

Influence of the Constitution on the law of delict



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I have been asked to write about the influence of our Constitution on private law over the last 20 years. But, on reflection, I found the theme too wide for the occasion. Hence I propose to limit my contribution to the law of delict. The reason for my choice is dictated by the belief that the influence of the Constitution – and especially the Bill of Rights in chapter 2 – has been more pronounced in the field of delict than in other areas of private law, such as the law of contract.

OUR LAW OF DELICT presents a time-honoured history. Although we have a law of delict rather than specific torts, a distinction is made in principle between conduct that causes patrimonial loss (*damnum iniuria datum*) and that which causes injury to personality (*iniuria*). The action for compensation for patrimonial loss has its origin in the Lex Aquilia, a Roman plebiscite of about 286 BC. Protection of personality rights, on the other hand, derives from the *actio iniuriarum* which dates back even further to the Twelve Tables of about 450 BC.

However, time-honoured as it may be, our law of delict is now rendered subject to what has been described as the objective normative value system contained in the Bill of Rights, by section 8(1) of the Constitution. Moreover, the influence of this normative value system on the common law is mandated by section 39(2) of the Constitution. It is with reference to the matrix of this value system that the principles of the common law must be adapted or changed and, if necessary, discarded. Fortunately Roman Dutch law does not suffer from any resistance to change. On the contrary, it has always been regarded as a vital, living legal system, adaptable to the changing needs of the society that it serves. If not, the law of delict, for instance, would hardly be able to accommodate the needs of society over several centuries. What is more, some areas of the law of delict—in the same way as other parts of private law—rely for their application on a value judgment which depends in turn on a weighing up of objective normative values, including those enshrined in the Constitution. The culmination of all these elements can, in my view, be illustrated with reference to our case law in the field of delict.

I find a good starting point in the delictual element of wrongfulness in cases of negligent omission. Ordinarily, there is no duty on a person to act to prevent harm to others. Liability for omissions in general was introduced for the first time into our law in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A). According to *Ewels* a negligent omission is wrongful only in circumstances where there exists a legal duty to act positively to avoid the materialisation of the harm. Whether or not such a duty exists, so it was said in *Ewels*, is in turn tested against the flexible standard of ‘the legal convictions of the community.’

In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) these principles came to bear in the post-Constitutional era. The appellant—who was shot and injured in a scuffle between a Mr Brookes and his family—sought to hold the State liable for the damages he sustained as a result of his injuries. The basis for his claim, put simply, was that the police had negligently failed to take away Brookes’ firearms when they had good grounds for doing so. Because his action relied on an omission—as opposed to positive action—on the part of the police, Van Duivenboden had to prove that the police had been under a duty to act positively in the circumstances. Proceeding from this premise Nugent JA inter alia expressed himself as follows in *Van Duivenboden* (at para 17):

‘In applying the test ... formulated in [*Ewels*] the “convictions of the community” must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution. The Constitution is the supreme law, and no norms or values that are inconsistent with it can have legal validity ...



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‘The reluctance to impose liability for omissions is often informed by a *laissez faire* concept of liberty that recognises that individuals are entitled to “mind their own business” even when they might reasonably be expected to avert harm and by the inequality of imposing liability on one person who fails to act when there are others who might equally be faulted. The protection that is afforded by the Bill of Rights to equality, and to personal freedom, and to privacy might now bolster that inhibition against imposing legal duties on private citizens. However, those barriers are less formidable where the conduct of a public authority or a public functionary is in issue, for it is usually the very business of a public authority or functionary to serve the interests of others and its duty to do so will differentiate it from others who similarly fail to act to avert harm ...

‘[I]t must also be kept in mind that in the constitutional dispensation of this country the State (acting through its appointed officials) is not always free to remain passive. The State is obliged by the terms of s 7 of the 1996 Constitution not only to respect but also to “protect, promote and fulfil the rights in the Bill of Rights.’

In weighing up these different policy considerations, Nugent JA concluded that the police had breached a constitutional duty to act positively to protect the rights to personal security, life and human dignity, which indicated that their negligent

conduct was wrongful. Hence the Constitution was held to outline the ‘convictions of the community’ insofar as it detailed not only the duty to act (section 7) but also the rights in relation to which it has an obligation to do so (the Bill of Rights).

A difficulty that the court faced was in determining whether the police’s public law breach of duty ought to be transposed into an actionable private law breach. In so doing, the court weighed the threat that allowing damages actions may unduly hamper administrative organs in the execution of their duties against the constitutional norm of accountability.

Accountability had a particular bearing on the matter insofar as, save for a private law delictual claim for damages, the court found that there was no way of holding the State to the norm of accountability. In the result, having found no compelling policy reason not to hold the State accountable in the circumstances of this case, the State was held vicariously liable for the consequences of the negligent omission on the part of the police. In this way, public policy became the gateway for the introduction of constitutional norms in the application of the traditional rules of delict law.

The principles thus underscored in *Van Duivenboden* were essentially twofold. First, that the criterion of wrongfulness ultimately depends on a judicial determination of whether—assuming all the other elements of delictual liability to be present—it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and secondly, that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Thus understood, the Constitution, for the most part, does not require amendment to the principles of the law of delict. What may be required in circumstances of a particular

case is an adjustment or modification of the way in which these principles had been applied in the past so as to give effect to constitutional values.

The principles determined by *Van Duivenboden* were later echoed in *Carmichele v Minister of Safety and Security* 2004 (3) SA 431 (SCA). This judgment, incidentally, brought an end to a long history of litigation between the parties involving two stages of trial hearings; two appeals to the SCA; and one appeal, in the middle, to the Constitutional Court. The basis of Ms Carmichele’s claim once again rested on an omission, more particularly, the negligent failure on the part of a prosecutor and the investigating officer to oppose the bail application of one Coetzee. Consequent to the release of Coetzee, Ms Carmichele was assaulted by him and suffered serious injury. The litigation resulted from her claim against the State for damages she sustained as a result of these injuries.

A GAIN THE CASE turned on the issue of wrongfulness. During the first round of litigation, both the trial court and the SCA held that Ms Carmichele had failed to make out a case for wrongfulness in accordance with the *Ewels* test. On appeal, the Constitutional Court found, however, that both courts had ‘assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this kind should be applied and had ‘overlooked the demands

of s 39(2) [of the Constitution]'. On this basis, the SCA changed its previous finding to one in favour of Ms Carmichele in the final appeal. The court endorsed the new approach adopted in *Van Duivenboden* with regards to both (1) the State's constitutional duty to act positively in protection of the rights enshrined in the Bill of Rights and (2) the liability of the State in circumstances where the plaintiff had no other effective remedy and where no compelling reason not to adhere to the constitutional principle of accountability existed.

Apart from *Carmichele* the approach in *Van Duivenboden* also led to findings of wrongfulness on the part of police officials and the consequent imposition of vicarious liability on the State for the negligent conduct of these policemen in *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) and *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA). It has been extended also to negligent omissions on behalf of other State actors, such as prison authorities (in *Minister of Correctional Services v Lee* 2012 (3) SA 617 (SCA)) and officials of the State Tender Board in *Minister of Finance and others v Gore NO* 2007 (1) SA 111 (SCA)). Without embarking upon the facts of these cases I believe it can be safely assumed that, but for the influence of constitutional norms on the law of delict, the decisions in both these cases would have gone the other way.

Another area where the influence of constitutional values led to results different from those which would ensue, but for the influence of constitutional norms, relates to the imposition of vicarious liability on the State for conduct on the part of policemen which was clearly wrongful. It started with *K v Minister of Safety and Security* 2005 (6) SA 419 (CC). Late one night Ms K was abandoned by her boyfriend at a nightclub. In consequence she was offered and accepted a lift home from three uniformed policemen in a police car. On the way home she was brutally raped by all three. Since the conduct of the policemen was clearly wrongful, the *Van Duivenboden* approach did not come into play. In fact, they were all charged under criminal law, convicted and sentenced to life imprisonment. The sole question was therefore whether vicarious liability could be imposed on the State for this wrongfulness conduct of its employees. Both the High Court and the SCA held that it could not.

But the Constitutional Court held otherwise. In doing so the court started out from the well-established principle that vicarious liability can notionally be imposed on an employer in so-called 'deviation cases'; that is where the delict was committed whilst the employee was deviating from the business of the employer. With regard to these deviation cases, the Constitutional Court then adopted the test laid down in *Minister of Police v Rabie* 1986 (1) SA 117 (A). In broad outline, the *Rabie* test calls for a two-tier enquiry. The first question is whether the wrongful act was committed solely for the purpose of the employee. Even if this question is answered in the affirmative, the employer may still be held liable vicariously if there was a sufficiently close connection between the employee's act in his or her own interest and the employer's business.

The first question, so the Constitutional Court held, is a purely subjective question dependent on the intention of the employee which should in this case be answered in the affirmative. There was no doubt that the three policemen raped Ms K solely for their own gratification. This shifted the focus of the enquiry to the second question. This question, so the

Constitutional Court held, is to be approached with the spirit, purport and objects of the Constitution in mind. Proceeding from this premise, the reasoning of the court went along the following lines:

- The conduct of the three policemen comprised both a commission, the crime of committing the rape itself, and an omission which consisted of the failure to protect Ms K from crime.
- In committing their crime of rape the policemen infringed Ms K's fundamental rights to dignity and security of the person.
- Our Constitution imposes an obligation on the State and particularly the police to protect members of the community against crimes like this.
- Because of the failure by the three policemen to protect Ms K from crime, their employer's constitutional obligation (and theirs) to do so was not met.
- In these circumstances there was a sufficiently close connection between the delict committed by the three policemen and the business of their employer to warrant the imposition of vicarious liability on the latter.

THE JUDGMENT in *K* was subjected to severe criticism in academic circles, essentially on the basis that it reflects a confusion between the imposition of vicarious liability, on the one hand, and holding the State directly liable for its own wrongful failure to comply with its constitutional obligations to protect its citizens, on the other. Nonetheless, *K* was followed and applied by the majority of the Constitutional Court in *F v Minister of Safety and Security* 2012 (1) SA 536 (CC). Yet, the minority judgment by Froneman J essentially adopts the approach proposed by academic authors and hence presents a completely different approach to matters of this kind. What the impact of the minority judgment will be on the imposition of vicarious liability outside the sphere of intentional wrongful police activity, remains to be seen.

Somewhat unexpectedly, the influence of the Constitution on claims based on the *lex Aquilia* was, at least on the face of it, more dramatic than on actions deriving from the *actio iniuriarum*. In fact, when our law of defamation was subjected to a constitutional audit in *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC), it passed the test with distinction. I say 'unexpectedly' because claims for personality rights, which are protected by the *actio iniuriarum*, clearly lie at the intersection between the constitutional right to freedom of speech, on the one hand, and other rights equally enshrined by the Constitution, such as the right to reputation, the right to dignity and the right to privacy, on the other. One would therefore have expected the import of the Constitution to be more pronounced. I say 'on the face of it' because the historical development of private law immediately preceding *Khumalo*, was somewhat more intricate.

It will be remembered that for many years prior to the new constitutional dispensation, our law of defamation treated media defendants differently from other defendants. While the latter could escape liability if the defamatory statement had been published without the object to insult, eg by honest mistake, the media were strictly liable for the publication of defamatory statements. Mistake, however reasonable, was not a defence. The only defences available to the media were

those arising from the objective factors surrounding publication—truth and public benefit, privilege, fair comment and other grounds of justification excluding wrongfulness. In practice it meant, of course, that if the media defendant were to rely, for instance, on truth and public benefit, the defence would fail if the defendant was unable to establish the truth of the statement on a balance of probabilities. Particularly during the late 1980s and early 1990s, the Appellate Division widened the boundaries of common law defamation claims against the media. By corollary these decisions narrowed the ambit of free speech and debate.

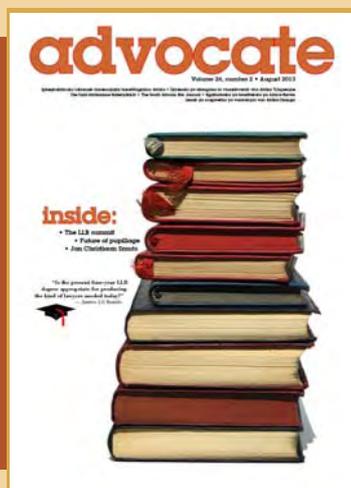
In the circumstances, not surprisingly, some decisions of the high courts held, after the advent of the new constitutional dispensation, that our common law was not sufficiently even-handed in its protection of the right to freedom of speech when it came into conflict with the right to reputation (see eg *Holomisa v Argus Newspapers* 1996 (2) SA 588 (W)). In *National Media Limited and others v Bogoshi* 1998 (4) SA 1196 (SCA) specific reference was made to earlier decisions of the Appellate Division which held freedom of the press to be adequately protected by the stereotype defences like truth and public benefit, fair comment and so forth. But in *Bogoshi* (at 1209A) Hefer JA pertinently held that this was not the case. Without any specific reference to the Constitution at all, the SCA consequently amended our common law by creating a new ground of justification—that is, a defence excluding wrongfulness—referred to as ‘reasonable or justifiable publication’ (at 1212G-H). In consequence, publication in the press of false allegations of fact is no longer wrongful—and therefore actionable—if upon a consideration of all the circumstances of the case, it is found to have been justifiable to publish the particular facts in the particular way at the particular time.

One cannot help to think that, if not for the influence of constitutional norms, this fundamental change for the benefit of the media would not have occurred. But, be that as it may, it is in consequence of this amendment that our common law was held to pass constitutional muster. In fact, so the Constitutional Court specifically held in *Khumalo* (para 43):

‘Were the Supreme Court of Appeal not to have developed the defence of reasonable publication in *Bogoshi’s* case, a proper application of constitutional principle would have indeed required the development of our common law to avoid this result. However, the defence of reasonableness developed in that case strikes a balance between the constitutional interests of plaintiffs and defendants.’

With regard to the protection of dignity our common law was also held adequate to strike the balance required by the Constitution between the right of freedom of expression, on the one hand, and the right to dignity, in the narrow sense of the right to a sense of self-worth, on the other. This happened in *Le Roux v Dey* 2011 (3) SA 274 (CC). But what became apparent in *Dey* once again is the impact of constitutional values when it comes to the application of the principles of common law. Broadly stated, the common law of impairment of dignity comprises both a subjective and an objective element. The subjective element entails that the plaintiff must in fact have felt insulted while the objective element requires that a reasonable person would feel the same way. The objective element, so the Constitutional Court held in *Dey* (para 180) ‘incorporates constitutional values and norms’. ‘The Constitution’, so the court proceeded (paras 184-5) ‘does not condone individual prejudice against people who are different in terms of race, sex, sexual orientation, conscience, belief, culture, language or birth ... It therefore cannot be actionable simply to call or depict someone as gay even though he chooses not to be gay and dislikes being depicted as gay—and even though stigma may still surround being gay.’

What is demonstrated by all this, I believe, is that although the overt purpose of the law of delict is to compensate, it also plays a covert role which it prescribes a set of ethical rules for social interaction. As a natural consequence, the law of delict is underpinned by a sense of morality and fairness. In this light it seems logical that constitutional values would have a dramatic impact on delict, but that the impact would be through the application rather than the amendment of established principles. **A**



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