IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO 1789/2020

Date heard: 22/09/2020
Date delivered: 01/10/2020

In the matter between

IMBUMBA ASSOCIATION FOR THE AGED — APPLICANT

and

MEC FOR SOCIAL DEVELOPMENT,

EASTERN CAPE — FIRST RESPONDENT

HEAD OF DEPARTMENT:

SOCIAL DEVELOPMENT, EASTERN CAPE — SECOND RESPONDENT

JUDGMENT

ROBERSON J:

[1] The applicant is an association comprising 25 member non-profit organisations (the members), whose function is to provide specialised community-based care as envisaged by s 11 of the Older Persons Act 13 of 2006. This section provides:

> " Community-based programmes for older persons
>
> (1) The Minister may, in collaboration with any relevant Minister or Member of the Executive Council in a province-
>
> *(a)* develop community-based programmes that fall into two broad categories, namely-

(i) prevention and promotion programmes, which ensure the independent living of an older person in the community in which the older person resides; and

(ii) home-based care, which ensures that a frail older person receives maximum care within the community through a comprehensive range of integrated services;

(b) determine how any person who runs a programme contemplated in paragraph *(a)* may be supported, either financially or otherwise.

(2) The programmes contemplated in subsection (1) are programmes aimed at-

(a) economic empowerment of older persons;

(b) establishment of recreational opportunities for older persons;

(c) information, education and counselling services, including HIV and AIDS, care for orphans, Alzheimer's, dementia and basic emergency care;

(d) spiritual, cultural, medical, civic and social services;

(e) provision of nutritionally balanced meals to needy older persons,

(f) promotion of skills and capacity of older persons to sustain their livelihoods;

(g) professional services, including care and rehabilitation to ensure independent living of older persons;

(h) appropriate services contained in the indigent policy for vulnerable and qualifying older persons;

(i) the utilisation and management of existing facilities for older persons as multi-purpose community centres;

(j) integrated community care and development systems for older persons; and

(k) inter-generational programmes.

(3) Home-based care programmes directed at frail older persons within the community may include-

(a) provision of hygienic and physical care of older persons;

(b) provision of professional and lay support for the care of older persons within the home;

(c) rehabilitation programmes that include provision of assisted devices;

(d) provision of respite care;

(e) information, education and counselling for family members, caregivers and the community regarding ageing and associated conditions; and

(f) provision of free health care to frail older persons and to other older persons determined by the Minister."

[2] The members each entered into a service level agreement (SLA) with the Eastern Cape Department of Social Development (the Department), in terms of which, inter alia, they were to receive funding from the Department for care and support services to older persons, in accordance with each member's business plan. These business plans recorded, inter alia, the number of persons, described as beneficiaries, who were intended to benefit from the services, and the amount of funding required. According to the business plans which were annexed to the founding affidavit, the number of persons targeted by each member ranged from 16 to as many as 245. The Recital to the SLA's recorded the Department's mission to improve the quality of life and social well-being of the poor and the vulnerable, through integrated developmental social services, with a special focus on women, children, older persons, youth and people with disabilities. It further recorded that the Department is mandated to provide social welfare services and does so either by supplying the service itself or by acquiring the services from service providers.

[3] The SLA's were to run for the period 1 April 2020 to 31 March 2021 and funding was to be paid monthly. It appears that they were only available for signature during May 2020. On 8 May 2020 Ms Lisa Vetten, the project manager of The Care Work Campaign, wrote to the second respondent on behalf of the applicant. She enquired when the members could expect to receive their SLA's and what services the members could provide to older persons who were very vulnerable to the Corona virus and who had been advised to stay at home for the next few months. She stated that the members were committed to continuing to provide service to their beneficiaries in safe and appropriate ways. In response the second respondent said that the Department had managed to sign all master lists and allocation letters for all programmes and had promoted virtual signing of SLA's where feasible.

[4] It is common cause that no payments have been made to the members by the Department in accordance with the SLA's. As at the end of July 2020 the total amount due was R1 530 296.45. On 5 June 2020 the second respondent issued a notice to all non-profit organisations funded by the Department for the 2020/2021 financial year. The notice included organisations providing various types of services. The opening paragraph stated:

> "This serves to inform all NPOs that have signed Service Level Agreements with the Department for 2020/21 financial year that payments for the first quarter is (sic) being processed as follows:"

Paragraph 1 of the notice is relevant to this application. It states:

"Care and support to Older Persons: Residential facilities for Older Persons will be paid in full as beneficiaries are resident within the facilities. For community based care services – only stipend for care givers will be paid as Covid-19 regulations stipulate that the movement of Older Persons over 60 years of age is highly restricted. For Welfare Organisations, payment of Social Work posts and administration will be paid in full."

The last paragraph of the notice states:

"Nevertheless, the Department will review its payment approach as it moves to alert Level 3 Risk Adjusted Approach and will be (sic) implement a variety of intervention to mitigate measures taking into account the balance between social impacts, reduction of community transmission and service delivery imperatives."

[5] Other non-profit organisations included in the notice were those providing care and support services to people with disabilities, those providing HIV and AIDS programmes, early childhood development centres, child care and protection organisations, and those providing restorative services involving crime prevention, substance abuse prevention and gender based violence. The funding of some of these organisations was also reduced.

[6] It is not in dispute that the Department has not paid stipends to care givers as undertaken in paragraph 1 of the notice.

[7] In this application, brought as a matter of urgency, the applicant seeks an order declaring the Department's decision of 5 June 2020 to be a repudiation of the SLA's and directing the Department to comply with the SLA's. Alternatively it seeks an order declaring the decision to be unconstitutional, unlawful and invalid, and

reviewing and setting the decision aside in terms of the principle of legality. Further alternatively it seeks an order reviewing and setting aside the decision in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000.

[8] The deponent to the founding affidavit, Mr Melumzi Sauka, who is the applicant's vice-chairperson, stated that the members provide services to older persons in rural and impoverished communities in the form of nutrition, administration, recreation services and nursing care. Ordinarily these services are provided at care centres operated by the members. Each day older persons attend the care centres between 08h00 and 16h00 where they participate in a number of activities and programmes. These include: growing vegetables for the centre's beneficiaries and to supplement food for older persons who cannot afford to buy food; sewing, beadwork and handicraft programmes to generate income for older persons; support and recreation programmes; recreational opportunities; intergenerational programmes; counselling services, and specific care of Alzheimer's disease and dementia. Daily nutritional meals are also provided.

[9] Mr Sauka said that the majority of the beneficiaries are older women who head households consisting of extended family members, including grandchildren whose parents work in other provinces. These households depend financially on old age pensions, child support grants and financial support from the grandchildren's parents working away from home. These financial resources are often insufficient and the provision of meals for older persons therefore assists in supplementing these resources. The Covid-19 pandemic has caused the reduction of income of adult children working away from home and their financial support for the household has been reduced or terminated.

[10] Following the lockdown implemented because of the Covid-19 pandemic, older persons were not allowed to travel to the care centres. The restriction on movement continued under lockdown Level 2. The beneficiaries, so Mr Sauka stated, were still dependent on the services provided by the care centres and the members still had a duty to provide those services. Mr Sauka referred to the Disaster Management Act 57 of 2002 regulations of 25 March 2020 in which care services and social relief of distress provided, inter alia, to older persons, were included in the categories of essential services. The members therefore provided the necessary care to the beneficiaries at their homes, at no extra cost. These home care services include: the provision of two to three meals a day; the collection of medicine from clinics and hospitals for older persons and ensuring that housebound beneficiaries take their medication; provision of groceries and basic essentials; assisting older persons to wash; assisting with the cleaning of homes and laundry; providing transport to clinics and hospitals when needed; and assisting house-bound older persons to exercise, through the assistance of the care giver.

[11] Mr Sauka said that the services provided by the members at the beneficiaries' homes are substantially the same as those formerly provided at the care centres. In some cases there are no adults living with the beneficiaries who can assist with the necessary care, and some beneficiaries live alone and there is no other person to take care of them. Some of the beneficiaries are impoverished and cannot afford to survive without the care provided by the members. Some of the beneficiaries are not able to manage their finances and rely on the members for assistance in

this respect. The care provided by the members is therefore, according to Mr Sauka, undoubtedly essential.

[12] Mr Sauka said that although the beneficiaries live independently, the majority of them have hypertension, diabetes and heart disease, which are chronic conditions requiring continuous management. In addition it was important during the pandemic that the psychological and emotional well-being of the beneficiaries was ensured through human interaction. They were still reliant on the services provided by the members and without such services it could not be guaranteed that they would not suffer harm because of their socio-economic circumstances.

[13] Mr Sauka said that the matter was urgent because the beneficiaries' survival depends on the uninterrupted and continuous services provided by the members. The decision of the Department not to pay the subsidies means that the members will be unable to fulfil their duties to the beneficiaries. The withdrawal of these services will affect the health and quality of life of those beneficiaries who cannot care for themselves, or who rely on the members for food, medicine and other necessities, or who receive daily care, to the extent that they may die. There may also be consequences for the extended family members. Presently the beneficiaries are at even greater risk because of the pandemic, which risk is increased when they are deprived of access to food, medicine and nursing care currently provided by the members. Without these services, so Mr Sauka said, the beneficiaries may be compelled to leave their homes to purchase food or go to the hospital or the clinic, thus exposing themselves to greater risk.

[14] Mr Sauka said that the members have incurred a massive financial burden. In addition to providing services to older persons, they have to maintain the infrastructure to provide these services, which includes administrators, cooks, care givers, care giver assistants and drivers, who all need to be paid. If urgent relief is not granted to the members they will be forced to close, a consequence which would impact not only the members but their staff and the beneficiaries. Presently the members are providing the services at their own expense but once they run out of funds they will no longer be able to do so.

[15] It is apposite at this point to mention certain clauses in the SLA's which are particularly relevant to this application.

Clause 6

REPORTS TO BE SUBMITTED TO THE DEPARTMENT AND REPORT PROCEDURES

6.1 Financial Reports.

6.2 Service / programme reports

6.3 Annual and / or quarterly reports and

6.4 The reports must be submitted quarterly within 5 days of expiry of each quarter.

Clause 13

REPORT OF CHANGED CIRCUMSTANCES

The service provider will inform the Department without delay of any circumstances that impact negatively on the service and the

Department's financing. These may include reduction in human resources, financial problems, reduced services, infra-structural problems, (temporary stoppages of services delivered, such as closures over Christmas) etc. The service provider shall not be entitled to take a unilateral decision regarding the provision of the service.

Clause 16

REDUCTION, SUSPENSION OR TERMINATION OF FINANCING

16.1 The department shall be entitled to reduce, suspend or terminate financing of the service if the Department find:-

16.1.1 that the Service Provider has failed to deliver the service or to deliver the service to the extent that was approved;

16.1.2 that the Service Provider has failed to comply with or does not meet provision of this agreement or any statutory or other departmental requirements in terms of this agreement;

16.1.3 that the Service provider has failed to achieve the stated outcomes; or

16.1.4 that in the opinion of the Department that the need for the service no longer exists or to the extent that warranted the initial approval.

16.2 As a general rule, the Department will give three months written notice to the Service Provider that their financing will be reduced, suspended or terminated, provide the service provider with reasons for the reduction, suspension or termination and allow

the service provider reasonable time to make representations as to why financing should not be reduced, suspended or terminated.

16.4 The reduction, suspension or termination of financing shall be preceded by consultation and negotiation in an effort to enable the Service Provider to rectify the situation. This may include an independent investigation. However, if no satisfactory progress is made within a reasonable period fixed by the Department, or if the Service Provider does not co-operate in the consultation, negotiation or investigation, the Department will be entitled to proceed to give the notice referred to in 16.2 or 16.3.

Clause 18

APPEAL AGAINST FINANCING DECISIONS:

18.1 The service provider shall have a right to appeal against the Department's financing decision.

18.6 If the service provider is still not satisfied with the decision of the Department, it may within ten days of the date of the delivery to it of the decision of the Department, request in writing that the matter be submitted to arbitration in terms of the provisions of paragraph 22 hereunder.

Clause 20

FORCE MAJEURE

20.1 Neither party shall have any claim against the other Party (the "Affected Party") for any delay or failure of the Affected Party to carry out any of its

obligations under this Agreement arising from or attributable to any cause whatsoever beyond the control of the Affected party ("*force majeure*). A *force majeure* shall not include: (a) industrial action; (b) lock out; (c) strike; or (d) any other issue pertaining to labour dispute.

20.2 The performance of the obligations of the Affected Party shall, subject to clause 20.3, be suspended for the duration of the *force majeure*. Upon cessation of the *force majeure*, this Agreement shall again become fully operative and the Affected Party shall immediately resume its performance.

20.3 If the suspension of performance continues for more than 30 (thirty) consecutive calendar days, either party may then summarily terminate this Agreement by written notice to the other Party.

Clause 22

BREACH AND TERMINATION

22.1 In the event of any one of the parties to this Agreement failing to comply with any of its obligations in terms of the Agreement, the aggrieved party shall issue a notice to the defaulting party calling upon it to remedy the breach within a period of 7 days from date of receipt of the notice. In the event of the defaulting party remaining in breach after the expiry of the 7 days, the aggrieved party shall issue a notice of cancellation of the agreement forthwith:

22.2 Institute action against the defaulting party for the recovery of damages which the aggrieved party may have suffered as a result of such breach; or

22.3 Institute action for the specific performance of the terms of this Agreement and / or the recovery of damages which the aggrieved party may have suffered.

22.4 No indulgence which either party may allow at any time whatsoever to the other party in regard to the carrying out of any of the terms and conditions of this Agreement shall:

22.4.1 Constitute a waiver of; or

22.4.2 prejudice its rights under this Agreement.

Clause 23

ARBITRATION

23.1 For the purpose of this paragraph, "dispute" includes, without prejudice to the generality of the term -

23.1.1 Any dispute as to the interpretation of this Agreement; and

23.1.2 any appeal which the service Provider wishes to make in terms of paragraph 18.6

23.2 Should a dispute arise, any one of the parties shall be entitled to require, by written notice to the other party, that the dispute be submitted to arbitration in terms of this paragraph.

[16] On 3 July 2020 the applicant's attorneys wrote to the second respondent demanding payment of the funding owing at that date. They stated that the Department had unilaterally reduced the subsidy it had contracted to pay and that such conduct was irrational, unlawful and in breach of the SLA's. They pointed out

that under Alert Level 3 of the Covid-19 lockdown the members were fully operational and were now providing home based care to their beneficiaries. Reference was made to clause 16 of the SLA's and the failure of the Department to give three months' notice of its intention to reduce the subsidies. The Department was put on terms to pay the subsidies by 14 July 2020.

[17] The second respondent replied on 14 July 2020. She said that the business funding model of the Department was premised on older persons physically visiting service centres to access services, as opposed to the provision of home care based services as envisaged in s 11 (1) (a) (ii) of the Older Persons Act, which services the Department presently cannot fund because of budgetary restraints. The second respondent stated that as the Department's accounting officer she could not agree with the members' decision to render home based services because it "goes against the grain of our business funding model that is based on Section 11 (1) (a) (i) of the Older Persons Act No 13 of 2006". The second respondent said that the members' decision to implement home care services was in violation of s 11 (1) (a) (i). If the Department were to fund the members for home based services, so the second respondent stated, it would be considered as unlawful and wasteful expenditure. The second respondent said that there were alternatives to meet the needs of the beneficiaries such as services offered by the Department in association with the South African Social Security Agency, the Department of Health and local government authorities. The second respondent's excuse offered for not giving three months' notice in terms of clause 16 of the SLA's was the immediate impact of the Covid -19 pandemic. The applicant was reminded of its right to appeal in terms of clause 18 of the SLA's.

[18] Mr Sauka maintained that the members' provision of home based services was a result of the pandemic and not a service contemplated under s 11 (1) (a) (ii) of the Older Persons Act.

[19] In her answering affidavit, the second respondent persisted in her stance set out in her letter. Before dealing with the merits of the application, she raised three point in limine: lack of urgency, failure to exhaust internal remedies, namely an appeal, and failure to refer the matter to arbitration. She said that the appeal and arbitration provisions enabled disputes to be dealt with expediently and in the case of arbitration it assisted in maintaining a cordial relationship between aggrieved parties. As far as urgency was concerned, she said that it was self-created because the applicant had launched the application on 28 August 2020 nearly three months after the Department's decision of 5 June 2020, and had failed to utilise the remedies of an appeal and arbitration.

[20] The second respondent emphasised that the Department, in carrying out its mandate to provide social welfare services, was required to comply strictly with its statutory duties which included those prescribed in the Public Finance Management Act 1 of 1999 (the PFMA). She referred to the three services for older persons provided in the Older Persons Act, namely residential care, care at care centres and home based care. These three services involve different funding models, and different SLA's are concluded for each service. The members were not entitled to payment because they had not provided the services in accordance with the SLA's they had concluded with the Department. There is no budget for home based care

services and accordingly no home based care SLA's in place. The second respondent said she would therefore be acting in contravention of her statutory duties in terms of ss 38 to 40 of the PFMA if she paid for services for which there was no allocated budget. In elaborating on this aspect she said that payment for services rendered outside the provisions of the SLA's without proof or records would mean that she had contravened these sections of the PFMA. Without source documents to support the claims and an allocated budget for the claims, payment would amount to fruitless and wasteful expenditure. The second respondent said that the members had not provided any proof that they had rendered the services for which they were claiming payment, and had not provided reports required in terms of clause 6 of the SLA's.

[21] The second respondent expressed the view, as indicated in her letter, that in providing food and health care to older persons in their homes the members were in breach of clause 13 of the SLA's, namely that they took a unilateral decision regarding the provision of services. She pointed to certain services provided by the members at the beneficiaries' homes which were not provided at care centres, for example helping the beneficiaries to wash, accompanying them on shopping trips and visits to clinics, cleaning their homes, and medical care. She further said that the beneficiaries who visited the care centres were independent and capable of taking care of themselves.

[22] The second respondent moved on to discuss the effect of the Covid-19 lockdown and the regulatory restrictions on older persons leaving their homes. She said that even when Level 2 was implemented older persons remained vulnerable to the virus. She said that the notice of 5 June 2020 was a result of the pandemic

and the lockdown and that the rationale for not paying the members their full funding was that older persons were prohibited from moving and could not attend the care centres. In reliance on the *force majeure* clause in the SLA's she said that the pandemic was an act of god which was beyond the control of both parties to the SLA's. In terms of this clause the Department could have terminated the SLA's.

[23] The second respondent disagreed that the beneficiaries would go hungry if the members did not deliver food. She said that government, various non-profit organisations and other good samaritans had contributed towards food parcels for the poor, vulnerable and older persons during the lockdown. In the Eastern Cape the Department had interacted with ward councillors in ensuring the delivery of food parcels to older and vulnerable persons. The national government had also made emergency social grants available which included an increase of R250.00 to the old age pensions.

[24] In his replying affidavit, Mr Sauka denied that food parcels had been provided to the beneficiaries and said that the Department had given no details of the distribution of food parcels, such as the number distributed, to whom they had been provided, and when and in what areas.

[25] With regard to the quarterly reports required in terms of clause 8 of the SLA's, Mr Sauka said that the members had compiled all the reports and that they were available to the court. He also annexed attendance registers from one of the members as evidence that services had been provided during June 2020 and said

that in the short time available it was not possible to obtain all the attendance registers.

[26] Affidavits were also filed from a number of care givers attached to various members to the effect that no food parcels had been received by their particular organisation.

Discussion

[27] I deal firstly with urgency. In my view this is a vexatious and futile point when one is dealing with the welfare of people in need, during a life threatening pandemic. One would not expect it to be raised by an organ of state mandated to provide social services, and especially when no SLA's have been concluded for home based care because there is no budget for such services. In any event Mr Sauka adequately explained the time period between the 5 June 2020 and the launching of the application. He said that the applicant only became aware of the notice of 5 June 2020 in mid-June 2020, via the "grapevine". It was not formally communicated to the applicant. The applicant realised it needed pro bono assistance and Ms Vetten put it in touch with the pro bono department of the applicant's attorneys, Webber Wentzel, based in Johannesburg. Following the Department's response to the letter of demand it was realised that there was no choice but to approach the court for urgent relief. Prior to the launch of the application, it was necessary for the attorneys to consult with each of the members, who are in the Eastern Cape, consider the various business plans, and verify subsidy amounts, all of this during lockdown and its restrictions. In these circumstances I am of the view that there was no self-created urgency. The matter is inherently urgent. The members may have to close if they do not receive the

subsidies and the beneficiaries, elderly and vulnerable, will be deprived of services. It is in my view critical to bear in mind that there is no budget to conclude SLA's for the provision of home based care.

[28] In my view the starting point in deciding this application is to recognise that there are two constants which prevail: the constitutional obligation to provide social services in terms of s 27 of the Constitution, and the need of the beneficiaries for these services. Section 27 of the Constitution provides:

> "Health care, food, water and social security
>
> (1) Everyone has the right to have access to-
>
> *(a)* health care services, including reproductive health care;
>
> *(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."

[29] The Department, in terms of the SLA's, acquired the services of the members to carry out its constitutional obligation. The members, as Mr Sauka stated, were obliged to provide services to the beneficiaries. Counsel for the applicant referred to what was said by Froneman J in *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA (No 2)* 2014 (4) SA 179 (CC) at paragraph [38] (footnote omitted):

> "Where an entity has performed a constitutional function for a significant period already, as Cash Paymaster has here, considerations of obstructing private

autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all. The conclusion of a contract with constitutional obligations, and its operation for some time before its dissolution – because of constitutional invalidity – means that grant beneficiaries would have become increasingly dependent on Cash Paymaster fulfilling its constitutional obligations. For this reason, Cash Paymaster cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational."

what happens to the beneficiaries

[30] In addition, and at the risk of over-emphasising the point, there are presently no SLA's in place for the provision of home based care. If organisations such as the members do not receive funding, and cannot provide services to their beneficiaries, what is going to happen to the beneficiaries? The provision of food parcels by the Department and others, for which the respondents have provided no proof, is no substitute for the type of assistance envisaged in s 27 of the Constitution and s 11 of the Older Persons Act. Mr Sauka appropriately described the services provided by the members as holistic. The effect of the Department's stance is that the beneficiaries are deprived of the services to which they are constitutionally and statutorily entitled. These are services which not only assist the beneficiaries to survive but also to survive with dignity, in the exercise of their right to dignity in terms of s 10 of the Constitution. Within this framework the taking of contractual points, the reliance on the PFMA and the reliance on the fact that the Department does not have a budget for home based care as defences seem, at best, cynical. One would think that after Ms Vetten's request for advice on how the members could provide services during the pandemic some arrangement could have been made through consultation and negotiation. The request was made

when lockdown had started more than a month before and it was known then that the beneficiaries would not be able to leave their homes and access the care centres. Despite this knowledge, the SLA's were concluded, but less than a month later the Department said it would not pay what it had contracted to pay. One wonders what services the Department expected the members to provide when lockdown had already started.

[31] Having expressed these views, I am required to consider the legal basis for the applicant's claim for relief. The applicant's main case is that the Department has repudiated the SLA's and the applicant elects to claim specific performance, maintaining that the members have materially complied with their obligations in terms of the SLA's to provide the services. It was submitted on behalf of the applicant that it needed to be emphasised that the members lawfully provided an essential service in terms of the Disaster Management Act regulations and further that they were exercising a public power on behalf of the Department. With regard to the manner in which the members were carrying out their obligation to provide the services, reference was made to the judgment in *Singh v McCarthy Retail Ltd* 2000 (4) SA 795 (SCA) where the appellant had complained about the manner in which a vehicle had been delivered to him, the contract stipulating that it was to be transported by carrier whereas it was driven to him. At paragraphs [15] and [16] the following was said:

> "I perceive the correct approach to be as follows: The test, whether the innocent party is entitled to cancel the contract because of malperformance by the other, in the absence of a *lex commissoria*, entails a value judgment by the Court. It is, essentially, a balancing of competing interests - that of the innocent party claiming rescission and that of the

party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?

[16] Approaching the matter from this broad perspective, I am of the view that the breach of the contract by the respondent does not justify rescission of the contract."

[32] In the present case, so it was submitted, the respondents have likewise objected to the manner in which the members have provided services and have put form above substance. The purpose of the SLA's was to ensure that services were rendered to older persons who were dependent on those services and the manner in which those services were provided was not an essential element of the agreement. It was further submitted that the Department depended on the members to provide services which fulfilled the rights in terms of ss 10, 11 (the right to life) and 27 of the Constitution.

put form above substance

[33] I agree with these submissions. The underlying purpose of the SLA's had to be considered in the light of the Department's constitutional obligations, especially in the time of the pandemic, and the necessary adaptations which had to be made. It was submitted on behalf of the Department that the beneficiaries contemplated in the SLA's are not frail or infirm and are capable of managing a household, and that the services provided at their homes differ from those provided at the care centres. However, as was submitted on behalf of the applicant, although these beneficiaries may be able to live independently, they still rely on the support provided by the members including the provision of food and emotional support. There was

therefore in my view no breach by the members in rendering the services at the beneficiaries' homes rather than at the care centres. If they had not done that, there would effectively have been no equivalent substitute services in place for the beneficiaries. Such a result would negate the purpose of the SLA's, which I emphasise were concluded when the lockdown had been in place for some time. Importantly the members were providing these home based services at no extra cost.

[34] It is interesting that only in the answering affidavit was the non-provision of quarterly reports and the lack of proof of the provision of services raised. This was not the reason for the notice of 5 June 2020. The reason for non-payment was the fact that the members' beneficiaries could not leave their homes and access the care centres. In the second respondent's letter of 14 July 2020, which importantly was in response to a demand for payment, no mention was made of non-compliance by the members in this respect. It was clear from that letter that the Department justified its refusal to pay because the members had decided to render home based services which according to the second respondent was a violation of s 11 (1) (a) (i) of the Older Persons Act and in conflict with the Department's business funding model based on that subsection. In my view the reliance on the alleged failure to submit reports and provide proof of the provision of services was an afterthought. It was also contradictory, because the Department's stance is that it will not pay because the members are not providing the services they undertook to provide in terms of the SLA's. In any event I am satisfied that the applicant met these allegations satisfactorily.

[35] It follows in my view that the applicant is correct in its stance that the members have performed in terms of the SLA's and that the Department has repudiated the SLA's. It did not, as was submitted, follow the procedure for reducing the funding in terms of clause 16 of the SLA's. Its excuse for not giving three months' notice is unpersuasive in the context of the enduring need for the provision of services to the beneficiaries. It knew of the members' enquiry, through Ms Vetten, concerning what services they could provide when the beneficiaries were confined to their homes during lockdown. It also knew, through Ms Vetten, of the members' commitment to the provision of services at this time. Clearly consultation was essential, in the interests of the beneficiaries. By approaching the Department in this manner the members were taking the initiative in trying to find a solution to the provision of services during lockdown, services which they were to provide on behalf of the Department. The Department disregarded the terms of the SLA's and in my view unequivocally demonstrated its intention not to be bound by the SLA's. It has not even paid the care givers, in spite of its undertaking to do so in the notice of 5 June 2020. The members were therefore entitled to demand specific performance. As pointed out on behalf of the applicant, s 38 (1) (i) of the PFMA provides that accounting officers must settle all contractual obligations and pay all money owing.

[36] With regard to the members' right of appeal in terms of clause 18 of the SLA's, it was submitted on behalf of the applicant that this clause was not of application in the circumstances. In terms of clause 18.1 an appeal lies against a financing decision which, so it was submitted, presupposes a valid decision. The Department did not follow the procedural requirements in terms of clause 16 and its

breach in unequivocally indicating that it would not comply with its obligation to pay subsidies fell outside the scope of an appeal.

[37] The same submissions were made with regard to a referral to arbitration. It was submitted that for the purposes of a referral to arbitration there must be an arbitrable dispute. (See *PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at paragraph [7].) The Department's conduct in indicating it would not comply with its obligation did not, so it was submitted, give rise to an arbitrable dispute.

[38] I agree with these submissions in relation to an appeal and arbitration. The Department unilaterally announced without any prior warning, negotiation or consultation that it was not going to pay the subsidies because the intended beneficiaries of the SLA's could not leave their homes. The notice of 5 June 2020 barely purports to be a decision reached in terms of the provisions of the SLA's. It is in the form of a policy announcement, particularly the last paragraph which I have reproduced above. The tenor of the notice and its terminology appear to be divorced from contractual terms and are rather in the form of a continuing unilateral process depending on the stages of the pandemic and the associated restrictions.

[39] Lastly I deal with the defence of *force majeure*. It was submitted on behalf of the respondents that both parties were unable to perform because of the pandemic. The members were unable to perform because older persons could not attend the care centres and the Department was unable to perform because it could not pay for services for which there was no funding model and for which there were no

SLA's in place. I find this to be an extraordinary stance in circumstances where older persons are in need of social services, and even more so in the midst of a pandemic. Nonetheless it is not so that the members were unable to perform. They provided essential services and were obliged to perform. Covid-19 did not prevent them from performing. Similarly it was not impossible for the Department to perform. It had the budget. If the services were provided, it had to pay. The Department cannot rely on the *force majeure* clause.

[40] The applicant must therefore succeed in its main claim and it is not necessary for me to consider relief in the form of a review and setting aside of the Department's decision to reduce funding.

[41] Before making the appropriate order I need to comment on the way the Department has conducted this matter both prior to and during litigation. In *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at paragraph [15] Cameron JA (as he then was) said the following (footnote omitted):

> "But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution, and requires that public administration be conducted on the basis that "people's needs must be responded to". It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was at war with its own citizens, the more shamefully because those it was combating were in terms of secular hierarchies and affluence and power the least in its sphere."

[42] In this matter the Department's resistance to the application is regrettable, when the subject matter of the litigation is the needs of older persons and their constitutional rights to social services and dignity, and even the right to life. Prior to the launching of the application, the Department was invited to give advice to the members on the appropriate way to provide the necessary services on the Department's behalf during the pandemic. It gave no meaningful response. It made its unilateral decision to reduce funding to the members knowing that there was no budget for home based care and knowing that it had concluded the SLA's when lockdown was already in place. When it received the letter of demand it did not use the opportunity to consult, knowing that its decision to reduce funding would be harmful to older persons in need. In these circumstances to accuse the members of violating s 11 (1) (a) (i) of the Older Persons Act and of breaching clause 13 of the SLA's and using that accusation as a defence, fell below the standard expected of it in litigation. So did its reliance on an appeal, arbitration, and force majeure. It is extremely ironic that the second respondent should blandly say that an appeal or arbitration would have dealt with the dispute expediently, and that arbitration would have assisted in maintaining a cordial relationship, when the Department itself failed to consult and negotiate before reducing the funding to the members, and disregarded the needs of the beneficiaries.

the breakdown

[43] The following order will issue:

[43.1] The notice published by the Department of Social Development, Eastern Cape (the Department) on 5 June 2020, is declared to be a repudiation of the service level agreements entered into between the Department and the members of the applicant.

[43.2] The respondents and the Department are ordered to comply with the terms of the service level agreements.

[43.3] The Department is ordered to pay to the applicant's members all amounts due in accordance with the service level agreements concluded between the members and the Department, together with interest thereon at the prescribed rate from the date upon which the amounts fell due by no later than 15 October 2020.

[43.4] The respondents are to pay the costs of the application, such costs to include the costs of two counsel.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances (matter heard virtually via Microsoft Teams)

Applicant: Adv O Ben-zeev with Adv M Danisa, instructed by Webber Wentzel, c/o Nettelfons, Makhanda.

Respondents: Adv A Rawjee, instructed by the State Attorney, c/o NN Dullabh & Co, Makhanda.