



CONSTITUTIONAL COURT OF SOUTH AFRICA

BE obo JE v Provincial Member of the Executive Council Department of Social Development, Western Cape

CCT 234/20

Date of hearing: 25 February 2021

Date of Judgment: 27 August 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday, 27 August 2021 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal (“SCA”). Leave to appeal was sought against the SCA’s decision that set-aside the High Court’s order to the effect that the respondent, Provincial Member of the Executive Council, Department of Social Development (“the Minister”) was liable to pay delictual damages to the applicant (“BE on behalf of JE”).

On 12 August 2008 in Bredasdorp, at Babbel and Krabbel Pre-Primary School, JE was playing on a wooden swing structure during a morning break. A top beam of the wooden swing structure dislodged and collapsed on top of her. As a result of this, JE suffered a very severe traumatic brain injury, the consequences of which will impact permanently on her entire life. At the time of the incident, JE was only 5-years old. JE was born on 5 December 2002 and is currently living with disability.

The applicant then sued the Minister for damages arising from the said incident in the Western Cape High Court. The Minister then, by way of third-party notice, joined the Overberg District Municipality. The Municipality also in turn, by way of third party notice, joined the Minister and the school as first and second parties. The High Court upheld the applicant’s claim against the Minister but dismissed that of the Minister against the Overberg Municipality. The Minister applied for leave to appeal in the High Court and his application was dismissed. The Minister then petitioned the SCA and was granted leave to appeal to the SCA.

Before the SCA the central question was whether the Minister owed any legal duty to children in places of care to take reasonable steps to ensure safety of equipment? The collateral question, was whether the Minister was liable for damages suffered by JE? The SCA held that Minister was not charged with the primary role of operating the place of care, children homes, and places of safety and shelters but to regulate these places. The SCA held that it was not suggested that regulation 30(4) of the Regulations to the Child Care Act 74 of 1983, properly construed, imposed an obligation to pay damages if injury was caused as a result of non-compliance with obligations imposed thereby. The SCA accordingly held that the Minister owed no duty to JE and upheld the Minister's appeal.

The applicant sought leave to appeal from this Court on the basis that the SCA erred by not holding the Minister liable for delictual damages. The applicant submitted that this matter concerns issues of fundamental constitutional import, the rights of children in section 28 of the Constitution. The applicant submitted that this matter also raises an arguable point of law of general public importance which must be considered by this Court given the subject matter of the case, specifically the extent of the legal duty (if any) owed by a Provincial Minister of Social Development to children attending Early Childhood Development centres.

The applicant further submitted that considerations of public policy in accordance with constitutional norms as set out in section 28 of the Constitution render it fair, just and reasonable to impose an obligation to pay damages if injury flowed from non-compliance with the provisions of regulation 30(4). The applicant submitted that the Minister had, in the circumstances of this matter, a legal duty 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 and that reasonable steps ought to have been taken to ensure the safety of JE at the school. The applicant submitted that legal convictions of the community, constitutionally understood, demand that the Minister's omissions in this case be found wrongful.

The applicant, contrary to the SCA's finding on wrongfulness, submitted that the right of children to be received and cared for in places of care in a safe manner is so important that it requires everyone who intervenes in the lives of children in this context to be held accountable for the delivery of an appropriate, effective and efficient service. The applicant submitted that the Constitution, the Act, the Regulations and the Guidelines of Early Childhood Development centres all placed a duty upon the Minister to ensure the safety of children at Early Childhood Development centres. The applicant submitted that the Minister's failure to act in terms of his statutory duties is the kind of conduct which should attract liability and the preventive measures necessary to avert this tragic occurrence.

The Minister, on the other hand, argued that this application does not raise any constitutional issues. The Minister submitted that this application is about the proper interpretation of the legal and policy framework regulating the provision of child care services that being the proper interpretation of regulation 30(4) of the regulations promulgated in terms of the Child Care Act. The Minister submitted that this exercise does

not require the consideration and application of some constitutional rule or principle in order to decide the matter as is required by the jurisprudence of this Court.

The Minister submitted that section 28(1)(b) and (d) of the Constitution, which are relied upon by the applicant, do not apply here as they deal with children in need of care. The Minister goes further to state that section 28(1)(c), read with subsection (2) of the Constitution do not also assist in the proper interpretation of the aforesaid legislative framework, including regulation 30(4), as these deal with the obligations of the State to register, and thereafter oversee, the operation of child care facilities. Thus they, according to the Minister, have no direct bearing on the question of the safety of children at such facilities.

The Minister submitted that regulation 30(4) does not, on its plain or contextual meaning, require a physical inspection of every child care facility in the province. Instead, what it requires is a consideration of the requirements for registration, which are the same requirements that have to be satisfied at the time of re-registration. The Minister submitted that she and the Department are only responsible for attendance to registration and overseeing the operations of childcare facilities to the exclusion of their day-to-day operations. The Minister submitted that local authorities are responsible, in terms of schedule 4 of the Constitution, for child care facilities and are constitutionally entitled and obliged, *inter alia*, to legislate and to administer such legislation. In the instant case, the Minister submitted, the Overberg District Municipality did precisely that, and its by-law provides in express terms for access to, and the inspection of, child care facilities within its jurisdiction, in order to ensure, *inter alia*, that they are structurally sound and that the equipment provided thereat is in good order.

Finally, the Minister also submitted that neither negligence, causation nor wrongfulness was established in this case. The Minister prayed for dismissal of the application for leave to appeal with no costs against the applicant.

In a unanimous judgment penned by Tshiqi J concurred in by (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J and Tlaletsi AJ), the Constitutional Court agreed with the SCA's findings and reasoning on wrongfulness. It held that the legislative framework sought to be relied on by the applicant did not place a legal obligation on the Minister and the Department to ensure the safety of the play ground equipment in order to ensure the safety of children at ECD centres on a daily basis. It noted that the alleged duty, if imposed, would create an unrealistic obligation on the Minister to ensure safety of children in thousands of places of care, children's homes and places of safety nation-wide. In the circumstances, it held that the considerations of public policy do not favour holding the Minister liable for damages arising from JE's accident.