



Keeping an eye on non-profit laws

'AT BEST, CYNICAL'

By Ricardo Wyngaard

ABOUT NPO LEGAL

ISSUES:

This is an electronic newsletter published by:

RICARDO WYNGAARD ATTORNEYS which is aimed at updating the non-profit sector on relevant legal issues.

IN THIS EDITION:

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ATTORNEYS is a law practice that specialises in rendering advice and assistance on non-profit law and governance.

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IMBUMBA ASSOCIATION FOR THE AGED VS MEC for Social Development, Eastern Cape and Another

(1789/2020) [2020] ZAECGHC 112 (1 October 2020)

On 1 October 2020 the Eastern Cape Division of the High Court, Grahamstown handed down a judgment, which offers a vivid depiction of the extraordinary challenges faced by non-profit organisations and their beneficiaries during the national state of disaster. This was compounded by administrative bureaucracy.

The facts

The dispute arose from separate Service-level Agreements (SLAs) entered into between 25 member organisations (NPOs) of the *Imbumba Association for the Aged* and the *Eastern Cape Department of Social Development* (the Department). The SLAs were meant to run from 1 April 2020 to 31 March 2021. The NPOs received funding from the Department to provide specialised community-based care and support services to mainly older persons as envisaged under section 11 of the Older Persons Act of 2006 (the Act). Section 11(1) of the Act caters for two broad community-based programmes, i.e.: (i) service-centre based prevention and promotion programmes and (ii) home-based care services. The beneficiaries, per NPO, ranged in number from 16 to 245 and catered for the first category of programmes – not home-based care. The Department is constitutionally mandated to provide social welfare services and, in this context, does so by acquiring the services from the NPOs.

Unfortunately, payments were not made by the Department to the NPOs, as provided for under the SLAs. According to the Court, as at the end of July 2020 more than R1.5m was due. The Department notified the NPOs that only stipends for care givers rendering community-based care services will be paid as Covid-19 regulations stipulate that the movement of Older Persons over 60 years of age is highly restricted. This stipend was not paid, despite the undertaking. Also, for welfare organisations, payment of social work posts and administration will be paid in full. In a similar vein, funding was also reduced for other NPOs providing care and support services to people with disabilities, those providing HIV and AIDS programmes, early childhood development centres, child care and protection organisations, etc.

The application to Court

An urgent application was made for the Court to direct the Department to comply with the SLAs, alternatively, to declare the Department's decision to be unconstitutional, unlawful and invalid. Due to lockdown restriction, the NPOs continued to provide essential home-based care services to their beneficiaries, the majority of whom were older women who head households with extended family members. The Court was informed that: "The Covid-19 pandemic has caused the reduction of income of adult children working away from home and their financial support for the household has been reduced or terminated." In doing so, the NPOs have incurred a massive financial burden. In motivation for the urgency, it was argued that: "the beneficiaries' survival depends on the uninterrupted and continuous services provided by the (NPOs)." And the withdrawal of such services will, amongst other, impact on the 'health and quality of life of those beneficiaries who cannot care for themselves'

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The Department's contention

The Department essentially contended that:

1. Its business funding model was premised on older persons physically visiting service centres to access services and not providing home-based care services. The latter could not be funded by the Department.
2. It was required to comply with specific statutory duties, including the Public Finance Management Act of 1999 (the PFMA). Funding home-based care services would have been unlawful and wasteful expenditure.
3. It did not give the required 3 months' contractual notice to the NPOs, due to the immediate impact of the Covid -19 pandemic; and
4. Alternatives were available to meet the needs of the beneficiaries, including services offered by the Department in association with the SASSA, the Department of Health and local government authorities.

The Department also contended that: (i) there was a lack of urgency, (ii) the NPOs did not exhaust the internal resources and (iii) the NPOs failed to refer the matter to arbitration.

The Court's analysis and finding

On the issue of urgency, the Court rejected the Department's contention and described the matter as 'inherently urgent'. It further stated that the Department's contention on this is: "a vexatious and futile point when one is dealing with the welfare of people in need, during a life threatening pandemic." The Court remarked that the Department appointed NPOs to carry out the Department's constitutional obligation, i.e.: the obligation to provide social services in terms of section 27 of the Constitution. In this context, the Department has a constitutional obligation to ensure that a workable system remains in place until a new one is operational. There were no SLAs in place for provision of home-based care. The Department's stance would deprive the beneficiaries of their constitutional services.

The Department's reliance on the PFMA and a lack of a budget for home-based care (whilst ignoring their constitutional mandate) was described by the court as '**at best, cynical**'. The Court observed that the 'underlying purpose of the SLA's had to be considered in the light of the Department's constitutional obligations, especially in the time of the pandemic, and the necessary adaptations which had to be made.' Strikingly, the Court concluded that: "The Department disregarded the terms of the SLA's and in my view unequivocally demonstrated its intention not to be bound by the SLA's. The Court described the Department's resistance to the application as: 'regrettable'.

Court order: The Court ordered the Department to comply with the terms of the service level agreements.

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