

Saturday, July 4, 2020

TO WHOM IT MAY CONCERN

RE : LEVEL 3 LOCKDOWN REGULATIONS AND PARTIAL CARE FACILITIES THAT CONDUCT EARLY CHILDHOOD DEVELOPMENT PROGRAMMES

1. This letter serves to provide guidance to owners of partial care facilities who conduct early childhood development programmes (as provided for in the Children's Act, 2005) (hereinafter referred to as "ECD Centres"). ECD Centres are regulated by the Children's Act and fall under the control of the Minister of Social Development.
2. South Africa is a constitutional democracy in which the rule of law is sacrosanct. When there is an imbalance of power, such is the case in the interaction between government and citizens, the law requires the government to act rationally, with due regard to the rights of its citizens as enshrined in the Constitution, and strictly in accordance with the law.
3. The so-called "lockdown" regulations in terms of the Disaster Management Act, 2002, have been amended a number of times, and now regulate the "Alert Level 3" lockdown. Regulation 46(1) provides that, subject to certain conditions, "Businesses and other institutions may operate except those set out in Table 2."
4. Table 2 of the Regulations makes no mention of partial care facilities or early childhood development programmes. It does, however, provide for an exclusion "... relating to education services as set out in the directions issued by the Cabinet members responsible for education." There are only two Ministers who are responsible for education in South Africa, namely the Minister of Basic Education and the Minister of Higher Education and Training.
5. Even if the above interpretation is incorrect, and the "Cabinet members responsible for education" indeed includes the Minister of Social Development, the Minister has to date not issued a single direction that has shut down ECD Centres. Our administrative law requires such directions to be published in the Government Gazette, which is the practice that has been followed by all ministers who have been publishing directions in terms of the Regulations.
6. The Minister of Social Development has published a number of letters and made public announcements indicating that ECD Centres may not re-open, but none of the letters or announcements have qualified as directions in terms of our law.
7. The above issue is currently the subject-matter of proceedings in the High Court in Pretoria, and judgment is expected on Monday, 6th July 2020.
8. Despite the fact that the Minister has been made aware of the legal invalidity of her position, she has been steadfastly insisting that ECD Centres may not re-open. The fact that the industry has been adhering to this position out of fear of criminal prosecution does not make the Minister's communications valid or enforceable.

9. Many ECD Centres have indicated to us that they are going to open their doors on the 6th July 2020 despite the risk of potential interference by the police and the Department of Social Development. If you are one of them, these are your rights:
- a. No representative of the Department of Social Development is allowed to enter your premises without a prior appointment, without providing reasons for the visit, and without having a lawful purpose.
 - i. It will be lawful if such person wishes to inspect the facility to ensure compliance with Regulation 47, which requires facilities that have opened to comply with COVID-19 protocols.
 - ii. It will be unlawful for such a person to enter the premises if that person intends to take any steps to shut down the facility purely by virtue of the supposed contravention of the Regulations.
 - b. No member of the SA Police is allowed to arrest someone, unless he/she:
 - i. produces a warrant for that person's arrest
 - ii. witnesses the person committing an offence; or
 - iii. has probable cause to believe that the person was involved in the commission of a crime.

Regulation 48(1) provides that "any person who convenes a prohibited gathering" will be committing an offence. The definition of "gathering" excludes a "workplace". It is hard to see how an ECD Centre cannot be a "workplace" for all the staff employed there, and it follows that ECD Centres are excluded from the definition of "gathering".

Furthermore, regulation 37, which specifically deals with gatherings, excludes "a gathering at a workplace for work purposes" (regulation 37(1)(c)). The operating of ECD Centres will clearly fall within that exclusion.

Regulation 48(2) introduces further criminality for someone who contravenes specific provisions of the Regulations. Regulation 46 is not included in the list, which means that, even if we are incorrect in our interpretation of Regulation 46(1) (which we do not believe to be the case), any contravention thereof is not criminalised in terms of the Regulations.

In conclusion, no police officer will be witnessing a person committing an offence or could have probable cause to believe that a person is involved in the commission of a crime if he or she witnesses an ECD Centre that has opened its doors on the 6th July 2020. In other words, such police officer may not arrest anyone purely because such person has opened an ECD Centre on that date and will be acting unlawfully if he or she does so.

We recommend that you keep a copy of this letter handy so that you may present it to any police officer who attempts to arrest you for opening an ECD Centre and to request him or her to contact the writer hereof on 083 600 9809. If such officer still insists on arresting someone, or refuses to consider the letter or contact us, such officer will be acting unlawfully, and we will take steps to report such officer with a view to his or her prosecution.

- c. No person, whether a representative of the Department of Social Development or a police officer, is allowed to enter your premises unless they do so for a lawful purpose and unless have complied with your COVID-19 protocols. This means that they must undergo a health screening and, if there is any doubt as to whether such a person may be ill, you are entitled to refuse him or her access to your premises.
10. In conclusion, there is in our opinion no legal impediment to the opening of ECD Centres on the 6th July 2020. In addition, for the reasons set out above, ECD owners who open their facilities on

that date will not be committing a crime, and any attempts to arrest them or to shut down their facilities will amount to unlawful arrest and/or harassment.

Yours sincerely

VAN WYK AND ASSOCIATES

Per:


ANTONIE VAN WYK