IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: UM181/2022
Reportable: NO
Circulate to Judges: NO
Circulate to Magistrates: NO
Circulate to Regional Magistrates: NO

In the matter between:-

AGE IN ACTION: NORTH WEST	**APPLICANT**
and	
MEC FOR SOCIAL DEVELOPMENT, NORTH WEST	**1st RESPONDENT**
HEAD OF DEPARTMENT: DEPARTMENT OF SOCIAL DEVELOPMENT, NORTH WEST PROVINCIAL GOVERNMENT	**2nd RESPONDENT**

This judgment is deemed to be handed down electronically on 8 May 2023 by e-mail distribution to the parties' representatives.

KEYWORDS

Civil applications – review applications – PAJA

JUDGMENT

FMM REID J (FORMERLY SNYMAN):

Introduction

[1] This application was initially brought as an urgent application on 6 October 2022 when it was struck from the roll for want of urgency. It now serves before me in the normal course of allocations.

[2] The purpose of the application is to judicially review and set aside the decisions of the 2nd respondent being the Head of Department (HOD) of the Department of Social Development, North West Provincial Government to refuse the applicant's application for funding for the 2021/2022 and 2022/2023 financial years. The application is brought in terms of section 6(2) of the **Promotion of Administrative Justice Act** 3 of 2000 (PAJA).

[3] In addition to reviewing and setting aside the decision of the HOD to refuse funding for the 2021/2022 and 2022/2023 financial years, the applicant further seeks relief to the following effect:

3.1. That the Court should substitute the refusal of the HOD with an approval for the funding for the aforementioned financial years;

3.2. That the 1st respondent (MEC: Social Development, North West) and the 2nd respondent (HOD: Department of Social Development, North West Provincial Government) be directed to enter into service level agreements with the applicant for the provision of funding for the 2021/2022 and 2022/2023 financial years in amounts commensurate with the funding provided to the applicant in previous years;

3.3. That the MEC and HOD are directed to make payment of the funding due and payable to the applicant within 30 days from the date of this Order;

3.4. That the MEC and HOD are directed to pay the applicant's cost,

including the cost of two (2) counsel.

[4] The applicant is represented by Adv Ori Ben-zeev and the respondents are represented by Adv Tumelo Loabile-Rantao.

[5] In summation, the applicant seeks that the Court should review and set aside the decision made by the respondents that the applicant did not qualify for funding for the aforementioned two financial years, and replace it with an order that the applicant should be funded by the respondents for the aforementioned period.

Factual Background

[6] The majority of the facts are common cause and can be summarised as follows. The applicant provides care and services to older people in the North West Province (the Province) and has been doing so **since 1994**. The scope of the outreach and work done by the applicant extends to approximately 10,000 older people who are resident in the Province. The applicants claim that there is no other entity which provides such services as the applicant provide to the elderly in the Province. The respondent denies this and state that there are other organisations working with the respondents to provide the same or similar services to the elderly in the Province.

[7] **Since 2002** the North West Department of Social Development (the Department) has provided the applicant with funding to enable the applicant to provide social assistance and social services to the elderly. In doing this, the Department acted in accordance with its constitutional duty to fulfil its constitutional responsibilities towards the elderly citizens of South Africa with specific regard to the following rights of the elderly citizens: their right to dignity (as envisioned in section 10 of the **Constitution of the Republic of South Africa** 1996 – the Constitution), the right to freedom and security of the person (as envisioned in section 12 of the Constitution) and the right to healthcare, food, water and social security (as envisioned in section 27 of the Constitution).

[8] The applicant also fulfilled this duty in that the Department acted in compliance with section 7 of the **Older Persons Act** 13 of 2006 (the Older Persons Act) by granting funding to the applicant. The Older Persons Act protects the rights of older people to:

8.1. Participate in community life;

8.2. Establish and participate in activities in structures and associations for older persons;

8.3. Participate in activities that enhance their income generating capacity;

8.4. Live in an environment that caters for the changing capacities of the elderly; and

8.5. Access opportunities to promote their optimal level of social, physical, mental and emotional well-being.

[9] It is argued by Adv Ben-zeev on behalf of the applicant that the applicant, in receiving funding from the Department in the fulfilment of these constitutional rights, became the “face” and the “operational arm” of the Department for the purposes of carrying out the constitutional obligations. As such, so the argument goes, the contract between the applicant and the respondents allows the applicant and respondents to perform public duties under the Constitution and the Older Persons Act.

[10] At the centre of the dispute lies the Service Level Agreement (SLA) that the Department entered into with the applicant for financial assistance to the applicant for the 2020/2021 financial year. The last date that the Department made any payment to the applicant was in **March 2021** in accordance with the SLA.

[11] The respondents' case is that the respondent acted reasonable and fair and that funding in favour of the applicant was refused on the basis that the applicants:

11.1. Failed to comply with the tax requirement and the applicant was tax non-compliant; and

11.2. Transferred money that was left over from one financial year, into another account against the provisions of the SLA and the **Public Finance Management Act** 1 of 1999 (PFMA).

[12] It is argued by Adv Loabile-Rantao on behalf of the respondents that the relief sought against the respondents is unsustainable as it would result in funding being granted in contravention of the PFMA. In further argument, Adv Loabile-Rantao submits that the granting of the relief to the applicant may set a dangerous precedent in the governmental sphere of allocating public money to private entities or any Non-Profit Organisation (NPO) where those entities did not adhere to the requirements stipulated in the SLA and the PFMA. This may lead to unprecedented consequences as prospective funding applicants may form an expectation to be granted funding on the basis that they have previously been granted funding, despite their failure to comply with the SLA and PFMA.

[13] In addition to the above, the respondent's case is that the Court should not interfere with a discretionary power exercised by the respondents, which are organs of state and the Court should adhere to the doctrine of separation of powers. It is also argued on behalf of the respondents that the Court cannot order retrospective funding to be granted for two (2) financial years which has past. The financial years for which the applicant seeks funding is the 2021/2022 and 2022/2023 financial years, which financial years have been closed and finalised. The respondents have informed the applicant that refusal for funding does not preclude the applicant from making future applications for any future fundings.

[14] The respondent provides the following detail in setting out in which manner the applicant failed to comply with the SLA:

14.1. Clause 6.1.2 of the SLA states that the applicant undertakes to *"obtain written approval from the head of Department or his/her delegate prior to any deviation from the service plan."*

14.2. Clause 9.8 of the SLA states that *"… in the event that there are unspent funds as at the 31st of March 2021, the unspent funds shall be disclosed to the Department and returned within 30 calendar days to the Department calculated from the 1st of April 2021."* The respondents state that the applicant has failed to inform the Department of the unspent funds and also failed to return the funds within 30 days.

[15] The respondents state that the applicant had no intention to comply with clause 9.8 of the SLA, since the applicant had compiled an implementation plan in terms of which the funds were transferred for future use. The respondent highlights, however, that the SLA does not provide the applicant with any discretion to utilise unspent funds in terms of an implementation plan, or that funds are to be put in any other account than the account as specified in clause 9.6 of the SLA.

[16] It is common cause that the applicant has transferred unspent money to another account. The argument of the applicant is that the funds were only allocated to them very late in the financial year, and that the respondent was aware of the implementation plan which mandated such a transfer for future use.

Grounds for review

[17] The applicant raises the following grounds for review in terms of PAJA:

17.1. That the respondents were bias and the decision should be reviewed in terms of section 6(2)(a)(iii) of the PAJA.

17.2. That the respondents acted unreasonable and arbitrarily in refusing funding for the applicable financial years.

17.3. That the respondents did not apply its mind in whether the applicants are tax-compliant or not and the applicant submitted printouts of the CSD system indicating that the applicant was tax compliant for the course of June 2021 to June 2022. The applicant alleges that the decision to refuse funding, was not rationally connected to the facts before the Department and falls to be reviewed and set aside in terms of section 6(2)(f)(ii)(cc) of the PAJA.

17.4. That the respondents, in refusing funding to the applicant, infringes on the constitutional rights of the beneficiaries of the applicant.

17.5. That the decision to refuse funding amounted to an unreasonable form of punishment against the applicant and had no lawful basis under the PFMA.

17.6. That the respondents were unduly formalistic in persisting that the transfer of funds in terms of the implementation plan was not in accordance with the SLA or the PFMA.

[18] It is argued on behalf of the applicant that a forced closure of the applicant will be inevitable in the event that this application fails. The argument is that this forced closure will be as a result of the Department's unfair and unjust refusal to fund the applicant will result in a massive transfer of the beneficiaries to the Department and other organisations which do not appear to have the capacity to assist these beneficiaries. The applicant compares this to the mass transfer of patients from Life Esidimeni by the Gauteng Department of Health that was criticised and held to be unlawful by the former Deputy Chief Justice

in the arbitration of the **Life Healthcare Esidimeni Arbitration Award** as found in **Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project v National Minister of Health and Others**. The Life Esidimeni tragedy involved the deaths of 144 people at psychiatric facilities in the Gauteng province of South Africa from causes including starvation and neglect.

[19] The respondents oppose the application to review and set aside its decision to not provide funding to the applicant, on the following basis:

19.1. That the respondent did not act bias, prejudicial, arbitrarily or unreasonable in failing to grant the funding.

19.2. That the respondents have a legislative duty in terms of the PFMA to deny the applicant funding when the PFMA has not been complied with on previous occasions.

19.3. That the respondents have legitimate reasons for denying the applicant's application for funding.

19.4. The Department gave the applicant reasonable opportunities to make representations prior to the Department's decision to refuse funding, which was done in terms of Section 3(2)(b)(ii) of PAJA.

19.5. The applicant was furnished with reasons for the decision why funding was not approved.

[20] It is argued on behalf of the respondent that the refusal of funds was for reasonable reasons and on a well-considered basis. The respondents case is that providing funding to the applicant would be in contravention of the respondent's duties in terms of the PFMA and is not possible due to the closing of the financial years.

Tax compliance

[21] The respondent works on a system called the Central Supplier Database (CSD) which generates a report for the supplier outlining the supplier's information which includes the supplier's tax status. The respondent states that the CSD indicated that the applicant was tax non-compliant and as such was disqualified in receiving funding.

[22] The applicant attaches print-outs from the CSD which indicate that the applicant was tax compliant in the CSD over the course of June 2021 to June 2022. The applicant states that these printouts were provided to the Department when-ever the Department requested proof of the applicant's tax compliance.

[23] The respondents state that the tax certificate presented in support of the application for funding, was insufficient for two (2) reasons:

23.1. The tax certificate lapsed on 13 March 2022 which is before the decision was taken to refuse funding. The fact that the tax certificate has lapsed is admitted by the applicant.

23.2. That the CSD System indicated that the applicant is not tax compliant.

[24] In relation to the lapsing of the certificate, the applicant's case is that the certificate lapsed as a result thereof that the Department took an unreasonable long time of more than two (2) months to make its decision whether funding would be granted or not. The applicant further states that the Department should have enquired from the applicant whether the applicant was tax compliant and if necessary, called for a fresh compliance certificate.

[25] The documents before Court support the version of the respondents that the applicant was not tax compliant when the decision was made to refuse funding for the relevant financial years. At the very least, it appears to be common cause that the CSD database did not reflect that the applicant was

tax compliant when the application for funding was considered.

The Service Level Agreement (SLA)

[26] The respondents argue that the applicant undertook in the SLA to source other funding to be able to sustain itself beyond the Department's funding. In clause 7.3 of the SLA the parties agree that:

> *"The Organisation agrees to source funding from other sectors in order to enable it to sustain itself even beyond the Departmental funding and shall declare such sources and the actual funding received by the Organisation."*

[27] The SLA specifically determines that previous funding do not entitle the applicant to future funding. Clause 7.2 of the SLA states that:

> *"This agreement does not purport to create rights and entitlement to funding from the Department to the Organisation."*

[28] The respondent states that the applicant's argument cannot be sustained that the applicant solely relies on the respondents for funding, and that the applicant is entitled to funding, and has a right of expectation to receive funding in order to fulfil its, as well as the respondent's, constitutional obligations as set out above.

[29] The applicant states that the implementation plan was discussed with the Department and as such the transfer of the unspent money was not done in contravention of the SLA. In addition, the applicant confirms that the unutilised funds were transferred to a separate Money-on-Call bank account and that the applicant was entitled to do this since there is nothing in the PFMA or in the SLA that prohibits this. The applicant's case is that the respondents were aware of the implementation plan and the transfer of funds, and as such a refusal for funding amounts to an unduly formalistic approach which should not prejudice the applicant.

[30] The facts common cause indicate that the applicant has transferred unspent money to another account than the one specified by the SLA. Whether the Department was aware of this transfer, is of no relevance and does not assist the applicant as the transfer of money was never agreed to in writing as stipulated in the SLA.

[31] Any changes to the SLA can only be done in writing, which was not done.

Legal position

[32] Section 6(2)(f)(ii)(cc) of the **Promotion of Administrative Justice Act** 3 of 2000 reads as follows:

> *"**6 Judicial review of administrative action***
>
> *(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*
>
> ***(2) A court or tribunal has the power to judicially review an administrative action if-***
>
> *(a) the administrator who took it-*
>
> *(i) was not authorised to do so by the empowering provision;*
>
> *(ii) acted under a delegation of power which was not authorised by the empowering provision; or*
>
> *(iii) was biased or reasonably suspected of bias;*
>
> *…*
>
> ***(f) the action itself-***

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to*-*

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator*; or*

(dd) the reasons given for it by the administrator"

[33] In the matter of **Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA** 2015 (5) SA 245 (CC) considered the circumstances where a Court could substitute its own decision for that of an administrator, as provided for in Section 8(1)(c)(ii)(aa). The section provides that:

"(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders —

. . .

(c) setting aside the administrative action and —

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases —

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; . . . ."

[34] It was held in paragraph [47] that **Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA** 2015 (5) SA 245 (CC) that the factors to be taken into account in deciding if a case was 'exceptional' were:

34.1. Whether the Court would be in as good a position as the administrator to make the decision;

34.2. Whether the decision was a foregone conclusion;

34.3. Where there was an unreasonable delay; and

34.4. Whether there was bias or incompetence on the part of the administrator.

[35] In **Allpay Consolidated Investment Holdings (Pty) Ltd v CEO SASSA and Others (no 1)** 2014 (1) SA 604 (CC) it was held that the legislative procurement framework is legally binding to parties in a procurement process. Any irregularities in the procurement process, such as failure to comply with an organisation's constitutional and legislative framework, is subject to the norms of procedural fairness as codified in PAJA.

Application of legal principles

[36] In application of the abovementioned principles, the Court has to determine whether the applicant's application for funding was unduly and unreasonably denied. If it is found that the applicant's application for funding was unfairly denied, and should exceptional circumstances exist, the Court should come to the assistance of the applicant and make an Order in substitution of the respondent's decision.

[37] As set out above, the reasons advanced by the respondent were two-fold; namely (a) that the applicant was not tax-compliant and (b) the applicant did not adhere to the terms of the contract set out in the SLA.

[38] The applicant argues that the failure to provide it with funding, is unconstitutional as the older persons in the Province will be prejudiced. This argument is made from the point of view that the applicant, as a non-profit organisation, has a constitutional duty to fulfil in the social development and care of the elderly. It also assumes that the applicant has a right to receive such funding from the respondents. The argument develops to the point where the applicant places a constitutional duty on the respondents to provide the applicant with funding which would enable the applicant to serve the elderly. This argument is, in my view, misplaced. It is the government, by means of the respondent, that has a constitutional duty to care for the elderly, and not the applicant. The respondents have no constitutional obligation to place the applicant in funds to proceed providing its services to the elderly.

[39] In relation to the failure to provide an updated tax-compliant certificate, the applicant's argument that there is a duty on the respondents to enquire as to the status of the applicant's tax compliance, is also misplaced in my view. It cannot be expected from government organisations to effectively "assist" any applicant for funding that originates from public funds. That would be grossly unfair to other applicants for the same funding, and would place an immeasurable task on the respondents when considering applications for funding.

[40] In as far as the provisions of the SLA was not complied with, and unused funds were transferred from the account specified in the SLA to another account, the argument of the applicant that there is nothing in the SLA or PFMA that prohibits such a transfer, is not tenable. The funds are from the proverbial "public purse" and strict compliance with any and all of the various aspects of management of the funding should be adhered to.

[41] An SLA is nothing other than a contract concluded between the parties. The Court is to ensure compliance with the terms of the SLA. In the event that a Court condones compliance with the terms of an SLA, such a condonation

would entitle public funds to be spent at the will of any beneficiary for specific funds. The fact that the applicant has communicated with the Department in relation to the transfer of the unused funds, does not automatically justify the transfer of the funds to an account other than that account specified in the SLA. The Court cannot condone the applicant's non-compliance with the terms of the SLA.

[42] The applicant cannot rely on previous funding to ensure future funding. No expectation is created by the respondent in providing funding, and the SLA specifically provides as such. The applicant is not entitled to funding as of right.

[43] Having regard to the above, I find that the respondent has exercised its discretion to not allocate funding for the applicant, in a fair and reasonable manner. I do not find any malicious or unjust reasoning for the reasons provided by the respondents as to why the applicant was not provided with funding for the financial periods of 2020/2021 and 2021/2022.

[44] As a result, the application is bound to be dismissed.

Cost

[45] The normal principle in the allocation of costs, is that the successful party is entitled to its costs.

[46] I do not find any reason to deviate from the normal principle and as a result the respondents are entitled to their costs on a party and party scale.

Order

In the premise, I make the following order:

i) The application is dismissed.

ii) The applicant is to pay the costs of the respondents.

FMM REID (FORMERLY SNYMAN)
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE OF HEARING: **01 DECEMBER 2022**

DATE HANDING DOWN: **08 MAY 2023**

APPEARANCE FOR
THE APPLICANT: **VAN ROOYEN TLHAPI**
WESSELS INC.
09 PROCTOR AVENUE
MAFIKENG, 2745
(Ref: WEB4/0004/CS)

APPEARANCE FOR
THE RESPONDENT: **THE OFFICE OF THE STATE**
ATTORNEY
MEGACITY COMPLEX
FIRST FLOOR
EAST GALLERY
CNR SEKAME ROAD &
DR JAMES MOROKA
MMABATHO,2735
(Ref: 0951/22/p14)