

SOUTH AFRICA / JUDGMENT

Eastern Cape NGO Coalition v MEC for Social Development EC [2021] ZAECGHC 33 (16 March 2021)

[2021] ZAECGHC 33

COURT

Eastern Cape High Court, Grahamstown

BEFORE

A Govindjee

CASE / FILE NUMBER

2460/2018

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REPORTABLE

IN THE HIGH COURT

OF SOUTH AFRICA

EASTERN CAPE

DIVISION, GRAHAMSTOWN

CASE NO: 2460/2018

In the matter

between:

EASTERN CAPE NGO

COALITION

Applicant

And

MEC FOR THE

DEPARTMENT OF SOCIAL DEVELOPMENT,

EASTERN CAPE

PROVINCE

Respondent

JUDGMENT

GOVINDJEE AJ:

Background

[1] This application raises important issues of separation of powers,

including the appropriate level of deference to be afforded to the executive arm of government when budgetary constraints and transformation imperatives result in changes to its modus operandi. The nature and extent of consultation required when decreasing subsidies payable to non-governmental organisations ('NGOs') assisting in the provision of social services, and when revising existing annual service-level agreements, is also in issue. The applicant NGOs seek a declaration that the respondent's decision to reduce or terminate NGO subsidies in the 2017/18 financial year and in the 2018/19 financial year was unlawful and unconstitutional. It seeks to review and set aside this decision, also on the basis that the respondent breached its duty to consult, and claims damages and costs. In the event that the respondent's

conduct is found to be unlawful and unconstitutional, the appropriate remedy to be ordered is a further issue.

[2] The applicant is an association established in 1995 to represent the common interests of non-governmental and community-based organisations. It currently represents over 1000 members across a

range of sectors and approaches this Court on behalf of its members and in the public interest.

[3] The respondent is the political head of the Eastern Cape Department

of Social Development (the Department), responsible for the transformation of social service provisioning in the province and obligated to ensure that vulnerable communities are able to access these services.

[4] Social welfare services have historically been the joint responsibility of government and civil society, with government providing financial support to organisations through subsidisation. The Department adopted a 'Policy on Financial Awards to Service Providers' (the Policy) to address transformation challenges and to achieve its 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 all those who are committed to building a caring society'.

The Policy and Service Level Agreements

[5] The respondent relies heavily on the sentiments expressed in this Policy to support her case. The expressed aim of the Policy is to guide the country's response to the financing of service

providers in the social development sector, to facilitate transformation and redirection of services and resources, and to ensure effective and efficient services to the poor and vulnerable sectors of society. The Policy notes that funding shifts would be required to support high priority areas where needs are greatest, and to build the infrastructure and institutional capacity within disadvantaged organisations and communities, particularly in rural areas.

[6] The Policy contains detailed provisions on financing, which are relevant to this application. In particular:

'The Department recognizes 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.

Depending on the funding options as will be outlined below, 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 proceeds from lotteries.'

[7] The Policy permits the Department to supply services itself, or to outsource the supply of services to service providers. One of the ways in which the Department purchases services is through a process of subsidisation of programmes that meet the Department's basic requirements for financing. The Policy also details the types of funding available, the methods of payment, eligibility criteria and requirements for funding. National and provincial governments are furthermore empowered to develop procedure guidelines according to specific needs and available resources.

[8] It is common cause that the affected NGOs entered into annual service level agreements ('SLAs') with the Department. In terms of these agreements, the NGOs agreed to ensure compliance with the Public Finance Management Act, 1999[1] and the Policy, as well as 'applicable norms and standards and other legislation as may be applicable'. Although valid only for a year, it is clear that the relationship between the Department and the NGOs who entered into such SLAs typically went beyond a single year period, and that many of these relationships continue. This is also evident from the Policy which provides that services providers should submit a detailed multi-year business plan:[2]

‘Business plans must reflect multi-year planning and budgeting for a period of up to three years. This will enable the Department to consider the appropriateness and affordability of long-term developmental initiatives aimed at addressing priorities and giving effect to transformation shifts. Financing levels for the ensuing year as well as in principle approval for longer-term financing will be based on the results of performance evaluation against set objectives and the extent to which the service provider is able to meet transformation challenges’.

[9] Similarly, the SLAs also reflect the connection between the NGOs’ provision of services and the Department’s mission to improve the quality of life and social well-being of the poor and vulnerable through integrated developmental social services. The preamble to the SLAs confirms that the Department executes its mandate either by supplying the service itself, or by acquiring the services from service providers. The NGOs are expected to submit a written annual report of the results that have been achieved (in addition to other reporting requirements). This is ‘to enable the Department to evaluate the extent to which the funds provided were applied in an effective, efficient and economic fashion and the extent to which the objects set out in the Service Provider’s business plan have been met’.[3]

[10] Reference is also made to the Department’s entitlement to on-site assessments and inspections, to appraise progress reports and evaluations on the business plan, and to appraise applications for renewed financing. Paragraph 21 of the SLA is headed ‘Application for renewal of financing agreement’ and provides as follows:

‘21.1. The financing agreement is valid only for the period stated in Section A. Renewal of the agreement for a further period or amount is subject to the submission and appraisal of a report on results and an application for renewal of financing. If approved, Section A will be replaced by a new agreement or be amended by a new section.

21.2. The Service Provider shall ensure that applications for renewal are submitted at least three full calendar months before the date of termination of this Agreement.’

[11] It may also be accepted that NGOs receive allocation letters, including reference to funding being subject to annual review and that receipt of funding in that financial year should not give rise to an expectation of future funding.

The dispute

[12] Following the results of the 2011 multiple deprivation index, and mindful of the transformation imperative, the Department considered it necessary to revise its funding approach and the subsidies provided to NGOs. It appears to have taken a few years for this revision to be implemented. In the absence of an overall budgetary increase, redistribution occurred in 2016/2017 so that social welfare posts previously funded through subsidies for established NGOs in urban areas have given way to subsidies for NGOs in rural communities. This was coupled with the insourcing of social worker services previously provided by certain NGOs represented by the applicant, in circumstances where it is alleged that the Department lacked the capacity to attend to the necessary work. It is also suggested

that this decision was taken without any warning or consultation, in circumstances where there was a duty to consult, with disastrous consequences, including job losses, reduced programme offerings and closure.

[13] The respondent denies this and states that one hundred (100) social workers were employed from the database of unemployed social worker graduates in 2016/2017 and placed in areas in need, while one hundred and fifty-one (151) social workers were engaged via a conditional grant allocation for the 2017/2018 financial year. The respondent argues that consultations with the broad NGO sector have been ongoing and included the 2017/2018 budget.[4] An NGO Forum was also established in September 2016 and discussions related to government policy, the transformation policy and rural community focus have allegedly occurred at provincial and district level. It is also suggested that subsidies were only reduced where the Framework of Social Welfare Services Policy (Supervisory Framework Policy) norms and standards were not met, following a Departmental audit. This related specifically to the set ratio of 1:8 supervisors to social workers. Two sets of minutes, reflecting

consultation sessions in Buffalo City Municipality (on 7 September

2016) and Nelson Mandela Metropolitan Municipality (29 September

2016) respectively, were attached to the respondent's answering affidavit in support of these contentions.

[14] Following a meeting called by the Eastern Cape Legislature's Portfolio Committee on 4 July 2017, the Department increased some of the subsidy allocations to the NGOs, but not to the 2016/2017 level, so that payments for (some) supervisory social workers remained excluded. [5] In cases where affected organisations no longer had the resources to assist social welfare beneficiaries, matters were handed over to the Department. While this process was not completely smooth, all cases were ultimately attended to in-house, and the Department continues to render supervised social work services utilising and capacitating its available personnel. Social workers continue to be appointed by the Department, also in a supervisory capacity.

[15] The respondent's version is that this process has been necessary in the name of transformation, to fund newly formed organisations,

especially community-based organisations, in rural communities in accordance with the Department's vision and goals. Given the prevalent drug abuse and social ills experienced in the province, the Department has also committed itself to the Prevention and Early Intervention Programmes (PEIP) and re-prioritised early childhood development and child care protection in accordance with the Children's Act, 2005.[6] The adversely affected NGOs are all urban based and are expected to obtain funding from other sources to sustain their activities.

Moreover, none of the NGO programmes suffered budgetary cuts and only the positions of social workers were affected in cases where there was non-compliance with the Supervisory Framework Policy.

[16] The applicant seeks to review and set aside the decision of the Department in relation to the NGO subsidies, on the basis that it was irrational and unlawful. It also seeks an order declaring that the respondent has an obligation to consult with the applicant and with affected organisations before reducing, terminating or otherwise interfering with the allocation of subsidies to NGOs. The applicant claims compensation (in the form of the difference between the amounts that should have been paid and the amounts actually paid to its members) and costs. It avers that NGOs had budgeted in expectation of a certain allocation, and then found themselves without the necessary funds when subsidies were cut without warning or consultation. The applicant states that ‘...the net effect of this decision is that hundreds of thousands of vulnerable persons, including children, the disabled, and the elderly, among others, have been deprived of access to the social services upon which they are dependent...’

Analysis

[17] The exercise of public power must comply with the Constitution of the Republic of South Africa (‘the Constitution’), including adherence to the rule of law and the doctrine of legality. [7] The executive arm of government is given a wide berth in fulfilling its constitutional mandate. As the Constitutional Court held in *Albutt*: [8]

‘The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected.’

[18] Courts are also obligated to respect the effect of budget cuts and constraints. Government decisions about funding and prioritisation of scarce resources are notoriously challenging, and affordability is a major issue in governance. [9] Courts must, therefore, be slow to interfere with rational decisions taken in good faith by governmental departments whose responsibility

it is to deal with such issues. [10]

[19] This does not, however, place executive action completely beyond the control of the courts: [11]

‘But, where the decision is challenged on the ground of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution’.

[20] The Constitutional Court has confirmed that all that is required for rationality to be satisfied is the connection between the means and the purpose, so that the means chosen to achieve a particular purpose are reasonably capable of accomplishing that purpose.[12] In ETV, the Constitutional Court held as follows:[13]

‘It needs to be said that rationality is not some supra-constitutional entity or principle that is uncontrollable and that respects or knows no constitutional bounds. It is not a uniquely designed master key that opens any and every door any time, anyhow. Like all other constitutional principles, it too is subject to constitutional constraints and must fit seamlessly into our constitutional order, with due regard to the imperatives of separation of powers. It is a good governance-facilitating, arbitrariness and abuse of power-negating weapon in our constitutional armoury to be employed sensitively and cautiously.’

[21] Significantly, the process by which a decision is taken (as opposed to a decision on the merits of the matter under consideration) might itself be denounced for want of rationality. [14]

[22] The state must respect, protect, promote and fulfil the rights in the Bill of Rights,[15] and provisions of the Bill of Rights bind a natural or a juristic person to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.[16] The NGOs are non-profit organisations that partner with the Department to provide social services to vulnerable communities in the province. They are, to that extent, contractually engaged to support the state’s attempts to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of everyone’s right to have access to social security.[17]

[23] The Department has settled on a subsidisation model, based on the provisions of the Policy, to support this arrangement. Annual,

renewable agreements, are entered into and form the basis for the funding allocated. The NGOs are expected to fund-raise independently

to supplement their allocation. The respondent’s case is based largely on the Policy’s explanation of a shift in focus to rural areas to address transformation challenges and the need to insource social worker services. The Policy itself has not been challenged and there can be no qualms about this shift or its underpinning objectives, which must be constitutionally permissible.

The means selected to achieve this, including the subsidy cuts and employment of increasing numbers of in-house social workers (from the unemployed social worker graduates database, and also from a conditional grant) to be spread across the province, are also beyond reproach.[18] The determination of such polycentric matters must be left to the executive, without unnecessary judicial interference. The applicant’s

claims in this regard, including the call for a detailed cost accounting exercise and suggestion that the funds were lost to corruption, must be rejected.

[24] That is, however, not the end of the matter. The Policy also references ‘financing levels for the ensuing year’ and links this to ‘the results of performance evaluation against set objectives and the extent to which the service provider is able to meet transformation challenges’. The SLAs, correspondingly, explain that the Department’s evaluation of the NGOs’ performance will be based on reports received, including a written annual report. These reports are to be appraised and considered before the financing agreement is renewed. This evaluation does not appear to have occurred prior to the decision to reduce the subsidies for 2017/2018, despite the constitutional rights implicated, the

existing relationship between the parties, the wording of the Policy and SLA.

[25] But was there a duty on the respondent to consult with the NGOs prior to the subsidy reduction, and do the meetings of September 2016 constitute proper consultation? In *Minister of Home Affairs v Somali Association of South Africa, Eastern Cape*, [19] Ponnann JA held:

‘I accept as Nugent JA did, that a duty to consult will arise only in circumstances where it would be irrational to take a decision without such consultation, because of the special knowledge of the person or organisation to be consulted. The relevant authorities were aware that the respondents had close links to refugee communities and experience and expertise in dealing, not just with asylum seekers in Port Elizabeth, but also with the challenges that confronted them. That was acknowledged, implicitly at least, when they were invited to a stakeholders meeting during June 2011. But that meeting was a charade and positively misleading as to the intentions of the relevant authorities. What is worse...it was suddenly sprung on them...that a decision had already been taken...That was, to borrow from Nugent JA, “inconsistent with the responsiveness, participation and transparency that must govern public administration”.’

[26] In *ETV*, the Constitutional Court confirmed that we have a single standard for consultation in our jurisprudence, and that standard ‘insists

on a genuine and meaningful consultative process that passes muster, regardless of which legislation or legal framework regulates that process’.[20] Similarly, in *Scalabrini Centre, Cape Town v Minister of Home Affairs*, [21] Rogers J held that ‘consultation entails a genuine invitation to give advice and a genuine receipt of that advice...Consultation

is not to be treated perfunctorily or as a mere formality. This means inter alia that engagement after the decision-maker has already reached his decision or once his mind has already become ‘unduly fixed’

is not compatible with true consultation...sufficient information must be supplied to the consulted party to enable it to

tender helpful advice; sufficient time must be given to the consulted party to enable it to provide such advice; and sufficient time must be available to allow the advice to be considered...’

[27] The meetings of September 2016 reflect little more than a broad, general, single discussion opportunity for the non-profit sector in the Buffalo City and Nelson Mandela Metropolitan areas. Matters discussed included findings of the Auditor-General South Africa relating to the sector, presentation of service specifications to inform the submission of 2017/2018 business plans and budgetary limitations. Little attention seems to have been paid to the role of NGOs as service delivery partners, or to their special knowledge of the sector and social welfare beneficiaries, which underpin the duty to consult in this case.[22] The genuine 'give and take' expected of a meaningful consultation process, described in Scalabrini Centre, Cape Town, is palpably absent. This was in all likelihood due to a final decision to reduce subsidies having been taken in August 2016 already, and prior to the alleged consultative meetings on which the respondent relies. As such, the meetings, as well as the averred (broad) discussions within the NGO forum around budgets and funding, fall short of proper consultation in respect of the subsequent subsidy reductions and that decision is the outcome of an irrational process and is unlawful.[23]

[28] Once it is accepted that there was a requirement of a proper consultative process prior to a reduction in funding, and that the September meetings (and discussions within the NGO forum) do not constitute adequate consultation, the negative rights of social welfare beneficiaries (in particular, not to have their right to access to social security unreasonably diminished) are also implicated.[24] While there can, in my view, be no objection to the reduction of subsidies due to budgetary constraints, or even the re-prioritisation

of limited state funds for transformation and cost-cutting reasons, as the respondent argues, it is the failure to adequately consult

with the NGOs that is ultimately problematic. While this failure would arguably not be fatal if there is an overriding public interest, no overriding public interest for non-consultation is evident on the papers before me.[25]

[29] Section 195 of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including accountability and transparency through the provision of timely, accessible and accurate information. A proper consultative process would certainly have facilitated the realisation of these principles. Distinct from negotiation and a consensus-seeking exercise, this merely required a genuine effort to obtain the views of the NGOs at the appropriate time.[26] This is buttressed by the social security entitlements of social welfare recipients, which must endure irrespective of whether

services are obtained directly from the state or through a form of contract or partnership with NGOs working in this area.

Relief

[30] Anyone listed in section 38 of the Constitution has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. Ackermann J explained the notion of ‘appropriate relief’ as follows in *Fose v Minister of Safety and Security*:^[27]

‘Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief might be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.’

[31] When deciding a constitutional matter within its power, a court must declare that any conduct that is inconsistent with the Constitution

is invalid to the extent of its inconsistency.^[28] Such a declaration must follow in this matter, given the absence of proper consultation. The court may then make any order that is just and equitable^[29] and section 38 sanctions a flexible approach to remedies.^[30] While the default position is that the consequences of invalidity ought ordinarily to be corrected or reversed where they can no longer be prevented, the declaration of invalidity does not necessarily equate to the setting aside of the decision to reduce the

subsidies.^[31]

[32] There is a close connection between the granting of an appropriate remedy and the rule of law.^[32] As Moseneke DCJ held, in the context of an administrative action, in *Steenkamp NO v Provincial Tender Board, Eastern Cape*:^[33]

‘It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law...The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.’ (Footnotes omitted.)

[33] Currie and De Waal have argued that the harm caused by violating constitutional rights is not merely a harm to an individual applicant, but a harm to society as a whole in that the violation impedes the realisation of the constitutional project of creating a just and democratic society. The object in awarding a remedy therefore is not merely to grant relief to the litigants before the court, but also to vindicate the Constitution and deter future infringements.^[34] Vindication is necessary because unaddressed harm to constitutional rights will dampen the public’s faith in the Constitution.

- [34] Whether vindication in this sense requires the setting aside of the subsidy allocations and awarding of compensation or damages, as prayed for, is another matter.[35] Counsel for the applicant conceded that the claim, properly formulated, was not one for delictual damages, contrary to what appeared in the papers. Similarly, on the approach I take to the matter, there could be no legitimate expectation of receipt of exactly the same funding in 2017/2018 and there is no claim for contractual damages.[36] It cannot be said that there was a clear, unambiguous representation induced by the Department, devoid of any qualifications related to the subsidy to be awarded.[37]
- [35] While a declaration of invalidity may not always be enough to eradicate inconsistencies between law and conduct and the Constitution, there are difficulties in contemplating a damages award as a remedy for the violation of fundamental rights. Constitutional remedies should ideally be forward-looking, community-orientated and structural. An award of damages requires a court to look to the past to determine compensation and it must be reasonable in the court's appreciation of the sense of justice of the community to compensate the applicants in this matter.[38] In *MEC for the Department of Welfare v Kate*, [39] the SCA, in deciding whether the breach in that case warranted relief in the form of monetary damages, considered the nature and relative importance of the rights in issue, the alternative remedies that might be available and the consequences of the breach for the claimant concerned.
- [36] In coming to a decision in this regard, I have considered the existing relationship between the respondent and the applicant NGOs. The applicant's members are dependent on the grants and subsidies provided by the Department, and I have also considered that the amounts provided in 2017/2018 were reduced in a limited fashion (in most cases apparently in accordance with the specified ratio), and not merely cancelled across the board. No reductions to the budgets for the actual programmes were effected. I also accept, on the papers, that the applicant has overstated the impact of the funding reductions, and that while the process of transferring cases to the Department was imperfect, the negative impact on social welfare beneficiaries was limited and the provision of services remained adequate on the whole. It is also noteworthy that the respondent expressed contrition for the budgetary cuts at the time, and that it sought to address its failure to consult by meeting with the affected organisations between 20 and 30 June 2017. In doing so it responded appropriately to the intervention of the Portfolio Committee. Significantly, in many cases the subsidies payable to these organisations was then increased, and in many cases the amounts were then equal to or greater than the previous year's allocation. On the papers before me, only a handful of NGOs suffered any reduction whatsoever. While continuing to provide substantial funding to the NGOs, the Department has continued to employ its own social workers and to deliver these services in the province. As Ms Rawjee argued, the partnership between the Department and the NGOs remain intact insofar as the delivery of programmes go, and ideally should continue to flourish going forward. I have also considered the time period that has lapsed and the effect that setting aside the unlawful decision and a compensatory order would have on the Department's ability to perform its

functions in 2021. Finally, the inevitability of a similar outcome if the decision had been retaken following a proper process is also a factor to be considered.[40]

[37] It must be noted that the case at hand is distinguishable from KZN Joint Liaison Committee, which dealt with an enforceable undertaking, or 'public promulgated promise to pay' giving rise to a legitimate expectation in the context of the right to basic education.[41] The promise to pay subsidies were retroactively reduced after the date for payment had fallen due.[42] In that case, administrative fairness justified some measure of enforcement of that undertaking.[43]

[38] The relief to be imposed must seek to effectively redress the wrong suffered, deter future infringements and ensure future compliance.

I am ultimately of the view that the appropriate relief to be awarded is a declaration of invalidity in respect of the identified

procedural shortcomings in the conduct of the Department. As the SCA held in *Kate*, a declaration of rights is essentially remedial and corrective and is most appropriate where it would serve a useful purpose in clarifying and settling the legal relations in issue, providing legal and practical guidance to resolve the underlying dispute and to prevent new disputes from arising.[44] It would serve little purpose to issue a further declaratory order in respect of future consultations prior to subsidy reduction of NGOs, on the basis that this prayer is indeterminate and given the clarification in relation to the duty to consult provided above.[45] It would not be just and equitable, for the reasons advanced and in all the circumstances, to set aside the 2017/2018 allocations (or those for subsequent years) or to award compensatory relief and those prayers must be dismissed.

Costs

[39] I have carefully considered the issue of costs, given the facts that resulted in the dispute and the conclusion that the applicant has succeeded in obtaining a declaratory order, whilst being unsuccessful in respect of the further relief sought.[46] The awarding of costs is a matter which is within the discretion of the court. It is a discretion that must be judicially exercised

having regard to all relevant considerations. One such consideration is the general rule in constitution-related litigation that an unsuccessful litigant ought not to be ordered to pay costs. This is due to the chilling effect such an order may have on future litigants seeking to vindicate constitutional rights,[47] and because constitutional litigation, whatever the outcome, often goes beyond merely resolving the dispute between the parties and has a wider impact on the rights of similarly situated persons.[48]

[40] It is also important to bear in mind that the state bears the primary responsibility for ensuring that law and state conduct are consistent with the Constitution.[49] The primary consideration must be the way in which a costs order would hinder or promote the advancement of constitutional justice.[50] The principle has also been established that,

ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.[51] In Biowatch, the Constitutional Court added that ‘particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it’.[52]

[41] In this case the success has been partial. The decision of the respondent to reduce subsidies without proper consultation warrants

the appropriate declaratory relief. That decision is, however, not set aside and compensatory relief is not ordered for the reasons

advanced. Large parts of the documentation focused on demonstrating the exact loss suffered by each NGO, and even so the exact position remained mired. I am mindful of the interwoven nature of the application and relief sought and the anxiousness on the part of litigants to place all possibly relevant information before the court. I have also considered the voluminous, largely repetitive service level agreements and master lists filed by the respondent which have unnecessarily increased the costs in the matter. In addition, applicant has succeeded in coming to court to vindicate the right to consultation claimed. As Reynolds JP held in *Invernizzi v Port Elizabeth Municipality*,[53] to give a judgment directing costs on each issue to be awarded separately would make the task of taxation very difficult indeed. As in that case, I consider it appropriate to exercise the discretion to award the applicant a portion of its taxed costs. Mathematical

accuracy is impossible in this regard, and only a rough apportionment can be made. Taking all of this into consideration, a fair award as to costs will be that applicant in this case is to be paid 60% of its taxed costs by respondent.

Order

1. The respondent’s decision to reduce or terminate subsidies given to non-governmental organisations in 2017/2018 is declared to be irrational and unlawful.
2. Prayers 2, 3 and 4 of the Notice of Motion are dismissed.
3. The respondent is ordered to pay to applicant 60% of its taxed costs.

A. GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

Obo the Applicant :

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Heard:

12 February 2021

Delivered:

16 March 2021

[1] Act 1 of 1999.

[2] Para 11 of the Policy, p 287 of the bundle. The Policy does provide that the Department may enter into one-year contracts or multi-year contracts with service providers.

[3] Para 14.1 of the SLA.

[4] The reference to the '2016/2017' budget in para 72 of the answering affidavit is clearly an error.

[5] Para 104 of the answering affidavit.

[6] Act 38 of 2005.

[7] Affordable Medicines Trust v Minister of Health [2005] ZACC 3 para 49.

[8] Albutt v Centre for the Study of Violence and Reconciliation [2010] ZACC 4 para 51.

[9] KZN Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal [2013] ZACC 10 at para 70.

[10] Soobramoney v Minister of Health (Kwazulu-Natal)

[1997] ZACC 17 at para 29. Also see *Electronic Media Network Ltd v ETV (Pty) Ltd and others*

[2017] ZACC 17 at para 1.

[11] Soobramoney para

29. Also see *Economic Freedom Fighters v Speaker of the National Assembly*

[2016] ZACC 11.

[12] *Minister of Constitutional Development and another v South African Restructuring and Insolvency Practitioners Association and others* [2018] ZACC 20 at para

55. Also see *Minister of Defence and Military Veterans v Motau*

[2014] ZACC 18 at para 69.

[13] ETV para 6.

[14] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at para 36; *Minister of Home Affairs v Scalabrini Centre, Cape Town and others*

[2013] ZASCA 134 at para 69.

[15] Section 7(2) of the Constitution.

[16] Section 8(2) of the Constitution.

[17] Section 27 of the Constitution. Other related constitutional rights, including the right to dignity, are also impacted.

[18] See *Scalabrini Centre supra* at paras 58, 59, 65 and 66.

[19]

[2015] ZASCA 35 at para 17, with reference to *Scalabrini Centre supra* at para 72.

[20] ETV *supra* at para 66.

[21]

[2013] ZAWCHC 49 at para 72 (references omitted). Also see *Minister of Home Affairs v Scalabrini Centre, Cape Town* [2013] ZASCA 134 (SCA) at para 42 and *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd*

[2010] ZACC 26 at para 66.

[22] As Ms Moodley, the director of the applicant, indicated in the papers, the NGOs could advise the Department of the level of demand

for the services that they provided, the number of beneficiaries that they served, the cases that could be transferred and the skills necessary to handle those cases, and the needs of the beneficiaries in respect of a smooth and proper transition and handover process: at para 66 of the Founding Affidavit.

[23] See Scalabrini Centre *supra* at para 37, 70.

[24] See, by analogy, KZN Joint Liaison Committee *supra*, at para 45. In this case, which dealt with a unilateral subsidy reduction after the due date for payment, the Constitutional Court came to its conclusion based on the principles of reliance, accountability and rationality.

[25] See Premier, Mpumalanga and another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal

[1998] ZACC 20 para 41. Budgetary cuts, by themselves, do not necessarily constitute ‘an overriding public interest’: see KZN Joint Liaison Committee *supra* at para 66:

[26] ETV *supra* para 37.

[27]

[1997] ZACC 6; 1997 (3) SA 786 (CC) at para 19.

[28] Section 172(1)(a) of the Constitution.

[29] Section 172(1)(b) of the Constitution. On the limitations of the court’s power to order just and equitable remedies, see *Black Sash Trust v Minister of Social Development and others* 2017

(5) BCLR 543 (CC) at para 51.

[30] Bill of Rights Handbook 181.

[31] See *Allpay* at para 30.

[32] I Currie and J De Waal *The Bill of Rights Handbook* (6th Ed) (Juta) (2016) 179.

[33] 2007 (3) SA 121 (CC) at para 29.

[34] *Fose* at para 96.

[35] See *Fose* at para 72. Also see *Komape and others v Minister of Basic Education and others* 2020

(2) SA 347 (SCA) at para 63.

[36] See *Duncan v The Minister of Environmental Affairs and Tourism*

[2009] ZASCA 168 para 15. Also see *Central Energy Fund SOC Ltd and another v Venus Rays Trade (Pty) Ltd and others* [2020] ZAWCHC 164 at para 501.

[37] While there was a legitimate expectation of continued funding, which is not in dispute, the papers reflect that funding in most cases continued, and in many cases was restored to the 2016/2017 level during the course of 2017.

[38] Currie and De Waal 200.

[39]

[2006] ZASCA 49 at para 25.

[40] Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others [2013] ZACC 42 at para 56. Also see Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (No 2)

[2014] ZACC 12 at para 31.

[41] At para 48.

[42] At paras 49 et seq.

[43] The Constitutional Court has consistently held that fairness needs to be determined in the light of the circumstances of a particular case: see Joseph and others v City of Johannesburg and others

[2009] ZACC 30 at para 56, 58.

[44] At para 28. Also see Komape at paras 61-67.

[45] See Kate at paras 28 and 29 and Komape at para 66.

[46] See Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others

[2014] 2 All SA 493 (SCA) at para 31.

[47] In the context of public interest advocacy groups, see Biowatch Trust v The Registrar, Genetic Resources and others 2009

(6) SA 232 (CC) at para 15.

[48] Affordable Medicines Trust v Minister of Health [2005] ZACC 3 at para 138 et seq.

[49] See Biowatch at para 22. Tlouamma and others v Mbethe, Speaker of the National Assembly of Parliament of the Republic of South Africa and another

[2015] ZAWCHC 140 at para 176.

[50] Biowatch at para 16.

[51] Biowatch at para 22.

[52] Biowatch at para 24.

[53] 1954 (2) SA 288 (EDL) at 299A.

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