REPORTABLE (13)

MILDRED MAPINGURE
v
(1) MINISTER OF HOME AFFAIRS
(2) MINISTER OF HEALTH AND CHILD WELFARE
(3) MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & PATEL JA
HARARE, MAY 28, 2013 & MARCH 25, 2014

I Mureriwa, P Mungwari and F Traquino, for the appellant
T Mpofu and C Saruwaka, for the respondents

PATEL JA: This is an appeal against the decision of the High Court in Case No. HC 4551/07, handed down on 12 December 2012, dismissing an application for default judgment against the respondents. The latter, having failed to file their plea, were barred in the proceedings before the court *a quo*. The appellant's claim, as amended, was for damages in the sum of US$10,000 for physical and mental pain and US$41,904 for maintenance in respect of her minor child. Her claim as against all three respondents was dismissed with no order as to costs.

THE FACTS

Most of the facts *in casu* are common cause. On 4 April 2006, the appellant was attacked and raped by robbers at her home in Chegutu. She immediately lodged a report

with the police in Chegutu and requested that she be taken to a doctor to be given medication to prevent pregnancy and any sexually transmitted infection. Later that day, she was taken to hospital and attended to by a Dr. Kazembe. She repeated her request, but the doctor only treated her injured knee. He said that he could only attend to her request for preventive medication in the presence of a police officer. He further indicated that the medication had to be administered within 72 hours of the sexual intercourse having occurred. She duly went to the police station the following day and was advised that the officer who dealt with her case was not available. She then returned to the hospital, but the doctor insisted that he could only treat her if a police report was made available. On 7 April 2006, she attended the hospital with another police officer. At that stage, the doctor informed her that he could not treat her as the prescribed seventy – two (72) hours had already elapsed. Eventually, on 5 May 2006, the appellant's pregnancy was formally confirmed.

Thereafter, the appellant went to see the investigating police officer who referred her to a public prosecutor. She indicated that she wanted her pregnancy terminated, but was told that she had to wait until the rape trial had been completed. In July 2006, acting on the direction of the police, she returned to the prosecution office and was advised that she required a pregnancy termination order. The prosecutor in question then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. She finally obtained the necessary magisterial certificate on 30 September 2006. By that stage, the hospital matron who was assigned to carry out the termination felt that it was no longer safe to carry out the procedure and declined to do so.

Eventually, after the full term of her pregnancy, the appellant gave birth to her child on 24 December 2006.

GROUNDS OF APPEAL

As I have already indicated, the learned judge *a quo* dismissed the appellant's claim in its entirety. He found that the appellant's misfortune was the result of her own ignorance as to the correct procedure to follow. In particular, it was incumbent on her to initiate the process for the termination of her pregnancy by way of affidavit or oath before a magistrate. He further held that it was not the mandate of the officials involved to advise the appellant on questions of procedure. Consequently, the respondents were not directly or vicariously liable to the appellant.

The appellant's grounds of appeal against this decision are fairly extensive. The court *a quo* is stated to have erred in the following respects:

(i) applying the provisions of the Termination of Pregnancy Act in relation to the failure to prevent her pregnancy immediately after she was raped;

(ii) holding that the negligence of the police in relation to the prevention and termination of the appellant's pregnancy was not material;

(iii) finding that the duties of the officials in question did not include the giving of proper guidance on the procedure to be followed;

(iv) finding that the appellant had not complied with the relevant provisions of the Act;

(v) not finding that the "authorities" referred to in the Act meant the employees of the respondents;

(vi) not holding that the police and prosecutors were enjoined by the Act to submit the requisite documents to the magistrate; and

(vii) holding that the liability of the respondents did not extend to extra-statutory duties founded on the public's expectation of their official standing.

In essence, the issues arising for determination from these wide-ranging grounds of appeal are twofold. The first is whether or not the respondents' employees were negligent in the manner in which they dealt with the appellant's predicament. The second, assuming an affirmative answer to the first, is whether the appellant suffered any actionable harm as a result of such negligence and, if so, whether the respondents are liable to the appellant in damages for pain and suffering and for the maintenance of her child.

MEDICAL NEGLIGENCE

The principles of Aquilian liability for medical negligence were extensively canvassed by the South African Appellate Division and Supreme Court of Appeal in *Administrator Natal* v *Edouard* 1990 (3) SA 581 (AD) and *Mukheiber* v *Raath & Anor* 1999 (3) SA 1065 (SCA). Both cases arose in the specific context of unwanted pregnancies.

In *Edouard's* case, the respondent sued the appellant for damages in a Local Division, for breach of a contract concluded between the respondent's wife and a provincial hospital, arising from its failure to perform a tubal ligation to render her sterile during the course of a caesarean section. After his wife gave birth to another child a year later, the respondent claimed contractual damages for the cost of supporting and maintaining the child and general damages for the discomfort, pain and suffering and loss of amenities of life suffered by his wife. The court *a quo* upheld the claim for maintenance and support of the child but held that a breach of contract did not give rise to a claim for non-patrimonial damages. On appeal, it was contended for the appellant that to allow the pregnancy claim would be to transfer the legal obligation of supporting a child from the parents to a doctor or hospital and this ran counter to public policy which demanded that there be no interference with the sanctity accorded by law to the relationship between parent and child. This contention was rejected by VAN HEERDEN JA, at 592H-593E, on the basis that:

> "The judgment in favour of the respondent …… in no way relieved the respondent [or his wife] from the obligation to support [the child]. At most it enabled the respondent to fulfil that obligation. There can thus be no question that the obligation has in law been transferred from the respondent to the appellant …….
>
> In the result, I am of the view that the respondent's pregnancy claim was rightly allowed by the Court *a quo*. I should make it clear, however, that my conclusion is intended to pertain only to a case where, as here, a sterilisation procedure was performed for socio-economic reasons. … different considerations may apply where sterilisation was sought for some other reason."

As regards the claim for pain and suffering, it was held that only patrimonial loss could be recovered in contract. There was no sufficient reason of policy or convenience

for importing into the law an extension of liability for breach of contract so that intangible loss may be recovered *ex contractu*, as this would lead to incongruous results.

In the *Mukheiber* case, the claim against the doctor was not contractual but delictual. The respondents, husband and wife, relying on a misrepresentation by the appellant, a gynaecologist, that he had sterilised the wife, had desisted from contraception. Consequently, a child was conceived and born. The respondents claimed compensation from the appellant under two heads of pure economic loss, for the costs of confinement of the wife and for the maintenance of the child until it became self-supporting. As regards the existence of a legal duty of care, it was held by OLIVIER JA, at 1076F:

> "The relationship between Mrs. Raath (and her husband) and Dr. Mukheiber and the nature of his duties towards them amounted, in my view, to a special duty on his part to be careful and accurate in everything that he did and said pertaining to such relationship."

The test for professional negligence was expounded by the learned Judge of Appeal, at 1077D-I, as follows:

> "For the purposes of liability *culpa* arises if–
> (a) a reasonable person in the position of the defendant-
> (i) would have foreseen harm of the general kind that actually occurred;
> (ii) would have foreseen the general kind of causal consequence by which that harm occurred;
> (iii) would have taken steps to guard against it; and
> (b) the defendant failed to take those steps.
>
> In the case of an expert, such as a surgeon, the standard is higher than that of the ordinary lay person and the Court must consider the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs (*Van Wyk* v *Lewis* 1924 AD 438 at 444). Dr. Mukheiber did not dispute that, if it was found that he had made the representation under discussion, his action was negligent. Applying the tests set

> out above, it is clear that Dr. Mukheiber should reasonably have foreseen the possibility of his representation causing damage to the Raaths and should have taken reasonable steps to guard against such occurrence, and that he failed to take such steps."

As regards the extent of the expert's liability vis-à-vis considerations of public policy, it was held, at 1081H- 1082B:

> "As far as the confinement cost is concerned, there can be no defence: such costs were reasonably foreseeable and there is no reason to limit them. The problem arises in connection with the maintenance claim. The cost of maintaining the child Jonathan is a direct consequence of the misrepresentation. It was foreseeable by a gynaecologist in Dr. Mukheiber's position. In principle he is, by virtue of considerations of public policy, not protected against such a claim, as pointed out above. But the claim cannot be unlimited. His liability can be no greater than that which rests on the parents to maintain the child according to their means and station in life, and lapses when the child is reasonably able to support itself.
> In the result, I am of the view that considerations of public policy do not militate against holding Dr. Mukhaiber liable for compensating the Raaths for the damages claimed by them."

LIABILITY OF THE POLICE

With respect to the liability of the police, in the context of their prescribed functions and duties, the South African case of *Minister of Police* v *Ewels* 1975 (3) SA 590 (AD) is particularly instructive. The respondent in that case, an ordinary citizen, had been assaulted by an off-duty police sergeant in a police station. In an action for damages, the appellant had excepted to the respondent's claim on the ground that the Police Act No. 7 of 1958 placed no legal duty on the policemen to protect the appellant, nor created any civil liability, and that the conduct of the policemen was not such as to have created a legal duty to protect the respondent. The court *a quo* dismissed the exception and its decision was upheld on appeal to the Appellate Division.

As regards the statutory functions of the police, Rumpff CJ took the view, at 596, that:

> "If the purpose of the Legislator, as reflected in this Act, is taken into account, it cannot in my opinion be said that the non-compliance by a policeman of the provisions of sec. 5 necessarily creates a civil liability. …… Despite this, the statutory duty which appears from sec. 5 is a factor which ought to be taken into account in the factual circumstances of this case ……"

In the context of liability for omissions in general, the learned Chief Justice expounded the governing principles, at 596-597, as follows:

> "It would appear that the question of an omission, as delictual unlawful conduct, has reached a measure of clarity, cf. ……. The premise is accepted that there is no general legal duty on a person to prevent harm to another, even if such person could easily prevent such harm, and even if one could expect, on purely moral grounds, that such person act positively to prevent damage. It is also however accepted that in certain circumstances there is a legal duty on a person to prevent harm to another. If he fails to comply with that duty, there is an unlawful omission which can give rise to a claim for damages. …… It appears that the stage has been reached where an omission is regarded as unlawful conduct when the circumstances of the case are such that the omission not only occasions moral indignation but where the legal convictions of the community require that the omission be regarded as unlawful and that the loss suffered be compensated by the person who failed to act positively. When determining unlawfulness, one is not concerned, in any given case of an omission, with the customary 'negligence' of the *bonus paterfamilias*, but with the question whether, all facts considered, there was a legal duty to act reasonably. ……
>
> Just as a duty to rescue can sometimes be a legal duty, so a duty to protect may be a legal duty, and it would depend on all the facts whether such duty is a legal duty or not. Clearly it is impossible to determine in general when such a legal duty would arise."

With specific reference to the preventive functions of the police, it was held at 597:

> "As regards crime, the policeman is not only a deterrent and a detective but also a protector. Plaintiff was assaulted in a police station under the control of the police and in the sight of a number of policemen, for whom it was possible, even easy, jointly, to prevent or stop the attack on plaintiff. ……

> When all the circumstances are considered, I think that the duty of the policemen to assist the plaintiff was a legal duty, and that, because it was an omission which took place in the course of duty of the policemen, defendant is liable."

In upholding the decision of the lower court dismissing the exception, it was observed, at 597-598:

> "According to the pleadings the policemen were negligent, and in the context of the cause of action this must be understood as an allegation that they ought to have foreseen that their inaction would cause damage to plaintiff and that they failed, by reasonable action, to prevent the damage. The cause of action therefore contains the allegations of an unlawful omission and fault, and the exception was correctly dismissed."

In *Minister of Police* v *Skosana* 1977 (1) SA 31 (A) the Appellate Division grappled with the question of causation in a situation where a drunken driver, who had been injured in a motor accident, died whilst under police custody due to the failure to timeously procure medical attention for him. The deceased would probably have survived had he been taken for treatment timeously. It was held, by a 3-2 majority, that the police had failed in their duty towards the deceased and were liable to his widow and minor children for damages resulting from his death. Corbett JA, delivering the majority judgment, set out the governing principles, at 34E-35D:

> "Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to …….. the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue, or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part. ……..
>
> The test is thus whether but for the negligent act or omission of the defendant the event giving rise to the harm in question would have occurred. The test is otherwise known as that of the *causa (conditio) sine qua non* and I agree with my

> Brother Viljoen that generally speaking …….. no act, condition or omission can be regarded as a cause in fact unless it passes this test."

Applying this test, the majority concluded that the respondent had established negligent delay in furnishing the deceased with medical aid and treatment and that, as a matter of probability, the deceased would have survived but for the negligence of the police.

In *Minister of Law and Order* v *Kadir* 1995 (1) SA 303 (A) the Appellate Division adopted a more restrictive approach to the claim before it. The police attending to a traffic accident failed to record the particulars of the driver who caused the accident. The result of this failure was that the person who had been injured in the accident was unable to locate the driver and sue him. It was held that the police did not owe the injured party a legal duty to record information relating to the identity of the driver or his vehicle and, therefore, the injured party was not entitled to sue the police. Hefer JA, at 321H-322B, distinguished the facts of *Ewels'* case as being vastly different and reasoned as follows:

> "Viewing the matter objectively society will take account of the fact that the functions of the police relate in terms of the Act to criminal matters and were not designed for the purpose of assisting civil litigants. Members of the community will realise that services are rendered by the police in connection with road accidents in the course of what was described in *Dease* v *Minister of Justice* 1962 (3) SA 215 (T) at 218B-C as "exceptional duties falling outside the meaning of the term 'police duties' as ordinarily understood," and that these duties, largely self-imposed, may well be terminated or curtailed if the Courts penalise less than perfect performance. Bearing this in mind society will baulk at the idea of holding policemen personally liable for damages arising from what was a relatively insignificant dereliction of duty.

> In my view the facts alleged in the particulars of claim do not *prima facie* support the existence of a legal duty towards the plaintiff. The exception should have been allowed."

In *Van Eeden* v *Minister of Safety and Security* 2003 (1) SA 389 (SCA) the Supreme Court of Appeal evaluated the concept of the legal convictions of the community in light of the constitutional imperatives of the State as embodied in the Bill of Rights The State was held liable for a rape committed by a known dangerous criminal and serial rapist who had escaped through an unlocked gate from police cells where he was being held for an identification parade. Vivier ADP enunciated the common law position, at paras. 9-12:

> "Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment, based *inter alia* upon its perception of the legal convictions of the community and on considerations of public policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered. ……..
>
> In applying the concept of the legal convictions of the community the court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community, such as the legislature and judges. .....
>
> The approach of our courts to the question whether a particular omission to act should be regarded as unlawful has always been an open-ended and flexible one. ……..

> The concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the Constitution. The Constitution is the supreme law of this country, and no law, conduct, norms or values that are inconsistent with it can have legal validity, which has the effect of making the Constitution a system of objective, normative values for legal purposes. …….. The Constitution cannot, however, be regarded as the exclusive embodiment of the delictual criterion of the legal convictions of the community, nor does it mean that this criterion will lose its status as an agent in shaping and improving the law of delict to deal with new challenges."

Having regard to the constitutional right to freedom and security of the person, as including the right to be free from all forms of violence from either public or private sources, it was held, at para. 24:

> "In all the circumstances of the present case I have come to the conclusion that the police owed the appellant a duty to act positively to prevent Mohamed's escape. The existence of such a duty accords with what I would perceive to be the legal convictions of the community and there are no considerations of public policy militating against the imposition of such a duty. To sum up, I have reached this conclusion mainly in view of the State's constitutional imperatives to which I have referred, the fact that the police had control over Mohamed who was known to be a dangerous criminal and who was likely to commit further sexual offences against women should he escape, and the fact that measures to prevent his escape could reasonably and practically have been required and taken by the police."

In Zimbabwe, in the leading case of *King* v *Dykes* 1971 (2) RLR 151 (AD), the factual situation involved the failure of a farmer to take reasonable steps to fight and prevent the spread of a fire which had spread onto his land from an adjoining farm. Our Appellate Division reserved to itself the power to create additional legal duties to act positively in cases falling outside the scope of the recognised categories of negligence. As was explained by Macdonald ACJ, at 154C-D:

> "In border line cases the real problem with which a court is faced in the final analysis is to whether an undoubted moral duty existing in the particular circumstances should be translated into a legal duty. It is the intractability of this problem, arising more particularly in cases involving omission, which encourages

> courts to seek refuge in rules of thumb. Such a refuge, however, is illusory and in the end causes a great deal more mischief to the law than good."

The preferable approach to be taken was articulated by the learned Acting Chief Justice, at 157D-F, as follows:

> "Whether a moral duty exists will not, in the majority of cases, be difficult to decide. The problem, as indicated above, is always to decide whether the moral duty should be translated into a legal duty. The resolution of this problem is not an exact science, on the contrary, the court, after assessing all the relevant factors, must of necessity come to what is essentially a value judgment in order to do justice between the parties. It is beyond the wit of man to devise sets of rules for different situations, the application of which will provide a satisfactory answer with mathematical certainty."

Commenting on this decision in comparison with the *Ewels* and *Kadir* cases, *supra*, Prof. G. Feltoe in *A Guide to the Zimbabwean Law of Delict* (2012) at p. 45 opines that:

> "There appears to be little difference between the test applied in South Africa and that applied in Zimbabwe to decide whether a new legal duty should be recognised because the final decision will obviously revolve around policy considerations such as social utility, practicality of enforcing a new duty, and the likely impact upon the [defendant's] activities of such a duty".

In summation, the underlying rationale of all of the decided cases vis-à-vis the role of the police is that their duty to act cannot be confined to their statutorily prescribed functions. In the specific circumstances of any given case, it may be legally incumbent upon them to act outside and beyond their ordinary mandate, so as to aid and assist citizens in need, in matters unrelated to the detection or prevention of crime. Consequently, where such a legal duty is found to exist, and harm that is foreseeable eventuates from the failure to prevent it, the victim of that harm may be entitled to pursue

and obtain appropriate compensation through a claim for damages, having regard in every case to considerations of public policy.

THE INTERNATIONAL DIMENSION

A further aspect that arises for consideration in the present context is the normative role of international instruments that specifically address the rights of women. In strict constitutional terms, the prescriptions of such instruments cannot operate to override or modify domestic law unless and until they are internalised and transformed into rules of domestic law. (This principle of the common law was expressly codified in s 111B (1) (b) of the former Constitution and is now reaffirmed in s 327 (2) (b) of the new Constitution). Nevertheless, it is proper and necessary for national courts, as part of the judicial process, to have regard to the country's international obligations, whether or not they have been incorporated into domestic law. By the same token, it is perfectly proper in the construction of municipal statutes to take into account the prevailing international human rights jurisprudence. As was observed by Dumbutshena CJ in *State* v *A Juvenile* 1990 (4) SA 151 (ZSC) at 155G-I:

> "An added advantage is that the Courts of this country are free to import into the interpretation of s 15(1) interpretations of similar provisions in International and Regional Human Rights Instruments such as, among others, the International Bill of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Convention on Human Rights. In the end international human rights norms will become part of our domestic human rights law. In this way our domestic human rights jurisdiction is enriched."

This approach was positively endorsed and adopted by Gubbay CJ in *Rattigan & Ors* v *Chief Immigration Officer & Ors* 1995 (2) SA 182 (ZSC) at 189G-190I. The

learned Chief Justice, eschewing "the austerity of tabulated legalism", made extensive reference to decisions of the United Nations Human Rights Committee and the European Court of Human Rights in the process of purposively interpreting and applying provisions embodied in our Declaration of Rights.

For present purposes, there are several internationally recognised norms that have a direct bearing on the issues at hand. Firstly, there is the Convention on the Elimination of All Forms of Discrimination against Women 1979, which was ratified by Zimbabwe on 13 May 1991. Article 16 of the Convention requires States Parties to eliminate discrimination against women in all matters relating to marriage and family relations. In particular, para. (e) of Article 16.1 guarantees "the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights".

Again, Article 4 of the United Nations Declaration on the Elimination of Violence against Women 1993, calls upon States to pursue a policy of eliminating violence against women. To this end, women who are subjected to violence "should be provided with access to the mechanisms of justice and …… just and effective remedies for the harm that they have suffered" as well as information on "their rights in seeking redress through such mechanisms" (para. (d)). Furthermore, States should ensure that female victims of violence "have specialised assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services" (para. (g)).

Also relevant are various provisions of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2003. Article 4 of the Protocol enjoins States Parties to take appropriate and effective measures to "establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women" (para. (f)). Of special relevance is Article 14 pertaining to health and reproductive rights. Article 14.1 obligates States Parties to respect and promote the rights of women "to control their fertility …… to decide whether to have children, the number of children and the spacing of children [and] …… to choose any method of contraception". Equally significantly, in terms of Article 14.2(c), States Parties must take all appropriate measures to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest ……".

I note that many of the above-mentioned requirements are already recognised in the laws and administrative practices of Zimbabwe, though they may not have been specifically domesticated. In any event, as I have intimated earlier, it is both proper and instructive to have regard to them as embodying norms of great persuasive value in the interpretation and application of our statutes and the common law.

NEGLIGENCE IN RESPECT OF PREVENTION OF PREGNANCY

In terms of the appellant's declaration, the negligence of the respondents' employees in relation to their failure to prevent the appellant's pregnancy is stated as follows. Firstly, the police failed to attend timeously in taking the appellant to the doctor

for her pregnancy to be prevented. Secondly, the doctor himself failed to terminate the pregnancy when it could have been reasonably prevented. The magistrate and prosecutors are not implicated in this aspect of the appellant's claim.

As a general rule, the mandate of the police is to prevent the commission of crimes and to bring to book the perpetrators of crime. Their functions in cases involving rape do not ordinarily extend to the prevention of potential pregnancy or the provision of assistance in that process. Indeed, the declaration does not aver the existence of any specific common law or statutory duty in that regard. This is an aspect that is only raised in the appellant's heads of argument. Be that as it may, I do not think that this omission is fatal to the appellant's cause of action. In my view, the averments of negligence as framed in the declaration suffice to import, by necessary implication, the requisite averment of breach of duty (*cf.* the approach taken in *Ewels'* case, *supra*, at 597 -598).

Notwithstanding what might be accepted as the ordinary functions of the police, the inaction of the police in this case cannot be treated in isolation. It must be seen in conjunction with the conduct of the doctor who treated the appellant after she was raped. It is common cause that the doctor declined to administer the preventive medication requested by the appellant without a police report. Subsequently, after the appellant made numerous trips to the police station, a police officer eventually accompanied her to the hospital. At that stage, the doctor again refused to administer the drug because (seventy-two) 72 hours had already elapsed since the occurrence of the sexual intercourse. In all of these respects, there is nothing in the record to show why the doctor

insisted on a police report or why he regarded the period of (seventy-two) 72 hours as being critical. It may well be that the established hospital procedure or practice necessitated that insistence. However, there is no plea filed of record or any other evidence to explain or support the position adopted by the doctor.

Another aspect that is absent from the record, but which was alluded to by counsel for the respondents at the hearing of the appeal, is the availability of the preventive drug off the counter upon request from any licensed chemist. (I understand that this drug is pharmaceutically identified as "livonorgesterol" and sold under the trade names Pregnon and Prostino). Again, it is not at all clear whether this was a viable option without a medical prescription and, if it was, why the doctor did not advise the appellant to proceed accordingly. Consequently, in the absence of any evidence to the contrary in the record, we find that the only recourse available to the appellant, at the relevant time and in the prevailing circumstances, was the medication that could and should have been administered by the doctor himself.

It cannot be disputed that there was a professional relationship between the appellant and the doctor. The nature of his duties required that he attend to all the physical injuries arising from the sexual assault inflicted upon her. Consequently, as was postulated in *Mukheiber's* case, *supra*, the doctor was under a special duty to be careful and accurate in everything that he did and said pertaining to his relationship with the appellant. It behoved him to exercise that level of skill and diligence possessed and exercised at the time by the members of his profession. In my view, a reasonable person

in the position of the doctor would have foreseen that his failure to administer the contraceptive drug, or his failure to advise the appellant on the alternative means of accessing that drug, would probably result in her falling pregnant. Being in that position, he should have taken reasonable steps to guard against that probability. However, despite the appellant's quandary and persistent pleas for treatment, he stubbornly failed to take any steps to mitigate her condition.

On their part, the police failed to compile the requisite report or to accompany the appellant to the doctor despite several spirited efforts by her to obtain their assistance. The evidence before the court *a quo* indicates that the police were very alive to the appellant's predicament but neglected to comply with her entreaties for various administrative reasons that are not entirely clear. The situation before them was that of a victim of sexual violence requiring their urgent assistance. They were called upon either to compile a report on the assault or to accompany the appellant to the doctor within a specified period. Having regard to the principles articulated in the *Ewels* and *Van Eeden* cases, *supra*, it seems to me that the circumstances *in casu* were such as to create a legal duty on the part of the police to assist the appellant in her efforts to prevent her pregnancy. They failed to comply with that duty, which they could have done with relative ease, and there is no clear evidence to indicate why they did not. In my view, their inaction amounted to unlawful conduct by reason of their omission to act positively in the circumstances before them. They were under a legal duty to act reasonably and they dismally failed to do so.

Insofar as concerns the requisite causal nexus, the factual circumstances of the present case are not dissimilar to those in *Skosana's* case, *supra*. In that case, the deceased, who had been injured in an earlier motor accident, would probably have survived but for the negligent delay of the police in procuring medical attention for him. *In casu*, although the originating cause of the appellant's pregnancy was the rape inflicted upon her, its proximate cause was the negligent failure to administer the necessary preventive medication timeously. But for that failure, the appellant would not have fallen pregnant.

In summation, I am satisfied that the police failed in their duty to assist the appellant timeously in having her pregnancy prevented by the doctor. Again, the doctor himself failed to carry out his professional duty to avert the pregnancy when it could have been reasonably prevented. There can be no doubt that these unlawful omissions took place within the course and scope of their employment with the first and second respondents respectively. Accordingly, the first and second respondents must be held vicariously liable to compensate the appellant in respect of the harm occasioned through the failure to prevent her pregnancy.

NEGLIGENCE IN RESPECT OF TERMINATION OF PREGNANCY

The negligence of the respondents' employees in relation to the non-termination of the appellant's pregnancy is pleaded as follows. Firstly, the police failed to attend at the hospital within a reasonable time or to take reasonable steps to ensure that the pregnancy was terminated. Secondly, the matron failed to take reasonable steps to terminate the pregnancy. Lastly, the prosecutors and the magistrate failed to attend

timeously to or to take reasonable steps necessary for the issuance of a certificate for the pregnancy to be terminated.

The provisions governing the lawful termination of pregnancies are contained in the Termination of Pregnancy Act [*Cap15:10*]. According to its long title, it was enacted in 1978 as:

> "An act to change the law relating to abortion by defining the circumstances in which a pregnancy may be terminated and to provide for matters incidental to or connected with the foregoing."

In terms of the definition of "Minister" and "Secretary" in s 2 (1) of the Act, as read with Statutory Instrument 66 of 2010, the administration of the Act is assigned to the Minister of Health and Child Welfare., *i.e.* the second respondent. There is nothing specifically stated in the Act pertaining to the administrative roles of the first and third respondents.

The circumstances in which pregnancy may be lawfully terminated are enumerated in s 4 as follows:

> "Subject to this Act, a pregnancy may be terminated—
> (*a*) where the continuation of the pregnancy so endangers the life of the woman concerned or so constitutes a serious threat of permanent impairment of her physical health that the termination of the pregnancy is necessary to ensure her life or physical health, as the case may be; or
> (*b*) where there is a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will permanently be seriously handicapped; or
> (*c*) where there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourse."

The term "unlawful intercourse" (as substituted by section 282 of Act No. 23 of 2004) is defined in s 2 (1) to mean:

> "rape, other than rape within a marriage, and sexual intercourse within a prohibited degree of relationship, other then sexual intercourse with a person referred to in para (*i*) or (*j*) of subsection (1) of section 75 of the Criminal Code."

Section 5 spells out the conditions under which pregnancy may be terminated. It provides in its relevant portions that:

> "(1) Subject to section *seven*, a pregnancy may only be terminated by a medical practitioner in a designated institution with the permission in writing of the superintendent thereof.
> (2)…….. .
> (3) In the case of the termination of a pregnancy on the grounds referred to in paragraph (*c*) of section *four*, the superintendent shall give the permission referred to in subsection (1) on the production to him of the appropriate certificate in terms of subsection (4).
> (4) A pregnancy may only be terminated on the grounds referred to in paragraph (*c*) of section *four* by a medical practitioner after a certificate has been issued by a magistrate of a court in the jurisdiction of which the pregnancy is terminated to the effect that –
> (*a*) he has satisfied himself –
> (i) that a complaint relating to the alleged unlawful intercourse in question has been lodged with the authorities; and
> (ii) after an examination of any relevant documents submitted to him by the authorities and after such interrogation of the woman concerned or any other person as he may consider necessary, that, on a balance of probabilities, unlawful intercourse with the woman concerned has taken place and there is a reasonable possibility that the pregnancy is the result of such intercourse; and
> (iii) in the case of the alleged incest, that the woman concerned is related within the prohibited degree to the person with whom she is alleged to have had incest; and
> (*b*) in the case of alleged rape or incest, the woman concerned has alleged in an affidavit submitted to the magistrate or in a statement made under oath to the magistrate that the pregnancy could be the result of that rape or incest, as the case may be.
> (5) …….. .
> (6) …….. ."

It is clear from these provisions that permission for the termination of pregnancy pursuant to unlawful intercourse may only be granted by the superintendent of a designated institution. The precondition for that permission is the production of a certificate from a magistrate within the same jurisdiction. As is evident from s 5 (4) (a) (i) and (ii), the issuance of a magisterial certificate is preceded by a complaint having been lodged with the authorities and the submission of relevant documents by those authorities. The term "authorities" is not defined in the Act but, in the context of unlawful intercourse, *i.e.* rape or incest, it would ordinarily apply to mean the police authorities. For present purposes, the critical question to be answered is whether the responsibility for instituting proceedings in the Magistrates Court lies with the relevant authorities or the victim of the alleged unlawful intercourse.

Mr. *Mureriwa* for the appellant submits that it is the police who should have presented the relevant documents to the magistrate, in terms of s 5 (4) (a), and that any further affidavit by the appellant under s 5 (4) (b) was unnecessary. The latter provision, so he contends, is confined to instances of intra-marital rape, where a simpler procedure is prescribed. Therefore, the learned judge *a quo* misapplied s 5 of the Act in finding that an affidavit from the appellant was a prerequisite for the issuance of a magisterial certificate. In support of his argument, Mr. *Mureriwa* relies on the case of *Ex parte Miss X* 1993 (1) ZLR 233 (H).

As I read this case, it clearly does not support any of Mr *Mureriwa's* contentions. On the contrary, as is evident from its facts, at 235F-236G, it was Miss X herself who

made an application for a certificate in terms of s 5 (4) of the Act, pursuant to which the Provincial Magistrate in question recorded her full sworn statement. In any event, what can be usefully gleaned from the case is the standard of proof required to secure a certificate. As was observed by CHIDYAUSIKU J (as he then was) at 239F-G:

> "In an application for termination of pregnancy, the stringent requirements of proof before a complainant's evidence can be accepted for the purpose of conviction do not apply. All that was required of the magistrate in this case was to be satisfied that the complainant probably did not consent to the alleged intercourse and that there was a reasonable possibility that the pregnancy arose from that intercourse."

Turning to the question at hand, it is abundantly clear that subparas. (a) and (b) of s 5 (4) are framed conjunctively and not disjunctively. Accordingly, their provisions and requirements must be construed as being conjunctive and cumulative rather than in the alternative. What they envisage is a single application and not two distinct processes applicable to different circumstances. The reference to "rape or incest" in subpara (b), as opposed to "unlawful intercourse", may well be a drafting anomaly. However, it follows immediately after the reference in subpara. (a) (iii) to "incest" only, and appears to have been inserted so as to make it clear that the applicant's evidence by way of affidavit or under oath is necessary in the case of both rape and incest.

What all of this means is that the victim of the alleged rape must depose to an affidavit or make a statement under oath <u>in addition</u> to being present for possible interrogation by the magistrate. Given the *ex parte* nature of the procedure, an affidavit on its own may not always suffice to enable the magistrate to make the necessary determination, on a balance of probabilities, that the applicant was raped and that her

pregnancy resulted therefrom. However, the applicant's affidavit or statement under oath is essential and required in every case, whether or not the magistrate decides to examine the applicant or any other person as he may deem necessary.

It follows from the foregoing that it is the responsibility of the victim of the alleged rape to institute proceedings for the issuance of a magisterial certificate allowing the termination of her pregnancy in terms of s 5 (4). What then is the role of the other participants in the overall process? The role of the police and the prosecutor, upon request by the victim or in response to a directive by the magistrate, is to compile the relevant report and documentation pertaining to the rape for submission to the magistrate. The role of the magistrate is to issue the requisite certificate upon being duly satisfied in terms of s 5 (4), while that of the superintendent of the designated institution is to authorise its medical practitioner, upon production of the certificate, to terminate the unwanted pregnancy. It may also be necessary, where appropriate, for these functionaries to give accurate information and advice, within the purview of their respective functions, to enable the victim to terminate her pregnancy. But that, in my view, is as far as one can take the responsibilities and duties of the relevant authorities.

In taking this view, I have not disregarded the various international instruments discussed earlier. Amongst other things, they enjoin the relevant authorities to ensure that the perpetrators of sexual violence are brought to book and that the victims are given access to appropriate mechanisms of justice in enforcing their claims against their assailants. They also call upon the authorities to assist any such victim so as to enable

her to effectively protect and control her biological integrity. In legislative terms, this would involve the enactment of an enabling legal framework for the termination of pregnancy in appropriate circumstances. In practical terms, it would also entail availing the necessary information and affording the requisite facilities, to the extent that this is possible, in accordance with the prevailing material and financial means of the State. However, I do not think that the obligations of the authorities can be extended to any legal duty to initiate and institute court proceedings within that framework on behalf of the victim.

Reverting to the appellant's claim as pleaded, the police certainly cannot be held accountable for failing to accompany her to the hospital or to take other reasonable steps to ensure that her pregnancy was terminated. Their function in this regard was confined to producing such report or other document as may have been required to establish that the appellant had been raped. Again, it cannot possibly be said that the matron at the hospital failed to take reasonable steps to terminate the pregnancy. When presented with the magisterial certificate, she took the professional view, the correctness of which is not disputed, that it was no longer physically safe for the appellant's pregnancy to be terminated. As for the prosecutors and the magistrate, it appears that they may have given the appellant incorrect advice on the procedure to be followed for terminating her pregnancy. However, there is insufficient evidence on record to show what precisely transpired in the interaction between the appellant and these functionaries.

In any event, it is necessary in dealing with this aspect to consider the designated functions of a prosecutor and magistrate in proceedings under s 5 (4) of the Act. The prosecutor has no specific role to play other than to furnish such documents as the magistrate may direct. The mandate of the magistrate is to consider and determine any application for termination of pregnancy that is placed before the court. In my view, the circumspect approach adopted in *Kadir's* case, *supra*, commends itself for application in the present context. Even on the broadest interpretation of the Act, taken as a whole, I do not think that it is within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a pregnancy. To accept that position would be tantamount to opening the floodgates to a veritable deluge of claims founded on the perceived failure to act reasonably in relation to matters clearly beyond the bounds of their official competence. Moreover, I am inclined to believe that the convictions of the community and considerations of public policy would militate unequivocally against the imputation of liability in the present context.

Accordingly, on the facts of this case, I take the view that the duty of the prosecutors and magistrate to act reasonably in the performance of their functions did not extend to the giving of legal advice, whether accurate or otherwise, to the appellant. It was for her to have sought that advice *aliunde*, preferably from a lawyer in private or paralegal practice, as soon as possible after she became aware of her pregnancy in May 2006. It follows that the prosecutors and magistrate cannot be held liable for failing to take such reasonable steps as may have been necessary for the issuance of the requisite certificate. It also follows that it was the appellant's own failure to institute the

necessary application that resulted in the inability to have her pregnancy timeously terminated. Consequently, her claim founded on the failure to terminate her pregnancy must fail as against all three respondents.

Having arrived at this conclusion, I think it necessary to comment on the formulation of the statutory provision under consideration. It is apparent from the foregoing that s 5(4) of the Act is ineptly framed and lacks sufficient clarity as to what exactly a victim of rape or other unlawful intercourse is required to do when confronted with an unwanted pregnancy. The subsection obviously needs to be amended. In particular, it is necessary to specifically identify the "authorities" that are referred to in the provision and to delineate their obligations with adequate precision. It is also necessary to systematically spell out the procedural steps that the complainant herself must follow in order to obtain the requisite magisterial certificate to terminate her pregnancy. This is especially so in the present context, where it is more likely than not that the complainant will be legally unrepresented.

The need to clarify the provision is abundantly self-evident from the facts of the instant appeal and the circumstances of the appellant. Moreover, it is a matter that calls for general attention by virtue of the international obligations of the State that I have alluded to earlier, *viz.* to afford assistance to rape victims to enable them to effectively protect and control their biological integrity. From a practical perspective, there is also the obligation to avail the necessary information to ensure the appropriate level of public awareness of the legislative and procedural measures in place.

In my view, these are matters that should be brought to the specific attention of the second respondent, as the Minister responsible for the administration of the Act, and the third respondent, in his capacity as the Minister charged with the passage of amending legislation through Parliament.

DAMAGES FOR PAIN AND SUFFERING AND MAINTENANCE

As I have already concluded, the police and the doctor were negligent in that they failed in their duty of care towards the appellant in having her pregnancy prevented. Consequently, the first and second respondents are vicariously liable in damages for any actionable harm sustained by the appellant.

Having regard to the broad principles of delictual liability, and in light of the decisions in the *Edouard* and *Mukheiber* cases, *supra*, I do not perceive any conceptual limitation to allowing a claim in general damages for foreseeable harm that eventuates from an unwanted pregnancy. Although the present claim is without precedent in this jurisdiction, its novelty does not involve any impermissible extension of Aquilian liability. In short, an unwanted pregnancy can, depending on the circumstances of its occurrence, constitute actionable harm. Accordingly, the appellant is entitled to proven general damages arising from the failure to prevent her pregnancy.

As regards the claim for maintenance, such a claim is ordinarily predicated on a relationship between the parties of such kind as to create a legal duty to support between them, *viz.* husband and wife, parent and child, grandparent and grandchild, and

immediate collaterals. The liability of a third party outside any such familial relationship is traditionally confined to one who deprives a dependant of support by wrongfully causing the death or incapacitation of the person supporting the claimant. See Boberg: *The Law of Persons and the Family* (1977) at pp. 249-250 and 302-303. However, as was clearly recognised in *Mukheiber's* case, *supra*, there can be no objection in principle to a claim for delictual damages flowing from an unwanted pregnancy. This would apply not only to the costs of confinement and the physical pain of delivery but also to the expense of maintaining the child until it becomes self-supporting.

In para. 2 of her affidavit of evidence, dated 6 April 2010, the appellant sets out her claim for US$10,000 as general damages arising from her pregnancy. She avers that she went through physical and mental pain, anguish and stress. More particularly, she had to endure a pregnancy, which was the result of rape, for nine months, followed by the labour pains of delivery. She was stressed throughout that period and is now stressed with the reality of having a child who is the product of that rape. In para. 3 of the same affidavit, the appellant elaborates her claim for US$41,904 as damages representing the reasonable costs of maintaining her child until he attains the age of majority or becomes self-supporting. The claim covers food and clothing as well as medical and educational expenses.

The respondents' heads of argument do not attempt to controvert the appellant's averments as to the physical and mental anguish that she endured as a result of her

unwanted pregnancy. Nor do they suggest that this harm was not foreseeable. Again, at the hearing of the appeal, Adv. *Mpofu* did not proffer any submissions to counter the appellant's claim on the ground of unforeseeable harm.

In the instant case, it cannot be doubted that the appellant did suffer harm as a result of the failure to prevent her pregnancy. Moreover, on the facts before us, there is nothing to indicate that this harm was not reasonably foreseeable. It was manifestly clear, to both the police and the doctor, that the appellant was vehemently averse to falling pregnant. Consequently, they must have foreseen that, if she were to fall pregnant, she would inevitably undergo the mental anguish of an unwanted pregnancy. To this extent, the appellant's claim is factually and legally sustainable as having resulted from the negligence of the police and the doctor.

However, the chain of causation in this case cannot be extended beyond the period of one month after the appellant was raped, *i.e.* when her pregnancy was confirmed. As I have already concluded, the responsibility for taking steps to terminate her pregnancy fell squarely upon the appellant's shoulders and, by the same token, the capacity to do so also lay within her hands. On that basis, the respondents cannot be called to account for any subsequent pain and suffering endured by the appellant, whether arising from her continued pregnancy or the delivery of her child or the period thereafter. The same must obviously also apply to any patrimonial damage incurred or to be incurred consequent upon the birth of the child. All of that angst and expense was of the appellant's own making and cannot be attributed to any negligence on the part of the

respondents' employees. In short, the causal chain was broken by the appellant's own failure to institute the necessary proceedings to terminate her pregnancy. It follows that the appellant's claim for damages must be limited to the period between the date of her rape and the date of confirmation of her pregnancy.

What remains is to quantify the appellant's entitlement to damages. This task is rendered somewhat difficult by the appellant's failure to identify any comparative awards in similar cases. Nevertheless, this omission should not preclude the computation of such damages as might be deemed just and equitable on the facts *in casu*, commensurate with the indisputable anguish and stress that the appellant was subjected to during the period alluded to above. In any event, this is a matter for determination by the court *a quo* after due inquiry into the appellant's personal, social and economic circumstances.

As for costs, the appellant has partially succeeded in this appeal and on her original claim in the court below, and then only as against the first and second respondents and not against the third respondent. For that reason and having regard to the relatively novel nature of her claim, we take the view that there should be no order as to costs.

DISPOSITION

In the result, this Court makes the following order:

1. The appeal is partially allowed to the extent that the dismissal of the appellant's claim for damages for pain and suffering, arising from the failure to prevent her pregnancy, be and is hereby set aside.

2. The claim for damages for pain and suffering is remitted to the court *a quo* for the grant of default judgment, in such amount as the court may assess and determine after due inquiry, together with the question of costs.

3. For the avoidance of doubt, the dismissal of the appellant's claim for damages for the maintenance of her minor child is hereby confirmed and upheld.

4. There shall be no order as to costs.

GARWE JA: I agree.

GOWORA JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners