CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 182/14

In the matter between:

DE Applicant

and

RH Respondent

Neutral citation: *DE v RH* [2015] ZACC 18

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J and Theron AJ

Judgments: Madlanga J (majority): [1] to [66]
Mogoeng CJ (concurring): [67] to [72]
Order: [66]

Decided on: 19 June 2015

Summary: Law of delict — *actio iniuriarum* — injury to personality — *contumelia* — loss of consortium — development of common law of delict based on public policy — must consider constitutional values — wrongfulness of adultery

Delictual claim against third party based on adultery — continued existence of claim for adultery in South African law — right to dignity — right to privacy — protection of marriage — constitutional rights of spouses and third party

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the North Gauteng High Court, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed.

JUDGMENT

MADLANGA J (unanimous):

Introduction

[1] Undertakings of fidelity – whether in the form of *ho lauwa*, *go laiwa* or *ukuyalwa*[1] or solemn vows or any other form dictated by various cultures or religions – are no guarantee that adultery will not take place in marriage. In fact, adultery is probably fractionally younger than the institution of marriage. In the legal context, when a spouse commits adultery, does the non-adulterous spouse have a right of action in delict against the third party for injury or insult to self-esteem (*contumelia*) and loss of comfort and society (consortium) of her spouse? If so, is there justification for the continued existence of the action? These questions are at the centre of this application.

[1] SeSotho, SeTswana and Nguni – respectively – for the counselling that takes place at traditional weddings on the do's and dont's of marriage.

[2] Until a recent pronouncement by the Supreme Court of Appeal, the delictual action has been part of our law.[2] On appeal to it in this very matter, the Supreme Court of Appeal held that the time had come to rid our legal system of this claim.[3] It is that decision, which undoubtedly is of historical moment in our jurisprudence, with which we must now grapple.

[3] The applicant, Mr DE, successfully sued the respondent, Mr RH, in the North Gauteng High Court, Pretoria (High Court) for damages arising from adultery that occurred between Mr RH and Mr DE's erstwhile wife, Ms H.[4] Mr DE sued on the *actio iniuriarum*.[5] The claim was for loss of consortium and *contumelia*.[6]

[4] On appeal to it, the Supreme Court of Appeal raised – *mero motu* (of its own accord) – the question whether the claim should continue being part of our law.[7] It invited written submissions on this issue from the parties. In a unanimous judgment

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[2] As far back as 88 years ago the Appellate Division recognised the claim for the first time in *Viviers v Kilian* 1927 AD 449 (*Viviers*). Before that it was recognised in the then Cape Colony in *Biccard v Biccard and Fryer* 1892 (9) SC 473. The recent pronouncement by the Supreme Court of Appeal was made in the instant matter (*RH v DE* [2014] ZASCA 133; 2014 (6) SA 436 (SCA) (*RH*)). See *Foulds v Smith* 1950 (1) SA 1 (A) (*Foulds*) and *Bruwer v Joubert* 1966 (3) SA 334 (A) (*Bruwer*) at 337 and *Wiese v Moolman* [2008] ZAGPHC 246; 2009 (3) SA 122 (T) (*Wiese*).

[3] *RH* id at para 41.

[4] *E v H* [2013] ZAGPPHC 11. That adultery did take place is not at issue. What is in issue is its timing.

[5] This is the general remedy for the infringement of personality rights. Its main aim is to protect plaintiffs against wrongful and intentional infringement of these rights and allow for the recovery of damages if infringement is proved. Under Roman-Dutch law, the personality rights protected by this action are bodily integrity (*corpus*), dignity (*dignitas*) and reputation (*fama*). *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) at 247-8. *Dignitas* essentially functions as an umbrella for all personality rights apart from physical integrity and good name and includes the concept of *contumelia*. See generally Neethling and Potgieter *Law of Delict* 6 ed (LexisNexis, Durban 2010) at 13-5 (Neethling and Potgieter). See also *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (*Khumalo*) at para 27, where this Court notes that "no sharp line can be drawn between these injuries to personality rights" and in essence states that constitutional values imbue our understanding of these rights.

[6] *E v H* above n 4 at para 17.

[7] It appears from the papers before the High Court that Mr DE did also claim on the basis of the action for enticement. That action is available when "a third person, by persuasion or inducement alienates one spouse from the other, and convinces him or her to leave the matrimonial home". Neethling and Potgieter above n 5 at 353. The Supreme Court of Appeal, possibly erroneously, was of the view that this action was not pleaded. It also expressed the view – and perhaps correctly – that in any event, Mr DE was hopelessly short of proving this claim on the facts. *RH* above n 2 at para 10. Accordingly, it did not rule on the continued existence of that claim at all. Before us, no issue has been raised around that claim. Therefore, there is no need for me to deal with it, or indeed any other claim other than for loss of consortium and *contumelia*.

by Brand JA, the Court held that on the facts the applicant did not have a claim for loss of consortium against the respondent,[8] but that, on the law as it stood, he may have a claim for *contumelia*.[9] This then brought to the fore the question the Court had raised *mero motu*. In dealing with this issue, the judgment canvassed the historical trajectory of the claim, foreign law comparators, changing societal norms and the detrimental financial and emotional costs of an action of this nature. It concluded "that in the light of the changing *mores* of our society, the delictual action based on adultery . . . has become outdated and can no longer be sustained; that the time for its abolition has come".[10]

[5] Mr DE seeks leave to appeal to this Court against that decision. This Court has elected to give judgment on the papers without an oral hearing.[11]

Background

[6] It is common cause that adultery did take place. Intimate details of it were laid bare in a very raw and intrusive way before the High Court and then, to a lesser extent, before the Supreme Court of Appeal. For purposes of this judgment, I need only state the facts very briefly. Cohabitation between Mr DE and Ms H ceased on 23 March 2010 when Ms H left the common home. In June 2010 Ms H instituted divorce proceedings. In September 2011 a divorce order was granted. Mr DE avers that the breakdown of the marriage was due to the adulterous relationship. He maintains that the marriage relationship was a happy one until 2010.

[7] Ms H claims that the marriage began to deteriorate in late 2008. By late 2009 the seriousness of the marital problems caused her to consult a marriage counsellor. She admits that she and the respondent became romantically involved after she left the

[8] The Supreme Court of Appeal's assessment of the facts was that loss of consortium between Mr DE and Ms H occurred when Ms H left the family home in March 2010 – a few months before the adultery took place – and the parties lived apart and never resumed cohabitation.

[9] *RH* above n 2 at paras 13-5.

[10] Id at para 40.

[11] Rule 11 of this Court.

marital home and that they only had sex much later, at a time when the marriage relationship had broken down irretrievably.

Leave to appeal

[8] The applicant contends that the question whether the delictual claim based on adultery should continue to exist is an arguable point of law of general public importance. Yes, it is.[12] The survival or demise of a delictual claim invariably affects the broader public, it is a discrete legal question and there is some merit in the appeal.

[9] The application is also founded on constitutional issues. The test for the grant of leave in applications raising constitutional issues is well-established and I need not rehash it. The question raised *mero motu* by the Supreme Court of Appeal engages the development of common law in accordance with public policy. Public policy is now infused with constitutional values and rights contained in the Constitution.[13] The applicant raises three main constitutional issues. First, the Supreme Court of Appeal failed to develop the common law in line with the Constitution. Second, that Court did not take into account the applicant's right to dignity when it abrogated the delictual action based on adultery, as the action serves to protect the dignity of the non-adulterous spouse. Finally, that Court failed to take heed of the value and importance of marriage and family, acknowledged in section 15(3) of the Constitution,[14] which he claims should be protected – under section 8 of the

[12] Without getting into any detail, the test laid down in *Paulsen and Another v Slip Knot 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC) at paras 20-3 is met.

[13] *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR (CC) 511 at para 34 (*Loureiro*); *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at paras 28-9 (*Barkhuizen*); *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 56 (*Carmichele*); and *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) (*Brisley*) at para 91 of the concurring judgment by Cameron JA.

[14] Section 15(3) relates to the right to freedom of religion, belief and opinion, and states:

> "(a) This section does not prevent legislation recognising—
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> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
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> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

Constitution – from interference through the continued existence of the delictual claim.[15]

[10] This Court's jurisdiction is engaged both on the basis that an arguable point of law of general public importance has been raised and the matter is constitutional in nature. The debate that follows plainly demonstrates that the issues that the applicant raises are arguable and they bear reasonable prospects of success. Also, it is in the interests of justice for this Court to pronounce on the central question facing us. Leave to appeal must be granted.

Continued existence of the claim

[11] In essence, this is the only issue to be determined. The answer to this question lies in whether nowadays the act of adultery meets the element of wrongfulness in order for delictual liability to attach. Even though my discussion has a number of headings, the pivotal question concerns wrongfulness and all those headings relate to it.

[12] From this point onwards I borrow extensively from the well-reasoned judgment of the Supreme Court of Appeal and I am grateful to that Court. That judgment deals

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(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

[15] Section 8 provides:

"(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

with the subject so extensively that, in essence, what this Court's judgment does is to focus on the impact constitutional imperatives have on the delictual claim.

[13] Giving a brief historical background of its development, the claim was recognised by the Appellate Division[16] in *Viviers*.[17] This has been confirmed several times since.[18]

[14] The origins of the claim are deeply rooted in patriarchy. Originally only a man had the right to pursue a claim against a third party that had committed adultery with his wife.[19] Wives were viewed as mere chattels.[20] And that probably explains why the claim was available only against the third party, and not the wife who – in essence – was a co-wrongdoer. As time went on, South African courts began questioning the discriminatory nature of the claim.[21] Making contentions based on Christian principles of fidelity, which are applicable both to husbands and wives, Barlow advocated that the delictual claim be available to wives as well.[22] Not long thereafter the case of *Rosenbaum v Margolis* declared that the claim was available to wives.[23] The Appellate Division confirmed this in *Foulds*.[24]

[15] Reverting to the issue at hand, must the claim continue to exist?

[16] As the Supreme Court of Appeal was then known.

[17] *Viviers* above n 2 at 449-450 and 457-9.

[18] *RH* above n 2 at para 16. On cases that have previously confirmed the existence, see, for example, *Foulds* above n 2 and *Bruwer* above n 2.

[19] Carnelly "One Hundred Years of Adultery – Re-assessment Required?" in Hoctor and Kidd (eds) *Stella Iuris Celebrating 100 Years of Teaching Law in Pietermaritzburg* (Juta and Co Ltd, Cape Town 2010) (Carnelly).

[20] Tennet "Damages for adultery; a criticism of our law" (1952) 69 *SALJ* 96 (Tennet).

[21] Carnelly above n 19 at 188.

[22] Barlow "A Wife's Claim to Damages against a Female Co-respondent" (1940) 57 SALJ 6 (quoted in Carnelly id at 188).

[23] *Rosenbaum v Margolis* 1944 WLD 147.

[24] *Foulds* above n 2.

[16] Without doubt it is open to courts to develop the common law. This is a power they have always had.[25] Today the power must be exercised in accordance with the provisions of section 39(2) of the Constitution which requires that common law be developed in a manner that promotes the spirit, purport and objects of the Bill of Rights. This entails developing the common law in accordance with extant public policy. In *Du Plessis*[26] Kentridge AJ quoted the case of *Salituro* with approval:

> "Judges can *and should* adapt the common law to reflect the changing social, moral and economic fabric of the country. *Judges should not be quick to perpetuate rules whose social foundation has long since disappeared*. Nonetheless there are significant constraints on the power of the [J]udiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The [J]udiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."[27] (Emphasis added.)

This *dictum* shows that courts have the duty to develop the common law whenever that is warranted.[28]

[17] Public policy is now infused with constitutional values and norms.[29] In *Barkhuizen* this Court said:

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[25] See *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* [1992] ZASCA 63; 1992 (3) SA 579 (A) at 590G-H, where the Court, in the context of developing the common law delictual action for defamation, stated:

> "These are the rules which would be applicable to the defamation of political bodies, if an action by them is to be permitted. And if it were to appear, in the interests of legal or public policy, that the limits of lawfulness are, in certain circumstances, unreasonably wide or narrow our law is flexible enough to adapt to the needs of the times."

[26] *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 61 (*Du Plessis*). This was again quoted by a unanimous Court in *Carmichele* above n 13 at para 36.

[27] *R v Salituro* [1991] SCR 654 (Canada) at paras 666G-H and 670F-I (*Salituro*).

[28] See also *Carmichele* above n 13 at para 36 where this Court held that—

> "the courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. We would add, too, that *this duty upon Judges* arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2)." (Emphasis added.)

> "Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. . . .
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> What public policy is . . . must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights."[30] (Footnote omitted.)

Also, public policy does inform the wrongfulness element of delictual liability.[31]

[18] In this Court, although expressing himself in the context of the Aquilian action,[32] Van der Westhuizen J said:

> "The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability."[33]

[19] In the context of the *actio iniuriarum* under which the present claim falls, the Appellate Division said:

> "In determining whether or not the act complained of is wrongful the Court applies the criterion of reasonableness – the 'algemene redelikheidsmaatstaf' . . . . This is an

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[29] *Paulsen* above n 12 at paras 69-70; *Barkhuizen* above n 13 at paras 28-9; *Carmichele* above n 13 at para 56; *Du Plessis* above n 26 at para 24; and *Brisley* above n 13 at para 91.

[30] *Barkhuizen* above n 13 at paras 28-9.

[31] *Le Roux v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 122 and *Carmichele* above n 13 at paras 37 and 39.

[32] The action is described in *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 377: "In essence the Aquilian action lies for patrimonial loss caused wrongfully (or unlawfully) and culpably".

[33] *Loureiro* above n 13 at para 53.

> objective test. It requires the conduct complained of to be tested against the prevailing norms of society (i.e. the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful."[34]

[20] The Supreme Court of Appeal in the instant matter acknowledged that it had to analyse the *mores* of society (or public policy) in order to assess the currency of this delictual claim but felt it unnecessary to analyse its continued existence in the context of constitutional norms. The Court held:

> "In the light of this conclusion I find it unnecessary to consider the further contention advanced by some of our academic authors . . . which was subscribed to by the defendant in argument, that the continued existence of the action is in conflict with our constitutional norms."[35]

[21] Any analysis of the *mores* of our society must include an assessment of constitutional norms as *Barkhuizen* detailed; public policy is now steeped in the Constitution and its value system. The Supreme Court of Appeal's analysis stopped short of this.

[22] I now turn to whether the act of adultery is wrongful for purposes of the claim in issue here. If it is not, that is the end of the matter as there can be no delictual liability without wrongfulness. Based on the above test, changing – and indeed softening – attitudes towards adultery bear relevance to public policy and, therefore, wrongfulness.

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[34] *Delange v Costa* 1989 (2) SA 857 (A) at 862E-F (*Delange*). The Afrikaans "algemene redelikheidsmaatstaf" means "general reasonableness criterion". See also *Van Jaarsveld v Bridges* [2010] ZASCA 76; 2010 (4) SA 558 (SCA) at para 19.

[35] *RH* above n 2 at para 40.

Changing attitudes

(a) South Africa

[23] Unthinkable pronouncements – obviously informed by attitudes towards adultery at the time – would sometimes be made not only about adultery, but about children born of adulterous relationships.[36] Over time there has been a softening of attitudes towards adultery.

[24] In *Green v Fitzgerald* De Villiers CJ pronounced that the criminal offence of adultery had been abrogated by disuse. He said:

> "Adultery . . . is unhappily of most frequent occurrence, and although the reports of divorce cases are daily published in the newspapers, the authorities take no notice of the offence. It has ceased to be regarded as a crime".[37]

[25] The continued existence of the contentious claim was questioned by a South African Court more than seven decades ago. The Court said:

> "There is something . . . to be said for the view that an action for damages against an adulterous third party is out of harmony with modern concepts of marriage and should be abolished."[38]

[36] This is what was said in *Hoffman and Others v Estate Mechau* 1922 CPD 179 at 183:

> "I do not think it can be said to be either just or expedient that bastard children, whose very existence must have been a source of humiliation and disgrace to the children born in lawful wedlock, should be admitted as lawful children into the family by virtue of a subsequent marriage of the father with the very woman whose illicit relationship with their father, the children born of lawful wedlock probably know embittered the life of their mother and brought disgrace upon themselves. Such legitimation may be the source of much strife and unpleasantness in the family and may operate very unfairly and unjustly upon the children of the lawfully wedded wife by wholly or partially depriving them of their rights of succession as lawful issue."

Needless to say, these utterances would not bear scrutiny in our present constitutional dispensation. Not surprisingly, in *Makhohliso* [misspelt *Makholiso*] *and Others v Makhohliso and Others* 1997 (4) SA 509 (Tk) at 520G-I the Court first disagreed with these views and then held that, in any event, they did not accord with modern-day notions of morality.

[37] *Green v Fitzgerald and Others* 1914 AD 88 at 103.

[38] *Rosenbaum* above n 23 at 158.

The Supreme Court of Appeal judgment has a useful collection of authorities that have opined on this issue.[39] Academics overwhelmingly take the view that the claim is outdated and should be abolished.[40] A notable exception is Neethling.[41] He finds judicial support in *Wiese v Moolman*.[42] The High Court in the instant matter followed *Wiese* which it considered to have been decided correctly.

[26] On concrete changes, I have touched on the abrogation of adultery as a crime.[43] Central to the applicant's case is a theme that the delict founded on adultery is intended to protect marriage. In that context, it is not without significance that divorce laws have long been relaxed to make it easier for spouses who no longer wish to be bound by a marriage that does not work to obtain a divorce. Before the relaxation, divorce could only be obtained on circumscribed grounds: adultery; malicious desertion; incurable insanity; and habitual criminality. This was altered by section 3 of the Divorce Act,[44] which made it possible for a marriage to be dissolved on the basis that it had broken down irretrievably. I am not mentioning this to suggest that the value of marriage as an institution has diminished. Quite the contrary is true. This Court has expressed itself favourably towards the institution.[45]

[39] *RH* above n 2, commencing at para 21.

[40] The Supreme Court of Appeal identifies the following: Church "Consortium Omnis Vitae" (1979) 42 *THRHR* 376 at 380-1; Hahlo *South African Law of Husband & Wife* (1980 Supplement to 4 ed) at 31; Labuschagne "'Deinjuriering' van Owerspel'" (1986) 49 *THRHR* at 336; Cronjé and Heaton *South African Family Law* 2 ed (2004) at 50-1; Erasmus et al *Lee & Honore Family, Things and Succession* (1983) at para 59 fn 5; and Carnelly above n 19.

[41] Neethling *Law of Personality* 2 ed (LexisNexis, Durban 2005). See also Neethling "Owerspel as onrigmatige daad – Die Suid-Afrikaanse Reg in Lynregte Teenstelling met die Nederlandse Reg" (2010) 73 *THRHR* 343 at 346.

[42] *Wiese* above n 2.

[43] At [24].

[44] 70 of 1979.

[45] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*) at para 30. See also *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) (*Fourie*) at paras 63-74 and *Volks NO v Robinson* [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (*Volks*) at para 52.

[27] What I do say, however, is that our modern day idea of the sacrosanctity of marriage and its concomitant protection by the law are by no means what they were in, say, the times of King Henry VIII, who – because of Roman Catholic tenets, at a time when there was not much separation between church and state – could not even get a divorce and was forced to decree that thence forth the Church of England would be separated from the papal authority of the Roman Catholic Church. Needless to say, he was then free to follow his heart's desire, although he was excommunicated by the Pope for this conduct. We have come a long way from those strictures and gymnastics. That is because times are changing, and the law – though still recognising the sanctity of marriage – has moved with the times both in its conception of the institution of marriage and the punitive extremes to which it will go to protect it.

(b) Comparative law

[28] It may be of value to seek guidance from foreign law on developments on the claim. But – because of differences in context – this is something that must be done with the necessary caution. This Court has said:

> "The relevant question then is what role foreign law can fulfil in considering this case. Where a case potentially has both moral and legal implications in line with the importance and nature of those in this case, it would be prudent to determine whether similar legal questions have arisen in other jurisdictions. In making this determination it is necessary for this Court to consider the context in which these problems have arisen and their similarities and differences to the South African context. Of importance is the reasoning used to justify the conclusion reached in each of the foreign jurisdictions considered, and whether such reasoning is possible in light of the Constitution's normative framework and our social context."[46]

[46] *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC) at para 32. See also *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at paras 26-7 and *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 39.

[29] The Supreme Court of Appeal identified English law as the origin of the private law claim for damages arising from adultery in South African law.[47] The action – which was called "criminal conversation" in England – was abolished by legislation.[48] This has since been followed by New Zealand and Australia in 1975, Scotland in 1976, Ontario in 1978, and subsequently by almost all the provinces of Canada.[49] In 42 states in the United States of America the action has been abolished or severely restricted.[50]

[30] While at one time adultery was punishable as a criminal offence in France, the Netherlands, Germany and Austria, it no longer exists as a crime in any of these countries; nor do civil claims exist in these jurisdictions.[51] As long ago as 1952, an unnamed professor at the University of Vienna is reported to have said the continued existence of an action for damages for adultery was "utterly repugnant to modern ideas".[52] He continued:

> "Not only is it degrading to the wife, who is treated as a kind of chattel belonging to her husband, but it is wrong that the time of the courts should be taken up in attempting to assess marital fidelity in terms of money."

[31] The German position was emphatically articulated in a case before the Bundesgerichtshof,[53] which rejected a plea for the development of German law to recognise the claim. The Bundesgerichtshof held:[54]

> "[N]o claims in tort are allowed by the law in force in cases of 'intrusion of a marriage' either against the guilty spouse or against the intruding third party. . . . [I]t

[47] *RH* above n 2 at para 24 read with para 26.

[48] Section 4 of the Law Reform (Miscellaneous Provisions) Act 1970. Id at para 26.

[49] *RH* above n 2 at para 27.

[50] Id.

[51] Id at para 24.

[52] Quoted by Tennet above n 20 at 96.

[53] This is the Federal Court of Justice, Germany's highest court of civil and criminal jurisdiction.

[54] Quoted in *RH* above n 2 at para 25.

> expresses the conviction that highly personal relations should not be regulated by law, which is at least compatible with constitutional law and corresponds to modern ethics."[55]

[32] The majority of other jurisdictions based on English civil law have also disposed of the claim.[56] These nations include the Republic of Ireland,[57] Barbados,[58] Bermuda,[59] Jamaica[60] and Trinidad and Tobago.[61]

[33] To the extent I could ascertain, the position in Africa reveals a chequered pattern.[62] I deal with only a few countries on the continent. Cameroon is one of those countries where adultery is still a criminal offence.[63] Kenya has recently introduced changes which appear to leave some room for a claim; its exact nature is not all that clear to me. The Matrimonial Causes Act[64] allowed for a "husband . . . [to] claim damages from any person on the ground of adultery with [his] wife". This was repealed by the Marriage Act,[65] section 13 of which replaced the action with the following claim:

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[55] Bundesgerichtshof (Sixth Civil Senate) on 22 February 1973 (JZ 1973, 668), relying upon the translation of Markesinis and Unberath *The German Law of Torts: A Comparative Treatise* 4 ed (Hart Publishing, Oxford and Portland 2002) (*Bundesgerichtshof 668*) at 364-5.

[56] *RH* above n 2 at para 27.

[57] In 1981 – section 1(1) of the Family Law Act, number 22 of 1981.

[58] In 1982 – section 96 of the Family Law Act 29/1981.

[59] In 1977 – section 4 of the Law Reform (Miscellaneous Provisions) Act 1977.

[60] In 1989 – section 35 of the Matrimonial Causes Act (1 February 1989).

[61] In 1972 – section 19(2)(b) of the Matrimonial Proceedings and Property Act 2 of 1972.

[62] This exercise does not purport to be comprehensive. But I think a sufficient enough number of countries was considered to give us an idea of the trends. I can only hope that the available research tools yielded information that is as up to date as possible.

[63] Section 361 of the Cameroon Penal Code provides that—

> "(1) any married woman having sexual intercourse with a man other than her husband shall be punished"; and
>
> "(2) any married man having sexual intercourse in the matrimonial home, or habitually having sexual intercourse elsewhere, with a woman other than his wife or wives, shall be punished".

[64] Chapter 152, 1962 at section 23(1).

[65] 4 of 2014.

> "Despite the provisions of any other written law—
>
> . . .
>
> (c) a spouse shall be entitled to claim, in any action resulting from a negligent act, omission or breach of duty, which causes loss of the companionship of the other, or damages in respect of that loss."[66]

[34] Several African countries retain the action for damages for adultery against a third party.[67] They include Zimbabwe,[68] Namibia,[69] and Botswana.[70]

[35] Seychelles is an example of a country that has definitively disposed of the action for adultery. The claim was repealed by the Matrimonial Causes Act, which stated that "[n]otwithstanding any other written law, the adultery of a party to a marriage shall not give rise to a claim for damages".[71] Quite instructively, in *Rose v Valentin* the Supreme Court of Seychelles, quoting *Cosgrow v Cosgrow* said:

> "The evolution of the law within commonwealth jurisdictions over the last decade or so demonstrates that there is no longer any turpitude attached to adultery."[72]

[36] It is worth noting that in the Namibian case of *Van Wyk* even as the Court upheld the claim, it acknowledged the softening of attitudes towards adultery.[73] It accepted that societal *mores* in modern times have moved on from olden day

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[66] Seeing that the act of sexual intercourse can hardly ever be negligent, can adultery be committed negligently? If a person engages in sexual relations with a married person unaware that that person is married but in circumstances where she or he ought reasonably to have been aware, the failure to establish the true facts would constitute negligence. Adultery may result in a spouse losing the companionship of the other. If that be so, "negligent adultery" may well be covered by the section. Happily, I do not have to resolve the interpretive issues on this.

[67] These are countries which were influenced by the English "criminal conversation" action.

[68] As recently as 2010 the Zimbabwean High Court upheld the claim in *Jhamba v Mugwisi* [2010] ZWBHC 1.

[69] *Jaspert v Siepker* [2013] NAHCMD 267 and *Van Wyk v Van Wyk and Another* [2013] NAHCMD 125 (*Van Wyk*).

[70] *Madidimalo v Madidimalo and Another* 2006 (2) BLR 102 (HC) and *Malikita v Webb* 1996 BLR 986 (HC). In *Medupe v Baakanyang* 1996 BLR 612 (HC) the High Court extended the action to allow a wife to claim against a third party, in light of constitutional provisions.

[71] 3 of 1992, Chapter 124 at section 26.

[72] *Rose v Valentin* [1999] SCSC 8; 1999 SLR 99, quoting *Cosgrow v Cosgrow* SCA 12/1992 (New Zealand).

[73] *Van Wyk* above n 69 at para 26.

perceptions of adultery. It recognised certain core rights of each spouse as an individual, especially the autonomy and individual agency of each. In this respect, society no longer views it as reprehensible, without more, that a married person may meet and fall in love with someone else. It said:

> "*It may well be that in this age, society views with less disapprobation than in the past the commission of adultery*. There are also degrees of reprehensibility in the delict of violating the marital relationship ranging from the isolated chance encounter to the sustained continuing invasion of the sanctity of the marital relationship. It must however be remembered that marriage remains the cornerstone and the basic structure of our society. The law recognises this still today and the court must apply the law. One can also not ignore the possibility that a married person meets someone else, develops feelings for that person and falls out of love with his or her spouse without intending to. But the way in which the 'guilty' spouse and third party behave thereafter, due regard being had to the innocent party's personality rights, will determine the extent of an award of damages in an action for damages against the guilty party."[74] (Emphasis added and footnote omitted.)

[37] Taking the foreign law that I have tracked as a whole, it appears that the general trend is towards the abrogation of a civil claim following on the heels of the even faster paced international disposal of the crime of adultery. The wave of change seems to be moving – certainly preponderantly – in one direction. I would be surprised if in recent history there are countries, let alone a significant number, that have introduced more restrictive laws against the act of adultery.

[38] Also, the retention of the claim by some countries is not necessarily an indication that these countries would not abolish it even if called upon to do so. In certain cases it may well be that the issue of abolition has never arisen for judicial determination. Quite mindful that we are yet to pronounce finally on the issue, let us take South Africa as an example. Had the Supreme Court of Appeal not raised the issue of its own accord, South Africa would still be counted amongst those nations that retain the claim. So, all that may be keeping some countries where they are may

[74] Id.

be no more than a lack of the necessary trigger; the issue whether the claim should continue to exist may simply never have been raised pertinently.

Constitutional significance of marriage

[39] Where does the above discussion take us? The thrust of the applicant's argument says nowhere. Not in the face of the seal of constitutional significance of marriage given by this Court. For this the applicant relies on *Dawood*[75] and *Fourie.*[76] In *Dawood* O'Regan J said:

> "Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.
>
> The institutions of marriage and family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. . . . The importance of the family unit for society is recognised in the international human rights instruments referred to above when they state that the family is the 'natural' and 'fundamental' unit of our society."[77] (Footnotes omitted.)

[40] More pertinently:

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[75] *Dawood* above n 45.

[76] *Fourie* above n 45.

[77] *Dawood* above n 45 at paras 30-1. See also *Fourie* id at paras 63-74. In *Volks* above n 45 at para 52 this Court said:

> "Marriage and family are important social institutions in our society. Marriage has a central and special place, and forms one of the important bases for family life in our society."

> "[I]t cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationships than the right to dignity in section 10. . . .
>
> The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, [legislation interfering with the right to enter into permanent intimate relationships] would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right."[78] (Footnotes omitted.)

[41] Without derogating from the above pronouncements by this Court, it is crucial to look closely at the context in which they were made. *Dawood* concerned the insufferable impact on marriage relationships of statutory provisions governing the immigration of, and grant of residence permits to, foreign spouses of South Africans.[79] Of importance, there it was the law itself that rendered cohabitation and the meaningful enjoyment of a marriage relationship intolerable. Similarly, in *Fourie* it was the law that precluded same-sex couples from getting married.[80] In both these cases, the removal of legal obstacles amounted to the protection of marriage.

[42] Here, we face different considerations. The applicant wants the law to use punitive measures to come to his aid as the non-adulterous spouse. In this case, the marriage deteriorated without obstruction or intervention by the law. The distinction is not insignificant. It is one thing for the law to protect marriages by removing all legal obstacles that impede meaningful enjoyment of married life.[81] It is quite another

[78] *Dawood* id at paras 36-7.

[79] Dawood id.

[80] *Fourie* above n 45.

[81] I am by no means suggesting that that is the only form of protection the law can afford to marriage relationships. I am addressing myself to the limited question of the applicant's reliance on cases like *Dawood* and demonstrating why those cases are not suited to his proposition.

for spouses to expect the law to prop up their marriage which – for reasons that have nothing to do with the law – is weakening or disintegrating.

[43] *Dawood* and *Fourie* do not go as far as the applicant would like them to. Carnelly observes that the time has come for us to say "[l]ove and respect are foundations of a solid marriage and not legal rules".[82] Those are within the control of the spouses themselves. After all, it is they who undertook to be truthful and faithful to each other.[83]

[44] The words of the Bundesgerichtshof are quite instructive:

> "Admittedly marriage is a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties. Its essence, however, consists in the readiness, founded in morals, of the parties to the marriage *to create and to maintain it.*"[84] (Emphasis added.)

The obligation pre-eminently rests on the spouses themselves to protect and maintain their marriage relationship. Subject to some cultural variations,[85] love, trust and fidelity are the bedrock on which a marriage relationship is built. Whittle or take that away, the relationship may perish. It is the spouses that must avert anything negative befalling the foundation of their marriage.

International law obligations and the family

[45] Of relevance to the applicant's case are some international instruments. The protection of marriage and the foundational role marriage plays in the formation of the family unit forms part of this country's international law obligations.[86] Article 18 of

[82] Carnelly above n 19 at 203. (Footnote omitted.)

[83] Compare *RH* above n 2 at para 30.

[84] *Bundesgerichtshof 668* above n 55 at 365.

[85] In marriages under certain cultures the one or other of the characteristics I next refer to may only come to the fore as a marriage blossoms. Here I have in mind arranged marriages.

[86] In terms of section 39(1)(b) of the Constitution this Court is bound to consider international law when interpreting the Bill of Rights. To the extent that the claim based on adultery concerns impairment of *dignitas*,

the African Charter on Human and Peoples' Rights[87] (African Charter) enjoins states parties to protect and assist "the family":

> "1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals.
> 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community."

[46] This does not make specific reference to "marriage". Indeed, based on our constitutional values, the idea of a family is much wider than married heterosexual couples.[88] A family may take various forms, including lesbian and gay couples, whether married or not, and with or without children. That notwithstanding, it cannot be gainsaid that "[m]arriage has a central and special place, *and forms one of the important bases for family life in our society*".[89] It follows that the explicit injunction in Article 18 in respect of the family does require – albeit implicitly – that marriage be protected and assisted. Our non-homophobic constitutional ethos has led to the recognition of same-sex civil unions.[90] In our context, Article 18 must find equal application to both same-sex civil unions and heterosexual marriages.

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the right to dignity contained in section 10 of the Bill of Rights is implicated; and section 39(1)(b) finds relevance.

[87] African Charter on Human and Peoples' Rights, June 1981. South Africa ratified the African Charter on 9 July 1996. It has not yet been enacted in terms of section 231(4) of the Constitution such that it "becomes law in the Republic", but section 39(1)(b) nevertheless still enjoins this Court to consider the provisions of this instrument when interpreting the Bill of Rights.

[88] In *Fourie*, this Court cited the majority judgment, per Cameron JA, in the Supreme Court of Appeal decision in the matter:

> "[F]amily as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family and what constitutes family life should change as social practices and traditions change; permanent same-sex partners are entitled to found their relationships in a manner that accords with their sexual orientation and such relationships should not be subject to unfair discrimination; and same-sex life partners are 'as capable as heterosexual spouses of expressing and sharing love in its manifold form.'"

Fourie above n 45 at para 15, citing *Fourie and Another v Minister of Home Affairs and Others* [2004] ZASCA 132; 2005 (3) SA 359 (SCA) at para 13.

[89] *Volks* above n 45 at para 52 (emphasis added).

[90] The Civil Union Act 17 of 2006 recognises civil unions entered into by same-sex couples, which encompasses civil marriages and civil partnerships.

[47] Although express reference to assistance and protection "of marriage" is not present, both the Universal Declaration of Human Rights[91] and the International Covenant on Civil and Political Rights[92] identify the right to marry and to found a family and talk of the family as the natural and fundamental unit of society.[93]

[48] In the light of these international instruments and the fact that adultery is deleterious to marriage relationships, an argument may be made that there continues to be sufficient reason for the law to protect marriages from adultery.

[49] Does the African Charter assist the applicant? At first blush, it appears so. But, for the same reasons I advanced when dealing with this Court's judgments on the protection of marriage, there cannot possibly be any cogent reason for this instrument to be read to require of states parties to strengthen a weakening marriage or breathe life into one that is disintegrating on its own. If the duty imposed by the African Charter is not to be rendered nugatory, we must give content to it. The Constitution itself undoubtedly forms the basis for the protection of marriage. This Court has reinforced this in the *Dawood*-type context.[94] That serves to comply with the duty imposed by the African Charter.

[50] The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights – which are no more forceful than the African Charter – are similarly unlikely to come to the aid of the applicant.

Determination on wrongfulness

[51] On the yardstick for wrongfulness, the Afrikaans language – in its characteristic expressive manner – refers to the *algemene regsgevoel van die*

[91] Universal Declaration of Human Rights, 1948.

[92] International Covenant on Civil and Political Rights, 1966.

[93] Article 16(1) and (3) of the Universal Declaration of Human Rights and Article 23(1) and (2) of the International Covenant on Civil and Political Rights.

[94] *Dawood* above n 45.

gemeenskap,[95] the rough translation of which would be "the community's general sense of justice". This is a concept that has also been referred to as "the *boni mores* of society"[96] or "the legal convictions of the community".[97] All are about public policy. Does public policy – a notion that is now informed by our constitutional values – tell us that the delictual claim founded on adultery must still be part of our law? Put differently, in this context, is it reasonable to impose delictual liability?[98]

[52] The answer lies in the relevant constitutional norms: those in favour of the non-adulterous spouse and those in favour of the adulterous spouse and the third party. What also comes into the equation are the softening and current trends and attitudes towards adultery.[99] The constitutional norms and changing attitudes are not necessarily separate notions: constitutional norms also inform present day attitudes towards adultery.

[53] Of relevance in respect of the adulterous spouse and the third party are the rights to freedom and security of the person,[100] privacy[101] and freedom of

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[95] See, for example, *Meskin, NO v Anglo-American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W) at 800B, 800D and 804B-E, quoted by *Eerste Nasionale Bank van Suidelike Afrika BPK v Saayman NO* 1997 (4) SA 302 (SCA) at 320I-J; and *Bester v Calitz* 1982 (3) SA 864 (O) (*Bester*) at 880A.

[96] *Bester* id.

[97] *Minister van Polisie v Ewels* 1975 (3) 590 (A) at 597B, which refers to "die regsoortuiging van die gemeenskap" ("the legal convictions of the community"), and *Barkhuizen* above n 13 at para 28.

[98] See *Delange* above n 34 at 862B-G and *Loureiro* above n 13 at para 53.

[99] At [24] to [38].

[100] Section 12 of the Constitution provides:

> "(1) Everyone has the right to freedom and security of the person . . . .
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right—
>
> . . .
>
> (b) to security in and control over their body".

[101] Section 14 of the Constitution reads:

> "Everyone has the right to privacy".

This is how this Court captured the right in *Khumalo* above n 5 at para 27:

> "The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion." (Footnote omitted.)

association.[102] These rights do not necessarily weigh less just because the two have committed adultery.

[54] The delictual claim is particularly invasive of, and violates the right to, privacy. This very case is illustrative of this. The Supreme Court of Appeal dealt with the abusive, embarrassing and demeaning questioning that Ms H suffered in the High Court. She was "made to suffer the indignity of having her personal and private life placed under a microscope and being interrogated in an insulting and embarrassing fashion".[103] Likewise, in order to defend a delictual claim based on adultery, the third party is placed in the invidious position of having to expose details of his or her intimate interaction – including sexual relations – with the adulterous spouse. That goes to the core of the private nature of an intimate relationship.

[55] It is so that at times a spouse may engage in adultery even in instances where the non-adulterous spouse has not committed any marital wrong. And at times the adulterous spouse may not even be desirous of ending the marriage relationship. It is equally true that there are factors that may make the act of adultery less reprehensible and, in certain instances, not reprehensible at all.[104] For example, the conduct of the non-adulterous spouse might have caused the marriage relationship to be so intolerable as to drive the spouse who ends up being adulterous into the arms of the third party. Surely then, the rights of the adulterous spouse and third party to privacy,

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[102] Section 18 of the Constitution provides:

> "Everyone has the right to freedom of association."

Taylor v Kurtstag NO and Others 2005 (12) BCLR 1269 (W); [2004] 4 All SA 317 (W) at para 37 describes this right in the following terms:

> "The right articulated in section 18 of the Constitution is 'freedom of association', a guarantee of a choice, not an absolute right. The guarantee applies to 'everyone' . . . . Thus, section 18 of the Constitution guarantees both an individual the right to choose his or her associates, and a group of individuals their rights to choose their associates."

[103] *RH* above n 2 at para 39.

[104] Compare the Namibian case of *Van Wyk* above n 69 at para 26 where the Court said:

> "*It may well be that in this age, society views with less disapprobation than in the past the commission of adultery.* There are also degrees of reprehensibility in the delict of violating the marital relationship ranging from the isolated chance encounter to the sustained continuing invasion of the sanctity of the marital relationship." (Emphasis added.)

freedom of association and freedom and security of the person can hardly be questioned. The non-adulterous spouse is less likely not to comprehend what it is that drove the other spouse into a sexual relationship with someone else. I am not unmindful that hitherto the abusive conduct of the non-adulterous spouse has always been relevant to the quantum of damages, and not the question of liability.[105] That is an approach more suited to the era that predates our present constitutional dispensation. The antecedent question is whether – in the face of the overarching constitutional rights of the adulterous spouse and third party – there should be a delictual claim at all.

[56] Even where the adulterous spouse has not been wronged by the other, it is life's reality that sometimes marriages just do not work out. In those instances the rights of the two that have committed adultery do not become irrelevant. This affords an answer even to the view that a married couple restricts its own right to associate and have extra-marital sexual relations with whomsoever.[106]

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[105] Compare *RH* above n 2 at para 13 citing *Groundland v Groundland and Alger* 1923 WLD 217. In *Groundland* at 220 the Court held:

> "The question then remains as to the amount of damages. There is a judicial separation in existence between the plaintiff and his wife, but in my opinion the fact that a separation exists, does not in itself, according to our law, disentitle the husband from claiming damages. . . . I am satisfied that the plaintiff in this case had not permanently given up all intention of living with his wife. This case is distinct from the case of *Michael v Michael & McMehon* 1909 TH 292, where the plaintiff had abandoned his wife."

[106] See *Wiese* above n 2 at 129D-F:

> "[A]rtikel 18 bepaal elkeen 'het die reg op vryheid van assosiasie'. Dit is betoog dat die aksie gegrond op owerspel inbreuk maak op die derde en die skuldige eggenoot se reg om hulle liggame volgens hulle eie oortuigings aan te wend. Die betoog verloor uit die oog dat die skuldige eggenoot vrywillig daardie reg beperk het deur in die huwelik te tree en dat die derde daarvan bewus was. Laasgenoemde is so omdat die reg opset aan die kant van die derde vereis."

I would translate this as follows:

> "Section 18 provides that everyone has 'the right to freedom of association'. It is argued that the action based on adultery infringes on the third party and the guilty spouse's right to use their bodies according to their own beliefs. The argument loses sight of the fact that the guilty spouse voluntarily restricted that right through entering into the marriage and that the third party was aware of this. The latter is so because the law requires intention on the part of the third party."

[57] I should not be misunderstood to suggest that in instances where there is reprehensibility on the part of the adulterous spouse and third party, their rights count for nought. Little or no blame on the part of the adulterous spouse and the third party affords the least contentious atmosphere to illustrate my point. Indeed, above I make plain that this is not about only an adulterous spouse who has been wronged by the non-adulterous spouse.

[58] What is the relevance of the adulterous spouse's rights as the claim is not against him or her? It is this: the claim has the potential of having a negative impact on the adulterous spouse's rights. The threat of delictual liability is undoubtedly an intrusion into the right of a consenting individual to have a sexual relationship with whomever he or she chooses.

[59] We may easily be driven to conclude that the third party's constitutional rights count for nothing: she or he has disrespected and trampled on a marriage relationship. But human relationships are such a multifarious complex that – short of being purely sanctimonious – we may find that the third party's conduct too is less reprehensible or not reprehensible at all. But I reiterate: reprehensibility is immaterial. In any event, it is the parties to a marriage relationship that undertake to be faithful to each other, and not a third party. Therefore, I do not believe that the third party's rights become irrelevant.

[60] The right of a non-adulterous spouse that is implicated by the act of adultery is the right to dignity.[107] Not surprisingly, that is the right that the applicant asserts. Undoubtedly, adultery has the potential to infringe the non-adulterous spouse's right to dignity. This Court has previously held:

[107] Section 10 of the Constitution provides:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

Although the view is that "*dignitas*" – the impairment of which is what the claim is about – is not quite the same as "dignity", the section 10 right is what would be at issue under the Constitution. *Dendy v University of Witwatersrand and Others* 2005 (5) SA 357 (W) at para 14.

> "Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent".[108]

[61] Adultery, while very different to taking a second spouse, entails a significant intrusion of a third party into a person's most intimate relationship without their consent. That intrusion is not made any less severe by present day attitudes towards adultery.[109]

[62] Nevertheless, this potential infringement of dignity must be weighed against the infringement of the fundamental rights of the adulterous spouse and the third party to privacy, freedom of association and freedom and security of the person. These rights demand protection from state intervention in the intimate choices of, and relationships between, people. This must be viewed in light of current trends and attitudes towards adultery both nationally and internationally.[110] These attitudes also demonstrate a repugnance towards state interference in the intimate personal affairs of individuals.

[63] I am led to the conclusion that the act of adultery by a third party lacks wrongfulness for purposes of a delictual claim of *contumelia* and loss of consortium; it is not reasonable to attach delictual liability to it.[111] That is what public policy dictates. At this day and age it just seems mistaken to assess marital fidelity in terms of money.[112]

Conclusion

[64] The application for leave to appeal must succeed but the appeal falls to be dismissed.

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[108] *MM v MN and Another* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) at para 74.

[109] See the discussion on changing attitudes at [23] to [38].

[110] At [21] to [36].

[111] See *Delange* above n 34 at 862B-G and *Loureiro* above n 13 at para 53.

[112] Tennet above n 20 at 96.

Costs

[65] The applicant brought suit in terms of an extant common law remedy the continued validity of which had been confirmed as recently as 2009.[113] It was the Supreme Court of Appeal that *mero motu* raised the question whether the claim should continue being part of our law and proceeded to pronounce that it should not. The applicant could not have foreseen this. On the contrary, he was perfectly entitled to bring suit based on what the law was at the time. It is only fair and just that there should be no order as to costs.

Order

[66] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.

MOGOENG CJ (Cameron J concurring):

[67] I am indebted to my Brother Madlanga J for the background and exposition of the law on adultery and the action for damages arising from adulterous conduct of one of the spouses. I concur in that judgment. All this judgment seeks to do is lay some emphasis on and give perspective to certain aspects of the main judgment.

[68] The essence of marriage and what it takes to sustain it was captured by the Bundesgerichtshof as follows:

> "[M]arriage is a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties. Its essence, however,

[113] *Wiese* above n 2.

> consists in the readiness, founded in morals, of the parties to the marriage to create and to maintain it."[114]

This was also quoted with approval by the Supreme Court of Appeal which added that "[i]f the parties to the marriage have lost that moral commitment the marriage will fail, and punishment meted out to a third party is unlikely to change that".[115]

[69] I am in agreement with these views. The law does and can only create a regulatory framework for the conclusion of marriage and the enforcement of obligations that flow from it. It can also help ensure that barriers to family life are removed.[116] The rest is in the hands of the parties to the marriage. Barring exceptions, they decide freely to get married and it is within their ability to protect their marriage from disintegrating.

[70] It bears emphasis, that marriage essentially hinges on the "readiness, founded in morals, of the parties to the marriage to create and to maintain it".[117] Like the Supreme Court of Appeal, I also believe that parties' loss of moral commitment to sustain marriage may lead to its failure. For abuse of one by the other and other factors that could lead to the breakdown of marriage are, in my view, likely to creep in when that commitment ceases to exist.

[71] The law cannot shore up or sustain an otherwise ailing marriage. It continues to be the primary responsibility of the parties to maintain their marriage. For this reason, the continued existence of a claim for damages for adultery by the "innocent spouse" adds nothing to the lifeblood of a solid and peaceful marriage.

[72] I reiterate my concurrence in the judgment by Madlanga J.

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[114] *Bundesgerichtshof 668* above n 55.

[115] *RH* above n 2 at para 34.

[116] *Dawood* above n 45 at paras 36-7.

[117] *Bundesgerichtshof 668* above n 55.

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