

**The challenge of constitutional transformation of society through judicial adjudication:  
*Mildred Mapingure v Minister of Home Affairs and Ors* SC 22/14.**

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## 1. Introduction

The adoption of a new Constitution in Zimbabwe in 2013 to replace the Lancaster House Constitution of 1979 potentially represents an important milestone in the country's legal history, and also, in the evolution of Zimbabwe as a constitutional democracy. Most importantly, the new Constitution sets an interesting platform for the transformation of society through judicial activism, adjudication and constitutional interpretation and also through the realignment of the country's laws by the government. Such transformation is necessary in the progressive development of Zimbabwe as a constitutional state.<sup>1</sup> This is particularly true considering the fact that the previous 1979 Lancaster House Constitution succeeded in signaling the dawn of political independence in Zimbabwe and putting a break to generations of colonialism, racial domination and oppression. The 2013 Constitution is therefore yet another step in the advancement of the ideals of a constitutional and democratic state and its adoption is a cause for optimism, in the least.

In general, the abandonment of a past constitutional order and its replacement by a new one has traditionally been welcomed by political societies, particularly those transitioning from revolutions or periods of political domination. In contemporary African political societies however, constitutional changes not preceded by revolutionary conflict have led to few celebrations and guarded optimism. Conceding that the reasons for this do vary from place to place and from time to time, it is however argued that the most prominent reason for limited celebrations and guarded optimism when it comes to new constitutions is that there seems to be a general belief that there is no direct, tangible benefit that the new framework brings to local

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<sup>1</sup> See A van der Walt 'Dancing with Codes: Protecting, Developing, Limiting and Deconstructing Property Rights in the Constitutional State' a seminar presented in the Faculty of Law, PUCHE, on 2- 3 November 2000, under the theme, *Development in the South African Constitutional State*.

communities and social groups.<sup>2</sup> Thus, any positive changes introduced by the new Constitution into the legal system are at first viewed with skepticism, and only tentatively experienced.

It can further be argued that, another important reason why constitutions are hardly celebrated in Africa may be the fact that African societies appear more reliant, not on national Constitutions, but on other forces and systems to achieve their social, economic or political goals. For instance, historical studies claim that social transformation in Congo has been driven more by perennial wars in the Great Lakes region<sup>3</sup> and in Somalia,<sup>4</sup> by political conflicts, oil resources and coups in Nigeria<sup>5</sup> and by the new post-apartheid economic system in South Africa.<sup>6</sup> Further, economic research demonstrates that it is the nature and strength of a country's economy that has, perhaps more than other factors, shaped social transformation in, for instance Libya, Angola, Botswana and South Africa.<sup>7</sup>

The ultimate argument for limited celebrations and guarded optimism when it comes to constitutions is that the preeminent role of economic, political and other social drivers seems to relegate the importance of constitutional documents in social transformation. African constitutions, it is argued, seem to surrender the front seat to other more dominant social forces that predominantly shape and define contemporary African society such as religion, war, culture, adverse climatic conditions, political conflict and population movement among others. Combined, it is difficult to refute that indeed, this set of forces seem to have been more responsible for shaping norms and behavior and social attitudes, or for deeply affecting and regulating the affairs of ordinary African communities. As a consequence, albeit with the exception of very few, African national constitutions seem destined to fail recasting or (re) developing local economies, influencing social systems or transforming political experiences.

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<sup>2</sup> See for instance K Prempeh 'A new jurisprudence for Africa' 1999 (10.3) *Journal of Democracy* 135. Prempeh suggests that African judicial institutions seem unable to achieve any fundamental social outcomes without the domineering influences of the executive organs of the state.

<sup>3</sup> F Reyntjens *The Great African War: Congo and regional geo-politics 1996 – 2006* (2009) Cambridge University Press, New York.

<sup>4</sup> JR Beloff 'How Piracy is affecting economic development in Puntland, Somalia' 2013 (6:1) *Journal of Strategic Security* 47.

<sup>5</sup> A Ikelegbe 'The economy of conflict in the Oil rich Niger Delta region of Nigeria' 2005 (14:2) *Nordic Journal of African Studies* 208.

<sup>6</sup> H Marais *South Africa: Limits to change: The political economy of transition* (2001) 8, highlighting the critical influence of economic developments on South African society.

<sup>7</sup> See Africa Progress Report (2013): *Equity in extractives: Stewarding Africa's natural resources for all*, 20.

Put differently, it would seem that, in the African context, new constitutions introduce a new constitutional *framework*, but not a new constitutional *system*. These new constitutional frameworks, it can be argued, do not necessarily chart a fundamentally new course in a country's legal system.<sup>8</sup> In contrast, a new constitutional system is a clear break from a previous constitutional and legal order, and rests on an entirely new foundation. Thus, while a new constitutional framework rests on pillars fundamentally similar to its predecessor, a new constitutional system represents a new dawn in a society's legal system, and aspires to erase the memory of the past with haste, albeit with care. Further, unlike the change of a constitutional framework where constitutional interpretation and adjudication by the judiciary basically follows previously trodden contours, judicial dispute resolution and constitutional adjudication where a constitutional system is replaced by another, takes a paradigm shift with the objective of establishing a new social, economic or political order altogether.

### 1.1 The 2013 Constitution of Zimbabwe

Having considered the context of African constitutions, it becomes necessary to explain in brief, Zimbabwe's constitutional setup. To this end, it is not in doubt that in Zimbabwe, as with various other Constitutions, the old constitutional setup had its relatively fair share of successes in relation to social development.<sup>9</sup> However, it is difficult to contest that the footprint of other more dominant social forces such as politics and political struggles has been larger and more visible than the impact of the 1979 Constitution on society. Perhaps it could be argued that it was for this reason that the country necessarily had to take another giant step to constitutional democracy by adopting a new Constitution in 2013.

It should however be noted that there has always been attempts to retain particular aspects and systems from the old constitutional framework,<sup>10</sup> especially in relation to the political, legislative and judiciary system. For instance, the 2013 Constitution is predicated on largely the same

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<sup>8</sup> E Muirenik 'A bridge to where? Introducing the interim Bill of Rights' 1994 (10) *South African Journal of Human Rights* 31.

<sup>9</sup> See for a general legal analysis G Linington *Constitutional Law in Zimbabwe* (2001) Legal Resources Foundation.

<sup>10</sup> The new Constitution borrows heavily from the old 1979 Constitution in various important aspects. A study of the exact provisions is beyond the scope of this work. However, this trend has also been witnessed in relation to the draft constitution rejected in 2000 after a referendum, the Kariba draft and another draft presented for consideration by the National Constitutional Assembly.

political, legislative and judicial system that defined the old constitution,<sup>11</sup> whilst clearly acknowledging the same set of historical and social facts that shape a nation's aspirations.<sup>12</sup> Critically, despite clearly broadening access to court opportunities,<sup>13</sup> the new Constitution is enforced in much the same manner as the old Constitution,<sup>14</sup> despite the fact that there have been some notable improvements and changes.<sup>15</sup>

It is certainly still too early to determine whether the changes introduced by the new Constitution are of such depth as to fundamentally steer the ship in another new direction. A useful measure in determining the potential of the new constitutional framework is to consider the judiciary's treatment of cases of constitutional import that come before superior courts. The judiciary is a useful measure in this regard because it has a fundamental role to play in constitutional transformation of society, and its role is clearly stated in the Constitution.<sup>16</sup> Such a responsibility can never be shirked or abdicated and indeed, the courts cannot wait for other social forces to lead the constitutional transformation agenda; they are the guardians of the Constitution.<sup>17</sup>

Social transformation through constitutional interpretation and adjudication ensures that society and the law move in tandem and that the values and principles defining the constitutional framework are put to action. Germane to this contribution is the judicial role that critically relates to the development of the common law. The courts cannot sit where principles of the common law appear to move at a pace more tedious than that of society, or where those time-tested concepts and maxims threaten to stifle social progress. The power to develop the law is now a constitutionally granted power, and there is little doubt that such power should be actively

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<sup>11</sup> See for instance the provisions on the Legislative, Judicial and Executive system (Chapter 5, Chapter 6 and Chapter 8) in the 2013 Constitution.

<sup>12</sup> There is an expanded set of fundamental rights and freedoms. However, there is no fundamental shift in rights discourse implicit in the given rights and freedoms. For instance section 16, 16A and 16B of the old Constitution is reproduced almost verbatim in the 2013 Constitution, and is now section 71 and section 72.

<sup>13</sup> The 2013 Constitution has a new rights enforcement section. (see Part 4 of the 2013 Constitution).

<sup>14</sup> See for example Part 5, which is the general limitation clause for all fundamental rights and freedoms. The criterion in this Part is similar to criteria adopted by the Supreme Court prior to the 2013 Constitution. For instance see generally, *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S); and generally, *CoT v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S).

<sup>15</sup> For the raft of changes that makes the new document more appealing, at least on paper, see T Madebwe 'Constitutionalism and the new Zimbabwean Constitution' above, para 2.1.

<sup>16</sup> See Part 8 of the 2013 Constitution.

<sup>17</sup> See Chapter 8 of the Constitution of Zimbabwe Amendment No. 20, 2013.

exercised where appropriate in order to respond to the complexities of society.<sup>18</sup> Indeed, it can be argued that a questionable approach by the judiciary to exercising such power is a useful indicator of whether the same disappointments that attached to the jurisprudence of the old constitutional framework, especially the failure to apply the Constitution in transforming society, could similarly characterise the new constitutional framework.

This paper is an analysis of one such important decision passed by the Zimbabwean Supreme Court in 2014, namely the case of *Mildred Mapingure v Minister of Home Affairs and Ors.*<sup>19</sup> As acknowledged by the Court, the *Mapingure* case was a novel one. Considering this important facet of the case, this paper critically analyses the Supreme Court's appreciation of the salient facts and issues of the case and the greater need to comprehensively lay down the law, develop it in line with constitutional standards and expectations and, of course, create precedent. In addition, the paper also analyses the Supreme Court's preparedness to seize the moment in important and appropriate cases in order to respond to the complexities that define contemporary society.<sup>20</sup> Ultimately, the paper considers whether the turn to the new Constitution, at least as far as this case is concerned, truly signals the dawn of a new beginning in constitutional interpretation, adjudication and development of the law by Zimbabwe's superior courts.

### 1.1 The *Mapingure* Case: Salient Facts

Mildred Mapingure's darkest hour left her not only a victim of a robbery, but a traumatized, injured and violated victim of rape. Frantically, she had rushed to seek medical treatment for her injuries, and also to ensure that she would not fall pregnant. The doctor she visited advised her that the medication had to be administered within 72 hours and in the presence of a police officer. Rushing to and fro, she returned to the doctor in the company of a police officer, only to

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<sup>18</sup> In *Pearl Assurance Co. v Union Government* 1934 AD 560, Lord Tomlin (at 563) commented of the common law, that; "That law is a virile, living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society"

<sup>19</sup> Judgment No. SC 22/14 (Civil Appeal No. SC 406/12).

<sup>20</sup>Innes CJ in *Blower v Van Noorden* 1919 TS 890 at 905 precisely pointed this truism, stating that; "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the Legislature."

be told that the doctor needed a police report before treatment could be availed. Three days after, she appeared before the same medical doctor with a different police officer and was advised that 72 hours had elapsed and the necessary medication could not be administered. She immediately sought audience from the public prosecutor, informing him of her intention to terminate the pregnancy. She was advised that she had to postpone terminating the pregnancy until the rape trial was over.

She returned to the Public Prosecutor four months after the rape incident and was advised that she required a pregnancy termination order before she could terminate the pregnancy. A magistrate who was consulted by the Public Prosecutor stated that her Office was unable to assist because the rape trial had not been finalized. After further delays and frustration, Mildred finally obtained the magisterial certificate nearly six months after the rape incident. To her further dismay, the hospital matron who was assigned to carry out the termination opined that it was no longer safe to carry out the procedure and declined to do so. On 24 December 2006, Mildred gave birth to a child. She approached the High Court claiming damages for pain and suffering arising from failure to prevent the pregnancy. She further claimed damages for the maintenance of her minor child till it became self supporting.

### **1.2 The High Court Decision**

The High Court dismissed the appellant's claim in its entirety. The court's decision, which was passed in terms of the Lancaster House Constitution, was summarized in the briefest of terms by the Supreme Court. The High Court blamed the victim, Mildred Mapingure, as having suffered misfortune as a result of her own ignorance concerning the correct procedure to follow in relation to termination of the pregnancy. In addition to absolving the concerned officials from negligence, the court *a quo* stated that it was Mildred's responsibility to initiate the process of terminating her pregnancy, and that it was not the mandate of the justice officials involved to advise her on the correct procedure to do so. The High Court dismissed Mildred's application for default judgment against the respondents, and ruled that they were not vicariously liable to Mildred.

### **1.3 The Supreme Court's approach**

The Supreme Court appreciated the seven grounds of appeal raised by Appellant, but opted to consider the Appeal under two issues:

- (i) Whether or not the concerned officials were negligent in their dealings with the Appellant
- (ii) Assuming the answer to (i) to be in the affirmative, whether or not the Appellant suffered any actionable harm as a result of such negligence, and if so, whether respondents were liable to Appellant in damages for pain and suffering and for maintenance of the child.

## 2. Professional Negligence

### 2.1 Medical Negligence

The first issue that the Supreme Court canvassed related to the Aquilian liability for medical negligence. In order to reach a definitive conclusion, the Court canvassed mostly South African cases with an essentially similar factual context. The first case, *Administrator Natal v Edouardo*, had a similar context of unwanted pregnancy, albeit due to the failure by a doctor to render a woman sterile. The Appeal Court allowed the claim for “child rearing expenditure”, arguing that it would enable the Appellant to support the child, and that allowing that claim “in no way relieved the respondent (wife) from the obligation to support the child,” but in fact, “enabled the respondent to fulfill” the obligation of supporting the child that resulted from the unwanted pregnancy.

The Court further made reference to *Mukheiber v Raath and Another*,<sup>21</sup> a case where the South African Supreme Court had to rule on the liability of a doctor who had misrepresented to a couple, leading to an unwanted pregnancy. The Court ruled that the child maintenance costs were a “direct consequence of the misrepresentation” and that the doctor’s liability was similar to that which rests on parents to maintain the child until it becomes self supporting.

It should be emphasized that in both these cases, the South African courts allowed the claim for child maintenance expenditure against negligent medical practitioners. Further, it should be pointed out that the negligence of the medical professionals in both cases led to unwanted pregnancies, albeit as a result of lawful intercourse between consenting adult couples. Thus,

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<sup>21</sup> 1999 (3) SA 1065 (SCA).

despite the fact that there was the similarity that the pregnancies were unwanted as they had not been planned, these two cases were entirely distinguishable from the *Mapingure* case in that, in *casu*, the pregnancy in question was a result of violent and unlawful sexual intercourse. Finally, it is important to observe that the two decisions did not seek to blame the concerned women for consequent failure to seek abortion or termination of the pregnancy. The South African Appeal Court did not consider apportioning blame in both appeals and allowed both claims.

## 2.2 Police Negligence

It was not difficult for the Supreme Court to quickly rule that the police were negligent in their dealings with Mildred Mapingure. Again, the court made reference to mostly South African cases that had dealt with police negligence, most notably *Minister of Police v Ewels*,<sup>22</sup> *Minister of Police v Skosana*,<sup>23</sup> *Minister of Law and Order v Kadir*,<sup>24</sup> *Van Eeden v Minister of Safety and Security*,<sup>25</sup> as well as the Zimbabwean case of *King v Dykes*.<sup>26</sup>

In the *Ewels* case, the Court ruled that the lack of a positive statutory duty to act did not excuse the police from acting to protect a person in their custody, and that the failure to act positively was therefore an omission that founded delictual liability. In *Skosana*, the police were held negligent and thus liable for failing to timeously bring a deceased person to medical attention and care. However, in *Kadir*, the Court declared that the police were not to be held liable for “what was relatively insignificant dereliction of duty” such as failing to record the identity of a driver who had caused an accident. In the *Van Eeden* case, the South African Supreme Court ruled that the police owed a duty to act positively and prevent a serial rapist from escaping out of their custody. The police, the court reasoned, failed in their constitutional duty to prevent the escape of the dangerous criminal, and were thus liable for claims arising out of the criminal’s subsequent actions upon escape, in this case rape. Finally, in the *Dykes* case, the Zimbabwean Appeal Court had appeared timid and counseled caution in cases of omission, doubting whether

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<sup>22</sup> 1975 (3) SA 590 AD.

<sup>23</sup><sup>23</sup> 1977 (1) SA 31 (A)

<sup>24</sup> 1995 (1) SA 303 (A).

<sup>25</sup> 2003 (1) SA 389 (SCA).

<sup>26</sup> 1971 (2) RLR 151 (AD).



such cases should unquestionably attract liability on the basis of failure to act positively. The court concluded by holding that courts must have discretion in determining whether, in light of all relevant factors, omission can attract delictual liability.

### **2.3 Liability of Public Prosecutors and Magistrate**

The Court noted that the Prosecutor's role included assisting the rape victim to obtain a magisterial certificate for pregnancy termination by compiling the necessary report and documentation for the attention of the magistrate. The magistrate's role would thereafter be the issuing of the requisite certificate for termination of pregnancy. The medical superintendent would subsequently authorize its medical practitioner to terminate the unwanted pregnancy. Most importantly, the Court observed that it might 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 the pregnancy". Having stated this, the Court's opinion was that the obligations of the concerned authorities (magistrate, public prosecutor) could not be extended to "any legal duty to initiate and institute court proceedings" on the victim's behalf.

Further, the Supreme Court held that, despite the fact that the prosecutors and magistrate seemed to have given the victim incorrect advice on the procedure to be followed in terminating the pregnancy, it was not "within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a pregnancy." Thus, the prosecutors and magistrate could not be held liable for failing to take such reasonable steps as may have been necessary for the issuance of the requisite certificate.

These findings formed the basis upon which the Court established the nature and amount of damages to be payable to Mildred. The Court consequently decided that "it was the Appellant's own failure to institute the necessary application that resulted in the inability to have her pregnancy timeously terminated."

The Supreme Court proceeded to reject the claim for child maintenance entirely. It reasoned that "the chain of causation" ended one month after the rape and upon confirmation of the pregnancy. The court therefore delineated damages to only cover this one month period. It was the Court's opinion that this was based on the reasoning that the responsibility for taking steps to terminate the pregnancy lay with Mildred "... and by the same token, the capacity to do so".

### 3. Supreme Court's Appraisal of General Principles

The Supreme Court admitted that the case was the first of its kind in the Zimbabwean jurisdiction. There was therefore little doubt that the case presented golden opportunities to explore the law, possibly develop the major principles or probably, introduce new trajectories in the area of delictual liability for professional negligence. The Court was dealing with a rape victim and her claim for the maintenance of an offspring of rape. Consequently, neither the deeply serious criminal origins of the case could be ignored, nor the even more harrowing reality that the rape victim was faced with having to maintain a rape child on her own, despite having done almost all in her power to terminate the pregnancy. Clearly therefore, the Supreme Court, it has to be argued, was under an expectation to approach, albeit dispassionately, the child maintenance claim with these considerations in mind.

It should be noted that the Supreme Court admitted to the novelty of the case. Such a finding raised expectations that the ultimate decision would be comprehensive. This was not to be, however, as the Court immediately surmised that the *Mapingure* case was covered by the ordinary time-tested principles of the *Aquilian* action. Patel JA expressed this view, stating that:

*".... 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.<sup>27</sup>*

Apart from this rather bare comment and reference to a few South African cases, the Supreme Court's investigation into the law relating to delictual claims based on unwanted pregnancy eventuating from a criminal offence seemed done. Patently, the Court gave a cursory, if at all, appreciation of the criminal origins of the *Mapingure* case, and its traumatic consequences to the Appellant. It can be claimed that for this reason, Patel JA missed the importance of the distinction that, unlike the *Mapingure* case, the South African cases he made reference to and applied all dealt with unwanted pregnancy conceived in lawful social relationships, not from rape. The fact that the *Mapingure* case was groundbreaking, it can be argued, necessarily called for a comprehensive reiteration of the major pillars of the *Aquilian* action and the

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<sup>27</sup> SC22/14, 29.

circumstances under which principles of the action can be extended, developed or modified. The Court was found wanting in this respect.

It would seem that in light of the seriousness of the crime and its extended traumatic aftermath, the imposition of a higher level of responsibility and a broader duty of care against qualified professionals who negligently rendered professional assistance was justified. Arguably, this would mean casting the net for delictual liability against negligent professionals a bit wider. The important question is however, whether in theory, such an approach to delictual liability for professional negligence could be justified and defended in the *Mapingure* case. An offshoot of this question is whether the superior courts are able to develop seemingly iron-cast and stringent principles of delictual liability for professional negligence in order to widen the liability net. This Supreme Court did not follow this line of reasoning, and chose a different path. Its consideration of applicable principles is carefully explored below.

### 3.1 Special Relationship

It would appear that the Supreme Court absolved the magistrate and prosecutors of liability on the basis that there was no legal relationship between Appellant and these officials. Further, that the lack of a special relationship meant that there was no duty upon the Magistrate or Prosecutor to supply correct information to the Appellant. The public prosecutor advised Appellant not to terminate the pregnancy until the trial had been completed. The magistrate repeated the same when Appellant had approached her for a termination order. The weight given to advice by court officials to lay persons who come into contact with the justice administration system should never be underestimated. In this case, it was solicited and the Appellant did not wish to proceed in a way that would prejudice the rape trial. She had an interest in the outcome of that trial, and there were few other options for her to inquire into the legal process apart from the public prosecutors and the magistrate.

Despite this background, it is clear that in cases of wrong advice or misstatements, as was the issue in the *Mukheiber* case, there ought to be a relationship between the person giving the advice and the recipient for a duty of care to be owed to the recipient of that advice. In the *Mapingure* case, this would translate into the need for a special relationship between Mapingure and the Magistrate or public prosecutor, before *Mapingure* could claim against these persons for wrong advice. Further, for a plaintiff to found a claim on negligent misstatements such as the

one in *Mukheiber's*, he should have a right to be given correct information and the defendant should have a legal duty to supply that information.<sup>28</sup> Consequently, the lack of that special relationship through, for instance, contractual agreement, means that the plaintiff has no right to information, and defendant cannot be liable for any information he gives.

In the *Mapingure* case, Patel JA did not dispute the professional relationship between the doctor and the Appellant. He followed the same approach and conclusion pertaining to the police. However, in relation to the prosecutor and magistrate, the learned Judge opted to consider whether these officials had an obligation or legal duty to initiate and institute legal court proceedings on behalf of Appellant under the Termination of Pregnancy Act. Unsurprisingly finding in the negative, Patel JA proceeded on the crucial question of whether the advice these officials gave the Appellant was correct or not. Regarding this, the Judge declared that an analysis of the Termination of Pregnancy Act leads to the conclusion that it was not “within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a pregnancy.” This sealed the fate of Mildred’s child maintenance claim against the magistrates and prosecutor. It is strongly contended that the learned Judge should have reverted not only to the Pregnancy Termination Act, but the general statutory and constitutional duties of the prosecutors and magistrates regarding victims of crime that they are obliged to assist. The proximity, it is argued, between the Appellant (in the rape case) and the state officials had been created by law, and could be read as pointing to a relationship that is crucial in determining liability.

### 3.2 Causation

As is clear from the case, an important part of the Supreme Court decision hinged on causation. The Supreme Court commenced by establishing the applicable principles and concepts, highlighting that there should be a causal link between a defendant’s conduct and harm suffered by plaintiff. Generally, for factual causation, the test used is the “But for” or *sine qua non* test,<sup>29</sup> which inquires whether the wrongful act is linked sufficiently closely or directly linked to the loss, or the loss is too remote. For legal causation, the test is whether the harmful consequences or loss is fairly attributed to defendant’s conduct. In the *Mukheiber* case, Olivier JA (quoting Boberg *The Law of Delict* at 381) noted that in relation to legal causation, courts often proceed

<sup>28</sup> M Loubser and R Midgley (ed) *The Law of Delict in South Africa* 2<sup>nd</sup> ed, 225.

<sup>29</sup> M Loubser and R Midgley (eds) *The Law of Delict in South Africa* 2<sup>nd</sup> edition, 6.

on the basis of the relative view, that inquires, “not whether the defendant’s conduct was wrongful and culpable, but whether the harm for which plaintiff sues was caused wrongfully and culpably by the defendant.”<sup>30</sup>

The court clearly rejected the maintenance claim on the basis that Appellant’s claim failed the causation test. Surprisingly, the Court did not carefully explore the element of causation in delict before coming to the conclusion that “the chain of causation was broken.” Apart from just mentioning this, the Court did not highlight instances where such chain is said to be broken. There was no reference to authorities or precedent. Of course, this area is an ordinary stomping ground and might not require reiteration in straightforward ordinary cases. However, this was no ordinary case. A recap or appraisal of the applicable law was necessitated by the fact that this case is the first of its kind in the Zimbabwean jurisdiction, and involved claims based on professional negligence against three different professions.

Essentially, the chain of causation is broken by a new intervening cause (*novus actus interveniens*), which is defined as an independent event which, after the wrongful act has been concluded, contributed to the consequence concerned.<sup>31</sup> The initial wrongful act is only disregarded if the new intervening cause completely extinguishes the causal connection between the initial wrongdoer’s conduct and the final consequence.<sup>32</sup> In the *Mapingure* case, the Supreme Court obviously regarded the actions of Mapingure after pregnancy confirmation as a new intervening cause, concluding that after this one month, the Appellant failed in her responsibility of taking steps to terminate the pregnancy. Clearly, the Court was not impressed by the relentless efforts made by the Appellant to terminate the pregnancy. The Court, albeit without expressly saying so, regarded the Appellant as negligent in her efforts to terminate the pregnancy, and thus rejected the child maintenance claim. But why didn’t the Court come out in the open and say the Appellant had been negligent, and, most importantly, that the assessment of damages had to be determined on the basis that the post conception negligence is wholly, or partially attributable to the Appellant alone?

The question that was not asked by the Supreme Court, but which seemingly is one of the bases for its decision was whether the Appellant’s post-conception conduct could be read as

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<sup>30</sup> *Mukheiber case supra*, paragraph 36.

<sup>31</sup> Neethling, Potgieter and Visser *Law of Delict* 5<sup>th</sup> edition, 189.

<sup>32</sup> *Ibid.*

negligent. If the answer is in the affirmative, then, whether the degree of that negligence necessitated a reduction or extinguishing of damages claimed by plaintiff. The other question is whether Appellant's conduct after confirmation of pregnancy was an intervening cause that acted to extinguish the initial negligent conduct of the police and medical doctor, and that consequently excluded the liability of these professionals altogether.

In *Gibson v Berkowitz*<sup>33</sup> Claasen J had to respond to a query of this nature. The learned judge remarked as follows:

*“A distinction should ... be drawn between plaintiff's negligence prior to the harmful event and any relevant negligence after the harmful event. In the case of a plaintiff, his pre-delictual negligence will trigger the application of contributory negligence to reduce his damages. The plaintiff's post-delictual negligence will, however affect the principles of legal causation (or remoteness) which may reduce his damages.”*

From this case, there is no doubt that Patel JA regarded Appellant's post-delictual negligence as fundamentally affecting legal causation to the extent that such post-delictual negligence completely excluded respondents' liability for the child maintenance claim. There is however no analysis by Patel JA of these rather sophisticated principles, and in view of the fact that this was the first case of this kind before the Supreme Court, that lack of a comprehensive investigation into the law is regrettable.

A closer examination of the applicable delictual principles, it is contended, could have influenced a different conclusion to the case. This contention is based on the following general positions of the law of delict. Firstly, there was clear knowledge and foreseeability on the part of state officials (the police, the magistrate and the public prosecutors) that the Appellant ran the risk of conception, and subsequently, of giving birth to the rapist's child.<sup>34</sup> It was this knowledge or reasonable foreseeability by state officials that was critical in determining wrongfulness, and consequently delictual liability in the *Ewels* case mentioned above.<sup>35</sup>

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<sup>33</sup> 1996 (4) SA 1029 (W).

<sup>34</sup> J Neethling 'Delictual protection of the right to bodily integrity and security of the person against omissions by the state' 13 (2006) *South African Law Journal* 572,580.

<sup>35</sup> See *Minister van Polisie v Ewels* supra, at 590. See also *Nkumbi v Minister of Law and Order* 1991 (3) SA 29 (E).

A second basis is the fact that since the Appellant was now for all intents and purposes the main witness in the criminal case there was a special relationship (or proximity) between the state (complainant) and the victim that created a duty of care on the part of the state.<sup>36</sup> Such duty of care, it could be argued meant that the Appellant critically relied on the state and its officials in relation to any necessary steps that would affect the rape trial.

Finally, it is contended that the state has a constitutional duty to assist victims of crime particularly for the reason that the state is effectively in factual control of the criminal proceedings. The prosecutors are the *dominus litis*, and their advice to complainants and witnesses involved in the trial process is important. The argument is that, if the state inhibits a complainant from terminating a pregnancy, the state has assumed control of the situation, and should be delictually liable for any negligence of its officials committed in handling the dangerous situation.<sup>37</sup> The advice that the Appellant should not terminate the pregnancy until the completion of the rape trial was wrong, and for that reason, was sufficient to attract delictual liability for the magistrate and the prosecutors concerned. The Supreme Court ignored this line of reasoning, and in any case, insisted that complainant should have ignored such advice.

There is no doubt that in determining the case, the Supreme Court found it unnecessary to undertake a deeper doctrinal analysis of the law of delict, even after admitting that the case was rather a novel one. At best, where there was need to evaluate the law, the court chose to stick to doctrine. This approach ignores the constitutional imperative upon the judiciary to develop the law. Such an approach where courts will most probably play it safe (“err on the side of caution”) and refuse to develop the law along a particular trajectory that better serves society has to be condemned. One could argue such an approach by the superior courts means most judgments remain pedantic and run the risk of time-locking the law.<sup>38</sup> It is this view that leads to a conclusion that a better and comprehensive description of the law coupled with a fairer

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<sup>36</sup> J Neethling 'Delictual protection of the right to bodily integrity and security of the person against omissions by the state' 13 (2006) *South African Law Journal* 572,580.

<sup>37</sup> See *Van Eeden* case supra, at 400.

<sup>38</sup> On the clear dangers of this approach, see D van der Merwe 'Constitutional colonization of the common law: A problem of institutional integrity' 2000 *Tydskrif vir die Suid-Afrikaanse Reg*12, 13. The author contends that “the outcome” of treating the common law like “a pre-determined, pre-cast legal form from which the judge, much as a shopper in a supermarket, can select – indiscriminately – from the shelves of legal scholarship, a rule, a principle, a doctrine or an insightful comment or pithy maxim appropriate to the determination of a solution in the instant case..... has been a brand of common law scholarship that, at times, has produced results more than mildly quaint and even quirky...”.

appreciation of the uniqueness of the facts at hand might have necessitated a different line of reasoning and eventually a different conclusion. The fact that the Court refused to swim out of the doctrinaire pool meant this was not to be. Surprisingly, South African authorities used by the Court in arriving at a decision had, in fact, attempted to break new ground and develop the law towards a more progressive direction appropriate at the time.

### 3.3 The Supreme Court and the Constitutional framework

It is worth noting that the origins of the case predated the 2013 Constitution. The High Court's decision, for instance, was passed in 2012.<sup>39</sup> This means that the 2013 Constitution was not applicable, and any constitutional analysis had to be confined within the previous Constitution.

In *casu*, the Supreme Court appeared to be preparing the ground for determining the constitutional consonance of applicable principles for delictual liability. This it did by making reference to prominent South African cases that had canvassed the important elements of wrongfulness and causation from a constitutional perspective. In relation to wrongfulness, the Supreme Court made reference to *Van Eeden v Minister of Safety and Security*. Pertinently, the Court reproduced a very interesting paragraph of this case, noting (at page 12):

*“The concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the (South African) 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... 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.”*

This paragraph was neither explained nor interpreted to suit the Zimbabwean context. It is not clear from the whole judgment whether this approach now characterizes the courts' approach to the element of wrongfulness in delictual claims. Indeed, there is a disturbing lack of effort by Patel JA to approach the case at hand from a Zimbabwean constitutional perspective. This is quite lamentable as the learned judge fails to appreciate that it is the Supreme Court's

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<sup>39</sup> The High Court case was HC 4551/07, suggesting that the case had even earlier origins than 2012.



responsibility to chart this course.<sup>40</sup> Indeed this was what Vivier ADP intended to do in the *Van Eeden* case. There is a limit to the application of ordinarily relevant foreign jurisprudence in a country's legal system, and once such limit is reached, the duty upon the superior courts to create jurisprudence unique to that country's legal system can never be shirked.

It is argued that the Supreme Court could have attempted to determine wrongfulness from a constitutional perspective. This, it could have done by necessarily incorporating the "norms and values" of the Constitution into the concept of legal convictions of the community.<sup>41</sup> These norms and values could be inferred from constitutional jurisprudence. Currently such a task is made easy by section 3 of the new Constitution since it contains a list of founding values and principles and these include constitutional supremacy, recognition of the inherent dignity and worth of each human being, and equality of all human beings. In addition the Constitution provides for the right to human dignity and the right to personal security. It could therefore be argued that any test for wrongfulness arising from omissions by the state, through the negligence of its officials that result in the infringement of these rights had to take constitutional values and norms such as these into account.

#### 4. Conclusion

It is often a constitutional requirement and an obligation for the superior courts to develop the common law, taking into consideration the interests of justice and most importantly the provisions of the Constitution. There is no other way in which this judicial function can be carried out except through judicial decision making and interpretation of the law in appropriate cases. The common law is a time tested institution, and an important edifice in the law of delict. Indeed, it sustains the law of delict and has served society well when appropriately applied. The judge's function is not to unnecessarily replace, ignore or seek to discard its principles, but to develop some of them in appropriate cases such as the *Mapingure* case in order to correspond to prevailing constitutional values and principles. The danger is not in the application of the common law in resolving cases, but in the belief that despite constitutional and legislative

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<sup>40</sup> See for instance section 176 of the 2013 Constitution. The previous Constitution did not have such a provision.

<sup>41</sup> See J Neethling 'Delictual protection of the right to bodily integrity and security of the person against omissions by the state' *South African Law Journal* 572,580.

instruments, the common law is immovable. Such belief freezes the law and gives an incorrect impression that social conflicts and disputes can always be resolved by a backward-looking approach to the law. Further, and most importantly, such an approach denies the judiciary the opportunity to advance ever mutating constitutional ideals through adjudication and interpretation of the law.

In view of the above arguments, it can be concluded that the failure by the Supreme Court to examine the constitutional consistency of delictual principles, or to expand and broaden the definitions of such principles in accordance with the Constitution in the *Mapingure* case is regrettable. The Supreme Court's approach was dangerously doctrinaire. The *Mapingure* case was one great opportunity for the courts to clearly expand and broaden the Aquilian liability for professional negligence. This opportunity was missed; the Supreme Court undertook a rather cursory, unconvincing treatment of relevant principles and followed a conservative and timidly rigid approach. It is hoped that in future, and in view of the clear provisions of the 2013 Constitution, the superior courts will seize such kind of opportunities and develop the law to appropriately respond to the needs and expectations of contemporary society rather than remain forever in thrall of "the clanking of mediaeval chains" of the common law.