THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1220/2017

In the matter between:

THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE: DEPARTMENT OF SOCIAL DEVELOPMENT **APPELLANT**

and

CRAIG CHARLES BARLEY **FIRST RESPONDENT**

RIETTE BARLEY **SECOND RESPONDENT**

DAWN KATHRYN DOUGLAS MOORE **THIRD RESPONDENT**

Neutral citation: *Government of the Western Cape: Department of Social Development v Barley & others* (1220/2017) [2018] ZASCA 166 (30 November 2018)

Bench: Navsa ADP, Wallis, Mbha and Dambuza JJA and Nicholls AJA

Heard: 02 November 2018

Delivered: 30 November 2018

Summary: Civil Procedure – separation of issues in terms of Uniform Rule 33(4) – principles restated – repeated warnings against impulsive separation of issues – issues to be separated have to be carefully and clearly circumscribed – no court order of separation – procedure improper.

Delict – damages claim by a secondary victim for psychological harm suffered – Provincial Government owed no legal duty to secondary victim – nothing in the statutory framework indicating intention to provide for delictual damages – no negligence proved.

ORDER

On appeal from: Western Cape Division, Cape Town (Dlodlo J sitting as court of first instance):

1 The appeal is upheld.

2 The order of the high court is set aside and replaced by the following order:

'(a) The first defendant is liable to pay damages to the plaintiffs arising from the wrongful death of their daughter, Ava Barley, which occurred on 14 October 2010.

(b) The first defendant is liable for the costs incurred by the plaintiffs.

(c) Determination of quantum is postponed sine die.

(d) The claim against the second defendant is dismissed.

(e) Each party shall pay its own costs in respect of the claim against the second defendant'

3 Each party shall pay its own costs in this appeal.

JUDGMENT

Dambuza JA (Navsa ADP, Wallis and Mbha JJA and Nicholls AJA concurring):

Introduction

[1] This appeal arises from the tragic, and for the parents, the heartrending death of a five month old baby girl, Ava Barley (Ava), at a day care (early child development (ECD)) facility, known as 'Aunty Dawn's', in Pinelands, Cape Town, on 14 October 2010. As a result of Ava's death, her parents, Mr and Mrs Barley (the Barleys), instituted a claim against the operator of the facility, Ms Dawn Moore (Ms Moore), and the appellant, the Provincial Government of the Western Cape: Department of Social

Welfare (the Province), for damages suffered by them as a result of Ava's death. The Western Cape Division of the High Court (high court) (Dlodlo J) found Ms Moore and the Province jointly and severally liable for damages suffered by the Barleys as a result of Ava's death. This appeal by the Province, is with the leave of the high court.

Background

[2] During 2006 Ms Moore started operating Aunty Dawn's from her home in Verbena Way, Pinelands, Cape Town. At that stage the facility accommodated five children. On 6 February 2008 Ms Moore applied for registration of her facility with the Province as a partial care facility,[1] as she was required to do in terms of s 30(2) of the Child Care Act 74 of 1983 (the Child Care Act), which was the then applicable legislation.[2] In her application for accreditation Ms Moore stated that she intended to increase the number of children accommodated at Aunty Dawn's to about 18 to 20.

[3] On 27 February 2008 the Province issued a written acknowledgment of receipt of Ms Moore's application. A written instruction also went out to the municipal health department for inspection of the facility so that a health care certificate would be issued in preparation for registration. However, at the time of Ava's death, two years after the application for registration of Aunty Dawn's, there had been no further consideration, by the Province, of Ms Moore's application for registration. By that time (2010) Ms Moore was caring for 17 children, 15 above the age of three, one below the age of three, and Ava.

[4] Ava was born on 10 May 2010. At the time Mrs Barley was employed as an information technology specialist in Westlake, Cape Town, but lived in Pinelands. Towards the end of her maternity leave Mrs Barley visited Aunty Dawn's to assess its suitability as she was looking for a day care facility for Ava and her three year older

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[1] Section 1 the Child Care Act defined a 'place of care' in relation to children as:
'any building or premises maintained or used, whether for profit or otherwise, for the reception, protection and temporary or partial care of more than six children apart from their parents, but does not include any boarding school, school hostel or any establishment which is maintained or used mainly for the tuition or training of children and which is controlled by or which has been registered or approved by the State, including a provincial administration.'

[2] Section 30(2) of the Child Care Act provided:
'No child may be received in any place of care (other than a place of care maintained and controlled by the State) unless that place of care has been registered under this section, or otherwise than in accordance with the conditions on which that place of care has been so registered.'

sister Chloe.[3] She found Aunty Dawn's clean, reasonably spacious, with appropriate indoor and outdoor equipment and conveniently located. She was satisfied that it was properly run and the fees were within her and her husband's budget. Ms Moore told her that Ava would be the only baby at the facility and undertook to personally take care of her. There were cots for Ava to sleep in. Mrs Barley approved of the facility and she and her husband decided to enrol their children there.

[5] In August 2010 Chloe and Ava were enrolled at Aunty Dawn's. The routine was that Mrs Barley would drop both children at Aunty Dawn's at about 07h15 in the early morning before going to work. She would leave Ava still strapped into her car safety seat and find her secured in the same manner when she came to fetch the children in the afternoon.

[6] On 14 October 2010 Ava died after she had been left alone in Ms Moore's bedroom. Because Ms Moore left South Africa before the trial, there was no direct evidence in the high court as to how the events of the day unfolded after Mrs Barley had dropped the children off that morning. The facts relating to Ava's death could only be distilled from her statement filed in the record of the inquest together with other evidence that I will deal with in due course. According to that statement after Mrs Barley left Ava at the facility at about 07h30, Ms Moore put her on the bed in her bedroom to sleep. She placed pillows around her. [4] At about 09h45 she changed Ava's nappy and, once more, left her sleeping on the bed amongst pillows as she went to prepare her food. When she returned to the bedroom Ava was still asleep. Ms Moore left her sleeping on the bed with the door closed and checked on her regularly. At about 10:30 am she found her lying on the floor, wedged between the bed and a bedside pedestal. She was not breathing, and Ms Moore's attempts at resuscitating her proved fruitless. She had sustained an abrasion on one side of the head and a bruise on the other. Vomit on her left wrist was suggestive of the wrist having come into contact with her mouth and thus contributed to the obstruction of the mouth and nose. The opinion of a pathologist who interviewed Ms Moore was that having rolled off the bed and become

[3] At that time the Barleys only had the two children, Chloe and Ava. Two more girls were born subsequent to Ava's death; Erin on 10 October 2011 and Eve, on 10 March 2016.
[4] Despite poor quality, black and white photocopies of photographs on record, taken on the day of the incident, show the pillows still scattered on the bed.

stuck between the bed and a bedside pedestal Ava must have died of positional asphyxiation.

[7] Mr and Mrs Barley were called to Aunty Dawn's and were told of the tragic news of their baby's death. They also learnt at that stage that Ms Moore had left Ava to sleep on the bed instead of a cot. It turned out that this was not the first time that Ms Moore had left Ava to sleep on the bed rather than in a cot. In a statement made to the social workers subsequent to Ava's death, Mrs Barley related that when she picked up the children from Aunty Dawn's on the afternoon preceding Ava's death she found Ava sleeping on the bed.[5] Ms Moore explained to her that Ava had fallen asleep whilst the two of them were sitting on the bed and, because she did not want to wake her up, Ms Moore put pillows around her and left her sleeping on the bed.

[8] Subsequent to Ava's death, on 25 October 2010, Dr Badronessa Govender, a registered social worker employed as a Director by the Province, visited Aunty Dawn's to investigate the circumstances of Ava's death. Her assistants, Ms Charmaine Brown and Ms Abrahams, as well as an environmental practitioner also visited Aunty Dawn's. At the time, Pinelands fell under Dr Govender's responsibility. She was responsible for, amongst other things, registration of partial care facilities in terms of s 80 of the Children's Act 38 of 2005 (the Children's Act).[6] In a quality assurance report compiled by her pursuant to the visit, she recorded the conditions at Aunty Dawn's as follows:

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[5] Mrs Barley confirmed this incident when giving evidence.

[6] Although the application for registration of Aunty Dawn's was made in terms of the Child Care Act, when the Children's Act came into operation the responsibilities of the Provincial Government continued in terms of the latter Act. Section 79 of that Act provides:

'(1) The Minister, after consultation with interested persons and the Ministers of Education, Finance, Health, Provincial and Local Government and Transport, must determine national norms and standards for partial care by regulation.

(2) The national norms and standards contemplated in subsection (1) must relate to the following:

(a) A safe environment for children;
(b) proper care for sick children or children that become ill;
(c) adequate space and ventilation;
(d) safe drinking water;
(e) hygienic and adequate toilet facilities;
(f) safe storage of anything that may be harmful to children;
(g) access to refuse disposal services or other adequate means of disposal of refuse generated at the facility;
(h) a hygienic area for the preparation of food for children;
(i) measures for the separation of children of different age groups;
(j) the drawing up of action plans for emergencies; and
(k) the drawing up of policies and procedures regarding health care at the facility.'

'Mrs Dawn Moore is the owner of the centre and the principal. She has no formal qualification in ECD practices. She operated an ECD centre in the 1970's for four years. She then closed down and took up other employment for a few years. According to Mrs Moore, she has experience of early childhood development for the past ten or eleven years. She indicated that she has first aid training. Further to this, she indicated that she has two "helpers" who assist with the caring of the children and keeping the centre clean and tidy. They have no qualifications in early childhood development'.

[9] Regarding 'sleeping arrangements' she reported that:

'It can be reported that it was observed that there were adequate cots and mattresses available for the children. There were also extra mattresses if the need should arise for its use. It can also be reported that it was clean and covered with plastic'.

[10] Her assessment of the facility was that the staff complement appeared to be adequate and compliant with the ratio of ECD practitioners to children, laid down in the Guidelines for ECD services. Although the carers did not have formal qualifications they had prior experience of working with children and demonstrated a positive attitude towards the children and sensitivity to their needs. Ms Moore was open to the development of practitioners and was eager to comply with the Department's regulations. She was also willing to be trained. The premises were clean and tidy, and reasonable precautions had been taken to protect the children.

[11] Dr Govendor recommended that the pre-registration processes, such as rezoning and health inspections be done so that the facility could be registered. She also recommended that Ms Moore reduce the number of children to fewer than 6 until the facility was registered. Her view was that the facility should not be closed down because the non-adherence to the norms and standards of the Province was not of such a degree as to negatively affect the children.[7] In her evidence before the high court she

[7] Section 80(1) provides:
'Any person or organisation may establish or operate a partial care facility provided that the facility–
(a) is registered with the provincial government of the province where that facility is situated;
(b) is managed and maintained in accordance with any conditions subject to which the facility is registered; and
(c) complies with the prescribed national norms and standards contemplated in section 79 and such other requirements as may be prescribed.'
In terms of s 82(1):
'The provincial head of social development must–
(a) within six months of receiving the application consider an application for registration or conditional

attributed the failure by the Province to process Ms Moore's application to a policy of the province at that time, which was to prioritize ECD facilities located in previously disadvantaged communities. Apparently there were over 1300 unregistered facilities in the province and many of these were in previously disadvantaged communities. Aunty Dawn's was eventually registered as an ECD facility on 22 July 2011.

The pleadings

[12] As against Ms Moore the Barleys' case was that she was negligent in causing Ava to sleep on a bed. There were also contentions that she failed to ensure that her facility complied with the minimum standards set for ECD's in the Children's Act and the Guidelines. A further contention was that she failed in her Constitutional duty to ensure Ava's safety and security.

[13] In respect of the Province, the claim was broadly premised on failure, by the Provincial officials, to comply with statutory and Constitutional obligations to regulate, manage, control and support provision of ECD services in the Western Cape Province generally and to Aunty Dawn's in particular. The high-water mark of the case against the Province was that, had the officials processed Ms Moore's application for registration of Aunty Dawn's, they would have visited and inspected the facility for compliance with the applicable laws. Had they done that, and provided the necessary support and advice to Ms Moore, she would have complied by implementing a safe sleeping regime for the children, and would not have placed Ava on the bed. Her death would not have occurred.

[14] Both Ms Moore and the Province denied negligence in relation to Ava's death.

The trial

The evidence

[15] The high court considered the evidence of five witnesses. On behalf of the Barleys it was the evidence of Dr Yolande van der Heyde, a pathologist, Dr D H Van der

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registration or for the renewal of registration and either reject the application or, having regard to subsection (2), grant the registration or renewal with or without conditions;

(b) issue to the applicant a certificate of registration or conditional registration or renewal of registration in the prescribed form if the application is granted; and

(c) state in the certificate of registration the period for which the registration will remain valid.'

Watt, a specialist paediatrician, Mrs Barley, and Mr Terrence November who also testified as an expert witness and whose expertise is adverted to later in this judgement. The social worker, Dr Govender was the only witness who testified on behalf of the Province. Apart from Mr November the essence of the evidence of these witnesses appears in the background already outlined above.

[16] There is nothing contentious about the evidence of all the witnesses except Mr November. Although he held a three year degree in BA Social Science at the time of giving evidence he was neither a registered social worker nor qualified to register as such because he did not hold the requisite four year degree. He had only completed a number of short courses related to management of non-governmental and non-profit organizations, and had 27 years' experience working in the early childhood and community development sectors. He never worked for the State and had never managed an ECD or partial care facility. He had also never published any material in the area of ECD. Most importantly, he had no qualification in the field of law. Yet he claimed to be and testified impermissibly as an expert in relation to interpretation of the ECD and partial care statutory regime. Based on his asserted expertise, he gave lengthy evidence on the statutory obligations of the Province in relation to early childhood development. The contention, on behalf of Mr and Mrs Barley, was that he was an expert on 'facilitation of registration of ECD facilities'

[17] It is true that in certain cases lack of formal or theoretical training may be offset by practical experience in a specific field. However it is important to bear in mind that the basis for acceptance of opinion evidence is that such evidence will assist the court appreciably. A witness' opinion may assist the court in this way if the witness is better qualified to form an opinion than the court. If the court is in as good a position to form an opinion as the witness, or even better, the opinion of the witness is inadmissible.[8]

[18] Mr November's evidence relating to interpreting the relevant legislation, was clearly inadmissible. That task is one for the court.[9] Counsel on behalf of the Barleys correctly did not rely on any of it.

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[8] Zeffert and Paizes *The South African Law of Evidence* 2nd ed; at 311.
[9] *South Atlantic Islands Development Corp v Buchan* 1971 (1) SA 234 (C) at 238C-F.

Separation of issues

[19] The trial was conducted on the basis of an agreement or understanding between the parties and the court that the issue of liability for the damages suffered by the Barleys as a result of Ava's death, would be separated from the quantum thereof. But nowhere in the record does such an agreement appear. Nor is it referred to in the judgement of the high court. And no order of separation was granted by the court.

[20] This court has repeatedly warned against ill-considered separation of issues. In *Denel (Edms) Bpk v Vorster*[10] Nugent JA expressed this warning as follows:

'Rule 33(4) of the Uniform Rules – which entitles a court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not always be assumed that that result will always be achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly when there is more than one issue that may be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But where the trial court is satisfied that it is proper to make such an order – and in all cases it must be so satisfied before it does so – it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms like the 'merits' and the 'quantum' is often thought by all the parties to be self-evident at the outset of a trial but in my experience it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of Rule 33(4) and when issuing its orders a trial court should ensure that the issues are circumscribed with clarity and precision.'

[21] This is yet another case in which one can only conclude that no careful thought was given to the implications of separating the issues. The separated issues were never clearly circumscribed and the question of the evidence necessary in relation to each of those issues was seemingly not carefully considered. It appears that the idea was that evidence relating to the harm suffered by the Barleys would be led when considering the claim in relation to quantum of damages. This was wrong.

[10] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3.

[22] The Barleys had claimed damages for 'psychiatric injuries in the form of severe depressive symptoms, anxiety, post traumatic stress disorder and emotional disorder'. Their entitlement to an order for general damages after an assessment thereof, depended on them showing that they had indeed suffered injuries as alleged. Their best evidence on record in this regard was that Mrs Barley never went back to work subsequent to Ava's death, that Mr and Mrs Barley could not 'face living in Cape Town anymore', and that they went to live with Mr Barley's parents in Hermanus to get their support.

[23] A claim for sentimental damages based on deterioration in the quality of life as a result of emotional shock or grief, caused by the death of another is distinguishable from a claim for emotional shock associated with pain and suffering experienced by a plaintiff directly.[11] Medical or psychiatric evidence is the usual method by which psychiatric injuries are proved. Such evidence usually establishes, simultaneously, the causal nexus between the shock and the harm suffered. The extent to which such grief endures, and the impact thereof on the physical and mental wellbeing of the plaintiff, are crucial in proving a damages claim. If the shock is only for a short period and does not have real impact (transient shock) on the health of the plaintiff, it is usually disregarded.[12]

[24] No evidence of detectable or recognised psychiatric injury was led in this instance. In the absence of such evidence a finding of liability lacked a fundamental basis. This court seems to have been confronted with the same problem in *Barnard v Santam Bpk (Barnard)*.[13] There counsel were in agreement that the case had to be decided on an assumption that the appellant had suffered nervous shock resulting in significant psychological trauma. Whether she had indeed suffered such trauma and the extent thereof were questions that had to be referred back to the trial court.

[25] Foreseeability of the harm suffered and whether a reasonable person would have taken preventive action remains a further requisite for a finding of liability for damages

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[11] *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A). See also *Barnard v Santam Beperk* 1999 (1) SA 202 (SCA) and *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA).
[12] Visser and Portgieter *Law of Damages* 3rd edition at 110.
[13] *Barnard v Santam Beperk* 1999 (1) SA 202 (SCA).

based on psychiatric injuries. Indeed in *Barnard* this court held that the relationship between a mother and child was, by nature, very close, and that the closer the relationship between the victim and the traumatised person, the more reasonable the inference that shock was reasonably foreseeable. It must be stressed however, that the claim in Barnard was only against the perpetrator of the harm (and not the regulator). Had the separated issues been clearly circumscribed in this case, due attention would have been paid to these aspects. The differences between this and other similar cases and the implications of those differences would have been closely considered. Incidentally, the fact that the Barleys would, as a result of the separation, have to return to court to recount the tragic event and its effect on their lives for the purposes of determination of the quantum, is a telling factor in relation to the lack of thought given to the separation of issues.

The judgment of the court a quo

[26] Despite these deficiencies in the evidence, the high court found Ms Moore and the Province jointly and severally liable to Mr and Mrs Barley for Ava's death. The judge a quo concluded that 'the omissions of both defendants constitute(d) substantial factors in bringing about the harm that eventuated in th[e] matter'.[14]

[27] The court's findings were premised, broadly, on the responsibilities of the Province under the Child Care Act, the Children's Act, the Guidelines[15] to ECD services and the Regulations[16] promulgated in terms of the Child Care Act. The high court found that if the officials of the Province had visited Aunty Dawn's as required by these legal instruments, they would have become aware of the deficiencies at the facility and would have instructed Ms Moore to either close down the facility or reduce the number of children accommodated there until it qualified for registration. The court also found that the omission by the Province in this regard was a factual cause of (or contributor to) Ava's death and the consequent harm to her parents was what a reasonable person in

[14] *B and another v Moore and another* (20388/2011) [2017] ZAWCHC 70; [2017] 3 All SA 799 (WCC) para 92

[15] The Guidelines for Early Childhood Development Services (the guidelines - developed by the National Minister of Social Development, in terms of the Children's Act, to facilitate execution by that department of its role in early childhood development in the country).

[16] Children's Act Regulations.

the place of the Province would have foreseen and avoided. The court also found that the Barleys had no alternative remedy (against the Province) but to sue for damages.

On appeal

[28] The appeal had the following bases. It was contended that the Province did not owe the Barleys any legal duty attracting civil liability in relation to Ava's death. Whilst the Province acknowledged, as one of its primary duties, the promotion of the proper care of children and protection of their rights within the partial care facilities environment, it denied that it carried the primary responsibility of ensuring the safety of children in the day to day operation of privately run facilities. That primary responsibility resorted with the owners of the facilities, so it contended. Consequently the Barleys could not prove the requisite negligence (duty of care) on the part of its employees. In the absence of wrongfulness no question of negligence would arise, but in any event the Province argued that a reasonable person in its position would not have taken any further steps to guard against harm to Mr and Mrs Barley. Moreover, there was no causal link between Ava's death and the failure by Provincial officials to process Aunty Dawn's registration application. And, the alleged failures by Provincial employees were too remote from the harm (allegedly) suffered by the Barleys to constitute the legal cause thereof. And fourthly, the harm suffered by the Barleys was not reasonably foreseeable by the Provincial employees.

[29] The Barleys persisted in their reliance on the failure by the provincial employees to perform their statutory duty of processing Ms Moore's application for registration of Aunty Dawn's in terms of the Child Care Act, the Children's Act, the Guidelines and the Regulations.

Discussion

Common law claims for damages against the State

[30] In paras 23 to 25 above I have discussed the common law principles relating to a claim for damages for psychiatric injuries. That discussion does not consider cases such as the present, where the claim for damages is against the State. It is a basic requirement for delictual liability that the conduct complained of must have been wrongful (apart from being negligent).[17] For conduct to be wrongful it must infringe

[17] Joubert *LAWS* (2nd ed) Vol 8 at 81

either a legally recognised right of the plaintiff or constitute a breach of a legal duty owed to the defendant by the plaintiff.

'The legal duty may be imposed by statute or by operation of common law, in which case the imposition of the duty depends upon the particular circumstances of the case.'[18]

[31] In this case there can be no dispute that Ms Moore had a legal obligation to prevent harm to Ava as a primary victim and to Mr and Mrs Barley as secondary victims in relation to Ava's death. However the situation was different in respect of the Province. The question whether the Province had a statutory duty to protect the Barleys depended on its legal duty, if any, towards Ava and the causal link between the breach of that duty and the harm suffered by the Barleys.

[32] Whilst the regulatory responsibilities of the Province must be accepted, this does not necessarily translate into a legal duty to prevent harm to either Ava or her to parents. Breach of a statutory duty, such as that on which the claim against the Province was founded, is not per se wrongful for the purposes of determining delictual liability. It is merely a relevant factor in the determination of wrongfulness. The test as to whether in a given case the State has a legal duty, is flexible.[19] In *Minister of Safety and Security v Van Duivenboden*[20] this court expressed itself as follows on state delictual liability:

'The reluctance to impose liability for omissions is often informed by a *laisez faire* concept of liberty that recognises that individuals are entitled to 'mind their own business' even when they might reasonably be expected to avert harm, and by the inequality of imposing liability on one person who fails to act when there are others who might equally be faulted. The protection that is afforded by the Bill of Rights to equality, and to personal freedom and to privacy, might now bolster that inhibition against imposing legal duties on private citizens. However those barriers are less formidable where the conduct of a public authority or a public functionary is in issue, for it is usually the very business of a public authority or functionary to serve the interests of others, and its duty to do so will differentiate it from others who similarly fail to avert the harm. The imposition of legal duties on public authorities and functionaries is inhibited instead by perceived utility of permitting them the freedom to provide public services without the chilling effect of the threat of litigation if they happen to act negligently and the spectre of limited liability'.

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[18] Ibid at 83

[19] *Aspects of the Role of Policy in the Evolution of our Common Law* (1987) 104 SALJ 52

[20] *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA); [2002] 3 All SA 741 (SCA) para 19

The court also warned, however, that:

'That last consideration ought not to be unduly exaggerated, … bearing in mind that the requirements for establishing negligence, and a legally causative link, provide considerable practical scope for harnessing liability within acceptable bounds'.

[33] Relevant factors in determining delictual liability of the State include, its primary relationship with the plaintiff; potential of risk of harm created by the State prior to the breach; control, by the State, over a potentially harmful situation or thing; Constitutional norms and values; foreseeability of harm, the extent thereof and available practical preventive measures.[21] This case is distinguishable from *Van Duivenboden* and *Van Eeden* where this court found that the State had a legal duty towards the plaintiffs by virtue of the police having failed to take into custody dangerous criminals after reports had been made to them. This case is also distinguishable from those where the State has been held to have a direct responsibility to the plaintiff in respect of specific services.[22]

[34] In *Olitzki Property Holdings v State Tender Board & another*[23] the approach was outlined as follows:

'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 statutory duty *per se*, but because it is reasonable in the circumstances 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

[21] Joubert *LAWSA* (2nd ed) Vol 8 at 102.
[22] For example *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC).
[23] *Olitzki Property Holdings v State Tender Board and Another* [2001] ZASCA 51; 2001 (3) SA 1247 (SCA) para 12.

the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.'

[35] In *Knop v Johannesburg City Council*[24] this court held that the question whether a public authority is liable in damages for negligence in exercising its statutory functions must depend on the answer to the question whether the conduct was wrongful. This, in turn, entails consideration of the nature of the functions of the public authority.

[36] Against this background I now turn to examine the legislative framework on which the claim against the Province is founded in this case.

The legislative framework

[37] Ms Moore's application for registration of Aunty Dawn's straddled two pieces of legislation. It was made in 2008 in terms of s 30 of the Child Care Act. On 1 April 2010 the Children's Act came into effect. The Guidelines give insight as to the intention of the legislature in regulating as it did the accommodation and care of children in partial care facilities.

[38] The foundation for the minimum standards set in the Guidelines appears in the foreword to the Guidelines as follows:

'Early childhood development services need to be holistic and should attend to the child's health, nutrition, development, psychosocial and other needs. Parents, communities, non-governmental organisations and government departments have a role to play to ensure an integrated service to children. Collaboration between sectors is therefore of utmost importance. Access to basic social services is the right of all children, parents and other primary caregivers. They should have access to as many resources as possible to provide [for] the needs of young children'.

[39] Although the Department of Social Development bears the primary responsibility of ensuring that conditions are created for the optimum development of children through provision of support of appropriate services, it is not the only government department responsible for ensuring that young children are taken care of in the best way. Other government departments include the Departments of Health, Education, Housing, Home

[24] *Knop v Johannesburg City Council* [1994] ZASCA 159; 1995 (2) SA 1 (A); [1995] 1 All SA 673 (A).

Affairs, Justice and local municipalities.[25] The Regulations require the municipalities to be involved in giving approval in the establishment and continuation of ECD facilities. They also promulgate by-laws that regulate and monitor day-care facilities and child minding.

[40] The role and responsibilities of the provincial departments includes provision of support and guidance to ECD service providers in the province; development at the discretion of the Member of Executive Council (MEC) of provincial legislation, policies, guidelines, strategies and priorities on ECD; facilitation of registration of ECD facilities and monitoring the provision of registered and non-registered ECD services within communities.[26]

[41] Although registration of ECD facilities and adherence to minimum standards is strongly advocated,[27] challenges to responsibilities of government are acknowledged in the Guidelines. These include poverty, HIV and AIDS, disability, and inter-sectoral collaboration.[28] Further, the extent of logistical and financial difficulties inherent in the provision of these services was not lost on the legislature.

[42] The report of the South African Law Commission which preceded the promulgation of the Children's Act gives insight into the experience derived from implementation of the Child Care Act. In that report the Commission suggested that the provisions of the contemplated Act not be applicable to ECD facilities providing services to fewer than six children, a position taken to prevent over-regulation of the sector. The commission accepted that not all ECD services would be rendered in buildings.[29] Adequacy of human resources to assist in monitoring and evaluation of ECD facilities, especially in remote areas, was a concern expressed by the some of the role players.[30]

[43] Some of the challenges acknowledged in the Guidelines resonate with the difficulties expressed by Dr Govender when giving evidence in this case. For example,

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[25] See for example the Introduction to the Guidelines and Part One of Chapter 1 thereof at 13 (under the Heading 'The Importance of Providing Quality ECD services').
[26] At 24-25
[27] See ss 30(2) and (3) and s 30(6) of Child Care Act and Regulation 30 (2) and (3). Section 30(6) of the Child Care Act provided that any person who contravened or failed to comply with the provisions and requirements for registration of places of care would be guilty of an offence
[28] At 14 and 15.
[29] Compare with description of 'place of care' in the Child Care Act, 1983.
[30] For example this challenge was expressed to the commission by the Department of Health, Pretoria.

Aunty Dawn's was one of approximately 1400 private and unregistered ECD facilities operating in the Western Cape. Her evidence regarding the shortage of social workers in the country was that there were 16 164 registered social workers as against a need for 68 498. It is in this context that the province developed a policy in terms of which priority would be given to facilities located in disadvantaged communities. It is difficult to understand why Dr Govender's evidence in this regard was rejected by the judge a quo.

[44] Nothing in the legislative framework on which the Barleys rely is indicative of an intention to visit with delictual liability non-compliance with any particular regulatory function. Registration of ECD facilities under the Child Care Act and the Children's Act was essentially part of the broader role intended for the State to promote, provide and support EDC services around the country. In this regard the Guidelines provide that

'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'.

Given the important role fulfilled by child care facilities across social and economic strata throughout the country it is not surprising that a corrective rather than a purely punitive approach is preferred where there is non-compliance with minimum standards. In large part therefore, the legislative framework remained aspirational. The intention must have been that government, through the various government departments, led by the Department of Social Development would develop a plan to effect progressive access to ECD services in the various provincial jurisdictions within the country.

[45] Insofar as the Barleys' claim was founded on ss 12 and 28 of the Constitution an argument may be made that powers were conferred on the Province with the aim of safeguarding children in ECD facilities. However, 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.

[46] The role of the state in this case is distinguishable from that of the police officers in *Minister of Safety and Security v Van Duivenboden*[31] and *Van Eeden v Minister of Safety and Security*[32] where the police had previously been asked to exercise their powers to restrain specific unlawful conduct that had been brought to their attention. In this case there was no evidence that the Province had been alerted to specific risks or dangers to the children at Aunty Dawn's. On the contrary, the Barleys were satisfied with the services they received from the facility. Parents that were interviewed during the investigation into the tragedy expressed their willingness to continue entrusting their children to Ms Moore's care. And there is no evidence that non-adherence to norms and standards would have led to the closing down of the facility.

[47] More significantly, the contention that registration of the facility and consequent inspections would have prevented the tragedy finds no support in the evidence. The Guidelines prescribed only one visit to a facility per year. Ms Moore was quite alert to (recommended) safe sleeping practices for small children. She was also aware that Mrs Barley was not comfortable with the practice of causing Ava to sleep on the bed. Hence her coy explanation on the day preceding Ava's death about why she had left her sleeping on the bed. Yet, the following day she put her to sleep on the bed and left her alone in the bedroom. The contention that a visit from Provincial officials would have caused her to observe a safer sleep routine finds no support in the evidence. Consequently the order of liability against the Provincial Government cannot be sustained.

Causation

[48] Although given the findings made above, it is strictly speaking, not necessary to consider this aspect, I shall do so briefly. Even if the conduct of the Province gave rise to legal liability it is difficult to understand how such conduct could be causally linked to Ava's death. Apart from the fact that Ms Moore was quite aware of the recommended sleeping environment for babies of Ava's age, on the evidence, even if the Provincial officials had visited Aunty Dawn's and had done the prescribed inspections (which

[31] *Minister of Safety and Security v Van Duivenboden* .
[32] *Van Eeden v Minister of Safety and Security* (176/01) [2002] ZASCA 132; [2002] 4 All SA 346 (SCA) (27 September 2002).

would have been once a year), they would not have recommended closure of the facility. In the end, on all levels the claim for damages had to fail.

Costs

[49] Although this case does not fall squarely within the scope of *Biowatch Trust v Registrar Genetic Resources and Others*[33] it is only proper that the Barleys not be mulcted with an order of costs. The Barleys experienced great suffering as a result of the tragedy and it is understandable that they would approach the court for what assistance they might get. It would be undesirable to inflict further anguish on them.

[50] Therefore the following order is made:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced by the following order:

‘(a) The first defendant is liable to pay damages to the plaintiffs arising from the wrongful death of their daughter, Ava Barley, which occurred on 14 October 2010.

(b) The first defendant is liable for the costs incurred by the plaintiffs.

(c) Determination of quantum is postponed sine die.

(d) The claim against the second defendant is dismissed.

(e) Each party shall pay its own costs in respect of the claim against the second defendant’

3 Each party shall pay its own costs incurred in this appeal.

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N Dambuza

Judge of Appeal

[33] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

APPEARANCES

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