

Summary

National Association of Welfare Organisations and Non-Governmental Organisations and Others vs the Member of the Executive Council for Social Development, Free State and Others.

Case no: 1719/2010. Free State High Court.

Free State NPOs challenge government on problems in its NPO funding policy

Recent judgments of the Free State High Court in respect of funding of non-profit organisations (NPOs) are relevant for NPOs and provincial departments of social development in other provinces as well because the Free State policy on funding of NPOs is almost identical to the national policy which covers all provinces.

The judgments relate to a court application brought in mid-2010 by the National Association of Welfare Organisations and Non-Governmental Organisations (NAWONGO), NG Social Services Free State and Free State Care in Action against the MEC for Social Development in Free State, the Head of the Free State Department of Social Development, and the National Minister of Social Development. The three NPOs brought this court application after several years of serious frustration about the way in which the Department dealt with transfers (or subsidies) to NPOs for delivering welfare services to vulnerable people on behalf of the Department. The frustration arose, among others, from delays in payment and failure of the Department to consult with and inform them as to how much it would pay them for the services they delivered. Equally importantly, the frustration arose from the fact that the transfers are too small. The NPOs are thus unable to deliver the services which they are willing and able to deliver, and which they know are badly needed by poor and vulnerable people in the province, because they have too little money.

The first part of the NPOs' application was that government should immediately pay them the transfers that had already been allocated to them but not yet transferred. The second part of the NPOs' application was that government should review its policies in respect of NPO funding.

The first judgment

The first judgment, delivered in August 2010, noted that 1 400 NPOs were currently funded by the Free State Department of Social Development, and that the Department openly acknowledged that these organisations play a major role in delivering social services to children, older people, people with disabilities and others. In fact, the Department is dependent on the NPOs for delivering services which the Department is responsible for providing in terms of various laws, in particular the Children's Act, and the Older Persons Act. The Department also acknowledged that the transfers it provides to NPOs do not cover the full costs of delivering the services. Yet its allocations to NPOs and the way in which it makes (or does not make) payment do not reflect these acknowledged facts.

The judgment gave the example of child and youth care centres (CYCCs). It noted that the Department acknowledges that about 2 000 CYCC beds are needed in Free State for children found in need of alternative care by the courts, yet only 1 085 beds are currently available. Of the 1 085 currently available beds, only about 320 are provided in government-run CYCCs, while the rest are provided by NPOs and were established at a cost (to the NPOs) of “millions of rands” so that they are now able to provide for children in all parts of the province. In terms of running costs, the costing of the Children’s Act commissioned by the national Department of Social Development estimated that R6 000 per child per month would be needed to provide adequate care. Meanwhile the Department allocates R5 000 per month per child for one of the homes that it runs itself, and R6 750 per month per child for the other home that it runs. In contrast, the subsidy paid to NPOs is only about R2 000 per month per child. The judgment notes that this means that NPOs are expected to provide three meals per day for each child for only R11,84. The judgment gives similarly worrying estimates in respect of shelters for children living and working on the streets. Here the Department pays the NPOs a subsidy of between R400 to R500 per child per month yet acknowledges that at least R2000 per child per month is needed.

The judgment notes that this situation violates the rights of children and other vulnerable groups that are laid down in the Constitution and in other legislation such as the Children’s Act and Older Persons Act. The judge therefore ordered the Free State Department of Social Development to revise its policy on financial awards to NPOs. Because the Department had failed even to pay the already allocated subsidies, and because there were other indications that the “department lacks leadership and/or capacity” the judge decided to impose a structural interdict which meant that the Court would supervise to ensure that the court order was implemented by the Department. He said that within four months of the judgment the Department must report to the court what steps it had taken to revise the policy. The NPOs that made the court application would then have one month to comment on the Department’s report, and the Department would have a further month to respond to the NPOs’ comments. In the meantime, the Department was required to pay all the transfers that were due to NPOs timeously. Finally, the Department was required to pay most of the legal costs incurred by the NPOs.

The first judgment provided guidance to the Department on how it should revise its policy in order for the policy to be reasonable. The judgment said that the policy must:

- recognise that the NPOs are providing services that the Department itself is obliged to provide in terms of the Constitution and various laws, and
- have a fair, equitable and transparent method of determining how much the department should pay and how much the NPOs should contribute from other sources of income such as donations from funders.

The Department’s submission and the NPO response

The Free State Department of Social Development duly submitted its response. Their submission included incomplete work by KPMG towards development of a model for costing of welfare services and distributing the available funds, as well as proposed revised wording for part of the NPO financing policy.

The NPO applicants were not satisfied with several aspects of the Department's interim revised policy and duly submitted its comments on the proposals.

- The NPOs noted that the Department had consulted with them only minimally in coming up with its revised policy.
- They rejected the Department's proposal that NPOs should wait a further year for a new financing policy to be finalised and implemented.
- They suggested that KPMG's costing was based on poor understanding of the services provided in the social welfare sector.
- They rejected the Department's proposal that NPOs should be obliged to contribute financially towards the costs of services which they were delivering on behalf of government, and that government should have the power to decide how much each NPO should contribute.
- They rejected the Department's assumption that they should take as given both the overall amount of funds allocated to the Department by the Provincial Treasury and, within that, the amount of funds allocated by the Department for NPO transfers.

The NPOs observed that the Department's proposed approach involved only redistribution of the given amount between NPOs rather than provision of additional funds for NPO. In essence, what the Department proposed was that they would:

- a. calculate, using KPMG's model, what the total costs of each particular NPO's service delivery would be,
- b. subtract their own estimate of what each NPO could raise from other sources from that NPO's total,
- c. sum the remaining amounts after subtraction across all NPOs, (d) compare this sum total with what was allocated for NPO transfers in their budget,
- d. if – as would inevitably be the case – the available money was less than the total needed, calculate the available money as a percentage of the amount needed, and
- e. give each NPO only that percentage of what was needed.

As the NPOs noted, in essence government's proposed solution was to require NPOs to make up the shortfall even beyond what the Department had estimated the NPOs were able to raise from other sources.

After the Department and NPOs had argued their positions in court, both parties revised their positions. The Department's revised position showed some improvement over the earlier version. For example, the revised position said that the Department would consult with each NPO before deciding how much the NPO would be expected to raise from other sources. The government's document also openly acknowledged that the government has a constitutional and statutory obligation to achieve progressive realisation of socio-economic rights, and therefore must increase the amount available over time.

The second judgment

After describing the above aspects of the revised policy, paragraph 14 of the second judgment – issued in June 2011 – states: "So far so good". However, the judgment

notes that the revised policy then goes on to provide, as before, that the Department will only provide a percentage of the calculated amount needed by the NPO to deliver services if the Department's total allocation for NPO transfers cannot cover the full amount. The way in which this percentage will be calculated is not explained in the revised proposal.

These factors, in the words of the judge, make the new approach both "illogical and irrational". As with the previous version, the revised version still expects NPOs to bear the burden when the Department's budget is insufficient. The result is likely to be that NPOs either cannot provide the needed services, or provide services of poor quality. This, in turn, will harm the human dignity as well as the rights to equality of those who need the services as beneficiaries of government's own service provision will have access to fully funded services.

The June 2011 judgment found that the revised policy does not comply with the first judgment. The judge gave the Department a further three months to come up with a new revised policy and ordered that the process should include consultation with the NPO applicants. The judge again ordered government to pay most of the costs of the NPO applicants.

How is this case relevant to the national policy on financing of NPOs?

The National Department indicated recently at a conference held at National Treasury that they had revised the National Policy on Financing of NPOs. The policy has, however, not yet been published for public comment or been debated by Parliament.

The process for finalising the national policy should take note of the principles laid down in these two judgments of the Free State High Court, namely

- the policy should be revised in consultation with NPOs;
- the policy must have a fair, equitable and transparent method of determining how much the provincial departments should pay and how much the NPOs should contribute from other sources of income such as donations from funders
- NPOs cannot be made responsible for covering the shortfall in funds for delivering services for which government is constitutionally and statutorily responsible.

**By Debbie Budlender
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