THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1054/2015

In the matter between:

MEC FOR SOCIAL DEVELOPMENT, WESTERN CAPE	**FIRST APPELLANT**
THE DEPARTMENT OF SOCIAL DEVELOPMENT, WESTERN CAPE	**SECOND APPELLANT**
MEC FOR EDUCATION, WESTERN CAPE	**THIRD APPELLANT**
THE DEPARTMENT OF EDUCATION, WESTERN CAPE	**FOURTH APPELLANT**

and

THE JUSTICE ALLIANCE OF SOUTH AFRICA	**FIRST RESPONDENT**
SCHOOL GOVERNING BODY OF OTTERY YOUTH CARE AND EDUCATION CENTRE	**SECOND RESPONDENT**

Neutral citation: *MEC: Social Development, Western Cape v The Justice Alliance of South Africa* [2016] ZASCA 88 (1 June 2016)

Coram: Mpati P, Saldulker, Mbha JJA, Fourie and Victor AJJA

Heard: 17 May 2016

Delivered: 1 June 2016

Summary: Establishment of child and youth care centres in terms of s 195 of the Children's Act 38 of 2005 – involves decisions which are polycentric and policy-laden in nature – intervening therewith undermines the doctrine of separation of powers – the requirements for the establishment of child and youth care centres not met.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Salie-Hlophe J sitting as court of first instance), judgment reported *sub nom Justice Alliance of South Africa & another v Minister of Social Development, Western Cape & others* [2015] 4 All SA 467 (WCC):

1 The appeal is upheld and the order of the Western Cape Division of the High Court, Cape Town, is amended to the extent that orders (iii), (iv), (v) and (vi) made on 31 August 2015, are set aside.

2 No order is made in respect of the costs of the appeal.

3 The cross-appeal is dismissed with costs, which costs, including the costs of two counsel, are to be borne by the first respondent.

JUDGMENT

Fourie AJA (Mpati P, Saldulker, Mbha JJA and Victor AJA concurring):

[1] This is an appeal against a judgment of the Western Cape Division of the High Court, Cape Town (the WCC), declaring that four educational centres in the Western Cape Province were to be regarded as child and youth care centres (CYCCs) in terms of the provisions of the Children's Act 38 of 2005 (the Children's Act).

[2] The first appellant is the Member of the Executive Council for Social Development, Western Cape (the MEC Social Development), while the second appellant is the Department of Social Development, Western Cape (the WCDSD). The third appellant is the Member of the Executive Council for Education, Western Cape, while the fourth appellant is the Department of Education, Western Cape (the WCED).

[3] The first respondent is the Justice Alliance of South Africa, a non-profit voluntary association constituted as a juristic person with standing by virtue of the

provisions of s 38*(d)* and *(e)* of the Constitution. The second respondent is the School Governing Body of Ottery Youth Care and Education Centre.

[4] On 17 December 2013, the respondents launched an application in the WCC in relation to four educational centres in the Western Cape, which they asserted must be regarded as CYCCs for purposes of the Children's Act, being Die Bult Youth Centre (Die Bult), Eureka Youth Centre (Eureka), Wellington Youth Centre (Wellington) and Ottery Youth Centre (Ottery), collectively referred to as 'the centres'. The respondents sought wide-ranging relief. In fact, their notice of motion contained twenty-two prayers for relief including declaratory orders and a series of mandatory interdicts.

[5] The appellants opposed the application and, after hearing argument, the WCC granted six of the twenty-two substantive prayers for relief. The appellants have appealed four of the substantive orders, while the respondents have lodged a cross-appeal against the order relating to costs (the WCC made no order as to costs). The appeals are brought with the leave of the WCC.

[6] The relief sought by the respondents was premised, in the main, on s 196(1) of the Children's Act, the relevant part of which reads as follows:

'(1) As from the date on which section 195 takes effect [1 April 2010], -

. . .

(d) a government industrial school established in terms of section 33 of the Children's Protection Act, 1913 (Act 25 of 1913) and maintained as a school of industries in terms of the Child Care Act [74 of 1983] 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 s 52 of the Prisons and Reformatories Act, 1911 (Act 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)*.'

[7] Section 191(2)*(i)* and *(j)* of the Children's Act provides as follows:

'A child and youth care centre must offer a therapeutic programme designed for the residential care of children outside the family environment, which may include a programme designed for –

. . .

(i) the reception, development and secure care of children with behavioural, psychological and emotional difficulties;

(j) 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.'

'Secure care' is defined in s 1 of the Children's Act to mean:

'the physical containment in a safe and healthy environment –

(a) of children with behavioural and emotional difficulties; and

(b) of children in conflict with the law.'

[8] Section 196(2) obligates the WCED to provide education to the children in the facilities mentioned in s 196(1)*(d)* and *(e)*. Section 196(3) provides that a school of industries and a reform school referred to in s 196(1)*(d)* and *(e)*, respectively, which are the responsibility of a provincial department of education as at 1 April 2010, becomes the responsibility of a provincial department of social development within two years of that date.

[9] Section 195 of the Children's Act provides for the establishment of CYCCs by the respective MEC's for Social Development from money appropriated by the relevant provincial legislatures for that purpose. The respondents contended that the centres which had been established as schools of industries (Ottery, Die Bult and Wellington) and as a reform school (Eureka), are respectively to be regarded as CYCCs contemplated by s 196(1)*(d)* and *(e)* of the Children's Act.

[10] This contention found favour with the WCC which made orders to the following effect on 31 August 2015:

(i) The national Minister of Social Development (the fifth respondent in the WCC, who is not a party in this appeal) was directed to produce and present to the registrar

of the WCC within 6 months of the date of the order (ie by 29 February 2016), the national strategy referred to in s 192(1) of the Children's Act.

(ii) The MEC Social Development was directed to produce and present to the registrar of the WCC the provincial strategy referred to in s192(2) of the Children's Act, within 4 months from the date that the national Minister of Social Development produced the national strategy.

(iii) It was declared that, in accordance with s 196(1)*(d)* of the Children's Act, from 1 April 2010, Ottery, Die Bult and Wellington were respectively regarded as having been established in terms of s 195 of the Children's Act as a CYCC providing a residential care programme referred to in s 191(2)*(i)* of the Children's Act.

(iv) It was declared that, in accordance with s 196(1)*(e)* of the Children's Act, from 1 April 2010, Eureka was regarded as having been established in terms of s 195 of the Children's Act as a CYCC providing a residential care programme referred to in s 191(2)*(j)* of the Children's Act.

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

(a) being responsible for the possession, use and upkeep of the physical infrastructure of each CYCC; and

(b) ensuring that each CYCC is properly resourced, co-ordinated and managed in compliance with its obligations in terms of the Children's Act.

(vi) The WCDSD was directed to forthwith consider afresh the placements of those children who had been placed in terms of ss 156(1)*(h)* and 158 of the Children's Act at the secure care CYCCs at Outeniqua, Vredelus, Horizon and Clanwilliam, and who are still so placed.

(vii) No order as to costs was made.

[11] The appellants have appealed orders (iii), (iv), (v) and (vi). The two remaining substantive orders (i) and (ii) were granted by consent and are not impugned on appeal. It is necessary to consider briefly the import of orders (i) and (ii).

[12] As envisaged in s 191(2)*(i)* and *(j)* of the Children's Act, provision is made for the establishment of CYCCs for the reception, development and secure care of children who broadly fall in two categories, ie children whose parents or care-givers

are unable to control them due to behavioural and emotional difficulties, and those who are in conflict with the law. To this end s 192(1) of the Children's Act requires the national Minister of Social Development to prepare a comprehensive national strategy after consultation with interested persons and the national Ministers of Education, Health, Home Affairs and Justice and Constitutional Development. This national strategy has to be aimed at ensuring an appropriate spread of CYCCs throughout the Republic providing the required range of residential care programmes in the various regions, giving due consideration to children with disabilities or chronic illness.

[13] Section 192(2) requires the MEC's for Social Development to provide, within the national strategy, for a provincial strategy aimed at the establishment of an appropriate spread in the respective provinces of properly resourced, co-ordinated and managed CYCCs providing the required range of residential care programmes. The respondents have recognised the importance of s 192, by stating that, 'absent a strategy, National and Provincial, the Provincial Minister arguably cannot roll out any new child and youth care centres. He certainly cannot close any . . .; a significant reason for the nationwide confusion regarding a proper interpretation of the Children's Act, can be attributed to the failure on the part of the Minister for Social Development (National) to produce a national strategy . . . , Behind the confusion in the Western Cape Province, is also the failure on the part of the Provincial Minister for Social Development to produce a provincial strategy . . ., [w]ithout the national and provincial strategies it is no wonder that there is such chaos in respect of the implementation of the transfer of these [c]entres'.

[14] The national strategy had, despite assurances by the national Minister of Social Development, not yet been finalised at the time of the hearing of the application by the WCC. Absent a national strategy, the MEC Social Development had also not been able to prepare a provincial strategy for the Western Cape. The time-limit laid down by the WCC in order (i) for the production and delivery of the national strategy, had expired, but we were informed by counsel that it had been made available on 1 April 2016. In terms of order (ii) of the WCC the provincial strategy has to be delivered by 31 July 2016.

[15] Apart from the national and provincial strategies, s 194 also requires the national Minister to determine national norms and standards for CYCCs by regulation, after consultation with interested persons and the national Ministers of Education, Health, Home Affairs and Justice and Constitutional Development. Subsection 194(2)*(a)*-*(n)* sets out a detailed range of aspects concerning the development and care of children in CYCCs, to which the contemplated norms and standards must relate. These norms and standards had been published on 1 April 2010.

[16] When regard is had to the ambit and extent of orders (iii) – (v), one is struck by the impact that these orders will have on the decision-making powers of the executive in regard to the establishment and conduct of CYCCs in the Western Cape. As recorded earlier, the Children's Act vests wide discretionary powers in the national Minister of Social Development, the MEC Social Development and the WCDSD. These include the compilation of the national and provincial strategies aimed at ensuring an appropriate spread of CYCCs throughout the Republic and the Western Cape Province, and ensuring that they are properly resourced, co-ordinated and managed, whilst providing the required range of residential care programmes. To this end s 192(1) provides for an inter-ministerial consultative process involving other interested parties prior to compiling the national strategy, while s 194(1) provides for a similar process prior to the determination of the national norms and standards for CYCCs. As submitted on behalf of the appellants, the nature of these consultative processes highlights the polycentric and policy-laden character of the decision-making process concerning the distribution of CYCCs and the programmes to be provided by them.

[17] The effect of orders (iii) – (v) is that the centres are to be regarded as CYCCs, with the result that, by operation of s 195 of the Children's Act, the WCDSD was bound to establish and operate the centres from money appropriated by the Western Cape Legislature. This means that the WCDSD must provide the necessary personnel and funding to operate the centres as CYCCs.

[18] What the WCC had not taken into account when granting orders (iii) – (v), is that, with effect from 31 December 2000, ie more than nine years prior to the

commencement of the Children's Act on 1 April 2010, these centres had been formally closed down. The functions of the centres, other than Ottery, had thereafter been progressively wound down, so as to enable the WCED to repurpose them for use as schools for children with special needs. In fact, by the time the application was heard by the WCC in June 2015, Die Bult had been converted for use as a secondary school for children with special needs; Eureka had de facto ceased to function as a CYCC and there were only eight children in need of care and protection that had been placed at Wellington. Ottery had by then been granted conditional registration as a CYCC under s 199 of the Children's Act. All of the centres operated under the auspices of the WCED and the facilities at the centres were owned by the WCED.

[19] In view of the above, orders (iii) – (v) clearly trench on the decision-making powers of the executive. The decisions as to the establishment, appropriate spread and conduct of CYCCs in terms of the Children's Act, are ones (to borrow a phrase from Moseneke DCJ in *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) para 44) that reside in the heartland of the exercise of national and provincial executive authority. The separation of powers doctrine requires a court to refrain from intervening in decisions of this nature, particularly as they are polycentric and policy-laden in nature. The appellants correctly submitted that the granting of orders (iii) – (v) was the equivalent of the implementation of a strategy of the nature contemplated by s 192 of the Children's Act, in circumstances where such implementation would occur without any of the consultative processes required by the legislature. In addition, these orders clearly impinge on the function of the executive by effectively determining where and how public funds and resources should be deployed.

[20] In *Minister of Home Affairs & others v Scalabrini Centre Cape Town & others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) para 57, Nugent JA said the following with regard to the establishment of reception offices under the Refugees Act 130 of 1998:

'The question whether a Refugee Reception Office is necessary for achieving the purpose of the Act is quintessentially one of policy. Where, and how many, offices should be established will necessarily be determined by matters like administrative effectiveness and

efficiency, budgetary constraints, availability of human and other resources, policies of the department, the broader political framework within which it must function, and the like. I do not think courts, not in possession of all that information, and not accountable to the electorate, are properly equipped or permitted to make those decisions.'

A similar warning was sounded by Sachs J in *Du Plessis & others v De Klerk & another* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 para 180:

'The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions, which appropriate decision-making on social, economic, and political questions require.'

These observations apply with equal force in the instant matter.

[21] What the WCC further failed to appreciate is that the transfer of the centres from the WCED to the WCDSD, would involve the transfer of the employees from their current employment with the WCED to the WCDSD. This process would impact on the terms and conditions of their current employment and thus require a labour relations process to be undertaken, including an organisational design process to determine equivalent job descriptions and gradings, and negotiation with the relevant labour unions and bargaining councils. Obviously no process of this nature had taken place and orders (iii) – (v) ought therefore not to have been made.

[22] It appears that the provisions of s 14(1) and (3) of the Public Service Act 103 of 1994, were also overlooked by the WCC. The effect of these subsections is that a public sector employee may be transferred from one department to another, when the public interest so requires, provided that the approval of the persons who, in respect of each of those departments, have the power to transfer, must first be obtained, and after meaningful and proper consultation with the employee concerned has taken place. (See *Public Servants Association of South Africa v Minister of Department of Home Affairs & others* [2012] ZALAC 35; [2013] 3 BLLR 237 (LAC) paras 70 and 83-84.) In effect orders (iii) – (v) granted by the WCC amounted to a transfer of employees of the WCED to the WCDSD, without compliance with s 14 of the Public Service Act.

[23] There was also a statutory impediment preventing the WCC from lawfully granting orders (iii) – (v). I have recorded that the centres had been formally closed down at the time of the coming into operation of the Children's Act. This resulted from various statutory enactments which had repealed the Children's Protection Act 25 of 1913 (the CPA) and the Prisons and Reformatories Act 13 of 1911 (the Prisons Act), culminating, insofar as the Western Cape Province is concerned, in the enactment of the Western Cape Provincial School Education Act 12 of 1987 (the WC Schools Act). In terms of s 18 of the WC Schools Act, the centres were closed by provincial proclamation dated 16 September 2000, with effect from 31 December 2000. This followed on the decision of the WCED to close the centres and to re-establish them under the WC Schools Act as schools for learners with special educational needs. Therefore, as from 31 December 2000, the centres were, in law, public schools for learners with special educational needs in terms of s 12 of the WC Schools Act.

[24] The respondents recognised this statutory impediment to the relief sought by them. Therefore, they sought orders in terms of paras 12 and 13 of their notice of motion, declaring the decision to close and/or the intended closure of the centres to be unlawful and unconstitutional. However, the WCC did not grant any relief to the respondents under paras 12 and 13 of the notice of motion.

[25] Until such time as the decisions of the WCED, as embodied in the respective proclamations, to close and re-establish the centres as public schools are set aside, they exist in fact and have legal consequences that cannot be overlooked. See *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para 26 and *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 103. Absent orders declaring the formal closure of the centres to have been unlawful and setting aside the closure and re-establishment of the centres as schools for learners with special educational needs, there was no basis for the WCC to grant orders (iii) – (v).

[26] As indicated earlier, the respondents premised their application on the deeming provisions of ss 196(1)*(d)* and *(e)* of the Children's Act. In terms of these sub-sections government industrial schools and reformatories had, with effect from 1

April 2010, to be regarded as CYCCs established in terms of s 195 of the Children's Act, if two requirements were met. In the case of a government industrial school it had to have been established in terms of s 33 of the CPA and maintained as a school of industries in terms of the Child Care Act. A reformatory, on the other hand, had to have been established in terms of s 52 of the Prisons Act and maintained as a reform school in terms of the Child Care Act.

[27] The difficulty facing the respondents was that, as at 1 April 2010, the centres did not fall within the ambit of ss 196(1)*(d)* or *(e)* of the Children's Act. It is common cause that the centres had not been established in terms of either the CPA or the Prisons Act. In addition, as recorded above, the centres had as a matter of fact and of law, as at 1 April 2010, been lawfully established as schools for learners with special educational needs in terms of s 18 of the WC Schools Act. They were accordingly not, as at 1 April 2010, maintained as schools of industries or reform schools respectively. Therefore, there was no basis in law upon which the WCC could have held that the centres fell within the ambit of ss 196(1)*(d)* or *(e)* of the Children's Act and it should accordingly not have granted orders (iii) – (v).

[28] Counsel for the respondents, however, submitted that, notwithstanding the formal closing down of the centres by the WCED and their re-purposing as schools for learners with special educational needs, they were, as at 1 April 2010, being maintained as schools of industries and a reformatory, respectively, in terms of the Child Care Act. This submission did not take account of the undisputed evidence recorded in para 18 above, that the centres had been engaged in a process of closure and winding down of operations. There was accordingly no basis for a finding that, as at 1 April 2010, the centres had been maintained as schools of industries or as a reform school, respectively.

[29] I should add that, even if the centres had been maintained as such, they would not have fallen within the ambit of ss 196(1)*(d)* or *(e)* of the Children's Act, as they must, as a matter of fact and law, as at 1 April 2010, have been both established in terms of the CPA or the Prisons Act *and* maintained as schools of industries and a reform school, respectively. (My emphasis.) In an attempt to overcome this hurdle, counsel for the respondents submitted that the word '*and*' in

ss 196(1)*(d)* and *(e)* of the Children's Act ought to be read disjunctively rather than conjunctively. Therefore '*and*' should be read as '*or*' for the purposes of those subsections. This submission found favour with the WCC who applied what it termed a 'purposive interpretation' of ss 196(1)*(d)* and *(e)*, by finding that the section merely required erstwhile schools of industries and reform schools to have been established in terms of the CPA or the Prisons Act *or* maintained as such in terms of the Child Care Act, in order to be deemed to be CYCCs as contemplated by s 195 of the Children's Act. (My emphasis.)

[30] The WCC reasoned that, to give ss 196(1)*(d)* and *(e)* its ordinary meaning, would lead to an absurdity, ie an arbitrary distinction being drawn between schools of industries and reform schools established in terms of the CPA or the Prisons Act and those established in terms of other legislation. However, in applying this construction of ss 196(1)*(d)* and *(e)* the WCC ignored the legislative scheme by which, in the Western Cape Province, all schools of industries and reform schools established and managed by the WCED as at 1 December 2000, had as a matter of law been established as public schools for learners with special educational needs.

[31] In *Ngcobo & others v Salimba CC; Ngcobo & others v Van Rensburg* [1999] ZASCA 22; 1999 (2) SA 1057 (SCA) para 11, this court held that there must be compelling reasons why the words used by the legislature should be replaced; in this case why 'and' should be read to mean 'or'. Olivier JA, writing for the court, stressed that the words 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. In *Preddy & another v Health Professions Council of South Africa* [2008] ZASCA 25; 2008 (4) SA 434 (SCA) paras 9-11 it was emphasised that, as a starting point in the interpretation of a statute, the words used ought to be given their ordinary grammatical meaning having due regard to their context. Therefore, a construction which requires the words used by the legislature to be replaced, should be regarded as a violent expedient which ought not to be adopted, except in the last resort.

[32] For the reasons enunciated above, there are, in my view, no grounds, let alone any strong grounds, why the word 'and' used by the legislature in ss 196(1)*(d)*

and *(e)* should be replaced with 'or'. On the contrary, there appears to me to be no inconsistency or absurdity which arises from the ordinary meaning of 'and' as used in the section. Therefore, upon a proper construction of ss 196(1)*(d)* and *(e)*, there was no basis for the granting of orders (iii) – (v) by the WCC.

[33] This brings me to order (vi), in terms of which the WCDSD was directed to consider afresh the placement of those children who had been placed at the secure care CYCCs at Outeniqua, Vredelus, Horizon and Clanwilliam. The order was made on the strength of the allegations of the respondents that, at these institutions, children with behavioural problems were housed together with sentenced or awaiting trial children, which constituted a serious infringement of the constitutional rights of the children with behavioural problems. When order (vi) of the WCC is read in the context of the judgment as a whole, it is apparent that the WCC was of the view that the housing of children who were subject to secure care programmes for involvement in criminal activities in the same facilities that house children that are in secure care programmes for behavioural reasons, is unconstitutional and constitutes an infringement of the basic human rights of the latter category of children. Hence the order that the WCDSD was to consider afresh the placement of these children.

[34] It will be immediately apparent that order (vi) seeks to prescribe to the WCDSD how it should fulfil its functions contemplated by the Children's Act. In terms of s 158 of the Children's Act, the placement of children in CYCCs is the function of the Provincial Head of Social Development. In so doing a range of considerations enumerated in s 158(3) are to be taken into account. The Provincial Head of Social Development is required to select a centre offering the programme ordered by the court and which is located as close as possible to the child's family or community. As I see it, the WCC did, by making order (vi), usurp the functions that the Children's Act has entrusted to the WCDSD. As in the case of orders (iii) – (v), order (vi) violates the doctrine of separation of powers and ought not to have been made.

[35] Further, and in any event, it appears that order (vi) was made in circumstances where there was no factual basis for it. In responding to the allegations of exposure of children placed in secure care programmes for behavioural reasons, to children placed in secure care who are sentenced offenders

or awaiting trial or sentence on criminal charges, the appellants made the following factual averments in their answering affidavit:

'The respondents have repeatedly advised the applicants that children found by the courts to be in need of care and protection due to behavioural problems, who are placed in the same child and youth care centres with children who are awaiting trial or have been sentenced, are accommodated separately and attend separate programmes during the day.

The applicants were further advised that children in need of care and protection, without behavioural problems are not accommodated in the same child and youth care centres as children who are awaiting trial or have been sentenced.

. . .

It is difficult to appreciate why the applicants are proceeding in this matter when they have clearly been informed that the facts upon which they based their application are not correct.'

[36] These averments were not disputed in reply. In addition, the appellants invited representatives of the respondents to accompany them on an inspection in loco to satisfy themselves that there was no truth in the allegations contained in the founding papers. This invitation was not accepted.

[37] The respondents sought final relief on motion and, in view of this dispute of fact, the matter had to be adjudicated upon the version of the appellants, particularly as there was no basis to say that the appellants raised fictitious disputes of fact or that their version was so far-fetched, or clearly untenable, that it could be rejected merely on the papers. See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634-5 and *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) paras 55-56.

[38] Furthermore, as pointed out by the appellants, there is no provision in the Children's Act which requires that children in the different categories should be housed separately in the sense that they need to be placed in separate facilities. All that the Children's Act contemplates is that children in secure care be kept separate from children not in secure care. In any event, it appears that in the Western Cape there is a more fundamental separation than that required in terms of the Children's Act, in that the different categories of children in secure care are housed separately in the facilities in which secure care is provided, while children not in secure care are placed in separate facilities.

[39] For all the above reasons, the appeal should succeed and orders (iii), (iv), (v) and (vi) be set aside. The appellants have not sought costs on appeal and accordingly no order should be made in this regard.

[40] In view of the appellants' success on appeal resulting in the setting aside of orders (iii) – (vi), the respondents' cross-appeal against the costs order made by the WCC, has to fail. With regard to the costs of the cross-appeal, the principles set out in *Biowatch Trust v Registrar, Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC) do not apply, in that it does not relate to the assertion of a constitutional right. The costs of the cross-appeal should accordingly follow the result. In my view the first respondent should be declared liable for these costs as it was the driving force behind the application and the eventual cross-appeal. This is borne out by the fact that its Executive Director deposed to the founding and replying affidavits, while the second respondent merely filed brief confirmatory affidavits.

[41] In the result the following orders are made:

1 The appeal is upheld and the order of the Western Cape Division of the High Court, Cape Town, is amended to the extent that orders (iii), (iv), (v) and (vi) made on 31 August 2015, are set aside.

2 No order is made in respect of the costs of the appeal.

3 The cross-appeal is dismissed with costs, which costs, including the costs of two counsel, are to be borne by the first respondent.

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P B Fourie

Acting Judge of Appeal

APPEARANCES:

Counsel for Appellants:	A Katz SC (with him M Adhikari) Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein
Counsel for Respondents:	I Jamie SC (with him B Studti & A Nacerodien) Instructed by: C & A Friedlander Attorneys, Cape Town Symington & De Kok, Bloemfontein