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Commentary on Contemporary Legal Issues

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The Editorial Board of this new electronic journal comprises:

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The primary objective of this journal is to post regularly online articles discussing topical and other important legal issues in Zimbabwe soon after these issues have arisen. However, other articles on other important issues will also be published.

The intention is to post at least two editions of this journal each year depending on the availability of articles.

We would like to take this opportunity to invite persons to submit for consideration for publication in this journal articles, case notes and book reviews.

Articles must be original articles that have not been published previously, although the Editors may consider republication of an article that has been published elsewhere if the written authorization of the other publisher is provided. If the article has been or will be submitted for publication elsewhere, this must be clearly stated. Although we would like to receive articles on issues relating to Zimbabwe, we would also encourage authors to send to us other articles for possible publication.

Using the Constitution to Develop the Law of Delict

By G. Feltoe

Introduction

The law of delict is a dynamic branch of the law which has shown itself to be capable of development and adaptation in the light of changing conditions in society. For instance, the concept of negligence has been applied to many new situations arising out of modern industrial and technological developments. Particularly in South Africa, the ambit of legal duty for public authorities in respect of liability for omissions has been broadened based upon the concept of the legal convictions of the community.

This article explores how the constitutional provisions can and should be used to develop and expand the common law of delict. It draws mostly from South African case law in which the courts have relied on constitutional values and fundamental rights guarantees to re-shape certain areas of the law of delict. The Constitution of Zimbabwe¹ contains many values and rights which are identical, or at least very similar, to those in the South African Constitution. The jurisprudence in these South African cases is thus of importance in the development of the law of delict in Zimbabwe.

Judicial development of common law prior to enabling constitutional provision

Prior to the inclusion of a constitutional provision empowering the courts to develop the common law in line with the Constitution, the courts were already taking it upon themselves to develop the common law. In the case of *Zimnat Insurance Co Ltd v Chawanda* 1990 (2) ZLR 143 (S) the court said that law in a developing nation must be dynamic and capable of accommodating to change. It said that the judiciary has a vital role to play in moulding and developing the law in light of social and economic change so as to accord with social needs of the country².

Zimbabwe constitutional provision on development of common law

The Constitution of Zimbabwe obliges the courts to develop the common law in line with it, delict being a branch of law that is governed primarily by the common law.

Section 46(2) of the Constitution provides that when developing the common law, every court must promote and be guided by the spirit and objectives of the fundamental rights provisions in Chapter 4 of the Constitution. Section 176 provides that the Constitutional Court, the Supreme Court and the High Court have inherent power to develop the common law, taking into account the interests of justice and the provisions of this Constitution. Like the Zimbabwean Constitution, the South African Constitution in s 19(2) provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights.

Constitutional values and fundamental rights provisions in the Constitution of Zimbabwe

¹ Constitution of Zimbabwe Amendment No 20, 2013

² In this case the court extended the Aquilian action for loss of support to cover a situation where a woman in an unregistered customary law union had lost support due to the death of her husband.

Section 3 of the Constitution of Zimbabwe contains the founding values and principles that must be respected. These include the supremacy of the Constitution, the rule of law, fundamental rights and freedoms, the recognition of the inherent dignity and worth of each human being, equality, gender equality and good governance. Chapter 4 contains the fundamental rights provision such as the right to life, the right to personal liberty, the right to dignity and the right to personal security.

Case law in South Africa

Various South African cases are summarised below. These cases show how constitutional values can be used to fortify the arguments in favour of delictual liability.

Loubser and Midgley *The Law of Delict in South Africa*³ p 33 point out:

“The [South African] courts have repeatedly emphasised that the [South African] Constitution embodies a normative value system that underpins our law and provides the backdrop against which we must develop the common law. Therefore, the Constitution expresses society’s core values and sets basic criteria against which we must test laws and conduct.”

Legal duty leading to liability for omissions

The cases summarised below deal with the issue of the extent to which constitutional provisions should be taken into account in deciding whether state officials should be held liable for omissions which have led to harm to private persons. These cases illustrate that, in deciding whether the legal convictions of the community demand the imposition of a legal duty upon the State, important considerations are constitutional values and rights. The cases dealt with below all involve police officers whose action or failures to take action have led to harm being caused to private persons.

The Carmichele case

This case illustrates the way in which constitutional provisions can help to shape the law of delict. In a Masters Dissertation⁴ the author refers to the *Carmichele* case as heralding the birth of transformative jurisprudence.

The summary of this case draws from Loubser and Midgley *The Law of Delict in South Africa*⁵ pp 37-40.

X was charged with attempted rape and attempted murder. The investigating officer was aware of X’s previous convictions for sexual offences. Despite this, he told the prosecutor there was no reason to oppose bail and the prosecutor did not oppose bail. X was released on bail and a few months later he broke into C’s house and attempted to murder her. He was convicted for these offences. C claimed damages against the police and the prosecution for the harm she had suffered.

³ Loubser, M and Midgley, R Eds *The Law of Delict in South Africa* Second Edition (2012)

⁴ H.W. Chauke *The Development of the Common Law under the Constitution: Making Sense of Vicarious Liability for Acts and Omissions of Police Officers* Masters Dissertation, University of the Limpopo 2010. <http://ul.netd.ac.za/bitstream/handle/10386/580/Research.pdf?sequence=3>

⁵ Loubser, M and Midgley, R Eds op cit note 3.

The Supreme Court of Appeal originally dismissed the claim for damages finding that neither the police nor the prosecutor had acted wrongfully as there was no legal duty to act positively to oppose bail. The matter was then taken to the Constitutional Court.⁶ The issue there was whether the court should develop the law of delict in this regard in the light of the contention by C that her rights to life, human dignity, equality and security as well as the constitutional provisions on the duties of the police had been violated. In particular, she alleged that the State had a duty to protect women against violent crime and sexual abuse.

The Constitutional Court reiterated that the Constitution is the supreme law and the Bill of Rights applies to all law and that under s 39(2) of the Constitution it provides that when developing the common law, every court must promote the spirit, purports and objects of the Bill of Rights and remove deviations in the common law where these are found to exist. The Court said that it was implicit in C's case that the common law had to be developed in this case beyond existing precedent. The court would consider whether the common law is in need of development and, if it is, in what way it should be developed. It pointed out that the State has positive duties to promote and uphold the spirit, purport and objectives of the Bill of Rights and is obliged not to perform any act that infringes the rights to life, human dignity and the freedom and security of the person.

The Constitutional Court then referred the matter back to the Court of first instance to reconsider the matter in the light of the principles raised by the Constitutional Court. The court of first instance, having heard further evidence, found in C's favour.⁷ There was then an appeal to the Supreme Court of Appeal. This court dismissed the appeal and found in C's favour. It accepted that both the police and the prosecutors have a public duty either to oppose bail or to place all relevant and readily available facts before the Court. It found that they had failed in this duty. It referred to the principles it has set out in the earlier decision of *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) and found that someone in the position of C had no other effective remedy against the State except an action for damages in delict. This remedy would therefore be available unless there were public policy considerations that required that the remedy should not be granted, such as whether in the present case that granting of the remedy would inhibit the police or the prosecution in the performance of their duties. The Court found that in the present case there was no reason to depart from the general principle that the State will be liable for its failure to comply with its constitutional duty to protect C who pre-eminently was a person requiring the State's protection.

In granting the damages, the Supreme Court of Appeal found that the police and prosecution had acted negligently and the harm to C was foreseeable in the circumstances given the proximity of the parties.

The *Van Duivenboden* case

In *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) under statute the police had power to take measures to deprive an unfit person of a firearm. The police were in possession of information that a person was unfit to be granted the permit but did not take action and the person used the weapon to kill his wife and daughter and to injure a third party. It

⁶ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)

⁷ *Carmichele v Minister of Safety and Security* 2004 (3) SA 431 (SCA) paras 21-22

was held the police owed a legal duty to members of the public to take reasonable steps to act on information in order to prevent harm to members of the public.

In reaching this conclusion, the court said that in determining whether the law should recognise the existence of a legal duty in any particular circumstances is a balancing against one another of identifiable norms. While private citizens might be entitled to remain passive when the constitutional rights of other citizens are threatened, the State has a positive constitutional duty, imposed by s 7 of the Constitution, to act in protection of the rights in the Bill of Rights. The existence of that duty necessarily implies accountability and s 41(1) of the Constitution expressly requires that government be accountable. Where the State officials act in conflict with their constitutional duty to protect rights in the Bill of Rights, the norm of accountability will assume an important role in determining whether a legal duty ought to be recognised in any particular case. Here there was a potential threat which placed in peril the constitutionally protected rights to human dignity, to life and to security of the person.

The present case concerned only with whether police officers who, in the exercise of duties on behalf of the State, are in possession of information that reflects upon the fitness of a person to possess firearms are under an actionable duty to members of the public to take reasonable steps to act on that information in order to avoid harm occurring. The imposition of this legal duty will not disrupt the efficient functioning of the police. There is no effective way to hold the State to account in the present case other than by way of an action for damages and, in the absence of any norm or consideration of public policy that outweighs it, the constitutional norm of accountability requires that a legal duty be recognised. The negligent conduct of police officers in those circumstances is thus actionable and the State is vicariously liable for the consequences of any such negligence.

The *Van Eeden* case

In *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 (1) SA 389 (SCA) C, a 19-year-old woman, was sexually assaulted, raped and robbed by M, a known dangerous criminal and serial rapist. M had escaped from police custody through an unlocked security gate some two-and-a-half months before. A instituted an action for delictual damages against the State in a Provincial Division. She claimed that the police owed her a duty to take reasonable steps to prevent C, a dangerous criminal and serial rapist, from escaping and harming her and that they had negligently failed in that duty. The police admitted that at the time of M's escape they had realised that M was a dangerous criminal who was likely to commit further sexual offences; that his continued detention was necessary for the protection of the general public and their personal rights and property; that his escape could easily have been prevented; and that the police regarded escapes from police custody and sexual attacks on women as 'policing priorities'. The Court *a quo* dismissed the appellant's claim on the ground that in the light of *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA) the police had owed the appellant no legal duty to act positively in order to prevent harm.

The appeal succeeded. The Supreme Court of Appeal emphasised that the police have a legal duty to act positively to protect individuals by taking active steps to prevent violations of the constitutional right to freedom and security of person, *inter alia* by protecting everyone from violent crime. The State was also obliged under international law to protect women against

violent crime such as sexual assaults. The police had failed in this duty by negligently allowing a known dangerous criminal to escape from police custody. The requirement of special relationship between plaintiff and defendant for imposing legal duty was no longer valid. The criterion in terms of the legal convictions of the community lies in deciding whether an omission must now incorporate constitutional norms, values and principles. This has to be done because the Constitution is the supreme law of the country, and no law, conduct, norms or values that are inconsistent with it have legal validity. This, for legal purposes, makes the Constitution a system of objective normative values. Under the Constitution there was a fundamental right to dignity and the Constitution sought to achieve equality and to advance human rights and freedoms, non-racialism and non-sexism.

The *Hamilton* case

In *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) the police failed to enquire into the psychological fitness of a person to hold a firearms permit. The applicant, who was mentally unstable, shot and seriously injured the respondent. The respondent sued the police in delict and was granted damages. On appeal, the court found that the police had negligently failed to perform their statutory duty to screen properly the applicant for the firearms permit. In deciding the issue of legal duty, the court took into account the duties imposed by the legislation relating to firearms permits. It also upheld, that under the Constitution, the injured party had an absolute right to protection of his right to bodily integrity and security.

The *Moses* case

In *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C) a person detained in a police cell died after being assaulted by fellow inmates. The assault took place between cell inspections which were 25 minutes apart. The police were unaware of the propensity of assailants towards violence and the assailants had not exhibited signs of aggressiveness. The police had limited manpower available and had other duties. In the circumstances the reasonable person would not have done more than the police had done.

Although the court decided that the police were not liable in this case, on the issue of wrongfulness it said that once a person was arrested, the defendant's employees were under an obligation to such a person to perform their duties and functions in a manner reasonable in the circumstances and with due regard to such a person's fundamental rights. The consequence of a person's detention was that she or he was deprived of her or his freedom of movement. Furthermore, that person's capacity to make and carry out her or his own decisions was interfered with. That brought about a heightened duty on the part of the defendant's employees of safeguarding a detained person's interests as one of the factors in the totality of circumstances relevant to the enquiry into wrongfulness.

Legal duty and vicarious liability

The *K* case

In *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) the applicant, who was brutally raped by three uniformed policemen who had given her a lift, applied for leave to appeal against a judgment of the Supreme Court of Appeal that held that the respondent was not vicariously liable for the policemen's conduct because, on the application of the standard test for vicarious

liability of whether there had been deviation from course of employment, the policemen had deviated from the course of their employment to an extent that they were no longer exercising the functions for which they were appointed or carrying out an instruction of their employer.

One of the grounds of appeal was that the Supreme Court of Appeal had erred in its application of the common law test for vicarious liability; and that if it had not, the test had to be developed as intended in s 39(2) of the South African Constitution. Leave to appeal was granted.

The court held that the overall purpose of s 39(2) was to ensure that the common law was infused with constitutional values. This normative influence had to extend throughout the common law, not only to instances in which the existing rules were clearly inconsistent with the Constitution. Thus the obligation s 39(2) imposed on courts was extensive and required them to be alert to the normative framework of the Constitution not only when some startling new development of the common law was in issue, but in all cases in which the incremental development of the rule was in issue. It held that the protection of the applicant's fundamental rights (to security of the person, dignity, privacy and substantive equality) were of profound constitutional importance. It was part of the duties of every police officer to ensure the safety and security of the public and to prevent crime. These were constitutional obligations affirmed by the provisions of the Police Act.

The court held the principles of vicarious liability and their application had to be developed to accord more fully with the spirit, purport and objects of the Constitution. What this meant was that the existing principles of common law vicarious liability had to be understood and applied within the normative framework of the Constitution, and the social and economic purposes which they sought to pursue. Although in committing the rape, the police officers had deviated from their duties and were acting for their own purposes and not those of the employer, they were simultaneously omitting to perform their duties as policemen.

There were several important facts pointing to the closeness of the connection between the conduct of the policemen and the business of their employer. First, the policemen all bore a statutory and constitutional duty to prevent crime and protect the members of the public. That duty also rested on their employer, and the policemen had been employed to perform that obligation. Secondly, the policemen had offered to assist the applicant and she had accepted their offer. She had thus placed her trust in them. In determining whether the Minister was vicariously liable, the court had to take into account the importance of the constitutional role entrusted to the police and of nurturing confidence and public trust in the police in order to ensure that their role was successfully performed. It had been objectively reasonable for the applicant to place her trust in the policemen. From a constitutional perspective the connection between the conduct of the policemen and their employment was sufficiently close to render the Ministry liable. Accordingly, that the Ministry was vicariously liable to the applicant for the wrongful conduct of the policemen.

Conclusion

The South African courts have relied upon their constitutional provisions when deciding when the State should be delictually liable for inaction or action on the part of State officials. Chauke, in his dissertation, comments that the landmark decisions of the Constitutional Court in

Carmichele v Minister of Safety & Security & Anor and *K v Minister of Safety & Security* represent its first steps forward in the journey of modernizing the law of state delictual liability to remedy the violation of fundamental rights occasioned by acts and omissions of police officers in the discharge of their duties.

The Zimbabwean courts should follow the lead provided by these cases and take full account of constitutional values and rights provisions when deciding cases of this nature.