

REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO: 4 of 2008/9

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AGAINST THE NATIONAL DEPARTMENT OF SOCIAL DEVELOPMENT AND THE KWAZULU-NATAL PROVINCIAL DEPARTMENT OF SOCIAL SERVICES AND POPULATION DEVELOPMENT.

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Executive summary

The Office of the Public Protector conducted an own initiative investigation into an allegation published by a newspaper that a dispute between the national Department of Social Development and the KwaZulu/Natal Provincial Department of Social Services and Population Development in connection with the re-advertising of a tender for the distribution of food parcels, was causing further hardship to thousands of impoverished people in KwaZulu/Natal.

From the investigation it appeared that the decision of the Department of Social Development to award the said tender was set aside by the High Court and a re-advertising of the tender ordered.

The court application and subsequent appeal by the Department caused a substantial delay in the delivery of much needed assistance to a large group of impoverished people in the Kwazulu/Natal province.

From the judgments of the court *a quo* and the Supreme Court of Appeal it is clear that the delay could have been avoided had the Department taken reasonable care to comply properly with the relevant provisions of the Constitution and the legislation regulating the tender process in the public service.

Subsequent to the court judgment, the National Food Emergency Programme to which the tender was related, was terminated by the Cabinet and its funding redirected to broader welfare objectives.

Currently, the Department of Social Development is running a social relief programme in terms of which it provides temporary relief to those in need, in the form of food parcels, vouchers or cash payments to buy food. This programme forms part of the Government's commitment towards poverty relief.

There was no dispute about the re-advertising of the tender between the national Department of Social Development and the Kwazulu/Natal provincial Department of Social Services and Population Development after judgment in regard to the review application was delivered.

It was consequently found the allegation that a dispute between the Department of Social Development and the Kwazulu/Natal Department of Social Services and Population Development in connection with the re-advertising of a tender relating to the National Food Emergency Programme was causing hardship to thousands of people in the province, was unfounded.

The Public Protector recommended that the Director General of the Department of Social Development take urgent steps to ensure that the shortcomings in the Department's tender alluded to by the Supreme Court of Appeal (referred to in this report) have been adequately addressed to prevent a recurrence of similar deficiencies.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AGAINST THE NATIONAL DEPARTMENT OF SOCIAL DEVELOPMENT AND THE KWAZULU-NATAL PROVINCIAL DEPARTMENT OF SOCIAL SERVICES AND POPULATION DEVELOPMENT.

1. INTRODUCTION

This Report is submitted to the Minister of Social Development, the Director General of the Department of Social Development and the Member responsible for Social Services and Population Development of the KwaZulu/Natal Provincial Government (the MEC), in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act). It relates to an own initiative investigation into allegations of maladministration made against the national Department of Social Development and the Kwazulu-Natal Provincial Department of Social Services and Population Development.

2. BACKGROUND

2.1 *Beeld* newspaper published an article on 12 June 2007, alleging that:

2.1.1 In 2005 the National Department of Social Development awarded a tender for the distribution of food parcels to 60600 underprivileged families in KwaZulu/Natal, to 3 private entities;

2.1.2 One of the unsuccessful tenderers took the decision of the Department in regard to the awarding of the said tender on review to the High Court and was successful. The Department and the 3 private entities to whom the contract was awarded appealed against the decision of the High Court. The Supreme Court of Appeal dismissed the appeal.

- 2.1.3 There appeared to be a dispute between the said national and provincial departments as to who was responsible for re-advertising the tender.
- 2.1.4 The national department reportedly held the view that as the money associated with the tender was transferred to the Provincial Government, the provincial department was responsible for re-issuing of the tender. However, the provincial department was of the opinion that as the original tender was issued by the national department, it does not have the authority to re-advertise.
- 2.1.5 Whilst this apparent impasse between the two departments continued, the 60600 families that were supposed to have received aid from the Government in the form of food parcels, were struggling to survive.

3. THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE ALLEGATION

Section 182 of the Constitution provides that the Public Protector has the power to:

- 3.1 Investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- 3.2 Report on the conduct investigated; and
- 3.3 Take the appropriate remedial action.
- 3.4 In terms of section 6(4) of the Public Protector Act, the Public Protector is competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged maladministration in connection with the affairs of government at any level and any alleged improper conduct by a person performing a public function.

- 3.5 The allegations contained in the newspaper article referred to in paragraph 2.1 fall under the jurisdiction and within the powers of the Public Protector to investigate.

4. THE INVESTIGATION

The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act, 1994. It comprised:

- 4.1 Consideration of the article published by *Beeld*;
- 4.2 Consideration of the judgment of the Supreme Court of Appeal in the case of *The Minister of Social Development and Others v Phoenix Cash and Carry and Others*¹;
- 4.3 Correspondence with the Director General of the Department of Social Development; and
- 4.4 Correspondence with the Member of the Executive Council for Social Services and Population Development of the Kwazulu/Natal Provincial Government.

5. THE JUDGEMENT IN THE CASE OF *THE MINISTER OF SOCIAL DEVELOPMENT AND OTHERS v PHOENIX CASH AND CARRY AND OTHERS*

- 5.1 In the second half of 2005, the Department of Social Development (the Department) awarded a tender for the supplying of food hampers to families in need in the province of KwaZulu/Natal. Phoenix Cash and Carry (Phoenix) was one of the unsuccessful tenderers.
- 5.2 Phoenix took the decision of the Department in respect of the awarding of the tender on review to the High Court and was successful in having it

¹ Case no's 189/06 and 244/06

set aside. The Department and some of the other interested parties took the matter on appeal.

5.3 The appeal was dismissed on somewhat different grounds than those held by the court *a quo*. The Supreme Court of Appeal (SCA) found that the Technical Tender Evaluation Committee of the Department acted unfairly when it adjudicated the bids and that the decision to award the tender was therefore unlawful.

5.4 The order of the court *a quo* that should the Department wish to pursue the supply and delivery of food hampers in terms of the National Food Emergency Scheme, it should invite fresh tenders was, *inter alia*, confirmed by the SCA.

5.5 In concluding his judgment Heher JA, stated the following²:

"The affidavits in this matter revealed disquieting features, which, in view of the conclusion which I have reached, need to be noted by those responsible, in order to avoid repetition.

1. The initial reasons furnished to Phoenix by the Department were, to say the least, seriously misleading. They created the impression that its tender had been evaluated and rejected on its merits, which was far from being the case. No explanation for the compilation of those reasons was ever furnished. In a proper case such a failure might justify an inference of mala fides. In addition, the reasons speak of a prerogative and a discretion which betrays a fundamental misconception of the function to be performed by the adjudicator of the tender, whose duty under s2(1)(f) of the PPPF Act (the Preferential Procurement Policy Framework Act, 2000) is to award the contract to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in s2(1)(d) and (e) of the Act justify the award to another tenderer."

² From paragraph [23]

5.6 The learned Judge of Appeal also pointed out that the bid of one of the successful tenderers was *prima facie* invalid as it failed to comply with the tender specifications. Yet this was not picked up by the relevant tender committee when the bid was adjudicated³.

5.7 Judge Heher further stated that⁴:

As has been shown, the merits of Phoenix's tender were so manifest and the grounds of its exclusion so flimsy that doubts are necessarily raised as to the reliability and credibility of the procurement process employed by the Department."

6. THE EXPLANATION PROVIDED BY THE DIRECTOR GENERAL

6.1 The Director General of the Department responded to the allegations referred to in paragraph 2 above and explained that:

"It should be noted that the funding received for the Emergency Food Relief Programme in the 2004/5 financial year was voted as conditional grants to provinces in terms of the Division of Revenue Act, 2004. The 2004 conditional grant framework for the Emergency Food Relief Programme provided for the joint centralized procurement of service providers to effect uniformity and economies of scale.

Further to the above, section 24(4) of the 2004 Division of Revenue Act, 2004 (sic) stipulates that the National Treasury could authorise a province to retain and utilise portions for (sic) funds of an allocation, which remains, provided funds are utilised in compliance with the conditions to which funds are subject.

The court case in respect of the supply and delivery of food hampers in Kwazulu/Natal resulted in an under-spending of the Emergency Food

³ At paragraph [23]

⁴ At paragraph [23]

Relief conditional funds at the end of the 2004/5 financial year. Consequently, the Kwazulu/Natal Department of Social Welfare and Population Development obtained approval to retain the unspent Emergency Food Relief conditional grant funds at the end of the 2004/5 financial year to ensure the completion of the objectives of the programme.”

- 6.2 He also indicated that after the ruling of the court referred to in paragraph 6 above, the Department requested the KwaZulu/Natal Department of Social Services and Population Development to consider proceeding with a new tender or to consider other options on how to utilise the remaining funds to achieve the objectives of the Emergency Food Relief Programme.

7. THE RESPONSE TO THE ALLEGATIONS BY THE MEC

- 7.1 The MEC confirmed that there was no dispute between his department and the National Department of Social Development in connection with the matter concerned.
- 7.2 He was advised by the Minister of Social Development on 21 May 2007 that the Cabinet has decided to terminate the National Food Emergency Programme and to redirect the funding involved to other and broader welfare objectives.
- 7.3 A joint business plan was subsequently developed by the National Treasury, the Department of Social Development and the Department of Health, focussing on and prioritising areas that have a high percentage of poverty and TB/HIV prevalence.

- 7.4 This business plan targets households with an income of less than R 300 per month or with no income at all.
- 7.5 The MEC also indicated that the Department currently has a programme of social relief that caters for indigent persons that find themselves in a crises situation.

8. THE SOCIAL RELIEF OF DISTRESS PROGRAMME

- 8.1 This programme of the Department provides for temporary relief in the form of food parcels, vouchers, or cash payments to buy food.
- 8.2 People that qualify for social relief are those that are in a crisis situation due to, for example, a natural disaster, failure to obtain maintenance for a child, the death, or imprisonment of a breadwinner, etc.
- 8.3 The commitment of Government in this regard was emphasised by President Mbeki in his *State of the Nation Address*, delivered in Parliament on 8 February 2008, in which he stated, *inter alia*, that:

"Yet another critical Apex Priority is the elaboration of an integrated and comprehensive anti-poverty strategy that addresses especially sections of the population most affected by this scourge. These include children, women, the youth, people living in rural areas and urban informal settlements, people with disabilities or chronic illnesses and the elderly.

Among the key proposed interventions are: Expanding the public works programme, employment subsidies for direct job-creation for targeted groups, enhancing employment search capability, improving education and training, improving services and assets among poor communities, specific interventions in poor households, and ensuring effectiveness of institutions supporting women and other sectors. Among others, we will make an evaluation of the gender machinery so as to improve all aspects related to women empowerment.

Parallel to this initiative is a special project to examine interventions required to deal with vulnerable children over the age of 14.

But we will all agree that our society, and the poor specifically, cannot wait for strategies and dialogues and workshops, important as these may be. In any case, most of the interventions possible are things that government is already doing though not sufficiently integrated. As such, in the spirit of Business Unusual, government intends this year to intensify the campaign to identify specific households and individuals in dire need and to put in place interventions that will help, in the intervening period, to alleviate their plight.

For this, we will require a National War Room for a War Against Poverty bringing together departments such as Social Development, Provincial and Local Government, Trade and Industry, Agriculture and Land Affairs, Public Works and Health as well as provincial and local administrations, which will work with non-governmental organisations (NGOs) and business to identify the interventions required in specific households and implement them as a matter of urgency. "

9. OBSERVATIONS

The following observations have been made from the investigation:

- 9.1 The court application for the review of the decision of the Department in respect of the awarding of the tender concerned and subsequent appeal caused a substantial delay in the delivery of much needed assistance to a large group of impoverished people in the Kwazulu/Natal province.
- 9.2 From the judgments of the court *a quo* and the SCA it is clear that the delay could have been avoided had the Department taken reasonable care to comply properly with the relevant provisions of the Constitution and the legislation regulating the tender process in the public service.

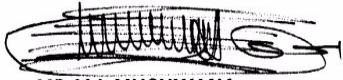
- 9.3 The court order in regard to the re-advertising of the tender became defunct when the National Food Emergency Programme was terminated and converted into a broader social welfare approach.
- 9.4 There was no dispute about the re-advertising of the tender between the national Department of Social Development and the Kwazulu/Natal provincial Department of Social Services and Population Development after judgment in regard to the review application was delivered.
- 9.5 The funds allocated for social relief to the Kwazulu/Natal Provincial Government had to be redirected in compliance with a decision of the Cabinet.
- 9.6 The Department of Social Development has an established programme of social assistance to those in dire need of food in accordance with the commitment of Government in respect of poverty relief.

10. KEY FINDING

The allegation that a dispute between the Department of Social Development and the Kwazulu/Natal Department of Social Services and Population Development in connection with the re-advertising of a tender relating to the National Food Emergency Programme was causing hardship to thousands of people in the province, was unfounded.

11. RECOMMENDATION

In terms of the provisions of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, it is recommended that the Director General of the Department take urgent steps to ensure that the shortcomings in the Department's tender alluded to by the Supreme Court of Appeal and referred to in paragraph 6 above, have been adequately addressed to prevent a recurrence of similar deficiencies.



ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Date: 13 May 2008