

MILDRED MAPINGURE
versus
MINISTER, HOME AFFAIRS
and
MINISTER, HEALTH AND CHILD WELFARE
and
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 28 & 29 March 2012 and 12 December 2012

Default Judgment application

I Murerwa, for the applicant
No appearance for the respondents

BERE J: This is an application for the granting of default judgment against the defendants who after filing a notice of intention to defend this action through the Civil Division of the Attorney General's Office neglected to file their pleas resulting in them being barred from pleading hence this application.

It is sad in my view that once again the dilatory approach by the Civil Division of the Attorney General's Office comes under scrutiny. This court is naturally concerned with the casual approach adopted by the division given the significance of this case and the far reaching consequences of the judgment desired by the applicant. Government departments have a legitimate expectation for quality professional assistance from the division. The limping services which were rendered by the division in this matter do not enhance the stature of the Civil Division.

THE BACKGROUND

This case is no doubt a tragedy. The facts which are not in dispute can be summarised as follows:-

On 4 April 2006 the plaintiff was raped by robbers who attacked her residence in the Chegutu area after which she immediately lodged a report at the Zimbabwe Republic Police at Chegutu. The report was made on the same morning of the alleged rape.

At the police station the applicant requested the attending detail to arrange for her to immediately see a doctor as she sought medical intervention to prevent pregnancy and any possible transmission of sexually transmissible infections.

At the police station the applicant did not get prompt desired assistance. She was kept waiting for the whole day in order to get assistance from the officer mandated to deal with rape victims. It was not until 1600 hours on the same day that the applicant was taken to hospital where she was attended to by a doctor Kazembe.

The applicant asked the doctor concerned to ensure that she did not fall pregnant or contract any sexually transmissible infection. The doctor advised the applicant that he could only terminate the pregnancy in the presence of the police and that a report was also required. The applicant was further told by the doctor concerned that the desired termination had to be done within 72 hours of the unlawful intercourse. The doctor then invited the applicant to come back to the hospital on the following day with a police officer.

On the 5th day of April 2006 around 7 o'clock in the morning the applicant went back to Chegutu police station where she was referred to the Criminal Investigation Department, (C.I.D) and attended to by the investigating officer. Again the investigating officer advised the applicant that one Musarurwa who was not present at the station at the time was the only officer who could take her to the doctor.

Conscious of the need to act within the 72 hours advised by the doctor, the applicant went back to the doctor and advised him the officer responsible was not at the station. The applicant asked the doctor to terminate the pregnancy but the doctor insisted he could only do so if a 'report' was available.

On 6 April 2006 the applicant went back to the police station where she was once again advised that the officer responsible was unavailable. Frustrated, she went back to the doctor to whom she reported that the police officers were not cooperating and emphasised her fear of falling pregnant. The doctor was adamant he could not assist her as the police had to do their investigations first. The doctor cleaned and dressed her wound and sent her away.

It was only on 7 April 2006 that the applicant was able to find the appropriate officer at the station. When the officer escorted her to the doctor, the doctor advised that it was too late to terminate the pregnancy.

On the 5th day of May 2006, the applicant's pregnancy was formerly confirmed.

The police officer then referred the applicant to a public prosecutor where again the applicant made it clear she wanted the pregnancy terminated. The applicant was told by the public prosecutor to wait until the 'rape trial was done'.

In July of the same year the applicant on the advice of the officer mandated to deal with rape cases, went back to the prosecution department where the applicant saw one of the prosecutors whom she again advised she required to get her pregnancy terminated order.

The prosecutor concerned saw a Magistrate who according to the applicant advised that he could not help because the trial had not been done. It was not until 30 September 2006 that the certificate was eventually given to the applicant. The applicant's pregnancy was now around 7 months old. By the time the certificate was obtained the matron who was assigned to carry out the termination felt that it was no longer safe to do so and she declined to terminate the pregnancy.

The long and short of it is that for all her efforts to have the pregnancy terminated, the applicant, against her will kept the pregnancy to full term and eventually delivered a baby girl on the 24th of December 2006 whom she named Vimbainashe.

It is this untimely birth of Vimbainashe and the complications associated with the conception itself, the various efforts she made to have the pregnancy terminated which prompted the applicant to issue court process against the defendants seeking the following relief:-

- (a) payment in the sum of ten thousand dollars (US\$10 000-00) for physical and mental pain, anguish and stress suffered.
- (b) payment in the sum of forty one thousand and nine hundred and four dollars (US\$41 904) for the maintenance of Vimbainashe since her birth in December 2006 until the child attains the age of 18 years or becomes self-supporting whichever may be the sooner.
- (c) interest on the global amount of claim from date of judgment to date of full payment.
- (d) costs of suit.

The basis of the applicant's claim is that the employees of the three cited defendants were negligent in their failure to prevent the pregnancy or to expedite its termination.

In her declaration the applicant alleged that the employees of the first defendant were negligent in one or more of the following respects:-

- (a) they failed to attend to the plaintiff timeously for the pregnancy to be prevented;

- (b) they failed to take the plaintiff to the doctor timeously for the pregnancy to be prevented;
- (c) they failed to attend at the hospital with the plaintiff within a reasonable time for the pregnancy to be terminated;
- (d) the police failed to take reasonable steps to ensure that the pregnancy was terminated.

As for the employees of the second defendant, the applicant alleged that:-

- (a) they failed to prevent the pregnancy when it could have been reasonably prevented;
- (b) they failed to take reasonable steps to terminate the pregnancy.

Finally, as for the employees of the third defendant the applicant alleged they were negligent in one or more of the following respects;

- (a) they failed to attend to the plaintiff's case timeously in order to issue a certificate for the pregnancy to be terminated;
- (b) they failed to take reasonable steps necessary to ensure that the certificate required in terms of the Termination of Pregnancy Act was granted, and thereby prevented the termination of the pregnancy.

It is not in dispute that at all material times the defendants' employees were acting in the course and scope of their employment.

In determining this application I will also proceed on the basis that what the applicant alleges in her affidavit of evidence as well as her declaration is accurate since by allowing themselves to be barred the defendants deprived themselves of the opportunity to controvert the narration of events as put across by the applicant.

THE LAW ON TERMINATION OF PREGNACY IN ZIMBABWE

The termination of pregnancy in this country is governed or regulated by The Termination of Pregnancy Act¹ ("the Act").

The most relevant sections of the Act that deal with the situation that confronts me in this case is ss 4 and 5 of the Act.

The relevant para of s 4 o the Act is framed as follows:-

"4 circumstances in which pregnancy may be terminated

Subject to this Act, a pregnancy may be terminated –

- (a).....
- (b).....

¹ Chapter 15:10

(c) where there is reasonable possibility that the foetus is conceived as a result of unlawful intercourse”.

The most relevant part of s 5 of the same Act reads as follows;

“5 conditions under which pregnancy may be terminated

(4) A pregnancy may only be terminated on the grounds referred to in para (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)
- (i)
- (ii)
- (iii)

(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. (my emphasis).

I find it quite instructive that s 6 of the same Act deals with appeals by “any person who is dissatisfied with the refusal of the superintendent of a designated institution”.

In my view, liability of the cited defendants must naturally fall within the four corners of the Act. There must be a specific finding made by the court that the defendants, one or more of them, acted in a manner that was not consistent with the act in question.

I propose to consider the alleged liability of the defendants in the order they appear in the declaration itself.

THE MINISTER OF HOME AFFAIRS

It is true that after the alleged rape the applicant presented herself to different officers of the Ministry who in turn shuffled her from office to office whilst time for the required termination was running out.

The Act itself does not make any specific reference to the role which police officers play in the chain of events that lead to the termination of pregnancy. However, the same Act prescribes that “the woman concerned has to allege in an affidavit” which must be presented to a Magistrate that her pregnancy could be a result of rape.

The applicant does not allege that she did this in all her affidavits that were filed in these proceedings.

extra-stabilizing duties of police to the public

The second requirement or the other alternative requirement prescribed by s 5(4)(b) of the Act is that a woman requiring to have her pregnancy terminated must make a statement under oath to a magistrate that her pregnancy could be the result of *inter alia* rape.

It is common cause that once again the applicant did not do this as evidenced by the conspicuous absence of this averment in all of the papers filed.

It is equally true that the police officers were not of assistance to the applicant in giving her the correct advice. Without in anyway condoning the conduct of the police in this regard I am far from being convinced that by being a rape victim, the role of the police vis-a-vis the applicant should be raised to that of legal advisers to her.

It is understandable that the applicant was ignorant of the action that she had to take and that because of this she wasted valuable time shuffling from one office to the other.

That there was some negligence in the conduct of police in their interaction with the applicant is quite evident. However this is the kind of negligence which some legal minds have referred to as "negligence in the air"².

The police officers' constitutional mandate in a rape case is to ensure the culprit is brought to book in criminal proceedings. I do not read their mandate to extend to ensure the successful termination of unwanted pregnancy. The Termination of Pregnancy Act does not say so and its clear language must not be stretched to cover situations which even the legislature could not have contemplated.

It is for this reason that I am unable to attach any delictual liability to the police officers because of their omissions. If liability cannot be traced to the police officers, it goes without saying that the first defendant must be exonerated from any civil liability.

THE MINISTER OF HEALTH AND CHILD WELFARE

The role of a medical practitioner in the termination of the undesired pregnancy is quite simple and straightforward and it is governed in terms of s 5(4) of the Act. That section as I perceive it requires the medical practitioner to terminate the pregnancy once a magistrate has issued the appropriate certificate to authorise such termination. This position was emphasised for time without number by the Doctor who was approached by the applicant on numerous occasions. The applicant could not possibly have reasonably expected the doctor to Act in violation of the law.

post coital contraception would not be
been termination?)

² Per McNALLY JA In Mayor of the City of Harare and Anor v Magama and Anor 1992(2) ZLR 75 (SC) @ p83

When the certificate was eventually obtained when the applicant's pregnancy was seven months or so old, the conviction by the matron who was supposed to terminate it was that it was no longer safe to do so. I did not hear the applicant to be arguing that at that stage it was still safe to have the pregnancy terminated nor did I hear her through her filed papers to be saying that the doctor or matron was to blame for the delay in her obtaining the appropriate certificate. In fact, her own counsel through supplementary heads of argument filed at the request of my brother, MUTEMA J on 3 March 2012 concedes that when the certificate was eventually issued on 30 September 2006 it was too late for the pregnancy to be terminated.

In any event if the applicant felt that those who attended to her at the institution had erred, she could have at that stage taken her case on appeal to the Secretary as provided for in terms of s 6 of the Act.

Again, in this regard, I do not find any negligence on the part of the second defendant's employees. If anything, they deserve to be commended for their insistence on compliance with the statutory requirements of the Act, and their cautious approach in avoiding taking a risk with the applicant's life by attempting termination of pregnancy which was approaching maturity.

It remains as fanciful thinking for the applicant to attach any liability to the second defendant's employees and consequently no vicarious liability can be visited upon the second defendant.

THE THIRD DEFENDANT

It occurs to me that by the time the employees of the third defendants were approached valuable time had already been lost by the applicant in barking the wrong tree.

Counsel for the applicant/plaintiff suggests in para 22³ of his supplementary heads of argument that "the Act does not specifically prescribe who should initiate the process of termination of pregnancies per se nor does the Act clearly spell out the procedure to be followed in effecting termination ..".

With respect, I have extreme difficulties in following this argument. A proper reading of the Act in my view clearly shows that the victim must herself take the initiative because not all victims who conceive through rape desire termination. The onus was clearly on the victim in this case to have initiated termination of her pregnancy.

³ P 121 of the consolidated index

Secondly, the conditions under which a Magistrate issues a certificate to authorise termination of pregnancy is clearly spelt out in s 5(4)(b) of the Act. It is the applicant (the woman concerned) who had the obligation to present an affidavit to a Magistrate or to physically present herself before a Magistrate and make a statement under oath explaining the circumstances surrounding her pregnancy.

This is all that was required of the applicant. There is no role for the public prosecutor. Again the public prosecutor's mandate is to prosecute the alleged rapist and he has nothing to do with the termination of the pregnancy or to give legal advice to a person in the position of the applicant.

The applicant's numerous papers as presented to me in this application for default judgment do not show that when she presented herself to a Magistrate she had satisfied the conditions under which the Magistrate could have issued her with the required certificate. The applicant took it upon herself to shuffle from office to office, from one officer to the other instead of doing simple things required by the Act.

The applicant's situation is understandable. What runs through all her efforts is that she did not know the correct procedure. She was simply ignorant of the procedure or processes involved and she spend quite sometime knocking at almost every door that presented itself to her. But we all know and tragically so, that ignorance of the law is no excuse, neither can one find refuge in such ignorance to attach liability to someone else.

That ignorance of the law does not excuse anyone is a concept that has survived the test of time does not trigger any debate.

The strong view that I take is that the mere fact that officials from the third defendant may have mistakenly or wrongly advised the applicant on the process of termination of her pregnancy does not give the applicant ammunition to turn her sword against them because they were not her legal representatives.

If the applicant was not aware of the process or procedure for terminating her pregnancy she was at liberty to seek proper legal advice in time like what she has now done in these proceedings.

The applicant cannot and must not be allowed to derive some financial benefit from her ignorance and or failure to do the right thing at the appropriate time.

I would have understood the applicant's case if her position was that after she had complied with the provisions of s 5(4)(b) of the Act, the Magistrate failed to assist her. The applicant does not say that and she cannot possibly say that because it is clear she did not

herself comply with the requirements of the Act. The reason for such non-compliance is simple. The applicant was simply ignorant of the processes involved.

I am again at a loss as to why the third respondent has been dragged to court in these proceedings.

The applicant cannot vent her frustrations for her misfortune on the cited Ministers or Ministries because of her own inadequacies in failing to do the right thing in time.

I accordingly dismiss her claim against the third defendant.

In conclusion, I want to comment the extensive research done by counsel for the applicant's counsel and I am persuaded that in a proper case courts should have no difficulties granting the relief sought. Unfortunately this is not one such a case.

I may also want to add and say that if the applicant still finds it difficult to come to terms with the misfortune of having given birth in the circumstances she was subjected to she must be advised of the various options open to her by legal practitioners.

I have agonised over the question of costs in this matter conscious that I have a wide discretion in this regard.

This case has once again brought to the fore the rights of women falling into the category of the applicant. These are matters of national interest and I am satisfied the applicant must be spared the burden of costs despite her having lost.

Consequently the applicant's application for default judgment is dismissed with no order as to costs.

Scanlen and Holderness, applicant's legal practitioners