



Keeping an eye on non-profit

NPOs and SAFETY MANAGEMENT

By Ricardo Wyngaard

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

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This is an electronic newsletter published by:
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On 16 September 2020 the Supreme Court of Appeal (SCA) handed down a judgment, which it described as ‘one of general importance, as it dealt with the nature of the legal duties being imposed upon the regulators having oversight of places of care. The SCA essentially had to decide whether the MEC and the Director-General of the Department of Social Development of the Western Cape owed a legal duty to protect children at places of care against harm by taking reasonable steps to ensure the safety of equipment.

The Facts

Janeca Esau, together with about 190 children, were under the care of the Babel & Krabbel Kleuterskool (the school), which is registered under the Nonprofit Organisations Act of 1997. The school’s playground was equipped with several playground equipment, including swings. On 12 August 2008 a swing’s heavy cross-beam collapsed on five-year old Janeca, which sadly left her severely disabled. Janeca’s father instituted a claim against the MEC to recover damages.

Decision of the Western Cape High Court:

The Western Cape High Court (the High Court) held that the MEC was liable to pay the damages claimed by Janeca’s father. The High Court considered the provisions of the Child Care Act 74 of 1983. This Act has since been repealed by the Children’s Act, but the SCA remarked that it was not suggested that the outcome would have been any different had Children’s Act applied. The SCA subsequently granted leave to appeal the matter as the MEC disputed the existence of such legal duty.

Decision of the SCA:

The SCA upheld the appeal and concluded that the MEC cannot be held liable to pay the damaged claimed by Janeca’s father. The SCA underscored and recognised that, due to the human tragedy involved, such matters are always hard to deal with, but also reiterated that ‘sympathy is not a basis for imposing legal liability’. The SCA analysed the various provisions of the Child Care Act and concluded that: “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.” Also, “The evidence showed that social workers [ordinarily authorised to do inspections at places of car] are not qualified to assess technical issues of safety. But it was not to be expected of them that they would have the structural and technical knowledge that Mr Hillman [the mechanical engineer] 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.”

**SAMPLE GOVERNANCE
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The SCA stated that: “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.” Accordingly, the SCA concluded that the MEC and the Director-General of the Department of Social Development of the Western Cape could not be held liable in this context. The SCA further remarked that: “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.”

The SCA on duties of NPOs:

In giving consideration to the context, the SCA made the following statement: “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.”

With reference to the safety at places of care, the SCA stated:

“As regards general issues of safety, including the construction and maintenance of playground equipment, the responsibility for this is that of the person or organisation operating the facility and the persons employed in it as teachers, carers, assistants or ground staff.”

Also, “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.”

Conclusion

Organisations operating places of safety must take note that ‘general issues of safety’ are the responsibility of the organisation operating the facility. Organisations should therefore have a sound and suitable risk management system in place which should also include a safety management system.

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