IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 24258/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHERS JUDGES: YES / NO
(3) REVISED

6/7/2020

In the matter between:

SKOLE-ONDERSTEUNINGSENTRUM NPC	First Applicant
BRONKIELAND KLEUTERSKOOL	Second Applicant
SOLIDARITY	Third Applicant

and

MINISTER OF SOCIAL DEVELOPMENT	First Respondent
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Second Respondent
MINISTER OF BASIC EDUCATION	Third Respondent

JUDGMENT

FABRICIUS J

[1] In this urgent application the following relief is sought:

> "1. That condonation be granted for the non-compliance with the forms, service and time limits provided for in the rules in terms of Rule 6(12), and that the application be dealt with on an urgent basis;
>
> 2. That it is declared that, in terms of the amendment to the Regulations issued by the Second Respondent in terms of section 27(2) of the Disaster Management Act, No 57 of 2002 and published in the Government Gazette on 28 May 2020 (the Alert Level 3 Regulations), all private pre-school institutions offering Early Childhood Development services (Grade R and lower) are entitled to re-open immediately; (my underlining)
>
> 3. That the decision of the First Respondent or the Department of Social Development as evinced in the Media Statement of 5 June 2020 to the effect that the Early Childhood Development sector will remain closed under the Alert Level 3 lockdown regulations, be declared to be unconstitutional and unlawful insofar as it applies to private pre-schools offering Early Childhood Development services (Grade R and lower);
>
> 4. That the decision referred to paragraph 3 above be set aside to the extent that it applies to private pre-schools offering Early Childhood Development services (Grade R and lower);
>
> 5. The First Respondent is ordered to pay the costs of the application such costs to include the costs of two counsel."

[2] The first respondent did not file an answering affidavit which was due on 15 June 2020, and the second respondent and third respondents filed a notice to abide. The respondents also did not reply to a letter sent by applicants' attorney on 3 June 2020 which gave a full exposition of their interpretation of the legal position relating to the relief now sought. In a case of this nature, involving millions of children this conduct is unacceptable. It does not assist me to deliver an urgent judgment and to do so effectively. Section 165(3) of the Constitution was ignored. So was the *dictum* of the Constitutional Court in Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA (CC) at par [60] and in MEC for Health Eastern Cape v Kirland Investments (Pty) Ltd 2014 (3) SA 481 (CC) at par [82], that the state or an organ of

state is subject to a higher duty to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. I must add that it cannot simply remain supine and expect a Court to deal with last minute points of law (without bothering with a condonation application or an explanatory affidavit), letters written by the ministers or officials, newspaper reports and television interviews. None of that are admissible evidence. Even counsel for the first respondent was ultimately at pains to say that I must decide this case on what was before me on 1 July 2020. No doubt he hoped that this belated point of law would be considered. My strong aversion to the attitude adopted by the first and third respondents will be reflected in the costs order that I will make.

[3] In what follows I will refer to certain, but not all, of the submissions made by the applicants' counsel and counsel for the *amicus curiae*, who had filed detailed heads of argument for which I am grateful.

[4] The application concerns the rights and interest of private pre-school institutions which are not affiliated with schools and which offer Early Childhood Development ("ECD") education to children in Grade R and lower. Grade R is a reception year preceding grade 1.

[5] The South African Schools Act No 84 of 1996 deals with a registered "independent school" and a "public school", and falls under the auspices of the third respondent. In terms of s5.3 of the Act, school attendance is compulsory from the first school day of the year in which a child attains the age of seven years.

[6] By way of the Government Gazette No. 43372 dated 29 May 2020 and Notice 302 of 2020, the third respondent gave directions to provide for arrangements for a phased return of educators, officials and learners to school and offices. This however only applied to a "school" as defined in the said Schools Act.

[7] The phased in return for such children was 6 July 2020 for "ECD" and Grades R. Minimum health requirements were stipulated.

[8] On 1 June Notice 304 of 2020 was published in Government Gazette No. 43381. "Early Childhood Development" was defined as meaning "a leaner in Grade R or lower in a school". The phased in return remained at 6 July 2020.

[9] On 22 June 2020 another Notice 343 of 202 was published by the third respondent in Government Gazette 432165 dated 23 June 2020. In section 1 "Pre - Grade R" was defined as meaning "the provision of early educational programmes by a school for learners below the age of admission to Grade R, and excludes an early childhood development programme as contemplated in s93 of the Children's Act No 38 of 2005. Chapter 6 of this Act (s91-103) deal in detail with these programmes, which fall under the auspices of the First Respondent. Again, reference is made to a "school" and 5.3 of this notice state specifically that the directions apply to a school (as defined in the Schools Act, as I have pointed out).

[10] The phased in return for learners, in the present context was 6 July 2020 for "Pre-Grade R" and "Grade R". Safety precautions were also stipulated for in some detail. The directions of 29 May and 1 June were withdrawn.

[11] It was submitted that confusion has ensued inasmuch as private pre-schools are not dealt with. Whilst the third respondent has clarified the situations in respect of ECD institutions affiliated with schools, the first respondent has not done so.

[12] It is however clear from Chapter 4 of the Regulations. Including Table 2 in respect of Alert Level 3, read with Regulation 46(1)(a), (b), (c) and (g) that there is no specific exclusion pertaining to private pre-school learning institutions.

[13] Counsel for the *amicus* referred in more detail to additional considerations relating to the legal framework and these were put as follows in her heads of argument:

13.1 ECD and Partial-Care Centres, as well as AfterCare Centres all form part of the Children's Act and fall under the control of the Department of Social Development ("DSD") under the Children' Act. All these Centres could be

deemed private pre-school institutions as they were opened and managed by private owners or organizations and not by Government;

13.2 Within this ambit, some of these Centres were registered as Non- Profit Organizations ("NPO's"). These NPO's could apply at DSD for a subsidy if they were registered by DSD as an ECD and Partial-Care Centre. But all of them, whether in disadvantaged areas or not, can be seen as private as opposed to public. They are not "funded" by the Government in the same way as public schools, but are but subsidised;

13.3 In terms of an earlier administrative decision made by DSD in conjunction with the Department of Basic Education ("DBE"),Grade R pupils were incorporated into the sector of DBE;

13.4 The regulation of Grade R learners then accordingly changed from that of the Children's Act," to the Schools Education Act which meant ECD's and Partial Care Centres had to be registered with DBE. Grade RR followed the same route in 2019;

13.5 Some Grade R and RR, ECD and Partial Care Centres then moved to public and independent private schools registered with DBE. Many of the public schools however also started enrolling pre-Grade R from the age of 2 years. The DSD ECD and Partial Care Centres also admit Gr R and pre-Grade R as per the Children's Act, from the age of three months.

13.6 The first respondent indicated at a press conference that her Department is in the process of transferring the whole portfolio from DSD to DBE. This statement was made in accordance with the President's SONA announcement of a transfer of responsibility for ECD centres from DSD to DBE and the intention to introduce two years of mandatory preschool education as an opportunity to make children and young people the National Project, to place human agency at the centre of national development and to begin to meet the Constitutional

imperative of putting the interests of children first in all matters pertaining to them;

13.7 It is therefore undeniably clear that the intention is for no difference to be made between "private" or "public" ECD's and Partial-Care facilities which are in process of combining DSD and DBE ECD and Partial-Care Centres under DBE. This process has not been finalised and this creates part of the confusion in interpreting the regulation of ECD's as opposed to Public schooling facilities as defined in the Schools Education Act and the applicable laws relating thereto;

13.8 SA Childcare (Pty) Ltd ("SACA") represents all ECD's and Partial-Care Centres registered with it, not only private entities. It was submitted on behalf of SACA that there should, therefore, be no distinction made between public and private ECD and Partial Care Centres as the intent had been expressed by the first respondent, for both sectors to be regulated by DBE;

13.9 SACA submits that this is the very reason why the first respondent fails to make any decision in relation to ECD's and Partial-Care Centres because the process of transfer has ensued and she is uncertain of which powers to exercise;

13.10 It was submitted that pending the finalization of the transfer of the sector, the position regarding ECD's and Partial Care Centres need to be regulated, and it is for this reason that SACA supports the relief sought by the applicants in the main application.

[14] I agree with these submissions in as much as they relate to prayer 2 of the Notice of Motion.

[15] I also agree with the submissions of counsel for the applicants that there can be no rational and justifiable ground, when interpreting the Regulations, upon which it was envisaged that schools offering ECD programmes including Grade R and lower which forms part of schools as defined in the Schools Act (which include both public

and independent schools), are permitted to re-open from 6 July 2020 in terms of the directions, but that other private pre-schools offering ECD education for children, in Grade R or lower are not permitted to open or simply left in a vacuum.

[16] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. The question whether a decision is rationally related to its purpose is an objective one.

See: Pharmaceutical Manufactures Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at par [85].

[17] Further and in addition, I have regard to s28(2) of the Constitution and s9 of the Children's Act No 38 of 2005, which make it abundantly clear that in all proceedings the best interest of the child are paramount. Section 7 of the Children's Act is of particular relevance as well. It is clear from expert evidence attached to the founding affidavits of both the applicants and the *amicus* that development of the pre-school child takes place holistically. Every aspect of their development influences other aspects of development being intellectual development and physical development. If a child's social development is neglected it will impair intellectual development for example.

[18] Prof P Cooper, Emeritus Professor Department of Paediatrics and Child Health at the University of Witwatersrand, supports the view that children should return to school and that children biologically contain SARS-COV-2 better than adults, are less likely to get sick if infected, have milder disease, are unlikely to die from COVID 19, and are probably less infections than adults. He also supports the "Position Statement: Return of South African Children to school" dated 30 May, issued by the South African Paediatric Association (SAPA).

[19] The views were quoted in the applicants founding affidavit and are the following:

"5.5.1 Children biologically contain SARS-Co V-2 better than adults" It is clear from the statement that children:

5.5.1.1 are less likely to get sick if infected;

5.5.1.2 have milder disease;

5.5.1.3 are unlikely to die from COVID-19; and

5.5.1.4 are probably less infectious than adults;

5.5.2 Furthermore, SAPA acknowledges that although children are at higher risk of being infected once at school, such risk to themselves and other is outweighed by the benefits of them returning to school.

5.6 Furthermore, SAPA outlines evidence to support its recommendations and, inter alia, states the following:

5.6.1 Children are less likely to acquire SARS-CoV-2 than adults;

5.6.2 Children have less severe disease, accounting for less than 1% of severe cases and deaths;

5.6.3 Children are more likely to have an asymptomatic infection than adults;

5.6.4 At a population level, children may be less likely to transmit and have a minor role in transmission;

5.6.5 Teachers are not at high risk of being infected by children;

5.6.6 Measures obviously have to be taken in order to reduce the risk of transmission in school settings such as hand washing, sanitizing and social distancing as is the case with all other business and institutions in operation amid the pandemic, and detailed for in the health protocol provided for in the Regulations.

5.7 In paragraph 7 of the statement, which deals with Risk-benefit analysis, the following is stated, inter alia:

"The benefits of returning to school, particularly for poorer children, include the positive impact on their learning, access to the School

Nutrition Programme (one meal per day), and mental health and well-being gains."

5.8 The social and emotional well-being of children are affected in various ways by the pandemic. The world in which we live has changed dramatically since the declaration of the state of disaster. Children, especially young children cannot be expected to understand the pandemic and the multitude of consequences arising therefrom.

5.9 Section 91(1) of the Children's Act provides as follows, with reference to Early Childhood Development, inter alia:

"(1) Early childhood development, for the purposes of this Act, means the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school-going age."

[20] There are other experts that hold the same view and these were presented to a recent full court hearing in the application of *Educators Union of South Africa v Minister of Basic Education*, Case No. 23533/20. This application concerned the opening of schools as defined, and sought in essence an order that the re-opening be on a phased in basis be interdicted. The application was refused on 1 July 2020. It is clear that the Department of Education is of the view that children should return to school. It is in their best interests having regard to all of their fundamental rights, including the right to education. UNESCO has also prepared a framework for the re-opening of schools having regard to the pandemic which has affected every country. They say that "the adverse effects of school closures on children's safety, well-being and learning are well documented."

[21] Taking all of the above into account, and the unfair and unlawful discriminatory and irrational vacuum that I have described, the question is what would be the most appropriate, fair and equitable relief? I am of the view that granting prayer 2 would suffice with an addition relating to safety measures. A mere media statement which is the subject matter of prayer 3, has no legal effect. It is not clear what actual decision

the first respondent made in this context having regard to the decisions made by the third respondent, and the apparent process of placing the whole topic under the auspices of the third respondent.

[22] Having completed the above draft judgment and handing it to my secretary for typing on 30 June 2020, I was rather surprised to put it mildly, when the following communication was received at about 17h30 on the same day, which I will quote in total.

> "**KINDLY TAKE NOTICE THAT** the First Respondent intends, at the hearing of the above matter, to raise the following point of law:
>
> 1.
>
> **RELIEF SOUGHT MOOT AND OR INCOMPETENT.**
>
> 1.1 The applicants seek an order:
>
> 1.1.1 that it be declared that in terms of the amended regulations issued by the second respondent in terms of section 27(2) of the Disaster Management Act, No. 57 of 2002 and published in the Government Gazette on 28 May 2020 all private pre-school institutions offering Early Childhood Development services are to re-open immediately;
>
> 1.1.2 that the decision of the First Respondent or the Department of Social Development as evinced in the Media Statement of 5 June 2020 to the effect that the Early Childhood Development sector will remain closed under the Alert Level 3 Lockdown regulations, be declared to be unconstitutional and unlawful in so fat as it applies to private pre-school offering Early Childhood Development services (Grade R and lower); and
>
> 1.1.3 that the decision referred to paragraph 3 of the Notice of Motion be set aside to the extend that it applies to private pre-schools offering Early Childhood Development services (Grade R and lower)
>
> 1.2 In essence the applicants' case is pegged on the Directions issued by the Department of Basic Education on 28 May 2020.
>
> 1.3 They contend that the said Directions allow Early Childhood Development centres that are housed in the independent and public schools and there is no rational basis not be allow the privately owned ECD's not to re-open.
>
> 1.4 On 23 June 2020 the Directions were amended to exclude ECD'S envisaged in section 93 of the Children's Act from the definition of Pre-Grade R schools. Attached hereto marked as **Annexure "A"** is a copy of the amended regulations.

1.5 The Directions dated 23 June 202 were again amended on 29 June 2020 to remove any reference to ECD's or Pre Grade R's from the Directions. Attached hereto marked **Annexure "B"** is a copy of the Directions issued on 29 June 2020.

1.6 In the light of the recent amendments to the Directions and Gazetted on 29 June 2020 all ECDs, including public, independent and private ECDs are not allowed to open until further Directions have been issued by the first respondent.

1.7 The amendment to the Directions has rendered to applicant's case academic or moot.

1.8 Alternatively, the relief sought by the applicant's, for as long as the amended Directions have not been challenged and set aside, is incompetent.

1.9 It is submitted that the respondents and the court are constrained by the principle of legality to perform their functions consistently with the law. As things stand presently the law, in the form of the Directions issued on 19 June 2020 is that no ECDs shall open until the first respondent has issued Directions in that regards.

The application therefore deserved to be dismissed with costs on this basis alone."

APPLICANTS' ANSWER TO THE POINT OF LAW TAKEN ON 30 JUNE 2020

[23] The Applicants managed to draft a speedy and detailed answer thereto, which also includes a chronology which now became relevant and important, taking into account the surprising attitude adopted by the first respondent up to late 30 June 2020. I deem it appropriate to quote their answer in full. Of particular importance are par 3.6 -3.9 and 3.17 -3.21 thereof, with which I agree. Paragraph 2.2.2 also reflects what was said in the Buffalo City and Kirland decisions *supra*.

"INTRODUCTION:

1.1 Before we make submissions on the points of law raised by the First Respondent, a few remarks need to be made with regard to the First Respondent's conduct in the course of this application and the belated notice under reply.

1.2 The Applicants only became aware of the First Respondent's notice when counsel for the amicus drew the attention of the Applicants' counsel thereto at approximately 18h10 on 30 June 2020.

1.3 We will invite the Honourable Court to disapprove of the conduct of the First Respondent with regards to her approach to this matter as dealt with further herein and in the context of the entire application.

1.4 The Applicants hereby give notice that they now seek a punitive cost order against the First Respondent on the scale as between attorney and client, such costs to include the costs of two counsel for the reasons set out herein.

1.5 We submit from the outset that the points of law raised have no merit whatsoever and are based on a misconstruction of the relief sought by the Applicants and the legal foundation thereof.

1.6 It would appear that the First Respondent believes, as a matter of law, that she has the power to regulate the re-opening of private pre-school institutions offering Early Childhood Development ("ECD") that are not affiliated with schools as defined in the South African Schools Act, 1996 ("Schools Act") by way of Directions to be issued by her.

1.7 The First Respondent simply does not have that power by virtue of a proper interpretation of the Alert Level 3 Regulations dated 28 May 2020 issued by the Second Respondent. In this regard, it needs to be pointed out that the interpretation of the Second Respondent's Regulations, which form the focus of the declaratory relief sought by the Applicants are not contested by the Second Respondent, who filed a notice to abide.

1.8 Furthermore, the latest Directions issued by the Third Respondent respectively on 23 June 2020 and 29 June 2020 provide all the more reason why a declaratory order is warranted and ought to be granted by the court's in terms of its power in section 38 of the Constitution or in terms of the wide powers which the court has in terms of section 172(1)(a) and (b) of the Constitution.

1.9 We deem it necessary to start with an outline of the chronology of events preceding and following the application to provide the requisite context.

2.

CHRONOLOGY:

2.1 On 3 June 2020, after the initial Directions were issued by the Third Respondent respectively dated 29 May 2020 and 1 June 2020 and after the Alert Level 3 Regulations were issued by the Third Respondent, the Applicants addressed a letter to all three Respondents via the Applicants' attorneys, calling for their response by 5 June 2020 on the exposition of the interpretation of the legal position set out in this letter.

2.2 Obviously, the purpose of this letter was firstly to obtain clarity as a result of the prevailing uncertainty with regard to re-opening of the private pre-schools in question and secondly, in an attempt to avoid having to approach the court on an urgent basis.

2.3 Instead of favouring the Applicants with the courtesy of a response, not only in the interests of the Applicants but also in the interest of ECD institutions and parents and children throughout the country, the First Respondent elected to rather issue a media statement on 5 June 2020 in which it was stated, inter alia, that the ECD sector will remain closed under the Alert Level 3 Regulations. This despite the self-acknowledged and obvious importance of ECD as stated by the First Respondent in the media statement in question, where she said the following:

"The ECD service run by Non-Profit Organisations and regulated by the Department of Social Development provides children with opportunities for early learning, health and nutrition services that enhance their physical, emotional and cognitive skills. In 2010, the South African Government declared ECD a public good and embarked on expanding universal access by 2030."

2.4 As dealt with in paragraphs 10.21 and 10.22 of the Applicants' founding affidavit, whilst the Alert Level 4 Regulations were in place, the First Respondent stated that she and her Department are directed by what the Department of Basic Education does.

2.5 Section 92 of the Children's Act, 38 of 2005 ("Children's Act") envisages a national strategy aimed at securing a properly resourced and co-ordinated ECD system. This ought to be developed by the First Respondent after consultation with interested persons and the Ministers of Education, Finance, Health, Provincial and Local Government and Transport.

2.6 From the aforementioned, one would expect, with regard to the management of ECD institutions, that proper coordination between the First, Second and Third Respondents, in particular as far as the management of the COVID-19 disaster is concerned, would have had to be applied. On the contrary, the Ministers appear to contradict each other, accentuating the uncertainty in the process as exemplified by the two most recent Directions respectively dated 23 June 2020 and 29 June 2020 issued by the Third Respondent.

2.7 As a result of the absence of a response to the letter of 3 June 2020, the Applicants had no alternative but to approach the court for urgent relief. The application was issued on 9 June 2020 and served on the Respondents care of the State Attorney on the same day.

2.8 On 10 June 2020, the First Respondent delivered a notice to oppose. On the same day, the Third Respondent filed a notice to abide. The Second Respondent filed a notice to abide on 15 June 2020.

2.9 The notice of motion called upon the Respondents to file answering affidavits by not later than 16h00 on Monday, 15 June 2020. Following the notice of opposition, no further steps were taken by the First Respondent.

2.10 The application was enrolled for hearing on 23 June 2020.

2.11 Since the filing of the aforesaid notices, there was no further communication from any of the Respondents, in particular the First Respondent in the days leading up to the hearing.

2.12 There was no indication of any point of law to be raised, any challenge with regard to the relief sought by the Applicants or any intimation of anticipated Directions which may have influenced the application.

2.13 On the contrary, when the Third Respondent issued Directions on 22 June 2020 as published in the Government Gazette on 23 June 2020, a definition of "Pre-Grade R" was incorporated in the said Directions to mean "the provision of early educational programmes by a school for learners below the age of admission to Grade R, and excludes an early childhood development programme as contemplated in section 93 of the Children's Act, 2005..."

2.14 In terms of direction 5 of the Directions of 22 June 2020, Pre-Grade R and Grade R learners are to return to school on 6 July 2020. It is to be noted that the term 'Early Childhood Development ("ECD") in the Directions of 29 May 2020, read with the Directions of 1 June 2020 was replaced with the term 'Pre-Grade R' in the Directions of 23 June 2020.

2.15 This did not affect the relief sought by the Applicants as the relief sought had no bearing on ECD or Pre-Grade R offered by schools in terms of the Schools Act.

2.16 On 23 June 2020, the matter served before Justice Mothle via virtual appearance by counsel for the Applicants and counsel for the amicus curiae. There was no appearance on behalf of the First Respondent.

2.17 Justice Mothle indicated that he had been informed by the Judge President that a judgement by the Full Court in a matter relating to re-opening of schools would be handed down on Friday, 26 June 2020 and that the application ought to be re-enrolled for the next week in anticipation of the judgement in question. Justice Mothle admitted the amicus curiae but otherwise ordered that the matter be re-enrolled for Tuesday, 30 June 2020, costs to be reserved."

[24] The Full Court delivered judgment on 1 July 2020 in the matter of One South African Movement and Another v The President of the Republic of South Africa under case no 24259/2020. It dismissed an application that schools must not re-open, which position was in fact supported by the third respondent.

"2.19 No practice note was filed by the First Respondent indicating any intention to raise matters of law or to indicate that further Directions were in the offing and anticipated to be published.

2.20 A logical inference can be drawn that there must have been liaison and discussion between the Respondents, in particular between the First Respondent and the Third Respondent prior to the issuing of the Directions by the Third Respondent on 29 June 2020.

2.21 In terms of Rule 6(5)(d)(iii), the First Respondent had to deliver a notice to raise questions of law within the time period within which a Respondent had to deliver an answering affidavit. In view of the urgency of the matter, this had to be done by 15 June 2020. When regard is had to the notice filed by the First Respondent on 30 June 2020, there is not even as much as an attempt to seek condonation for the late filing of the notice or any explanation as to why the notice was only served on 30 June 2020.

2.22 We respectfully submit that the conduct of the First Respondent in these proceedings and prior to the issuing of the application is indicative of the following:

2.22.1 a total disregard of the Court and its process;

2.22.2 a total disregard of the Applicants and their rights;

2.22.3 a total disregard of the interests of young children, parents of young children, teachers and employees of private pre-schools and ECD institutions countrywide;

2.22.4 a total disregard of the fundamental rights in terms of Section 28 of the Constitution promoting and protecting the best interests of minor children and the right to basic education in terms of section 29(1) of the Constitution.

2.23 The submission above must also be seen against the backdrop of evidence that was presented by the Third Respondent and which is also presented by the amicus in this application to the effect that young children who are the subjects of ECD are at low risk of contracting the COVID-19 disease and are also at low risk of transmitting the disease to adults.

2.24 To date hereof, there is no indication whatsoever as to when ECD institutions such as private pre-schools are to re-open according to the First Respondent.

2.25 In any event, as we will indicate further herein, the crux of this application and the relief sought does not turn on the Directions issued by the Third Respondent, but turns on a proper interpretation of the Alert Level 3 Regulations that were issued by the Second Respondent and bearing in mind that there was no provision in the said Regulations for any further Directions regarding either the exclusion of ECD institutions or their re-opening dependent upon Directions to be issued by the First Respondent.

3.

POINTS OF LAW RAISED BY THE FIRST RESPONDENT:

3.1 In paragraph 1.2 of the notice, the point is incorrectly taken that the Applicants' case is 'pegged' on the Directions issued by the 'Department of Basic Education' on 28 May 2020. To this end:

3.1.1 Firstly, the Applicants' case is concerned with an interpretation of the Alert Level 3 Regulations issued by the Second Respondent and a declaratory order is sought in this regard, coupled with consequential relief pertaining to the decision of the First Respondent to the effect that the ECD sector will remain closed under the Alert Level 3 lockdown Regulations. The reference to the Directions of the Third Respondent was made in order to contrast the position of ECD offered by schools in terms of the Schools Act and other ECD institutions falling under the authority of the First Respondent.

3.1.2 Secondly, directions are not issued by the Department of Basic Education as such. The power vests in the Minister of Basic Education to issue directions.

3.2 In paragraph 1.6 of the notice, the point is taken that in the light of the amendments to the Directions of the Third Respondent published on 29 June 2020 "all ECDs, including public, independent and private ECDs are not allowed to open until further Directions have been issued by the first respondent."

3.3 It appears from the Directions issued by the Third Respondent on 29 June 2020 that the definition of Pre-Grade R was deleted and that the Directions was amended to exclude any reference to grades lower than Grade R with reference to direction 5 and the table for the phasing in of the various grades.

3.4 Apart from the fact that this is quite a startling turn of events, it has no bearing on the relief sought by the Applicants. The turn of events is astonishing, to say the least, because teachers, parents and learners acted on the understanding that pre-schools offering education for learners in Grade R and lower which are affiliated with public or independent schools under the Schools Act are scheduled to re-open on 6 July 2020.

3.5 As recent as the Directions of 23 June 2020, the position remained essentially unchanged with regard to Grade R and lower, but the Directions issued on 23 June 2020, as per direction 7 thereof, permitted schools to deviate from the phased return in respect of specific grades or dates outlined in direction 5.

3.6 The latest Directions of 29 June 2020 now appears to dissect grades lower than Grade R from schools under the Schools Act, leaving learners in grades lower than grade R attending pre-schools attached to schools under the Schools Act in the lurch.

3.7 The First Respondent incorrectly acts under the misapprehension that 'independent and private ECDs' are not allowed to open until she has issued Directions.

3.8 The Applicants have dealt with their interpretation of the Alert Level 3 Regulations in the founding affidavit and in the Applicants' initial Heads of Argument, specifically with reference to Table 2, read with regulation 46. A proper reading and interpretation of the specific exclusions in Table 2 reveals that there are no exclusions pertaining to private pre-school learning institutions or such ECD programmes.

3.9 Item 9 of Table 2 foreshadowed exclusions set out in directions to be issued by the cabinet member responsible for Education (i.e the Third Respondent and the Minister of Higher Education). No exclusions are envisaged or stipulated to be dealt with in Directions to be issued by the First Respondent.

3.10 We do not repeat the consideration of the relevant constitutional provisions that are applicable to the interpretation of the said Regulations as dealt with in the initial heads of argument herein.

3.11 We submit that the actions of the First Respondent, maintaining that no ECD institutions shall open until she has issued Directions, are unconstitutional and unlawful and infringes the principle of legality.

3.12 It also needs to be borne in mind that the Second Respondent, who had the primary power under the Disaster Management Act to make law by means of regulations elected to abide and does not challenge the Applicants' interpretation of her Regulations.

3.13 It is a sad state of affairs that the First Respondent, who holds the portfolio of social development and the all-important primary responsibility for the social upliftment in terms of the Children's Act by means of early childhood development appears to be completely oblivious of her constitutional responsibilities and her powers.

3.14 Throughout, the First Respondent's actions have been causing uncertainty and confusion instead of promoting and creating clarity and certainty in respect of ECD institutions nationwide.

3.15 With reference to paragraphs 1.7 and 1.8 of the notice, we submit that the Directions referred to do not render the Applicants' case academic or moot. To the contrary, the latest Directions and the further confusion caused enhances the need for declaratory relief as sought.

3.16 Although the said amended Directions might be the subject of a further challenge, they certainly do not stand in the way of the relief sought by the Applicants.

3.17 An anomalous and absurd situation will occur as a result of the latest Directions. The Directions provide that pre-schools that are part of schools may only re-open in respect of Grade R learners on 6 July 2020, excluding grades lower than Grade R, despite the fact that in many instances, Grade R is offered in conjunction with grades lower than Grade R as part of one pre-school structure.

3.18 Furthermore, as from 6 July 2020 Grade R learners may return to their schools (as per the Schools Act) but Grade R's not part of schools under the Schools Act, such as the Second Applicant's Grade R class may not return.

3.19 From a practical point of view, this results in various absurdities. For example Grade R's forming part of schools under the Schools Act may return on 6 July 2020, but their younger siblings in the same pre-school attending lower grades may not return until the First Respondent, as she claims, has issued Directions in respect of the re-opening of that portion of the pre-school.

3.20 The irrationality is exacerbated when regard is had to the fact that hundreds of thousands of children throughout South Africa are dependent upon nutrition provided by their pre-schools. A situation may for example arise where a Grade R sibling is able to receive nutrition whilst at school, whilst his or her younger sibling has to stay home and go without nutrition.

3.21 The can be no conceivable rationality in the approach of the First Respondent.

4.

CONCLUSION:

4.1 We respectfully submit that all of the points in law raised by the First Respondent stand to be dismissed.

4.2 We submit that the First Respondent should be ordered to pay the costs of the application on the scale as between attorney and client, such costs to include the costs of two counsel and including the costs that were reserved on 23 June 2020."

ANSWER OF THE AMICUS TO THE POINT OF LAW:

[25] Counsel for the *amicus* similarly managed to provide an urgent answer to the State Attorneys' belated notice in terms of Rule 6(5)(d)(iii). Again I deem it appropriate that I quote this answer in full. The broad-side aimed at first respondent is fully justified. A mere, summary thereof in a case involving children, would not do it justice.

"B. **MISINTERPRETATION OF LEGISLATION:**

5 The first respondent relies on the alleged mootness of the declaratory relief sought by the applicants, based thereon that the "Directions" issued by the DBE on 28 May 2020 were subsequently amended on 23 and 29 June 2020 and it therefore renders the application moot and academic in nature.

6 The argument is misconstrued and simply wrong. We say so for the reasons to follow.

7 The notice of motion delivered by the applicants refer to the "Regulations" issued by "second respondent" on 28 May 2020 ("the Alert Level 3 Regulations") and not any directions issued by the third respondent. (Our emphasis and underlining).

8 The Alert Level 3 Regulations issued by the second respondent on 28 May 2020 provided in section 46(1) thereof, that businesses and other institutions may operate except for those exclusions specified in Table 2.

9 Item 9 (nine) of Table 2 provides that services relating to education are excluded as set out in the directions issued by the Cabinet members responsible for education. Table 2 is completely silent on the exclusion of services relating to ECD's and Partial Care Centres by the Cabinet members responsible for Social Development. Accordingly, ECD's and Partial Care Centres are not stated to be a specific economic exclusion envisaged by the Alert Level 3 Regulations. 10 It follows that Partial- Care facilities and the providers of ECD services as regulated by the Children's Act (with the responsible Cabinet member being the Minister of Social Development) cannot fall under the specific economic exclusions in item 9 of Table 2. ECD's provide early childhood development services and not education services.

11 Consequently, the Alert Level 3 Regulations provide that Partial-Care facilities and the providers of ECD services can for all intents and purpose re-open in terms of the provisions of regulation 46(1).

12 In addition, the first respondent has not published any official directions indicating that the Partial- Care facilities and the providers of ECD services may not re-open to date. Even if she did, it would not be provided for in terms of the Alert Level 3 Regulations and would hence be invalid and unlawful.

13 The various directions issued by the DBE are accordingly irrelevant and the argument is falls to be unsustainable.

14 On this basis alone the purported point of law raised should be dismissed with punitive costs.

C. ABUSE OF PUBLIC POWERS:

15 The grounds relied on by the first respondent for the alleged mootness of the application before Court is that the directions issued by the third respondent in terms of regulation 46(1) read with Table 2, item 9 of the Alert Level 3 Regulations were amended on 23 and 29 June 2020, respectively.

16 Despite the fact that the legal basis for the arguments advanced by the first respondent is misconstrued as indicated above, the manner in which these amendments to the directions of the third respondent was orchestrated is curiously accidental and deserves specific deliberation.

i) Principles of rationality and purpose of legislation:

17 The first and third respondents are the executive Cabinet members representing the DSD and DBE as specific organs of state. They are therefore regulated by statute and subjected to the principles provided for in the Constitution.

18 It is trite law, that in every instance where the power to make a specific regulation or direction is exercised by an organ of state, the result of that exercise, namely the regulations or directions themself must be rationally related to the purpose for which the power was conferred. This is the so-called "rationality test". It answers the question: Is there a rational connection between the intervention and the purpose for which it was taken.

19 In addition, the supremacy of the Constitution and the principle of legality requires the steps taken to achieve a permissible objective to be both rational and rationally connected to that objective.

20 The third respondent is the Cabinet member responsible for regulating basic education services in the Republic of South Africa. The primary enabling

legislation from which she derives the authority to perform these functions in this instance is the South African Schools Act, Act 84 of 1996 ("the SA Schools Act") read with regulation 46(1) read with Table 2, item 9 of the Alert Level 3 Regulations.

21 It is common cause that the third respondent is not vested with the authority to exercise any powers in respect of the Children's Act, Act 38 of 2005 (as amended) ("the Children's Act").

22 It is further common cause that the second respondent did not confer onto the first respondent the authority to issue directions for specific economic exclusions in terms of regulation 46(1) read with Table 2, item 9, nor over any matter concerning education services in terms of the Alert Level 3 Regulations.

ii) Conduct of the First and Third Respondents:

23 Despite these limitations, the first and third respondents proceeded to perform the following actions outside of the scope of their respective authorities. We proceed to deal with the specific instances followed by the legal conclusion in succinct form: -

23.1 Firstly: During or about 29 May 2020 the third respondent issued directions providing for the phasing-in of ECD's and Grade R learners from 6 July 2020. This included, inter alia, the phasing-in of Grade R and other Grades in schools for learners with Severe Intellectual Disabilities as from 6 July 2020.

23.1.1 Consequently, this direction was issued by the third respondent despite the fact that ECD's and Grade R learners attending ECD's do not fall under the definition of a "school" defined in her Department's enabling legislation i.e. the SA Schools Act and thus outside of her authority;

23.2 Secondly: During or about 1 June 2020 the third respondent proceeded to amend the earlier direction of 29 May 2020 by inserting the definition of an "ECD" to state "a learner in Grade R or lower in a school".

23.2.1 Evidently, the third respondent, in realizing that she acted outside of the scope of her authority earlier, attempted to limit her directions to apply only to learners in Grade R or lower attending schools envisaged by the definition of a "school" in the SA Schools Act;

23.3 Thirdly: On or about 5 June 2020 the first respondent issued a media statement communicating to the public that all ECD's (including ECD services run by Non-Profit Organizations) would remain closed indefinitely, without any clarity, contemplation, or indication as to when they are to re-open ;

23.3.1 Consequently, the first respondent illustrated her awareness of the concerns raised in the letter of the applicants dated 3 June 2020 relating to the re-opening of ECD's. She stated that workstreams will be set up to perform risk-assessments, state of readiness and make recommendations on health, hygiene and protocols for the re-opening of ECD's but failed to provide any guidelines on how and when such actions will be performed, nor communicated timelines for the prospective re-opening of ECD's and Partial facilities and the reasons therefore.

23.4 Fourthly: On or about 10 June 2020 the first respondent delivered her notice of intention to oppose the present proceedings. The second and third respondents delivered their notices to abide;

23.4.1 Accordingly, both the first and third respondent were well aware of the issues raised by the applicants before this Honourable Court since at least this date.

23.5 Fifthly: On 21 June 2020 the first respondent issued a "circular" (not a direction or regulation) stating that ECD's may not re-open for the purpose of re-admitting any child until such time that the she, as the Minister of Social Development pronounces a date and the conditions of such re-opening through Directions published in terms of regulation 10(3);

23.5.1 The issue in this regard is twofold in nature, firstly, she does not have the authority to declare and/or impose specific economic exclusions in terms of items 1 to 10 of Table 2 of the Alert Level 3 Regulations,

secondly, there does not exist any regulation 10(3) bestowing onto her the powers to perform such functions.

23.6 Sixthly: This application was set down for hearing on Tuesday 23 June 2020. On Monday, 22 June 2020 the third respondent proceeded to issue and sign off a further amended direction, providing for the exclusion of ECD's as envisaged in section 93 of the Children's Act from the definition of Pre-Grade R schools as provided for in the SA Schools Act. This direction was published in the Government Gazette of 23 June 2020 mere hours before this matter was to be heard.

23.6.1 Consequently, the ECD's with Pre-Grade R learners envisaged in section 93, were then excluded from re-opening on 6 July 2020, but schools with the very same Pre-Grade R learners were allowed to open on 6 July 2020. It is of significance to note that the exclusion of ECD's once again do not fall within the authority or jurisdiction of the third respondent.

23.7 Seventhly: The present application was stood down to Tuesday 30 June 2020 by the Honourable Justice Mothle for hearing on the urgent roll. On or about Sunday 29 June 2020, the third respondent again proceeded to amend the Directions dated 23 June 2020 to completely remove any reference to ECD's or Pre-Grade R's from the Directions.

23.7.1 In doing so, the third respondent's actions confirm that the re-opening of the ECD's are not regulated by her Department and can now safely be classified as that of businesses and other institutions which may operate under Alert Level 3 Regulations subject only to the inherent Safety Operational Procedures prescribed therein.

23.8 Thereafter, despite being aware of all the issues raised in this application, of the hearing date since 8 June 2020, and being additionally kept appraised of all the developments in the matter through the thorough communications of the Judge Fabricius' Registrar Ms. Swart, the first respondent proceeds on the eve before the hearing of the matter (30 June 2020) to raise a point in law, premised thereon that the amendments to directions issued by the third respondent in terms of Table 6 item 9 of the Alert Level 3 Regulations (which actions fall

outside of the scope of authority of the third respondent and exclusively within the first respondent's authority), allegedly render the matter moot and academic.

24 It follows that if due consideration is had to the evaluation of the relationship between proverbial means and ends, it is clear that the directions sought to be employed by the third respondent to exclude ECD's from re-opening are not in the least rationally related to the purpose for which the power in terms of section 46(1) read with Table 2, item 9 of the Alert Level 3 Regulations was conferred onto the third respondent.

25 In the matter of **ELECTRONIC MEDIA NETWORK V E.TV (PTY) LTD** 2017 (9) BCLR (CC) 8 June 2017, the Chief Justice labelled such a failure a "disconnect" between the means and the purpose.

26 It must therefore follow that, if the directions of the third respondent is not rationally connected to a permissible objective, then that lack of rationality by necessity results in such a measure not constituting a permissible limitation of a Constitutional right in the context of Section 36 of the Constitution.

27 It is submitted that the conduct of the first and third respondents are not only irrational but illustrative of a flagrant disregard of their Constitutional duties and obligations envisaged in section 195 of the Constitution.

iii) Breach of Public Administration Duties:

28 Section 195(1) of the Constitution deals with the principles underlining the performance of public duties and provides:

> *"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
>
> *(a) A high standard of professional ethics must be promoted and maintained.*
>
> *(b) Efficient, economic, and effective use of resources must be promoted.*
>
> *(c) Public administration must be development oriented.*

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policymaking.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible, and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

29 It is submitted that the first and third respondents have through the conduct demonstrated in paragraph 23 above breached each and everyone of the principles prescribed by section 195 of the Constitution. This is so for the reasons to follow.

30 The notice delivered in terms of rule 6(5)(d)(iii) is the product of a strategically planned ambush, orchestrated by the first and third respondents for the sole purpose of disarming the Court from adjudicating over the matter at the very last minute and thereby leaving the applicants without legal recourse without warning or notice. Fortunately, the relevance of the directions of the third respondent relied on by the first respondent as basis for this attack is misconstrued and therefore renders the point in law raised ineffective and without any prospect of success.

31 In many recent cases concerning the lawfulness of the Regulations to the Disaster Management Act, Act 57 of 2002 that came before Court, this tactic appears to have become the general means of disposing of the consequences of unlawful administrative actions by simply amending or substituting the applicable regulations and directions in terms of which the unlawful actions are performed, and thereby securing a guaranteed escape from the brunt of accountability. This situation is simply not tenable and inconsistent with the provisions of the Constitution.

32 The consequence of the conduct of the first and third respondents has an unconscionable and irreversible effect on the development and nutritional needs of approximately 2.7 million children who are left defenceless in the midst of what appears to be a "cat and mouse" game performed by the very officials appointed to attend to their wellbeing. The first respondent appear to be oblivious to the plights made on behalf of young children constituting the some of the most vulnerable members of society by simply passing the proverbial "buck".

33 Neither the first, nor the third respondent has to date advanced a single reason or motivation for the refusal to re-open ECD's and Partial-Care facilities whilst the underlying basis and rationale for the decisions made are readily available at their disposal because it formed part of the decision making process at the time when the decisions were made (or delayed), yet not one reason or rational ground was advanced by either one of these respondents since inception of this matter to show adherence to the needs of children, teachers, ECD owners or the people employed by them in an attempt to foster transparency through timely, accessible and accurate information. Instead accountability is avoided through simply changing the laws on the last minute.

34 We submit that the conduct of the first and third respondents are demonstrative of a flagrant abuse of public power inconsistent with the values enshrined in the Constitution.

35 SACA therefore requests the Honourable Court to consider making a special costs order in this matter to demonstrate the Court's dismay of the manner in which these officials conduct their portfolios to the detriment of the public interest.

D. <u>PUNITIVE COSTS:</u>

i) principals relating to award of costs due to involvement of amicus curiae:

36 The general rule relating to costs is that an amicus curiae is there to assist the Court and generally do not get awarded costs for their participation in a matter.

37 Provision is however expressly made in rule 10(10) of the Constitutional Court Rules, that a costs order may "make provision" for costs incurred due to the

involvement of an amicus. The rules for amici in the Constitutional Court appear to serve as models for the rules in the lower Courts.

38 This principle is enforced by the provisions of rule 16(10) of the Supreme Court of Appeal rules stating that an order of the Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an amicus curiae.

39 In addition, the Honourable Court has the inherent discretion to award special costs in circumstances where the abuse of public powers and processes occur. It is submitted this matter justifies constitutes such an instance. We proceed to explain.

ii) grounds for seeking punitive costs award:

40 The respondents had been aware of the proceedings since approximately 8 June 2020.

41 The reasons for administrative action taken which adversely affects the rights of the applicants has been within the knowledge of the first and third respondents since the the decision-making processes complained off took place. In the absence of such reasons the administrative actions will lack the necessary rational basis and would have been taken unlawfully.

42 The first and third respondents had a period of approximately 17 (seventeen) days to:

42.1 prepare an answering affidavit, or

42.2 give notice that the intend to raise a point of law;

42.3 or provide guidelines regarding the future processes regulating the re-opening of ECD's and Partial Care facilities.

43 Instead of acting in the public interest, the first and third respondents opted to engage in continuous amendments to the directions, in order to dispose of the matter and avoid accountability.

44 The legal representatives of SACA extended vast efforts as well as incurred extensive costs in order to facilitate its participating in this matter as follows:

44.1 through interviewing and securing the evidence of the relevant experts relied on in the affidavits;

44.2 conducting surveys to establish the vital necessities and economic status of ECD's and Partial Care facilities on an ongoing basis;

44.3 travelling between Cape Town and Johannesburg for purposes of consultations and attending Court proceedings on 23 June 2020;

44.4 expending countless hours preparing court papers, legal notices, heads of argument and preparations for the hearing only to be met with a rule 6(5)(d)(iii) notice on the evening before the hearing seeking to render all the extensive efforts fruitless based on the third respondent's changing of laws to facilitate the disposal of the matter.

45 The first respondent's brazen actions extended as far as to absolve herself from the requirement of providing the Honourable Court with an explanation for the extensive delay in delivering the notice as provided for in rule 27 of the uniform rules of Court.

46 SACA submits that the measures imposed by the first and third respondents are patently inconsistent with the norms and values envisaged in the Constitution. It is irreconcilable with the principles set out in section 195 of the Constitution and deserving to be punished with a special award of costs.

47 Accordingly, SACA requests the Honourable Court to grant an order in terms of the notice of motion delivered by the applicants and grant a special award for costs in favour of the applicants, including the payment of costs incurred by, or as a result of the intervention of the amicus curiae."

[26] Of particular importance are the submissions made in par 30-34 thereof with which I agree. I also agree with the contentions raised in respect of the Court Order sought except to say that first respondent should pay the costs.

[27] Having read the abovementioned answers by the applicants and the *amicus,* I issued an order that the State Attorney reply thereto by 16h00 on 1 July 2020, which I deemed sufficient time.

[28] The State Attorneys' reply was received on 1 July 2020 and again it is convenient to quote it in full:

"A. INTRODUCTION:

1 The applicants and the Amicus have, pursuant to receipt of the first respondent's notice in terms of rule 6(5)(d)(iii) of the Uniform Rules of Court ("the notice") filed their respective heads of argument.

2 These heads are directed at responding to their points of argument.

3 They argue that the notice is late and has not been uploaded on caselines. The simple answer to that is that to expect the first respondent to have raised the points that she has raised which arise from an amendment effected on 29 June 2020 prior to that date would simply be expecting her to do the impossible. The law does not expect persons to do the impossible.

4 We submit that justice demands that the notice be admitted and considered by the above Honourable Court.

B. ARGUMENT:

5 On a proper interpretation and analysis of the applicant's and the Amicus' heads of argument it is clear that they argue a case that is directed at challenging the newly amended regulations on the basis that they are inconsistent with the legislations under which they are issued; that they are irrational and that they constitute an abuse of public power.

6 This is not the case that the applicants and the Amicus have pleaded in their Notice of Motion and Founding Affidavits.

7 In motion proceedings the Notice of Motion and Founding Affidavit constitute both the pleadings and evidence.

8 Furthermore, in an adversarial system of civil litigation, like ours, it is for the parties either in the pleadings or affidavits to set out and define the nature of the dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to basic human rights guaranteed by our constitution, for it is impermissible for a party to rely on a

constitutional complaint that was not pleaded. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where a court may mero motu raise a question of law that emerges from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.2

9 We accordingly, submit that the applicants cannot seek to argue a case and call upon the above Honourable Court to determine an issue outside their pleaded case as appears in the Notice of Motion and Affidavits. Otherwise, an injustice will result in that the respondents will be deprived of an opportunity to answer to the case not argued by the applicants.

10 In any event it is a trite principle of our law that the applicants must make out their case in the founding papers. They cannot seek to do so in the heads of argument.

11 For the above reasons we submit that this application deserves to be dismissed with costs."

[29] I do not agree that the applicants and the *amicus* now argue a case that was not pleaded. The crux of the applicants case is set out in par 7.11 – 7.14 and 7.26 of the Founding Affidavit. The Directives issued by the third respondent on 29 June 2020 have no bearing on the relief sought in prayer 2 of the Notice of Motion. The mentioned paragraphs read as follows:

"7.11 When further consideration is given to the content of the specific economic exclusions listed under items 1 to 10 of Table 2, read with regulation 46(1) and regulation 33(1)(a), (b), (c) and (g), it appears that all institutions may operate and function except where specifically excluded under Table 2.

7.12 A proper reading and interpretation of the specific exclusions in Table 2, reveals that there are no specific exclusions pertaining to private pre-school learning institutions.

7.13 Item 9 of Table 2 foreshadowed exclusions relating to education services as set out in directions issued by the Cabinet members responsible for education. Those Cabinet members are the Minister for Basic Education and the Minister for Higher Education. No exclusions are envisaged or stipulated to be dealt with in directions to be issued by the Minister of Social Development.

7.14 The private pre-school institutions including nursery schools and early childhood development institutions which do not fall within the scope and function of the Minister for Basic Education appear not to fall under the specific economic exclusions in Table 2. As such, it begs the question as to what the position are in respect of private pre-schools (which offer ECD education) which are not affiliated with schools as defined in the Directions. They appear not to be excluded although it seems that the First Respondent and her Department of Social Development holds otherwise.

7.26 There could be no rational and justifiable ground, when interpreting the Regulations, upon which it was envisaged that schools offering ECD programmes, including Grade R and lower which forms part of schools as defined in the Schools Act (which include both public and independent schools) are permitted to re-open as from 6 July 2020 in terms of the Directions, but that other private pre-schools offering ECD education for children in Grade R or lower are not permitted to open or simply be left in a vacuum."

[30] It is abundantly clear that the Notice of Motion as per prayer 2, (which embodies the crux of the case) refers to Regulations issued by the second respondent and not to any directions issued by the third respondent. I have already referred to the argument, with which I agree, that the Alert Level 3 Regulations issued by the second respondent on 28 May 2020 provided in section 46(1) thereof, that businesses and other institutions may operate except for those exclusions specified in Table 2. Table 2 is completely silent on the exclusion of services relating to ECD's AND Partial Care Centres by the Cabinet member responsible for Social Development. ECD's provide early childhood development services and not education services that are referred to in item 9 of Table 2. Directives issued by the third respondent are in this stage. It is also clear that the second respondent did not confer on the first respondent the authority to issue directives for specific economic exclusions in terms of Regulation

46(1) read with Table 2, item 9, nor any matter concerning education services in terms of the Alert Level 3 Regulations.

[31] I am accordingly of the view that the Directive of 29 June 2020 does not preclude me from granting prayer 2, subject to the appropriate and/or prescribed safety measures being in place.

[32] Having regard to the conduct of the first respondent in this matter I agree with the submissions made by the *amicus* Counsel in her answer to the State Attorneys' point of law. The applicants and the *amicus* are on that basis entitled to their costs on an attorney and client scale. The State Attorney and his counsel should know (and I accept that counsel does,) that litigation that affects the rights of children ought not to be conducted in the manner set out. A Court can expect proper and timeous and transparent responses to correspondence and applications. Litigation is not a game, be it in the present context or in any event.

[33] A hearing was to have been held on Wednesday 1 July 2020 alternatively a judgment was to be handed down. This was delayed by the mentioned "point in law" referred at the last moment without any explanation or application for condonation as I have said. To make matters worse, and not surprisingly but astoundingly, my secretary handed me a letter during the afternoon of 1 July 2020 from the third respondent. Apparently is had come to the notice of the applicants' counsel. It was not accompanied by any explanatory or confirmatory affidavit. It is dated 29 June 2020 and addressed to Members of the Executive Council, Heads of Provincial Education Departments, District Directors, School Governing Bodies, School Principals and Governing Body Associations.

[34] The letter reads as follows:

> "Dear Colleagues
>
> Kindly note that the Directions published on 23 June 2020 have been amended to exclude the phasing in of Pre-Grade R which was anticipated to be phased onto schools on 6 July 2020.

I however wish to clarify that those schools that have already phased in Pre-Grade R do not have to reverse that decision.

No new Pre-Grade R may now be admitted in schools henceforth for the period of the COVID-19 pandemic until further direction are provided in this regard.

Yours sincerely

MRS AM MOTSHEKGA, MP

MINISTER

DATE: 29 JUNE 2020"

[35] No explanation was provided to me why this letter was written on 29 June 2020 and handed to me on 1 July 2020. My first thought, apart from the disappointment relating to the respondents' handling of this case, which after all affects the rights of children in a number of material ways plus those of the parents, teachers and care-givers, was: what is the legal effect of this letter?

[36] I accordingly requested the parties to provide me with their written comment urgently. It has been held repeatedly, and I should scarcely repeat it, that in constitutional litigation, which after all concerns the rule of law and the principle of legality, the state should be held to a higher standard than an ordinary litigation. A court can expect compliance with the relevant Rules of Court, as well as openness, transparency, accountability as well as a higher standard of professional ethics. Section 195 of the Constitution makes this clear. See above par 2 *supra*.

[37] The letter, merely on the face of it, and in the absence of any explanation for its reason, unfairly and unlawfully discriminates between "schools". It is also irrational to do so. Furthermore, it is not explicitly said that this letter applies, or is intended to apply to "schools" (which fall under the Schools Act), or to private day-care centres as well, and if so, why?

[38] In addition, I have yet to hear of a case in which a Minister may make law, by the mere production, to a confined group of persons and without consulting interested parties, of a letter expressing an opinion or an intent to do something unexplained in the future. Laws are made by Parliament, see s43 of the Constitution. Depending on the context most such Statutes provide that the responsible minister may make Regulations, as is done by s59 of the Disaster Management Act No 57 of 2002. Any such Regulation must be properly promulgated in the Government Gazette, and Regulation 59(4) must also be complied with. The Executive is constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenched the principle of legality and provides the foundation for the control of public power.
See: Affordable Medicine Trust and Others v The Minister of Health and Others 2006 (3) SA 247 (CC) at par [49]. In my view therefore this letter has no legal effect or consequence, and especially not in proceedings of this nature. It cannot be said that third respondent was not aware of this litigation in the urgent court.

[39] The above mentioned method of making legislation and regulations seems however to have been "amended" by Regulation No. 46 in Government Gazette No. 43258 of 29 April 2020. Chapter 2 thereof provides that the Minister of Health may issue "directions" to prevent address, prevent and combat the spread of the virus. Similarly, the Ministers for basic and higher education may issue such "directions" to prevent the spread of the virus in "all schools". "Directions" are defined as meaning those contemplated in s27(2) of the Act, issued by a Cabinet member relating to his or her line of functions, after consultation with the Cabinet members responsible for the cooperative governance and traditional affairs and justice and correctional services. Section 27(2) of the Disaster Management Act provides that, after the declaration of the national state of disaster the minister may, subject to subsection (3) and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions on a number of topics.

[40] Section 27(3) states these powers may be exercised "only to the extent that this is necessary for the purpose of:

(a) Assisting and protecting the public;
(b) Providing relief to the public;
(c) Protecting property;
(d) Preventing or combating disruption; or
(e) Dealing with the destructive and other effects of the disaster

[41] There is no reference in this letter or directive that the Minister consulted with anyone, nor is there any indication that such is "necessary" for any of the purposes stated in section 27(3) of the Act. Furthermore, it only refers to "schools" as defined in the Schools Act.

[42] The applicants' submissions in answer thereto are the following, and I quote relevant parts:

"SUMMARY OF DIRECTIONS:

For ease of reference, we provide the following summary in respect of the four sets of Directions issued by the Third Respondent pertaining to ECD / Pre-Grade R / Grade R and the phasing-in of learners to schools:

Date of Directions	Direction	Grade Description	Return date	Amendment
29 May 2020	4(1)	"ECD" Grade R	6 July 2020	
01 June 2020	3	ECD	6 July 2020	a) Removal of reference to Grade R b) Definition of ECD inserted to mean a learner in Grade R or lower in a school
23 June 2020	5	Pre-Grade R Grade R	6 July 2020	a) Pre-Grade R[2] defined b) ECD removed
29 June 2020	3	Grade R	6 July 2020	a) Definition of Pre-Grade R deleted and no further reference to grades lower than Grade R

ANALYSIS OF THE CIRCULAR AND ITS EFFECT:

3.1 We submit that the circular has to be interpreted in light of the Directions issued by the Third Respondent on 23 June 2020 and the Directions issued on 29 June 2020 and in the context of the points of law raised in the First Respondent's notice in terms of Rule 6(5)(d)(iii) dated 30 June 2020.

3.2 It is submitted that it appears that the Third Respondent anticipated a problem in view of certain rights that were afforded in the Directions of 22 June 2020 and also in the context of the previous Directions of 1 June 2020 and 29 May 2020 insofar as they relate to "ECD" and „Pre-Grade R".

3.3 The problem lies in direction 7 of the Directions of 23 June 2020, where provision was made for schools to apply to deviate from the phased-in return of the various grades upon notification of compliance with the minimum health, safety and social distancing measures and requirements on COVID-19.

3.4 These Directions applied equally to public schools and independent schools.

3.5 It follows that certain schools (public and independent schools) which complied with the health measures accelerated the phasing-in of Pre-Grade R learners into schools. As a result, many learners in Pre-Grade R have already returned to schools across South Africa.

3.6 When the Third Respondent issued the Directions on 29 June 2020, which removed any reference to Pre-Grade R or ECD in the phased-in return of learners, the Third Respondent was at the horns of a dilemma with regard to Pre-Grade R learners who have already returned to school in terms of the Directions of 23 June 2020.

3.7 We submit that the circular is an apparent attempt to remove this legislative quandary and the uncertainty that would have resulted following the Directions of 22 June 2020.

3.8 The quandry is exacerbated as a result of the fact that although the Directions of 29 June 2020 purports to be an amendment of the Directions of 23 June 2020, it amounts to a repeal of the phasing-in of Pre-Grade R or ECD lower than Grade R to schools entirely, without any reference to any future date for the phasing-in of these Grades.

3.9 Whereas the circular is aimed at providing clarity, the exact opposite is achieved inasmuch as it results in grave incongruities and confusion.

3.10 The Directions of 29 June 2020 only provide for Grade R learners to return to school on 6 July 2020 and remove the right of Pre-Grade R learners to be phased-in as previously regulated.

3.11 The differentiation between Pre-Grade R learners in schools that have already re-opened and those Pre-Grade R learners that are now suddenly prohibited from returning to schools is untenable from a Constitutional point of view and, we submit, discriminatory in terms of section 9(1) of the Constitution and furthermore not a reasonable and justifiable limitation in terms of section 36 of

the Constitution. It also impacts on the rights protected by section 28 and 29(1) of the Constitution.

3.12 We submit that the circular, in the context of the aforesaid Directions, has a constitutional effect.

3.13 The legal status of the circular in itself is subject to doubt. At best it can be regarded as implementation of legislation in the form of administrative action or some executive decision. Whatever the nature of the circular, at the core of these sudden legislative and/or executive and/or administrative action lies a further constitutional difficulty in relation to the promotion of uncertainty instead of clarity and irrationality which adversely affects learners and their parents who until 29 June 2020, anticipated the return of learners to school on 6 July 2020.

[43] I interpose to say that the doctrine of vagueness is founded on the rule of law. It requires that laws (and I would say directions as well) be written in a clear and accessible manner. Reasonable certainty is required, so that those who are bound by them know what is required so that they may regulate their conduct accordingly. See: Affordable Medicine Trust and Others v The Minister of Health and Others 2006 (3) SA 247 (CC) at par [108].

3.14 The situation is hugely untenable and has a detrimental practical and social effect on schools, teachers, parents and children throughout the country. What is deplorable is that all this occurred at the eleventh hour, whilst the application is pending before the Honourable Court.

3.15 When these actions are considered in the context of the legal points raised by the First Respondent, a reasonable inference can be drawn that the First Respondent, against whom the application is primarily directed, must have had some influence in bringing about the current state of affairs. It appears to be a spill-over of a conflict of power between the First Respondent and the Third Respondent.

3.16 The third paragraph of the circular reads as follows:

"No new Pre-Grade R may now be admitted in schools henceforth for the period of the COVID-19 pandemic until further directions are provided in this regard."3

3.17 The admission of new Pre-Grade R learners in schools has not been raised in any of the Directions issued by the Third Respondent. It is unclear why reference is now made to this for the very first time.

3.18 Due to a poor choice of wording, it may very well be that the Third Respondent intended to say that Pre-Grade R learners (who have not yet returned to their schools) may not return until further directions are issued.

3.19 This in turn begs the question as to who should issue such „further directions".

3.20 When regard is had to the amendments to the different sets of Directions as set out in the table above, it would appear as if the Third Respondent changed her stance as regards which Minister is responsible for ECD of learners in grades lower than Grade R, even in respect of such grades affiliated with schools as a result of uncertainty in respect of her powers and those of the First Respondent.

3.21 If the Third Respondent indeed adopted the stance that she had no power to regulate grades lower than Grade R, the content of the circular in its entirety is clothed with uncertainty.

4.

CONCLUSION:

4.1 In a nutshell, the circular, read together with the Directions aforementioned, has an adverse effect on the constitutional rights dealt with above.

4.2 We submit that the circular has no legal effect on the relief sought by the Applicants. On the contrary, it reinforces the need for the relief sought."

[44] I agree with the above, and it has yet to be explained to me on which basis I must regard this circular as evidence in this case.

Counsel for the *amicus* made the following submissions:

"4 It follows from the content of the circular, that pre-school learners who are admitted and phased into school systems prior to 23 June 2020 may continue to attend school, but pre-school learners that have not been admitted in schools are prohibited from attending schools for the period of the pandemic.

5 We pause, at this juncture, to record that in the present instance, the powers to make a specific regulations or directions are exercised by an organ of state, therefore the result of the exercise, namely the regulation or direction itself must be rationally related to the purpose for which the power was conferred. It must answer the question: is there a rational connection between the intervention and the purpose for which it was taken.

6 The answer in the present matter is simply, no.

7 Before dealing with the rationality and challenge to the Constitutional validity of the circular, we shall first deal with the legal status of the circular. We do so in succinct form

B. **QUASI-LEGISLATION: INTERNAL CIRCULARS, GUIDES, DIRECTIVES:**

i) Legal Status of a Circular:

8 Circulars, policy determinations, guidelines, directives, and manuals which govern the way in which administrators act are known as standards or quasi-legislation instruments.

9 In **AKANI GARDEN ROUTE v PINNACLE POINT CASINO (Pty) Ltd** 2001 (4) SA 501 (SCA) at par 7, Harms JA dealt with the difference between quasi-legislation instruments and subordinate legislation. He noted that the intention of the legislature in that instance, was to elevate policy determinations to the level of subordinate legislation. Ordinarily, however, laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Furthermore, policy determinations cannot override, amend or be in conflict with laws, including subordinate legislation. Otherwise the separation between Legislature and Executive will disappear.

10 Quasi-legislation instruments generally have legal force and application within a particular organization or hierarchy only, and do not affect the rights and privileges of subjects.

11 The exercise of such public powers and functions is subject to the principles of just administrative action envisaged by section 33 of the Constitution, Act 108 of 1996 ("the Constitution").

12 Quasi-legislation instruments have varying legal status'. In some instances, the Courts afford them legal recognition and enforceability, but where they infringe on any statutory or common law right, they are held to lack legal authority.

13 The validity of quasi-legislation instruments has to be established in relation to their effect in particular, and the terms of the relevant enabling legislation.

ii) Publication as requisite for validity:

14 Legislation requires publicity in an official publication such as the Government Gazette in order to become valid.

15 Section 81 of the Constitution deals with publicity as a requisite for validity applicable to Acts of Parliament.

16 Section 16 of the Interpretation Act, Act 33 of 1957 deals with publicity of delegated legislation.

17 At common law, the case of BYERS v CHINN 1928 AD 322 (at 327-8) establishes that with limited exceptions, any law, regulation, or subordinated legislation becomes operative only once it has been promulgated (officially published).

18 Quasi-legislation instruments are internal policy guidelines which are not necessarily published as official rules or regulations. The circular in this instance was simply distributed to be circulated via electronic mail amongst the designated recipients and never formally published. It is therefore clear that it was never intended to be a formal direction (as subordinated legislation) which was gazetted.

19 In order for the circular to be elevated to be classified as subordinated legislation in the form of a direction envisaged in section 27(1) of the Disaster Management Act, Act 57 of 2002 ("DMA") read with regulation 46(1) and Table 2 item 6, it had to be published as such in the Government Gazette.

20 This was not done in the matter before Court. The circular therefore remains a quasi-legislation instrument, subservient to the direction from which it was issued. It will only have legal force insofar as it does not infringe on any statutory or common law right, in which case, it is held to lack legal authority. It is submitted that the circular indeed infringed on the aforementioned rights and therefore indeed lack authority. We proceed to explain.

C. LACK OF LEGAL AUTHORITY:

21 The circular infringes several statutory rights.

22 It is submitted that there are three broad-based grounds why the circular is unlawful and therefore lacks authority. We proceed to state each ground accompanied by its short legal conclusion: -

First Ground: Rationality:

22.1 the first is that it contravenes section 6(2)(f)(aa)(ii) of the Promotion of Administrative Justice Act, Act 6 of 2000 ("PAJA") because it is not rationally connected to the purpose for which it was taken.

22.1.1 It is simply impossible to recognise the rationality in a decision, allowing pre-school learners who are admitted and phased into school systems prior to 23 June 2020 to continue to attend school, but to prohibit pre-school learners (of the exact same age) that have not yet been admitted as of 23 June 2020 from

attending schools for the total period of the pandemic. The absence of this rationality renders the circular ultra vires as it is disconnected from the purpose for which it was taken i.e. those envisaged by section 27(3) of the DMA as follows:

22.1.1.1 assisting and protecting the public;

22.1.1.2 providing relief to the public;

22.1.1.3 protecting property;

22.1.1.4 preventing or combating disruption: or

22.1.1.5 dealing with the destructive and other effects of the disaster.

22.1.2 The circular on this ground lacks authority and do not have legal substance.

[45] I agree with this argument. Even answering that that any such directive is for the purpose of assisting and promoting the public, one should be able to glean, with a degree of clarity what the purpose of the unfair (on the face of it) differentiation is. The public is however not protected if the children are deprived of social and intellectual development and even nutrition.

"Second Ground: Absence of Authority:

22.2 the second is that contravenes the DMA in that it exceeds the authority granted to the third respondent by the second respondent in terms of regulation 46(1) read with Table 2, item 9 of the DMA and is inconsistent with the direction under which it was issued for the reasons to follow:

22.2.1 the third respondent extends the exclusion to endure "for the period of the COVID-19 pandemic" – thus beyond the Alert Level 3 Regulations. She has no authority to issue directions in terms of Alert Level 5, 4, 2 or 1 regulations. The circular therefore lacks authority;

22.2.2 In addition, the content of the circular is in contradiction of that, of the direction under which it is issued. The direction provides that all pre-Grade R children are not permitted to attend school on 6 July 2020. In contrast, the circular states that pre-Grade R learners phased into

schools on or before 23 July 2020 are allowed to continue attending their pre-school facilities. The circular therefore is in contravention of the direction and on this ground too lacks authority.

[46] I agree with this argument as well.

"iii) Constitutional Right Infringement:

22.3 the third is that it unjustifiably limits the following Constitutional rights of pre-school learners who are not admitted and phased into school systems prior to 23 June 2020: - The right to:

22.3.1 Section 9(2): Equality, which includes the full and equal enjoyment of all rights and freedoms. These children are not allowed to equally enjoy their right to schooling and are prohibited purely because they have not been admitted and phased into schooling systems at a date that was not even known to them before 23 June 2020.

22.3.2 Section 28(1)(b): family care or parental care, or to appropriate alternative care when removed from the family environment.

22.3.2.1 Children whose parents have to attend to their work obligations will have to be accommodated wherever they can be facilitated. For many of these children this will increase the likelihood of exposure to an unsafe environment without alternate recourses.

22.3.3 Section 29(1)(a): Basic education. A large portion of these children are dependent on schools to provide for their nutritional and social needs.

22.3.3.1 This is provided for in the evidence advanced by Professor Cooper and Mrs Kriel. The effect of the circular is that they will be deprived of their basic social, nutritional, and developmental needs met, whereas the children who have been phased in before 23 June 2020 are permitted to continue deriving these benefits with no reservation or explanation advanced for the distinction.

22.3.4 Section 33(1): just administrative action that is lawful, reasonable, and procedurally fair as well as efficiently administrated instead of the first and third

respondents continued shifting of the goal posts, by either refusing to deal with the re-opening of pre-schooling facilities or by changing the terms for the re-opening unreasonably. The following is illustrative of the inconsistencies in the present instance:

22.3.4.1 the circular was penned on the very same day that the alleged amendment to the direction took place on 29 June 2020;

22.3.4.2 it is impossible to comprehend why the third respondent did not provide for the same stipulations to be dealt with in both the direction as subordinated legislation and the circular as purportedly a policy determination for the execution thereof;

22.3.4.3 it appears that the intent of the third respondent was not to act with the requisite standard of professional ethics in the public interest through providing timely, accessible, and accurate information. Instead she issued two conflicting instruments as a tactic to cause confusion, which seems like a specific attempt aimed at derailing the proceedings before Court.

22.3.4.4 Accordingly, the only reasonable deduction is that the third respondent intentionally caused legal uncertainty and confusion through the irrational amendment of the directions so as to enable the first respondent to raise a technical defence without which she would otherwise not have been able to proceed with any opposition to the proceedings. This is evidently the only defence raised by her.

23 Consequently, the circular overrides, amends and/or conflicts with the provisions of the PAJA and the DMA together with the regulations promulgated in terms thereof. It is accordingly unlawful and therefore lacks authority.

24 Similarly, the circular is in conflict and/or inconsistent with the aforementioned sections of the Constitution. It is accordingly unlawful and therefore lacks authority.

25 The issuing of the circular constitutes the exercise of public power and must be exercised lawfully. The third respondent can only make directives that fall within the four corners of the aforesaid empowering legislation. For the third respondent to issue a circular that contradicts or extends beyond the powers

given to her by the second respondent in terms of the DMA and the regulations thereto, is to act without legal authority and violate the rule of law.

26 Additionally, based on the grounds advanced above, it is submitted based on these grounds too, the circular lacks authority and therefore has no legal effect.

D. CONCLUSION:

27 Very succinctly, some of the main challenges facing the early childhood development (ECD) sector are the following:

27.1 There is an overlap between the responsibilities of the first respondent and the third respondent in respect of Grade R and pre-Grade R facilities, with two completely different sets of legislation potentially applicable to both. It is, with respect, even for trained legal professionals a challenge to wade through the complexities of the situation.

27.2 The first respondent seems to have abdicated all responsibility and have left it to the third respondent to determine when the ECD sector will open. This has happened in that she seems to have given up on her task of separating her area of responsibility from that of the third respondent. She has also publicly expressed her opinion that she will be guided by the third respondent, despite her "blanket shutdown" approach.

27.3 Both the first and the third respondents have "ruled by circular". Both have been issuing letters and circulars that have at worst been either unlawful or at best simply invalid. The problem is that the industry, which is not legally sophisticated, has been following these circulars slavishly and attempted to implement it to the letter for fear of being arrested or shut down by the authorities.

28 It is evident from this latest circular issued and distributed that the administrative actions of the third respondent (and by implication the first respondent, who is simply following her lead) are an ever-moving target. They lack legal certainty and cause untold trauma and distress to children, parents, teachers, employees, principals, and owners of educational and childcare facilities. Instead of efficiently navigating the ship through the stormy COVID-19 waters, thereby trying to reduce the impact on especially our children, the

first and third respondents are responsible for actively creating additional trauma by their irrational behaviour, turning the ship into unpredictable and unnecessary directions at a whim – often reversing it for no reason.

29 The third respondent has unequivocally publicly supported the return of learners, including Grade R and lower to the schooling system, in two Court cases preceding this matter, in one of which judgment was handed down yesterday in her favour, instituted by One South Africa Movement under the auspices of Mr Mmusi Maimane (*supra*).

30 It is inconceivable to comprehend how she could completely change course a mere day before the hearing and engage in the issuing of these irrational administrative decisions in the direct opposite to hear evidence on oath in the other proceedings."

[47] I interpose again to refer to par 174 of the One South African decision *supra*.

"31 This latest circular again caused major public pandemonium and uncertainty for all parties affected by her decision-making processes and at the end of the day it is the children who suffer the worst harm in the process.

32 The time has come for the Court to re-establish legal certainty and regain public trust in both the DBE and DSD's sectors. It is therefore of critical importance that the Honourable Court steps in and issues a declaratory order regulating the position and thereby put an end to the mayhem created by the first and third respondents' actions and continued to be created by their unlawful conduct.

33 Accordingly, we request the Honourable Court to grant an order in terms of the notice of motion delivered by the applicants and acknowledge the unlawful conduct of the first and third respondents by granting a special costs order in favour of the applicants, including the payment of costs incurred by, or as a result of the intervention of the amicus curiae."

[48] I agree with the contentions raised therein and in particular par 14-20, 21-22 and even more specifically with par 22.2- 22.2.2 relating to the absence of authority. It is abundantly clear that the directive unjustifiably limits a member of constitutional rights of pre-school children as pointed out in par 22.3-22.3.4.4. In my view the issue

of this directive was not done lawfully and not within the Minister's powers. Legal authority is a pre-requisite under the principle of legality and the rule of law as I have said in par [16] above. Apart from that I also agree with the conclusions set out by the *amicus* in par 27-33.

[49] No submissions by the first respondent were received on 2 July 2020 (or at all) as I have ordered. I did however receive the following submissions from first respondents counsel on 3 July 2020 after I had asked for certain clarifications (which I would not have done had the interest of young children not been my main concern). This note in effect confirms that applicants are entitled to prayer 2 on the basis as stated in par 7.11-7.14 and 7.26 which I have quoted above.

> **"A. SUBMISSIONS:**
>
> 1 The Honourable Judge has requested some submissions on the following:
>
> 1.1 Whether there are any recent (during the course of this week) gazetted regulations regarding the re-opening of ECDs and is any party aware of any gazetted regulations due to be issued in the near future regarding the re-opening of ECDs.
>
> On this aspect the instruction from the first respondent, in her capacity as the legislative authority in respect of ECDs and the authority with power to issue Directions in this regard in terms of the National Disaster Management Regulations, is that there are indeed Directions to regulate the re-opening of ECDs which are currently being considered by the State Law Advisers for certification and which may be issued soon, but certainly not within this week.
>
> 1.2 What is the status of the schools re-opening for Grade R, 6 and 11 as per the News.
>
> The first respondent is not in a position to comment on this issue save only to state that she only accepts as published in the news that Grade R, 6 and 11 will indeed re-open on 6 July 2020. This, however, has nothing to do with ECDs since the Directions in respect of the latter (ECDs) can, and will, only be issued by the first respondent.
>
> 1.3 Should the Honourable Judge decide the matter and ignore the News or order the 1st and 3rd respondents to provide the court with an affidavit.
>
> As stated above, the first respondent's view is that there are currently no Directions regarding the re-opening of ECDs, the subject of this application. Grade R does not fall within ECDs as per definition of "school" in the Schools Act 84 of 1996 and the definition of "Early Childhood Development Programme" in the Children's Act 38 of 2005.
>
> Whether Grade R re-opens on Monday 6 July 2020 or not is, in our respectful submission, irrelevant to the current proceedings which deal with re-opening of ECDs. The first respondent, therefore, does not see the need for the filing of

> an affidavit, since the issue is more on the interpretation of the current regulations in so far as they affect ECDs, if they do.
>
> We do not represent the third respondent in these proceedings. She has elected, according to our knowledge, to abide the decision of the court. We refrain from making any submissions on her behalf."

[50] At 4h27 on 4 July 2020 first respondents Counsel sent a further submission to my secretary (which reached me at about 16h00 and after the first draft of my judgment had been completed and typed. It states in essence that the Schools Act falls under the authority of the Minister of Basic Education and excludes in its definition of "School" pre-grade R which are ECD. This meant that the Minister of Basic Education has no authority to regulate ECD's. The first respondent is the responsible Minister over Early Childhood Development Centres and this is the only authority to issue Directions under the Disaster Management Regulations. He agreed that the third respondent had no authority to issue the letter of 29 June 2020. See: Master of the High Court v Motala 2012 (3) SA 325 at par 14. Counsel therefore submitted that the letter was a nullity and of no force and effect. It could not create any rights or legitimate expectations. He concluded that the application therefore deserved to be dismissed. I do not agree and the logic escapes me, having regard to what was said in par1.2 of the previous submission.

[51] The following order is therefore made in light of all the above extensive submissions and arguments:

51.1 Prayer 2 of the Notice of Motion is granted subject to the appropriate and/or prescribed safety measures being in place.

51.2 The first respondent is ordered to pay the costs of applicants and the *amicus* on an attorney and client scale. The conduct of the first respondent in these proceedings falls far short of the standard that can and must be expected in these crucially important proceedings concerning young and vulnerable children, and my strong disapproval thereof must be expressed. Were it not for the interests of young children I would have made short-thrift of all the inadmissible evidence.

H FABRICIUS

JUDGE OF THE HIGH COURT OF SOUTH-AFRICA

GAUTENG DIVISION

PRETORIA

APPEARANCES:

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FOR THE RESPONDENTS:

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VAN WYK & ASSOCIATES

DATE OF HEARING: 1 AND 3 JULY 2020 (ON THE PAPERS)

DATE OF JUDGMENT: 6 JULY 2020