



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no. 71/2021

In the matter between:

MINISTER OF SOCIAL DEVELOPMENT

Appellant

and

SA CHILDCARE (PTY) LTD

First Respondent

**CENTRE FOR EARLY CHILDHOOD
DEVELOPMENT NPC**

Second Respondent

REVEREND TEMBELA MAGADLA

Third Respondent

BUSY BEE CRECHE AND PLAYSCHOOL

Fourth Respondent

**SOSHANGUVE FOR EARLY CHILDHOOD
DEVELOPMENT FORUM**

Fifth Respondent

BONANG DAY CARE CENTRE

Sixth Respondent

**COMMUNITIES, CHILDREN AND
RESPONSIBLE CARE ORGANISATION
Respondent**

Seventh

FEED THE BABIES FUND

Eighth Respondent

MINISTER OF FINANCE

Ninth Respondent

In the matter between:

MEC, SOCIAL DEVELOPMENT EASTERN CAPE

First Appellant

MEC, SOCIAL DEVELOPMENT GAUTENG

Second Appellant

MEC, SOCIAL DEVELOPMENT FREE STATE

Third Appellant

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

Neutral citation: *Minister of Social Development v SA Childcare (Pty) Ltd & Others; MEC, Social Development, Eastern Cape & Others v SA Childcare (Pty) Ltd & Others* (Case no. 71/2021) [2022] ZASCA 119 (29 August 2022)

Coram: Ponnann, Plasket and Hughes JJA and Tsoka and Savage AJJA

Heard: 20 May 2022

Delivered: 29 August 2022

Summary: Social development – Early Childhood Development facilities – payment of subsidies by national and provincial Departments of Social Development

– whether breaches of constitutional obligations established – principles applicable to determination of disputes of fact in application proceedings re-stated.

ORDER

On appeal from: Gauteng Local Division of the High Court, Pretoria (Janse van Nieuwenhuizen J sitting as court of first instance).

- 1 The appeal is upheld.
 - 2 The order of the high court is set aside and replaced with the following order.
'The application is dismissed.'
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JUDGMENT

Plasket JA (Ponnan and Hughes JJA and Tsoka and Savage AJJA concurring)

[1] Early Childhood Development and Partial Care facilities (collectively, ECDs) play an important role in the progressive realization of an interwoven network of socio-economic rights guaranteed by the bill of rights that forms part of our Constitution. These include the fundamental rights to social assistance in terms of s 27(1)(c), of children to basic nutrition in terms of s 28(1)(c) and of the paramountcy of the best interests of children in terms of s 28(2). This case is concerned with whether the appellants – the Minister of Social Development (the Minister) and the MEC's for Social Development in eight of the nine provinces (the MECs) – violated these rights in relation to the subsidization of ECDs during the lockdown imposed after the declaration of the state of disaster in the country as a result of the COVID-19 pandemic.

[2] SA Childcare (Pty) Ltd – the first respondent – and seven other organisations and an individual involved in the ECD sector – the second to eighth respondents – brought a wide-ranging urgent application for declarations of invalidity of various directions issued by the Minister; what was called a ‘Declaration of Clarification’ in relation to a judgment handed down by the high court; and a structural interdict premised on the Minister and MECs having acted unconstitutionally in relation to the payment of subsidies to ECDs during the lockdown.

[3] The court below found that much of what had been applied for was moot, and it declined to engage with those issues, and some of the relief claimed was abandoned. It found, however, that the Minister and the MECs had violated the Constitution in relation to the payment of subsidies to ECDs during the lockdown and ordered them to rectify the situation. The court below decided against granting a structural interdict as requested. Two appeals – one in which the Minister is the appellant, and one in which the MECs are the appellants – are before us with the leave of the court below. They constitute, for all intents and purposes, one appeal and I shall treat them in that way.

[4] As, by the time the appeals were to be heard, the state of disaster had been lifted and the relief related to the 2020/2021 financial year, which had passed, the parties were requested to file heads of argument on whether the appeal was moot. The Minister and the MECs conceded that the appeal was indeed moot but wanted the attorney and client costs orders made against them by the court below altered to party and party costs orders. Strangely, despite being faced with the capitulation of the Minister and the MECs, and certain victory in the appeal, the respondents asserted that the appeal was not moot and ought to be argued. They argued that an obligation to pay is a continuous obligation and that a constitutional obligation to pay could not be rendered moot by the lifting of the state of disaster. Faced with this, the Minister and MECs ran down the white flag, withdrew their concession as to mootness and prepared to argue the merits of the appeal. In the light of the position adopted by the respondents and the fact that the punitive costs order was a live issue, we decided to determine the appeal on the merits.

The relief claimed and granted

[5] It is necessary at the outset to set out the relief that was claimed by the respondents and what was eventually granted by the court below. In so doing I confine myself to the relief that had not been found to be moot or had been abandoned.

[6] The residual relief that was claimed by the respondents was described by them in the notice of motion as a structural interdict. The essence of that relief consists of a declarator of a general nature and essentially similar orders in respect of the Minister, on the one hand, and the MECs, on the other.

[7] In the first place a declarator was sought to the effect that ‘all approved institutions providing early childhood development and partial care services (hereafter 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 (hereafter “*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*”). I shall refer to this Act as ‘the DORA’.

[8] A declarator was sought against the Minister to the effect that she was ‘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’. This prayer was followed immediately by one to declare that ‘the Minister is in breach of that duty’.

[9] Then, an order was sought that directed the Minister 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] Declarators were sought against the MECs to the effect that they were 'under a constitutional and statutory duty to implement the subsidies in their respective Provinces' in the manner specified and that they were 'in breach of that duty'. As with the Minister, orders were sought to direct the MECs to 'forthwith implement the subsidies in their respective Provinces' in the manner specified by the respondents.

[11] A number of orders were then sought that would require the Minister to file with the court 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 directing her to file reports every 15 days 'setting out the steps she has taken to give effect to this order, when she took such steps, what the result of those steps have been, what further steps she will take, and when she will take each such step'. Essentially similar orders were sought against the MECs.

[12] Finally, a costs order was sought. The respondents sought an order directing the Minister and the MECs to pay their costs on an attorney and client scale, with the Minister to pay *de bonis propriis*.

[13] To a large extent, the order granted by the court below followed the notice of motion, although it decided that 'a structural interdict will not at present be necessary'. The first order made by the court below – the general declarator – differed from the order sought in the notice of motion in two significant ways. First, in the notice of motion, the ECDs that were the subjects of the relief claimed were described as 'approved institutions' or 'approved ECDs', although what was meant by the word 'approved' was never explained or defined. The court below's order identified the beneficiaries of the relief as 'institutions providing early childhood development and partial care services that received funding through subsidies before 31 March 2020'.

[14] Secondly, the notice of motion sought a declarator that 'approved ECDs' were entitled to be paid subsidies 'regardless of whether or not they have resumed the provision' of services. The court below limited the right to be paid subsidies. Its declarator was to the effect that those ECDs that received subsidies before 31 March

2020 'shall continue to receive their funding in the 2020/2021 financial year for the duration of the lockdown's alert levels . . . regardless of whether or not they have resumed the provision of such services'.

[15] In the remaining orders, sometimes the reference is to 'approved ECDs' and at other times they are simply referred to as 'ECDs'. It seems to me that the first order granted by the court below defined the ECDs that were the beneficiaries of the relief as those who had been receiving subsidies before 31 March 2020, and the references to 'approved ECDs' and 'ECDs' should be understood in this way. It is also noteworthy that both the notice of motion and the orders made by the court below contemplate the payment of the full subsidy to each ECD, made up of three components – nutrition, stimulation and administrative. The administrative component includes salaries.

[16] As to the costs order, the most obvious difference between what was sought in the notice of motion and what was granted by the court below is that the costs order did not direct the Minister to pay costs de bonis propriis. She and the MECs were, however, directed to pay the respondents' costs on an attorney and client scale.

The determination of facts in applications

[17] Applications, Harms DP said in *National Director of Public Prosecutions v Zuma*,¹ are designed to deal with legal issues on common cause facts. Unfortunately, few applications meet this idealized standard, with the result that rules have been developed to determine how disputes of fact should be dealt with in application proceedings.

[18] The locus classicus on the issue is Corbett JA's judgment in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.² He defined the general rule as to the resolution of disputes of fact as follows:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be

¹ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-I.

granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.'

[19] Corbett JA proceeded to state, however, that the court's power to grant final relief on the papers was not limited to the above. He held in this regard:³

'In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.'

[20] A gloss to *Plascon-Evans* was added in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*.⁴ Heher JA re-iterated that 'an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers'.⁵ He then considered how a proper dispute of fact arises. He held:⁶

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so,

³ At 634I-635C.

⁴ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA).

⁵ Para 12.

⁶ Para 13.

rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.’

The issue in dispute and the evidence

[21] In the founding affidavit, the respondents summarized the principal issue of relevance to this appeal as being that the Minister and the MECs had unlawfully withheld subsidies due to ECDs, to the detriment of children attending those institutions. That this is the issue to be decided is also evident from the relief that was claimed and then granted by the court below. That relief is not aimed at securing specific relief for particular ECDs that may claim to have been denied what was their due, but for general, declaratory relief premised in the main on a systemic denial of subsidies to ECDs. This is a factual issue, the question to be answered being whether the facts admitted by the Minister and the MECs, together with their version of events, justified the granting of the relief by the court below.

[22] This core issue also appears clearly from the respondents’ averments concerning urgency. The deponent to the founding affidavit stated that non-compliance by the Minister and the MECs with statutory obligations in terms of the DORA and directions made in terms of the Disaster Management Regulations to pay subsidies to ECDs constituted a ‘gross violation of children’s rights to a life, basic nutrition, basic education, to equality and to public administration that is in line with the basic values expressed in section 195 of the Constitution’.

[23] Later in the founding affidavit, the point was made that the application was directed at compelling ‘the performance of the [Minister’s and MECs’] statutory duties

to transfer subsidies already allocated in terms of the ECD Conditional Grant, established in 2017/2018, the purpose of which is to increase the number of poor children accessing subsidized early childhood development services'. It was alleged that these subsidies 'have been allocated since 1 April 2020 but have been unlawfully withheld without reason or justification'

[24] The crux of the respondents' case against the Minister and the MECs is captured in the following paragraphs of the founding affidavit:

'135 The [Minister] (who is well aware of these factors) has publicly announced and issued directions that subsidy payments must continue flowing to funded registered ECD operators in spite of closures. Her practices, however, indicate otherwise.

136 It will be shown in this affidavit that the [Minister] (supported by the [MECs]) have acted in the utmost bad faith to the detriment of infants and young innocent children, not only by infringing their rights, but also by causing them to suffer physical hardship and probable impairment as a result of this conduct, as illustrated in the supporting affidavits attached hereto.

137 The conduct of the [Minister and the MECs] falls significantly below the standard expected of officials in a position of trust, tasked with the protection of the rights and interests of infants and young children and is nothing short of delinquent.'

[25] Before progressing any further, it is necessary to say something of the respondents' papers. They consist, in large measure, of vague factual allegations such as, for instance, that ECD staff were intimidated, with absolutely no detail as to how, when, where and by whom; of emotive and vague statements masquerading as facts; of inadmissible hearsay evidence; and of unfortunate, ill-conceived and unsubstantiated allegations of bad faith directed at the Minister and the MECs.

[26] When boiled down to its basics, the factual basis of the respondents' case appears to be that the Minister and the MECs withheld subsidies to ECDs when the lockdown commenced, have continued to do so, and in this way have breached their statutory and constitutional obligations. It is, for instance, stated in the founding affidavit that the Minister's direction to the MECs to pay the subsidies was intended to mean the full subsidy because provincial administrations do not have the authority to adjust the subsidy; and that despite the Minister's direction, payments 'did not

materialise', with the result that many children and their caregivers were left 'without funding for a period of approximately 4 (four) months at this point in time'.

The answering papers

[27] It is to these allegations that the Minister and the MECs have responded. After sketching some common cause background, I commence with the answering affidavit of Ms Isabella Sekawana, the Chief Director: Early Childhood Development in the Department of Social Development, deposed to on behalf of the MECs. I shall then deal with the Minister's answering affidavit.

[28] As a result of the COVID-19 pandemic, a national state of disaster was proclaimed on 15 March 2020 in terms of s 27(1) of the Disaster Management Act 57 of 2002 (the DMA). Section 27(2) of the DMA empowers a minister designated by the President – in this instance, the Minister of Co-operative Governance and Traditional Affairs (the COGTA Minister) – to make regulations. The regulations empowered all other ministers to make directions in relation to their portfolios. The COGTA Minister imposed an almost complete lockdown of the population. With the exception of those people deemed to provide essential services, the rest of the population was required to remain at home, and only allowed out of their homes for limited purposes. With time, the lockdown measures were progressively relaxed to the point where, now, the state of disaster has been lifted and very few restrictions remain.⁷

[29] One of the consequences of the initial lockdown was that schools, universities and technikons were all closed. Students attending these institutions were required to remain at home. The same fate befell ECDs. On 16 March 2020, the Minister issued a circular directing that, with effect from 18 March 2020, all ECDs were to close, as part of the national lockdown aimed at keeping the large majority of the

⁷ For background to the declaration of the state of disaster and its consequences, see *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; 2021 (3) SA 593 (SCA) paras 18-33. On the power vested in ministers to make directions, see *Afriforum NPC v Minister of Tourism and Others; Solidarity Trade Union v Minister of Small Business Development and Others* [2021] ZASCA 121; 2022 (1) SA 359 (SCA) paras 17-18 and 33-34.

population in their homes with a view to limiting the transmission of COVID-19. The closure of ECDs was, initially, to last until 15 April 2020, but was extended from time to time. They were required to close their doors and the children who attended them were required to remain in their homes. The issues in this case arise from the lockdown and the re-opening of ECDs as the lockdown restrictions were eased.

[30] The Minister made it clear that despite the closure of ECDs, those of them that had been receiving subsidies before 31 March 2020 would continue to receive funding for the 2020/2021 financial year. She stated this, inter alia, in directions she issued in terms of the DMA on 9 May 2020 and in a circular dated 29 May 2020 addressed to the heads of social development departments in the provinces.

[31] In early June 2020, the Minister announced that workstreams would be set up to conduct risk assessments and to determine the state of readiness of ECDs to re-open. She said that ECDs would remain closed while the country was under alert level 3 lockdown, but that planning for re-opening would forge ahead. This process was an inclusive one. It involved engagement with the ECD sector. Ms Sekawana stated, for instance, that in addition to working with the provincial administrations on planning for the re-opening of ECDs, she 'engaged extensively with the sector itself' by convening meetings on 26 May 2020, 3 June 2020, 12 June 2020, 22 June 2020 and 28 July 2020. The minutes of these meetings confirm the involvement of a significant number of organisations in the ECD sector, including the first respondent, and their participation in the process, especially in the eight workstreams that were established.

[32] Ms Sekawana made the point that at the first meeting, attended by 69 people, after she had explained the purpose of the workstreams, 'all members present agreed that there had to be a support package that was COVID-19 compliant, and to participate in and support the planning and re-opening of ECDs'. By the end of the meeting 'there was firm consensus that workstreams would start meeting and begin drafting plans and proposals'.

[33] At the second meeting (on 3 June 2020), attended by 26 people, it was agreed that 'a coherent document setting out a reopening plan based on the

collective input of the workstreams would be developed for presentation to the Minister'. It was also agreed at this meeting that 'monitoring and evaluation was to continue'. Ms Sekawana described this as 'the golden thread running through every element of a viable reopening plan'.

[34] The third meeting (on 12 June 2020) was attended by '70 members from civil society; provincial departments of social development and national departments'. It was noteworthy, Ms Sekawana said, that it was agreed that 'everything had to be done in line with the disaster management regulations' and that the 'verification process and the support required for self-assessment was accepted as a legitimate part of the process'.

[35] The fourth meeting (on 22 June 2020) was attended by 65 people. Those present were informed that their work had been presented to the Department as well as the meeting of the Minister and MECs, and that the go-ahead for implementation had been given. What remained to be done was the finalization of standard operating procedures for ECDs.

[36] The final meeting (on 28 July 2020) was attended by 70 people. It was convened to 'wrap up the first phase of the re-opening process'. Ms Sekawana said that the meeting concluded with an agreement that ECDs 'could reopen subject to meeting the prescribed COVID-19 requirements and that parties would continue working together to deal with the registration backlog'.

[37] By that stage, directions had been issued by the Minister in terms of the DMA to regulate the phased return to ECDs of the children who, prior to the lockdown, had attended them. The directions were also aimed at achieving uniformity in the re-opening process. They prescribed conditions such as that ECDs had to 'comply with the minimum health, safety and social distancing measures on COVID-19, referred to in these directions and the Regulations'.⁸ Section 14 of the directions stated that the 'department must continue to subsidise early childhood development centres or partial care facilities during the national state of disaster'.

⁸ Government Gazette 43520, GN 762 of 10 July 2020, s 4(4)(a).

[38] A number of facts emerge from the chronology that I have outlined. The first is that when the lockdown was imposed, ECDs had to close their doors and the children who attended them had to remain at home. Secondly, the Minister made it clear throughout, and repeatedly, that the subsidies that were paid to ECDs prior to the lockdown would continue to be paid to them during the lockdown. Thirdly, as soon as it was possible to do so, detailed plans were developed to regulate the re-opening of ECDs in a safe and responsible manner. Fourthly, those plans were formulated with the active participation and involvement of organisations in the ECD sector, including the first respondent. Fifthly, ECDs were re-opened as soon as they could be in the circumstances. With this context in mind, I turn now to that section of the affidavit of Ms Sekawana in which she deals specifically with the payment of subsidies to ECDs.

[39] Ms Sekawana denied that the eight MECs had unlawfully withheld subsidies to ECDs. Instead, the provincial departments were encouraged to use their discretion during the lockdown in respect of the utilization of their funds because they would have to account in due course to the Auditor-General for their expenditure. As a result, each of the MECs had taken a decision on how to implement the Minister's direction that ECDs be paid their subsidies during the lockdown. These decisions were described as executive in nature. They were, however, probably administrative in nature. Their classification is of no real moment because none of these decisions has been challenged by means of an application to review them. The result is that they exist in fact and have practical effect until such time as they may be successfully challenged and set aside by a court.⁹

[40] Most of the MECs decided to pay 60 percent of the subsidies for the period when ECDs were prohibited from operating. This percentage of the subsidy constituted the salaries of staff and the administration costs of ECDs. It did not cover the nutrition component of the subsidies because the children were precluded from attending the ECDs.

⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para 26; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* [2013] ZASCA 58; 2014 (3) SA 219 (SCA) paras 20-22; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) para 105.

[41] Ms Sekawana explained the reasoning behind these decisions as follows:

'The rationale for the decision was that the centres and programmes were closed until 6 July 2020 and therefore, no children attended. Furthermore, given the restrictions on movement during the hard lockdown, children and their parents would not have been in a position to attend the centres and programmes purely for the purpose of meeting their nutritional needs. As such, centres and programmes were funded for the administrative costs associated with their operations and the stipend payable to their employees. The 40% portion of the subsidy that was meant to be allocated for learners' nutritional needs was repurposed during the lockdown period for the benefit of children not attending ECD programmes and partial care facilities.'

[42] Because the children could not obtain nutrition from the ECDs, the department put in place other measures to provide access to nutrition for them. Those measures, as part of broader COVID-19 relief measures, made provision for the payment of an additional amount of R300 for child support beneficiaries in May 2020. This amount increased to R500 from June to October 2020. In addition, food parcels were provided as temporary assistance for those in need. These measures, Ms Sekawana said, were 'directed at ensuring that even though children did not receive their daily meal at [ECDs], their nutritional needs were met'. Ms Sekawana emphasized that it had been decided that as soon as children returned to ECDs, full subsidies would again be paid, and that 'all of the cited provinces have undertaken to re-instate the full allocation of the grant' when this happened.

[43] She made the point that it was a 'curious fact of this application' that while 'the applicants use sensationalist language, accusing the department of starving defenceless children, there is no evidence before this Court that any of the centres were open prior to the judgment of Fabricius J', which allowed for the conditional re-opening of private ECDs, and 'that children actually attended centres allowing these facilities to attend to their nutritional needs'. No evidence was, in other words, adduced to establish that 'when centres were empty the nutritional component was necessary for them to continue functioning'.

[44] She then dealt with the allegations of non-payment of subsidies to some ECDs. She admitted that there had 'regrettably' been 'occurrences of non-payment'. This had, however, been 'sporadic and certainly not systemic or as a result of an unwillingness to pay'. In certain instances, blame could not be attributed to the provincial departments. In some cases payments were not made because ECDs had previously misused subsidies. In other cases, details had been furnished by ECDs of inoperative or closed bank accounts. These instances apart, Ms Sekawana was unequivocal in asserting that despite the administrative challenges that faced provincial departments, 'where centres are open and they qualify for subsidies under the Children's Act they have been paid, or will in due course be paid'. She had been assured of this by the provincial departments.

[45] Action was taken to ensure that payments were made. For instance, at a meeting held on 20 July 2020, reports were submitted by provincial departments concerning the payment of subsidies to ECDs. For the most part, this concerned the payment of subsidies for the second quarter. Some administrative difficulties were reported on. The Eastern Cape department had experienced 'challenges' in respect of payment to 'new ECDs'. The Gauteng department had paid most of the ECDs in the first quarter but undertook to pay those that had not been paid a lump sum for the first and second quarters when payment for the second quarter fell due. The Northern Cape department reported that it had 'paid the organisations until September 2020'. The provincial departments were requested to continuously update their reports on subsidy payments.

[46] Ms Sekawana explained that the purpose of the meetings with provincial departments was to 'gauge from the provinces the extent to which they were implementing the recommendations emanating from the workstreams and to assess readiness to reopen ECDs'. To that end, a 'toolkit was developed and all of the provinces submitted feedback on registration, payment of subsidies and the procurement of PPE'.

[47] Finally, in answer to the allegations made by the respondents concerning unconstitutional conduct on the part of the Minister and the MECs, Ms Sekawana stated:

'Again, the applicants in broad sensationalist terms accuse the department and provinces of reneging on their constitutional mandate. There is no objective empirical evidence before this Court that the department with the assistance of the provinces is not attending to the needs of the poor and vulnerable. In fact, the evidence shows the contrary. It demonstrates that through the implementation of the 8 workstreams; the increase in grant money; the provision of groceries to households and the social [distress relief] programme vulnerable communities are being reached and assisted.'

[48] During the course of Ms Sekawana's answering affidavit, she dealt in detail with the position of each of the provincial departments. Her averments in that regard have been confirmed in affidavits deposed to by each of the eight MECs concerned. The Minister, in her affidavit, confirmed the correctness of Ms Sekawana's affidavit insofar as it related to her.

[49] The Minister also dealt specifically with the respondents' attack on her conduct. In this respect, she denied having withheld, 'unlawfully or otherwise', the subsidies due to ECDs. She rejected what she termed 'the unsubstantiated insinuations and allegations' made by the respondents of bad faith on her part as well as irrational conduct, unlawfulness and contempt of court. She took exception to being labelled 'delinquent'.

[50] She stressed that it was common cause that she had issued a direction that ECDs were to be paid their subsidies during the lockdown. She also said that, once the lockdown had been relaxed sufficiently to allow ECDs to re-open and children to attend them once again, there was no longer any reason why the provinces could not pay a 'hundred percent of the subsidies to relevant ECDs'. She noted that the provincial departments had undertaken to do so and stated that there was no reason why that undertaking could not be accepted.

[51] She submitted that, on the basis of what is contained in Ms Sekawana's affidavit as well as her own, there was no basis for the structural relief claimed by the respondents because the 'MECs and I [are] complying with our statutory and constitutional obligations vis-à-vis the ECDs'.

Conclusion

[52] The court below misdirected itself on the facts. It all but ignored the version of the Minister and the MECs and, when it took it into account, it appeared to find that it lacked credibility. It thus decided the matter on the facts put up by the applicants before it (the respondents on appeal) even when those facts were disputed.

[53] To the extent that the court below rejected the Minister's and the MEC's version on the papers, there was no justifiable basis for doing so. It cannot be said that the disputes of fact raised by the Minister and the MECs were not real, genuine or bona fide disputes of fact. In their affidavits, they engaged with the facts in detail, and did so seriously and unambiguously. In addition, it certainly cannot be said that their version was far-fetched, clearly untenable or uncreditworthy – and thus liable to be rejected on the papers. The court below ought to have decided the application on the basis of the Minister's and the MECs' version.

[54] Had it done so, it could not have justifiably upheld the application and granted the relief that it did. On the version of the Minister and the MECs, the former instructed the MECs to pay subsidies to ECDs during the lockdown when ECDs could not function and children were prevented from attending them. The MECs, for their part, undertook to do so. The affidavit of Ms Sekawana stated that the necessary funds were transferred from the national sphere of government to the provinces to augment each province's own contribution. As the nutrition component of the subsidies could not be utilized by the ECDs, it was decided by the MECs to withhold payment of that part of the subsidy and to repurpose it, so that the nutritional needs of children could be addressed in other ways.

[55] I cannot see what prejudice the management of ECDs could possibly have suffered as a result of this arrangement: if the nutrition component had been paid to them during the lockdown, they could not lawfully have used it for the intended purpose. Those funds would have had to remain unspent in each ECD's bank account and, presumably, be returned to the provincial department concerned. As ECDs were, in effect, mothballed for the period of the lockdown, the payment of the administrative component of the subsidy and salaries kept them in a position to re-open as soon as the COVID-19 position improved sufficiently to allow this.

[56] I am not unmindful of the fact that a great deal of suffering occurred during the lockdown. What is clear, however, is that it was not possible, in the light of the lockdown, for ECDs to provide nutrition to the children that had attended them prior to the lockdown. The Minister and the MECs tried to find alternative ways to provide that nutrition to those children.

[57] The Minister made it clear that full subsidies were to be paid to ECDs as soon as the lockdown had been lifted and children could attend them again. Once again, the MECs were in agreement and undertook to comply with the Minister's direction. Ms Sekawana's evidence was that subsidies were, for the most part, paid to ECDs, but some were not. This failure was not the result of a reluctance to pay but rather the result of administrative failures attributable in some cases to one or other of the provincial departments and in others to the management of particular ECDs. She stressed that such failures as there may have been were not systemic, and would be rectified.

[58] Once the above evidence is accepted, as it must be, it cannot be concluded that either the Minister or the MECs had breached any of their constitutional obligations in respect of the funding of ECDs. The relief claimed by the respondents, and granted by the court below, is, in any event, not designed to remedy the individual instances of non-payment, and is incapable of doing so.

[59] The appeal must, for the reasons stated above, succeed. Before I make an order to that effect, it is necessary to record two observations. First, the punitive costs orders made by the court below were unwarranted. Secondly, despite the patently unreasonable attitude adopted by the respondents in the appeal, the Minister and the MECs have not sought costs against them either in the court below or in the appeal.

[60] As a result, I make the following order.

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following order.

'The application is dismissed.'

C Plasket
Judge of Appeal

APPEARANCES

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