IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

CASE NO: 3935/2020

(1) Reportable: ~~Yes~~/No
(2) Of Interest To Other Judges: ~~Yes~~/No
(3) Revised: ~~Yes~~/No

24 January 2024
.....
Date

[redacted]
Signature

In the matter between:-

AFRIFORUM NPC	**First Applicant**
SUNFIELD HOME (FORTUNA) NPC	**Second Applicant**

and

THE MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT OF SOCIAL DEPARTMENT, MPUMALANGA	**First Respondent**
THE HEAD OF DEPARTMENT OF SOCIAL DEVELOPMENT, MPUMALANGA	**Second Respondent**
NICOLAAS JOHANNES DU PLESSIS N.O.	**Third Respondent**

JUDGMENT

Mazibuko AJ

Introduction

1. The applicants seek an order declaring that the first and second respondents have failed to sufficiently budget in that they did not take into account inflationary increases during the past fifteen years for subsidies of thirty-six (36) state-subsidised residents residing with the second applicant and for those with same or similar circumstances as those housed with the second applicant in the Mpumalanga Province.

2. Further, the baseline for the calculation of the 2024/2025 financial year subsidy to be paid by the first and second respondents to the 36 state-subsidised residents housed with the second applicant and all other persons with the same or similar circumstances to the state-subsidised residents housed with the second applicant in the Mpumalanga Province be calculated by increasing the current subsidy by the consumer price index (CPI) published by Statistics South Africa, with specific percentage increases outlined for each year from 2008 to 2023.

3. They further seek an order for the first and second respondents to take reasonable measures (including interim steps) by budgeting sufficiently, taking into account inflation in terms of the CPI for subsidies of any state-subsidised resident residing at the second applicant, and, all other persons with the same or similar circumstances to the state-subsidised residents housed with the second applicant in the Mpumalanga Province for the 2024/2025 financial year and subsequent financial years.

4. The applicants further seek an order directing:

4.1. The first and second respondents to, within twelve months of the date of this order, deliver to the applicants and file at this court a report, under oath, on their implementation of sufficient budgeting. Such a report may deal with any relevant matter the respondents wish to raise or report. In addition, it will set out the details of what steps they have taken and are still to take to sufficiently budget, as well as when they will take each further step to sufficiently budget.

4.2. The applicants are to deliver their commentary under oath on the said report within one month after service upon it of the said report.

4.3. Within two weeks after service upon them of the applicants' commentary, the respondents will deliver their reply under oath to the commentary.

4.4. The applicants, if so wish, to enrol the matter for hearing after that to determine whether the first and second respondents have sufficiently budgeted and for such other relief as the applicants may seek in the light of the information exchange.

5. The first applicant (*hereinafter referred to as 'Afriforum'*) is a non-profit company registered as such in terms of the company laws of the Republic of South Africa. The second applicant (*hereinafter referred to as 'Sunfield'*) is a non-profit company registered as a welfare organisation in terms of the provisions of section 13 of the National Welfare Act[1], located in Balfour, Mpumalanga. It accommodates and cares for about sixty-seven (67) physically and intellectually disabled persons. 36 are state-subsidised by the Department of Social Development (*hereinafter referred to as '*DSD').

6. The first respondent is a Member of the Executive Council of the Mpumalanga Department of Social Development (*hereinafter referred to as 'the MEC'*). The second respondent is the head of the Department of Social Development (*hereinafter referred to as 'the HOD'*). DSD is Constitutionally obligated to,

[1] Act 100 of 1978

among other things, care or cause to care for people who are physically and intellectually disabled.

7. The third respondent is the Curator *ad litem* (hereinafter referred to as 'the curator') appointed to investigate and report back to court the conditions of the 36 state-subsidised persons housed at Sunfield (*hereinafter referred to as 'the patients'*).

Background

8. A service level agreement (*SLA)* was concluded between DSD and Sunfield regulating the rights and obligations of DSD and Sunfield when patients are placed with Sunfield for care by DSD. The dispute between Sunfield and DSD concerns the non-increase of the subsidy it receives for caring for the patients. A new SLA was due to be entered into after the existing SLA had expired on 31 March 2022. To date, it has yet to be signed.

9. On 30 May 2021, the Sunfield board of directors addressed a letter to the MEC calling upon DSD to increase the subsidy amount for its patients, indicating that Sunfield could not continue operating sustainably with insufficient subsidies received. In the past 15 years, the subsidy amount has not been increased in terms of the annual CPI inflation rates. Further, the letter recorded[2].

10. In response, DSD, on 13 July 2021, proposed a meeting with Sunfield's Board and management for 26 July 2021. On 15 July 2021, Sunfield received a written notice in terms of the SLA stating that DSD would make funds available in the amount of R2 169.19 per each of the 36 patients per month.

[2] The current SLA expires on 31 March 2022. Should your Department wish to enter into a further SLA for another 3year period, the board of directors of Sunfield Fortuna hereby advises the Department that it is not prepared to enter into such an SLA unless the quarterly subsidy per state resident is increased to an amount of 23,000 per quarter.
Should the Department not consider it reasonable to increase the quarterly subsidy to the above amount, the Board of Sunfield Fortuna will advise the Department to withdraw all state residents on 1 April 2022 for relocation to another home for disabled persons.'

11. On 26 July 2022, the proposed meeting about the inadequate funding was held. DSD responded that Sunfield should sign a further SLA with them. After that, they would review the funding and decide on the increase request. Sunfield board of directors did not agree as they believed that would result in a breach of their fiduciary duties. The meeting agreed that Sunfield would sign an SLA expiring on 30 September 2022 to facilitate the due and owed payments to them.

12. DSD indicated that they would remove the patients by no later than 30 September 2022. On 16 and 17 August 2022, two DSD officials visited Sunfield to determine where the patients could be placed.

13. Hurter Spies Attorneys (HS Attorneys), on behalf of the applicants, dispatched a letter dated 23 August 2022 to the MEC informing her that Sunfield would be amenable to extending the SLA beyond September 2022, provided a new SLA was provided to Sunfield, making a provision for an increase in subsidy that is equal to the fees paid by Sunfield home's private residents. Also, if DSD did not, by no later than 31 August 2022, reconsider and review its decision to relocate the patients and increase Sunfield's subsidies, their instructions were to approach the court for appropriate relief, including punitive costs.

14. DSD invited Sunfield's board for a meeting on 1 September 2022. They stated they consulted with all relevant authorities to find a possible solution.

15. On 2 September 2022, through their attorneys, the applicants informed her that they were unavailable on 1 September but on 6 or 8 September. The MEC indicated her unavailability on 6 and 8 September 2022 and said she would revert with further dates.

16. On 8 September, HS Attorneys wrote to the MEC seeking an undertaking by close of business day on 9 September 2022 that the 36 patients would be kept from being relocated pending the dispute's final resolution concerning the subsidy increase. Further, DSD would continue to pay the R1 984 per patient

per month pending resolution of the matter. On 9 September 2022, DSD proposed a meeting with Sunfield's board for 20 September 2022.

17. On 12 September 2022, HS Attorneys informed DSD that they were amenable to that meeting. However, they held an instruction to prepare an urgent application following DSD's failure to provide a written undertaking as requested and that such an application would be served on DSD on 14 September 2023. They asked for an undertaking on the same basis by 9H00 on 14 September 2022.

18. On 15 September 2022, an urgent application was lodged for an order preventing DSD from removing the 36 patients from Sunfield and directing DSD to pay Sunfield an amount of R1 984 per patient per month, pending the institution and finalisation of the application.

19. The application was heard as urgent. *Rule nisi* was issued in favour of the applicants on 27 September 2022, among others, calling upon DSD to file a report on affidavit, followed by the South African Human Rights Commission (SAHRC), whose views the court decided should be considered. The court also believed that the applicants and the SAHRC had no authority to represent the patients in then and future litigation. It determined that only the *curator ad litem,* who was properly appointed, would have such powers and authority.

20. DSD did not oppose the application. The rule nisi was confirmed on 14 November 2022. To comply with the court order, in November 2022, DSD filed their report. The SAHRC filed its report in December 2022, whilst the curator filed his in May 2023.

Issues

21. The determination to be made is whether the applicants have made a case for the orders they sought and whether condoning the late filing of DSD's report is in the interest of justice.

Condonation

22. According to the 27 September 2022 confirmed on 10 October 2022 Rule *nisi*, DSD was ordered to, by no later than 30 calendar days of the order, compile and deliver a report to the applicants, SAHRC and the curator, investigate and report to this court on affidavit (including such submissions they intend to make) over the: (a)Physical, mental, social and economic circumstances of each one of the state residents; (b)The alternative residence that is contemplated for of each of the state residents and (c) What measures the first and second respondents intend to take to secure the continued overall well-being of the State residents.

23. DSD requested the court to condone the late filing of its report. Its report was due to be filed on 28 October 2022. However, it was filed twenty days later. In Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)[3], it was stated: *"This court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to* grant *condonation depends upon the facts and circumstances of each case. Factors that are relevant to this inquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the i*ssue *to be raised in the intended appeal and the prospects of success."*

24. DSD stated that they assessed Sunfield on 19 to 21 October 2022. The teams were divided into two from DSD and DOH. No details were provided as to the reasons for the late filing of its report. The applicants did not oppose the late filing. However, they viewed the report as inconsequential as it was filed after the confirmation of the rule *nisi.*

[3] 2008 (2) SA 472 (CC) at 447A-B

25. The issues dealt with in the DSD's report are of importance as they relate to the welfare of the vulnerable patients of Sunfield, both physically and intellectually disabled. DSD bears both statutory and constitutional duties to care for the patients. Their contribution to the welfare of the patients is of utmost importance and value. Condoning the late filing of their report will be in the interest of justice.

Legal principles

26. The High Court may grant a declaratory order without any consequential relief sought[4]*.* When considering the grant of declaratory relief, the court will not grant such an order where the issue raised before it is hypothetical, abstract and academic or where the legal position is clearly defined by statute.

27. The requirements in respect of the granting of a declaratory order are two-fold: "*A declaratory order is an order by which a dispute over the existence of a legal right is resolved, which right can be existing, prospective or contingent. [11] To obtain a declaratory order, the following requirements must be met- (a) The court must be satisfied that the applicant has an interest in an existing, future, or contingent right, and (b) Once the court is satisfied, it must be considered whether or not the order should be granted.*' See Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd[5].

28. Issuing the rule nisi, the court considered section 38 of the Constitution[6] and concluded that Sunfield and Afriforum, as well as SAHRC, had no power and authority to act on behalf of the patients. Subsequently, the curator was appointed. The curator compiled a report and made recommendations. The application is supported by Sunfield's affidavit deposed to by one of its directors, NZ Mthembu (herein referred to as 'Mthembu').

[4] Section 21(1)(c) of the Superior Courts Act, 10 of 2013
[5] 2005(6) SA 205 (SCA) paras 16-17.
[6] Constitution of the Republic of South Africa Act 108 of 1996.

29. Section 38 of the Constitution provides that:

> *'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and a Court may grant appropriate relief, including a declaration of rights. The persons who may approach a Court are:- a. Anyone acting in their own interest, b. Anyone acting on behalf of another person who cannot act in their own name, c. Anyone acting as a member of, or in the interests of, a group or class of persons; d. Anyone acting in the public interest, and e. Association acting in the interests of its members.'*

30. In determining whether the order should be granted, the object of a mandamus must be considered. The object of mandamus *"… is to compel an administrative organ to perform some or other statutory duty. The remedy is somewhat limited because the administration cannot be compelled to do anything it is not obliged to do under the enabling statute."*[7]

31. *A mandamus is an order that a court issues directing a party to either do something or refrain from doing something. It is a remedy against the effects of an unlawful action that has taken place. It may be granted where there is a clear duty to perform the act ordered. To grant a mandamus, the following requirements must be proved- (a) A clear right, (b) An injury actually committed or reasonably apprehended, and (c) The absence of similar protection by any other ordinary remedy. [10] A declaratory order is a flexible remedy which may be accompanied by other forms of relief, including a mandatory order. It is valuable in a constitutional democracy.*'[8]

32. It is not a requirement that a Constitutional right should have been actually violated. All that needs to be shown is that a right is under threat and that there is, therefore, a reasonable probability of an infringement of that right[9]. A right is said to have been

[7] Burns & Beukes: Administrative Law under the 1996 Constitution, 3rd Edition, Lexis Nexis, at P.525.
[8] 2005(2) SA 359 (CC) para 107- 108
[9] Geuking v President of the Republic of South Africa 2003(3) SA 34 (CC) at para [32] to [34].

infringed or threatened if the conduct is objectively inconsistent with a right contained in the Bill of Rights[10].

Discussion

Declaratory orders

33. The applicants seek an order declaring that the first and second respondents have failed to take reasonable measures to make provision for the needs of the thirty-six (36) state-subsidised residents residing with the second applicant, specifically by not taking into account inflationary increases during the past 15 years in budgeting for the subsidies payable to the second applicant. Also, for those with the same or similar circumstances as the state-subsidised residents housed with the second applicant in the Mpumalanga Province.

34. Also, the baseline for the calculation of the 2024/2025 subsidy to be paid by the first and second respondents to the 36 state-subsidised residents housed with the second applicant and all other persons with the same or similar circumstances to the state-subsidised residents housed with the second applicant in the Mpumalanga Province be calculated by increasing the current subsidy by the consumer price index (CPI) published by Statistics South Africa, with specific percentage increases outlined for each year from 2008 to 2023.

35. At the centre of this application is the best interest of the patients residing at Sunfield and those housed in facilities same or similar to Sunfield across the Mpumalanga province. The 36 patients at Sunfield have an interest in their rights in terms of the Welfare Act and the Constitution, and such rights must be respected and protected.

36. The applicants relied on the DSD's annual reports for financial years 2020/2021 and 2021/2022, arguing that DSD can provide an adequate subsidy for Sunfield and other facilities of the same or similar circumstances to that of Sunfield. They

[10] Ferreira v Levin NO and Others, Vryenhoek and Others v Powell no and others 1996(1) SA 984 (CC).

submitted that for the 2020/2021 financial year, DSD budgeted for R625 708 000 for transfers and subsidies, with an expenditure of R580 163 000, whilst underspending an amount of R45 500 000. Regarding the financial year 2021/2022, it was averred that the DSD annual report reflected a surplus of R58 500 000.

37. In their report, DSD stated that they had been unable to meet Sunfield's demands to increase the funding since the programme for persons with disabilities has not increased the subsidy for the past 15 years. The decision not to increase the subsidy is based on the budget allocated by the Treasury, notwithstanding that DSD continued to present the Treasury with shortfalls and budget pressures to secure additional funding.

38. Compelling facts need to be placed before the court, establishing that DSD failed to provide the increase in their budgeting preparations in the past 15 years. Also, grounds upon which to direct DSD to make a provision in their 2024/ 2025 financial year budgets to cater for the past 15 years (from 2008 to 2023).

39. In the case of Rail Commuters[11], the Constitutional court stated: '*A final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state, will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-makers' authority to determine what*

[11] para 32 supra

are reasonable and appropriate measures in the overall context of their activities."

40. When granting the rule *nisi*, the court was specific in its order as to what the DSD report needed to cover. It would not be proper to expect DSD's report to have covered the details of their resource constraints that caused them not to cater for the increase in the subsidy budget in the years between 2008 and 2023. Absent the cogent facts showing the DSD's failure to budget sufficiently for subsidies by accounting for inflation over the past 15 years, the court is not justified in granting such a declaratory order.

41. DSD's report indicated that the decision not to increase the subsidy was due to the budget allocated by the Treasury, even though they continued to present the Treasury with shortfalls and budget pressures to secure additional funding. DSD did not provide any proof in the form of documentation or correspondence between them and the Treasury. However, I could not find any grounds not to accept their explanation.

42. On reading the note relating to the 2020/21 financial year under expenditure, as referred to by the applicants, the annual report stated, '*Underspending recorded under transfers and subsidies item relate to Presidential Employment Initiative funding which was additional funds received during adjustment appropriation in November 2020. The funds could not be spent wholly owing to the longer than anticipated logistical process of advertisement to call for interested ECD centres to apply for this funding and the verification process required to ascertain eligibility for funding all applications are received.' (sic).*

43. Regarding the 2021/2022 financial year annual report, it is noted: *"Underspending on this item is in relation to Presidential Employment Initiative of ECD employee stimulus package. This is attributed to significant errors and complexities in the applications received from NPOs that have resulted in consequential delays of payment of claims."*

44. Further, under social welfare services, an entry is made: *"Under expenditure in this programme is recorded largely from additional funds which were appropriated during adjustment appropriation in November 2021 in relation to Presidential Employment Initiative stimulus package for early childhood development centres employees. This is attributed to significant errors and complexities in the applications received from NPOs that have resulted in consequential delays of payment of claims."*

45. Given the preceding, the underspent of R45 545 000 by DSD for the financial year 2020/2021 and the surplus of R58 500 000 for the 2021/2022 financial year are accounted for in the notes of the annual reports, respectively. In my view, the subsidy is budgeted for together with the increase; however, the provision for an increment thereof is not received from the Treasury.

46. The fact that DSD underspent for the financial years 2020/2021 and 2021/2022 does not mean that they did not make provision for the increase in the subsidy for the years from 2008. It also cannot be the grounds for granting an order for DSD's calculation of the financial year 2024/2025 subsidy to be paid by DSD to Sunfield and other homes or facilities with the same or similar circumstances to be calculated by increasing the current subsidy by the CPI index published by Statistics South Africa, with specific percentage increases outlined for each year from 2008 to 2023. Consequently, the declaratory order application stands to fail.

47. It is common cause that the subsidy has remained the same since 2008. What the facts need to establish is that DSD failed to specifically account for inflationary increases when budgeting for the subsidies over the past 15 years. The applicants should have presented persuasive facts to support their averments that the non-increase in the subsidy was due to the failure of DSD. These averments, therefore, remain a bare statement with no proof.

48. I could not find that DSD has not previously made recommendations for the increase. In their report, DSD stated that they had previously requested the same from the Treasury with no success. I, therefore, found no convincing facts

that DSD has neglected or failed in its budgeting for the subsidy for Sunfield and other homes or facilities with the same or similar circumstances to request the increase as indicated.

49. Further, there is no justification to grant a declaratory order that the baseline for the calculation of the financial year 2024/2025 subsidy to be paid by DSD to the patients housed with Sunfield and all other persons with the same or similar circumstances to those of Sunfield in the Mpumalanga Province be calculated by increasing the current subsidy by the CPI published by Statistics South Africa, with specific percentage increases outlined for each year from 2008 to 2023.

Other Relief

50. The applicants, through their counsel, submitted that DSD needed to be ordered to take reasonable measures (including interim steps) by budgeting sufficiently, taking into account inflation in terms of the CPI for subsidies of the patients and all other patients with the same or similar circumstances to those of Sunfield in the Mpumalanga Province for the 2024/2025 financial year and subsequent financial years.

51. Sunfield averred that its monthly operating expense per patient is R7 637.23. It is common cause that DSD provides a subsidy of R1 984 per month. Each patient receives a monthly social grant of R1 990, which is paid directly to Sunfield. The subsidy is not sufficient. DSD pays R3 974 per month for each patient's care, with a shortfall of about R3 663.23 to meet a monthly patient’s expense at Sunfield.

52. The SLA between DSD and Sunfield expired on 31 March 2022. Sunfield continued to house and care for the patients. DSD continued to pay the subsidy. On 15 June 2022, in terms of clause 5 of the SLA, DSD issued a notice where they would appropriate and make payment of R2 169.19 instead of R1 990 per patient per month. DSD considered and effected an increase in the subsidy, though the increased amount was never paid.

53. On 26 July 2022, DSD and Sunfield's negotiations about the increased subsidy amount failed. Subsequently, in August 2022, DSD assessed Sunfield to relocate the patients. The culmination of these events contributed to the lodging of this application.

54. Outside the SLA, before the court issued the rule *nisi*, the parties continued as if the SLA still existed. I do not find Sunfield unreasonable in requesting an increase in the subsidy. In terms of all the reports, there is an apparent shortfall.

55. In their affidavit, the applicants' reasons for the increase that necessitated the court to intervene are that there was a shortfall after balancing the money received for the residents with the operating expenses. Sunfield did not elaborate on any specific reasons and justification for the need for increased funding. SAHRC noted that though Sunfield did not give a breakdown of their expenses, it was clear there was a shortfall.

56. The curator also recommended that DSD should approach the Treasury to reconsider the current subsidies paid to non-profit organisations with a request to increase such. Some of the Sunfield board members have their children residing in Sunfield. They informed him that the subsidy paid in other provinces is much higher than that paid in Mpumalanga. Not much detail was provided in this regard.

57. The report further stated that DSD concluded an SLA with Baneng for the intake of 30 patients, lapsing in August 2024 at R500 per patient per day. Baneng is a for-profit organisation. It is fully equipped to cater for mentally ill and cerebral palsy patients. It has 545 beds. It consists of an in-house pharmacy, kitchen and laundry. It is located close to hospitals in the event of emergencies. It was hygienic and well-managed. Men and women are separated. Patients who require 24-hour care have their separate sections. Baneng would need four to eight weeks to make the necessary preparations to cater for the individual patients' needs.

58. Rail Commuters[12], stated that '*the relevant human and financial resource constraints will require careful consideration when raised. The organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints.'*

59. The two DSD annual reports referred to by the applicants revealed that in the 2020/2021 and 2021/2022 financial years, DSD underspent in millions of rands. DSD did not resist the application for the increased subsidy. What they raised as the hindrance to the non-increase is that the Treasury allocation of the budget has never provided sufficient funding.

60. Considering the under-expenditure in the 2020/2021 financial year and surplus in the 2021/2022 financial year, it can be concluded that DSD can make an adequate provision for the increase in the subsidy for the patients in Sunfield and for the same or similar facilities to Sunfield in the Mpumalanga province from the financial year 2024/2025 and onwards.

61. I find that DSD has available resources to provide adequate subsidies to organisations which take care of persons with physical and intellectual disabilities, enabling them to have sufficient facilities and care thereof, hire adequate staff and provide them with proper remuneration, and provide adequate transport. Cogent facts, through the annual reports were placed before the court, showing that the increase in the subsidy would be justified, possible and sustainable when regard is had to the two annual reports of previous financial years.

62. The curator recommended that it would be in the best interest of the patients that they remain at Sunfield until a proper classification of the patients has been concluded, and the funding issue has been adequately addressed. Sunfield and its Board applied to DOH to be registered as a facility that may accommodate mental health users.

[12] Para 40 *supra*

63. In February 2023, the curator visited Sunfield, where they interviewed Sunfield's directors, personnel and the relevant state residents. Among others, at Sunfield, the curator was presented with admission files, Cardex cards comprising of reports by care workers, communication books, medical files, incident forms, disciplinary register and evaluation files.

64. The curator stated that not all patients were assisted by caregivers. They were encouraged to be visited by family. Of the 36 patients, only 15 have families that can visit and contact. The other 15 have family members who seldom make contact, and six do not have any family. They confirmed being in the process of registering with the DOH, though they are still waiting for the required occupational and rezoning certificate from the Municipality to do so.

65. Since the placement of the 36 patients, neither DSD nor DOH objected to their placement. Sunfield denied that 95% of the 36 patients had a mental health condition. Sunfield and DSD have no Standard Operating Procedures for transferring a private patient to a state patient.

66. Sunfield hosts various fundraisers and receives support from the community, which donates food and other goods. They confirmed that on one occasion, they took the patients to DSD's office *'(after explaining to the patients that they were going on a joyride since Eskom bills had to be paid and DSD did not effect payment)'* to put pressure on DSD to effect payment. The report revealed that taking the patients to DSD's office was merely a desperate attempt to have DSD consider an increased subsidy and not transfer the patients to another facility.

67. SAHRC also investigated and concluded that there was a lack of oversight by DSD. It is the same with DOH regarding monitoring or inspection and auditing to ensure compliance with the norms and standards required by DOH. Sunfield was not qualified and capacitated as it was not licensed to accommodate people with mental and intellectual disabilities, which may pose a serious risk to those with mental disability as opposed to their relocation.

68. SAHRC disagreed with Sunfield that retaining the patients with Sunfield is the better option. It relied on the fact that DSD informed that they had a transitional plan with timelines to ensure ease of relocation of the patients, though with few details. The safety of patients needed to be prioritised. The relocation should be timely. There must be piloting and due diligence conducted by the relevant stakeholders, including experts in the medical sector, in planning and implementing the relocation.

69. DSD's report indicated that Sunfield had been a home for most patients, and relocation might frustrate their physical and mental well-being. However, they were concerned each time there were disagreements with Sunfield regarding delays in subsidy payments, Sunfield would threaten them or, at times, present the patients to the local DSD offices.

70. To avoid the recurrence of removal and bringing the patients to DSD's offices in case of disagreements on the subsidy increase. DSD found an alternative placement option at Baneng. Further, they have a transitional plan that would encourage the involvement of the patients' families to manage the transition properly and ensure that the families can cope and provide the necessary support to the patients.

71. In compliance with section 7(2) of the Constitution, the state must respect, protect, promote and fulfil the rights enshrined in the Bill of Rights. In terms of section 27(2) of the Constitution, '*the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right of the people of South Africa to have access to health care services, including reproductive health care'.* In terms of section 24(a) of the Constitution, '*everyone has the right to an environment that is not harmful to their health or well-being.'*

72. In terms of the Mental Health Care Act[13], '*Anyone who wishes to operate a residential and or a daycare facility which provides care treatment and*

[13] Act 17 of 2002 Guidelines

rehabilitation for five or more persons with mental illness and or severe or profound intellectual disabilities should be designated and licensed by the relevant head of the Department of Health in terms of the Mental healthcare act. Further, before a license is granted, an inspection team of the Department of Health must conduct a physical inspection of the relevant facility and record the outcome regarding the norms and standards for licensing of residential and daycare facilities.

Once a license is issued, an inspection or monitoring team must conduct quarterly inspections to monitor facility compliance with all the relevant prescripts. The Provincial DOH must also conduct monthly audits in the facility and record the outcome in the assessment and compliance report for residential and daycare facilities, as well as make recommendations that would be considered when the license renewal is being considered.'

73. The reports of SAHRC and the curator both raised a concern, though according to the curator, DSD and DOH were aware and did nothing of the fact that Sunfield housed patients with intellectual disabilities with no licence. SAHRC concluded that Sunfield was not qualified and capacitated as it is not licensed, skilled and competent to accommodate people with mental and intellectual disabilities, which may pose a serious risk to those with mental disability as opposed to their relocation.

74. Where DSD or DOH delegate their duties to a welfare home, organisation or facility to care for the patients, they are not relieved of their obligations. Their statutory and constitutional obligations to care for patients continue. To give effect to the right to receive appropriate social assistance, the subsidy must be appropriate for DSD to have fulfilled its obligations. At the facilities where they are cared for, the patients should enjoy a complete and decent life in a conducive environment that ensures their dignity, promotes self-reliance, and facilitates active participation in the community. Such should be done within the DSD and DOH available resources.

75. Of paramount importance and centre of this application is the dignity of the most vulnerable people, the patients. Both DSD and Sunfield failed to resolve the issue of the subsidy increase. Sunfield went as far as taking the patients to DSD's offices '*after explaining that they were going on a joyride, as Eskom bills needed to be paid, and DSD did not effect payment.'* They were used as a negotiation tool to put pressure upon DSD to increase the subsidy.

76. I found Sunfield's conduct to be a serious violation of the patients' rights to dignity. The patients with their different disabilities, physical and intellectual, were taken to an office where the officials and other people (the public) could not have been aware of the patients' sickness or condition. The public's reaction to seeing the patients from Sunfield to the DSD's office and back is safer left to the imagination.

77. Conversely, some patients might be unaware of their surroundings. It is disappointing that the patients were exposed to such treatment by Sunfield, the facility acting instead of DSD or delegated by DSD to care for these patients. A human being cannot be used as a tool to put pressure or for negotiation. It does not matter under what circumstances they find themselves, be it sickness, a condition, or a lack of basic needs.

78. Noting Sunfield's conduct, DSD ought to have realised then that the patients' welfare at Sunfield was no longer secured and protected, necessitating prompt removal and placement of the patients in the facility where they would be treated with respect and dignity. DSD and DOH are responsible for avoiding a situation or state of affairs that endangers life or health or that adversely affects the well-being of the patients.

79. Section 27 provides that everyone can access health care, food, water, social security, and social assistance if they cannot support themselves and their dependents. The state must take reasonable legislative and other measures within its available resources to ensure the progressive realisation of these rights. These rights apply to all persons, including those with disabilities and DSD and DOH are responsible.

80. Whilst guarded and appreciating that the grant of a structural interdict might amount to an interference with the authority and discretion of the executive arm of the government. In the circumstances, persuasive facts and details warrant granting the declaratory order for the safety and welfare of the patients. Such relates to DSD and DOH re-screening all patients in Sunfield and other similar facilities in the Mpumalanga province to ensure their proper classification and that they are accommodated in the correct facility.

81. The court is justified to direct DSD and DOH or any other office of interest to parade respect and protection of the patients' rights in Sunfield and other facilities of the same or similar circumstances to Sunfield in the Mpumalanga province. Such exhibition is purposed to ensure that the state-subsidised residents in these facilities are not marginalised, ignored and stigmatised.

82. The question of inequality cannot arise from what is said or heard but from cogent facts with details placed before the court for the court to decide. DSD did not deny that the other facilities are not receiving adequate subsidies. In responding to Sunfield's demand, they said that if they increase Sunfield's subsidy towards the patients, they would have to do the same for the other facilities.

83. It is necessary for the court to interfere with DSD and DOH's authority and discretion for them to be directed to remove and place the patients in the correct facility as soon as possible. Whilst such arrangements are made, it will be proper for Sunfield to continue to care for the patients and DSD to continue to pay Sunfield until the said patients are removed and relocated. Alternatively, until a new SLA has been agreed upon between DSD and Sunfield.

84. The grant of such relief might amount to an interference with the authority and discretion of the executive arm of the government. The court wishes to refrain from stipulating to DSD and DOH how the departments discharge their duties and obligations to the patients in the province and the details of what steps to be taken concerning their budgeting process and the increase, as well as other

related matters thereof. However, this is an appropriate matter for granting a structural interdict. Such relief has been granted on numerous occasions and is suitable.

85. DSD owes a Constitutional and statutory duty to care for the patients of Mpumalanga province. So is DOH for persons with intellectual disability. They have a responsibility to take reasonable steps to settle any disputes with its service providers like Sunfield, mainly where such deadlock affects the care of one of society's most vulnerable groups.

86. The applicants further sought an order directing DSD to deliver to the applicants and file a report, under oath, as to their implementation of sufficient budgeting. Such a report may deal with any relevant matter the respondents wish to raise or report. In addition, it will set out the details of what steps they have taken and are still to take to sufficiently budget, as well as when they will take each further step to sufficiently budget. The applicants are to deliver their commentary under oath on the said report

87. Based on the DSD annual reports relating to the underspent and the surplus in the previous financial years, I have already found that DSD has available resources to adequately subsidise facilities like Sunfield and others same or with similar circumstances as Sunfield in the Mpumalanga province. There are no grounds for the court to grant an order directing DSD to present its budget and other related steps relating to proper funding of facilities like Sunfield in the Mpumalanga province. Sunfield stated how much they needed to cope with the patients' expenses. DSD did not in any way resist.

Costs

88. The applicants, through their counsel, argued that they be awarded the costs of suit. I find no justification for that argument. It is not sustainable with the facts and circumstances before me. It is common cause, DSD and the rest of the respondents did not oppose the application.

Conclusion

89. Having considered the facts before me and the circumstances of the case, I conclude that the steps shown to have been taken by DSD as a department and Sunfield in resolving the financial support towards the patients are unfeasible and characterised by delays and restrictions. The patients are entitled to the relief as such an order is justified in the circumstances of this case. It is in the interest of the patients that their rights be respected and protected by granting the following order.

90. I, accordingly, make the following order:

Order

1. The late filing of the Department of Social Development report is condoned.

2. The state-subsidised residents (the patients) will remain at Sunfield until a proper classification has been concluded and the funding issue has been appropriately addressed.

3. Department of Social Development will continue to make payments of R1 984 per month per state-subsidised resident to Sunfield until a new Service Level Agreement (SLA) is agreed upon.

4. In the event that the Department of Social Development and Sunfield do not agree regarding the subsidy amount or increase thereof or any matter, the Department of Social Development has to remove and house the patients in an appropriate facility within six weeks of such a disagreement.

5. Department of Social Development will, with effect from 1 April 2024, make payment to Sunfield towards the subsidy in the amount of R7 637.23 per month per state-subsidised resident. An annual increase in the subsidy shall be budgeted for by considering the CPI or agreed percentage.

6. Department of Social Development will, with effect from 1 April 2024, make payment to facilities of the same or similar circumstances to that of Sunfield

in the Mpumalanga province towards the state-subsidised residents' subsidy in the amount of R7 637.23 or an agreed amount per month per state-subsidised resident. An annual increase in the subsidy shall be budgeted for by considering the CPI or agreed percentage.

7. Department of Social Development and Department of Health will re-screen all patients in Sunfield by no later than 16 February 2024 to ensure their proper classification, allocation and accommodation to an appropriate facility in terms of the Mental Health Act Guidelines.

8. Department of Social Development and Department of Health will accommodate the state-subsidised resident in the appropriate facility by 1 April 2024, following the classification in paragraph 7 above.

9. Department of Social Development and Department of Health will re-screen all state-subsidised residents in other facilities with the same or similar circumstances as Sunfield in the Mpumalanga province by 4 May 2024 to ensure their proper classification, allocation and accommodation to an appropriate facility in terms of the Mental Health Act Guidelines.

10. Department of Social Development and Department of Health will accommodate the patients in the appropriate facility by 1 July 2024, following the classification in paragraph 9 above.

11. The curator *ad litem* is to bring this order to the attention of the MEC and HOD for the Department of Social Development, the MEC and HOD for the Department of Health, the State Attorney, and the South African Human Rights Commission, and/or any other person of interest, by no later than seven (7) calendar days of the order.

12. No order as to costs.

_____ [redacted] ___

N. MAZIBUKO

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email.

Representation

For the applicant:	Mr JHA SAUNDERS
Instructed by:	Hurter Spies Inc
For the first and second respondent:	No appearance from the State Attorney's office
Curator *ad litem*:	Nicolaas Johannes Du Plessis
Hearing date:	27 October 2023
Delivery date:	24 January 2024