CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 234/20

In the matter between:

BE obo JE Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR SOCIAL DEVELOPMENT, WESTERN CAPE Respondent

Neutral citation:	*BE obo JE v MEC for Social Development, Western Cape* [2021] ZACC 23
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J
Judgment:	Tshiqi J (unanimous)
Heard on:	25 February 2021
Decided on:	27 August 2021
Summary:	Delict — liability — child care facilities — public law duty — wrongfulness.

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa):

1. Leave to appeal is granted.
2. The appeal is dismissed.

JUDGMENT

TSHIQI J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J and Tlaletsi AJ concurring):

Introduction

[1] On 12 August 2008, during the morning break at the Babbel and Krabbel play school[1] (the school), JE, then 5 years old, went outside and joined her fellow pupils to do what children enjoy doing the most: play. She was playing on a wooden swing structure when the top beam of the structure became dislodged and collapsed on top of her. She suffered a severe traumatic head and brain injury, leaving her severely and permanently disabled. Suddenly, JE'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.

[2] The issue that arises in this application is whether the respondent, the Provincial Minister: Western Cape Department of Social Development (the Minister), should be held delictually liable for damages arising from the accident.

[1] The school was a community organisation operated by Child Welfare South Africa: Bredasdorp, a registered Non-Governmental Organisation (NGO) in terms of the Non-Profit Organisation Act 71 of 1997.

Litigation history

High Court

[3] Following the accident, JE's father, the applicant, instituted a delictual claim against the Minister. The Minister, by way of a third-party notice, joined the Overberg District Municipality (Municipality), and the latter in turn joined the Minister and the school as the second and third parties. They were joined on the basis of contributory negligence. Contributions were sought from the Municipality in the event of the Minister being held liable to the applicant, and in the case of the school, if the Municipality was held liable. The applicant had sued the school in a separate action which was then consolidated with the main action against the Minister. The action against the school was withdrawn in terms of a settlement agreement between the parties.[2] The matter proceeded to trial in the High Court of South Africa, Western Cape Division, Cape Town. The issue of liability was separated from quantum.

[4] One of the witnesses who testified for the applicant was Mr Hillman, a mechanical engineering consultant who testified as an expert. His evidence, which was not challenged, focused on the design of the swing and the probable cause of the accident. He testified that the construction of the swing was inadequate for its purpose. Mr Hillman's evidence on the design of the swing and the defects he identified is aptly summarised by the Supreme Court of Appeal in its judgment.[3] As this evidence is not in dispute, and in light of the conclusion I reach on the question of wrongfulness, it need not be traversed in this judgment. It suffices to mention that Mr Hillman testified that the probable cause of the accident was the ordinary continuous use of the swing by the children at the school. This would probably have caused its fixings to undergo stress and eventually suffer metal fatigue. If the wear and tear was not addressed, and he seemed to suggest this had been

[2] The details of the settlement agreement are not before us and are irrelevant to the dispute between the applicant and the respondent.

[3] *Minister: Western Cape Department of Social Development v BE obo JE* [2020] ZASCA 103; 2021 (1) SA 75 (SCA) at paras 6-8 (Supreme Court of Appeal judgment).

the case, the fixings would break and any child underneath the falling beam would be injured and such injuries would probably be serious.

[5] The High Court held that on the evidence, considered against the relevant legislative framework, delictual liability had been established. Consequently, it held the Minister liable for the damages flowing from the accident. It dismissed the Minister's claim for contributory negligence against the Municipality and ordered the Minister to pay the applicant's and the Municipality's costs.

Supreme Court of Appeal

[6] A subsequent application for leave to appeal was dismissed by the High Court and the Minister then sought leave to appeal from the Supreme Court of Appeal. The Supreme Court of Appeal granted leave, upheld the appeal and substituted the High Court's order with an order dismissing the applicant's claim with no order as to costs. The Court also dismissed the Minister's claims against the Municipality and ordered each party to pay their own costs in the High Court and in respect of the appeal in the Supreme Court of Appeal. In this application, the applicant seeks leave to appeal against the order of the Supreme Court of Appeal. The Minister is the only respondent participating.

This Court

Jurisdiction

[7] This matter requires us to determine whether the Minister has a legal duty to take reasonable steps to prevent harm to children in Early Childhood Development Centres (ECD centres), places of care and similar institutions. This entails an interpretation of the relevant legislation and the Constitution. In terms of section 28(1)(b) of the Constitution, every child is entitled to, inter alia, appropriate alternative care when removed from the family environment. Section 28(1)(d) requires that children be protected from, inter alia, neglect. Although a matter will not be constitutional merely on the basis that the interests of children are affected in some or other way, the impact on children in this matter is

neither remote nor indirect.[4] Furthermore, the first issue to be determined in this application is whether the Supreme Court of Appeal was correct in its findings that the delictual element of wrongfulness had not been proven. In *Loureiro*,[5] this Court held that an appeal against a finding on wrongfulness on the basis that a Court failed to have regard to the normative imperatives of the Bill of Rights ordinarily raises a constitutional issue. This is because the wrongfulness element in delict depends on the evaluation of public policy, duly informed by the Constitution and constitutional values. Accordingly, this Court has jurisdiction to entertain this application.

Leave to appeal

[8] Having found that this Court's jurisdiction is engaged, the next hurdle for the applicant to surmount is the interests of justice enquiry. Leave may be refused if the interests of justice do not favour the granting of leave. In considering the interests of justice, prospects of success are an important aspect, but this is not the only factor to be considered.[6] Other relevant factors include: the importance of the issue,[7] whether a decision by this Court is desirable,[8] and public interest in the determination of the issue.[9] It cannot be gainsaid that this matter is of considerable public importance to the extent that

[4] Section 28(2) of the Constitution. See also *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) at para 2 where this Court held as follows:

> "Our constitutional democracy seeks to transform our legal system. Its foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms, introduce a new ethos that should permeate our legal system. Consistent with these values, section 28(2) of the Constitution requires that in all matters concerning a child, the child's best interests must be of paramount importance."

[5] *Loureiro v Imvula Quality Protection (Pty) Limited* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 34; *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (*Steenkamp*) at para 19 found that when an aggrieved party seeks to appeal against a court's finding on wrongfulness, we are seized with the matter. *Phumelela Gaming and Leisure Ltd v Gründlingh* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) at para 23 also found that when a court is criticised for an alleged failure to have regard to the spirit, purport and objects of the Bill of Rights in applying the test for wrongfulness, this Court will have jurisdiction over the appeal.

[6] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

[7] *De Reuck v Director of Public Prosecutions* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3.

[8] Id.

[9] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) 2011 at para 53.

it will provide clarity on whether the Minister has a legal duty to prevent harm to children in ECD centres and other places of care. This Court has not in the past been called upon to grapple with the existence and ambit of this alleged legal duty. The public interest and importance in this matter is heightened by the fact that children require special protection owing to their vulnerability. The Courts, as their upper guardians, are obliged to ensure that their best interests are secured in every matter concerning them.[10] Leave to appeal should be granted.

Issues

[9] In order to succeed against the Minister, the applicant must prove the elements of delictual liability. These are wrongfulness, negligence and causation. The Supreme Court of Appeal held that because the applicant had failed to prove wrongfulness, it was unnecessary to analyse whether negligence and causation had been proven.[11] The first issue to be determined by this Court is therefore whether the Supreme Court of Appeal was correct in its conclusion on wrongfulness. The question to be asked in order to determine wrongfulness is whether the Minister had a legal duty towards JE to prevent the harm suffered. If he did, we must then determine whether both negligence and causation have been proven by the applicant such that the Minister should be held vicariously liable for the injury suffered by JE.

Wrongfulness and legal duty

[10] It is trite that liability for negligence in delict in the first instance depends on the existence of a legal duty owed by the party sought to be held liable to the injured party to take steps to prevent the harm-causing conduct that gives rise to the claim. In *Country Cloud*[12] this Court aptly summarised the law relating to wrongfulness as follows:

[10] Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child.

[11] Supreme Court of Appeal judgment above n 3 at para 47.

[12] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) (*Country Cloud*). Also see *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51; 2001 (3) SA 1247 (*Olitzki*).

"Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue.' Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.

Previously, it was contentious what the wrongfulness enquiry entailed, but this is no longer the case. The growing coherence in this area of our law is due in large part to decisions of the Supreme Court of Appeal over the last decade. Endorsing these developments, this Court in *Loureiro* recently articulated that the wrongfulness enquiry focuses on—

> 'the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.'

The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: 'that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages', notwithstanding his or her fault."[13]

[11] In *Olitzki* the Supreme Court of Appeal stated the following regarding the existence of a legal duty in respect of an action where the plaintiff sues on the basis that there was a breach of a statutory provision:

"Where the legal duty the plaintiff invokes derives from the breach of a statutory provision,. . . 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."[14]

[13] *Country Cloud* id at paras 20-1.

[14] *Olitzki* above n 12 at para 12.

[12] In *Steenkamp N.O.* this Court listed the following as relevant factors to be considered when determining wrongfulness:

> "Our courts - *Faircape, Knop, Du Plessis* and *Duivenboden* - and courts in other common law jurisdictions readily recognise that factors that go to wrongfulness would include whether the operative statute anticipates, directly or by inference, compensation of damages for the aggrieved party; whether there are alternative remedies such as an interdict, review or appeal; whether the object of the statutory scheme is mainly to protect individuals or advance public good; whether the statutory power conferred grants the public functionary a discretion in decision-making; whether an imposition of liability for damages is likely to have a 'chilling effect' on performance of administrative or statutory function; whether the party bearing the loss is the author of its misfortune; whether the harm that ensued was foreseeable. It should be kept in mind that in the determination of wrongfulness, foreseeability of harm, although ordinarily a standard for negligence, is not irrelevant. The ultimate question is whether on a conspectus of all relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages."[15] (Footnotes omitted)

[13] Before I analyse whether the applicant established the element of wrongfulness, it is necessary to examine the pleadings in the court a quo in order to understand the case for the applicant better. Thereafter, I will briefly set out how the case crystallised in this Court by setting out the respective submissions by both parties.

Pleadings

[14] As the Supreme Court of Appeal observed, the duty alleged to have been owed to the applicant was pleaded in broad and general terms. Thus, it was impossible to clearly identify what the Minister and officials of the Department were required to do.[16] The applicant's pleaded case was that the school could only be registered under the

[15] *Steenkamp* above n 5 at para 42.

[16] Supreme Court of Appeal judgment above n 3 at para 19.

Child Care Act[17] (the Act) if the Minister[18] was satisfied that it complied with all the prescribed requirements under the Act and that it would be so managed and conducted as to be suitable and safe for the reception, care and custody of children. The legal duty on which the case was based was expressed in the following terms:

> "10 Accordingly, in the light of [the allegations described above], and in any event, the defendant at all material times had a legal duty:
>
> 10.1 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, specifically the minor.
>
> 10.2 That reasonable steps be taken to ensure the safety of children, specifically the minor, whilst on the school's premises.
>
> 10.3 To ensure the safety of children, specifically the minor, whilst on the school's premises."[19]

[15] Further details of the alleged negligence on the part of the Department were included in the applicant's amended particulars. It was alleged that they were negligent in the following respects:[20]

> "(a) failing to inspect the school's premises and specifically the swing structure at all, or, if they inspected them, failing to do so properly and adequately;
>
> (b) failing to ascertain that the top beam of the swing structure was not properly fastened or secured to the support poles and failing to warn the school's employees of that fact;
>
> (c) failing to ensure that the swing structure was properly or adequately maintained;
>
> (d) allowing a dangerous, or potentially dangerous, structure to be erected and kept on the school's premises and used by the children;
>
> (e) failing to properly safeguard the learners on the school's premises;

[17] 74 of 1983.

[18] In practical terms, the officials in the Department.

[19] Supreme Court of Appeal judgment above n 3 at para 17.

[20] As aptly summarised in the Supreme Court of Appeal judgment above n 3 at para 19.

(f) failing to ensure that the school and its premises were suitable and safe for the reception, care and custody of children."

Properly construed, the Minister's plea disputed the existence of any legal duty on his part to ensure the safety of children in places of care.[21]

Applicant's submissions

[16] The applicant argued that the Supreme Court of Appeal erred in holding that the role of the Minister was merely regulatory. According to the applicant, this erroneous reasoning led the Supreme Court of Appeal to a finding that the applicant had failed, in the delictual context, to establish wrongfulness. The applicant referred to the undisputed evidence led at the trial. This evidence was to the effect that no quality assurance assessment of playground equipment was undertaken by an appropriately trained official. The applicant submits that had such an inspection been undertaken, the defects in the design, construction and maintenance of the swing would have been readily apparent. He submitted that had such defects been attended to, JE would not have been injured.

Respondent's submissions

[17] The respondent submitted that although it's role to give effect to the rights of children enshrined in section 28(1)(c) of the Constitution by ensuring that child care facilities are provided and regulated, it does not ordinarily operate such facilities. In giving effect to these rights, the Minister, firstly, oversees their operation, initially through a registration process, and thereafter, by two-yearly reviews, and by inspections where these are required. And secondly, they fulfil a crucial role in providing financial services, where such support is required.

[18] The respondent contended that in the present matter, its principal obligation and that of the Department was not to ensure the physical safety of children on a day-to-day basis, but instead to oversee the operation of the ECD centres and other facilities

[21] The record illustrates that any deficiency in, or confusion occasioned by the terms of the plea was clearly resolved by the end of the trial.

throughout the province, in a manner that ensured that they were safe and suitable for the reception and care of children. In fulfilling this oversight role, it submitted that it does not bear the responsibility to check that individual pieces of equipment are safe and in working order. Rather, it ensures that facilities meet minimum standards, as required by the Guidelines for Early Childhood Development Services 2006 (Guidelines).[22] The respondent argued that there was therefore no legal duty on it that translates into a private law duty to pay damages in the event of breach.

Analysis

[19] The gist of the applicant's case was that the Minister's alleged duty existed in terms of the Act and the regulations[23] promulgated under the Act (the regulations). Two provisions were central to the applicant's case. The first was section 30(3)(b)[24] of the Act which provides that the Director-General must be satisfied that a proposed place of care complied with all prescribed requirements for registration and that it would be so managed and conducted that it would be suitable for the reception, custody and care of children. The second, which was the main ground invoked by the applicant in his submission that the Minister was under a legal duty to prevent the harm to JE, is regulation 30(4).

[20] Regulation 30(4) provides:

[22] These guidelines were published by the Minister of Social Development to facilitate the Department's execution of its role in early childhood development in the country. The Guidelines were developed in conjunction with United Nations Children's Fund (UNICEF) by way of technical assistance and financial support.

[23] Child Care Act: Regulations, GN R.2612 GG 10546, 12 December 1986.

[24] Section 30(3)(b) of the Act provides:

> "Application for the registration of a children's home, a place of care or a shelter shall be made to the Director-General in the prescribed manner, and the Director may -
>
> (b) reject any such application or, if he or she is satisfied that the children's home, or place of care or shelter complies with the prescribed requirements and that it will be so managed and conducted that it will be suitable for the reception, care and bringing-up or for the reception, care and custody of children, grant the application either unconditionally or on such prescribed and other conditions as he or she may deem fit, and issue to the applicant a certificate of registration in the prescribed form."

> "Registration of a children's home, place of care or shelter shall be reviewed every 24 months on the basis of a quality assurance assessment undertaken by appropriately trained officials appointed by the Director-General."[25]

As stated by the Supreme Court of Appeal in *Olitzki* and later endorsed by this Court in *Steenkamp N.O.*, one of the considerations in determining whether a claim that a breach or non-compliance with statutory provisions is wrongful, and can give rise to delictual liability, is whether the operative statute anticipates, directly or by inference, an obligation to pay damages for loss suffered as a result of the breach. If the regulations do not expressly, or by clear implication, impose any duty, the focus of the inquiry will be on whether the breach or non-compliance, when taken with all relevant factors, leads to the conclusion that it was wrongful so as to attract delictual liability. The relevant factors would be whether the regulations provide alternative remedies for their enforcement and whether their object is to protect a certain group or class of persons, or advance public good. This would also entail a question whether the power conferred by regulation 30(4) is discretionary and whether the imposition of delictual liability on the Minister will have a "chilling effect" on the exercise of the power to register ECD centres. Ultimately, the question is whether public policy and interest favour holding the Minister liable for damages arising from JE's accident.

[21] The applicant's pleaded case is that the Minister had duties to "provide for a safe environment" at places of care and to "take reasonable steps . . . to ensure the safety of children on school premises". The legal duty alleged by the applicant requires the Minister to have a level of operational control of school premises and responsibility for the day-to-day safety of children at the ECD centres. The first step therefore is to determine whether regulation 30(4), on which the applicant relies, imposes directly or by inference, the legal duty alleged by the applicant and whether it anticipates, directly or by inference, an obligation to pay damages for loss suffered as a result of the alleged breach. In considering whether regulation 30(4), expressly or by clear implication, imposes the legal duty alleged by the applicant, the first enquiry is whether the text of the regulation can be

[25] Regulations above n 23.

read to impose such a duty[26] and also whether contextually[27] it can be interpreted in this fashion. What the regulation states is: "[R]egistration of a children's home, place of care or shelter shall be reviewed every 24 months on the basis of a quality assurance assessment undertaken by appropriately trained officials appointed by the Director-General".[28] It says no more than that.

[22] Whether the Minister was under a legal duty to prevent the harm to JE also depends on the nature of the duty imposed by regulation 30(4), as properly interpreted. It is evident from the text of regulation 30(4) that its purpose is to regulate registration and re-registration of ECD centres and places of care. It requires that registration must be reviewed every two years. Registration and the prescribed periodical review assure parents of toddlers that a centre in which they wish to enrol their children, meets certain standards set by the province. The purpose of the prescribed periodical review is to ascertain whether the requirements which were met for purposes of registration are still in place. The Minister has the power to withdraw registration, if the centre no longer meets the registration requirements. A regulation that requires two-yearly reviews is not designed to secure the safety of learners and other people who are on the centre's premises on a daily basis and it cannot be interpreted in that fashion. The nature of the public duty imposed by the regulation shows that it is regulatory.

[23] In *CB*[29] the Supreme Court of Appeal considered an appeal that arose from the tragic death of a five month old baby girl at an ECD centre. Her parents instituted action against the operator of the facility, and the Provincial Government of the Western Cape: Department of Social Welfare, for damages suffered by them as a result of the death. Regarding the legislative framework relied upon in order to hold the Provincial Government liable, the Supreme Court of Appeal said:

---

[26] *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 89.

[27] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[28] Regulation 30(4) above n 23.

[29] *Government of the Western Cape: Department of Social Development v CB* [2018] ZASCA 166; 2019 (3) SA 235 (SCA).

> "Nothing in the legislative framework on which the Bs 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. . . . 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."[30]

[24] One of the factors that the Supreme Court of Appeal took into account in *CB* was whether an imposition of liability for damages is likely to have a "chilling effect" on performance of an administrative or statutory function.[31] The Supreme Court of Appeal said:

> "[C]onsidering 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."[32]

This factor is also relevant in this matter because both the Act and regulation 30(4) operate nationally. The alleged duty, if imposed, would, as observed by the Supreme Court of Appeal, apply in all nine provinces in literally thousands of places of care, children's homes, places of safety and shelters and other similar institutions.

[30] Id at paras 44-5.

[31] Id; also see *Mashongwa v PRASA* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC) (*Mashongwa*) at para 22.

[32] Id above n 29 at para 45.

[25] The Supreme Court of Appeal was therefore correct in holding 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.

[26] A consideration of all the factors points away from the imposition of liability on the Minister. Therefore, as the Supreme Court of Appeal correctly concluded, whilst the regulatory responsibilities of the Minister must be accepted, this does not entail 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. Consequently, the regulatory responsibilities of the Minister did not translate into a legal duty to prevent the harm suffered by JE.

[27] Apart from placing reliance on regulation 30(4), the applicant had another string to his bow. He submitted that the Minister should be held liable on the basis that the Province had concluded an agreement with the Municipality in terms of which the Province assumed responsibility for functions the Municipality owed to ECD centres. This argument was premised on the fact that, in terms of section 156(1)(a) of the Constitution, a Municipality has executive authority in respect of, and has the right to administer, the local government matters listed in Part B of Schedule 4 of the Constitution. Amongst these matters "child care facilities" are a functional area of the Municipality. Section 156(2) of the Constitution provides that a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer. The Municipality had in fact enacted a by-law that deals with child care facilities.[33]

[28] The Minister vigorously denied the existence of an agreement between the Municipality and the Department to the effect that the Minister had agreed to take over the responsibility of ECD centres in the Western Cape. He correctly submitted that the alleged

[33] Sections 33-5 of the Overberg District Municipality Environmental Health By-Law, GG 6141, 25 June 2004.

agreement was not before this Court and that no reliance can be placed on it. We are thus effectively barred from considering and relying on this alleged agreement.

[29] Counsel for the applicant also sought to place reliance on the Guidelines as yet another basis to find that the Minister had a legal duty to ensure that the ECD centres in the Province were safe for daily use by the children in these centres. However, the reference to these Guidelines does not assist the applicant. There is no basis to find that the Guidelines imposed a legal duty on the Minister. As stated by the Supreme Court of Appeal, the Guidelines are merely aspirational. They provide an indication of what is expected of those responsible for the oversight of places of care and similar institutions.

[30] As the Supreme Court of Appeal held, issues of safety, including the construction and maintenance of playground equipment, seem to be the responsibility of the person or organisation operating the facility and the persons employed in it as teachers, carers, assistants or ground staff. Ms Wyngaard, a retired teacher who was still in active service at the time of the accident, testified that the teachers usually inspected the equipment before the children went out to play, to check whether it was in a good condition. On the day of the accident, one of them checked it before it was used. She also testified that they supervised the children during play time. Just before the accident happened, Ms Wyngaard observed JE using the swing. A few minutes later the accident happened. The applicant sued the school but the matter was settled between those parties.

[31] This matter is distinguishable from *Mashongwa*, which the applicant argued was a basis for finding that the Minister had a legal duty towards ensuring the safety of ECD centres and other places of care. In *Mashongwa* the duty of the Passenger Rail Agency of South Africa (PRASA) was held to exist because PRASA's mandate related directly to the safe transportation of passengers. This Court held:

> "Safeguarding the physical well-being of passengers must be a central obligation of PRASA. It reflects the ordinary duty resting on public carriers and is reinforced by the specific constitutional obligation to protect passengers' bodily integrity that rests on

> PRASA, as an organ of state. The norms and values derived from the Constitution demand that a negligent breach of those duties, even by way of omission, should, absent a suitable non-judicial remedy, attract liability to compensate injured persons in damages."[34]

[32] In the present matter, neither the Minister nor the Department had a legal obligation to ensure the safety of playground equipment at ECD centres or to ensure the safety of children on a daily basis at ECD centres beyond conducting a biennial quality assurance assessment. Since there was no duty on the Minister to inspect playground equipment, nor to ensure the safety of the children on a daily basis, the question whether a breach of such a public duty translates into a private law duty does not arise in this matter. In the circumstances, the considerations of public policy do not favour holding the Minister liable for damages arising from JE's accident.

[33] In light of the finding on wrongfulness, it is unnecessary to deal with the issue of negligence and causation. Accordingly, I am of the view that the Supreme Court of Appeal's judgment should be upheld.

Costs

[34] The general rule is that costs should follow the result. The *Biowatch*[35] principle is an exception to the general rule. The applicant in this matter raised a constitutional issue. Despite being unsuccessful in the Supreme Court of Appeal and in this Court, he was successful in the High Court, and thus his application cannot be regarded as being totally hopeless from inception. The application was genuine and not frivolous. Had he been successful, the decision of this Court would have significantly impacted not only children in the Western Cape but all children in child care facilities across the nine provinces. There is no reason why the *Biowatch* principle should not apply. In any event, the Minister has expressly indicated that no costs should be awarded against the applicant should the application be dismissed.

[34] *Mashongwa* above n 31 at para 26.

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

Order

[35] I make the following order:

1. Leave to appeal is granted.
2. The appeal is dismissed.

For the Applicant:	A R Sholto-Douglas SC and H Rademeyer instructed by Van Der Spuy Attorneys
For the Respondent:	I Jamie SC and G R Papier instructed by State Attorney, Cape Town