REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 20806/2013

In the matter between:

THE JUSTICE ALLIANCE OF SOUTH AFRICA	First Applicant
THE GOVERNING BODY OF OTTERY YOUTH CARE AND EDUCATION CENTRE	Second Applicant

And

THE MINISTER OF SOCIAL DEVELOPMENT, WESTERN CAPE	First Respondent
THE DEPARTMENT OF SOCIAL DEVELOPMENT, WESTERN CAPE	Second Respondent
THE MINISTER OF EDUCATION, WESTERN CAPE	Third Respondent
THE DEPARTMENT OF EDUCATION, WESTERN CAPE	Fourth Respondent
THE MINISTER OF SOCIAL DEVELOPMENT	Fifth Respondent
THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Sixth Respondent
SCHOOL GOVERNING BODY OF DIE BULT	

JEUGSENTRUM IN GEORGE IN THE EDEN AND CENTRAL

KAROO EDUCATION DISTRICT Seventh Respondent

SCHOOL GOVERNING BODY OF EUREKA

JEUGSENTRUM IN GROOT EILAND IN THE CAPE

WINDELANDS EDUCATION DISTRICT Eighth Respondent

SCHOOL GOVERNING BODY OF WELLINGTON

YOUTH CENTRE IN WELLINGTON IN THE CAPE

WINELANDS EDUCATION DISTRICT Ninth Respondent

CORAM:	SALIE-HLOPHE, J
HEARD:	24 June 2015
DELIVERED:	31 August 2015
COUNSEL FOR APPLICANTS:	Adv. I.Jamie SC and B.L.Studti
COUNSEL FOR 1st to 5th RESPONDENTS:	Adv. A.Katz SC and M.Adhikari

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JUDGMENT DELIVERED ON 31 AUGUST 2015

SALIE-HLOPHE, J:

In a land withered by drought and hunger, a place where hope and opportunity was hard to find, William Kamkwamba wrote:

"After a few days of rain, the seedlings will push through the soil and unfold their tiny leaves. Two weeks later, if the rain is still good, we then carefully apply the first round of fertilizer, because each seedling requires love and attention like any living thing if its going to grow up strong."

(excerpt from the book: The Boy Who Harnessed the Wind: Creating Currents of Electricity and Hope).

Our children are the seedlings of our country's next bloom. Nurturing and protecting each child, however different their challenges may be, is our responsibility to our land and our Constitution.

INTRODUCTION

1] This is an application for declaratory and mandatory relief concerning the proper interpretation of certain sections of the Children's Act 38 of 2005 ("the Children's Act"), and the implementation thereof, with respect to the following child and youth care centres ("CYCC's") in the Western Cape Province:

1.1 Die Bult Jeugsentrum in George in the Eden and Central Karoo Education District ('Die Bult');

1.2 Eureka Jeugsentrum in Groot Eiland in the Cape Winelands Education District ('Eureka');

1.3 Ottery Youth Centre (also known as Ottery Youth and Education Centre) in Ottery in the Metro South Education District ('Ottery'); and

1.4 Wellington Youth Centre in Wellington in the Cape Winelands Education District ('Wellington').

2] Prior to 31 December 2000, Die Bult, Ottery and Wellington were established as schools of industries and Eureka was established as a reform school. On 31 December 2000, the Western Cape Government closed all former schools of industries and reform schools in the Province, but retained, *inter alia*, Die Bult, Ottery, Wellington and Eureka by re-establishing them in terms of s18 of the Western Cape Provincial School Education Act No.12 of 1987 ('the Western Cape Schools Act'), that is, as public schools. It is common cause that the centres nonetheless continued to operate and perform the same functions as they did before 31 December 2000. After this date the centres continued to receive children and until 1 April 2010, which marks the commencement of the Children's Act, the relevant provisions of the Child Care Act, 1983 remained in force. During 2013 the Western Cape government embarked on a process of closures or otherwise termed *"repurposing"* of these centres in order to utilise the current physical infrastructure of these centres to serve as schools for children with special educational needs in terms of the Schools Act. The Applicants seek, *inter alia*, to prevent the repurposing of these four centres. It is their argument that any decision to close or repurpose can only take place once (at the very least) strategies are in place.

3] The term ***"reform school"*** was defined in the 1983 Children's Act as a school maintained for the reception, care and training of children sent thereto in terms of the Criminal Procedure Act 51 of 1977, or transferred thereto under the 1983 Children's Act whilst ***"school of industries"*** was defined to mean a school maintained for the reception, care, education, and training of children sent or transferred thereto under the 1974 Children's Act. Generally speaking the former is a residential institution where children who have been sentenced by courts are placed and children placed in the latter must have been declared by a Children's Court as being in need of care.

BACKGROUND FACTS:

4] John Jackson Smyth, ("Smyth"), deponent to the founding affidavit stated that in June 2010 the Governing Body of Ottery, through its members and persons assisting it, attempted to obtain clarification concerning the future of Ottery Centre. In particular they sought to obtain the interpretation placed on the relevant provisions of the Children's Act by the Provincial Minister of Social Development, the Department of Social Development and the Department of Education. In particular they wanted to know how the said departments would intend to implement the provisions of the Children's Act, with specific reference to section 196. He stated further that attempts to obtain the desired clarification were not met with a clear response or were met with mixed messages as would appear from the correspondence exchanged between them. He attributed this *impasse* as a result of

the fact that there was no coordinated approach to the interpretation and implementation of the Children's Act in respect of child and youth care centres such as Ottery. The lack of disclosure or clarity on the part of the Respondents was most notable. He illustrated it by way of the fact that Ottery Centre had as late as September 2012 launched three restored hostels at its family open day, using funds raised in the amount of approximately R500 000. This launch was attended by the Provincial Minister of Social Development. It was, however, shortly thereafter in November 2012 that the intentions of the Departments of Social Development and Education respectively began to emerge in the form of a presentation by the Ms. Leana Goosen of Social Development and which was also presented at a Child Justice Forum. Emanating from these presentations it was clear that the Department of Social Development would upgrade the facilities already maintained by it, including traditionally secure care facilities designed for the detainment of awaiting trial and sentenced youth, **for the purposes of housing all types of children requiring all types of residential care programmes**. Furthermore, it envisaged complying with its obligations in terms of the Children's Act by preventing admission of children to facilities such as Ottery, from 30 November 2012 onwards. Subsequent thereto all children in such facilities would be transferred to other child and youth care centres, most of which are high security facilities and geographically far removed from the relevant communities. Smyth submitted that this action amounted to an unlawful directive given the obligations placed on Social Development and the Education Department in terms of Section 196 of the Children's Act.

5] On 8 February 2013, a letter was addressed by Magistrate Denilia Diana Leppan, presiding officer of the Wynberg Children's Court in response to closure of

the CYCC'S, the contents of which were set out and quoted in part in the founding affidavit. Her concerns were addressed in some detail, in particular the repurposing of the former schools of industries without a process of consultation with the role players involved including the children placed there. She was also concerned that placements were done without a needs assessment and consequently without proper consideration of what is in the best interests of the relevant children. She further lamented the concerns that the closure of Ottery and the creation by the Department of Social Development of placement facilities outside the Wynberg and Cape Town Area would result in the Wynberg Children's Court being left with no facilities in that district for the suitable placement of children. Moreover that it was not located geographically close to the children's family. This, she said, would be in contrast to what the legislator had ordained in the Act which requires that a child found in need of care be placed as close to his or her family to promote family contact and ultimately reunification. She also expressed the view that placing all children into a *"one size fits all"* facility should be guarded against. She was particularly concerned about a system that provided for placing children in need of care, who are not an abscondment risk, to be caged with juvenile criminal offenders. She advocated strongly for separate residential facilities for children in need of care and protection to that of children in secure care facilities. In essence, children found to be in need of care were now being sent to "Social Development" facilities: Horizon, Outeniqua, Vredelus and Clanwilliam, all of which are structured and operated as high security facilities with a cold and harsh atmosphere not conducive to the social conditioning of children in need of care.

6] Smyth gave an account of his visit in November 2013 to Horizon CYCC which is one of the facilities where children in need of care have since been transferred to. He described the harsh conditions, stringent security checks, security control room, dormitories that are locked and barred every night after bedtime, all of which circumstances in every respect were akin to a prison. Whilst he was assured that there is no mixing of the different groups of children he found it difficult to understand how this could work in practice. All children appeared to him to have been treated similarly and there appeared to be very little differentiation between the children placed at the facility because they are in need of care and protection, and those placed there because of criminal activity. In his view, it is unlikely that such facilities will provide residential care programmes which are appropriately suited to children in need of care and protection. He went on to state that that it is **not** in the best interests of children found in need of care to be placed at the now designated secure care centres at Outeniqua, Vredelus, Horizon and Clanwilliam. In contrast to his experience and observations from his visit at Horizon, a visit to Ottery Centre presented children who were not locked away and that the centre was more of a homely school than a prison.

7] The functioning of the Ottery Centre and concerns of the future of its children were further described in a supporting affidavit by Mr. Moosa Mahadick, ("Mahadick") the principal of the centre. Mahadick set out a history and description of the centre and the growth that the centre had shown over the years, with the focus moving from control and punishment to one of education by creating an environment which is least restrictive. It is geared to accentuate the positive and works with the weaknesses that children bring from challenging life experiences. The centre

prioritises the reintegration of the child into his or her family and community including trips to ensure that children have contact with their families and visits by children of parents in prison. He is of the view that the closure of a centre such as Ottery would gravely disadvantage children who are in need of care and protection. Repurposing of these centres would result in the automatic reduction of the currently available residential care facilities in the Western Cape. Children with different needs would be inappropriately placed together. He added that the link between school, community and children in need of care ought not to be supplanted by a correctional and penal model of disciplinary care. It requires a dignified model of care practices and education, appropriate to the barriers to learning that such children encounter and face daily. Ottery Centre only served children in need of care (not children who were sentenced or awaiting trial or sentencing) until it experienced its first systemic challenge in 2010 when it received twenty children sentenced/diverted children. He indicated that although they had done their best to separate the different children, it proved most challenging in that those who are either sentenced or awaiting trial exhibit subcultural rituals and norms of youth that would result in the induction of children into gangs. They view violence as an acceptable method to exercise power and control over the vulnerable and weak. He supported the argument that it can never be in a child's best interest to place children in need of care and protection with children who are sentenced, diverted, or awaiting trial or sentencing.

8] Mr. Robert Macdonald, ("Macdonald') Acting Head of the Department for the Western Cape Provincial Social Development, the second respondent, deposed to the answering affidavit for the first to fourth respondents. He stated that were this court to grant the relief sought, it would not be in the best interests of the children

affected by the application. Macdonald added that there are separate facilities to offer programmes and accommodate the children found to be in need of care and protection on the one hand and on the other hand children who are awaiting trial or have been sentenced. He further explained that the Centres in question were closed by Provincial Proclamation dated 16 September 2000, issued in terms of Section 18 of the Western Cape Provincial School Education Act 12 of 1997. The closures took effect on 31 December 2000. **Die Bult, Eureka** and **Wellington** had been in a process of closure and winding down of operations since 2000. He added that the Centres were not taking any new children who have been sentenced or referred by the courts as these Centres have lawfully been closed and are to be repurposed as schools for children with special educational needs. He added that the Centres are currently registered as public special schools under the auspices of the Western Cape Education Department ("WCED"). The WCED had determined that it would be an appropriate use of available resources to utilise the infrastructure of the centres to provide schooling facilities for children with special educational needs. He further stated that **"*the decision to repurpose the centres involved a complex weighing of competing needs and priorities against the available resources in both the areas of child and youth care services and special needs education.*"**

9] Macdonald pointed out that after negotiations, subsequent to the launch of this application, the Western Cape Provincial Government undertook to ensure that Ottery fully complies with the Children's Act and that it is able to be fully registered as a child and youth care centre within a period of 12 months from the date on which an agreement to this effect could be reached with the Applicants. This undertaking includes providing continued regulatory oversight and support to Ottery. It also

undertook to regularly monitor and visit the Centre as required by the Children's Act; facilitate admissions to Ottery through its centralized admissions office; making sufficient budgetary and human resources available to sustain the current operations as well as effect the necessary improvements to the infrastructure to ensure that it meets the requirements of the Children's Act. It further undertook not to take any decision to close or repurpose Ottery for a period of 12 months and to provide at least 12 months' notice to all affected stakeholders, including the Applicants, in the event that such decision is made in the future. He denied that children who are not sentenced, awaiting trial or placed by a court as the result of behavioural problems or criminal behaviour have been placed at Outeniqua, Vredelus, Horizon and Clanwilliam secure care centres. Macdonald went on to explain the absence of a provincial strategy for the reason that the latter is dependent on a national strategy having been developed first. Once a national strategy had been made available, his department would require a period of 4 months to finalise the development of the provincial strategy.

10] Mr. Coceko Pakade, ("Pakade") the Director General of the National Department of Social Development, the fifth respondent, set out in his answering affidavit that the National Minister was in the process of compiling a national strategy. He added that a copy thereof would be placed before this Court, presumably at the hearing of this matter. Insofar as the national strategy had not been finalised for submission by 31 July 2014 as per the order of this court on 20 March 2014, Pakade set out in his affidavit that a draft national transformation strategy was in circulation and needed to be costed for the implementation process. Various national workshops were held to guide the development of the

transformation strategy. Initiation of the transformation process gave rise to various challenges in respect of the transfer of financial, human and capital resources and the determination of the number of former schools of industry and reform school to be transferred from the Provincial Departments of Education as well as Social Development. According to him the National Department was in the process of developing a model to assist it in the determination of the geographical spread of needs which would include a determination of travelling distance to the various facilities, the demographic profile of facilities, accessibility requirements as well as the requirements in terms of size, number and capacity of facilities. Various challenges had been identified. According to him the final implementation plan will need to take into account the identified challenges such as the limited resources that impact on the sufficient spread of residential care programmes and the appropriate placement options and access to the available services for children. In conclusion, he stated that the implementation plans would be guiding the transformation process. He envisaged that the National Strategy would be finalized by the end of September 2014.

11] In reply, Smyth stated that an undertaking by the Respondents in regard to Ottery Centre remained vague and given previous settlement attempts which appear to have been unsuccessful, it remains necessary for this court to determine the correct manner in which to regulate the continual existence of Ottery. Furthermore, the budget allocated for the Ottery Centre was cut by approximately R800 000 for the 2014 financial year resulting in a financial and humanitarian crisis which risked a real prospect that Ottery Centre would be unable to meet the minimum standards of caring for the basic needs of the children entrusted to its care. The Centre had not

received a staff establishment for the last two years which is crucial in planning delivery to the learners. He placed into dispute and denied the first to fourth respondents' averment that technically the Centres are not covered by section 196. Smyth maintained strongly that the law places the Centres under the control and jurisdiction of the Second Respondent and that from 1 April 2012 the Centres including the physical infrastructures became the responsibility of the second respondent, namely, Social Development. He also maintained that the Centres could not be repurposed as same had to be used for the purposes as contemplated in the Children's Act.

12] A further affidavit was served in reply by the Applicants. In an application for leave from this court to file same, Smyth stated that the further affidavit by Leppan was necessary due to the overly technical and elusive approach adopted by the Respondents in their answering affidavits as regards the detrimental effects of mixing children at the same centre. The Respondents brought an application to strike out the further affidavit for the reason that the applicants were effectively seeking to make out a new case in reply and it was further argued to be an abuse of the court's process. Leave was also sought by the Respondents for this court to accept a fourth set of affidavits, termed as the "***First to Fourth Respondents' Second Answering Affidavit"*** which included an affidavit and expert report by Dr. Lesley Corrie and a confirmatory affidavit deposed to by Linda Nothnagel. In response a further affidavit was deposed by Leppan and leave was also sought for such affidavit to be filed. Once again, the Respondents deposed to a further affidavit, titled as the "*First and Second Respondents' further affidavit in response to Applicants' affidavit*

dated 12 December 2012" and sought leave to file same. I shall deal with these applications later.

APPLICABLE LAW:

13] Sections 196(1)(d) and (e) of the Children's Act is central in the determination of the relief sought. It provides that:

> ***"(1) As from the date on which section 195 takes effect-…***
>
> ***(d) a government industrial school established in terms of section 33 of the Children's Protection Act, 1913 (Act No.25 of 1913) and maintained as a school of industries in terms of the Child Care Act must be regarded as having been established in terms of section 195 as a child and youth care centre providing a residential care programme referred to in section 191(2)(i); and***
>
> ***(e) a reformatory established in terms of section 52 of the Prisons and Reformatories Act, 1911 (Act No.13 of 1911) and maintained as a reform school in terms of the Child Care act must be regarded as having been established in terms of***

section 195 as a child and youth care centre providing a residential care programme referred to in section 191(2)(j).

14] Section 191(2)(i) defines the requisite programme for the transformation of the former school of industries to be for: ***"the reception, development and secure care of children with behavioural, psychological and emotional difficulties."*** Whilst Section 191(2)(j) in relation to former reformatory schools to be for: ***"the reception, development and secure care of children in terms of an order - (I)under section 29 or Chapter 10 of the Child Justice Act, 2008; (ii) in terms of section 156(1)(i) placing the child in a child and youth care centre which provides a secure care programme; or (iii) in terms of section 171 transferring a child in alternative care;"***

15] Section 196(2) of the Children's Act, which reads: ***"The provincial department of education must provide education to the children in the facilities mentioned in paragraphs (d) and (e)."*** places an obligation on the Education Department to provide education to the children in these facilities.

16] Section 196(3) of the Children's Act provides that:

"A school of industries referred to in paragraph (d) and a reform school referred to in paragraph (e) which are the responsibility of a provincial department of education on the

date when this section comes into operation becomes the responsibility of a provincial department of social development within two years of the commencement of this chapter."

Thus, in terms of this section the Centres which were the responsibility of the Department of Education on 1 April 2010 became the responsibility of the Department of Social Development as at 1 April 2012. However, the obligation to provide education to these children is vested in the Department of Education.

17] Section 192 of the Children's Act provides that:

"(1) the Minister, after consultation with interested persons and the Ministers of Education, Health, Home Affairs and Justice and Constitutional Development must include in the departmental strategy a comprehensive national strategy aimed at ensuring an appropriate spread of child and youth care centres throughout the Republic providing the required range of residential care programmes in the various regions, giving due consideration as provided in section 11, to children with disability or chronic illness.

(2) The MEC for social development must within the national strategy referred to in subsection (1) provide for a provincial strategy aimed at the establishment of an appropriate spread in the province of properly resourced, co-ordinated and managed child and youth care centres providing the required range of residential care programmes.

(3) The MEC for social development must compile a principal profile at the prescribed intervals in order to make the information available that is necessary for the development and review of the strategies referred to in subsections (1) and (2).

(4) The provincial head of social development must maintain a record of all available child and youth care centres in the province concerned and of the programmes contemplated in section 191 offered by each centre." (underlined emphasis my own)

DISCUSSION:

18] From the reading of Section 195 of the Children's Act which took effect on 1 April 2010 it is clear that the affected CYCC's must be regarded as having been established in terms of section 195 of the Children's Act as CYCC's providing residential care programmes referred to in section 191(2)(i) of the Children's Act. The case for the Applicants is that Die Bult Centre, Ottery Centre and Wellington Centre (all of which were industrial schools) must be regarded as having been established in terms of section 195 of the Children's Act as child and youth care centres providing residential care programmes referred to in section 191(2)(i). As regards Eureka Centre (which was a reformatory school) it must be regarded as having been established in terms of section 195 of the Children's Act as a CYCC providing a residential care programme referred to in section 191(2)(j). In opposing the Applicant's case, the Respondents argue that these four CYCC's are not subject

to section 195 and that it had been closed in 2000 and re-established as public schools for children with special educational needs.

What role does the national strategy play in this process?

19] Section 192(1) of the Children's Act places an obligation on the Fifth Respondent, the Minister of Social Development ("the National Minister"), to include in the departmental strategy a **comprehensive national strategy aimed at ensuring an appropriate spread of CYCCs** throughout the Republic providing the required range of residential care programmes in the various regions.

20] Section 192(2) states that the relevant MEC for social development must within the national strategy referred to in s 192(1) provide for a provincial strategy aimed at the establishment of an appropriate spread in the province of properly resourced, coordinated and managed CYCCs providing the required range of residential care programmes. On 20 March 2014 the National Minister agreed, by way of an Order of this Court, to produce the comprehensive national strategy by 31 July 2014, or to file a report under oath why such strategy had not been produced. On 30 July 2014, Mr. Coceko Pakade, the Director General in the National Department of Social Development ("the National Department"), deposed to an affidavit stating that ***"the National Minister is in the process of compiling a***

national strategy", and that "***a report will be prepared as to the progress being made on the national strategy which report will then be placed before this court".*** As at the hearing of this matter and in response to a question by the Court *apropos* the significant absence of such report, Mr. Katzeff submitted to the court that he is bound to the papers and has no further instructions in this regard. In the affidavit by Pakade, the National Department was, as at July 2014, still "***developing a spatial optimization model to assist in the determination of the geographical spread of needs which would include a determination of travelling distance to the various facilities.***" Notably it has been approximately five years since the commencement of section 192(1) of the Act. The national strategy has not been produced and consequently the third respondent could not produce its provincial strategy.

21] The Applicant's argument is that absent a national and provincial strategy, the Provincial Minister cannot arguably roll out any new CYCC'S and certainly cannot close any.

ISSUE IN DISPUTE / APPLICATION OF THE LAW TO THE FACTS:

22] The crisp issue for determination by this court is whether specifically these four centres fall within the purview of section 196 of the Children's Act.

Do these four centres meet the two requirements of section 196?

23] Insofar as Section 196 applies to schools that have been **established** in terms of the 1913 Children's Protect Act ("1913 Act") or the 1911 Reformatories Act ("1911 Act") and **maintained** as schools of industries or as reform schools Mr. Jamie argued that both requirements have been met. As indicated earlier in this judgment, these centres were closed in 2000 and re-established as public schools for children with special educational needs. Thus, the challenge for the applicants is that these centres were therefore strictly speaking not established in terms of the 1913 or 1911 Acts. Of course therein rests the strength of the argument for the Respondents, for on their version only those schools actually established in 1913 as industrial schools and which have not been "closed" and "re-established" under successive or alternate legislation, will be covered by section 196(1)(d). Similarly, only those schools actually established in 1911 as reformatories, and which have not been "closed" and "re-established" under successive or alternate legislation, will be covered by section 196(1)(e).

24] The argument in the alternate for the Applicant, and were this court to find that the Centres do not meet the "established" requirement, then Section 196 nonetheless applies to the Centres in that the word *'and'* in ss 196(1)(d) and (e) ought to be read disjunctively rather than conjunctively. In other words, *'and'* should in fact be read as *'or'* for the purposes of those sections which applicants submit

would bind the centres to section 196. The basis of the applicants' argument is that to give the sections their ordinary meaning would lead to an absurdity in that it would amount to an arbitrary distinction being drawn between reform schools and schools of industries established in either the Children's Protection Act 1913 or the Prisons and Reformatories Act 1911 respectively and those established in terms of other legislation.

25] Mr. Katz argued that until such time as the Western Cape Education Department's decisions to close the Centres as Schools of Industry and Reform Schools, and to re-establish the Centres as public schools for children with special educational needs, are set aside by a court in proceedings for judicial review, those decisions exist in fact and have legal consequences that cannot simply be overlooked by the applicants. At this juncture Mr. Jamie confirmed that the applicants would not seek to set aside on review the decisions of the education department to close the schools in 2000 or to re-establish the schools under the Western Cape Schools Act as schools for learners with special needs. He further submitted that given the case for the Applicant it was not necessary for them to do so. Mr.Katz continued that the effect of the decision to close the Centres as Reform schools and Schools of Industry on 31 December 2000, is that the Centres as a matter of law were not (as at 1 April 2010) established and maintained in terms of section 33 of the Children's Protection Act 25 of 1913 or established in terms of section 52 of the Prisons and Reformatories Act 13 of 1911. He argued further that this court should deal with the centres insofar as they are in fact and in law, public schools for children with special education needs and that in the premise they do not fall within the ambit of section 196.

26] Mr. Katz argued that the Applicants had not provided a basis upon which this court ought to depart from the *prima facie* meaning of the wording of ss 196(1)(d) and (e) of the Children's Act, and as such, in order for the Centres to fall within the ambit of these provisions they would have had to be established **and** maintained as either schools of industries or reform schools in terms of the Child Care Act. In response to a question by the court that a purposive interpretation would favour the reading of ***"and"*** to be read as ***"or"*** allowing for either schools established as well as school having been maintained as such to be the subject of Section 196, more so in view of the fact that these centres were post 2000 still operating as such, Mr. Katz replied that even on such an interpretation, the case for the applicants ought to fail as the schools in question were not "lawfully" operating. Section 196, he contended, would require any school that was being maintained as a reform or industry school to be one that was "lawfully" being maintained and though the Centres carried on after 2000 as such, their actions were not lawful as the schools were strictly speaking closed by proclamation on 31 December 2000.

FINDINGS:

27] I shall in my findings not deal with each and every argument by counsel or averments contained in the papers, save where it is relevant to the findings of this court.

28] The issue of non-joinder raised by the Respondents in respect of the CYCC's, Eureka, Die Bult and Wellington, was addressed prior to the hearing of this matter and they had been joined to the proceedings by order of court. This point *in limine* was accordingly dealt with and not pursued at the hearing. The school governing bodies of the aforesaid centres were joined as the seventh, eighth and ninth respondents respectively.

29] The Respondents brought an application to strike out the applicant's replying affidavit in part for the reason that it sought to make out a new case in reply. It is trite law that in motion proceedings, an applicant must make out its case in its founding affidavit and that it stands or fall by that which is contained therein. In particular, the facts essentially addressed in the further affidavit were clearly known to the Respondents at the time of launching the application and the information ought to have formed part of the founding papers. It is my considered opinion that if these affidavits were to be allowed, it would result in these proceedings being open-ended. Scholtz JA put it as follows in **Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA)** at 439G-H:

"There is one other matter that I am compelled to mention – replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest – and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the Courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them."

30] I am not persuaded by the reasons advanced by the Applicants to grant leave to file the affidavit of Leppan. In the interests of justice and finality of matters the application for leave to do so is accordingly dismissed. The affidavit in question and all further affidavits by both the Applicants and the Respondents filed thereafter are herewith ordered to be *pro non scripto.*

Do the provisions of section 196 apply to the centres?

31] The Applicant seeks to prevent the repurposing of the Centres. They also argue that it is not in the best interests of children found to be in need of care to be placed with children who had been convicted/sentenced or diverted from criminal offences. Respondents are adamant that section 196 is not applicable to the centres and as such this court is constrained to deal with the centres as public schools for learners with special education needs. The question is a complex one, no doubt best answered by considering the *de facto* status of these Centres as they had functioned at the time of the commencement of this legislation viewed within the spirit and purport of the Children's Act. The preamble sets out that:

"WHEREAS the Constitution establishes a society based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person…"

32] The intention of the legislature by the passing of this legislation is clearly defined to promote the fact that every child has the rights set out in section 28 of the

Constitution. The State bears the corresponding obligation to respect, protect, promote and fulfil those rights. The Children's Act recognises that the protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities. The United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance. Hence, the legislature recognised that it was necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community and develop his or her personality in an environment which recognises these rights and are sensitive to the different needs of children. Section 9 of the Children's Act, headed, ***"Best interests of child paramount***" requires that in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied. Section 10, ***"Child Participation"***, guarantees that every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

33] In my view, the interpretation that is being sought from this court must be assessed and interpreted by way of purposive interpretation and thereby echo the spirit and tenor of the Children's Act and the Constitutional values of our society in particular the rights of children. To interpret section 196 restrictively would in my view not promote the objects of the Bill of Rights. In terms of Section 28 of our Constitution, every child has the right inter alia to family care or parental care, or to

appropriate alternative care when removed from the family environment. Every child also has the right to social services and protection from maltreatment, neglect, abuse or degradation. For there to be an arbitrary distinction between schools established under the 1911 and 1913 Acts and those established thereafter is contrary to the objects and purposes of the Children's Act and the Bill of Rights. In my view there would have been no basis for such distinction to have been drawn and that the lack of reference to these four schools (which by then had been re-established by proclamation) must be deemed to have been an oversight by the legislature. To not do so would amount to an absurd result and would be adverse to the children of the Western Cape Province.

34] An analysis of other sections in the Children's Act further supports my finding. Section 197 provides that: ***"any national or provincial state department responsible for social development, municipality and accredited organisation may establish and operate a child and youth care centre."*** (underlined emphasis my own) In other words, the legislature had not provided for the Education Department to "establish and operate" a CYCC. I consider the absence of reference to the Education Department to mean that there is no room for the Education Department to retain responsibility for the centres. If the legislature had intended this, at the very least, clear provisions would exist for the retention of all (or at least) some of the centres as secure care CYCC's, albeit under the responsibility of the Education Department. What justification would exist for excluding the children of the Western Cape from this transition and the promotion of their rights as recognised and contemplated by the Children's Act?

35] Even if this court were to find that it does not meet with the "established" requirement of the section, the question that follows is whether the two requirements are to be interpreted as co-requirements or that the existence of either of the two could suffice to satisfy section 196. The interpretation that both factors must be met, that being, established and maintained, would not support an interpretation which would enjoin the spirit of affording the children of the four centres before this court the protection and benefit as contemplated by this very Act. This too applies to children of the geographical locations of these centres who presently and in future are found to be in need of care and who would be entitled to the assurances they would otherwise had been entitled to. In **Ngcobo and Others v Salimba CC; Ngcobo v van Rensburg 1999 (8) BCLR 855 (SCA)** the court held that in the context of interpreting the use of the word "and" in legislation, as follows:

"It is unfortunately true that the words "and" and "or" are sometimes inaccurately used by the legislature, and there are many cases in which one of them has been held to be the equivalent of the other…Although much depends on the context and the subject matter ….it seems to me that there must be compelling reasons why the words used by the legislature should be replaced; in case why "and" should be read to mean "or" or vice versa. The word should be given their ordinary meaning "…unless the context shows or furnishes very strong grounds for presuming that the legislature really intended" that the word not used is the correct one (see Wessels J in Gorman v Knight Central GM Co Ltd 1911 TPD 597 at 610; my underlining): Such grounds will include that if we give "and" or "or" their natural meaning, the interpretation of the section under discussion will be unreasonable, inconsistent or unjust…or that the result will be absurd….or I would add, unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights…"

36] In the premise, I do not find that both requirements must be met and in my view the meaning of **"and"** ought not be read conjunctively. Its inclusion in the section shall not be viewed as having a connecting purpose in the construction of the sentence and is to be given a disjunctive meaning, which could be read as **"or"**. These Centres were operating, functioning and serving as schools of industries or reform in terms of the Child Care Act and I am thus satisfied that it was maintained as such for the purposes of Section196. I am not persuaded by the argument for the Respondent that these centres had been in the process of winding down since 2000. How can that so convincingly be? A period of no less than 14 years or more had passed during which the Centres were functioning as CYCC's running residential care programmes. In the lives of the children it housed, they were being cared for in accordance with their challenges and in particular they were children who had been found to be in need of care. They have a right established through the circumstances and the actions of those who had been placed to care for them, to be afforded dignity and respect in the course of their further care. In **Centre for Child Law and Others v MEC for Education, Gauteng and Others 2008 (1) SA 223 (T)**, Murphy J held that: *"As a society we wish to be judged by the humane and caring manner in which we treat our children. Our Constitution imposes a duty upon us to aim for the highest standard, and not to shirk from our responsibility….What message do we send to the children when we tell them that they are to be removed from their parents because they deserve better care, and then neglect wholly to provide that care? We betray them, and we teach them that neither the law nor State institutions can be trusted to protect them. In the process we are in danger of relegating them to a class of outcasts, and in the final analysis we hypocritically renege on the constitutional promise of protection."*

37] I find that these Centres fall within the ambit and transfer envisaged by the Children's Act, and must be regarded from 1 April 2010 as having been established and/or maintained in terms of section 195 of the Children's Act as secure care child and youth care centres, the responsibility for which remained with the Department of Education (fourth respondent) until 1 April 2012. Thereafter the responsibility was transferred to, and remains with, the Department of Social Development (second respondent). However, the obligation rests on the Education Department to provide education to children at these facilities.

What role does the National Strategy play?

38] Section 192(1) of the Children's Act has obligated the Minister of Social Development ("National Minister") to include in the departmental strategy a comprehensive national strategy aimed at ensuring an appropriate spread of child and youth care centres throughout the Republic providing the required range of residential care programmes in the various regions. On 20 March 2014 the National Minister agreed, by way of an order of this court, to produce the comprehensive national strategy by 31 July 2014, or to file a report under oath as to why such strategy had not been produced. On 30 July 2014 Pakade stated in his affidavit that the National Minister was in the process of compiling a national strategy and that a report would be prepared as to the progress being made on the national strategy, which report would then be placed before this court.

39] I was not provided with any such report nor had the National Strategy been produced as at the hearing of this matter. Mr. Katzeff advised the court upon enquiry that he holds no instructions in this regard and concedes to an order as sought by the Applicant in terms of prayers 1 and 2 of the Notice of Motion. In my view, the National Strategy is paramount to the changes in the lives of the affected children, particularly in that its purpose would be to develop a model to determine what would best serve the geographical needs of such centre and included therewith the determination of travelling distance to the various facilities. Differently put, the National Strategy is to ensure that there is a sufficient spread of residential care programmes. In light of the fact that children have already been moved from or reduced from the centres and transferred to other secure care centres the question follows:

How can such limitations to their clear and distinct rights be justified in circumstances where the strategic plan or model envisaged by the legislature to assist the transformation process had not been honoured notwithstanding the lapse of five years since the commencement of section 192(1) of the Children's Act?

40] It is common cause that absent the National Strategy, a provincial strategy cannot follow as the latter is dependent on the former. The decision to repurpose the centres was thus made without the national and provincial strategies. The obvious question follows: How will the consultation process required by the National and Provincial Strategy and also Section 10 ***("Child Participation")*** be given effect to? How would the goals of the Children's Act in this regard be achieved without that

which the legislature had specifically envisaged to be provided in order to ensure that there is an equal spread of CYCC's? National and provincial strategies are after all professional programmes aimed at determining exactly what our children need, the geographical area from which they come and budgetary resources to name but a few vitally important beacons in this process. The children in need of care in the Western Cape cannot be expected to sacrifice their rights at the altar of other competing rights in circumstances where those responsible for them had not yet ensured that a strategic plan is in place to honour the constitutional obligations which rest upon them. The rights of these children as conferred by the Children's Act are a concrete embodiment of the rights in Section 28 of the Constitution, for every child, to receive appropriate alternative care when removed from the family, and to be protected from maltreatment, neglect, abuse and degradation.

Can children in alternative care be transferred to more restrictive care?

41] Section 171(1) provides that the provincial head of social development may transfer a child in alternative care from the CYCC or person in whose care that child has been placed to any other CYCC or person, subject, *inter alia*, to ratification by a Children's Court if the child is transferred to a secure or more restrictive child and youth care centre than their present one. Section 171(4) provides for a certain measure of consultation prior to such order being issued. Thus the intention of the legislature was quite clearly to ensure that when a child is moved to a more secure facility, that it be done on an individualised basis and to ensure that not only is the environment conducive to the said child, but also whether he or she would be compatible with that environment. Following that rationale, I am of the view that the

legislator was alive to the notion that mixing of children – those in need of care with children awaiting trial/convicted/sentenced/diverted – would not be conducive to their respective care, development, rehabilitation and re-integration into society. On the papers before me, the Applicants have made out a substantial and compelling case from which it can be accepted that transferring of children to more secure CYCC's and/or a blanket mixing those children would be detrimental to their social development and welfare. The Respondent's case is that the decision to repurpose the Centres involved a complex weighing of competing needs and priorities against the available resources in both the areas of child and youth care services and special needs education.

42] I am not persuaded by Respondents submission that the children would be cared for and housed separately. That does not necessarily offer a solution to what I would consider obvious adverse consequences. In fact the practical difficulties and reality would prove that it would not sufficiently curtail the adverse effects thereof. No doubt a child found to be in need of care would struggle with the stigma associated with a facility designed and known for that purpose. It would lower the self-worth and self-esteem of his or her developing psyche which had already been exposed to challenging life crisis. Whilst the Respondents have sought to defend their intentions or decisions by arguing that this is a policy-centric arena not for the court to trench upon the terrain of the executive, our courts have held in similar cases that insofar as polycentric issues may arise from the courts becoming involved in budgetary or distribution matters, our Constitution recognises, particularly in relation to children's rights that budgetary implications ought not to compromise the justiciability of the rights. (*see supra Centre for Child Law and others.*).

43] It is my considered opinion that placing children that are in the care system with those awaiting trial or who had been sentenced amounts to a flagrant disregard of Section 12 of our Constitution.

"12.(1) Everyone has the right to freedom and security of the person, which includes, the right –

(a) not to deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;"

Correctional facilities are known to have a culture of induction into gangs by use of force, violence and duress as well as riotous behaviour. Placing children in need of care in that environment amounts, in my view, to an infringement of their constitutional right to security and freedom from violence. Furthermore, placing such children with those whom had transgressed the law, results in my view to the deprivation of their liberty and arguably a form of detention without a trial.

44] As the upper guardian of all minor children and further guided by the principle of the best interests of the children, this court is empowered to make an order to address the placements of children who have been placed in terms of section 156(1)(h) and 158 at the CYCC's at Outeniqua, Vredelus, Horizon and Clanwilliam and who are still so placed.

In the result I make the following order:

i) *The Fifth Respondent is directed to produce and present to the Chief Registrar of this Court within six (6) months from the date of this order, the National Strategy referred to in section 192(1) of the Children's Act No 38 of 2005 ("Children's Act");*

ii) *The First Respondent is directed to produce, and present to the Chief Registrar of this Court, within a period of four (4) months from the date that the Fifth Respondent produces the National Strategy referred to in paragraph 1 above, the Provincial Strategy referred to in section 192(2) of the Children's Act;*

iii) *It is declared that in accordance with section 196(1)(d) of the Children's Act, from 1 April 2010,* ***Ottery Youth Centre*** *in Ottery in the Metro South Education District ("Ottery Centre"), Die* ***Bult Jeugsentrum*** *in George in the Eden and Central Karoo Education District ("Die Bult Centre") and* ***Wellington Youth Centre*** *in Wellington in the Cape Winelands Education District ("Wellington Centre") are respectively regarded as having been established in terms of Section 195 of the Children's Act as a child and youth care centre providing a residential care programme referred to in section 191(2)(i) of the Children's Act;*

iv) *It is declared that in accordance with section 196(1)(e) of the Act, from 1 April 2010,* ***Eureka Jeugsentrum*** *in Groot Eiland in the Cape Winelands Education District ("Eureka Centre") is regarded as having been established in terms of section 195 of the Children's Act as a child and youth care centre providing a residential care programme referred to in section 191(2)(j) of the Children's Act.*

v) *It is declared that from 1 April 2012, Die Bult Centre, Eureka Centre, Ottery Centre and Wellington Centre became the responsibility of the Second Respondent, which responsibility includes, but is not limited to:*

(a) Being responsible for the possession, use and upkeep of the physical infrastructure of each child and youth care centre; and

(b) Ensuring that each child and youth care centre is properly resourced, co-ordinated and managed in compliance with its obligations in terms of the Children's Act.

vi) *The Second Respondent is directed to forthwith consider afresh the placements of those children who have been placed in terms of sections 156(1)(h) and 158 of the Act at the secure care child and youth care centres at Outeniqua, Vredelus, Horizon and Clanwilliam and who are still so placed.*

vii) *No order as to costs.*

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SALIE-HLOPHE, J
JUDGE OF THE HIGH COURT
WESTERN CAPE