

**THE IMPACT OF THE ABOLITION OF THE THIRD PARTY DELICTUAL CLAIM FOR ADULTERY BY THE CONSTITUTIONAL COURT IN *DE v RH* (CCT 182/14) [2015] ZACC 18**

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## **1 INTRODUCTION**

With any defining judgment, once the dust settles, questions are raised about the broader impact of the decision. The Constitutional Court (CC) judgment in *DE v RH*<sup>1</sup> is no different. In this matter the court abolished the third party delictual *actio iniuriarum* claim based on adultery pertaining to a civil marriage, in the light of the changing mores of our society.

This article firstly discusses the CC judgment and the arguments raised in the groundbreaking decision itself, and secondly, the impact of the decision on similar claims *vis-à-vis* civil unions and customary marriages. Thirdly, although the order itself is limited to *actio iniuriarum* claims, the article also considers its influence on possible future (adultery) claims based on the *actio legis Aquiliae*, and delictual claims for enticement and harbouring. Finally, the article reflects on the effect of the finding on the remnants of possible references to adultery, generally in the form of “substantial misconduct” in South African divorce law – particularly as a punitive factor when determining the financial consequences of a divorce, and notably in calculating possible forfeiture of benefits, redistribution and/or spousal maintenance orders.

Subsequent case law is not *ad idem*. References are made to *MC v JC*<sup>2</sup> dealing with a forfeiture of benefits order, *LEM v MSM*<sup>3</sup> relating to spousal maintenance; as well as *RP v PP*<sup>4</sup> and *McFarlane v Matisonn*<sup>5</sup> concerning redistribution orders.

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<sup>1</sup>*DE v RH* (CCT 182/14) [2015] ZACC 18 confirming *RH v DE* 2014 6 SA 436 (SCA).

<sup>2</sup>2016 (2) SA 227 (GP).

<sup>3</sup>Unreported case number A3046/2016 dated 12 February 2016 (GJ).

<sup>4</sup>2016 (4) SA 226 (KZP).

<sup>5</sup>Unreported case number 4022/16 dated 20 July 2016 (KZNP).

## 2 THE CONSTITUTIONAL COURT JUDGMENT

The legal question before the court was whether a non-adulterous spouse had an *actio iniuriarum* action in delict against the third party for insult to the self-esteem (*contumelia*) and loss of comfort and society (*consortium*) of the spouse. And, if so, was there justification for the continued existence of the action?

The preceding SCA judgment did not engage with the constitutional issues, even though the matter raised several constitutional and public policy issues.<sup>6</sup> The applicant in the CC argued that the SCA's decision to abolish the claim failed to develop the common law in line with the constitutional principles, did not adequately consider the innocent spouse's right to dignity, and failed to take heed of the value and importance of marriage and family in terms of s 15(3) of the Constitution – the right to freedom of religion, beliefs and opinion.<sup>7</sup>

The CC confirmed that in considering whether the claim should remain, the court must develop the common law in a manner that promotes the spirit, purport and objects of the Bill of Rights – in terms of s 39(2) of the Constitution. This means developing the law in accordance with existing public policy, infused with constitutional values and norms – which reflects the changing social, moral and economic fabric of society and does not merely preserve rules without existing social underpinnings.<sup>8</sup>

This public policy, the court argued, informs the wrongfulness element of delictual liability<sup>9</sup> of both the *Aquilian* action<sup>10</sup> and *actio iniuriarum*.<sup>11</sup> The test for wrongfulness is objective and the reasonableness criterion has to be used to test the conduct against the mores of society to determine whether it can still be regarded as wrongful for purposes of the delictual claim.<sup>12</sup> The mores of society thus have to be assessed to determine whether adultery can still

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<sup>6</sup>For a full discussion of the SCA judgment, see Carnelley “Die doodskoot vir of slegs die verwonding van die eis teen die derdeparty-egbreker?” 2015 *Litnet Akademies* 333-346; Zitske “*RH v DE* 2014 6 SA 436 (SCA). A case of anti-constitutional common-law development” 2015 *De Jure* 467-480; Barnard-Naude “The pedigree of the common law and the ‘unnecessary’ Constitution: A discussion of the Supreme Court of Appeal’s decision in *RH v DE*” 2016 *SALJ* 16-28 and Barratt “Teleological pragmatism, a historical history and ignoring the Constitution – recent examples from the Supreme Court of Appeal” 2016 *SALJ* 189-221. The arguments relating to the lack of consideration of constitutional issues will not be repeated here.

<sup>7</sup>Para [9].

<sup>8</sup>Para [16] with reference to *Du Plessis v De Klerk* [1996] 3 SA 850 (CC) para 61.

<sup>9</sup>Para [17] with reference to *Le Roux v Dey* 2011 (3) SA 274 (CC) para 122.

<sup>10</sup>Para [18] with reference to *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 377.

<sup>11</sup>Para [19] with reference to *Delange v Costa* 1989 2 SA 857 (A) 862E-F.

<sup>12</sup>Para [19] with reference to *Delange v Costa* 1989 2 SA 857 (A) 862E-F.

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be regarded as legally wrongful. If adultery is no longer regarded as legally wrongful, there can be no delictual liability.

Unlike the SCA, the CC assessed the mores of society in light of constitutional norms.<sup>13</sup> Madlanga J found a softening of attitudes towards adultery that bear direct relevance to public policy and therefore to the element of wrongfulness.<sup>14</sup> The court noted that the changing attitudes about adultery were illustrated by the following: The change in legal fortunes of adulterous children from “bastard children whose very existence must have been a source of humiliation and disgrace”<sup>15</sup> to full legal acceptance;<sup>16</sup> the criminal offence of adultery was abolished by disuse;<sup>17</sup> and the scepticism of several courts and academics about the appropriateness of the continued existence of the claim<sup>18</sup> albeit with some exceptions.<sup>19</sup>

In addition, and central to the applicant’s argument around the protection that adultery affords marriage as an institution,<sup>20</sup> the court noted that the grounds for divorce have been significantly relaxed – and the relevance of adultery has been reduced to a mere guideline in determining whether the marriage has broken down irretrievably. Even though courts still value marriage as an institution, society no longer views it as sacrosanct, and there are no longer extreme punitive measures befalling those who interfere with it.<sup>21</sup>

The court considered the developments of similar claims in foreign jurisdictions, although it cautioned consideration within context.<sup>22</sup> The claim for adultery has been abolished in

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<sup>13</sup>Para [21].

<sup>14</sup>Para [22].

<sup>15</sup>Para [23] fn 36 with reference to *Hoffman v Estate Mechau* 1922 CPD 179 at 183.

<sup>16</sup>Para [23] fn 36 with reference to *Makhohliso v Makhohliso* 1997 (4) SA 509 (Tk) 520G-I. Note that the court could also have referred to s 28(2) of the Constitution, and the Children’s Act 38 of 2005 (s 21).

<sup>17</sup>Para [24] with reference to *Green v Fitzgerald* 1914 AD 88 at 103.

<sup>18</sup>Para [25] fn 38-40 with reference to *Rosenbaum v Margolis* 1944 WLD 147; Church “Consortium Omnis Vitae” 1979 *THRHR* 380-381; Hahlo *South African Law of Husband & Wife* (1980 Supplement to 4 ed) 31; Labuschagne “‘Deinjuriering’ van Owerspel” 1986 *THRHR* 336; Heaton *South African Family Law* 3 ed (2010) 45; Erasmus et al. *Lee & Honore Family, Things and Succession* (1983) para 59 fn 5; Carnelley “One Hundred Years of Adultery – Re-assessment Required?” in Hoctor and Kidd (eds) *Stella Iuris Celebrating 100 Years of Teaching Law in Pietermaritzburg* (2010) 183 onwards.

<sup>19</sup>*Wiese v Moolman* 2009 (3) SA 122 (T); Neethling *Law of Personality* 2 ed (2005). See, also, Neethling “Owerspel as onregmatige daad – Die Suid-Afrikaanse Reg in Lynregte Teenstelling met die Nederlandse Reg” 2010 *THRHR* 346.

<sup>20</sup>Para [26].

<sup>21</sup>Paras [26]-[27].

<sup>22</sup>Para [28] with reference to *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 32; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) paras 26-7; *S v Makwanyane* 1995 (3) SA 391 (CC) para [39].

England, Scotland, New Zealand, Australia, most provinces in Canada,<sup>23</sup> the Republic of Ireland, Barbados, Bermuda, Jamaica, and Trinidad and Tobago.<sup>24</sup> The action has either been abolished or restricted in more than 80% of the states in the USA.<sup>25</sup> Several European countries – France, the Netherlands, Germany and Austria – have abolished the crime of adultery and no civil claim has ever been possible.<sup>26</sup> African legal systems, however, are not consistent: In Cameroon, adultery is a criminal offence; in Namibia, Zimbabwe and Botswana the delictual claim remains; and the Seychelles abolished both criminal prosecution and the civil claim.<sup>27</sup> In Namibia, although the delictual claim remains, the court in *Van Wyk v Van Wyk*<sup>28</sup> also noted the softening of attitudes of society *vis-à-vis* adultery.<sup>29</sup> The CC interpreted the world trend as predominantly moving towards the abolition of the third party claim for adultery and that even where the claim still exists, it should not be suggestive of possible future non-abolishment should the opportunity for reconsideration arise.<sup>30</sup>

The court then dealt with the constitutional recognition of the significance of marriage and family as being vitally important social institutions – with specific reference to the judgments of *Dawood* and *Fourie*.<sup>31</sup> The court confirmed the right of individuals to enter into permanent intimate relationships, but distinguished these judgments from this matter.<sup>32</sup> *Dawood* addressed the negative impact of the immigration provisions on existing marriage relationships, and *Fourie* the impact of the common law on same-sex relationships. As both these judgments aimed to remove legal obstacles to the protection and recognition of valid marriages, they were distinguishable from the matter before the court. With adultery, there is no legal obstacle to marriage, to remove. With adultery, the court deals with a deteriorating marriage and a spousal claim for punitive measures against the third party. The CC noted that a marriage is for the parties to maintain, not the law or the courts. A spouse cannot expect the

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<sup>23</sup>Para [29].

<sup>24</sup>Para [32].

<sup>25</sup>Para [29].

<sup>26</sup>Paras [30]-[31].

<sup>27</sup>Paras [33]-[36].

<sup>28</sup>[2013] NAHCMD 125.

<sup>29</sup>The Namibian court found that the reprehensible behaviour of the adulterous pair, as it impacts on the personality rights of the innocent spouse, would impact on the award for damages. Subsequent to the CC judgment, in August 2016, two Namibian courts abolished the third party claim based on adultery on the same grounds as the South African courts (*Sibongo v Chaka* unreported case number SA 77/2014 (Supreme Court of Namibia) dated 19 August 2016 and *Van Straten v Bekker* unreported case number I 6056/2014 (High Court Windhoek) dated 25 August 2016).

<sup>30</sup>Paras [37]-[38].

<sup>31</sup>Para [39]; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) and *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

<sup>32</sup>Paras [41]-[42].

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law to prop up a disintegrating marriage where the law had nothing to do with its disintegration.<sup>33</sup>

In deciding the continued existence of the third party adultery claim, the pivotal question related to the wrongful element of the delict.<sup>34</sup> This wrongfulness is determined by public policy.<sup>35</sup> The question is whether public policy, as informed by constitutional values, demands that the delict should still be part of our law? Is it reasonable to impose delictual liability?<sup>36</sup> To answer these questions, the constitutional norms applicable to the parties, the non-adulterous spouse, the adulterous spouse, and the third party adulterer, were considered in light of the current attitudes towards adultery which are set out above.<sup>37</sup>

The applicable constitutional rights for the adulterous spouse and the third party include the right to freedom and security of the person (s 12), the right to privacy<sup>38</sup> (s 14), and freedom of association (s 18). The court noted that these rights do not necessarily carry less weight just because a party committed adultery.<sup>39</sup> Two points are noteworthy. First, it is inevitable that in an adultery action the intimate and private sexual relations of the parties are exposed and that privacy rights will be impacted upon.<sup>40</sup> Second, the span of the possible types of relationships existing between the spouses in instances of adultery is wide and inconsistent: the non-adulterous spouse may have not committed any marital wrong or may have caused the marital relationship to become intolerable.<sup>41</sup> Although the actions of the parties may be morally reprehensible and the abusive conduct of the adulterous spouse and the third party was historically taken into account with the quantum award, this approach is more suitable to a

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<sup>33</sup>Paras [43]-[44]. On this point, in a separate judgment, Mogoeng J, concurring with Madlanga J, highlighted that it falls on both spouses to sustain the marriage and if one spouse lost the commitment thereto, punishing the third party is unlikely to change that commitment (paras [67]-[68]). He noted that the law can at most create a marital regulatory framework, enforcement mechanisms of marital obligations, and remove barriers to family life (para [69]). Everything else is in the hands of the spouses, and the continuation of the marriage depends on their willingness to maintain the marriage (paras [69]-[70] with reference to Bundesgerichtshof 668). It is their loss of moral commitment to sustain the marriage that leads to its breakdown, and it is not possible for the law to “shore up or sustain an otherwise ailing marriage”, and the continued existence is unacceptable as the claim “adds nothing to the lifeblood of a solid and peaceful marriage” (para [71]).

<sup>34</sup>Para [11].

<sup>35</sup>Also known as “the community’s general sense of justice”, “the *boni mores* of society”, or “the legal convictions of the community” (para [51]).

<sup>36</sup>Para [51].

<sup>37</sup>Para [52].

<sup>38</sup>The privacy rights of the adulterous spouse in this case were particularly impacted on due to abusive, embarrassing and demeaning questioning in the court *a quo* [para 54].

<sup>39</sup>Para [53].

<sup>40</sup>Para [54].

<sup>41</sup>Para [55].

pre-constitutional dispensation. Today, (moral) reprehensibility is immaterial as the question is whether there should be a delictual claim.<sup>42</sup> The court argued that even if a spouse did nothing wrong, the reality is that some marriages just do not work out, and this does not make the rights of the adulterers irrelevant – even where a married person has restricted his/her right to associate and has extra-marital sexual relations with another.<sup>43</sup> Similarly, where the adulterers acted reprehensibly, their rights remain relevant.<sup>44</sup>

The possible delictual claim, even if against the third party only and not the adulterous spouse, does impact on the right of the adulterous spouse: his/her right as a consenting adulterer to have sexual relationships with a person of his/her choice.<sup>45</sup> In addition, the court found that it cannot be argued that the third party's constitutional rights count for nothing just because he/she disrespected a marriage relationship. Human relationships are more complex than that: reprehensibility is immaterial, and as it is the spouses that agreed to be faithful and not the third party, the third party rights cannot be disregarded as being irrelevant.<sup>46</sup>

The right of the non-adulterous spouse potentially infringed by adultery is the right to dignity (s 10).<sup>47</sup> It remains a substantial intrusion into a person's most intimate relationship without their consent – even today.<sup>48</sup> However:

“...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. These attitudes also demonstrate a repugnance towards state interference in the intimate personal affairs of individuals.”<sup>49</sup>

The court concluded that the third party's adultery lacks wrongfulness for purposes of a delictual claim of *contumelia* and loss of *consortium*, and that public policy dictates that it is not reasonable to attach delictual liability to it: “At this day and age it just seems mistaken to

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<sup>42</sup>Para [55].

<sup>43</sup>Para [56].

<sup>44</sup>Para [57].

<sup>45</sup>Para [58].

<sup>46</sup>Para [59].

<sup>47</sup>Para [60] with reference to *MM v MN* 2013 4 SA 415 (CC) para 74.

<sup>48</sup>Para [61].

<sup>49</sup>Para [62].

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assess marital fidelity in terms of money.”<sup>50</sup> The court dismissed the appeal and no cost order was made.<sup>51</sup>

### 3 REMNANTS OF ADULTERY IN SOUTH AFRICAN DIVORCE LAW

The outcome of *DE v RH* brought about a fundamental change in more than two centuries of legal interest in adultery pertaining to civil marriages – first recorded by Plutarch, codified in 18 BC by Augustus in the *lex Julia de adulteriis*, taken up in the *Digesta*,<sup>52</sup> and adopted and amended through the centuries to evolve into the South African delictual claim.<sup>53</sup> Although the law changed from adultery being a crime to becoming a delict, and from being available only to the husband to becoming gender neutral, the delictual claim was consistently applied in our courts as expected in a system underscored by judicial precedent.<sup>54</sup> In fact, one of the requirements for the delict – sexual intercourse – was still expanded in December 2014 in *PV v AM*, to include *fellatio*.<sup>55</sup> However, this debate is now of academic interest as far as possible claims against third party adulterers by the non-adulterous spouse in civil marriages are concerned. As is discussed hereunder, adultery remains relevant *inter partes*.

#### 3 1 Civil Unions

Although no direct authority exists, it was mooted by the court in *Wiese v Moolman obiter* that there is no reason why the claim for adultery should not be available to civil union

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<sup>50</sup>Para [63].

<sup>51</sup>Para [64].

<sup>52</sup>D 48 5.

<sup>53</sup>For a full discussion of the historical development, see Carnelley “Laws on adultery: comparing the historical development of South African common-law principles with those in English law” 2013 *Fundamina* 185-211.

<sup>54</sup>Judgments the past two years, apart from the case under discussion, include *PV v AM* 2015 3 SA 376 (ECP); *D v V* case number 12537/12 (GP) dated 1 October 2014; and *Sebidi v Thobejane* unreported case number 36432/2012 (GP) dated 21 February 2014.

<sup>55</sup>Historically, only penetrative vaginal sexual intercourse between a man and a woman was accepted as meeting the requirement for sexual intercourse for a successful adultery claim. Although this was extended to anal sex in *Kat v Kat* 1910 TPD 436 at 443 and sodomy in *McGill v McGill* 1926 NPD 398. Mutual masturbation was regarded as insufficient in *Cunningham v Cunningham* 1952 1 SA 167 (C) 170. This approach was criticised as being ridiculous and archaic that it should be reconsidered to include sexual acts of gratification whatever form it takes as the underlying rationale is the protection of the *consortium omnis vitae* of spouses (Labuschagne 338; Carnelley (2010) 190). The development would also have been in line with the legalisation on same-sex unions and the applicability of all marital consequences to civil unions subject to changes required by context, including (pre-*RH v DE*) a possible claim for adultery (s 13 of the Civil Union Act 17 of 2006). In *PV v AM*, the court found that *fellatio* met the requirement for the delict in light of the expanded rape definition in South Africa in s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and with reference to two judgments from South Carolina and Louisiana dealing with homosexual conduct. The court noted (para [26]):

“[A] technical and narrow approach [that only vaginal intercourse would suffice] can only lead to absurdity and unfairness. Firstly, it offends the equality prescripts of section 9 of the Constitution in that parties to a same sex marriage would not have the same rights with regard to adultery, as parties to a heterosexual marriage.”

partners.<sup>56</sup> After all, s 13 of the Civil Union Act makes all legal consequences that attach to a civil marriage applicable to a civil union (within context), and provides that the words “husband”, “wife” and “spouse” in any law, including the common law, must be interpreted to include the parties to a civil union. However, as far as the common law third party delictual claim is concerned, the matter would now also be academic as even if there had been such a claim, the abolition in *DE v RH* would also now apply to civil union partners.

### 3 2 Customary Marriages

The impact of the judgment on the existing third party adultery claims in a customary marriages context, however, is yet to be determined.<sup>57</sup>

“The customary law of delict gives redress for the violation of any right representing material value, capable of being acquired by a family head. This implies redress for damage to property, as well as for injury to a woman in so far as a family head’s rights in her have been violated. Thus, the customary law of delict originally primarily comprised various sexual wrongs, such as ... adultery (intercourse, with or without impregnation, with a married woman)...”<sup>58</sup>

Indigenous law is a dynamic system of law with its own values and norms, evolving to meet the changing needs of its society. The criteria to determine the changing mores and values as interpreted through the constitutional framework (and not the common law) has been set out in the CC in *Bhe v Magistrate, Khayelitsha*.<sup>59</sup> Where a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to either develop indigenous law to the changed circumstances,<sup>60</sup> or to remove it.<sup>61</sup>

“Yet there may be many people who observe that rule, and who will continue to observe the rule. And what is more, the rule may already have been adapted to the ever-changing circumstances in which it operates. Furthermore, the Constitution guarantees the survival of the indigenous law. These considerations require that, where possible, courts should develop rather than strike down a rule of indigenous law.”<sup>62</sup>

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<sup>56</sup>At 129A. This is supported by Smith *The Development of South African Matrimonial Law with Specific Reference to the Need for and Application of a Domestic Partnership Rubric* (PhD thesis, UFS, 2009) 313 fn 522.

<sup>57</sup>Knoetze “Fooling around with adultery – its future as delict in customary law” Private Law and Social Justice Conference 2015 (17 August).

<sup>58</sup>Knoetze “Fathers Responsible for the Sins of their Children? Notes on the Accessory Liability of a Family Head in the Customary Law of Delict” 2012 *Speculum Juris* 47-48.

<sup>59</sup>2005 (1) SA 580 (CC).

<sup>60</sup>216.

<sup>61</sup>215.

<sup>62</sup>215. The court should develop indigenous law to bring it in line with the rights in the Bill of Rights (218).

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The problem is often that of identifying living indigenous law.<sup>63</sup> However, the court must have regard to what customs people are actually following in order to adapt the indigenous law to the ever-changing circumstances. Divergence in legal rules in civil and customary law within the constitutional framework is not unknown.<sup>64</sup> The bottom line is that the CC in *DE v RH* did not engage in this aspect, and a full discussion hereof falls outside the scope of this note. Suffice to note, it cannot merely be presumed that the judgment will necessarily be applicable to indigenous law. The court will first have to assess whether the changing needs in this society demand a change in the law within the spirit, purport and objects of the Bill of Rights.<sup>65</sup> In light of the variation of laws on the African continent, the answer may not be as clear cut as it was in a civil law context.

### 3.3 Other Roman-Dutch Actions

Concentrating on the judgment itself, it is interesting how the court referred to the claimant-spouse not involved in the adultery. Traditionally, this spouse would be referred to as the “innocent spouse”.<sup>66</sup> Madlanga J consistently uses the non-judgmental term “non-adulterous spouse”. In fact, “innocent spouse” only appears twice: once in a quote from a Namibian judgment and the second time it is used by Mogoeng J where it appears in inverted commas. This is another indication of the open-minded manner in which the CC views the issue of adultery.

The CC judgment itself is limited to the third party *actio iniuriarum* claim based on adultery, and not the sister claims for enticement and harbouring. This would indicate that these claims are still enforceable.<sup>67</sup> The question may rightly be asked what the impact of this judgment will be on these claims. As the judgment was based on the changed mores of society that is similarly applicable to enticement and harbouring, and as these changed mores similarly impact on the wrongfulness element of these delicts in that they too relate to a marriage in a state of disintegration, it is submitted that it is unlikely that a future South African court

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<sup>63</sup>219.

<sup>64</sup>Instances of divergence between civil and customary law, where both are regarded as constitutional, is not uncommon – the most obvious example being the different provisions on polygyny.

<sup>65</sup>Knoetze “Fooling around with adultery – its future as delict in customary law” Private Law and Social Justice Conference 2015 (17 August).

<sup>66</sup>*Wiese v Moolman* 2009 (3) SA 122 (T), is an example hereof.

<sup>67</sup>Jenkins “Pain and no gain – should there be compensation for innocent spouses against third parties?” 2015 October *De Rebus* 194.

would uphold the claims for enticement and harbouring for the same reasons as those raised in *DE v RH*.<sup>68</sup>

Can the same, however, be argued for a claim in terms of the *actio legis Aquiliae* based on adultery? Neethling<sup>69</sup> argues, on the basis of the SCA decision, that the “innocent spouse” should be able to institute the Aquilian action against the third party adulterer for patrimonial loss, for example for loss of supervision over the household and children. It is submitted that after the CC judgment, this would be unlikely. The CC specifically made the point that the same public policy that informed the wrongfulness element of delictual liability of the *iniuria* claim also informs the Aquilian action and, it is submitted, by implication the change in public policy in the one has the same effect on the other. This judgment thus probably also resulted in the end of the possible adultery claim based on the *actio legis Aquiliae*. This remains to be confirmed.

### 3 4 Remedies for Reprehensible Conduct

The one aspect of the judgment that left a sense of unease was the general lack of sympathy for the non-adulterous spouse. The court noted that reprehensibility is immaterial in light of the broader constitutional rights. The negative impact of this viewpoint can be illustrated with the facts of *D v V*,<sup>70</sup> where the defendant were unnecessarily vulgar, boastful and mean towards the plaintiff through social media, and was intent on being hurtful, including *contumelia* by ridiculing her cancer based on the adultery claim. The court in these circumstances awarded a higher amount plus costs. After the CC judgment, the non-adulterous spouse will have no claim based on the adultery.

All parties in future will be limited to other delictual, contractual and criminal remedies that will depend on the actions of the individual parties and will not merely be based on the adultery. These could include, depending on the facts: defamation, insult, and unlawful publication of offensive or embarrassing photographs in the so-called revenge porn scenario. The non-adulterous civil law spouse is in the same position as any other person whose relationship ended in failure.

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<sup>68</sup>Jenkins 194.

<sup>69</sup>377.

<sup>70</sup>*D v V* (12537/12) [2014] ZAGPPHC 787 (2 October 2014).

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## 3 5 Adultery in the Divorce Law

In the Divorce Act 70 of 1979, adultery combined with the inability to continue with the marriage is still mentioned as one possible factor proving that the marriage has broken down irretrievably.<sup>71</sup> In addition, adultery may be indirectly relevant at the time of divorce as a factor to consider when determining post-divorce spousal maintenance,<sup>72</sup> a claim for forfeiture of benefits,<sup>73</sup> and/or a redistribution order.<sup>74</sup> In the last three instances, adultery is used as a financial punishment for actions that are no longer regarded as legally wrongful. The question would obviously be asked how the CC judgment would impact on these aspects. Have the *mores* surrounding the third party claim for adultery also impacted on the consequences of adultery *inter partes*? Recent judgments relating to these aspects are herewith considered.

In *MC v JC*,<sup>75</sup> the first steps were taken to have s 9(1) of the Divorce Act 79 of 1979 declared unconstitutional. The High Court ruled there was merit in the wife's argument that an order in terms of s 9(1) providing for partial forfeiture of the marital benefit based on "substantial misconduct" (in her case pertaining to several adulterous relationships) was outdated and unconstitutional; it punished a party for "substantial misconduct" by depriving him or her of patrimonial benefits of the marriage in the absence of proof of how such conduct may have impacted on the estate.<sup>76</sup> The court noted that s 9(1) may infringe on several constitutional rights. The judge noted three examples. First, the constitutional right to equality of a married person in the divorce process may be infringed as it places one of the parties (the party who committed "substantial misconduct") in a weakened bargaining position during the settlement negotiations and at trial.<sup>77</sup> Second, a woman may in certain circumstances, for fear of divorce, secretly terminate her pregnancy. This may be viewed as contrary to the trust relationship of

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<sup>71</sup>S 4(2)(b) of the Divorce Act 70 of 1979.

<sup>72</sup>S 7(2) factors include "conduct in so far as it may be relevant to the break-down of the marriage..."

<sup>73</sup>S 9(1) factors include "circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties..."

<sup>74</sup>S 7(5) factors do not include a direct reference to "misconduct", but it does include consideration of a s 9 order, as well as "any other factor which should in the opinion of the court be taken into account" that could include "misconduct" (Heaton (2010) 140 refers to *Beaumont v Beaumont* 1987 (1) SA 967 (A) 994E and *Buttner v Buttner* 2006 (3) SA 23 (SCA), where the courts adopted a conservative approach *vis-à-vis* a party's misconduct as a relevant factor). Misconduct will not be considered "where there is no conspicuous disparity between the conduct of the one party and that of the other". It is only a factor to be considered to achieve justice, especially where it was "gross and prolonged" (Heaton 141).

<sup>75</sup>2016 2 SA 227 (GP).

<sup>76</sup>Para 33. In *AMS v PJS* unreported case number 46732/2011 dated 2 September 2015 (GP) Thlapi J found that pre-reconciliation adultery could not be considered as "misconduct" at a later time when the marriage eventually ended in divorce (par 18).

<sup>77</sup>Para 32.1.

the marriage and the husband may successfully approach the court for a forfeiture of benefit order. In these circumstances it may infringe the wife’s reproductive right.<sup>78</sup> Moreover, by forcing parties to remain in an unhappy marriage for fear of losing patrimonial benefits, where the acrimony causes violence, it may, depending on the circumstances, also impact on the parties’ right to dignity and the right to freedom and security of person.<sup>79</sup> The matter is, however, yet to be considered for full consideration as the parties in this matter did not adhere to Rules 16A(1)(a)-(b) of the Uniform Rules of Law and the matter was referred back for correction and possible re-submission at a later stage.

In contrast hereto, the court of appeal in *LEM v MSM*<sup>80</sup> in a post-divorce spousal maintenance claim based on adultery repeatedly noted this comment of the court *a quo* without criticism:

“The magistrate accepted the appellant’s evidence that it was the respondent’s adultery that caused the breakdown and, given the prevailing societal views, the averred adultery amounted to misconduct on a balance of probabilities.”

In *RP v PP*,<sup>81</sup> Moodley J had to deal with the impact of adultery on a possible redistribution order in divorce proceedings in light of the court’s discretion:<sup>82</sup>

“Misconduct of the parties may be taken into account in determining the equities of a section 7(3) redistribution if the conduct is such that it would be inequitable to disregard it. Where there is no conspicuous disparity between the conduct of the parties, no fault will be apportioned. But where the misconduct of one party is ‘gross and prolonged’ it may constitute a relevant factor, but it should not be unduly emphasized. A failure on the part of a party to furnish available information relevant to a determination required of the Court may constitute misconduct.”<sup>83</sup>

After discussing the approaches in earlier cases,<sup>84</sup> this court noted that notwithstanding the prevailing societal mores in light of the CC decision of *DE v RH*, that:

“this relaxed attitude towards infidelity ought not unduly diminish the significance of such misconduct in the exercise of a Court’s discretion in determining an equitable redistribution. The effect of the

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<sup>78</sup>Para 32.2.

<sup>79</sup>Para 32.2.

<sup>80</sup>Unreported case number A3046/2016 dated 12 February 2016 (GJ).

<sup>81</sup>2016 (4) SA 226 (KZP).

<sup>82</sup>Para 17.7.

<sup>83</sup>Para 17.9.

<sup>84</sup>The court referred to the conservative approach in *Beaumont v Beaumont* 1987 (1) SA 967 (A) 994 that misconduct should not be overstated and be given weight only where it would be inequitable to ignore it; *Kritzinger v Kritzinger* 1989 1 SA 67 (A) 80-83 where the affair was not regarded as promiscuous or brazen with both parties being victims of the prevailing social attitudes; and *Buttner v Buttner* 2006 3 SA 23 (SCA) par 31 where the misconduct would only influence the outcome if it would be unjust to disregard it as both spouses would normally have contributed to the breakdown of the marriage.

## THE IMPACT OF THE ABOLITION OF THE THIRD PARTY DELICTUAL CLAIM FOR ADULTERY BY THE CONSTITUTIONAL COURT

betrayal on an aggrieved party who has remained committed to her/his marriage remains a relevant factor, and the general rule that each case must be evaluated on its own set of facts applies.”<sup>85</sup>

In this matter a second affair showed callous disregard for the non-adulterous spouse.<sup>86</sup> While he redeemed himself through the provision of material comforts and although his misconduct may not be termed “gross”, his affairs spanned a decade and could be considered as “prolonged” and the major cause of the breakdown of the marriage.<sup>87</sup> The court concluded:

“Despite the current attitude of society and our courts, his misconduct cannot be ignored in the determination of the redistribution to be ordered.”

In *McFarlane v Matisonn* the court refused to set aside a subpoena against a bank for the records of the third-party adulteress where there are evidence that she may have received funds from the husband that may be relevant to the patrimonial calculations during the divorce. Koen J noted:

“Under the circumstances I am not persuaded that the basis upon which the subpoena has been pursued is ‘obviously unsustainable’ or constitutes an abuse of the process of court. Experience teaches that it is not uncommon that funds are sometimes hidden in accounts of romantic partners of litigants to a divorce action. That might not have happened in this matter, but it is something which the Respondent is entitled to investigate.”<sup>88</sup>

### 4 CONCLUSION

Although the third party adultery claim is now history, except possibly in a customary law context, it does not mean that adultery as a phenomenon will decrease or that it is necessarily morally acceptable. What it does mean though is that the law and the courts have withdrawn from the playing field – unless the actions of the parties, apart from the adultery itself, warrant intervention. Spouses, like all other citizens, are expected to act with restraint within the law, and where one of the parties oversteps the boundaries of what is reasonable in terms of societal norms, no doubt delictual and/or contractual claims will follow. However, the inevitable third party claim for loss of *consortium* and *contumelia* generally used as a negotiating tool in divorce matters, or in certain instances for revenge or even blackmail, will no longer be available. This claim has been found to be out of line with modern societal morals and values. Where the marriage is over, the parties will have to deal with the issue as

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<sup>85</sup> Para 41.

<sup>86</sup> Para 43-44.

<sup>87</sup> Paras 45-46.

<sup>88</sup> Para 32. A discussion of the merits of this decision falls outside the scope of this article.

is fitting in a no-fault divorce system and not expect the courts to attempt to prop it up or punish a third party for becoming involved with one of the spouses. In weighing up the dignity rights of the non-adulterous spouse against the privacy rights and the freedom of association and freedom and security of the person of the third party and the adulterous spouse, these latter rights were found to demand protection from state intervention in the intimate choices of parties, and showed abhorrence towards state intervention in the intimate relationships.

The impact of the CC judgment is, however, wider than the third-party *actio iniuriarum* claim for adultery of a spouse in a civil marriage. It is submitted that it also sounds the end for the *actio legis Aquiliae* based on the adultery claim and the claims for harbouring and enticement not only for civil marriage spouses but also for civil union partners. The impact on the third party delictual claim in terms of customary law is, however, uncertain.

The impact of adultery as a factor in the patrimonial consequences at divorce is however not certain. It is anticipated that the constitutionality of the Divorce Act pertaining to financial punishment under the banner of “serious misconduct” (based on adultery) when considering claims for redistribution, forfeiture of benefits, or spousal maintenance orders will be challenged as was the case in *MC v JC*.

However, the chances of success of these challenges are not clear as is evident from the cases of *LEM v MSM*, *RP v PP* and *McFarlane v Matisonn*. In all these matters the courts still considered adultery as a relevant factor *inter partes* when determining the patrimonial consequences of the marriage at the time of divorce. The question whether the *mores* of society have changed to such an extent that this too has to be amended remains unanswered.