

# Holding government to account

## *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development, Free State*

### 1 Introduction

On the 2010-08-5, the Free State High Court (Van der Merwe, J) delivered *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development, Free State*,<sup>1</sup> which recognises the significant contribution by non-profit organisations (NPOs) to the provision of statutory services in South Africa. The judgment affirms the responsibility of government to offer financial support to organisations that render statutory services, and provides guidelines on how the responsibility between the state and NPOs should be shared in order to prevent the state from abdicating its constitutional and statutory duties.

### 2 Parties, issue and factual background

The National Association of Welfare Organisations and Non-Governmental Organisations (the first applicant), the NG Social Services, Free State (the second applicant) and the Free State Care in Action (the third applicant) brought an application against the Member of the Executive Council for Social Development, Free State, the Head of Department of Social Development, Free State and the national Minister of Social Development, alleging that the respondents failed to meet their constitutional and statutory obligations regarding the provision of welfare services to those in need.

The legal question to be decided was whether the provincial policy of the Department of Social Development, Free State ('the Department') to fund NPOs that provide statutory services to children, older persons and those affected by other vulnerability factors<sup>2</sup> is in conformity with its constitutional and statutory obligations.<sup>3</sup>

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<sup>1</sup>[2010] JOL 26056 (FB) (*National Association*).

<sup>2</sup>*Id* para 3.

<sup>3</sup>*Id* para 1.

The provincial Department of Social Development acknowledged that it is the bearer of the obligation to respond to the plight of those in dire need of care, protection and welfare services.<sup>4</sup> The Department fulfills its responsibilities *inter alia* by providing welfare services and programmes.<sup>5</sup> The social services provided by the Department focus *inter alia* on child care and protection, older persons, persons with disabilities, and persons living with HIV and AIDS.<sup>6</sup>

However, the intervention of the Department does not fully satisfy the demand for such services, and over the years, the NPOs have contributed to the delivery of social welfare services and their contribution has been acknowledged by the state.<sup>7</sup> Every year a share of the budget of the Department is allocated to NPOs (to be used for service provision). The Department acknowledged, however, that the amount is insufficient.<sup>8</sup>

The applicants provide services to children in need, older persons and other vulnerable categories who are not able to pay for social services. The contribution of NPOs to caring for children in need is significant. Out of 1 085 places available in child and youth care centres in the Free State, only 320 are provided by the Department whilst the remaining 765 are provided by NPOs.<sup>9</sup> Likewise, most of the outreach and drop-in programmes and shelters for street children in the Free State are provided by NPOs.<sup>10</sup> A similar situation is encountered in terms of support for older persons and other vulnerable categories, where a significant portion of welfare services is provided by NPOs.<sup>11</sup>

The applicable policy regarding the financing of NPOs by the Department – and the policy contested in the case – is set out in the document titled the ‘Policy on Financial Awards to the Nonprofit Organisations in the Social Development Sector’, August 2003<sup>12</sup> (‘the policy’). This policy is informed by the framework national documents – the 2004 Policy on Financial Awards to Service Providers and the Procedural Guidelines for the Implementation of the Policy on Financial Awards to Service Providers of the national Department of Social Development (‘the national policy’) – but contains more specific guidelines to respond to the context in the Free State.<sup>13</sup>

The policy indicates the conditions under which civil society organisations are funded by the state to deliver welfare services.<sup>14</sup> The national policy is based on

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<sup>4</sup>*Id* para 7.

<sup>5</sup>*Id* para 8.

<sup>6</sup>*Ibid.*

<sup>7</sup>*Id* para 9.

<sup>8</sup>*Id* para 10.

<sup>9</sup>*Id* para 13.

<sup>10</sup>*Id* para 14.

<sup>11</sup>*Id* paras 15 en 16.

<sup>12</sup>*Id* para 19.

<sup>13</sup>*Id* paras 19, 20 en 21.

<sup>14</sup>*Id* para 22.

the premise that the funding received by NPOs from the relevant department is not their only financial source, but that such organisations will also raise funds from other sources, such as other government departments, donors, companies, trusts, foundations and lotteries.<sup>15</sup>

The essential criteria to qualify for funding from the Department, as provided in the national policy, are that the NPOs are registered as legal persons; that they produce a business plan indicating how they intend to address the needs identified by the Department; and that they sign a contract with the Department.<sup>16</sup> Provincial policies, such as the contested document, may add supplementary criteria that reflect the realities of each province. The Free State policy indicates the broad categories of services for which subsidies are paid to NPOs by the Department, within the limits of the Department's resources, and considering its priorities and strategic objectives. Services to children and families, to older persons and to other vulnerable persons are included in these categories.

The financial award to NPOs is made only if funds are available and if the services provided by the NPO fall within the objectives and priorities of the Department.<sup>17</sup> The Department's lack of resources results in the financial award to the qualifying NPO being insufficient to cover the entire cost of the services provided by these organisations.<sup>18</sup> According to the policy, the final decision on the amount granted to the NPOs rests with the Department, and the NPOs have the right to either accept or reject that amount.<sup>19</sup> If an NPO refuses to sign an agreement with the Department, despite its provision of statutory services, no financial awards will be granted and the NPO will need to look for alternative sources of funding.<sup>20</sup>

The effect of the policy is that the amount of subsidy transferred to the NPOs is insufficient to cover the cost of services, and the NPOs are unable to provide the difference.<sup>21</sup> For example, R4 000 to R6 000 per month is necessary to care for a child in a child and youth care centre. Whilst the Department has allocated amounts of R5 000 and R 6 750 respectively per month per child for children in its own centres, it has allocated only R2 091 per month per child for children cared for by the applicants.<sup>22</sup> The same significant gap in the financial awards was noted with regard to street children (R2 000 needed per child per month whilst only R400 to R500 is received from the government)<sup>23</sup> and older and other vulnerable

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<sup>15</sup>*Id* para 23.

<sup>16</sup>*Id* para 24.

<sup>17</sup>*Id* para 26.

<sup>18</sup>*Id* para 29.

<sup>19</sup>*Ibid.*

<sup>20</sup>*Id* para 32.

<sup>21</sup>*Id* para 34.

<sup>22</sup>*Ibid.*

<sup>23</sup>*Ibid.*

persons.<sup>24</sup> The insufficient funds allocated to NPOs led to overloading of the social workers who provide statutory services and might in time result in the termination or scaling down of the services provided by NPOs.<sup>25</sup>

### 3 The judgment

In order to establish whether the Department's policy was constitutional and in conformity with statutory provisions, the Court proceeded to ascertain the rights potentially infringed and the obligations of the state pertaining to these rights.<sup>26</sup>

The Court referred to section 28 of the Constitution and, relying on *Government of the Republic of South Africa v Grootboom*<sup>27</sup> and *Minister of Health v Treatment Action Campaign*,<sup>28</sup> the Court concluded that the state has the obligation to provide care and protection to children removed from their families, such as children in child and youth care centres.<sup>29</sup> Noting that the constitutional provisions in section 28 have been given effect in the Children's Act 38 of 2005 ('the Children's Act'), and applying the principle of constitutional subsidiarity (which in essence means that when a statute was passed to give effect to a constitutional right, the statute rather than the Bill of Rights should be applied), the Court engaged in an analysis of the relevant provisions of the Children's Act.<sup>30</sup>

The Court referred to section 4(2) of the Children's Act which states that, considering other competing social and economic needs of the population, the government must take 'reasonable measures to the maximum extent of their available resources' to achieve the objectives of the Act,<sup>31</sup> which include giving effect to the constitutional rights of children.<sup>32</sup> The Court decided that the state is obliged by section 4(2) of the Children's Act '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'.<sup>33</sup>

Engaging in a similar analysis of the provisions of the Older Persons Act 13 of 2006 ('the Older Persons Act'), the Court concluded that in terms of section 3(2) of this Act, the state has an obligation, considering competing social and economic needs, to 'take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of the Act',<sup>34</sup> amongst

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<sup>24</sup>*Id* para 35.

<sup>25</sup>*Id* para 36.

<sup>26</sup>*Id* para 37.

<sup>27</sup>2001 1 SA 46 (CC) (*Grootboom*).

<sup>28</sup>2002 5 SA 721 (CC) (*Treatment Action Campaign*).

<sup>29</sup>*National Association* (n 1) para 40.

<sup>30</sup>*Id* paras 40-42.

<sup>31</sup>*Id* para 42.

<sup>32</sup>*Id* para 43, indicating s 4(2)(b) of the Children's Act.

<sup>33</sup>*Id* para 44.

<sup>34</sup>*Id* para 45.

which are the right to equality, the right not to be denied an environment catering for their changing needs, the right to reside at home as long as possible and to receive family and community care and protection.<sup>35</sup> Vulnerable persons have their rights protected in sections 26 and 27 of the Constitution, as well as the right to receive the statutory services contemplated in the Children's Act, the Prevention and Treatment of Drug Dependency Act 70 of 2008 and the Older Persons Act.<sup>36</sup>

The Court moved on to analyse whether the policy of the Department satisfied its constitutional and statutory obligations as discussed above. It stated that leaving the decision of whether to fund NPOs that provided statutory services that discharge the constitutional and statutory obligations of the Department to the sole discretion of the Department (a 'take it or leave it subsidy')<sup>37</sup> was 'fundamentally flawed'.<sup>38</sup> The funding policy should be informed by the constitutional and statutory requirement that the state must take reasonable measures to the maximum extent of available resources, or within available resources, rather than by a 'take it or leave it' approach. The Court further stated that the policy fails to recognise as a fundamental principle of funding that NPOs 'fulfill constitutional and statutory obligations of the department'.<sup>39</sup> However, it was reasonable, in the view of the Court, for the Department to take into consideration the NPOs' own resources. This is motivated by the need 'to address historical imbalances in respect of funding of social welfare services' and to deal with the shortage of funds.<sup>40</sup>

The reasonableness of the policy must be established in the context of the Bill of Rights. In order to be reasonable, the policy must be clear in terms of the extent of the financial contribution of the NPOs. Such contribution may not be established arbitrarily.<sup>41</sup> To constitute a reasonable measure, the policy 'must contain a fair, equitable and transparent method of determination of what these NPO's (*sic*) are able and should contribute to the provision of care for children, older children (*sic*) and vulnerable persons in need of statutory services'.<sup>42</sup> The absence of any method to establish the extent of the NPOs' contribution indicates that the policy of the department was not reasonable.

The Court found it unnecessary to deal with the question of whether the policy of the department amounted to unfair discrimination.<sup>43</sup> It also refrained from giving more specific direction on the content of the policy, limiting itself to stating

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Id* para 46.

<sup>37</sup> *Id* para 47.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Id* para 48.

<sup>41</sup> *Id* para 49.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Id* para 50.

that the Department must comply with the declaratory order of the Court.<sup>44</sup> The Court acceded to the request of the applicants to issue a structural interdict (an order which places the compliance with the Court order under the supervision of the Court). The choice of remedy was motivated by the Court's concern that the Department would fail to revise the policy in a timely and efficient manner because of its 'lack of leadership and/or capacity', which has also been the cause of the Department's failure to comply with its obligations discussed in the judgment.<sup>45</sup>

In its order, the Court declared the Free State Policy on Financial Awards to the Nonprofit Organisations in the Social Development Sector of August 2003 to be inconsistent with the Department's obligations in terms of sections 26, 27 and 28 of the Constitution, section 4(2) of the Children's Act, section 3(2) of the Older Persons Act and the other statutes providing for statutory services, in the sense that the policy fails to recognise as a fundamental principle of funding the NPOs which provide statutory services that such organisations fulfill the obligations of the Department.<sup>46</sup> The current policy is not a reasonable measure – as required by sections 26 and 27 of the Constitution, and section 4(2) of the Children's Act and section 3(2) of the Older Persons Act – because 'it lacks a fair, equitable and transparent method of determination of the contributions' that the NPOs should make from their own funds to the provision of statutory services.<sup>47</sup> Further, the Court ordered the Department to revise its funding policy, and to compile a report to document the progress within four months of the order. The applicants may comment on the report, which will be discussed at a date established by the court.<sup>48</sup>

## 4 Comment

The judgment signifies the recognition of the major contribution which the nonprofit sector is making to the provision of welfare services in South Africa. Although the judgment does not deeply explore the importance of the NPOs in the welfare system, it is worth pointing out that in addition to complementing the financial resources which the state expends in welfare services, the NPOs contribute their human capital, professional expertise and their infrastructure. As they generally work very closely with those in need, sometimes in places where the government might not have offices, the NPOs contribute to a more uniform provision of welfare services and improve the accessibility of such services.

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<sup>44</sup>*Id* para 51.

<sup>45</sup>*Id* para 53.

<sup>46</sup>*Id* para 56, point 1.1 of the order.

<sup>47</sup>*Ibid*, point 1.2 of the order.

<sup>48</sup>At the time of writing no appeal had been lodged against the judgment.

The judgment illustrates the dependency of statutory services on the non-profit sector in the Free State. For example, 70.5% of the beds in child and youth care centres in the Free State are provided by NPOs.<sup>49</sup> The NPOs' provision of the lion's share of essential services indicates that the Department not only collaborates with the NPOs, but relies heavily on them and their financial and human resources to discharge a substantial part of its statutory duties. This is confirmed by the Department's own admission that, overall, 40% of the statutory services in the Free State are provided by NPOs. In these circumstances, a collapse of the nonprofit organisations due to insufficient funding might lead to the implementation of various statutory provisions coming to a halt and to the deprivation of essential services of those who depend on them.

The judgment indicates that when such organisations provide services which fall within the constitutional or statutory obligations of the government, provided that the NPOs satisfy certain formal requirements, the state has the responsibility to design (and to apply) a fair, equitable and transparent system of financial support for such organisations, albeit within the state's available resources. The Court does not deal with the issue of whether the government has an obligation to support such organisations financially, limiting its order to the criteria which should apply when determining the contribution of the NPOs. It was not necessary for the Court to address this aspect, since the Free State policy already reflected the undertaking by the Department to provide financial support to the qualifying NGOs within the limits of its resources<sup>50</sup>.

However, the question arises as to whether a government policy which does not make provision for the financing of NPOs that render statutory services may be challenged as being inconsistent with the Constitution and the relevant statutes. It could well be argued that such a policy ought to be declared unconstitutional, given that the main thrust of the judgment under discussion is that the obligation to support the NPOs derives from their rendering of statutory services and effectively fulfilling the obligations of the government towards its subjects. In deciding the constitutionality or otherwise of such policies, the Courts will consider, however, the availability of state's resources.

The judgment acknowledges that in the context of many competing social and financial interests, the resources of the state may be complemented by the nonprofit sector's own resources in order for the constitutional rights of the vulnerable to be given effect. The judgment states that it is reasonable – in the context of sections 26, 27 of the Constitution and section 4(2) of the Children's Act and section 3(2) of the Older Persons Act – for the welfare services to be partially funded by NPOs from their own sources, other than from resources received by them from the state. The relationship between these two sources of funding is

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<sup>49</sup>*Id* para 13; the percentage given is the author's own calculation based on the data indicated in the paragraph mentioned.

<sup>50</sup>*Id* para 29.

informed, according to the Court, by the reasonableness criterion, a criterion which is reflected in the indicated constitutional and statutory provisions.

A policy establishing the contribution of the NPOs would be reasonable if such contribution is determined based on a fair, equitable and transparent method, which indicates clearly what is expected of the NPOs, considering their capacity. The judgment is not specific in terms of what is understood by the Court to be a fair, equitable and transparent manner of establishing the contribution of the NPOs. Based on the reasoning of the Court, one can speculate that 'fair and equitable' might be referring to the capacity of the NPOs which should not be left, unaided, to provide most of the statutory welfare services. 'Transparent' might be referring to the budgets which the Department and NPOs make available for welfare services.<sup>51</sup> More clarity on these aspects will be gained once the policy is drafted and meets the approval of the applicants and the Court, in the next stages of compliance with the structural interdict.

The judgment 'shakes' the current policy, which is predicated on the 'take it or leave it approach'. Prior to the judgment, the Department allocated a certain amount to the qualifying NPOs – usually an amount which was considerably lower than the real price of services, as admitted by the Department.<sup>52</sup> The NPOs were left to cover the rest of the costs, regardless of the amount and their capacity to do so. This position arguably amounted to an abdication of its duties by the Department, which dumped its constitutional and statutory obligations on the NPOs.

The order of the Court (when fully implemented) will bring a welcome change to the policy of the Department. The effect of the judgment is that the Department is confronted with the reality that the full extent of statutory services is beyond the capacity of NPOs; this will force the Department to assume responsibility for what exceeds the ability of the NPOs. The judgment acknowledges that the main duty bearer for the provision of welfare services is the state. Whilst the NPOs offer a valuable contribution, when the need for services exceeds their capacity, the government must acknowledge its duty and take responsibility for providing the needed services.

The impact of the judgment is limited to NPOs which provide statutory services and which thus contribute to the state departments' ability to comply with their constitutional and statutory duties. The effects of this judgment cannot be extrapolated to NPOs which do not provide the type of services indicated above, although they might be providing socially valuable services. The Court found it reasonable that the constitutional and statutory obligations of the state were discharged from state as well as nonprofit funds. This indicates that it is unlikely that NPOs would be able to claim from the state the full cost of statutory services provided, if they do not manage to secure funds from other sources.

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<sup>51</sup>Consider, in this regard, the hint in para 32 that the financial resources of the NPOs are disclosed to the Department in the application for subsidy.

<sup>52</sup>*Id* para 29.



An interesting point is contained in the judgment in terms of children's rights. The Court's interpretation of section 28 of the Constitution and sections 2 and 4 (2) of the Children's Act<sup>53</sup> affirms the application of the standard of reasonableness in assessing the government's compliance with its obligations under section 28(1)(d) of the Constitution. The novelty of this interpretation is that, whilst previously the reasonableness standard seems to have been used mainly with regard to socio-economic rights, through this interpretation the standard is applied to rights such as the right to be protected against abuse, degradation, maltreatment and neglect. The reasonableness standard could therefore be utilised to challenge the actions or inactions of the government in dealing with protection against child abuse and similar social ills.

## 5 Conclusion

The judgment in *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development, Free State* is an important judicial acknowledgement of the valuable contribution which the nonprofit sector has been making to the realisation of the human rights of those vulnerable. It compels the state to acknowledge, and to take into consideration in its policy making and budgetary allocation, the fact that some NPOs contribute to the government's compliance with its statutory and constitutional obligations. As such, the state has an obligation to design fair, equitable and transparent policies for funding such organisations. What is also significant is that the judgment sends a strong signal to the government that it cannot cherry-pick the causes, organisations and obligations it funds and leave underfunded NPOs to meet the government's own statutory and constitutional obligations.

*Meda Couzens*  
*University of KwaZulu-Natal, Durban*

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<sup>53</sup>*Id* para 44.