



NPOs and SAFETY MANAGEMENT – Part 2

By Ricardo Wyngaard

BE obo JE v MEC for Social Development, Western Cape [2021] ZACC 23

On 27 August 2021 the Constitutional Court handed down a judgment in which it pronounced on the issue of liability resulting from a devastating playground incident that took place on 12 August 2008. In Volume 52 we discussed the findings of the Supreme Court of Appeal (SCA) judgment which was handed down on 16 September 2020.

The Facts

As summarised under Vol 52, Janeca Esau, together with about 190 children, were under the care of the Babbel & 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.

The Constitutional Court described: "Suddenly, [Janeca's] hope of living an ordinary, free and unencumbered life came to an end because the accident and the consequent disabilities permanently affected several aspects of her life. For her parents, the hopeful dreams of raising a healthy and industrious child were shattered."

Janeca's father instituted a claim against the MEC to recover damages.

Litigation history

The Western Cape High Court (the High Court) held that the MEC was liable to pay the damages claimed by Janeca's father. The MEC lodged an appeal which was upheld by the SCA, which 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." 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.

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."

Constitutional Court Judgment

The key question for the Constitutional Court to answer was: "Whether the Minister has a legal duty to take reasonable steps to prevent harm to children in Early Childhood Development Centres, places of care and similar institutions."

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'SAFETY MANAGEMENT'...

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In order for Janeca's father to succeed against the Minister, he must prove the three elements of delictual liability, which are: wrongfulness, negligence and causation. The judgment focused on the first element, being, wrongfulness. The Constitutional Court had to determine whether the Minister had a legal duty to Janeca to prevent the harm suffered. Janeca's father argued that the law imposed a legal duty on the Minister.

The Constitutional Court did a detailed analysis of the relevant legislation and the Constitution. It also took into account the broader context, as alluded to in another SCA judgment which noted that: "Considering the vastness of the need for practical care services, the fact that some facilities may, by reason of their location and paucity of resources, not comply with the minimum standards set in the Guidelines, shows that strict adherence to legal prescripts was an unattainable goal."

The Constitutional Court however agreed with the SCA in stating that: "the imposition of a legal duty to ensure that each and every facility throughout the country – of which there are thousands – is safe, would impose an impossible obligation on the provincial departments of social development. This obligation would hamper their core function in this regard – which is to support, financially and otherwise, and oversee, the operation of such facilities by third parties."

It concluded that the Minister's responsibilities do not include 'operational control of school premises and does not amount to a legal duty to ensure the day-to-day safety of children at ECD centres.'

By implication, the Constitutional Court endorsed the SCA's finding that: "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."

Conclusion

What does the judgment mean for child care facilities like ECDs? In my view, several critical lessons can be extracted from the judgment. In particular, it is important for all ECDs to have a suitable risk management system in place, which should enable the responsible organisation to identify and manage safety risks.

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