THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 379/2019

In the matter between:

THE MINISTER OF THE WESTERN CAPE DEPARTMENT OF SOCIAL DEVELOPMENT **APPLICANT**

and

BASIL ESAU obo JANECA ESAU **FIRST RESPONDENT**

OVERBERG DISTRICT MUNICIPALITY **SECOND RESPONDENT**

Neutral citation: *Minister: Western Cape Department of Social Development v Esau and Another* (Case no 379/2019) [2020] ZASCA 103 (16 September 2020)

Coram: PONNAN, WALLIS, MAKGOKA, DLODLO and NICHOLLS JJA

Heard: 28 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 16 September 2020.

Summary: Nursery school – place of care in terms of Child Care Act 74 of 1983 – child injured when playing on swing in playground – defective design and construction of swing rendering it dangerous – whether Minister owed a legal duty to children in places of care to take reasonable steps to ensure safety of equipment – whether Minister liable for damages suffered by injured child.

ORDER

On appeal from: Western Cape High Court (Sievers AJ, sitting as court of first instance)

1 The application for leave to appeal is granted.

2 The appeal is upheld and the order of the high court altered to read;

'1 The plaintiff's claim is dismissed with no order as to costs.

2 The defendant's claims against the third party are dismissed with each party to bear their own costs.'

3 Each party is to bear their own costs of the appeal.

JUDGMENT

Wallis JA (Ponnan, Makgoka, Dlodlo and Nicholls concurring)

[1] In 2008 the Babbel & Krabbel Kleuterskool (the School) in Bredasdorp had around 190 children in its care.[1] Its playground was equipped with conventional playground equipment – a climbing frame, slides, a see-saw, a roundabout and swings. On 12 August 2008, Janeca Esau, then five and a half years old, was playing on the swing when the heavy cross-beam collapsed on top of her causing severe head and brain injuries and leaving her severely disabled. That family tragedy gives rise to the present proceedings in which Janeca's father, the first respondent,

[1] The School was a community organization operated by Child Welfare SA: Bredasdorp a registered NGO in terms of the Nonprofit Organisations Act 71 of 1997.

seeks to recover damages from the applicant, the Minister of the Department of Social Development in the Western Cape (the Minister).[2]

[2] The Minister joined the second respondent, the Overberg District Municipality (Overberg), as a third party and it in turn joined the School as a third party. Contributions were sought from them in the case of Overberg on the basis of contributory negligence in the event of the Minister being held liable to Mr Esau and, in the case of the School, if Overberg was held liable. Mr Esau had sued the School in a separate action that was consolidated with this case, but it played no active role in the litigation.

[3] The issue of liability was separated from the remaining issues and tried before Sievers AJ in the Western Cape Division of the High Court, Cape Town. On 25 January 2019 he handed down a judgment holding the Minister liable to pay the damages claimed by Mr Esau and dismissing the Minister's claims against Overberg. Thereafter he refused leave to appeal. However, this court granted an order on 29 July 2019 that the application for leave to appeal and condonation be referred for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013. That is the application before us, in which the Minister is the applicant, Mr Esau the first respondent and Overberg effectively the second respondent. The parties were directed, if called upon to do so, to address the merits of the appeal.

[2] In the Western Cape members of the provincial cabinet are described as Ministers in terms of s 42(1) of the Constitution of the Western Cape, 1997. In other provinces while they are sometimes described as Ministers the executive council of a province is made up of the Premier and the members appointed by the Premier. See s 132 of the Constitution. The correct full title in those provinces is Member of the Executive Council, usually abbreviated to the acronym MEC.

[4] The issue of leave to appeal can be disposed of forthwith. The case involves a consideration of the legal duties imposed upon the Minister and the Director-General (the DG) of the Department of Social Development (the Department) in their capacity as the regulators having oversight of all places of care and like institutions in the Western Cape. It does not arise from knowledge on the part of departmental officials of a specific issue relating to this school, where such knowledge might have operated to impose a legal duty to prevent or avoid harm that would not otherwise have arisen. As such, given the fact that the national legislation relied on in both the high court and this court applies in all nine provinces, the question whether it gives rise to legal duties to prevent or avoid harm to children in places of care and like institutions is one of general importance. Lastly, the judge distinguished the judgment of this court in *Barley*,[3] which raised similar issues under the same legislative provisions and where it was held that no legal duty had been imposed on the Minister or the Department in the circumstances of that case. Leave to appeal must be given.

The facts

[5] At the heart of the allegations of negligence against the Minister lay the fact that the swing that collapsed on Janeca was defectively designed and unsafe. Its design was simple. There were two sturdy upright poles lightly cemented into the ground and attached by a cross-beam to a similar upright pole fastened to the side of a wooden climbing frame, so that the swing stood at right angles to the climbing frame. A round cross-beam, similar in size and shape to the uprights, rested on top of the uprights. It was fastened to them by a hoop-shaped metal strap

[3] *Western Cape: Department of Social Development v Barley and Others* [2018] ZASCA 166; 2019 (3) SA 235 (SCA) *(Barley)*.

attached to each upright by nails and perhaps an occasional screw, passing over the top of the beam and attached again to the other side of the upright. Three swings made out of old car tyres were attached directly to the cross-beam by nylon ropes.

[6] The evidence of Mr Jeffrey Hillman, an expert mechanical engineer, identified three respects in which the design of the structure was defective. First, placing a round cross-beam on top of the flat tops of the upright poles meant that the cross-beam could move back and forth on the uprights in a rotary motion. To prevent this steps should have been cut at each end of the cross-beam at the points where it met the uprights so that the connecting surfaces between the two were both flat. The cross-beam would then not have rotated on the uprights.[4] Second, the appropriate method of fastening the cross-beam to the uprights would have been by way of a bolt or screw fastening driven through the top of the cross-beam into the centre of the uprights. This would have tied the cross-beam securely to the uprights. By contrast, the fixings (metal straps) used for that purpose flexed back and forth with any rotary motion of the cross-beam, ultimately weakening the straps until they broke. Third, the ropes holding the swings should not have been attached directly to the cross-beam, but rather to metal eyes set into the base of the cross-beam, or metal sleeves passing over the cross-beam and able to rotate when the swing was in use, without imposing rotational forces on the cross-beam itself. Instead, by attaching the ropes directly to the cross-beam, the to-and-fro motion of the swings transmitted a force directly to the cross-beam, causing it to move back and forth across the top of the uprights.

[4] Other designs that would not pose the same dangers are feasible. For example, two uprights on either side meeting at an angle forming a V-shaped notch in which the cross-beam could rest securely.

The fact that there were three swings attached to the cross-beam aggravated the situation.

[7] Mr Hillman did not say that these defects in the design would have been obvious to a layperson. His criticism was directed at the fact that the stability of the swing was dependent on the fixings rather than on the structure itself. Apparently a well-designed structure does not rely on the fixings in order to maintain its integrity. The fixings are there as a back-up to prevent the structure breaking apart if it comes under unexpected stress. Recognising that a design is poor requires what he described as 'a higher-level training and understanding' than would be possessed by a lay person. Some knowledge of and experience in structures and mechanics would be necessary. A layperson would be able to recognise that there were problems once it could be seen that the beam was actually moving and the fixings were coming loose. This would have occurred over years of use, when metal fatigue appeared in the fixings as a result of the rotational forces applied to the metal strips. While lines in the strips might have been visible from ground level, it would have required a closer inspection, using a ladder or chair, to recognise that the metal had become fatigued and was at risk of breaking. The photographs show that the cross-beam was higher than the security fencing surrounding the property and it would therefore have been above the height of anyone who was not exceptionally tall.[5]

[8] Mr Hillman's evidence that the swing's design was defective was unchallenged. It was also not challenged that as a result the ordinary use of the swing by the children in the School would cause the fixings to undergo stress and eventually suffer metal fatigue, with the result that, if

[5] One cannot be precise but it appears that it was about two metres or more above ground level.

the problem was not addressed, they would break. One infers from this evidence that it was probable that the swing would be in use when the fixings broke and the cross-beam became detached from the uprights. When that happened a large – several metres long – and heavy beam of wood would collapse and any child underneath the falling beam would inevitably be injured, quite probably fairly seriously. This was likely to occur if the swing's design was not remedied in the way Mr Hillman described or, at the least, the fixings were regularly replaced to guard against them breaking as a result of metal fatigue.

[9] The essential question against this background was whether the Minister, and through him the officials of the Department, owed a duty to Janeca to protect her against the situation that arose. That is the central issue in this case.

Wrongfulness and legal duty

[10] Liability for negligence in delict depends in the first instance on the existence of a legal duty owed by the party sought to be held liable to the injured party to take steps to avoid or prevent the harm-causing conduct that gives rise to the claim. Whether such a duty exists depends on whether the failure to take such steps was wrongful. In regard to the nature of wrongfulness I need do no more than quote the following passage from *Za v Smith*, which incorporates all the most recent jurisprudence on the topic from this court and the Constitutional Court:[6]

'The import of wrongfulness in the province of delict – and particularly with reference to delictual liability for omissions and pure economic loss – has been formulated, both by the Constitutional Court and in this court on numerous occasions recently… In the most recent of these expositions by the Constitutional Court in *Country Cloud*

[6] *Za v Smith and Another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA) paras 15 and 16.

Trading CC v MEC Department of Infrastructure Development,[7] Khampepe J explained the position as follows:

"Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether "the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue". Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable and overly burdensome to impose liability.

Previously, it was contentious what the wrongfulness enquiry entailed, but this is no longer the case. The growing coherence in this area of our law is due in large part to decisions of the Supreme Court of Appeal over the last decade. Endorsing these developments, this court in *Loureiro*[8] recently articulated that the wrongfulness enquiry focuses on –

"the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability."

The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: "that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages", notwithstanding his or her fault."

[7] *Country Cloud Trading CC v MEC Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1(CC) paras 20-21.
[8] *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC) para 53.

With reference to the criterion for wrongfulness referred to in *Loureiro*, as to whether it would be reasonable to impose liability on the defendant, the Constitutional Court sounded the following note of caution in *Le Roux v Dey*:[9]

"In the more recent past our courts have come to recognise, however, that in the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'" (Footnotes omitted.)

[11] A claim that a breach of, or non-compliance with, statutory provisions is wrongful and gives rise to delictual liability can rest on either one of two possible bases. The first is where, properly construed, the statutory provision imposes an obligation to pay damages for any loss caused by such breach or non-compliance. That involves a consideration of the object and purpose of the legislation in order to determine whether, properly interpreted, it imposes an obligation to pay damages if the statutory duty is breached, or provides a basis for inferring that an obligation to pay damages arises at common law.[10] The second is where the breach of, or non-compliance with, a statutory provision, when taken together with all other relevant factors, of which constitutional norms founded in the Bill of Rights will be fundamentally important, leads to

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[9] *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae*) [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122.

[10] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2005] ZASCA 120; 2006 (3) SA 151 (SCA); [2006] 1 All SA 478 (SCA) (*Steenkamp* SCA) para 20. See also *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 31C-D.

the conclusion, in accordance with common law principles, that it was wrongful so as to attract delictual liability.

[12] These two enquiries tend to overlap as the first involves a consideration of similar policy issues to the second. It is as well to bear in mind that, if the policy of the statute is not to create a statutory liability to pay compensation for breach of its provisions, those same policy factors will point against the existence of a common law duty of care.[11] When the statutory provisions in question involve conduct that constitutes administrative action in terms of s 33 of the Constitution, the breach or non-compliance relied upon is a breach of, or non-compliance with, a public duty and that ordinarily attracts a public law remedy rather than the private law remedy of damages.[12]

[13] The relationship between the two enquiries was dealt with in this court in *Olitzki*,[13] where Cameron JA said:

'Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. But where a common-law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is 'just and reasonable' that a civil claim for damages should be accorded. 'The conduct is wrongful, not because of the breach of the statutory duty *per se*, but because it is reasonable in the circumstances

[11] *Steenkamp* SCA para 20 citing *Stovin v Wise* [1996] AC 923 (HL) at 953A per Lord Hoffmann.
[12] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC) para 29.
[13] *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para 12.

to compensate the plaintiff for the infringement of his legal right.' The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.' (Footnotes omitted.)

[14] The legal duty that the Minister was alleged to owe to Janeca was formulated against the background of the statutory provisions governing the entitlement to operate a place of care, in which category the School fell.[14] There was some confusion in this regard between the provisions of the Child Care Act 74 of 1983 (the Act) and its successor the Children's Act 38 of 2005 (the Children's Act), but that was resolved in the course of the trial. The School had been registered under the Act, but its registration had expired and the renewal was not processed because it was accommodating more than the authorised 160 children and extensions were taking place, which would require a fresh review of the facilities. However, it continued to receive a subsidy from the Department and was for all practical purposes treated as if it were still registered. The events with which we are concerned all occurred before the Children's Act came into force on 1 April 2010. Accordingly, the relevant statute for the purpose of determining wrongfulness was the Act, although it was not suggested that the outcome would have been any different had the Children's Act applied.

[15] Apart from the Act, the statutory matrix against which the question of wrongfulness had to be considered included the Regulations published

[14] The same provisions applied to children's homes, places of safety, industrial schools and shelters.

in terms of the Act.[15] The Minister did not argue that the fact of non-registration at the time of the accident in any way lessened any legal duty that might have been owed to Janeca. An issue raised at the trial, that the Minister was obliged to close the School the moment its registration lapsed, was not persisted with on appeal. This was the correct approach because the statutory powers vested in the DG on which it was based did not empower the DG to close the School. Given that, apart from this tragic incident, it was operating normally and providing a vital service to the community, counsel rightly accepted that there was no prospect of a court granting an interdict to prevent its continued operation.

The pleadings

[16] The pleaded case was that the School could only be registered under the Act if the Minister, (in practical terms the officials in the Department under the DG), was satisfied that it complied with all prescribed requirements and that it would be so managed and conducted as to be suitable and safe for the reception, care and custody of children. This was admitted. It accorded with the provision in s 30(3)(*b*) of the Act governing the disposal of applications for registration of a place of care, which required the Minister to reject an application if not so satisfied. In argument it was pointed out that the section did not include the words 'and safe' that appear in the pleading. However, if the DG was not satisfied that the place of care would be managed and conducted in a safe manner for the children under its care, it is difficult to conceive how the DG could be satisfied that it was being suitably managed and conducted.

[15] See the Regulations published under GN R 2612 in *GG* 10546 of 12-12-1986, as amended by GN R416 of March 1998 and GN R119 of 3 February 1999. The Regulations became operative 1 February 1987.

[17] The allegation that the Minister provided the School with a financial grant was also not in dispute, but an allegation that the Minister was under a statutory obligation to review, by way of periodic quality assurance assessments, the registration of the School as a place of care, was denied. That allegation, taken together with the two that were not in dispute then formed the basis for the legal duty on which the case was based, expressed in the following terms:

'10 Accordingly, in the light of [the allegations described above], and in any event, the defendant at all material times had a legal duty:

10.1 To ensure that the school and its premises, as a place of care in terms of the provisions of the Act, provided a safe environment for children, specifically the minor.

10.2 That reasonable steps be taken to ensure the safety of children, specifically the minor, whilst on the school's premises.

10.3 To ensure the safety of children, specifically the minor, whilst on the school's premises.'

[18] The repeated references to 'specifically the minor' (meaning Janeca) added nothing to the legal duty. The fact that it was her, rather than another child, who was using the swing when it collapsed, was purely fortuitous. No suggestion of negligence was made relating to her specifically, as opposed to the general body of learners. The pleaded duties must therefore be understood as of general application in relation to all learners in all places of care under the jurisdiction of the Minister.

[19] The duty was alleged in terms so broad and general that it was not feasible to identify with precision its scope and what the Minister and officials of the Department were required to do to comply with it. A little more detail emerged when reading the particulars of negligence on the

part of unidentified employees of the Department. They were said to have been negligent in the following respects:

(a) failing to inspect the School's premises and specifically the swing structure at all, or, if they inspected them, failing to do so properly and adequately;

(b) failing to ascertain that the top beam of the swing structure was not properly fastened or secured to the support poles and failing to warn the School's employees of that fact;

(c) failing to ensure that the swing structure was properly or adequately maintained;

(d) allowing a dangerous, or potentially dangerous, structure to be erected and kept on the School's premises and used by the children;

(e) failing properly to safeguard the learners on the School's premises;

(f) failing to ensure that the School and its premises were suitable and safe for the reception, care and custody of children.

[20] The Minister disputed the existence of any legal duty in the terms set out above in para 17 and also disputed negligence in the respects alleged. Some confusion arose because the plea commenced with a denial of the existence of a legal duty on the footing that any duty in regard to the safety of the School premises and specifically the playground equipment rested on Overberg. It then continued with a general denial of the existence of the legal duty alleged by the first respondent. This resulted in an argument in the application papers and the heads of argument that the broad contention by the Minister of absence of a legal duty was not open on the pleadings. However, this was not pursued in oral argument and correctly so. Properly construed, the Minister's plea did not admit the existence of any legal duty to ensure the safety of children in places of care and the case was argued on the basis that this

court had held in *Barley* that there was no such duty. Any deficiency in, or confusion occasioned by, the terms of the plea was clearly resolved by the end of the trial.

The relevant statutory provisions

[21] The foundation for the alleged duties was said to lie in the terms of the Act and the Regulations promulgated under the Act. Two provisions were central to the argument. The first was the need for the Minister to be satisfied in terms of s 30(3)(*b*) that a proposed place of care complied with all prescribed requirements for registration and that it would be so managed and conducted that it would be suitable for the reception, custody and care of children. The second, where the argument by counsel for the first respondent focussed, was regulation 30(4) of the Regulations published in terms of the Act. This dealt with the requirements for applications for registration of places of care at that time. In view of their centrality to the argument two of its provisions should be highlighted. After providing that the application for registration must be made on a form determined by the DG, it reads:

'(2) The application shall be accompanied by—

(*a*) the constitution of the association of persons that is to manage the … place of care …;

(*b*) a certificate issued by the local authority within whose area the … place of care … is situated or is to be erected to the effect that the plans for the said building or buildings, if still to be erected, have been approved by the local authority or, alternatively, that the said building or buildings, if already erected, complies or comply with all the structural and health requirements of the local authority;

(*c*) a certificate issued by the Director-General confirming that a needs assessment which supports the need for this resource in the community undertaken by the applicant in collaboration with the Director-General; and

(*d*) in the case of a children's home or shelter a certificate in paragraph (*c*) shall also contain a confirmation that the children's home or shelter is able to comply with residential care minimum standards.
(3) …
(4) Registration of a … place of care … shall be reviewed every 24 months on the basis of a quality assurance assessment undertaken by appropriately trained officials appointed by the Director-General.'

[22] The high court's judgment also referred to the powers of the DG to cause an inspection of places of care. Section 31(1)(*a*) of the Act, empowered a social worker, a nurse or any other person, authorised by the DG or any commissioner of child welfare, to enter a place of care in order to inspect it and the books and documents appertaining thereto. After such an inspection the person conducting the inspection was obliged to submit a report to the DG. It appears that a social worker, Ms Balie, visited the School from time to time, but it is not clear that these visits were pursuant to s 31(1)(*a*) and there is no record of a report being rendered pursuant thereto.

[23] Had there been such a report, the DG would have been entitled to exercise the powers conferred by regulation 34A. An adverse report could lead to various steps being taken. These would be aimed initially at remedying problems identified in the report and providing guidance and support to the management of the place of care as to the requirements to be fulfilled in order to achieve this. If the problems were not resolved after a specified period of at least two months and not more than six months, and the DG was satisfied that the place of care still did not comply with the requirements for registration, the certificate of

registration could be withdrawn and the place of care ordered to close.[16] All of this was academic in the present case because there was no evidence that an inspection under s 31(1)(*a*) had taken place, or that an adverse report had been furnished to the DG, or would have been furnished had there been such an inspection. Additionally, it can safely be accepted that a report to the DG that the swing was unsafe in the respects identified by Mr Hillman, would only have led to the School being directed to make it safe and not to allow it to be used until that had been done.

[24] The high court referred to regulation 34A(3) which also deals with a quality assurance review every 24 months. However, that review was concerned with minimum standards for residential care and the School does not provide residential care. Reference to regulation 30(2)(*d*), quoted earlier in para 21, shows that the regulation, while purporting to include all places of care is concerned with those institutions that provide residential care such as children's homes and shelters and not with places of care, such as the School, that do not.

[25] The high court further relied on the Guidelines for Early Childhood Development Services (the Guidelines)[17] as indicating best practice in regard to early childhood development services. As guidelines these had no binding legal effect, but they provided an indication of what was expected of those responsible for the regulatory oversight of places of care and similar institutions. Ms Dianne de Bruin, the Department's

[16] See regulation 34A(*f*).

[17] See Department of Social Development *Guidelines for Early Childhood Development Services* (2006), published by the Minister of Social Development to facilitate execution by that department of its role in early childhood development in the country. The guidelines were developed in conjunction with Unicef by way of technical assistance and financial support.

manager of social work in the Overberg district, testified that they gave direction to officials in regard to early childhood development centres, as places of care have become known since the advent of the Children's Act.

[26] For present purposes the section of the Guidelines dealing with the roles and responsibilities of the provincial departments of social development seems the most apposite. It started by saying that the provincial departments' role was to promote the importance of early childhood development and to do this in collaboration with other departments, such as those of education and health, as well as non-governmental organisations that contribute services to young children and their families. This was to be done by establishing mechanisms and programmes to facilitate capacity development in early childhood development service delivery in the province and providing support and guidance to early childhood development service providers. Responsibility for registering early childhood development centres rested on them and they were to put mechanisms in place to facilitate such registration in an empowering and developmental way. Budgetary provision for early childhood development was a major feature of the role of these departments.

[27] The Guidelines dealt with quality assurance reviews. The purpose of such a review was described as follows:

'The quality assurance review is important as it helps improve the way the centre is run.

- Good practice must be noted and praise given where appropriate.
- Where there are improvements to be made, these should be discussed with the responsible staff member and guidance offered so that changes can be made.

- Where there are unacceptable practices, these must also be discussed and agreement reached on changes to be made immediately to ensure the safety and well-being of the children at the centre.'

A three-point quality assurance scale was identified under the headings 'not acceptable', 'acceptable with a few adaptations' and 'acceptable'. I agree with the characterisation of these provisions by Dambuza JA in *Barley*[18] as adopting a corrective rather than a punitive approach in regard to non-compliance with minimum standards. I also agree, given the challenges that exist in regard to the provision of early childhood development centres as identified in the Guidelines, that they provided a framework that was largely aspirational.

[28] An example of a quality assurance report was given. In regard to premises and equipment it had the following headings: toilet facilities; hand washing facilities; kitchen facilities; outside area; outside play equipment; fencing; other eg swimming pool; and management of pets. Rating all of these aspects of an early childhood development centre on the simple three-point scale provided would cover many matters in addition to safety. Focussing on outside play equipment there would be a concern whether there was sufficient equipment for the number of children being accommodated in the centre. The suitability of the equipment provided for use by children at the centre would be considered, for example, whether it would serve its primary purpose of helping children with their large muscle motor development? Consideration would be given to whether some of the equipment might be unsuitable for use by the younger children and the measures in place to prevent the younger children from using it. One thinks of a slide that is too high off the ground, or a swing that did not have any means to secure

[18] *Barley* op cit fn 3, para 44.

a young child safely. Broken equipment would be identified. The extent to which adult supervision would be necessary would be considered. All of these impact upon issues of safety, but the same is true of the state of the kitchen and toilet facilities. Overall the concern would be with whether the requirements for registration were met. According to the agreed minimum physical standards then applicable in the Western Cape, in regard to outdoor equipment and toys what was necessary was 'Improvised equipment (safe, suitable for stimulation and development) eg improvised sand tray'.

Discussion

[29] The role of the Department under the Act was primarily that of a regulator. It did not itself operate places of care, children's homes, places of safety and shelters. These would be operated by non-governmental organisations (NGO's) and private bodies. Initially the Department had a licencing function. In performing that function regulation 30(2)(*b*) provided for the local authority to provide assurance that the building or buildings where the place of care was to operate complied or would comply with the structural and health requirements of the local authority. That was consistent with the constitutional identification of child care facilities as a local government matter, albeit within a functional area of national and provincial legislative competence.[19]

[30] The School had been registered under the Act for a number of years. It had moved to its present location in 1999. The swing had been acquired from another school that had closed. It seems to have been erected in the playground some six years prior to this incident. The registration certificate issued to the School in 2009 after this incident

[19] Constitution, Schedule 4, Part B.

reflects that registration was valid for two years. It would then be subject to review in terms of regulation 30(4).

[31] It was not suggested that regulation 30(4), properly construed, imposed an obligation to pay damages if injury was caused as a result of non-compliance with the obligations imposed thereby. It was submitted that considerations of public policy, in accordance with constitutional norms, in particular the provisions of s 28(2) requiring that in all matters concerning children the interests of the child are of paramount importance, rendered it fair, just and reasonable to impose an obligation to pay damages if injury resulted from non-compliance with the regulation's requirements. In the result the argument took the following form.

[32] A quality assurance review of the registration of a place of care had to occur every twenty-four months. The review had to be undertaken by an 'appropriately trained official' appointed by the DG. Counsel for the first respondent submitted that this required a review of the continued suitability of the place of care to receive and care for children. The guidelines said that this included an assessment of the outside play equipment. This necessarily included whether this equipment was safe to use. Therefore, so the argument ran, the official undertaking the review needed to have the level of training necessary to make an assessment of whether the equipment was safe. Had such an official undertaken the review on the two or three occasions between the swing's erection in the School's playground and August 2008, they would have detected the defect in the swing's design and observed the signs of metal fatigue in the fixtures. The School would then have been required to address and resolve these issues and the accident would not have occurred.

[33] This argument had an appealing simplicity, but it does not withstand closer scrutiny. It needed to start by considering the purpose of regulation 30(4) on a proper construction thereof. The quality assurance review it required was linked to the renewal of the registration of the place of care. When initially registering the School, the DG had determined that it met all the prescribed requirements and that it would be so managed and conducted as to be suitable and safe for the reception, care and custody of children. The biennial regulation 30(4) review dealing with the renewal of registration was directed at ascertaining that this remained the case. The appropriate training of the official undertaking the review needed to be directed at issues relevant to renewal of the registration.

[34] As pointed out above in para 21, regulation 30(2) prescribed the requirements for registration. There were three elements. The constitution of the organisation that would operate the place of care had to be produced, together with a certificate from the local authority that its structural and health requirements were satisfied and a certificate from the DG that there remained a community need for the facility. The process followed by the Department was first to obtain the certificate from the municipality and then to send a qualified social worker to inspect the school. The social worker's task was to ascertain whether those responsible for the operation of the place of care were still managing and conducting it in a way that made it suitable and safe for the reception, care and custody of children, and would continue to do so. No additional requirements were stipulated for the review in terms of regulation 30(4).

[35] The next question is to determine what the regulation required insofar as issues of safety were concerned. The evidence showed that social workers are not qualified to assess technical issues of safety. Like any other layperson they would notice obvious deficiencies such as broken windows or holes in the fencing around the grounds, but it was highly unlikely that they would detect structural defects in buildings or equipment. If playground equipment was obviously broken or damaged, they would draw that to the attention of the relevant person at the place of care. In the case of the School that would be the head teacher. But it was not to be expected of them that they would have the structural and technical knowledge that Mr Hillman said was required to recognise deficiencies in the design or construction of playground equipment. Nor could they be expected to acquire such knowledge with a reasonable modicum of training. Counsel's submission was that more appropriately qualified persons were required to undertake quality assurance reviews in terms of regulation 30(4) and to make a full assessment of whether the playground equipment was safe for children to use. He had in mind a person with enough basic knowledge to undertake DIY ('do it yourself') work, or a handyman, and submitted that the DG needed to ensure that the Department employed, or had available to it, such people to conduct quality assurance assessments involving inspections of places of care and the equipment used in such facilities.

[36] I am by no means satisfied that a DIY enthusiast or a handyman would have the level of skill indicated by Mr Hillman, but the wider implications of the submission cast doubt upon its correctness. It focussed entirely on the safety and integrity of the playground equipment. Such a person would not necessarily have the knowledge and skill to consider whether the kitchen and toilet facilities were proper and hygienic. Nor

would they be able to assess whether the people in charge of the facility were suitably qualified to have the care of children. That required the knowledge and experience of the social worker. They might be unable to deal with all the issues of safety that might arise in relation to a place of care, such as the safety of the electrical appliances, the protection of plug points and the wiring of the premises. If cooking or heating water involved the use of gas this would raise other safety concerns. They might not be qualified to assess the risks of fire, the sufficiency of alarms and fire-fighting equipment, or whether there were suitable escape routes in the event of fire.

[37] One can multiply these examples, but it is unnecessary to do so. They illustrate that the construction of regulation 30(4) for which counsel contended would require the employment by the Department of a wide range of persons with knowledge in a range of fields to undertake inspections on an ongoing basis in order to satisfy the obligation of the DG to ensure that appropriately trained persons were undertaking the quality assurance reviews. Every review would need to be undertaken by several different officials each having different qualifications. In *Barley*[20] the evidence showed that there were around 1400 unregistered early childhood education facilities in the Western Cape alone, some of which would be operating pending registration, while others would be operating without registering. The Minister's oversight responsibilities, although not necessarily the funding obligation, would extend to all of these as well as those that were registered. To that number one would need to add the children's homes, places of safety and shelters to which these regulations apply. The enormity of the task of undertaking quality assurance reviews every two years in respect of all these institutions in a single province, let

[20] *Barley*, op cit fn 3, para 43.

alone every province throughout the country, provides a clear indication that counsel's construction of regulation 30(4) cannot be correct. It would have the effect of stultifying the provision in the Guidelines that provincial departments should facilitate the registration of these institutions.

[38] The correct construction of regulation 30(4) appears from its proper context. That context is that the provision of places of care as they were formerly known under the Act, and early childhood development centres, as they are now known under the Children's Act, is largely undertaken by NGO's, private organisations and individuals. The responsibility of the departments of social development in each province is to facilitate the establishment and registration of such facilities and to exercise general oversight over their operations by regular visits and inspections by departmental staff, who are primarily social workers or health care professionals such as nurses. That the structures in which these facilities operate are properly constructed is a matter over which the local authorities in which they are situated exercise their conventional powers to enforce both the National Building Regulations and Standards[21] and local by-laws governing the construction of buildings. Similarly, the Regulations contemplate that the health inspectors of the local authority will be responsible for monitoring that the premises are in a hygienic condition. This is an aspect of the intersectionality between different governmental structures that the Guidelines recognise is essential in this important field.

[39] As regards general issues of safety, including the construction and maintenance of playground equipment, the responsibility for this is that

[21] National Building Regulations and Building Standards Act 103 of 1977.

of the person or organisation operating the facility and the persons employed in it as teachers, carers, assistants or ground staff. In terms of s 30(3)(*b*) of the Act the Department's responsibility at the time of initial registration was to ensure that these people and organisations were suitable to manage and conduct the place of care so that it would be suitable and safe for the reception, care and custody of children. When a quality assurance review was undertaken every two years that would again be the focus. The obligation of the DG was to appoint officials to conduct reviews who were appropriately qualified to assess whether the people and organisations operating the place of care were suitable to manage and conduct it, so that it in turn would be suitable and safe for the reception, care and custody of children. Operational issues such as the proper design and maintenance of play equipment were the responsibility of the place of care and its management and employees.

[40] It is instructive at this point to contrast this position with that which prevails in respect of public schools in terms of the South African Schools Act 84 of 1996 (the Schools Act). Public schools are owned and operated by provincial education departments. Places of care under the Act are not. The majority of teachers in a public school are employees of the relevant Education Department. By contrast, while the salaries of the teachers at the School were funded from the Departmental grant, they were not employees of the Department. The responsibility of Education Departments for delictual claims arising from injury suffered by learners while about school activities is enshrined in s 60(1) of the Schools Act. There is no equivalent in the Act. These contrasting situations in relation to otherwise similar institutions, points to a difference in regard to liability for delictual claims.

[41] The structural underpinning of the argument for the first respondent was based on an incorrect interpretation of regulation 30(4). There are no policy considerations justifying the imposition of a broader duty on the Minister as pleaded on behalf of the first respondent. In fact, the relevant policy considerations point away from it. The first is one that I have already touched upon. It is that the role of the Minister and the Department is regulatory and not operational. Its responsibility at the time was to facilitate the operation by suitable persons of places of care and its current responsibility is to facilitate the operation by suitable persons of early childhood development centres. All obligations in relation to the day to day operation of such facilities rest with the persons who are registered to operate them. The Minister attends to the registration of the facility and reviews such registration biennially. The Act vests powers of inspection in officials appointed for that purpose by the Minister. If they discover matters of concern, whether in relation to safety or otherwise, they render a report and remedial action is taken over a period of time. The Minister has no powers of intervention to address safety issues directly. It is always the place of care itself that must address and resolve these.

[42] The second policy consideration is that responsibility for other health and safety issues lay explicitly with local authorities in whose area of jurisdiction childcare facilities are located. Compliance with building and health requirements would be reviewed biennially by the local authority. I am concerned here with general responsibility for these matters, not the question that divided the Minister and Overberg as to responsibility for the safety of playground equipment. Local authorities may make by-laws governing these matters and the provincial authorities would expect them to do so. The health by-laws of Overberg contain

detailed provisions in this regard, extending to issues of ventilation and lighting; the provision of waste receptacles; toilet and bathroom facilities; the provision of clean water; disposal of effluent; washing and sterilisation of nappies and separate changing facilities for changing dirty nappies.

[43] Nowhere in this highly regulated area is there any specific provision imposing responsibility for safety in places of care on the Minister and the Department. Their concerns lie elsewhere and extend far beyond the provision of places of care or early childhood development centres. An important policy issue involves asking whether the imposition of a liability to pay damages to person injured as a result of the defective design or maintenance of equipment in such institutions would impose an undue burden on the province and hamper it in undertaking its central functions.[22] In my view it would. The statutory scheme in the Act and subsequently in the Children's Act, is directed at promoting a public good rather than the protection of specific individuals in relation to whom some other responsible person owes that duty. Imposing a liability on the Minister for damages in respect of personal injuries arising in circumstances such as those in the present case would have a chilling effect on the Department's officials in the performance of their statutory and administrative duties.[23]

[44] The third policy issue is a concern about the ambit of the legal duties pleaded in this case to ensure that places of care provided a safe environment for children under their care; to take reasonable steps to

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[22] *Knop v Johannesburg City Council* op cit, at 33A-F; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 22; *Premier Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) paras 36 and 41.

[23] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC) para 42.

ensure the safety of children in places of care; and, to ensure the safety of children whilst on the premises of places of care. These duties were entirely general and not specific to Jacena or the School arising from circumstances particular to them. The legislation and Regulations were both national in operation. Accordingly, the duties alleged would, if imposed, apply in all nine provinces in literally thousands of places of care, children's homes, places of safety and shelters, using the terminology of the Act, and their successor institutions under the Children's Act. This was therefore a case where the principle that courts should avoid imposing liability in an indeterminate amount for an indeterminate time to an indeterminate class applied.[24] To uphold the claim would make provincial governments throughout the country insurers against the consequences of negligence in the construction and maintenance of fittings and equipment on the part of the operators and employees of every place of care, children's home, place of safety or shelter in the country.

[45] Concerns such as these lay at the heart of this court's conclusion in *Barley* that the Minister did not owe a legal duty in that case to the parents of a child who died of asphyxia after falling off a bed at a nursery and catching her head between the bed and a chest of drawers. The statutory provisions relied on in that case ranged far and wide across the field of both the Act and the Children's Act, the Regulations and the Guidelines, whereas here the focus ultimately narrowed to regulation 30(4). However, the same legal principles and policy issues governing wrongfulness were considered and led to the same conclusion, namely that the Minister did not owe the legal duties relied upon by the plaintiffs. The endeavour to distinguish that decision from the present

[24] See *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 832H-833A.

one, based upon the description of the child in that case as the primary victim and her parents as secondary victims, was misconceived. The judgment in *Barley* made it clear[25] that the first issue for consideration was whether the provincial government owed the plaintiffs any legal duty attracting civil liability in relation to their daughter's death. That question was answered in the negative and the high court was bound by the principles of *stare decisis* to follow it.

[46] Cases such as these are always hard cases because of the human tragedy involved, which naturally elicits sympathy from everyone, including judges. However, as this court has had occasion to point out, sympathy is not a basis for imposing legal liability.[26] I stress this because the judge in reaching his conclusion on wrongfulness said: 'Janeca has no other way than through a delictual action to hold the Minister accountable.' That approached the issue from a wrong perspective. The enquiry could not start from a conception that the Minister owed a duty that had been breached giving rise to Janeca's injuries and an obligation to account to her. That was to answer in advance the true question of whether any such duty was owed. For the reasons contained in this judgment it was not.

[47] In view of that conclusion it is unnecessary to address the further questions of negligence and causation. It is also unnecessary, and in my view undesirable, to address the issues arising out of the third party notice addressed to Overberg.

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[25] *Barley* op cit, fn 3, paras 28 and 30.
[26] *Buthelezi v Ndaba* [2013] ZASCA 72; 2013 (5) SA 437 (SCA) para 15; *McGregor and Another v MEC for Health, Western Cape* [2020] ZASCA 89, para 107.

Costs and result

[48] The Minister did not ask for costs in either the high court or this court. That left the costs of the third party proceedings. Section 41(1)(*h*)(vi) of the Constitution provides that organs of state should co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another.[27] That appears to have been overlooked in both the institution and the defence of the third party notice. Had regard been paid to the constitutional injunction, the costs that both the Minister and Overberg incurred could have been avoided and a suitable *modus vivendi* put in place to deal with the issue of their respective rights and responsibilities after the primary issue of liability as claimed had been resolved. In those circumstances it is appropriate that each of the Minister and Overberg should bear their own costs.

[49] I cannot end this judgment without commenting on both the conduct of the trial and the appeal. The only witnesses called by the plaintiff, now the first respondent, were Mr Hillman, Ms Wyngaardt, a former teacher at the School, and the plaintiff himself. None of these could address the issue of the legal duty that allegedly rested on the Minister or gave any evidence relevant to that issue. It was a legal issue that could properly be dealt with on exception,[28] or as a separate issue in terms of rule 33(4) of the Uniform Rules of Court. Had it been thought that greater detail was required in order to highlight the policy issues relevant to the determination of whether the Minister bore a legal duty as

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[27] See also the Intergovernmental Relations Framework Act 13 of 2005, promulgated in accordance with the constitutional mandate for national legislation that provides for 'appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes': s 41(2)*(b)* of the Constitution.

[28] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3.

alleged, a properly formulated request for particulars for trial and request for admissions at the pre-trial conference would have achieved that purpose. Either course would have led to the avoidance of a lengthy[29] and costly trial.

[50] The second comment relates to the evidence on behalf of the Minister and Overberg. Both in evidence in chief and under cross-examination the witnesses were repeatedly asked to deal with issues of the respective duties, rights and obligations of the Minister and Overberg. As was the case with similar evidence in *Barley* all this was irrelevant and inadmissible. Ms de Bruin's evidence of the processing of applications for registration and the reasons for the School's registration lapsing could not have covered more than a few pages. Similarly, the evidence of Ms Balie, who was responsible for dealing with the registration of this School would have been short and so would that of the other witnesses. Instead we were faced with a 900 page record. For the purposes of the appeal the issues had crystallised. Nonetheless, we were told by all parties in their practice notes, that counsel were of the opinion that it would be necessary for us to read the entire record. Very few references to that evidence were contained in the heads of argument and there was no dispute about what the witnesses had said. The continued disregard by counsel of their obligation in terms of the practice directive to identify the portions of the record that in their opinion are necessary to be read is unacceptable.

[51] The following order is made:

1 The application for leave to appeal is granted.

2 The appeal is upheld and the order of the high court altered to read;

[29] Evidence and argument took five days.

'1 The plaintiff's claim is dismissed with no order as to costs.

2 The defendant's claims against the third party are dismissed with each party to bear their own costs.'

3 Each party is to bear their own costs of the appeal.

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M J D WALLIS

JUDGE OF APPEAL

Appearances

For Appellant: I Jamie SC (with him G R Papier)

Instructed by: State Attorney, Cape Town and Bloemfontein

For First Respondent: A R Sholto-Douglas SC (with him H Rademeyer)

Instructed by: Van der Spuy, Cape Town

Lovius Block, Bloemfontein.

For Second Respondent: P de B Vivier SC (with him D S Niel)

Instructed by: Enderstein, Van der Merwe Inc, Bellville;

Jordaans, Rijkheer Attorneys, Blomefontein.