IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case number: **1381/2019**

In the matter between:

ENGO	1st Applicant
PROVINCIAL MANAGEMENT COMMITTEE OF YOUTH CARE CENTRES IN THE FREE STATE	2nd Applicant
NATIONAL ASSOCIATION OF WELFARE AND NOT FOR PROFIT ORGANISATIONS (2018)	3rd Applicant
PULUKOANE MIRRIAM MOLOI	4th Applicant

And

THE PREMIER OF THE FREE STATE PROVINCE	1st Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR SOCIAL DEVELOPMENT, FREE STATE	2nd Respondent
THE HEAD OF THE DEPARTMENT OF SOCIAL DEVELOPMENT, FREE STATE	3rd Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF TREASURY, FREE STATE PROVINCE	4th Respondent
THE MINISTER OF SOCIAL DEVELOPMENT	5th Respondent
THE MINISTER OF LABOUR	7th Respondent

CORAM:	DAFFUE, ADJP
HEARD ON:	19 MARCH 2020
JUDGMENT BY:	DAFFUE, ADJP
DELIVERED ON:	21 MAY 2020

I INTRODUCTION

[1] This is one of the most difficult judgments I have been called upon to write during my career on the bench, not necessarily because of intrinsic difficult legal principles, but, on the one hand, the effect it will have on the most vulnerable people in our society if I dismiss the application insofar as hundreds of people will be severely and detrimentally affected, even be found wanting of food, clothing and shelter. On the other hand, if I grant monetary relief against the Free State Province ("Province") which is apparently in serious and dire financial straits, Province will find it extremely difficult to make ends meet and this may ultimately have a negative impact on service delivery in other sectors within the Province.

[2] I started preparing this judgment over the Easter weekend and thus during the South African lockdown caused by the Covid-19 pandemic. A court is not supposed to consider aspects, evidence and/or events occurring after hearing of an action or application as

it should evaluate the law and facts presented to it in order to arrive at its decision. However, I believe that judicial cognisance may be taken of the disastrous economic consequences befallen upon the country in all spheres, *i.e.* the public and private sectors. The National Government, in particular, is searching for funding from third parties to assist in fighting the pandemic and its consequences.

[3] Having said this, Province is bound to ensure that the constitutional rights of the vulnerable people within the Free State Province are catered for, obviously within its financial means.

II THE PARTIES

[4] The applicants are the following:

4.1 First applicant is Engo, registered as a non-profit organisation ("NPO");

4.2 Second applicant is the Provincial Management Committee of Youth Care Centres in the Free Sate ("FSCYCC");

4.3 Third applicant is the National Association of Welfare and not for Profit Organisations (2018) ("Nawongo (2018)"); and

4.4 Fourth applicant is Pulukoane Mirriam Moloi, an adult female with full legal capacity, employed as a child and youth care worker at the House of Compassion, Bainsvlei,

Bloemfontein, one of the constituent members of the FSCYCC.

All applicants were represented by Advv JI Du Toit SC and MJ Merabe.

[5] The respondents are the following:

5.1 First respondent is the Premier of the Free State Province ("the Premier"), in whom vests the executive authority of the Province and who, together with other members of the Executive Council, exercises executive authority by the implementation of, *inter alia*, all national legislation within the functional areas listed in Schedule 4 or 5 of the Constitution, one of them being welfare services;

5.2 Second respondent is the Member of the Executive Council for Social Development ("the MEC"), she being responsible for the administration of, *inter alia*, social service laws in the Province performed by the Department of Social Development ("the Department");

5.3 Third respondent is the Head of the Department ("the HOD") who is, *inter alia*, as the highest administrative officer responsible for the administration of the actual payment of subsidies to NPO's, and according to applicants, apart from declaratory orders sought, to be held liable in these proceedings for:

5.3.1 the payment of subsidies, with the second respondent jointly and severally, promised in a policy which was held by this court to be constitutionally compliant;

5.3.2 alternatively, jointly with the other respondents (excluding the seventh) for the payment of any constitutional compensation.

5.4 Fourth respondent is the MEC for the Department of Treasury ("MEC Treasury") responsible for the Appropriation Bill voted on by the Free State Provincial Legislature;

5.5 Fifth respondent is the National Minister of Social Development who is cited as having a shared responsibility for social services in the Province, welfare services being a competency in terms of Schedule 4 of the Constitution;

5.6 Sixth respondent is the Minister of Finance, but as explained in the next paragraph, the applicants withdrew their application against him;

5.7 The seventh respondent is the Minister of Labour, who is cited because she may have an interest in the outcome of the claim arising from unfair labour practices and unfair discrimination. No orders are sought against this Minister.

The first to fifth respondents were represented by Advv N Snellenburg SC and K Nhlapo instructed by the State Attorney, Bloemfontein.

III THE RELIEF CLAIMED

[6] When the matter was called Mr Du Toit moved for an amendment of the notice of motion which application was not opposed and accordingly granted. Several minor amendments were obtained, but more significantly, all references to the sixth respondent, being the Minister of Finance as cited in the application, were struck out. This was required insofar as applicants decided earlier to withdraw their application against the Minister of Finance, apparently based on the contents of a letter written on behalf of the Minister which is attached to the replying affidavit.[1]

[7] The applicants seek the following relief in their amended notice of motion

"1. Declaring that the failure by the First, Second and Third Respondents to implement the 2014 policy in respect of social service delivery approved as constitutionally compliant by the Free State High Court on 28 August 2014, (under case no 1719/2010), and more specifically to pay subsidies calculated in terms of if the said policy is inconsistent with sections 125(2)d), 195 and 237 of the Constitution and is accordingly unlawful and invalid;

2. Payment by the Second and Third Respondents, jointly and severally:

2.1 to the First Applicant the amount of R176 133 735.82, alternatively R60 696 176.98;

[1] Annexure "DWC53", vol 4, pp 1489 & 1490.

2.2 to the Second Applicant the amount of R139 149 439.50; alternatively R50 239 097.76;

2.3 to the Third Applicant the amount of R25 785 834.16, alternatively R9 298 636.98.

3. Declaring that the failure by the First, Second, Third, Fourth and Fifth Respondents to develop the 2014 policy or to develop another policy for the payment of social service subsidies in the Free State by setting clear targets and setting out the way in which to achieve those targets for the progressive realisation of the section 26 and 27 rights of children, older persons and other vulnerable persons in the Free State and the realisation of the section 28 of the Constitution rights of children in the Free State, is unconstitutional, and accordingly unlawful and invalid;

4. Declaring that:

4.1 the 2014 policy aforesaid unfairly discriminates against the employees of the Applicants by establishing or maintaining a system of welfare subsidisation whereby employees of the First, Second and Third Applicants and their members, and the Fourth Applicant, are consistently paid substantially less than civil servants at the same experience level and for the same job description;

4.2 the conduct of the First, Second, Third, Fourth, Fourth and Fifth Respondents by maintaining the system aforesaid is unlawful and unconstitutional.

5. In the alternative to prayer 1, should it be found that the First, Second and Third Applicants are not entitled to payment on the basis of a reasonable expectation, they claim the payment of constitutional

compensation by the First, Second, Third, Fourth and Fifth Respondents, jointly and severally, as follows:

5.1 Payment in the amounts equal to those mentioned in Prayers 2.1 to 2.3 above;

5.2 Alternatively, should it be found that the provisions of Act 40 of 2002 applies, payment by the Second Respondent to:

5.2.1 The First Applicant in the sum of R91 044 265.46;
5.2.3 The Second Applicant in the amount of R75 358 646.64;
5.2.4 The Third Applicant the amount of R13 947 955.46.

6. *Mora* interest in respect of all the monetary claims at the prescribed rate from date of service of the application;

7. That the First, Second, Third, Fourth and Fifth Respondents be directed to pay the costs of this application, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.

8. That further and/or alternative relief be granted to the Applicants."

IV AMBIT OF SERVICES DELIVERED BY THE NPO's

[8] The first three applicants are duly registered NPO's as indicated. It is appropriate to briefly set out how these organisations support the Department in order to comply with the social needs of certain vulnerable citizens within the borders of the Province. I emphasise that the facts contained herein are not in dispute.

[9] ENGO, the first applicant, offers comprehensive services relating to family care offices, Child and Youth Care Centres, and the

training of students. Its Board co-ordinates and facilitates social services to cater for the welfare, care, development and treatment of individuals, families, groups and communities in the Free State. It has under its auspices (a) services to older persons and *inter alia* offers housing to the poor and residential care to frail older persons, (b) family and community services, (c) Child and Youth Care Centres and (d) a training centre to enable individuals in the social services sphere to enter the labour market and in so doing empowers them to enhance their quality of life.

[10] ENGO also instituted the application as a cessionary in respect of the monetary claims pertaining to (a) inter social work services programmes and family care centres in ten towns and cities, (b) residential facilities and frail care programmes at sixteen centres across the Free State and (c) a residential facility and disabled programmes in respect of a centre in Viljoenskroon.

[11] FSCYCC, the second applicant, manages thirty four registered Child and Youth Care Centres in the Province.

[12] Nawongo, the third applicant, is an organisation which acts as umbrella body for ENGO, the first applicant herein and all of its programmes, CWCL, Ithuseng Luncheon Club, Southern Free State Mental Health Society, and KZN Christian Social Services.

V BRIEF HISTORY OF THE LITIGATION THUS FAR

[13] I do not intend to deal with the facts presented by applicants relating to the history of social services in this country and

specifically in the Free State. All these facts are not seriously in dispute.[2] Given the facts that were common cause in 2010 and which is still the case, it is appropriate to briefly explain what transpired between the parties (or their predecessors) in and out of the court room between 2002 and 2014. These facts are also not in dispute.

[14] On 23 May 2002 a predecessor of Nawongo (2018) whose membership at the time included the predecessors of FSCYCC and ENGO launched an application against the Department based on either late payment of subsidies or the refusal to make payments in certain circumstances. The Department's conduct was held to be irresponsible and unreasonable insofar as it did not comply with the *audi alteram partem* principle. It was ordered to comply with its obligations to hear the applicants in compliance with the *audi alteram partem* principle and lawful administrative conduct.[3]

[15] In 2010 the predecessors of the current first to third applicants launched an application, attacking the 2003 policy adopted by the Department. On 5 August 2010 a structural interdict was granted under case number 1719/2010 by Van der Merwe J (as he then was).[4] The 2003 policy was declared "inconsistent with the constitutional and statutory obligations" of the respondents and "not a reasonable measure as envisaged by (sections 26, 27 and 28 of the Constitution, section 4(2) of the Children's Act, 38 of 2005 and section 3(2) the Older Persons Act, 13 of 2006) to the extent that it

[2] Founding affidavit, paras 32 – 40, vol 1 pp 28 – 31, read with answering affidavit, par 223, vol 3, p 762.
[3] Founding affidavit, par 51 pp 36 & 37.
[4] Annexure "DWC8" p 160 and further.

lacks a fair, equitable and transparent method of determination of the contributions that (NPO's) "should make from their own resources." The first and second respondents in that application were ordered to adopt and implement a revised policy and certain time frames were set out.[5]

[16] The MEC and HOD, being the first and second respondents in the 2010 application, attempted to remedy the defects in the policy, but on 9 June 2011 Van der Merwe J found the attempt wanting.[6]

[17] KPMG auditors were then instructed by the Department to devise a suitable costing model, apparently based on the reasoning of Van der Merwe J. Hereafter Kruger J heard the matter and delivered a judgment on 28 March 2013[7]. It was evident, as acknowledged by the Department's deponent, that no consultations took place with the applicants. The court held that the amended policy submitted by the Department remained a "deficit-sharing model" and because the Department might determine the content of each of the applicants' programmes, it might leave out what it regarded as non-essential. It added that in order to allow for proper budgeting by the applicants, the contents of the items covered ought to be "clearly and unambiguously spelled out." Ultimately Kruger J held that the revised policy was still non-compliant with the initial order granted by Van der Merwe J. Again, the Department was instructed to review the policy.[8]

[5] See court orders: par 56 of judgment, vol 1 pp 199 – 202.
[6] Annexure "DWC9" pp 204 – 231; the orders are contained in par 28, pp 230 & 231.
[7] Annexure "DWC10" pp 232 – 253.
[8] Ibid, par 17 & further, pp 249 -252.

[18] The fourth judgment ("the 2014 judgment") in the series of cases was delivered by Van der Merwe J on 28 August 2014.[9]

[19] The 2014 judgment will be dealt with again during the evaluation of the evidence, but I find it appropriate to quote the following:

"[13] … The test is whether the policy is a reasonable measure to the maximum extent of available resources or within available resources to achieve the progressive realisation of the rights. The test is not whether the policy is the best or most desirable measure possible. **Availability of resources is therefore an important factor** in determining what is reasonable, **but lack of funds cannot be used as a lame excuse**. Resources must be provided as far as reasonably possible. Reasonableness must also be understood in the context of the Bill of Rights as a whole…

[26] … However, the department explains that Treasury has maintained that it cannot provide increased funding without the motivation of a proper business case. The department states convincingly that the third revision, if approved, would enable it to satisfy Treasury criteria and to present Treasury with a **properly costed and realistic business case** for an increased allocation for NPO funding…

[27] I cannot imagine that Treasury will not give serious consideration to such properly motivated and costed request for funding and would allocate funds that would not cover the core costs of a reasonable number of NPO programmes… On the contrary, it seems to me that the third revision provides a realistic prospect of substantially increased NPO funding.

[29] … It aims at eventually funding the full costs of all NPO social welfare service programmes. Progressive realisation is of course a long term process. The department says that if the third revision is approved now, the benefits thereof will only begin to realise in the 2016/2017 financial year, as a result of government budgetary processes.

[9] Annexure "DWC11" pp 254 – 285.

> However, I do not think that there is any sound reason to doubt this commitment or its realisation…. For the reasons already mentioned, the third revision should enable the department to continue **to make a compelling case** for increased funding…." (emphasis added)

VI IN *LIMINE*:

Material non-joinder

[20] Although the issue of non-joinder was raised in *limine*, I ruled that the parties should proceed to extensively deal with the merits of the application as well and that appropriate orders would be made after hearing all the arguments.

[21] Mr Snellenburg argued that the effect of the withdrawal of the application against the Minister of Finance has the effect that National Treasury is not a party to the proceedings and its absence constitutes a material non-joinder. According to his argument the Minister of Finance (National Treasury) has a direct and substantial interest in the outcome of the application. He went even further, submitting that the orders in the previous judgments could not effectively be executed without National Treasury. According to him the evidence clearly establishes that what the National Department of Social Development does in one province has to be implemented nationwide. Monetary relief to be awarded would not only have a bearing on the purse of the Free State Province, but National Treasury.

[22] Mr Snellenburg submitted that this court should refrain from deciding the matter until all relevant parties, including the Minister of Finance, have been joined.[10] He argued that implementation of the 2014 policy by the Free State Government was objectively impossible without the unqualified support and financial backing of National Treasury. Therefore he suggested that the application be postponed to allow the Minister of Finance to be joined.

[23] Mr Snellenburg further argued that the relief sought in prayer 4 also necessitates the Department of Public Service and Administration to be joined out of necessity. In conclusion, it was argued that if applicants persist with the matter in absence of the relevant parties, the application should be dismissed.

[24] Mr Du Toit argued that the Minister of Finance provided cogent reasons why he did not have an interest in the matter. He stated that the applicants accepted these reasons and that "they could not flog a dead horse and risk adverse costs orders."[11] It is relevant to take note that the Minister of Finance holds the view that he was not a party to the previous litigation, that he is neither the executive authority responsible for social services, nor responsible for the development of policies for social service delivery and the budget vote for provincial social services comes from the provincial government and not from him. He also threatened with punitive costs if applicants would proceed against him.

[10] Reliance was placed on Amalgamated Engineering Union v. Minister of Labour 1949 (3) SA 637 (A) at pp 657 and 659.
[11] See replying affidavit, par 14 vol 4 pp 1458/9 and annexure "DWC53" p 1489.

[25] Mr Du Toit submitted that the Minister of Finance does not have a legal interest in the matter and that no judgment anticipated will affect any interest the Minister may have prejudicially. In *casu* the Premier and relevant MEC's of the Free State Province are before the court as representatives of the Provincial Government and it is not necessary to join every organ of every one of those Governments which plays some role in providing services elsewhere. Mr Du Toit, relied on pragmatism and the judgment of Binns-Ward J[12] to bolster his argument.

[26] Mr Du Toit also relied on *Gory v Kolver NO and others*[13] where the Constitutional Court held as follows:

"This Court would not be able to function properly if every party with a direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right as it were, to intervene in a hearing held to determine constitutional validity."

In *Khosa,*[14] an earlier judgment of the Constitutional Court, the court dealt with an application for a declaratory order of constitutional invalidity despite arguments that the non-joinder of the Minister of Finance was material. It did so, notwithstanding a recognition that its decision on the constitutionality of disqualifying permanent residents from receiving certain social grants could

[12] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2016] 1 All SA 520 (WCC), par 37 where the learned judge stated that some degree of flexibility in the application of the principle of joinder of necessity may be permissible on pragmatic grounds.

[13] 2007 (4) SA 97 (CC), par 12. This case is not directly in point. It concerned the constitutional validity of s 1(1) of the Intestate Succession Act, 81 of 1987 to the extent that it confirms rights of intestate succession on heterosexual spouses, but not on permanent same-sex partners.

[14] Khosa & others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development 2004 (6) SA 505 (CC), paras 19 & 20 and the order eventually granted without the Minister of Finance being a party to the proceedings.

have far-reaching budgetary effects. As in the case of *Gory*, this judgment is not directly in point.

[27] In the well-known eviction judgment, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and others,*[15] the Constitutional Court held that the absence of the Provincial Government from the proceedings was not fatal. The case turns around the fate of poor people evicted from premises in the city and the municipality's obligation to provide housing to the poor. The court held:

"Whether it is necessary to join a sphere in legal proceedings will however depend on the circumstances and nature of the dispute in every specific case. In this matter the absence of the provincial government is not fatal. The obligations and conduct of the City have to be considered. The joinder of the City as the main point of contact with the community is essential."

[28] I am satisfied that the issue at hand is whether or not the Department acted properly to ensure that the 2014 policy was implemented and/or whether there was proper compliance therewith, and if not, whether the Department's plea of financial constraints – financial incapacity – is valid to the extent that no relief should or could be granted as requested by applicants. No order to be granted herein could prejudicially affect the interests of the Minister of Finance or National Treasury. The manner in which I propose to deal with the merits of the application does not require either the Minister of Finance or the Minister of Public Service and Administration to be joined. In any event, the Minister of Finance

[15] 2012 (2) SA 104 (CC), par 45.

is fully aware of the application and if he really wanted to make an input, he could have done so. The point in *limine* is dismissed.

VII RELEVANT FACTUAL ISSUES

[29] I have referred to the ambit of services delivered by the applicant NPO's above and do not intend to repeat it. There is no dispute in this regard. I shall endeavour to deal with factual evidence under this heading and insofar as issues are in dispute, it will be indicated as such.[16] I also referred to the history of the litigation between the parties and do not intend to repeat that, save insofar as it is deemed necessary.[17]

[30] As indicated earlier, it is the applicants' case that the Department failed to implement the 2014 policy as amended during the course of the 2014 judgment. The latest version of clause 11.6 of the policy is quoted fully in paragraph 8 of the 2014 judgment and it will not be repeated herein. There is no doubt that respondents agreed to and unambiguously accepted the policy as amended. There are numerous references thereto in the papers before the court.[18]

[31] Having referred to the *dictum* in paragraph 11 of the 2014 judgment, the applicants aver that the MEC and the HOD of the Department gave an undertaking - an enforceable promise - to the effect that core costs (as explained in paragraph 11 of the

[16] Chapter IV: Ambit of services delivered by NPO's, supra.
[17] Chapter V: Brief history of the litigation thus far, supra.
[18] Letter of State Attorney, annexure "DWC17" p 528 and budget speech of MEC delivered on 16 March 2018 to mention two examples.

judgment) would be updated annually with a concomitant increase in the subsidy payable. It is common cause that there was no compliance herewith. In order to put the promise in proper perspective, I quote from paragraph 11 of the 2014 judgment:

"Where possible, costs items were standardised. These amounts were updated by KPMG to the 2013/2014 financial year in accordance with the Department of Public Service and Administration salary scales in respect salaries and employer contributions and the consumer price index in respect of other expenses. The core costs will be updated annually on these bases and reviewed in three year cycles to provide for possible changed circumstances, after consultation with stakeholders." (emphasis added)

It is the applicants' case that the core costs were not updated annually, no review took place in three year cycles or in in any other cycle and no consultation, properly so called, were conducted with any of the applicants as major stakeholders in the social service field.[19] Respondents deal with this issue and specifically deny that no consultations took place between the parties insofar as reference is made to consultations and attendance of a workshop "pursuant to the new policy being approved by the National Department."[20]

[32] It is apparent that there is no proper reconstructed 2014 policy available, although respondents refer to a revised provincial policy signed by the MEC on 28 September 2017 which apparently was supposed to be applicable to the 2017/2018 financial year according to the heading thereof.[21] However and as indicated, the parties are in agreement that clause 11.6, amended by Van der

[19] Founding affidavit, par 56.3.
[20] Answering affidavit, par 226, p 766.
[21] Par 227, p 766 and annexure "O80", vol 4 pp 1309 – 1347.

Merwe J and quoted in the 2014 judgment, is correctly worded and forms part of the 2014 policy. This paragraph and its non-compliance by the Department, which appears to be common cause, really lie at the heart of the dispute between the parties.

[33] Applicants allege that they had a legitimate expectation that the Department would perform its duties arising from the 2014 policy diligently and without delay as provided for in s 237 of the Constitution, that it would make proper submissions to Treasury for funding and commence with increased subsidies within a reasonable time, if not from the beginning of the 2016/2017 fiscal year, then the 2017/2018 fiscal year, alternative any of the following two financial years. If the Department incurred any problem with execution of the 2014 policy they reasonably expected it to seek an amendment in a constitutionally compliant manner.[22] Although applicants met all the conditions for receiving subsidies as set out in the 2014 policy, it turned out that they obtained a Pyrrhic victory – an empty judgment – in that notwithstanding an arduous and costly battle over several years, the Department failed to implement its own policy.[23]

[34] Instead of specifically denying that there was compliance with the 2014 policy, the Department responded as follows:

> "229.9 Upon the judgment being granted, the Provincial Department approached Provincial Treasury to inform them of the financial implications of this judgment. It can be appreciated that the judgment was given in August, well into the financial year. The Department then had to reprioritise from its previously allocated

[22] Founding affidavit, par 70, pp 58 & 59.
[23] Ibid, par 71, p 60.

and available funds in order to fund statutory services. Previously when funding programmes, the Department did not differentiate between statutory and non-statutory service, this was now done.

229.10 ….

229.11 ….

229.12 The lack of satisfactory implementation of this policy should be viewed as rather an **incapacity** than an unwillingness.

229.13 Fiscal consolidation affected every Department in every Province as stated above. Therefore, the notion that National Treasury simply had to find the funds to fund the new policy, is with respect, unreasonable and uninformed. There have been gradual increases in the funding of NPO's since the 2014 policy. It cannot be said that such increases were not as a direct result of the judgment. Although the policy may have not been given full effect, the Department has always advised Treasury about it during the various budgeting stages over the fiscal years since it had been approved. This is clearly reflected in the budget submissions."[24] (emphasis added)

[35] As early as 26 November 2015, although more than 15 months after the 2014 judgment, the State Attorney wrote to applicants' former attorneys, advising them *inter alia* that the Department had initiated processes towards the implementation of the court order, and although the Department accepted the policy as per the court order, it would not be implemented at that stage, but once it is fully functional and the NPO's shall be notified prior to this step being taken.[25]

[24] Answering affidavit, par 229, pp 769 & 770.
[25] Founding affidavit, par 81, pp 65 & 64, read with annexure "DWC17" p 528.

[36] In her provincial budget speech of 16 March 2018, the MEC Treasury made an announcement, indicating that funds were allocated to the Department of Social Development, "specifically to fund programmes aimed at violence against woman and the financial implications arising from the NAWONGO court judgment."[26] Some months later, *i.e.* in October 2018, a certain Ms Pottas of the Department communicated with the applicants which strengthened their expectation that the 2014 policy would be implemented at the beginning of the 2018/2019 financial year and provide for partial "backpay" for the previous years.[27] No payments were made as expected. The respondents were invited to a meeting to be held by the National Department of Social Development in March 2019.[28] The purpose of the presentation was to share contents of the Department of Social Development's sector funding policy, to update on the progress that far and to share future plans in relation to that policy. The legal status of this national policy is uncertain, but even if it has been adopted, the question is whether it can override the 2014 policy approved by a court order in respect of the period until acceptance thereof.

[37] Respondents have taken offence to the manner in which applicants projected their actions and/or inaction. As stated earlier, much is common cause. It is clear that respondents did not fulfil their promises evident from the 2014 policy. They rely on financial constraints. Applicants made some remarks which are viewed by respondents to be derogatory. I prefer to stick to the facts and do not want to become embroiled in the perceptions and

[26] Ibid, par 99, pp 72 & 73.
[27] Ibid, paras 96 – 98, pp 71 & 72.
[28] Annexure "DWC14" p 501.

beliefs of the parties. However, it is important to note that insofar as the allegations in paragraphs 41 and 42 of the founding affidavit are concerned,[29] *inter alia* that respondents failed to abide by or honour the 2014 policy in paying subsidies in terms thereof, and in doing so "the department rides roughshod over the needs of the most vulnerable in society," respondents stated the following in their answering affidavit:

"The contents hereof are noted. There is no malice on the part of the Department to not fully implement the compliant policy – as discussed above. It is due to fiscal constraints that the 2014 policy could not be fully implemented as would have been desired. I refer to what has been stated above regarding the relief and why the 2014 policy was not implemented."[30] (emphasis added)

[38] The allegations in paragraphs 43 to 48 of the founding affidavit[31] pertaining to the respondents' failure to comply with their constitutional duties and their "continuous underfunding of the NPO sector, throttling them gradually to total financial death whereas, in reality, these organisations render the very essential constitutionally obligatory services which the State should primarily be delivering to the most vulnerable citizens of South Africa in compliance with their constitutional obligations" are denied by respondents and I shall soon deal with their version in more detail.[32] Just briefly, any alleged negligent or intentional non-compliance with constitutional duties is denied by respondents, apparently as they could not "meet their duties as would have been desired but due to financial constraints" although "there has been a concerted effort to do so" whilst the respondents "are engaged in

[29] Founding affidavit, p 32.
[30] Answering affidavit, par 224.1, p 762, vol 3.
[31] Founding affidavit, pp 33 – 35.
[32] Para 225 of the answering affidavit, pp 763 – 765, vol 3.

processes that will yield progressive realization in their constitutional duties. The new policy, post the 2014 policy, is evidence of such."

[39] Despite all reasonable efforts applicants were not able to obtain any particulars of the submissions made by Provincial Treasury to National Treasury to ascertain whether funding needs were properly motivated or whether National Treasury simply dismissed properly motivated reasonable requests for funding.[33] In this regard I requested Mr Snellenburg during oral argument to point out any document submitted by the Department to Treasury in which a "properly costed and realistic business case" as envisaged in the 2014 judgment was made out in order for the Department to comply with its obligations in terms of the 2014 policy. I was not referred to any specific document, although I take cognisance of the extracts of budgets prepared for the Department. Nothing in the documents before court can realistically be described as compliance with the 2014 judgment.

[40] Applicants explained in detail how they calculated their claims and why they also rely on alternative claims. A careful reading of the founding affidavit together with the applicable annexures suffices to inform the reader how the claims have been calculated. I do not deem it necessary to set out the computations of the claims in any detail herein. Respondents do not deny the correctness of the computations on any grounds, but rely on a bare denial.[34] To put it more bluntly: not one single figure, or component, or item, or calculation has been shown to be incorrect. I shall deal with this matter again during the evaluation of the evidence.

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[33] Founding affidavit, par 105, p 75.

[34] Ibid paras 117 – 149 & annnexures "DWC18" – "DWC25" pp 534 – 558.

[41] It is also alleged by the applicants that no progressive realisation of rights was achieved contrary to the provisions of the 2014 judgment.[35]

[42] The applicants also rely on an unfair labour practice and/or unfair discrimination insofar as they cannot afford to pay employees in their service salaries equal to those payable to State employees in the service of the Department for Social Development. Proof of the differentiation in each case is clear from the founding affidavit.[36] Applicants' version relating to a skewering of priorities, differentiation between salaries and an inherent disparity insofar as the 2014 policy is concerned, must be considered in perspective. Applicants rely on this policy and cannot be heard simultaneously to say that the 2014 policy causes unfair discrimination and is not constitutionally compliant.[37]

[43] Finally, applicants rely in the alternative to their monetary claims on constitutional compensation and set out facts and figures upon which they rely for such compensation.[38] They claim in the main amounts equal to that calculated for purposes of the main relief in prayer 2 of the notice of motion, but bearing in mind the possibility that Act 40 of 2002 might apply pertaining to prior written demand to an organ of State, they claim one half of the 2018/2019 subsidy shortfall, plus an amount equal to the full subsidy for the 2019/2020 financial year based on the figures of the 2018/2019

[35] Ibid, paras 150 – 204, pp 94 – 118 and annexures "DWC27" – "DWC43" pp 563 – 634.
[36] Ibid, paras 206 – 240, pp 121 – 132 and annexures "DWC44" – "DWC50" pp 635 – 665.
[37] See *inter alia* founding affidavit, par 191, p 133; par 206, p 120; par 233 p 129 and paras 237 & 238.
[38] Ibid, paras 241 – 249, pp 133 – 136.

year. Again, these figures and calculations are not disputed, save for a bare denial. The detailed written letter of demand dated 11 March 2019 was sent by email to the respondents and also served on them by the sheriff.[39] Receipt hereof was not denied. It is important to note that, *ex facie* the documents before the court, the letter of demand, which sets out in detail the applicants' claims for subsidies as well as constitutional compensation, have not been disputed at any stage prior to the filing of the answering affidavit seven months later.

[44] Applicants' detailed analysis of the decline of social services in the Free State,[40] are not denied by respondents.[41] The respondents' meagre three-page response does not pay tribute to applicants' detailed and virtually uncontested testimony. Respondents merely repeat that the Department contributes within its available means.

[45] Serious problems are experienced by the applicants in that the Department does not subsidise private social services sufficiently. These are fully explained in length and will not be mentioned in any detail, save to indicate that there is a need to buy sufficient food for children in care, to provide therapy and to provide for repair and maintenance of vehicles and buildings. In some instances vehicles being used for the transport of children are decades old and need to be replaced.[42]

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[39] Annexure "DWC51" and "DWC52"vol 2 p 666 and further.
[40] Ibid, paras 157 – 205.
[41] Answering affidavit, paras 233 – 237, pp 774 – 776.
[42] Founding affidavit, par 205, pp 119 & 120.

VIII KEY CONSTITUTIONAL AND STATUTORY PROVISIONS

[46] The executive authority of a province is vested in the Premier of that province,[43] who exercises such executive authority together with the other members of his/her Executive Council by developing and implementing provincial policy as set out in ss 125(2)(d).

[47] The public administration must be governed by the democratic values and principles enshrined in s 195 of the Constitution. Nine values and principles are specifically mentioned. It is not deemed necessary to quote these, save to mention that efficient economic and effective use of resources must be promoted, services must be provided impartially, fairly, equitably and without bias, peoples' needs must be responded to, the administration must be accountable and transparency should be fostered by providing the public with timely, accessible and accurate information.[44] Finally, s 237 of the Constitution makes it obligatory that all constitutional obligations must be performed diligently and without delay.

[48] The case applicants try to make needs to be understood in the context of the challenges facing the Free State Province in particular and the Republic of South Africa ultimately. This is evident from the *dictum* in *Mazibuko and others v City of Johannesburg and others*.[45] In that case the court found that the

[43] Section 125(1) of the Constitution.
[44] Subsections 125(2)(b), (d), (e), (f) & (g).
[45] 2010 (4) SA 1 (CC), par 7.

provision of 6 kilolitres of free water per household per month was not unreasonable in the circumstances.

[49] Applicants rely on ss 23, 26, 27 and 28 of the Constitution read with ss 125(2)(d) and 195 and 207 thereof. In order to get a proper perspective of the genesis of the relief sought, it is deemed apposite to quote the relevant parts of sections 26, 27 and 28:

"**26 Housing**

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) …"

27 Health care, food, water and social security

(1) Everyone has the right to have access to-

(a) health care services, …

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

28 Children

(1) 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;

(e) ….

(f) ….

(g) ….

(h) ….

(i) ….

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

(emphasis added)

[50] Contrary to the ss 26 & 27 rights, the s 28 right pertaining to children are not limited to the internal limitation of "available resources". The State has a direct duty to meet the socio-economic needs of children who lack family care. In *Centre for Child Law and Another v Minister of Home Affairs and Others*[46] the court held as follows: "I agree with the view held by Liebenberg that this suggests that the State is under a direct duty to ensure basic socio-economic provision for children who lack family care, as do unaccompanied foreign children. There is thus an active duty on the State to provide those children with the rights and protection set out in s 28."

A similar conclusion was drawn by Murphy J in *Centre for Child Law and Others v MEC for Education, Gauteng and Others*[47] where the court specifically held that, unlike the case in other socio-economic rights, "s 28 contains no internal limitation subjecting them (children's rights) to the availability of resources and legislative measures for their progressive realisation."

[46] 2005 (6) SA 50 (T) par 17.

[47] 2008 (1) SA 223 (T) at 227 I. See also Equal Education and another v Minister of Basic Education 2019 (1) SA 421 (ECB).

These two judgments have not been overturned on appeal or qualified subsequently. I shall return hereto as well as other authority when evaluating the evidence.

[51] The courts should not interfere with the work of the executive and try to take over its role in our communities. This was put as follows in *Albutt v Centre for the Study of Violence and Reconciliation and Others*[48] as follows:

"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. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved."

[52] We live in a country where financial constraints are the order of the day. Businesses, individual persons and Government in all its spheres must budget and budget properly to ensure that they stay within their financial means. This issue was dealt with in *KwaZulu-Natal Joint Liaison Committee v MEC, Department of Education, KwaZulu-Natal and others*[49] where the Constitutional Court acknowledged the budgetary challenges faced by Government as follows:

"…Governance is hard. And the hardest part, no doubt, is budgeting. Government officials are slaves to the resources allocated to them. Budget cuts can lacerate their departmental spending plans and projections. Hence courts should respect the effect of budget cuts. But their impacts on those to whom undertakings have been made should be announced quickly. As

[48] 2010 (3) SA 293 (CC), par 51.
[49] 2013 (4) SA 262 (CC), par 64.

smartly as possible. Constitutional accountability and responsiveness demand this. It can never be acceptable in a democratic constitutional state for budget cuts to be announced to those to whom undertakings have been made after payment has be regulation already fallen due."

[53] The Constitutional Court made it clear that the court should be slow to interfere with rational decisions made in good faith by political organs concerning the allocation of funding, especially in the event of limited resources.[50] In *Soobramoney* the following was also reiterated:[51]

"What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which s 27(3) must be construed." (emphasis added)

[54] It may be an argument to say that there is no money to provide for certain services, but the real question to be considered is whether proper planning and budgeting processes were followed in an attempt by the State to comply with its constitutional obligations. In *Blue Moonlight Properties*[52] the Constitutional Court held:

"… This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state

[50] Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC), par 29.
[51] *Ibid,* par 11.
[52] *Loc cit,* par 74.

that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations." (emphasis added)

[55] In *Mazibuko v City of Johannesburg & others*[53] the court was at pains to explain the positive duties imposed on government by the socio-economic rights in the Constitution and how it will be enforced where the State acts unreasonable. The court went on to warn that the obligation of progressive realisation imposes a duty on the State to continually review its policies. Targets should be set in respect of socio-economic rights the State wishes to achieve. The State should be accountable, responsive and open.

[56] The Constitutional Court in the *KwaZulu-Natal Joint Liaison Committee* judgment[54] dealt with undertakings given by the Government as follows:

"[49] A government promise to pay subsidies in an approximate amount can seldom be incapable of retraction or reduction. The principal reason will usually be budgetary constraints.

[52] …… But in my view it reflects a sound principle of our constitutional law. It is that a public official who lawfully promises to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for their payment has passed. This is not because of a legitimate expectation of payment. Legitimate expectation relates to expected conduct. Rather, this principle concerns an obligation that became due because the date on which it was promised had already passed when it was retracted." (emphasis added)

[53] Loc cit, paras 67 & 70.

[54] Loc cit. See also the recent judgment: Traditional Council and Others v MEC for Education KZN Province and Others [2019] 3 All SA 817 KZP paras 125 – 127 and Pretorius v Transport Pension Fund and others 2019 (2) SA 37 (CC).

The Constitutional Court proceeded as follows:

"[64] … It can never be acceptable in a democratic constitutional state for budget cuts to be announced to those to whom undertakings have been made **after** payment has by regulation already fallen due.

[65] Last, rationality. Government officials must, in dealing with those who act in reliance on their undertakings, act rationally. A budget cut announced in relation to payments promised but not yet made would be regrettable. But it may be rational. Behaviour and expectations can be tailored to it. But it is impossible to tailor behaviour and expectations to a promise made in relation to a period that has already passed. Revoking a promise when the time for its fulfilment has already expired does not constitute rational treatment of those affected by it." (emphasis added)

IX EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY THE PARTIES

[57] I intend to deal with the issues at hand under the following headings:

1. The request for a declaratory order that the failure to implement the 2014 policy is unlawful and invalid (Prayer 1 of the notice of motion), with reference to the alleged lack of funding, which is also linked to sub-paragraph 3 *infra*.
2. Payment of the amounts claimed and the computation of the claims (Prayer 2 of the notice of motion).
3. Progressive realisation of rights (Prayer 3 of the notice of motion).

4. Unfair labour practice and/or unfair discrimination (Prayer 4 of the notice of motion).
5. Constitutional compensation. (Prayer 5 of the notice of motion).
6. Prescription & non-compliance with Act 40/2002.

The request for a declaratory order that the failure to implement the 2014 policy is unlawful and invalid – Prayer 1 of the notice of motion.

[58] Section 38 of the Constitution provides that anyone listed in the section whose constitutional right has been infringed or threatened may be granted appropriate relief, including a declaration of rights. In *Ngomane and others v Johannesburg City and another*[55] the court stated as follows:

> "In the circumstances, the respondents' conduct must be declared inconsistent with the Constitution and therefore unlawful, as required by s 172(1)(a) thereof. This finding entitles the applicants to appropriate relief for the violation of their fundamental rights as envisaged in s 38 of the Constitution."

[59] The *crux* of the matter, as Mr Snellenburg put it, is simply that the relevant respondents never had the available resources to fully fund the obligations in terms of the 2014 policy. This defence, *i.e.* "(t)hat the approved policy could not be implemented due to lack of resources," permeates the entire answering affidavit in numerous paragraphs and according to the applicants, in more than eighty paragraphs. However, I did not deem it necessary to count all

[55] 2020 (1) SA 52 (SCA), par 22.

allegations relying on incapacity, but it is reiterated that incapacity is apparently the only defence relied upon pertaining to the merits.

[60] There is no doubt that the Department must be kept to its promise. In terms thereof several years' subsidy claims have become due and payable. The applicants had a legitimate expectation to receive increased subsidies in accordance with the 2014 policy approved by the High Court in the 2014 judgment and which has been recognised as constitutionally compliant. I refer to the majority judgment by Cameron J in *KZN Joint Liaison Committee.*[56] There is no doubt in my mind that the respondents made a public promise which is enforceable and it would be unconscionable for respondents or any of the Department's employees to renege on the promise. I agree with Mr Du Toit that the respondents could not merely abandon the 2014 policy and in the process rely on the National Department to come up with a new policy. The applicants were fully entitled to assume that the Department would put in well-motivated submissions to Provincial Treasury, and for Province to do likewise to National Treasury, to ensure proper funding as anticipated in paragraph 11.6 of the 2014 policy.

[61] The Premier and the MEC's for the Departments of Social Development and Treasury are bound to implement provincial policy as indicated in s 125(2)(d) of the Constitution quoted *supra*. They should not merely pay lip service to their constitutional duties. It must be remembered that the applicants are in fact executing a service which is ultimately the Department's obligation.

[56] *Loc cit* par 49 & further; Pretorius loc cit.

[62] In *Pretorius and Another v Transport Pension Fund and Others*[57] the court had to deal with the upholding of an exception to a claim against the State based on breach of contract. The plaintiffs pleaded in their particulars of claim that the State unconscionably breached its promise to grant annual pension increases to employees of a State organ. The High Court upheld an exception and the applications for leave to appeal to both the High Court and the Supreme Court of Appeal were dismissed. The Constitutional Court eventually replaced the High Court's order, finding that the defendants' exception had to be dismissed with costs.[58]

[63] It is common cause that the respondents failed to implement the 2014 policy. Mr Du Toit submitted that the respondents' conduct in this regard "constitutes a deliberate unconscionable, unilateral deviation" from the policy. According to him, no answer was offered for the "serious dereliction of duties."

[64] Mr Snellenburg argued that the evidence does not support any finding that the respondents acted or conducted themselves in a manner inconsistent with their constitutional obligations. He submitted that vast engagements were held with various non-profit organisations as explained by the respondents.[59] The National Department of Social Development acted accordingly as it transpired that the 2014 policy would be too costly to implement. Therefore, that policy was reviewed and adapted to be consistent with the Constitution, but simultaneously to allow for progressive realisation of rights which government was statutory bound to

[57] Loc cit.
[58] Ibid, par 58.
[59] Answering affidavit, paras 178 – 218.

uphold. Mr Snellenburg submitted that the process adopted could be criticised and not "liked," but it serves as permissible means to reaching a proper constitutional objective. In this regard he relied on three judgments of the Constitutional Court.[60] I am not prepared to accept that whatever National Government did, could exonerate the Department and respondents in this application from complying with the 2014 policy. This policy has not been replaced or set aside. The parties are reminded that the court granted a structural interdict in 2010 and that the 2014 policy is a result thereof. It received judicial recognition.

[65] In my view, if financial constraints were really the issue, the respondents should have played open cards with the Free State High Court from the beginning, instead of allowing arduous, prolonged and expensive litigation to take place over a period of five years from 2010 to 2014. They could have pleaded incapacity from the onset and an unfavourable judgment could have been taken on appeal. During 2014 and when the matter was heard by Van der Merwe J, the Department had a budget deficit in excess of R400 million as is evident from the judgment. This also appears from the 2014 budget documents placed before me. Notwithstanding this, respondents accepted that the 2014 policy was constitutionally compliant. When the amended policy was placed before the court in 2014, bearing in mind the amendments brought about by Van der Merwe J, and consented to by the respondents, they sincerely promised to implement the policy and to comply with the prescripts thereof, notwithstanding the severe

[60] Minister of Health and others v Treatment Action Campaign and others No 2) 2002 (5) SA 721 (CC), par 49, *Albutt loc cit* par 51 and Law Society of South Africa and Others v Minister of Transport and Another 2011 (1) SA 400 (CC).

decline in the economy long before then as is evident from the four judgments relating to the parties and their predecessors. It is quite amazing that respondents even placed on record in internal documents put before the court that the Department was victorious in obtaining the 2014 judgment.[61] The following statements cannot be ignored: "The Court ruled in favour of the Department and basically found the revised policy compliant …. In essence, the clause as amended (clause 11.6) provides for the manner in which the Department will prioritise its services and the way it will cost each service as well as the stages to be followed for applications for funding…… An essential element of the court ruling was the calculation of funding cost, should core costs be funded for all programmes."

[66] Even insofar as respondents want the court to accept that matters became worse after the 2014 judgment, they should have taken immediate steps to have the policy set aside in a fair and constitutional manner, which they failed to do. It is just not good enough to come up with a new national policy five years after the 2014 judgment and then for the Department to claim that it should be excused from paying what it promised to pay. The subsidy payments for the financial years 2016/2017, 2017/2018 and 2018/2019 became due and payable long before the birth of the new national policy, the status of which is uncertain.

[67] A question to be considered is whether the lack of funding or budgetary provision is an excuse for non-payment. That might have been proven in a different scenario, but in such a case I would have expected the respondents to come to court

[61] 2016/2017 budget submission, annexure "O14" vol 3 p 854.

immediately and ask for the necessary variation or amendment of the 2014 policy. This they failed to do, but instead pursued the formulation of another policy, an initiative of the National Department of Social Development. I have no doubt that respondent had no intention to comply with the 2014 policy, but decided to look for other avenues to escape the consequences thereof. The applicants were at all times entitled to rely on the Department to fulfil its obligations. They had to continue with important programmes regarding vulnerable people in our society in the belief and expectation that they would receive the required financial assistance. However, they were kept on a string. I refer to the 2015 letter of the State Attorney and the 2018 budget speech of the MEC mentioned *supra.*

[68] During the proceedings before Van der Merwe J in 2014 there was talk of a national policy to be drafted as I gather from the judgment, but notwithstanding such negotiations the respondents agreed to the outcome of the 2014 judgment. I have reason to believe that the respondents deliberately elected to wait for the National Department to craft a new policy and in the meantime made discretionary subsidy payments contrary to the prescripts of the 2014 policy. Consequently, it is not surprising that the Department did not disclose its attempts over the past few years to convince Treasury to ensure that it abides by the 2014 policy. I agree with the applicants that as a result of this the Department took no trouble to propose a proper business case to Treasury and that being the case, the defence of lack of funding has no merit.

[69] I accept that budgets were prepared, incomplete extracts of which are attached to the answering affidavit.[62] I mention just one example: it is unknown how many pages the 2016/2017 budget consists of, but only 2 pages – 10 and 11 - are attached. The figures contained in the table on page 11 are virtually illegible. It is not clear what the total budgets for each year were, how these were calculated, for what services amounts were required and what percentage thereof was claimed in respect of the applicants' needs. Respondents elected to attach numerous pages, but failed to explain, or direct the court's attention to, specific issues. I had to trawl through the incomplete documents to try and establish what they intended me to understand. On page 10 of the 2016/2017 budget the amounts of R1 600 million and R1 385 000 million were "requested" for the 2016/2017 and 2017/2018 financial years respectively without explaining how these amounts have been calculated. The Provincial Treasury may not have provided funds as requested by the Department, but in my view it was just not good enough in the circumstances to rely on vague information. I also accept that allocations to provincial governments were cut by National Treasury due to economic pressures and that the large wage bill in particular, which increased through the years to an unprecedented level, made it difficult to make ends meet.

[70] I again refer to paragraphs 26 and 27 of the 2014 judgment quoted *supra*. No proper business plan was ever drafted and forwarded to Treasury *ex facie* the documents presented to court. Applicants

[62] 2014 budget: annexure "O9" p 819; 2015 budget; annexure "O10 p 834; 2016/2017 budget: annexure "O14" p 854 and the further budgets ranging from annexures "O18" p 878 – "O 25 p 932.

asked for that in vain. I asked during oral argument to be directed to a relevant document, but in vain. Van der Merwe J's positive remark that he "cannot imagine that Treasury will not give serious consideration to such properly motivated and costed request for funding" must be seen in light of the Department's apparent commitment to comply with its obligations. I also refer to the following suggestion as quoted in paragraph 30 of the judgment: "The department says that if the third revision is approved now, the benefits will only begin to realise in the 2016/2017 financial year, as a result of the government budgetary processes."

[71] There is no reason why a declaratory order as set out in prayer 1 of the notice of motion should not be granted.

The claims for payment and the computation of the claims – Prayer 2 of the notice of motion

[72] No doubt, a declaration of rights on its own is patently not an appropriate remedy. What then would be an appropriate remedy in this factual scenario? Applicants claim payment of subsidies payable under the 2014 policy for a number of years, alternatively constitutional compensation. I deal in this chapter with the applicants' monetary claims based on the 2014 policy. I need to point out that, as is evident from the answering affidavit, the computation of the claims is not seriously challenged.

[73] The applicants' claims have been properly calculated and set out in the papers. The submission on behalf of respondents that applicants themselves do not know what they are entitled to must

be seen in proper perspective. The applicants obviously considered that the court may not be prepared to grant payment pertaining to subsidies for the 2016/2017 and 2017/2018 financial years, but only from the subsequent financial year. I did not find any difficulty to understand the method of calculation as explained which are clearly in line with what KPMG, correspondents' auditors, had in mind. It is not good enough for respondents merely to say that they do not agree or do not understand the calculations. They had the benefit of auditors who assisted them in preparing the 2014 policy and could have made use of them or any other firm of auditors if they did not understand the calculations. A party in an opposed application cannot merely deny and then sit back without placing sufficient facts before the court to substantiate the denial.[63]

[74] The applicants' calculations are easy to understand. One does not have to be a rocket scientist to follow the methodology and calculations. The deponent to the founding affidavit, a qualified accountant, and Mr Church, an internal auditor with Engo,

[63] Wightman t/a J W Construction v Headfour (Pty) Ltd & another 2008 (3) SA 371 (SCA) at par 13 which reads as follows: "A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter." (emphasis added); See also Monde v Viljoen N.O. and Other 2019 (2) SA 205 (SCA) at par 8.

prepared the relevant spreadsheets. Their expertise have not been attacked at all. I am amazed that respondents suggest in two short sentences that "none of the amounts are lucidly quantified to enable the Court to ascertain without ado how they are calculated" and "amounts claimed could not be readily ascertained from the calculations."[64] Surely, the MEC should not speak for the court and if she as deponent is not conversant in arithmetic, not to speak of mathematics, someone in the Province, perhaps Treasury, could have assisted. The calculations have been prepared for the 2015/2016, 2016/2017, 2017/2018 and 2018/2019 years, but applicants claim for the last three financial years only. The alternative amounts have been calculated on the basis that the court might find that the expectation harboured is only relevant to the 2018/2019 financial year. Obviously, the alternative amounts claimed are much less than the main amounts and not because the applicants are uncertain of their calculations as vaguely suggested on behalf of the respondents.

[75] An aspect that cannot be disregarded is the fact that the application was only issued in 2019 and heard by me in March 2020 and thus a few days before the end of the 2019/2020 financial year. In the meantime, life has gone on and applicants had to make good with the funds received from the respondent as well as those raised from their donors. It is therefore a question of fairness also and the matter cannot be considered in exactly the same way as a court would have done in a normal creditor/debtor relationship. The amounts claimed are in excess of R340 million. These amounts must be considered with the subsidies actually

[64] Vol 3 par 98.8 p 711 and par 231 p 773

received over the period, which is but a few million rand, and the fact that the applicants could still, notwithstanding the lack of proper funding, carry on with their obligations. The facts are a bit different from those where textbooks are immediately needed for a particular school year to mention one example only. However, it must be accepted that children and older people's care is a day in and day out commitment: a never-ending obligation. In an attempt not to cause unnecessary hardship to the Department in particular and Province in general, I shall resist from granting the main claims set out in prayer 2 of the notice of motion. However, the Department shall at least be held liable for subsidy payments for the 2018/2019 financial year, *i.e.* the alternative amounts claimed in prayer 2. These amounts can be obtained from reprioritising its budget, as it is fully entitled to do.[65] The Department's total annual budget is in excess of a billion Rand and it would be possible to make required re-adjustments to settle the applicants' claims.[66]

Progressive realisation of rights - Prayer 3 of the notice of motion

[76] The evidence is clear. The Department never had in mind to implement the 2014 policy notwithstanding some attempts to communicate this, the reason being that it believed that a national policy would be crafted by government which would be applicable to all provinces in future.

[65] Answering Affidavit, vol 3 paras 229.3 and 229.9 pp 768/9

[66] The Department did not spend R55 m of its R1.1 billion budget in the 2017/2018 financial year, 5% of its annual budget and it asked for a roll-over of funds. See also the 2019 MTEF Budget submission, annexure "023" p 922; see also ss 25, 31 and 43 of the Public Finance Management Act, 1 of 1999

[77] The socio-economic rights contained in ss 26, 27 and 28 of the Constitution need to be considered. In ss 26 and 27 internal limitations have been built into the text and it is incumbent on a litigant asserting his/her rights to demonstrate a violation of the right through a failure by the State to take reasonable measures for its progressive realisation. The same internal limitation is not found in s 28 dealing with children.

[78] In *Minister of Basic Education v Basic Education For All and others ("BEFA"),*[67] yet another matter dealing with basic education, the Supreme Court of Appeal, relying on the Constitutional Court judgment in *Juma Musjid,*[68] held the same approach than the single judges in the two *Centre for Child Law* judgments quoted earlier when it came to the s 29(1) right of children to be provided with text books. The court had to grapple with the Government's failure to provide official textbooks to children in yet another case where the State raised the defence of budgetary constraints and separation of powers as justification for failure to deliver on its constitutional mandate. During argument the Department submitted that it could not be held to the ideal of providing a textbook for each learner as that equates to "a standard of perfection."[69] The court held that the Department's management plan "was inadequate and its logistical ability woeful." It carried on, stating that: "The undertaking by the DBE which is encapsulated in para 3 of the order by Tuchten J and the prior undertakings contained in orders by Kollapen J fly in the face of the contention on behalf of the DBE that it is restricted by budgetary constraints. For all the reasons set out in this

[67] 2016 (4) SA 63 (SCA).
[68] *Governing body of Juma Musjid Primary School and Others v Essay P NO and others (Centre for Child Law and Another as amici curiae)* 2011 (8) BCLR 761 (CC).
[69] BEFA, par 41.

paragraph the reliance by the DBE on budgetary constraints can rightly be discounted."[70] (emphasis added)

[79] It needs to be considered whether there are any reasonable and justifiable limitations of the socio-economic rights relating to ss 26 and 27. I agree that in the circumstances of this case, it is relevant to consider whether the defence of budgetary constraints meet the aforesaid standard with particular reference to s 36 of the Constitution.

[80] Although, a case as the present calls for a different enquiry when factual disputes have to be resolved, notwithstanding my reference to *Wightman supra*, it does not mean that there is no duty on respondents to establish a justifiable limitation on the applicable socio-economic rights, especially insofar as facts that might constitute justification are within their particular knowledge.

[81] The respondents' acknowledgment that they failed to comply with their constitutional obligations in terms of the 2014 policy due to incapacity is dispositive of this application. It is clear that they do not seek to justify the limitation against the requirements set out in s 36 of the Constitution. It was set out clearly in *Moise* in the following words:[71]

"Although the burden of justification under s 36 is no ordinary *onus*, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment."

[70] Ibid, par 43.
[71] *Loc cit.*

[82] Insofar as the respondents seek to justify the limitations contained in s 36 of the Constitution against the requirements of the section, it is common cause that the respondents admit their incapacity to comply with the constitutional obligations of the 2014 policy.

[83] In *Mazibuko*[72] the court stated:

> "59. … Social and economic rights empower citizens to demand of the State that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights."

[84] In *Juma Musjid Primary School*[73] the Constitutional Court stated emphatically that the right to a basic education in terms of s 29(1)(a) "is immediately realisable" and may only, in terms of s 36(1) of the Constitution, be limited in terms of a law of general application that is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

[85] In yet another case the State alleged that it was unable to afford further expenditure on education, whilst in that case imposing differential treatment on intellectually disabled children claiming that it was justifiable to do so and that there was a rational connection to a legitimate government purpose. The defence was rejected in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*[74]. This judgment was not qualified in any subsequent judgment or overturned on appeal.

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[72] *Loc cit*, par 59.
[73] Loc cit, par 7.
[74] 2011 (5) SA 87 (WCC).

[86] The question of limitation is ultimately one of proportionality involving the balancing of different interests as set out in *S v Manamela and another (Director General of Justice intervening)*[75] and I quote:

"32. … In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, applying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."

[87] In considering the evidence eventually I shall also take cognisance of the following two judgments, to wit *Minister of Home Affairs v National Institute for Crime Prevention and Reintegration of Offenders and Others ("NICRO")*[76] and *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)*[77]. In *NICRO,* the court stated[78]:

"This calls for a different enquiry to that conducted when factual disputes have to be resolved. In a justification analysis facts and policy are often intertwined. There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data."

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[75] 2000 (3) SA 1 (CC), par 32.
[76] 2005 (3) SA 280 (CC).
[77] 2001 (4) SA 491 (CC), par 19.
[78] NICRO, par 35.

In *Moise* the court held as follows:[79]

"It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but…, the party contending for justification must put such material before the Court."

[88] In *Equal Education and Another v Minister of Basic Education*[80] the Court had to deal with a defence by the Minister that the State did not have access to money for the improvement of a school's infrastructure. It was also alleged that it depended on other State organs for the revision of the infrastructure. The defence was rejected, but the court went further and stated that the Minister's version that her hands were tied "compromised the constitutional value of accountability," causing the public to be "hamstrung by this."[81] The court eventually held that the response of the Minister in resisting the relief sought by the applicant and offering nothing as an alternative, was untenable, unreasonable and unacceptable.[82] It is to be recorded that the court relied, not only on *Botsotso and others v Minister of Basic Education and others,*[83] but particularly on *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others.*[84]

[79] Moise, par 19, which dictum was applied in Phillips and another v Director of Public Prosecutions (WLD) and others 2003 (3) SA 345 (CC) & NICRO, loc cit.
[80] 2019 (1) SA 421 (ECB).
[81] *Ibid,* paras 182 - 184 respectively.
[82] Ibid, par 198.
[83] 2014 (3) SA 441 (SCM), par 34.
[84] 2005 (2) SA 359 (CC), paras 75 & 76 thereof in particular.

[89] I am satisfied that the respondents' alleged budgetary constraints do not meet the test for reasonable and justifiable limitation as they have failed to place sufficient information before the court to discharge this obligation.

[90] The Constitutional Court clearly indicated in *Blue Moonlight*[85] that a plan or policy for the discharge of the State's obligations must be based on a correct interpretation of the right. In going to court in 2014 (in fact from 2010 to 2014) and drafting revised policies, the latest which was eventually accepted by the court with certain amendments, the Department and its functionaries clearly indicated that it would be able to plan and budget for the provision of social services in terms of that policy. Therefore, and if it can be said that there was no proper planning and/or budgeting, the Department should bear the brunt for lack of planning and budgeting in order to fulfil its obligations.

[91] The s 28 rights pertaining to children need to be considered. The value of accountability cannot be over-emphasised. I agree with Mr Du Toit that there is a clear commonality between the protection of children's rights in terms of s 28 of this matter and the rights of children to schooling as set out in *inter alia Equal Education and Another v Minister of Basic Education and Others.*[86]

[92] I reiterate what was held by the Constitutional Court:[87] "(I)t can never be acceptable in a democratic constitutional state for budget cuts to be announced to those to whom undertakings have been made after payment

[85] *Loc cit*, par 74.
[86] *Loc cit.* See also Madzodzo & Others v Minister of Basic Education and Others 2014 (3) SA 441 (ECM).
[87] KwaZulu-Natal Joint Liaison Committee *loc cit*, par 64.

has by regulation fallen due." As quoted earlier, the court accepted in paragraph 65 that a budget cut may be announced pertaining to payments promised, but not yet made, although it would be regrettable. In such a case it is expected of government to act rationally. No announcements of any budget cuts have been made herein. Applicants received less than expected, but always believed matters would be rectified in the next financial year. This did not materialise.

[93] In *BEFA*[88] the court held that the Department of Basic Education's "management plan was inadequate and its logistical ability woeful." The same is equally true in this case and the Department's defence should fail. I do not intend to repeat what I have said earlier, save to mention that it is crystal clear that respondents embarked upon a path that led them in a totally different direction than the one anticipated by Van der Merwe J in the 2014 judgment. Instead of a progressive realisation of rights, there was a marked regression. Respondents admit that they failed to comply with the 2014 policy, let alone to improve on it.

Unfair labour practice and/or unfair discrimination - Prayer 4 of the notice of motion

[94] Applicants also rely on the right contained in s 23 of the Constitution pertaining to unfair labour practice. They also complain about unfair discrimination, bearing in mind the unequal salary structure of their employees compared to that of the State

[88] Loc cit, par 43.

employees. I have considered this, but do not believe that any order should be made in this regard.

[95] Firstly, the applicants accepted the constitutionality of the 2014 policy and it is not for them now to try and renege thereon pertaining to discrimination and/or unequal salary payments. They cannot blow hot and cold, or approbate and reprobate.

[96] Secondly, it is not the Department's constitutional obligation, either in terms of the 2014 policy or at all, to settle all expenses of the applicants. The policy provides for annual increases in respect of certain items based on inflation, but salaries of personnel were expressly excluded. The Department promised to pay a subsidy, calculated by its auditors in conjunction with it, which is no more than a contribution to the expenses of the NPO's. I accept that salary payments form part of the core costs agreed upon in 2014, but annual salary increases were not promised. It is a fact that over the years government employees have received massive salary increases, often far in excess of the inflation rate, due to the actions of labour unions. The Department acknowledges that its salary account has grown enormously and to an exceptionally high percentage of its overall expenses. Applicants and their employees cannot expect that employees in the private sector, even social workers and others doing exactly the same kind of work as government employees, may claim as of right that they are entitled to similar increases all the time.

[97] Mr Merabe on behalf of the applicants tried to convince me on the basis of the partnership agreement between the Department and

the NPO's as set out in the 2003 policy, that unfair discrimination and an unfair labour practice are the order of the day and in order to be constitutionally compliant the salary scales of applicants' employees should be on par with those in the public sector. I do not agree and do not intend to labour the issue any further, save to mention that the reliance on *Minister of Finance and Others v Van Heerden*[89] and *Governing Body of the Juma Musjid Primary School v Essay N.O. and Others*[90] do not support the case the applicants try to make out.

Constitutional compensation – Prayer 5 of the notice of motion

[98] Applicants submitted in the alternative with reference to *Fose v Minister of Safety and Security*[91] that the court should grant constitutional compensation.

[99] In *President of the RSA v Modderklip Boerdery (Pty) Ltd*[92] constitutional compensation was awarded to the owner of immovable property for the unlawful occupation of its property in violation of its rights. In this case, the State was not mulcted in paying something which it would not in any event have been liable for elsewhere and therefore no additional burden was placed on the fiscus. *In casu* the applicants seek constitutional compensation in the alternative and not over and above payment of the subsidies they aver being entitled to.

[89] 2004 (6) SA 121 (CC), par 26.
[90] *Loc cit*, par 57.
[91] 1997 (3) SA 786 (CC).
[92] 2005 (5) SA 7 (CC).

[100] *MEC, Department of Welfare, Eastern-Cape v Kate*[93] concerns a claim for constitutional compensation due to the late payment of social grants which had become endemic in the Eastern Cape at the time. The court accepted the following:[94]

> "Whether relief in that form (monetary damages) is appropriate in a particular case must necessarily be determined casuistically, with due regard to, among other things, the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned."

[101] In *Mahambehlala v MEC for Health Care, Eastern Cape* [95] Leach J (as he then was) ordered constitutional relief in similar circumstances, to wit the capital amounts that the applicants would have been paid if their applications for social grant had been timeously approved as well as interest on the prescribed legal rate on all arrear capital amounts until date of payment.

[102] It is evident that after many years of litigation in order to ensure that a constitutionally compliant policy be devised under repeated directions by this court, a final policy was accomplished in 2014. One would have thought that this would have been the end of the matter and it is also apparent from the remarks made by Van der Merwe J in the 2014 judgment as indicated *supra*. Unfortunately things did not transpire accordingly. I accept that this type of relief is not yet common in this country and there is no doubt that a casuistic development of the law should take place. On the basis

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[93] 2006 (4) SA 478 (SCA).
[94] Ibid, par 25.
[95] 2002 (1) SA 342 (SE).

that I may be held to be wrong in granting orders for payment in accordance with the relief claimed in prayer 2 of the notice of motion, *i.e.* the main or alternative relief, it is necessary to consider whether constitutional compensation should be awarded.

[103] The respondents dragged their feet initially and caused a delay of five years before the 2014 policy was eventually held to be constitutionally compliant. Furthermore, instead of immediately approaching the applicants, and in the event of their unwillingness to negotiate, the court to amend, terminate or substitute the 2014 policy due to financial constraints, they ignored their constitutional obligations for years, apparently waiting for the national department to come up with a new national policy. In the process many vulnerable children and older persons under the care of applicants did not receive benefits which would otherwise be the case if there was proper compliance.

[104] In the event that it could be held that applicants failed to make out a case for payment of subsidies as claimed in prayer 2 of the notice of motion, I am of the view, based on what I have stated herein pertaining to the attitude of the respondents, that a proper case has been made out for constitutional compensation. The applicants insist that Act 40 of 2002 does not apply and that demand in terms of the Act was not required, but decided to claim lesser amounts in the alternative in the event of a finding that the Act applies.

Prescription & non-compliance with Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002

[105] It is not necessary to deal with this issue in any detail in light of my finding *supra* in respect of prayer 2 of the notice of motion, but I deem it appropriate to mention the following. Respondents vaguely submit that some of the debts due on applicants' version have become prescribed. They mention this in the context of a condonation application insofar as an applicant applying for condonation in terms of Act 40 of 2002 is required to show that the debt relied upon has not become prescribed. I do not know which debts they refer to as they failed to explain. Some of the subsidies payable in respect of the 2016/2017 financial year might have been payable more than three years before the application was served. There is uncertainty in this regard. All payments are not due on the 1st day of a financial year, to wit in this case the 1st April.

[106] Respondents rely on a lack of demand in terms of Act 40 of 2002. It is their case that applicants are claiming damages and that ss 3(1) and 3(2) of this Act are applicable. The monetary claims set out in prayer 2 of the notice of motion cannot with the best will in the world be regarded as delictual claims or claims for damages. These claims are based on promises made by the Department in relation to its undertaking to implement the 2014 policy. The question to be decided is whether the claims for constitutional compensation are akin to claims for damages to which the Act applies.

[107] I do not agree with Mr Du Toit's submission that the compensation claimed is not a debt as defined in Act 40 of 2002. It appears as if

constitutional compensation is regarded as damages whereby the common law delictual action for damages is extended. I refer to the remarks of Ackermann J in *Fose* and the reference thereto by Nugent JA in *Kate* who also referred to "damages" instead of "compensation."[96] Insofar as Act 40 of 2002 applies, applicants would only be entitled to the alternative amounts claimed in prayer 5 of the notice of motion. In conclusion, if I would not be inclined to grant relief as requested in prayer 2, I would have granted compensation in terms of prayer 5.2 of the notice of motion.

X COSTS

[108] The applicants have achieved substantial success and there is no reason why they should not be granted costs as well, such costs to include the costs of two counsel.

XI ORDERS:

[109] The following orders are made:

1. It is declared that the failure by the first, second and third respondents to implement the 2014 policy in respect of social service delivery approved as constitutionally compliant by the Free State High Court on 28 August 2014, (under case no 1719/2010), and more specifically to pay subsidies calculated in terms of the said policy is inconsistent with sections 125(2)(d), 195 and 237 of the Constitution and is accordingly unlawful and invalid.

[96] Kate, loc cit paras 25 – 27 & 33.

2. Payment by second and third respondents jointly and severally:

   2.1 To the first applicant in the amount of R60 696 176.98 (sixty million, six hundred and ninety six thousand and one hundred and seventy six Rand and 98 cents);
   2.2 To the second applicant in the amount of R50 239 097.76 (fifty million, two hundred and thirty nine thousand and ninety seven Rand and 76 cents);
   2.3 To the third applicant in the amount of R9 298 636.98 (nine million, two hundred and ninety eight thousand and six hundred and thirty six Rand and 98 cents);

3. It is declared that the failure by first, second, third, fourth and fifth respondents to develop the 2014 policy or to develop another policy for the payment of social service subsidies in the Free State by setting clear targets and setting out the way in which to achieve those targets for the progressive realisation of the section 26 and 27 rights of children, older and other vulnerable persons in the Free State and the realisation of the section 28 Constitution rights of children in the Free State, is unconstitutional, and accordingly unlawful and invalid;

4. Interest *a tempore morae* shall be payable in respect of all monetary claims at the prescribed rate from date of service of this application to date of payment.

5. First, second, third, fourth and fifth respondents are directed to pay the costs of this application, including the costs of two counsel, jointly and severally, the one paying the others to be absolved.

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J P DAFFUE, ADJP

On behalf of Applicants	:	Advv JI du Toit SC & MJ Merabe
Instructed by	:	HURTER & SPIES INC c/o ROSSOUWS ATTORNEYS BLOEMFONTEIN
On behalf of Respondents	:	Advv N Snellenburg SC & K Nhlapo
Instructed by	:	STATE ATTORNEY BLOEMFONTEIN