



CONSTITUTIONAL COURT OF SOUTH AFRICA

DE v RH

CCT 182/14

Date of judgment: 19 June 2015

MEDIA SUMMARY

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

Today the Constitutional Court handed down judgment in an appeal concerning the continued existence of a spouse's right to claim damages for adultery against a third party.

The applicant, Mr DE, sued the respondent, Mr RH, in the North Gauteng High Court, Pretoria for damages on the basis that Mr RH had an extra-marital affair with Mr DE's former wife, Ms H. Mr DE had launched an action based on the general remedy for the infringement of personality rights, specifically claiming for insult to his personality and the loss of comfort and society of his spouse. Mr DE was successful in respect of the claim for insult but the High Court found that the loss of comfort and society of his spouse could not be proved because there was no evidence to show that the adultery had caused the breakup of Mr DE's marriage.

Mr RH appealed against these findings to the Supreme Court of Appeal. That Court recognised that our law currently allows for the claim of insult against a third party in the case of adultery. However, of its own accord, it raised the question whether the claim should continue to exist.

In dealing with this issue, the Supreme Court of Appeal judgment canvassed the historical trajectory of the claim, foreign law, changing societal norms and the detrimental financial and emotional costs of an action of this nature. It concluded that in light of the changing values of our society, the claim based on adultery had become outdated and could no longer be sustained. The Court therefore abolished it.

Mr DE appealed to this Court against the Supreme Court of Appeal's abolition of the claim. He contended that the claim serves the important purpose of protecting the non-adulterous spouse's dignity and, more importantly, preserving the institution of marriage. He also submitted that the Supreme Court of Appeal had failed to heed the Constitution when developing the common law. Mr RH aligned himself with the judgment of the Supreme Court of Appeal and argued that society would no longer consider a person's dignity to be infringed when his or her spouse has committed adultery.

In a unanimous judgment written by Madlanga J, this Court recognised that, when developing the common law, courts must have regard to societal values which are based on constitutional norms. The central question in this case, then, was whether society would still regard it as legally unacceptable for a third party to commit adultery with someone's spouse.

The judgment found that the global trend was moving towards the abolition of civil claims based on adultery. Even in South Africa, it is clear that attitudes towards the legal sanction of adultery have been softening. Marriages are founded on love and respect, which are not legal rules, and are the responsibility of the spouses themselves. In the present case, the breakdown of the marriage was as a result of a failure by the spouses themselves to sustain their marriage and thus it would be inappropriate for the courts to intervene.

By contrast, maintaining the claim in our law would infringe various rights of adulterous spouses and the third parties, including the rights to dignity and privacy. Accordingly, adultery should no longer be punished through a civil damages claim against a third party.

A concurring judgment by Mogoeng CJ (Cameron J concurring) emphasised that marriage hinges on the commitment by the parties to sustain it, rather than the continued existence of a claim for damages for adultery by an "innocent spouse".

In the result, leave to appeal was granted, but the appeal was dismissed.