IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED NO
DATE: **20 October 2022**
SIGNATURE: eieas

CASE NO: 32944/2022

In the application between:

CHRISTELIKE MAATSKAPLIKE RAAD NOORD ("CMR NORTH")	Applicant
and	
DEPARTMENT OF SOCIAL DEVELOPMENT	First Respondent
MEC FOR THE GAUTENG DEPARTMENT OF SOCIAL DEVELOPMENT	Second Respondent
DIRECTOR-GENERAL, DEPARTMENT OF SOCIAL DEVELOPMENT	Third Respondent
MINISTER OF THE DEPARTMENT OF SOCIAL DEVELOPMENT	Fourth Respondent
VARIOUS INTERVENING PARTIES	Amici Curiae

Coram: Millar J

Heard on: 15 September 2022

Delivered: 20 October 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 20 October 2022.

Summary: Application to set aside decision to withdraw Child Protection Organization designation in terms of section 107 of the Children's Act 38 of 2005 – decision taken based on a deliberate and self-serving misinterpretation of letter withdrawing from subsidized services once subsidy withdrawn – clear indication in letter to continue with other services - complaints about service - failure to conduct a proper investigation or to follow a fair process – Promotion of Administrative Justice Act 38 of 2000 – decision reviewable under sections 6(2)(c), 6(2)(e)(ii) & (iv) – (vi), decision reviewed and set aside and Applicants designation reinstated with punitive costs.

ORDER

It is ordered: -

1. The decision of the First Respondent on 6 June 2022 to withdraw the Applicants designation as a Child Protection Organisation in terms of the Children's Act 38 of 2005 is declared to be unlawful.

2. The decision of 6 June 2022 is hereby reviewed and set aside.

3. The Applicant's status as a Child Protection Organization, duly designated in terms of section 107 of the Children's Act 38 of 2005 is hereby reinstated.

4. The first respondent is ordered to pay the applicants' costs of the application on the scale as between attorney and client which costs are to include the costs consequent upon the employment of two counsel.

5. A copy of this judgment is to be sent to the South African Human Rights Commission.

JUDGMENT

MILLAR J

1. CMR North, the applicant, is a registered non-profit[1] Christian organization that consists of a professional network of social workers. It is one of several organizations that operate under the moniker of 'CMR' in various areas – the organization that operates in each area is autonomous and distinct from the others and each is known by the area within which they operate providing social work and other services.

2. Child Protection Organisation ('CPO') accreditation is granted in terms of section 107 of the Children's Act 38 of 2005[2] ('the Act'). CMR North has enjoyed CPO designation for many years, having been registered as a non-profit organization on 17 October 2001.

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[1] Registered as such in terms of the Non-Profit Organizations Act 71 of 1997.

[2] Section 107(1) of the Act empowers the director general or provincial head of social development to designate any organization that makes written application for such designation subject to such terms and conditions as may be imposed.

3. This is an application brought by the applicant – CMR North, for the review and setting aside of the decision taken on 6 June 2022 by the Department of Social Development in Gauteng, the first respondent ('DSD') to withdraw its designation and accreditation as a child protection organization ('CPO')[3].

4. The present application was initially brought as an urgent application on 5 July 2022. When the matter was called, notwithstanding its urgency, it was clearly not ripe for hearing – not least for the fact that the record of the decision had only after the service of the application and a day or so beforehand been furnished to the applicant. I accordingly made a holding order which included timeframes for the filing of such further papers as may have been necessary to ensure that the matter could be properly heard.

5. When the matter was called on 5 July 2022, I also heard an application for intervention on the part of various persons to be admitted as *amici curiae* – purported to include some of those that had lodged complaints against CMR North. Notwithstanding an objection by CMR North I deemed it prudent, given the nature of the application and the importance of its outcome to all concerned, that the intervention be granted but only for the *amici curiae* to make submissions on the papers to be filed by the parties.

6. In addition, I also granted an order giving the parties leave to approach the office of the Deputy Judge President to request the appointment of a case manager and indicated that I was willing to act as such should the request be favourably considered. It was, and it suffices to say, that the application was subsequently and by agreement between the parties heard on 15 September 2022.

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[3] Section 109 of the Act empowers the director general or provincial head of social development to withdraw the designation for inter alia failure to comply with any condition imposed and/or if it is in the best interests of the protection of children.

7. It is not in issue between the parties that the DSD's decision to withdraw the CPO status is administrative action as contemplated in the Promotion of Access to Justice Act[4] (PAJA) and that the determination of the present matter falls to be decided upon whether, in terms thereof, the decision to withdraw the designation was *'lawful, reasonable and procedurally fair'*.[5] It is the case for CMR North that the decision did not meet any of these criteria and was impeachable specifically for want of adherence to the provisions of *inter alia* sections 6(2)(c)[6] and 6(e)(ii)[7], 6(2)(e)(iv)[8], 6(2)(e)(v)[9] and (vi)[10] of PAJA.

8. The decision to withdraw the CPO status was made, firstly, in consequence of an investigation undertaken because of certain complaints made by members of the public about the conduct of social workers who it was claimed were linked to or employed by CMR North. The investigation also included a DSD departmental quality assurance process[11] ('DQA') and secondly, from the contents of a letter addressed by CMR North to the DSD on 29 March 2022. I propose dealing with each of these in turn.

9. Pursuant to various complaints received by the Department of Social Development against CMR North an investigation was undertaken. The investigation, at least initially, centered on 8 separate cases in which complaints had been received made by families with whom CMR North had dealt. A meeting was held with the 8 separate complainants on 21 January 2022 at which they recounted their complaints.

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4 3 of 2000

5 The purpose for which PAJA was enacted which reads in full – "To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996 and to provide for matters incidental thereto."

6 '*The action was procedurally unfair*'

7 The action was taken for '*an ulterior purpose*'

8 The action was taken '*because of the unauthorized or unwarranted dictates of another person or body*'

9 The action was taken in '*bad faith*'

10 The action was taken '*arbitrarily or capriciously*'

11 The DQA process is a mandatory requirement imposed on the DSD in terms of section 109(2) of the Act before a CPO designation can be withdrawn. The process is set out in Regulation 32 of the Regulations to the Act.

10. Arising from this investigation, 7 key challenges were identified. It is pertinent to mention at this point that at no stage during the receipt, processing, investigation, or discussion of the complaints was CMR North notified or invited to comment. The 7 key challenges that were identified were accordingly that it was alleged that:

10.1 Parents had been denied contact with their children.

10.2 Placement had been made of children in unrelated foster care with parents who had no children of their own together with the separation of siblings.

10.3 There was a lack of empowerment and support services to biological parents.

10.4 There was a lack of reunification services.

10.5 Children were being given away for adoption on the pretext of it being in the best interests of the child.

10.6 There was a breakdown of the relationship of trust between the biological families and CMR North social workers and with the social work profession as a whole.

10.7 There was a hostile children's court environment for biological parents and the Department of Social Development social workers.

11. In each case the DSD made a recommendation. The crux of these recommendations was that the funding of CMR North as well as the cases that its social workers had dealt with should be reviewed and that the partnership and the CPO status of CMR North should be reviewed.

12. In consequence of the allegations made on 21 January 2022 and the recommendations made in consequence, a team of social workers was mandated by the DSD to prepare a DQA report on CMR North.

13. The team tasked with this consisted of 10 social workers who did this over a total 5-day period, initially on 26 and 27 January 2022 and thereafter on 15, 16 and 17 February 2022. In undertaking the process, it was identified that:

- *"There were about two thousand (2000) given to the DQA team to audit covering all areas (sic) services by CMR North.*
- *The files were inclusive of Foster care, Adoption, Temporary Safe Care and Reunification programs. The team also, had access to closed files.*

The team sampled 168 files; each team member quality assured about 7 to 8 files."

14. Although only 168 of the 2000 files i.e., 8,4% were considered, several conclusions were drawn which resulted in the following recommendations:

- "*All Case files be reassessed.*
- *All Court Orders issued by the Children's Courts sec 48 of Children's Act 38 of 2005 be reviewed.*
- *Adherence to statutory management services must be adhered to."*

15. The recommendations of the DQA were contained in a report dated 9 May 2022. The DQA did not, as it was supposed to have, address all of the matters prescribed by Regulation 32[12], omitting in particular Regulation 32(2)(a).

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[12] The Regulation provides – *"32(1) A quality assurance referred to in section 109(2) of the Act must be conducted to evaluate a child protection organisation prior to the withdrawal of the designation as a child protection organisation.*

16. Besides the 8 complaints investigated on 21 January 2022 and in the DQA, the DSD also received a letter from the South African Police Services (SAPS) on 4 April 2022[13] requesting information to assist them with an investigation in respect of a complaint relating to what it was alleged related to illegal adoptions.

17. This request for information related to an organization known as the Christian Social Council (CSC) as well as to the 'Christelike Maatskaplike Raad' and a person – Ms. TA Terblanche who is allegedly known on Facebook as "Piexie Pienk". The letter from the SAPS sets out various allegations and concludes with *"your office is requested to conduct investigation to prove or refute the allegation and provide the outcome to Component Head Serious Organized Crime Investigation".*

18. On 16 May 2022 the DSD received a lengthy email in which various complaints were raised and various allegations made against CMR North. This was sent to the DSD by Mr. Leon Nel of an organization called "Cold Cases". These were set out in an email forwarded by him from Mr. Solomon Mondlane addressed to Mr. Hitler Sekhitla and to which was attached an article that appears to have been written by Mr. Johan Eybers a senior journalist at Media 24.

19. The allegations in the article were most serious and in the same vein as the initial 8 complaints investigated on 21 January 2022. In addition, however, the article

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32(2) The quality assurance contemplated in sub regulation (l) must be conducted by the Director-General or by the provincial head of social development and must consist of the assessment of the following:
(a)the business plan and financial statements of the organisation.
(b)adherence to the criteria for designation as a child protection organisation and to the national norms and standards for child protection.
(c)implementation of the designated child protection service/s;
(d)whether individuals, families, communities, and other organisations are receiving an effective and efficient service and whether they are satisfied with the quality of service so received;
(e)monitoring and evaluation framework and the impact of the services received;
(f)compliance and implementation of the appropriate legislation; and
(g)any service delivery challenges."

[13] A similar referral of the same allegations had also been made by a Lieutenant Colonel Elizabeth van der Merwe in the Economic Protected Resources: Human Trafficking and Serious Organized Crime Unit on 23 August 2021 but there is nothing in the record to indicate what if anything was done. Although this referral is reflected as a "complaint", in the record of decision, it is from the content of its text nothing more than a request to "advise me on the correct person to speak to regarding the following two allegations received".

also dealt at some length with another case[14] that is currently before the Constitutional Court dating back 10 years and in which CMR North was alleged to have been involved.

20. On 29 March 2022, CMR North having received no feedback regarding the DQA enquiry that took place during January and February 2022 and not having received any response to its request for the conclusion of a service level and subsidy agreement for the 2022/2023 financial year, notified the DSD that it would be unable to continue rendering any subsidized statutory services referred to it by the DSD. It set out a program for the winding down of such services and for the handover of all its existing cases. It furthermore undertook to notify all other relevant role players accordingly.

21. CMR North specifically qualified its withdrawal from the subsidized services and indicated:

> *"3 The management board of the CMR North therefore accepts that the Department of Social Development does not wish to continue its funding relationship with the CMR North in respect to the rendering of services and to pay out the subsidies accordingly."*

And

> *"i. As from 1 April 2022 the CMR North cannot accept any more statutory intakes (Form 9 and form 36 referrals from the Department of Social Development and court, as well; as referrals of any other statutory services including foster care screenings, foster care supervision services, and family reunification services); These intakes will immediately be referred to the Intake/Statutory section of the Department*

And

[14] WA Raaths v the State (case number A395/2018 in this division of the High Court)

"*iv* *The CMR North will continue with the rendering of prevention, family preservation and community development services in its current demarcated areas.*"

22. On 13 April 2022, a meeting was held between CMR North and the DSD. The purpose of the meeting was ostensibly to discuss the challenges and complaints received by the DSD regarding service delivery by CMR North.

23. The true purpose of the meeting was however disclosed when the CMR North representatives were informed during the meeting that:

> *"The DDG explained that there has been a number of parents who came forward to report that they have been unhappy in a manner that CMR North handled their cases and had no one to help them and their children are caught in the middle, thus they ended reporting to the Department.*
>
> *He added that other parties have shared their interests in seeing these complaints resolved, such as the Organised Crimes Unit, who have made it expressly clear to DSL) that there are serious concerns regarding the CMR North. The DDG remarked that the Organised Crimes Unit had indicated intent to pursue a detailed investigation regarding the CMR North, and has already formally requested DSL) to prove or refute their enquiry regarding the complaints against CMR North."*

And

> *"The DDG asked the board members if they were aware of the DQA process, and the CMR North social work manager responded that lots of documents were provided to the DSD team during the DQA process, but the DSD had been scant in its responses to the CMR North about what the progress was and what the findings were*".

And

"The DDG replied to the communicated concerns by stating that when the CMR North indicated its termination of funding relationship and statutory functions, the DSD's processes at the time had to change. In that time, the DQA report was received, and that report will later be formally communicated to the CMR North for

analysis and comments. The findings from the DQA report and the Intake and Field Unit's report were unexpected and alarming, and these reports indicated that the CMR North has a case to answer.

The DDG presented the following intentions of DSD to the board members:

- *To accept the CMR North's letter of withdrawal;*

- *The department intends to withdraw all other statutory programmes provided by CMR and the designation of child protection organisation status in terms of section 107 of the Children's Act, and to withdraw the designation certificate;*

and it was confirmed that DSD's letter of intention, the minutes of the meeting, the DQA report and the report on the findings from Intake and Field will be sent to the organisation within seven working days, and the organisation will be presented with an opportunity to respond to the matters presented".

24. It bears mention at this juncture that during the meeting on 13 April 2022 the representatives of CMR North informed the DSD representatives that they were '*terminating their funding relationship with the DSD, but not partnership with the entire DSD.'*

25. Notwithstanding the stated intention to furnish CMR North with the DQA report and other investigation documents to afford them an opportunity to respond thereto, this did not occur. On 6 May 2022, the DSD addressed a letter in which

they indicated that both the DQA as well as the investigation report and subsequent investigation:

> *". . . confirmed that the allegations made against CMR are in all probabilities (sic) accurate (as supported by evidence collected from the files and information collected during interviews with families, etc.)"*

26. On 18 May 2022, CMR North responded comprehensively to the letter of 6 May 2022. In the letter they explained, firstly, that CMR North had not sought deregistration as a CPO, or for that matter as a non-profit organization and that the letter of 29 March 2022 had been misconstrued. Secondly, they also addressed the very serious allegations made against them and pertinently stated:

> *"1. GDSD's notice and the attached DQA report contains general statements without substantial proof;*
>
> *2. All 168 files referred to in the DQA report need to be scrutinized and verified by the CMR to understand the vague outcomes stated in that report."*

27. They also went on to address comment and to dispute and rebut the allegations that had been made. I do not intend to traverse the allegations or the responses. These are not matters for consideration in the present proceedings. It suffices to state that every single allegation was placed in issue.

28. On 6 June 2022, the DSD proceeded to withdraw CMR North's designation as a CPO. The withdrawal and reasons for it were conveyed in a letter which read as follows:

> ***"NOTICE OF WITHDRAWAL OF THE DESIGNATION OF CMR NOORD's / NORTH's REGISTRATION AS A CHILD-PROTECTION ORGANISATION (CPO).***

The above captioned subject matter together with the letter dated 29 March 2022, under hand of Couzyn Hertzog & Horak Attorneys, and received on 6 April 2022, refers: -

1. *At Paragraph four (4)(i) Of the letter referred to above your Organisation gave Notice of the intention to -voluntary Withdraw the provision Of services from 1st April 2022, relating to Statutory Intakes: Form 9 & 36 referrals. The voluntary withdrawal also specifically referred to Statutory services inter alia foster care screenings, foster care supervision services and family reunification services.*

2. *The Gauteng Department of Social Development has noted and accepted the contents of' the letter, as Captioned in Paragraph one (I) above. Therefore, the designation of your organisation as a Child Protection Organisation (CPO)) is of necessity herby withdrawn.*

3. *Furthermore, the Department has also noted the contents of Paragraph four (4) (ii) (ii) (iv) and (v) of said letter, and expresses its appreciation for the anticipated enacting of the undertakings made therein,*

4. *The Department also takes this opportunity to express its gratitude to your Organisation for the services that it has provided during the course of the relationship between the parties"*

29. In its terms the withdrawal of the CPO status was predicated solely upon the contents of the letter sent by CMR North's attorneys on 29 March 2022 notwithstanding that the DSD had been made aware of the fact that the interpretation sought to be attributed to it was incorrect.

30. From the events between January 2022 and June 2022 as set out above, the following is readily apparent:

30.1 The interviews and such investigations as were undertaken on 21 January 2022 were not recorded, but if they were recorded, such

recordings or transcripts thereof did not form any part of the record before the DSD in its consideration of CMR North's CPO status.

30.2 The DQA investigation of 168 out of 2000 files, only 8.4%, resulted in generalized and wide recommendations without any reference to specific files or complaints which would have enabled CMR North to engage and properly respond. Furthermore, the DQA investigation dealt only with certain of the matters prescribed by Regulation 32 but not all.

30.3 The representations made at the meeting of 13 April 2022 by the DSD representative were not an accurate reflection of the contents of the SAPS letters that had been sent to them or of the findings in the DQA report, which self-evidently only seems to have been finalized almost a month later on 9 May 2022.

30.4 Notwithstanding that CMR North placed in issue the serious unsubstantiated allegations that had been made against it, the DSD persisted in accepting uncritically the veracity of such allegations without affording CMR North any fair or reasonable opportunity to have the allegations fully investigated and considered before the withdrawal of their CPO designation.

30.5 The DSD opportunistically sought to prefer a deliberately self-serving and selective misinterpretation of CMR North's letter of 29 March 2022 to provide it with a basis upon which it could withdraw the CPO designation, without having to properly discharge its obligation to investigate the allegations and not simply record and accept them uncritically as it did.

31. The investigation and presentation of the complaints by the DSD to CMR North was undertaken in an opaque and one-sided manner and in circumstances in which CMR North were not given any opportunity, either in writing or at a hearing, to either admit to, explain, or rebut any of the allegations made against them. The allegations themselves were expressed in general terms which in any event would have made it impossible for them to do so. In such circumstances, it is apparent that the process undertaken was not procedurally fair as required by section 6(2)(c) of PAJA.

32. The emails from third parties and the unsubstantiated allegations contained in them were quite clearly considered by the DSD – regard need only be had to the fact that such emails were included in the record relating to the making of the decision. However, it is unclear, having regard to the specific terms in which the withdrawal of the designation was couched whether these played any role in the making of the decision.

33. Furthermore, these were received after the meeting of 13 April 2022 and the letter of 6 May 2022, both of which evidence a clear intention on the part of the DSD to withdraw the CPO designation. I am not persuaded that the decision was made because of the '*unwarranted dictates of another person or body*' as provided for in section 6(2)(e)(iv) of PAJA and so this ground of review fails.

34. A striking feature of this matter is the way in which the contents of the letters from the SAPS were misrepresented at the meeting of 13 April 2022 and how the letter of 29 March 2022 was utilized as a peg upon which to hang the withdrawal of the CPO designation. For the reasons set out above I am driven to the conclusion that the DSD acted with an 'ulterior purpose' as provided for in section 6(2)(e)(ii) and in both 'bad faith' as provided for in section 6(2)(v) and 'arbitrarily or capriciously' as provided for in section 6(2)(vi) of PAJA.

35. When the argument in the matter had concluded I indicated to the parties that whatever the decision would be, it was incumbent upon the parties to ensure that the serious allegations that had been made were fully and properly investigated. I invited the parties to furnish me with proposals regarding how this could be undertaken in an effective and timeous fashion given their circumstances and resources.

36. I received from CMR North a comprehensive and well thought out proposal. Unfortunately, the DSD refused to make any proposal. I subsequently requested a meeting with the parties' representatives to obtain clarity on the DSD's refusal and was informed that they did not intend to make any proposal but that they would be referring the matter to the South African Human Rights Commission. It is perhaps apposite that the matter be so referred so that besides the complaints made against CMR North, the conduct of the DSD and any other relevant parties may also be investigated.

37. In the present matter the costs will follow the result. CMR North argued that I should exercise my discretion and make an award of punitive costs which costs should also include the costs of 2 counsel. Having regard to the matter as a whole and to the findings made by me, I am satisfied that the conduct of the DSD falls sufficiently short of that which is expected of it so as to merit an award of punitive costs.

38. In the circumstances it is ordered:

37.1 The decision of the First Respondent on 6 June 2022 to withdraw the Applicants designation as a Child Protection Organisation in terms of the Children's Act 38 of 2005 is declared to be unlawful.

37.2 The decision of 6 June 2022 is hereby reviewed and set aside.

37.3 The Applicant's status as a Child Protection Organization, duly designated in terms of section 107 of the Children's Act 38 of 2005 is hereby reinstated.

37.4 The first respondent is ordered to pay the applicants' costs of the application on the scale as between attorney and client which costs are to include the costs consequent upon the employment of two counsel.

37.5 A copy of this judgment is to be sent to the South African Human Rights Commission.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	15 SEPTEMBER 2022
JUDGMENT DELIVERED ON:	20 OCTOBER 2022
COUNSEL FOR THE APPLICANTS:	ADV. L HAUPT SC
	ADV. L VAN DER WESTHUIZEN
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COUNSEL FOR THE 1ST RESPONDENT:	ADV. M BOTMA
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COUNSEL FOR THE *AMICI CURIAE*:	MR. J LAZARUS
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