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DISPUTE RESOLUTION ALERT

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Policy considerations and the imposition of liability

During 2008, at a small school in Bredasdorp, a crossbeam collapsed on a five-and-a-half-year-old child while she was playing on a swing. Suffering critical injuries, the incident left the girl severely disabled. Tragedies such as this raise complex issues of determining whether, in the circumstances, a legal duty existed to prevent harm and, if so, who bore that responsibility. The Supreme Court of Appeal (SCA) was called on to determine these factors in *MEC: Western Cape Department of Social Development v BE obo JE and another*.

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CLIFFE DEKKER HOFMEYR

Policy considerations and the imposition of liability

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During 2008, at a small school in Bredasdorp, a crossbeam collapsed on a five-and-a-half-year-old child while she was playing on a swing. Suffering critical injuries, the incident left the girl severely disabled. Tragedies such as this raise complex issues of determining whether, in the circumstances, a legal duty existed to prevent harm and, if so, who bore that responsibility. The Supreme Court of Appeal (SCA) was called on to determine these factors in *MEC: Western Cape Department of Social Development v BE obo JE and another*.

The father of the child instituted a damages claim against the Minister of the Department of Social Development (Minister) in the Western Cape. In a nutshell, the allegations were that the swing was defectively designed, and that national legislation imposed a legal duty on the Minister to take reasonable steps to ensure the safety of children on the school premises.

Wrongfulness and a legal duty

The SCA pointed out that, for the Minister's omission to be actionable, a legal duty had to exist to prevent such harm. The SCA stated that non-compliance with statutory provisions is actionable when, taken together with all other relevant factors and the common law, a conclusion is reached that the breach was wrongful.

Legislation at issue

The applicable provision at the time was section 30(3)(b) of the Child Care Act 74 of 1983 (Act). The section required the Minister to be satisfied that the place of care complied with certain requirements for registration and would be managed

in a way suitable for the care and custody of children. Regulation 30(4) stated that a place of care must be reviewed every two years via a quality assurance assessment executed by appropriately trained officials appointed by the Director General (DG). Counsel for the father largely relied on Regulation 30(4), stating that if such assessments were conducted correctly, the defect would have been detected and the harm ultimately avoided.

Policy considerations

The SCA found that the argument submitted on behalf of the child's father was based on an incorrect interpretation of Regulation 30(4) and that policy considerations pointed away from the imposition of a broader liability on part of the Minister.

According to the SCA, the Minister and the Department acted as regulators, with operational issues such as design and maintenance of equipment falling outside the ambit of their responsibilities. The Guidelines for Early Childhood Development Services (Guidelines) alluded to the fact that the assessment acted to "help improve the way the centre is run" by providing guidance in areas where changes had to be made. Furthermore, a purposive interpretation of Regulation 30(4) revealed that the quality assurance review was directed merely toward the renewal of an institution's registration. The DG's function was to simply appoint suitably qualified department officials to ensure that those managing the place of care were qualified to do so. It follows that responsibility for the operation of such a place of care fell on the institution and those under its employ.

Policy considerations and the imposition of liability...continued

Although cases such as these naturally invoke sympathy for the parties involved, the SCA stated that sympathy is no ground for imposing liability.

The SCA went on to discuss that the alleged broad legal duty on the Minister would be overly burdensome. The SCA noted that the quality assessors could not reasonably be expected to possess the technical skills necessary to identify all intricate matters of safety highlighted in the guidelines. Appointing "appropriately qualified officials" would require the DG to biannually deploy several officials with varying skills and expertise to thousands of like institutions located in the Western Cape. This would go against the principle that courts should avoid imposing liability where the extent cannot be determined. The SCA noted that since the Act and Regulations operated at national level, the effect of projecting this duty on the Minister would be that the provincial governments throughout South Africa would serve as a safety net against personal injury claims that flow from the negligent conduct of ground staff that operate these facilities.

This diversion of liability was bolstered by the intersectionality between different levels of government to fulfil these roles. The SCA noted that local authorities are tasked with assisting provincial government in the performance of their function as facilitators. Local authorities thus possess a greater degree of responsibility for monitoring health and safety issues at ground level. This is in line with Schedule 4, Part B of our Constitution which brings childcare facilities within the ambit of local government responsibilities. As a result, public policy considerations strongly pointed away from the imposition of a legal duty and the court upheld the appeal.

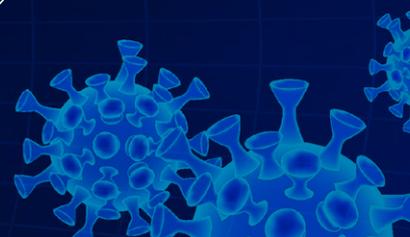
Conclusion

Although cases such as these naturally invoke sympathy for the parties involved, the SCA stated that sympathy is no ground for imposing liability. The court's finding was a logical one, based on sound contextual considerations that aligned with common law principles and public policy.

Roy Barendse and Layen Petersen

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2021 RESULTS

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2021 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Chambers Global 2021 ranked our Construction sector in Band 3: Construction.

Chambers Global 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2021 as Senior Statespeople: Dispute Resolution.

Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2021 in Band 1: Construction and Band 4: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2021 in Band 3: Dispute Resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2021 in Band 3: Dispute Resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Construction

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.



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CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

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Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

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Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.

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Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2020.

Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2020.

Siviwe Mcetywa is ranked as a Rising Star in Construction in THE LEGAL 500 EMEA 2020.



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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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