



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 36962/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 14 December 2020

SIGNATURE:

In the matter between:

MINISTER OF SOCIAL DEVELOPMENT

First Applicant

MEC SOCIAL DEVELOPMENT EASTERN CAPE

Second Applicant

MEC SOCIAL DEVELOPMENT GAUTENG

Third Applicant

MEC SOCIAL DEVELOPMENT FREE STATE

Fourth Applicant

MEC SOCIAL DEVELOPMENT KWAZULU-NATAL

Fifth Applicant

MEC SOCIAL DEVELOPMENT LIMPOPO

Sixth Applicant

MEC SOCIAL DEVELOPMENT MPUMALANGA

Seventh Applicant

MEC SOCIAL DEVELOPMENT NORTHERN CAPE

Eighth Applicant

MEC SOCIAL DEVELOPMENT NORTH WEST

Ninth Applicant

And

SA CHILDCARE (PTY) LTD

First Respondent

CENTRE FOR EARLY CHILDHOOD DEVELOPMENT NPC

Second Respondent

THE REVEREND TEMBELA MAGADLA

Third Respondent

BUSY BEE CRÈCHE AND PLAY SCHOOL

Fourth Respondent

SOSHANGUVE FOR EARLY CHILDHOOD

DEVELOPMENT FORUM

Fifth Respondent

BONANG DAY CARE CENTRE

Sixth Respondent

THE COMMUNITIES, CHILDREN AND RESPONSIBLE

CARE ORGANISATION

Seventh Respondent

FEED THE BABIES FUND

Eighth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

Introduction

- [1] This an application brought by the first applicant ("the Minister") and the second to ninth applicants ("the MECs") for leave to appeal the judgment and order of this court dated 20 October 2020.

Minister

- [2] The Minister relied on seven grounds of appeal in the application for leave to appeal.
- [3] During the hearing of the application, it appeared that the crux of the application is the question of whether this court was correct in finding that the Minister has a statutory and constitutional duty to ensure that specific purpose conditional grants in terms of Schedule 5, Part A of the Division of Revenue Act, 4 of 2020 ("DORA") is paid.
- [4] In finding that the Minister had a statutory duty, this court relied on the Framework published in terms of section 16 of DORA and more specifically, the Framework for the year 2020/2021 that was published in *Government Gazette* No. 434495 on 3 July 2020.
- [5] In terms of the published Framework, this court found that the responsibilities imposed on the National Department of Social Development, to monitor the utilization of the subsidy against the set outcomes and take appropriate action in cases of non-compliance with the framework, facilitate approval of the payment schedule, monitor

project progress and compliance to conditional grant framework and review and update subsidy guidelines in relation to the subsidy, rests with the Minister of the National Department.

[6] Mr Moerane SC, counsel for the Minister, however, pointed out that the responsibilities mentioned in the Framework are assigned to the transferring and receiving officers and not the Minister.

[7] The statutory duty imposed on the Minister by this court is, according to Mr Moerane, therefore, not in accordance with the Framework.

[8] Should Mr Moerane be correct, the remaining question is then whether the Minister has a constitutional duty to ensure that the subsidies are paid and if not, to take appropriate steps to ensure compliance with the Conditions of the Framework.

[9] The answer to this question has far-reaching consequences for the Minister in her future conduct and is deserving of the attention of the Supreme Court of Appeal. Leave will accordingly be granted to the Minister in respect of this issue.

MECs

[10] The MECs raised nine grounds in support of their application for leave to appeal. The MECs, furthermore, relied on compelling grounds for the granting of leave to

appeal as envisaged in section 17(1)(a)(ii) of the Superior Courts Act, 10 of 2013.

The grounds are dealt with *infra*.

Grounds 1 and 2: Needs of children and the subsidies paid to centres

- [11] These grounds pertain to factual findings the court made on the strength of the evidence contained in the various affidavits. The MECs are of the view that another court would find that the plight of vulnerable children was met during the COVID 19 lockdown and that the MECs did pay a portion of the subsidies.
- [12] The MECs did not respond to the allegations contained in the various affidavits filed by the heads of ECDs and as a result, the allegations of the dire need of children due to the non-payment of subsidies stand uncontradicted.
- [13] These grounds of appeals have no merit.

Ground 3: Flaws in order 1

- [14] The MECs contend that the court erred in including the words "*regardless of whether they have resumed the provision of such services*" in the order.
- [15] This according to the MECs will entail that non-operational ECDs will receive subsidies notwithstanding the fact that they are not operational.

[16] This complaint is not borne out by the facts that were before the court. The problem that some ECDs faced was precisely the fact that they cannot be operational without receiving the subsidy.

[17] There is no factual basis for the MECs' speculation that some ECDs might not open. The affidavits deposed to by the heads of some ECDs point to the exact opposite. ECDs are desirous of providing nutrition and stimulation to underprivileged children in their communities. This is the very reason the application was brought.

[18] Consequently, this ground too stands to be dismissed.

Ground 4: The statutory and constitutional duties on the MECs

[19] This ground is phrased as follows:

"There is a reasonable prospect that another court would find that ... the MECs acted in accordance with the obligations as defined in the Constitution and the applicable legislation in paying all 3 components to operational and in only paying 2 of 3 components for non-operational Centres."

[20] The ground is somewhat at odds with the MECs stance that they will not pay anything to Centres that had to close down due to non-or – partial payment of subsidies during COVID 19.

[21] Be that as it may, no facts underlying the mere averment that another court would come to another finding have been provided and on the strength of the evidence

before the court, I am of the view that there is not a reasonable prospect that another court would come to another finding.

[22] The ground has no prospects of success.

Fifth ground: The court impermissibly ordered that subsidies be paid to non-operational Centres

[23] This ground overlaps somewhat with ground 3. The MECs do, however, point out under this ground for leave to appeal, that the order is inconsistent with the Public Finance Management Act 1 of 1999 ("PMFA") in that it compels the government to pay subsidies to Centres which are not operational in circumstances where there is no sound reason for them not to be operational.

[24] The court order makes provision for the payment of subsidies to ECDs that were entitled to receive subsidies prior to the lockdown. These payments, furthermore, only extend to the financial year ending 28 February 2021.

[25] Lastly, there is on the facts before the court, a sound reason why the ECDs that received subsidies prior to lockdown, are not operational, namely that they are unable to function without financial assistance from the Government.

[26] This ground is similarly meritless.

Ground 6: Interpretation of DORA

- [27] This court did not interpret any provision of DORA, but simply directed compliance with the clear provisions of the Framework issued in terms of section 16 of DORA.
- [28] In the result, this ground has no factual or legal basis and stands to be dismissed.

Ground 7: This court impermissibly disregarded the executive decisions taken by MECs to pay only two of the three components of the subsidy

- [29] The application was not a review. The respondents sought a declaratory order coupled with relief consequent upon the declarator.
- [30] This ground for leave to appeal is consequently without legal foundation and stands to be dismissed.

Ground 8: Finding in respect of the database

- [31] This ground is phrased as follows:

"The court a quo erred in finding that the database being referred to in the answering affidavit by the MECs refers to the existence of a list in respect of the ECDs that are entitled to receive the subsidy. By so finding the court ignored the fact that the approval for any funding by the state is subject to availability of funds as approved in terms of the PMFA and/or Division of Revenue Act."

- [32] The subsidies received by the ECDs prior to lockdown are a specific purpose conditional grant in terms of Schedule 5, Part A of DORA.

[33] The ECDs qualified and received the subsidies prior to lockdown in terms of the provisions of the Framework. The revenue that was allocated by Treasury for this specific purpose was therefore distributed according to the amount received by Treasury.

[34] The "*availability of funds*" ground was firstly, not by the MECs in their answering and is secondly, for the reasons *supra* ill-founded.??

[35] This ground has no merit.

Ground 9: A punitive costs order was not warranted.

[36] It is trite that a cost order is in the discretion of the court. The MECs are of the view that the court should not have found that they had a higher duty to respect the law which resulted in the punitive cost order.

[37] In view of the reasons and manner in which the MECs opposed the relief claimed by the applicants, I am of the view that another court would not reach a different conclusion in respect of the cost order.

Compelling grounds under section 17(1)(a)(ii)

[38] This ground is set out as follows:

"19. The judgment sets out a novel interpretation of DORA and section 93 of the Children's the Act (sic). It also has serious PFMA implications to the extent that it obliges MECs to pay subsidies to non-operational Centres."

20. *It therefore raises finance questions of immense importance."*

[39] The interpretation of DORA and the payment of subsidies to ECDs that cannot open without receiving subsidies have been dealt with *supra*.

[40] There is not a single reference to section 93 of the Children's Act in the judgment. In the result, reliance on the interpretation of section 93 of the Children's Act is both perplexing and ill-founded in law.

[41] In the premises, the MECs application for leave to appeal stands to be dismissed with costs.

ORDER

[42] In the premises, I grant the following order:

1. Leave is granted to the first applicant to appeal to the Supreme Court of Appeal in respect of the question whether the first applicant has a statutory and constitutional duty to ensure compliance with the Framework issued in terms of section 16 of Division of Revenue Act, 4 of 2020.
2. Costs to be costs in the appeal.
3. The second to ninth applicant's application for leave to appeal is dismissed with costs.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Electronically submitted therefore unsigned

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2020-12-14
JUDGE'S SECRETARY REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 December 2020.

DATE HEARD PER COVID19 DIRECTIVES:

25th of November 2020

(TEAMS HEARING)

DATE DELIVERED PER COVID19 DIRECTIVES:

14th of December 2020

APPEARANCES

Counsel for the First Applicant:

Advocate M. Moerane SC and

Advocate N. Muvangua

Instructed by:

State Attorney Pretoria

Counsel for the Second to Ninth Applicants: Advocate K. Pillay SC, Advocate R. Tulk and

Advocate M. Rantho

Instructed by:

State Attorney Pretoria

Counsel for the Respondents

Advocate E.A. Lourens

Instructed by:

Van Wyk and Associates