

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 36962/2020

In the matter between:

SA CHILDCARE (PTY) LTD	First Applicant
CENTRE FOR EARLY CHILDHOOD DEVELOPMENT NPC	Second Applicant
THE REVEREND TEMBELA MAGADLA	Third Applicant
BUSY BEE CRECHE AND PLAY SCHOOL	Fourth Applicant
SOSHANGUVE FOR EARLY CHILDHOOD DEVELOPMENT FORUM	Fifth Applicant
BONANG DAY CARE CENTRE	Sixth Applicant
THE COMMUNITIES, CHILDREN AND RESPONSIBLE CARE ORGANISATION	Seventh Applicant
FEED THE BABIES FUND	Eighth Applicant
and	
MINISTER OF SOCIAL DEVELOPMENT	First Respondent
MEC SOCIAL DEVELOPMENT EASTERN CAPE	Second Respondent
MEC SOCIAL DEVELOPMENT GAUTENG	Third Respondent
MEC SOCIAL DEVELOPMENT FREE STATE	Fourth Respondent
MEC SOCIAL DEVELOPMENT KWAZULU-NATAL	Fifth Respondent
MEC SOCIAL DEVELOPMENT LIMPOPO	Sixth Respondent
MEC SOCIAL DEVELOPMENT MPUMALANGA	Seventh Respondent
MEC SOCIAL DEVELOPMENT NORTHERN CAPE	Eighth Respondent

NOTICE OF MOTION

PLEASE TAKE NOTICE that the applicants intend to make application to this Honourable Court, on a date and at a time to be determined by the Honourable Deputy Judge President, for the following relief, namely that:

- 1 This application is dealt with as a matter of urgency in terms of Rule 6(5)(12) and the forms and service provided for in the Rules are dispensed with.
 - i). Declaration of Unlawfulness of Directions:
- 2 The following provisions in the directions issued by the first respondent published in the Government Gazette No 43520 on 10 July 2020 (hereinafter "*the directions*") are declared to be unconstitutional and invalid:
 - 2.1 direction 4(1), 4(2), 4(3), 4(5), 4(6), 4(7), 4(8), 6, 7(b) and (c), and 10(1);
 - 2.2 the provision in Form 1 (Annexure A) attached to the directions stating: "*Subject to the pronouncement of a date and the conditions of such reopening by the Minister of Social Development*"
 - 2.3 paragraphs 2.14, 4.3, 4.4, 5.4 of Form 1 (Annexure A);

- 2.4 the wording: *“prior to the re-opening of early childhood development programme or partial care facility”* in every instance where it appears in Form 3 (Annexure C) to the directions;
- 2.5 the wording: *“prior to re-opening of early childhood development programme or partial care facility”* in every instance where it appears in Form 4 (Annexure D) to the directions;
- 2.6 paragraph 3 in Form 5 (Annexure E) to the directions which reads: *I further accept that any civil liability that may arise from the early childhood development program or partial care facility decision (delete whichever is not applicable) to re-open and the manner in which it operates following such reopening, shall fall exclusively on the early childhood development program or partial care facility, and that the national Department of Social development and Provincial Department of Social development shall bear no liability in this regard”.*
- 3 It is declared that the registration of early childhood development programmes and partial care facilities are regulated by the provisions of the Children's Act, 38 of 2005 (and the regulations thereto), exclusively.
- 4 The first respondent is ordered to withdraw the directions that were published in Government Gazette No 43520 on 10 July 2020 and publish replacement directions that correspond with the withdrawn directions with the exception of the amendments effected in terms of this order, within 3 (three) days of the granting of this order.

ii) Declaration of Clarification:

5 The order granted by Fabricius J on 6 July 2020 in the Gauteng Division of the High Court under case number 24258/2020, is clarified and interpreted as follows:

5.1 It is declared that the provision of early childhood development services and partial care services as contemplated in the Children's Act, Act 38 of 2005 ("the Children's Act") is permitted from re-opening from the date of 6 July 2020 as follows:

5.1.1 the provision of early childhood development services and partial care services is authorised in terms of the amendment to the Regulations issued by the Minister of Co-operative Governance and Traditional Affairs, in terms of section 27(2) of the Disaster Management Act, Act 57 of 2002 published in the government Gazette on 28 May 2020 ("*Alert Level 3 regulations*") and its provisions;

5.1.2 providers of early childhood development services and partial care services may operate immediately and are not precluded from operating by the provisions of section 46(1) read with Table 2 of the Alert Level 3 Regulations;

5.1.3 the Alert Level 3 regulations take precedence in any matter where there is a conflict between the provisions of the directions and the Alert Level 3 Regulations;

5.1.4 an inspection prior to re-opening to monitor and verify compliance with appropriate and/or prescribed safety measures referred to in the order is not a pre-condition for the providing of early childhood development

services and/or partial care services at or by early childhood development facilities, partial care facilities, after school care centres, toy libraries, parental support groups, child minders, day mothers and playgroups;

5.1.5 the imposition of a requirement to obtain a “*clearance certificate*” prior to opening as a pre-condition for the offering of early childhood development services and/or partial care services at or by early childhood development facilities, partial care facilities, after school care centres, toy libraries, parental support groups, child minders, day mothers and playgroups are in contravention of the Alert Level Regulations and are unlawful;

5.1.6 the imposition of a requirement to obtain a “*clearance certificate*” prior to opening as a pre-condition for the opening of early childhood development and/or partial care facilities by any of the first to ninth respondents and/or any official acting on their behalf and/or representing the Department of Social Development, is unlawful;

5.1.7 the appropriate and/or prescribed safety measures applicable to facilities offering early childhood development and/or partial care services are as contained in:

5.1.7.1 the provisions of the Alert Level 3 Regulations applicable to all businesses and institutions in terms of regulation 46(1) thereof; and

5.1.7.2 the remainder of the directions as amended by this order.

iii) Structural Interdict:

6 It is declared that all approved institutions providing early childhood development and partial care services (hereinafter jointly referred to as “*approved ECDs*”), regardless of whether or not they have resumed the provision of such services, are entitled to receive all subsidies, inclusive of all three components thereof, namely the nutritional, stimulation and administrative components (hereinafter “*the subsidies*”), in accordance with the allocation process conducted in terms of the Division of Revenue Act, Act 4 of 2020 (“*Division of Revenue Act*”);

7 It is declared that the first respondent (“the Minister”) is under a constitutional and statutory duty to ensure that the subsidies are paid to approved ECDs to allow them to function so that they may provide nutrition and stimulation to infants and young vulnerable children, thereby promoting the rights of children to life, nutrition, social services, education and the enhancement of their development, whether they are attending qualifying ECD facilities or merely collecting food as a result of the COVID-19 pandemic;

8 It is declared that the Minister is in breach of that duty;

9 The Minister is ordered to ensure without delay that the subsidies are paid to approved ECDs to allow them to function so that they may provide nutrition and stimulation to infants and young vulnerable children, thereby promoting the rights of children to life, nutrition, social services, education and the enhancement of their development, whether they are attending qualifying ECD facilities or merely collecting food as a result of the COVID-19 pandemic;

10 It is declared that the second to ninth respondents (“the MECs”) are under a constitutional and statutory duty to implement the subsidies in their respective Provinces in such a manner that it provides approved ECDs with the means to provide access to nutrition and stimulation to infants and young vulnerable children, thereby promoting the rights of children to life, nutrition,

social services, education and the enhancement of their development, whether they are attending approved ECDs or merely collecting food as a result of the COVID-19 pandemic;

- 11 It is declared that the MECs are in breach of that duty.
- 12 The MECs are ordered to forthwith implement the subsidies in their respective Provinces in such a manner that it provides approved ECDs with the means to provide access to nutrition and stimulation to infants and young vulnerable children, thereby promoting the rights of children to life, nutrition, social services, education and the enhancement of their development, whether they are attending approved ECDs or merely collecting food as a result of the COVID-19 pandemic;
- 13 The Minister is ordered to file at this Court under oath, within five (5) days, and to provide copies to the applicants, a plan and programme which she will implement without delay so as to ensure that the MECs immediately carry out their duties referred to above, and which will address the following matters:
 - 13.1 what steps she has taken to ensure that the MECs continue to provide access to nutrition and stimulation to infants and young vulnerable children by means of early childhood development and/or partial care services as provided by approved ECDs during the national state of disaster;
 - 13.2 what further steps she will take in that regard; and
 - 13.3 when she will take each such step.
- 14 The Minister is ordered to file reports with this Court under oath, and provide copies to all the applicants, every fifteen (15) days from the date of this order until the order is discharged by this Court, setting out the steps she has taken to give effect to this order, when she took such

steps, what the results of those steps have been, what further steps she will take, and when she will take each such step.

15 The MECs are each ordered to file at this Court under oath, within five (5) days, and provide a copy to the applicants, a plan and programme which they will implement without delay so as to comply with their duties referred to above, and which address the following matters:

15.1 when all approved ECDs that fall within their jurisdiction will receive subsidies to allow them provide access to nutrition and stimulation to infants and young vulnerable children by providing early childhood development and/or partial care services and by the distribution of food;

15.2 what steps they have taken to achieve that;

15.3 what further steps they will take to implement that plan and programme, and

15.4 when they will take each such step.

16 The MECs are ordered to file reports under oath with this Court, and to provide copies to the applicants, every fifteen (15) days from the date of this order, until the order is discharged by this Court, setting out the steps they have taken to implement the plan and programme, when they took such steps, and how many approved ECDs in the area of their jurisdiction are receiving the subsidies to provide to access to nutrition and stimulation to infants and young vulnerable children.

17 The applicants may set this matter down for further hearing, or hearings by the Court, on these papers and the reports filed in terms of this order, supplemented to the extent necessary:

- 17.1 for a determination of whether the plans and programmes referred to above comply with the duties of the Minister and/or the MECs concerned as declared or set out in this order;
- 17.2 for a determination of whether the Minister and/or an MEC has complied with the order of this Court and/or with his/her duties as declared or set out in this order;
- 17.3 for further or alternative relief to ensure that the Minister and the MECs comply with their duties as declared or set out in this order
- 18 Further or alternative relief;
- 19 The first to ninth respondents are ordered to pay the costs of this application, the first respondent to pay such cost *de bonis propriis*, together with the second to ninth respondents on the scale as between attorney and client, jointly and severally the one paying the other to be absolved.

TAKE FURTHER NOTICE that the affidavit of **ANTONIN ULRICH VAN DER MERWE** will be used in support of this application.

TAKE FURTHER NOTICE that the applicants have appointed the address as set out below at which it will accept service of all process in these proceedings.

TAKE FURTHER NOTICE that if you intend opposing this application, you must by 12:00 noon on Monday 17 August 2020, deliver:

- 19.1 I notice of such intention stating the address, including an email address, at which you will accept notice and service of all documents in these proceedings, and
- 19.2 your answering affidavit, if any.

DATED AT CAPE TOWN ON THIS 8TH DAY OF AUGUST 2020



VAN WYK & ASSOCIATES

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TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT

AND TO: MINISTER OF SOCIAL DEVELOPMENT

First Respondent

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CARE OF THE STATE ATTORNEY, PRETORIA AND BY FAX

AND TO: MEC OF SOCIAL DEVELOPMENT EASTERN CAPE

Second Respondent

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Bisho

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CARE OF THE STATE ATTORNEY, PRETORIA AND BY EMAIL

AND TO: MEC OF SOCIAL DEVELOPMENT GAUTENG

Third Respondent

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CARE OF THE STATE ATTORNEY, PRETORIA AND BY EMAIL

AND TO: MEC OF SOCIAL DEVELOPMENT FREE STATE

Fourth Respondent

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CARE OF THE STATE ATTORNEY, PRETORIA AND BY EMAIL

AND TO: MEC OF SOCIAL DEVELOPMENT KWA-ZULU NATAL

Fifth Respondent

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CARE OF THE STATE ATTORNEY, PRETORIA AND BY EMAIL

AND TO: MEC OF SOCIAL DEVELOPMENT LIMPOPO

Sixth Respondent

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CARE OF THE STATE ATTORNEY, PRETORIA AND BY EMAIL

AND TO: MEC OF SOCIAL DEVELOPMENT MPUMALANGA

Seventh Respondent

No 7 Government Boulevard

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Indwe Building (Building 3)

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Mbombela

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CARE OF THE STATE ATTORNEY, PRETORIA AND BY EMAIL

AND TO: MEC OF SOCIAL DEVELOPMENT NORTHERN CAPE

Eighth Respondent

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CARE OF THE STATE ATTORNEY, PRETORIA AND BY FAX

AND TO: MEC OF SOCIAL DEVELOPMENT NORTH WEST

Ninth Respondent

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Mmabatho

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CARE OF THE STATE ATTORNEY, PRETORIA AND BY EMAIL

AND TO: MINISTER OF FINANCE

Tenth Respondent

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CARE OF THE STATE ATTORNEY, PRETORIA AND BY FAX