

## New precedent set for wrongful death, government dept also held liable

The Western Cape courts have found against the owner of an unregistered ECD centre and the Western Cape Department of Social Development in the case of the death of Ava Barley, a five and a half month old baby.



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The ruling held both defendants jointly and severally liable for the wrongful death of Ava in 2010 and will set a new precedent for cases of this nature in the future.

This is according to DSC Attorneys' senior associate Chris Smit, who represented Ava's parents Craig and Riette Barley in the case against Catherine Moore, the owner of Auntie Dawn's Daycare Centre (an unregistered ECD centre) in Pinelands and the Department of Social Development.

The damages amount that the Western Cape Government and Moore (who left the country after being issued with a summons) must pay will be determined at a separate hearing.

"As legal representatives we are very satisfied with the ruling. This is a favourable outcome

and a landmark case because it will set a precedent for holding the (local) government accountable for failing to comply with its duties," says Smit. "It is particularly apt where harm that has ensued is closely connected to an omission of a defendant that carries the duty to prevent the harm.

"If the Department had complied with its obligations after having received Moore's application for the registration of her day-care centre, the risk of Moore leaving little Ava unattended on the bed alone, would have been eliminated.

"Legislative measures are not enough. The State is obliged to act to achieve the intended result. It failed to act in accordance with its obligations and must be held accountable for Ava's death."

Smit says that it is apparent that Moore's day-care centre remained unregistered for over 2½ years before Ava's death and that the application was only considered after the death.

"The Department was aware that the facility was being run as an unregistered facility and that Moore had no qualifications or formal training to look after infants. The Department did not take any steps to assist Moore's facility to become compliant and allowed it to operate in contravention of the Acts and Regulations and the Norms and Standards and Guidelines."

### Other deaths at unregistered providers

He says that during or around the time of Ava's death in 2010, at least two other infants died at unregistered facilities and that there are numerous other reported incidents of abuse and injuries to children at unregistered facilities. According to an audit of ECD facilities conducted in 2014 it is stated that the provinces appear "to be performing poorly in areas closely related to the care of infants."

Smit points out that despite numerous promises by the Department, made after Ava's death, that it would enforce and start complying with its obligations to register all ECD facilities in the Western Cape, there are still a large number of these centres which are being operated on an unregistered basis. There are an estimated 1500 unregistered day care centres in the province.

"Applications take years to be processed and, in some instances, applicants have been waiting for up to five years to be processed."

### Preventable death

In his opening, Judge Daniel Dlodlo said that a dark cloud enveloped the Barley family when their precious child named Ava rolled from the bed at

Aunty Dawns Daycare Centre and met her death.

"Moore took Ava to her own bedroom and placed her on her bed. She left the room and closed the door behind her. When she returned later that morning, she found Ava on the floor next to the bed, on which she had been put. Ava was not breathing and she was already dead."

"She had rolled off the bed and fell onto the floor and became wedged between the bed and a bedside table. She was then unable to breathe due to the position of her body and asphyxiated and died."

Smit says that the plaintiffs claimed that Moore was under a legal duty to ensure the safety and security of Ava whilst she was in her care. "They further claimed that the death of Ava was as a direct result of Moore's wrongful and negligent breach of her legal duty, in that she left Ava alone and unattended on a bed and failed to place her in a cot or some other safe resting area."

Dlodlo found in his ruling that the Department is and remains the primary agency of the State responsible for the discharge of its constitutional duty to protect the rights of infants in ECD facilities and that it failed to act in accordance with its obligations. "It cannot, in my view, evade being held accountable for Ava's death. It is and cannot be disputed that the Department is under a public-law duty to protect children in ECD facilities."

The judge also stated that the Department would be liable for its failure to comply with its constitutional and legislative duty to protect Ava.

The Department now has 20 days to lodge an appeal.