

**ALIX JEAN CARMICHELE v THE MINISTER FOR SAFETY AND SECURITY
AND THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

CCT 48/00

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This case concerns the constitutional obligation on the courts to develop the common law to promote the spirit, purport and objects of the Bill of Rights. The specific issue was whether the High Court and the Supreme Court of Appeal ought to have broadened the concept of “wrongfulness” in the law of delict in the light of the State’s constitutional duty to safeguard the rights of women.

The applicant sued the two Ministers concerned for damages resulting from a brutal attack on her by a man who was awaiting trial for having attempted to rape another woman. Despite his history of sexual violence, the police and prosecutor had recommended his release without bail. In the High Court the applicant alleged that this had been an omission by the police and the prosecutor. She also relied on the duties imposed on the police by the interim Constitution and on the State under the rights to life, equality, dignity, freedom and security of the person and privacy. The High Court dismissed the claim at the close of the applicant's case, finding that she had not established that the police or the prosecutor had wrongfully failed to fulfil a legal duty owed specifically to her. The applicant appealed to the Supreme Court of Appeal (SCA), which held that the police and prosecution had no legal duty of care towards the applicant and could not as a matter of law be liable for damages to her.

In a unanimous decision by Justices Ackermann and Goldstone, the Constitutional Court granted the application for leave to appeal and upheld the appeal. The Court held that, although the major engine for law reform should be the legislature, courts are under a general duty to develop the common law when it deviates from the spirit, purport and objects of the Bill of Rights. In this case the constitutional aspects had unfortunately not been raised before either the High Court or the SCA. This did not, however, affect the obligation on those courts to develop the common law if in this case it was appropriate to do so.

The Constitutional Court considered the potential liability of both police and prosecutors. As to the police, it held that the State is obliged by the Constitution and international law to prevent gender-based discrimination and to protect the dignity, freedom and security of women. It is important that women be free from the threat of sexual violence. In the particular circumstances of the present case the police recommendation for the assailant’s release could therefore amount to wrongful conduct giving rise to liability for the consequences. Similarly, the Court held that prosecutors, who are under a general duty to place before a court any information relevant to the refusal or grant of bail, might reasonably be held liable for negligently failing to fulfil that duty.

The Court also referred to the complex issue of causation in this case.

As to the order to be made in light of these findings, the Court was at a disadvantage in the absence of judgments on these constitutional issues by the High Court and the SCA. But the case has already passed through three courts and the interests of justice demand that it be brought to a head without delay. In view of the constitutional obligations on the police and prosecutors, the argument of the appellant has sufficient merit to place the respondents on their defence. The appeal was upheld and the matter referred back to the High Court. The effect of the order will be to have the case re-opened in the trial court on the basis that the appellant has made out a case in law for the Ministers to meet. The Ministers will now have the opportunity to lead evidence as to whether or not on the facts they should be held liable for damages.