

## FREE STATE SOCIAL WELFARE JUDGMENT

By Ricardo Wyngaard

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

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On 5 August 2010 the Free State High Court (the Court) in the matter of *National Association of Welfare Organisations and Non-Governmental Organisations & Others vs MEC for Social Development, Free State & Others* delivered a judgment in which it found that the Free State 'Policy on Financial Awards to the Nonprofit Organisations in the Social Development Sector' (the Policy) is inconsistent with the constitutional and statutory obligations of the Department of Social Development.

The Court essentially gave the MEC for Social Development (the MEC) and the Head of the Department of Social Development Free State (the department) an opportunity to revise the policy to make it consistent with the Constitution.

The department and MEC filed papers in which it attached a report prepared by KPMG Services (Pty) Ltd (KMPG) and a revised draft version of the relevant paragraph of the Policy. Although these documents were works in progress, the department was of the view that it would remedy the shortfalls identified by the Court. The Court considered the revised policy and, on 9 June 2011, delivered another judgment in which it found that the revised policy is still inconsistent with the Constitution.

### The KPMG Report

The KPMG report, in essence, came up with a technique to cost the provision of a welfare service programme to a typical beneficiary for a year. It provides a mechanism to determine **the annual service cost** of serving a beneficiary, for example, a child. If the annual service cost for a child is, for instance, R25 000, it will be multiplied with the number of children which a NPO serves to determine the total annual service cost to the NPO. If it serves 10 children, the total annual service cost would be R250 000. If the NPO can contribute, for example, R100 000 from its own funds towards the costs of rendering the services to the children – the amount of R100 000 will be deducted from the total annual service cost of R250 000 – to make the allocation R150 000. If the NPO cannot contribute from its own funds towards rendering the service – it would be allocated the full cost of rendering the service – according to the report.

**NB:** The report does not allow for a reduction of an annual service cost based upon the allocation of funds to the department.

### The Revised Policy

The KPMG report should be read with revised Policy. Paragraph 11.6.9 of the revised Policy, in contrast, states that provisional awards calculated based upon the costing model will be subject to; *“adjustment by an appropriate percentage, if necessary, to provide the financial awards of all programmes to which subsidies have been allocated to ensure that the aggregate of the approved financial awards do not exceed the funds allocated to the Department for transfer to the service providers rendering the relevant social welfare services. The appropriate percentage will be determined in respect of each service provider separately, taking into account the prioritization of services or activities within the service after consultation with the relevant service-providers”*

This means that an amount determined in terms of the KPMG report could be further reduced by the department if the overall departmental budget is limited. For example, the NPO that can contribute R100-000 towards the total annual service cost of R250 000, could be in a situation where the allocated R150 000 is further reduced by R60 000 because of departmental budget constraints. The amounts determined in terms of the KPMG costing model could therefore be rendered almost pointless.



## Social Welfare Judgment/....

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### The Court's finding:

The Court had to determine if the revised Policy complied with the Court's earlier judgment and order. The Court found paragraph 11.6.9 of the revised Policy to be problematic.

The Court points out that the revised policy basically makes provision for a meticulous calculation of funding required by each eligible NPO. *"This amount may then be reduced by what is termed 'an appropriate percentage'. This may be substantial reduction. The KPMG reports points out that in the 2010/2011 financial year the actual awards made were 40% less than those recommended."*

Although the Court recognised that the revised Policy can allow for a mechanism to allocate an insufficient departmental budget, it must be reasonable – as envisaged in the Constitution. The Court further states that: *"Paragraph 11.6.9 as presently framed is not a reasonable measure. It appears to me to be illogical and irrational."*

An organisation may, as a result of paragraph 11.6.9, find itself in a position where the department has allocated a substantial shortfall of the annual service cost – as calculated in terms of the KPMG report. The Court used the example of a child care organisation's financial award being reduced by 49% and asked the questions: *"What is the NPO to do in the circumstances? How will the human dignity of the [beneficiaries] be maintained? What about the rights to equality, because they may suffer solely as a result thereof that they happened to be referred to the NPO's child and youth care centre and not, for instance, to one of the department's own institutions? Will this not result in the failure of the NPO's programme and resultant effective waste of the financial award to it?"*

The Court found that it is irrational to deal with an inadequate budget in a manner proposed by paragraph 11.6.9 as it is not fair, equitable and transparent. The paragraph may also result in situation where the service required by the department, in terms of the Constitution, is not being rendered. The department and the MEC were ordered to file a revised policy within 90 days.

The final judgment will no doubt have implications for similar policies issued by other provincial departments.

### Employment Equity Reports

By Ricardo Wyngaard

*Designated employers* must, in terms of section 20 of the Employment Equity Act, prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.

A designated employer includes an employer who employs 50 or more employees. It also includes an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act, being R5m for community, social and personal services.

Designated employers that employs fewer than 150 employees (a small employer) must, in terms of section 21 of the Employment Equity Act, submit a report to the Director-General of Labour once every two years, on the first working day of October. A small employer must retain a copy of its employment equity report for a period of two years after it has been submitted to the Director-General.

### Global Forum on Civil Society Law

The *International Center for Not-for-Profit Law* has invited Ricardo Wyngaard to participate in the *Global Forum on Civil Society Law* that will take place in Stockholm, Sweden from August 21-23, 2011. The meeting will include 200 global leaders from civil society, governments, multilateral institutions, and the donor community interested in the legal framework for civil society.

ICNL states that: *"Participants at the Global Forum 2011 will explore a diverse range of issues they helped prioritize. Illustrative topics include information and communication technology (ICT) and its connection to the freedoms of assembly, association and expression; the legal framework for philanthropy; strategies to engage governments and legislatures on civil society law reform; counter-terrorism and civil society law; public-private partnerships with civil society; and aid effectiveness."* <http://www.icnl.org/globalforum2011/>

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