteries."

[32] Although the department and the NPO in question enter into an agreement in respect of funding, counsel for the department fairly conceded that matters of public law and policy are involved and that the relationship between the department and the NPO is not only governed by the terms of that agreement. The reality in terms of the policy is that NPO's have to sign the agreement or receive no funding at all from the department. It is true of course that the members of the first applicant and other NPO's do have resources of their own as well as other sources of income than subsidies paid by the department. Information in this regard is disclosed to the department in terms of the service plans submitted. These other sources of income are mainly fundraising projects and donations. It is not disputed however that it has become increasingly difficult to derive income from these sources.

<u>The impact of the policy on NPO's</u>

[33] The next question is what the effect and impact is of the implementation of the policy in respect of the aforesaid social welfare services. In this regard undisputed evidence reveals what is stated in the following paragraphs.

[34] The department accepts that an amount of R4 000,00 per child per month is the acceptable norm for the costs of caring for a child in a child and youth care centre. In terms of the costing of the Children's Act done by the national department of social development, the amount of R6 000,00 per child per month will be needed. The amounts actually expended by the department in respect of its two child and youth care centres are R5 000,00 per child per month in the case of Tshireletsong and R6 750,00 in the case of Leratong. This appears from the written answer given by the first respondent on 17 September 2009 in response to a question raised in the provincial legislature. The subsidy of the department for child and youth care centres for the 2011/2012 financial year however amounts to R2 091,00 per child per month, increased from R1 999,84 per child per month for the previous year. The second applicant, who as stated before provides 700 out of approximately 1 085 beds in child and youth care centres, says that it is unable to make up this difference. This, *inter alia*, resulted in the second applicant having to provide three very basic meals per day at the cost of only R11,84 per child per day, whereas at least R50,00 is needed per child per day. Shelters for street

children and children in difficult circumstances receive a subsidy of between R400,00 to R500,00 per child per month. The department acknowledges that at least R2 000,00 per child per month is needed in this regard. The second applicant states that unless increased and sustainable funding is received, it will be unable to continue to render a service which meets the needs of these children.

[35] Subsidies are also inadequate to meet the actual needs addressed by the second and third applicants in respect of the care of older persons and vulnerable persons in need as well as in respect of statutory services. The subsidy for older persons in need during 2009/2010 amounted to R1 925,00 per person per month. This is substantially inadequate. The second and third applicants are unable to make up the shortfall from own resources and sources of income. In the result it has become increasingly difficult to cater for the most vulnerable of older persons and other vulnerable persons, namely those that are unable to make a financial contribution to care or services.

[36] As a result of a lack of sufficient funds to employ more social workers, social workers employed by the second and third applicants that, *inter alia*, have to perform statutory services, have to carry untenable workloads. The second and third applicants state that they will have no option but to terminate or scale down these services.

<u>The obligations of the department</u>

[37] It has to be determined what the rights are of the aforesaid persons cared for by the NPO's, namely children, older persons and vulnerable persons in need as well as what the obligations of the State are in respect of these persons and the statutory services performed by the NPO's. It is not disputed that the obligations of the State in this regard must, in the Free State, be discharged by the department.

[38] The departure point of course is the foundational constitutional values of human dignity, equality and freedom.

[39] Section 28(1)(b) – (d) provide as follows:

> "Every child has the right-

(a) .....

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation."

Section 28 contains no internal limitation as is found in sections 26(2) or 27(2) of the Constitution.

[40] In **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v GROOTBOOM AND OTHERS** 2001 (1) SA 46 (CC) at 82 para [77] Yacoob J said the following:

"It follows from ss 1 *(b)* that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in ss (1) *(c)* is imposed primarily on the parents or family and only alternatively on the State. The State thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that s

> 28(1) *(c)* does not create any primary State obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families."

See also **MINISTER OF HEALTH AND OTHERS v TREATMENT ACTION CAMPAIGN AND OTHERS** 2002 (5) SA 721 CC at 750 para [79]. In terms of section 28(1)(b) – (d) of the Constitution the State therefore has the obligation to provide care and protection to children removed from the family environment, such as children removed to child and youth care centres and to street children.

[41] However, in terms of the principle of constitutional subsidiarity, where legislation has been enacted to give effect to a constitutional right, a litigant who does not challenge the legislation as being inconsistent with the Constitution, should rely on that legislation and cannot circumvent that legislation by attempting to rely directly on the constitutional right. See **MEC FOR EDUCATION, KWAZULU-NATAL, AND OTHERS v PILLAY** 2008 (1) SA 474 (CC) at 488 – 489 para [40] and **MAZIBUKO AND**

OTHERS v CITY OF JOHANNESBURG AND OTHERS 2010 (4) 1 (CC) at 23 – 24 para [73].

[42] Section 4(2) of the Children's Act provides as follows:

> "Recognising that competing social and economic needs exist, organs of state in the national, provincial and where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act."

[43] The objects of the Children's Act include giving effect to constitutional rights of children. This is dealt with in section 2(b) which states that it is an object of the Act:

> "*(b)* to give effect to the following constitutional rights of children, namely-
>
> (i) family care or parental care or appropriate alternative care when removed from the family environment;
>
> (ii) social services;
>
> (iii) protection from maltreatment, neglect, abuse or degradation; and

(iv) that the best interests of a child are of paramount importance in every matter concerning the child."

[44] It is immediately apparent that subsection 2(b) does not make express reference to the rights of children to basic nutrition, shelter and basic health care services. Does this mean that the Children's Act does not intend to give effect to these rights as opposed to the rights to appropriate alternative care, social services and protection from maltreatment, neglect, abuse or degradation? I do not think so. As stated in the **GROOTBOOM**-case, *supra*, p. 82 para [76], subsection 28(1)(b) of the Constitution defines those responsible for giving care while subsection (1)(c) lists various aspects of the care entitlement. In terms of these subsections the State must provide appropriate alternative care to children removed from the family environment. The Children's Act provides for alternative care in the form of foster care, care in child and youth care centres and temporary safe care. Appropriate alternative care in terms of subsection 2(b), must in context necessarily include basic nutrition, shelter and basic health care. Section 2(g) of the Children's Act provides that it is an object thereof to provide

care and protection to children who are in need of care and protection and section 2(i) provides that it is an object thereof generally to promote the protection, development and well-being of children. When it is stated in section 2 that the object of the Children's Act is, *inter alia*, to give effect to rights of children to appropriate alternative care when removed from the family environment, to provide care and protection to children who are in need of care and protection and to generally promote the protection, development and well-being of children, it could in my view not have been intended not to also give effect to the rights to basic nutrition, shelter and basic health care services. It follows in my judgment that in terms of section 4(2) of the Children's Act the State is obliged to take reasonable measures to the maximum extent of its available resources to achieve the realisation of the rights of children set out in section 28(1)(b), (c) and (d) of the Constitution.

[45] Section 2 of the Older Persons Act, 13 of 2006, contains the objects of the Act. The objects include to maintain and promote the status, well-being, safety and security of older persons and to maintain and protect the rights of older

persons. Section 7 states that older persons enjoy the rights contemplated in section 9 of the Constitution and that older persons, in particular, may not be unfairly denied the right to, *inter alia*, live in an environment catering for his or her changing capacities. The Act provides in chapter 3 thereof for community-based care and support services for older persons and in chapter 4 thereof, for residential facilities for older persons. Section 10 provides that an older person receiving community-based care and support services, has in addition to the rights contemplated in section 7, *inter alia*, the right to reside at home as long as possible and to benefit from family and community care and protection in accordance with society's system of cultural values. Section 16 in turn states that an older person residing in a residential facility has, in addition to the rights he/she has in terms of the Bill of Rights or any other rights he/she may have, *inter alia*, the right to access to basic care and to privacy. Section 3(2) of the Act is virtually identical to section 4(2) of the Children's Act and provides that recognising that competing social and economic needs exist, organs of state must take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of the Act. It follows that it is the obligation of the State to take such reasonable measures to achieve the realisation of the rights of older persons who are in need.

[46] Vulnerable persons in need at least have the rights to access to adequate housing, health care services and sufficient food and water set out in sections 26 and 27 of the Constitution. The State has the obligation to take reasonable measures within its available resources to achieve the progressive realisation of these rights. The State is also clearly obliged to provide the aforesaid statutory services. Reference can be made in this regard for example to the services that must be provided by social workers in terms of sections 155, 156 and 157 of the Children's Act in respect of children in need of care and protection, sections 182, 184 and 187 of the Children's Act in respect of foster care and sections 231, 233, 234 and 239 of the Children's Act in respect of adoption. See also section 21 – 23 of the Prevention and Treatment of Drug Dependency Act, No. 20 of 1992, in respect of alcohol and drug dependents as well as sections 25 and 28 of the Older Persons Act in respect of older

persons in need of care and protection and abused older persons.

<u>Does the policy comply with the department's obligations?</u>

[47] Does the policy comply with these constitutional and statutory obligations of the department? As pointed out above, the policy provides in all cases where NPO's provide social welfare services, including in the cases where the NPO's discharge the obligations of the department, for a take it or leave it subsidy as a prerogative of the department. In my judgment this is fundamentally flawed. As stated above, it is the constitutional and statutory obligation of the department to care for children, older persons and vulnerable persons in need and to provide statutory services, albeit by reasonable measures to the maximum extent of available resources or within available resources. This should be recognised in the policy as a fundamental principle of funding. It is not necessary for present purposes to determine whether reasonable measures to the maximum extent of available resources to achieve the realisation of rights as in sections 4(2) of the Children's Act and 3(2) of the Older Persons Act are higher standards than reasonable

measures within available resources to achieve the progressive realisation of rights as in sections 26(2) and 27(2) of the Constitution. I find therefore that the policy fails to recognise, as a fundamental principle of funding, that NPO's that provide care to children, older persons and vulnerable persons in need as well as statutory services, fulfil constitutional and statutory obligations of the department.

[48] Having said this however, I do not think that in considering funding of these NPO's it is unreasonable to take into account that the NPO's have or may have resources of their own and sources of income other than State funding, such as interest received, fundraising projects and donations. There is a need to address historical imbalances in respect of funding of social welfare services. There is a huge need for these services but a chronic shortage of funds to meet the needs. Fundraising and donations mostly raise funds from corporations and members of the general public wishing to assist in alleviating these pressing needs. The particulars of these resources, sources of income or expected income are relatively easy to provide and are in fact made available to the department.

[49] Reasonableness in this regard must be determined in the context of the Bill of Rights as a whole. What should be contributed from own resources and/or sources of income by the NPO's that fulfil the obligations of the department, cannot be determined arbitrally. To be a reasonable measure in this regard, the policy must contain a fair, equitable and transparent method of determination of what these NPO's are able and should contribute to the provision of care for children, older children and vulnerable persons in need and statutory services. The department must show that the policy is reasonable in this respect. See the **<u>MAZIBUKO</u>**-case, *supra*, p. 52 paras [161] and [162]. In my judgment the department did not do so. The policy lacks any method of determination described above, because its premise is that it does not require one. In this respect therefore, the policy is not a reasonable measure as required.

<u>The Relief</u>

[50] It follows that in my judgment the applicants made a case for a declaratory order in accordance with these findings.

[51] The applicants placed much emphasis on the disparity in funding referred to above and argued that the policy and its implementation amount to unfair discrimination. I do not find it necessary to deal with the question of equality and unfair discrimination. If the policy is redrafted or adjusted in accordance with what is stated above, there should be no question of unfair discrimination. Also 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, section 56 of the Child Justice Act, 75 of 2008, or sections 2 and 3 of the Nonprofit Organisations Act, 71 of 1997. As on 30 June 2010 the Prevention and Treatment of Substance Abuse Act, 70 of 2008, had not yet come into operation.

[52] It is of course not for me to say how the policy should be adjusted in order to meet these shortcomings. Many factors are involved and an adjustment in one respect may have a material impact on others. The department must respond to the declaratory order. The question however is whether the applicants also made a case for a structural interdict. See

the **TREATMENT ACTION CAMPAIGN**-case, *supra*, para [106] and [129].

[53] There are several indications in the papers before me that the department lacks leadership and/or capacity. To my mind this is the real reason for the much bemoaned failures of the department to pay even allocated and agreed subsidies on time. There is therefore reason to believe that revision of the policy may not be done expeditiously or efficiently. In the circumstances I am satisfied that supervision by the court is called for. The department did not object to the time limits proposed by the applicants in this regard.

[54] The applicants rightly did not press for emergency interim relief. I am persuaded that the balance of convenience justifies the granting of an interim relief similar to that granted on 20 May 2010.

Costs

[55] I deal firstly with the costs of hearing of this application on 20 May 2010. It is true that interim relief was granted to the

applicants in much the same terms as was offered by the department in a letter dated 21 April 2010. On the other hand the department unsuccessfully opposed the grant of any interim relief on several grounds such as lack of urgency and misjoinder. It was in the circumstances also necessary for the court to give orders directing the future conduct of the case. In the exercise of my discretion in respect of costs, I think that it is fair to order that each party pays its own costs of the hearing of this application on 20 May 2010. Save for this, costs should follow the result and the department be ordered to pay the costs of the application, including the costs of two counsel. The same should in my view be ordered in respect of the department's application no. 2146 of 2010.

[56] The following orders are issued:

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.

7. Pending the aforesaid determination, the first and second respondents shall pay the subsidies which become due and payable in terms of the schedule attached to the letter of the attorney for the respondents to the attorney for the applicants dated 21 April 2010, against signature by each beneficiary of the memorandum of agreement required by the first and second respondents.

8. Each party shall pay its own costs of the hearing of this application on 20 May 2010. Save for these costs, the first and second respondents shall jointly and severally pay the costs of this application as well as of application no. 2146/2010, including the costs of two counsel.

C.H.G. VAN DER MERWE, J

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

On behalf of the first and second respondents:	Adv. C.G. Marnewick SC With him: N. Singh SC and C. Human Instructed by: The State Attorney BLOEMFONTEIN

/sp