RH v DE (594/2013) [2014] ZASCA 133 (25 September 2014)

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 594/2013

In the matter between:

RH.....**APPELLANT**

and

DE.....**RESPONDENT**

Neutral citation: *RH v DE* (594/2013) [2014] ZASCA 133 (25 September 2014)

Coram: Brand, Cachalia, Tshiqi, Majiedt *et* Mbha JJA

Heard: 27 August 2014

Delivered: 25 September 2013

Summary: Delictual claim for damages based on 'adultery' between defendant and plaintiff's wife on the law as it stands. Award

rightly made for contumelia – but award for loss of consortium not justified – consideration of whether the action should be maintained as part of our law – concluded that its continued existence no longer justified.

ORDER

On appeal from: North Gauteng High Court, Pretoria (LI Vorster AJ sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

'Plaintiff's action is dismissed. Each party to pay his own costs.'

JUDGMENT

Brand JA (Cachalia, Tshiqi, Majiedt *et* Mbha JJA concurring):

[1] The respondent instituted an action for damages against the appellant in the North Gauteng High Court, Pretoria. To avoid confusion I shall refer to the parties as they were cited in the court a quo, ie to the respondent as the plaintiff and to the appellant as the defendant. The plaintiff's cause of action was that the defendant had committed ~~adultery~~ with the plaintiff's wife. Prior to the institution of this action, the plaintiff's wife divorced him and reverted to her maiden name. Minor children are born of the marriage between the plaintiff and his wife. In order to protect them against adverse publicity flowing from this litigation, the names of the parties shall not be disclosed in the citation of the case. For the same reason I refer to the plaintiff's wife just as Ms H.

[2] As has become customary in matters of this kind, damages were claimed under two headings: (a) contumelia and (b) loss of consortium. In the court a quo, LI Vorster AJ awarded damages under both headings, but in a composite amount of R75 000, together with interest and costs on the high court scale. The present appeal against that order is with the leave of this court.

[3] The background facts that turned out to be relevant appear from what follows. The plaintiff and Ms H were high school friends. They were married on 30 April 2005 when he was 26 and she 25. Two children were born of their marriage, a daughter in May 2006 and a son in October 2008. On 23 March 2010 Ms H left the common home and cohabitation between her and the plaintiff ceased, never to be resumed again. In June 2010 Ms H instituted action for an order of divorce which was eventually granted in September 2011. On 15 April 2009 Ms H started employment with a company where she met the defendant, who was the managing director of an affiliated concern operating from the same building. The defendant and Ms H, who both testified at the trial, admitted that they became romantically involved, but this only happened, so they said, after Ms H left the common home on 23 March 2010. They also admitted that they subsequently entered into an adulterous relationship, but this only started, so they said, on 17 July 2010. That was after Ms H had instituted action for divorce and the plaintiff had filed his plea in that action in which he admitted that the marriage had irretrievably broken down.

[4] The plaintiff's case, by contrast, was that the adulterous relationship must have started much earlier; that he had a happy marriage until the commencement of that relationship, which was the cause of Ms H leaving the common home on 23 March 2010. In answer to these allegations Ms H contended that there were serious problems in the marriage which started shortly before the birth of their son in October 2008. As a result, she testified, she went for marriage counselling in August 2009, but that, in spite of her efforts, the marriage kept on deteriorating until it finally broke down in March 2010. This deterioration and breakdown of the marriage, she said, had nothing to do with the relationship between her and the defendant. Despite the narrow ambit of the real issues, the trial ran for eight days. The record of evidence alone exceeded 800 pages with a further 400 pages of pleadings and documents. The parties succeeded in building this substantial record by an endless debate on when the marriage between the plaintiff and Ms H became unhappy and the heavily disputed reasons for that unhappiness, seemingly with little regard for the relevance of these debates to the outcome of the case.

[5] In the event the court a quo found it impossible and unnecessary to deal in its judgment with all the disputes of fact that arose. Broadly speaking, however, it accepted the plaintiff's version in preference to that of the defendant and Ms H on all the major issues. This court's reluctance to interfere with factual findings by trial courts has become well-established. One of the underlying reasons for this reluctance is precisely that trial courts are simply not able to motivate their eventual credibility findings with reference to every aspect of the evidence. At the same time, this court is equally conscious of the fact that an entirely uncritical approach to the factual findings of the trial court will render appeals on fact illusory. In this case I cannot avoid the impression that the court a quo had considerable personal sympathy with the plaintiff and his plight while at the same time it found the conduct of the defendant and Ms H unpalatable. Since these rather personal sentiments seem to have influenced the court's whole approach to factual findings, I believe those findings should be treated with caution. As it happens,

however, and for reasons that will soon become apparent, I think the determination of the numerous factual disputes that arose is for the most part not relevant to the outcome of this appeal. It will suffice, therefore, to highlight only a few aspects in the judgment of the court a quo to illustrate why I do not regard my criticism of the court's approach as unwarranted or unfair.

[6] The plaintiff's version, as we now know, was that the marriage between him and Ms H was a happy one until shortly before she left the marital home in March 2010. Ms H's version, on the other hand, was that the marriage started to deteriorate in October 2008 and by August 2009, was in serious trouble. In support of his version the plaintiff relied on a bundle of photographs comprising almost 100 pages of the trial record. The court a quo describes the import of this bundle in the following way:

> 'At the outset I must say that the photographs to which I have referred above depict a happy family consisting of both the plaintiff and [Ms H], their children and their relatives over a lengthy period of time since 2008 up and until at least February 2010. If no more is said, those photographs are *prima facie* evidence of a happy marriage relationship between the plaintiff and [Ms H].'

[7] Further evidence relied upon by the plaintiff in corroboration of his version that the marriage was a happy one until Ms H left in March 2010, stemmed from a transcript of a speech made by Ms H on the celebration of her 30th birthday on 3 October 2009. During this speech she described the plaintiff as 'her soul mate' and declared her undying love for him. With regard to the photographs Ms H's response was in essence that appearances can be deceptive; that she is an outgoing person who is eager to please; who often smiles even when she is hurting inside; that people normally smile when they are photographed; and that they normally look happy when they smile. As to her speech on her 30th birthday party, her answer was that she was keeping up a front before family and friends on an occasion which was supposed to be a happy one. The court's comment on this evidence shows the extent to which it was unimpressed by her answers, when it said:

> 'When the text of the speech was put to her in cross-examination she was constrained to deny the truth of what she had said about the plaintiff and explained that it was just a front she had put up to create the impression of happiness to the family and friends who attended the occasion. She was constrained to maintain the same stance in relation to all the other photographs handed in by the plaintiff and which depicted her and the plaintiff and their family and friends as in a state of complete happiness and harmony.'

[8] What the court seems to have lost sight of was the undisputed evidence that Ms H consulted a marriage counsellor on three occasions in August and September 2009. The court's only comment on this evidence is that 'those problems clearly did not terminate the cohabitation of [Ms H] and the plaintiff or cause the disintegration of their marriage'. But as I see it, this comment misses the point. The point being that it clearly corroborates Ms H's evidence that, despite what the photographs may show and in spite of what she said in her speech, the marriage was in serious trouble, at the latest in August 2009. Other objective evidence that the court a quo seemed to have lost sight of was an e-mail which Ms H sent to the plaintiff on 20 August 2009 where she pleaded with him that they must make time to talk about their difficulties. There was also the uncontroverted evidence of Ms H of a meeting between her and the plaintiff which she called for on 14 October 2009. The measure of her despair on that occasion appears from the agenda she prepared for that meeting in which she enumerated the difficulties she experienced in the marriage, which she proposed to discuss at the meeting and which happened to coincide with what she described in her evidence as the main reasons for the eventual breakdown of the marriage.

[9] Another example of where the court a quo missed the point again relates to the bundle of photographs. What Ms H marked as the beginning of the end of their marriage relationship was an incident shortly before the birth of their son in October 2008 when they attended the wedding of friends in the KwaZulu-Natal Midlands. That night at the reception, she testified, she began to feel seriously ill. Subsequently this proved to have been the start of pneumonia while she was heavily pregnant. She asked the plaintiff to take her back to the guesthouse where they were staying. He refused to do so and told her to lie down in the car. Upon their return to Johannesburg she asked him to take her to hospital. Again he refused, saying that she was exaggerating, as a result of which she had to call her parents that night to take her to hospital. With regard to this testimony, which was not really disputed by the plaintiff, the court a quo commented as follows:

> 'It is possible that she fell ill during the course of that occasion at some stage. The photographs to which I have referred showed her happily having a ball on the dance floor with the plaintiff.'

It is common cause, however, that the photographs depicting Ms H 'having a ball dancing with the plaintiff' were taken on a completely different occasion.

[10] That is why I conclude that not much reliance can be placed on the credibility findings of the court a quo. But at the same time, as I have said, I believe most of these findings to be of peripheral import only. I say that for the reasons that follow. To start with, it should be underlined that the plaintiff's cause of action relied on the *actio iniuriarum* in the form of **'adultery and adultery'** only. Although he claimed damages under the two headings of contumelia (ie insult or injury to his self-esteem) and loss of consortium (ie the loss of comfort and society of his wife), he did not rely on what has become known in our law of delict as the action for enticement. To succeed with the latter, the plaintiff would have to show not merely that his wife left him for the defendant, but that the defendant actually induced her to leave him or, in the words of Trollip J in *Wassenaar v Jameson* **1969 (2) SA 349** (W) at 352B, 'that he had coaxed her away from the applicant, that he had talked her over, or that he had persuaded her to leave the applicant, and as a result thereof she had lost her affection for him. That is usually a very formidable *onus* to discharge' (see also *Smit v Arthur* **1976 (3) SA 378** (A) at 387C-D; J Neethling, J M Potgieter & P J

Visser *Neethling's Law of Personality* 2 ed (2005) at 213). This means that, even on the assumption that the plaintiff had purported to rely on enticement as a separate cause of action – which was never pleaded or raised in any other way – he did not even come close to discharging that onus. On the contrary, what the evidence shows is that the defendant and Ms H became attracted to one another and became involved in a romantic relationship, each by their own desire. Ms H was as much the pursuer as the pursued. There was no evidence whatsoever of enticement by the defendant in the form of coaxing or persuasion.

[11] Once it is appreciated that the plaintiff's case relied on **'adultery'** only, the sole question is: what were the consequences of the **'adultery'**? Thus understood, the dispute as to whether Ms H and the defendant became romantically involved after March 2010 – as they said – or in January 2010 – as contended for by the plaintiff – is of no real importance. As to dates, the only relevant questions appear to be: when did they commit **'adultery'** for the first time? And what happened after that? In accordance with the admissions by the defendant and Ms H it happened on 17 July 2010. The plaintiff, on the other hand, set out to prove that it happened on 11 December 2009 at a year-end function when Ms H left the defendant's residence at about 2am the following morning. That suggestion was, however, refuted by the evidence of Mr Pieter Grimes who testified that he had also attended the same function; that there were about seven to ten other people present; that he left the function at the same time as Ms H and that nothing untoward happened while he was there.

[12] That moved the plaintiff's contention as to when **'adultery'** was committed for the first time, forward to either April or June 2010. What happened in April 2010, according to the defendant's own version, is that he invited Ms H to a health spa. He reserved a single room where they spent the night together in the same bed. In June 2010 Ms H returned the favour by inviting the defendant to spend the weekend with her in Paternoster. They admitted that on this occasion she booked a single bedroom cottage with a double bed in which they slept together, but denied, however, that they had sexual intercourse on either of these occasions.

[13] Even if the plaintiff's contention in this regard is to be accepted, it would of course not afford him a claim for loss of consortium. This derives from the fact, which is common cause, that the parties were separated in March 2010 and never resumed cohabitation. But as to the claim for contumelia, it turned out to be important to determine whether **'adultery'** occurred for the first time on one of these earlier dates and not on the later date admitted by the defendant and Ms H, which was 17 July 2010. Why this is so, stems from the principles of our law which were formulated as follows by Tindall J in *Groundland v Groundland and Alger* **1923 WLD 217** at 220:

> '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 & McMahon* **1909 TH 292**, where the plaintiff had abandoned his wife.'

(See also Neethling *et al supra* 209-210 and the authorities there cited.)

[14] By 17 July 2010 the plaintiff had relinquished all thought of reconciliation between him and Ms H and had given up on the marriage. I say this because by then the plaintiff had admitted in his plea filed in the divorce action that the marriage had broken down. By contrast, that was not the position in April 2010. At that stage the plaintiff was still trying to rescue the marriage with the help of professional counselling. The court a quo rejected the denial by the defendant and Ms H that they had intercourse on these earlier dates as completely improbable. I must admit having some misgivings about the notion that the defendant and Ms H would be truthful enough to admit that they slept in the same bed on two occasions – a fact about which there was seemingly no other evidence – and then to deny that they committed **'adultery'** on those occasions. Yet I am not prepared to say that the court a quo's finding on the probabilities constituted a misdirection which would allow us to interfere. Neither the defendant nor Ms H gave a satisfactory explanation as to why, on each occasion, they booked a single room with one bed. In addition I do not regard it as insignificant that towards the end of June 2010 the two of them exchanged e-mails suggesting the name Isabella for the daughter they hoped they would have.

[15] In the light of this finding of fact, the present state of our law allows the plaintiff an action against the defendant for contumelia. The conclusion that the **'adultery'** was committed at a time when the marriage had already broken down irretrievably is no absolute defence to this claim, although it means that the award for loss of consortium was wrongly made by the court a quo. That, however, introduces the antecedent question that we had raised with counsel prior to the hearing. It concerns the justification for the continued existence in our law of the delictual claim for **'adultery'**.

Continued existence of the action for 'adultery'

[16] The present existence of the action cannot be doubted. After it had been explicitly recognised by this court for the first time in *Viviers v Kilian* **1927 AD 449**, that recognition had been confirmed on several occasions (see for example *Foulds v Smith* **1950 (1) SA 1** (A); *Bruwer v Joubert* **1966 (3) SA 334** (A) at 337). Its continued existence was pertinently raised by way of exception in *Wiese v Moolman* **2009 (3) SA 122** (T). In that case Du Plessis J held, after an in-depth consideration, that the action should be maintained. In this matter, Vorster AJ not only held himself bound, but found himself in complete agreement with the decision in the *Wiese* case. The question raised now is whether that case was rightly decided.

[17] The context in which the question arises is the recognition by our courts that, while the major engine for law reform lies with the

legislature, the courts are nonetheless obliged on occasion to develop the common law in an incremental way. These occasions are dictated, firstly, by s 39(2) of the Constitution which imposes the duty on the courts to develop the common law so as to promote the spirit, purport and objectives of the Bill of Rights. Secondly, by the acceptance that the courts can and should adapt the common law to reflect the changing social, moral and economic fabric of society; that we cannot perpetuate legal rules that have lost their social substratum (see for example *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (3) SA 850 (CC) para 61; *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC) para 36).

[18] The *boni mores* of society or the legal convictions of the community, which in effect constitute expressions of considerations of legal and public policy, are of particular significance in determining wrongfulness, which is an essential element of delictual liability in our law, both under the *lex Aquilia* and the *actio iniuriarum.* In *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* 2011 (3) SA 274 (CC) para 122 the principle was formulated thus:

> 'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms.'

(See also *F v Minister of Safety and Security & others* 2012 (1) SA 536 (CC) paras 117-124; *Roux v Hattingh* 2012 (6) SA 428 (SCA) para 33.)

This means that, especially in determining whether conduct should be regarded as wrongful, ie whether delictual liability should follow, courts are more sensitive to have regard to the dynamic and changing nature of the norms of our society.

[19] The action for **adultery** is part of a group of actions, based on the *actio iniuriarum,* which are connected to the institution of marriage. The group also comprises the action for breach of promise to marry. With regard to the latter, Harms DP said the following in *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) para 3:

> 'Courts have not only the right but also the duty to develop the common-law, taking into account the interests of justice, and at the same time to promote the spirit, purport and objects of the Bill of Rights. In this regard courts have regard to the prevailing *mores* and public-policy considerations. Davis J felt [in *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 330I-331A] the time had come for a reconsideration of the action [for breach of promise to marry], but felt uncomfortable to take a lead in the matter. However, having had regard to the views expressed by the authors quoted by the learned judge . . . I do believe that the time has arrived to recognise that the historic approach to engagements is outdated and does not recognise the *mores* of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise.'

And (para 6):

> 'The world has moved on and morals have changed. Divorce, which in earlier days was available in the event of **adultery** or desertion only, is now available in the event of an irretrievable breakdown of the marriage. Guilt is no longer an issue. There is no reason why a just cause for ending an engagement should not likewise include the lack of desire to marry the particular person, irrespective of the "guilt" of the latter.'

(See also *Cloete v Maritz* 2013 (5) SA 448 (WCC).)

[20] The question raised in this case is whether the same can be said about the delictual claim for **adultery**. Exactly 100 years ago this court held in *Green v Fitzgerald* 1914 AD 88 that **adultery** was no longer a criminal offence in our law, because it had become obsolete due to disuse. In the course of his judgment Lord de Villiers CJ inter alia said (at 103):

> '**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.'

Thirty years later the following was said by Blackwell J in *Rosenbaum v Margolis* 1944 WLD 147 at 158:

> 'The criminal sanction for **adultery** having disappeared, the only remedy left to an injured husband is an action for divorce against his wife, with the claims ancillary thereto, and for damages against the adulterer. In so far as the latter may be regarded as a deterrent and in the public interest, I can see no good reason why it should not enure equally in favour of the wife. There is something, in my opinion, 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. But as long as the action remains, it should remain in favour of both sexes alike.'

[21] In *Foulds v Smith supra* the extension of the action to allow the wife of an adulterous husband to also have a claim, was confirmed by this court. But today, 70 years after Rosenbaum, the question brought up by Blackwell J is again pertinently raised before us. In the

meantime, **'adultery'** was abolished as a ground for divorce in the **Divorce Act 70 of 1979**. Yet, as I have said, *Wiese v Moolman supra* decided the question whether the action against the third party based on **'adultery'** should be maintained in the affirmative. Academic writers on the subject go the other way, with the notable exception of Neethling's *Law of Personality* to which I have referred earlier. The judgment in *Wiese* relied mainly on Neethling *Persoonlikheidsreg* 4 ed, ie the Afrikaans version of Neethling's *Law of Personality*. In a subsequent article by Prof Johan Neethling 'Owerspel as onregmatige daad – Die Suid-Afrikaanse reg in lynregte teenstelling met die Nederlandse reg' **(2010) 73 *THRHR* 343** at 346, he concludes that *Wiese* was correctly decided and seems surprised that Dutch law does not hold the same. The fact is, however, that the position in most other countries is that the action is no longer available. I shall come to that. The various other academic authors who argue that the claim should be abolished hold the view that the action is outdated and archaic and that it has lost its place in the context of modern society (see for example J Church 'Consortium Omnis Vitae' **(1979) 42 *THRHR* 376** at 380-381; HR Hahlo, *South African Law of Husband & Wife* (1980 Supplement to the 4th ed) at 31; JMT Labuschagne '"Deinjuriering" van Owerspel' **(1986) 49 *THRHR* 336**, DSP Cronje & J Heaton *South African Family Law* 2 ed (2004) at 50-51, HJ Erasmus, CG van der Merwe & AH van Wyk *Lee & Honore Family, Things and Succession* (1983) para 59 note 5; M Carnelley 'One Hundred Years of **'Adultery'** – reassessment required?' in S V Hoctor & M Kidd (eds) *Stella Iuris Celebrating 100 Years of Teaching Law in Pietermaritzburg* (2010) 183-204).

[22] From a historical perspective, Roman law punished **'adultery'** as a crime but did not afford an action in private law (see for example M Carnelley 'Laws on **'Adultery'**: Comparing the Historical Development of South African Common-Law Principles with those in English Law' (2013) 19 (2) *Fundamina* 185 et seq). As to Roman Dutch Law, JC Sonnekus concluded in his doctoral thesis at the University of Leiden in 1976, *Die Privaatregtelike Beskerming van die Huwelik* (at 58 and 75), that apart from certain general statements by De Groot (eg 'Inleidinge' 3.35.9 and 'De Iure belli ac pacis' 2.17.15), support for the proposition that Roman Dutch law afforded a private law action for **'adultery'**, is hard to find amongst our old authorities (see also Wessels JA in *Viviers v Kilian supra* at 458 and Watermeyer J in *Wagner v Kotze* unreported but referred to by CH van Zyl *The Theory of the Judicial Practice of the Colony of the Cape of Good Hope and of South Africa Generally* (1902) at 514-515 and alluded to by Wessels JA in *Viviers v Kilian*).

[23] In *Biccard v Biccard & Fryer* **(1892) 9 SC 473** at 475, De Villiers CJ, however, relied on De Groot *Inleiding* 3.35.1 to allay the doubt expressed earlier by Watermeyer J about the existence of the action in Roman Dutch law. When the issue came before this court for the first time in *Viviers v Kilian*, it confirmed the judgment of De Villiers CJ in *Biccard*. In doing so it relied largely on the judgment of the Privy Council in *Norton v Spooner* **[1854] UKPC 21** which was given in 1854. This was an appeal from British Guyana in which the Privy Council held that a civil action for recovery of damages against a defendant for 'criminal conversation' lies by Roman Dutch law which prevailed in British Guiana at the time.

[24] The thesis advanced by Sonnekus (at 219), was that the decision in *Norton v Spooner* was heavily influenced by English law and that in consequence *Viviers v Kilian* was representative of English law rather than Roman Dutch law. That thesis appears to be supported by the reference to 'an action for criminal conversation' in *Viviers* at 451, which is a description of the action peculiar to English law. Of further significance is the fact that other civil law countries such as France, the Netherlands, Germany and Austria do not recognise a private law claim for **'adultery'** although at some stage it was punishable in these countries as a criminal offence. So, for instance, a famous professor of civil law at the University of Vienna is reported to have said many years ago, when coming to the subject of liability for **'adultery'**:

> 'The treatment of **'adultery'** as a criminal offence, has long ago been abrogated in every civilised country in the world, but I am given to understand that there still exists in a few countries an action for damages for **'adultery'**. This is utterly repugnant to modern ideas. 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.'

(See B Tennet 'Damages for **'adultery'**: a criticism of our law' **(1952) 69 *SALJ* 96.)**

[25] It appears that after the Second World War academic writers in Germany sought to persuade the German courts to recognise a private law claim of this kind. The Bundesgerichtshof, however, steadfastly refused to do so. This appears, for instance, from the judgment of the Bundesgerichtshof (Sixth Civil Senate) on 22 February 1973 (JZ 1973, 668), as translated by BS Markesinis and H Unberath *The German Law of Torts A Comparative Treatise* 4 ed (2002) at 364-365. I apologise in advance for quoting so extensively from this judgment. My excuse is that I found much guidance in the clarity of reasoning that it displays. It reads:

> 'The plaintiff bases his claims on the fact that the defendant was an accomplice to the breach of fidelity for which the plaintiff's wife was to be blamed. According to a constant practice of the Bundesgerichtshof, maintained until now in the face of attacks by some writers, no 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 . . . [In an earlier case the] Fourth Division points out that without the co-operation of one of the spouses no interference with the marriage can occur and that, therefore, it constitutes essentially an internal marital matter, which is not sought to be protected by inclusion among the situations attracting liability in tort. In view of its strong link with the conduct of the unfaithful spouse the participation of the third party must be coloured by it as well. It is inadmissible to divide the activities into misbehaviour of the spouse governed by matrimonial law and a tort committed by the third party rendering him liable to pay damages. The Fourth Division has pointed out further that it is difficult, having regard to the multiplicity of possible acts of interference with marital relations, to establish suitable limits for any such liability and that the necessary enquiries, as required in the individual case, would

have undesirable effects in various respects . . .

It is true that according to the practice of the Bundesgerichtshof, particularly of this Division, a claimant whose general right of personality has been severely infringed may be awarded pecuniary damages for his non-pecuniary loss, provided that additional conditions have been met. However, in so far as the right of personality of a spouse has been infringed because a third party acting together with the other spouse has interfered with the right to the integrity of the marital community, as in the present case, any claims for damages in tort must be denied for the reasons stated above which rule out liability in tort . . .

The legislature has refrained from enforcing proper marital conduct directly or indirectly by public measures . . . including any penalties and equivalent measures for **adultery**, and has contented itself with the protection provided by family law . . . [I]t 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 . . .

Finally, a conclusion to the contrary cannot be based either on the protection of marriage . . . 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.'

[26] In view of the clear and consistent recognition of the private law action for **adultery** by this court, its origin is of significance in one respect only, namely that in England, which is its country of origin, the action for **adultery** against a third party, or 'criminal conversation' as it was called, has since been abolished by legislation in terms of the Law Reform (Miscellaneous Provisions) Act 1970. Both the history of the action and the reasons for its demise in England appear from the following summary by Diplock LJ in *Pritchard v Pritchard and Sims* [1966] 3 All ER 601 (CA) at 607-610:

'In 1857, when marriage in England was still a union for life which could be broken only by private Act of Parliament, there existed side by side under the common law three distinct causes of action available to a husband whose rights in his wife were violated by a third party, who enticed her away, or who harboured her or who committed **adultery** with her. In enticement and in harbouring, which were actions on the case, the damage claimed was for loss of the society and services of the wife. In the action for **adultery** known as criminal conversation, which . . . lay originally in trespass, the act of **adultery** itself was the cause of action and the damages punitive and at large. It lay whether the **adultery** resulted in the husband's losing his wife's society and services or not.

All three causes of action were based on the recognition accorded by the common law to the husband's proprietary interest in the person of his wife, her services and her earnings, and in the property which would have been hers had she been feme sole. The common law in 1857 reflected in this respect the social values of a country governed exclusively by the dominant male, and, although by judicial extension the cause of action for enticement is now available to both spouses . . . there is no trace of such an action being brought by the wife before 1857.

. . .

The ancient common law action for criminal conversation was abolished by s 59 of the Matrimonial Causes Act, 1857, which first gave jurisdiction to an English court to dissolve marriages. By s 33 of the same Act, however, the newly constituted court for matrimonial causes was empowered to award to a husband damages for **adultery**, and the section provided that such claim should be tried on the same principles and in the same manner as actions for criminal conversation were formerly tried at common law . . .

[I]n 1857 . . . the old concept of the husband's proprietary rights in his wife was still firmly rooted, and the principles on which the amount of damages was assessed in the old common law action for criminal conversation, immediately before the passing of the Act, were applied to the new statutory cause of action for damages for **adultery**. These principles . . . had by 1857 already been rationalised as compensatory – but compensatory for what? Certainly and primarily for the loss to the husband of the value of the wife . . . Nevertheless, no doubt as a rationalisation of the former punitive nature of the damages, it was well established that, where the action did lie, the husband was entitled to be compensated also for the injury to his feelings and his pride . . .

The measure of the . . . compensation for injury to the husband's feelings and pride, must also take account of changing social norms. The test must be his rational resentment, not his mere idiosyncratic ire, and the factors to be taken into account in mitigation or in aggravation are those which would affect the feelings of a reasonable man with an unfaithful wife in the social conditions of today. Such reasonable cuckold of the common law may be divorced from reality as well as from his wife, but the concept is needed so long as Parliament preserves a cause of action which, in so far as it extends beyond proven pecuniary loss, I confess I find "repugnant to modern and sensible ideas".'

And by Scarman J in the same case when he said (at 611):

'When a wife was a piece of property whom the husband could not divorce short of an Act of Parliament, her infidelity was understandably regarded as a terrible blow to his honour and his pride. A cuckold was then a contemptible, ridiculous figure, "the

husband of an unfaithful wife, derisory" says the Shorter Oxford English Dictionary; but today all is changed. Divorce runs at something like forty thousand cases a year; a man can divest himself easily, cheaply (and without loss of face) of his adulterous wife. Thousands of husbands come annually to the courts seeking the relief of divorce for **adultery**; but how many claim damages?—the merest handful. The truth is that our social mores have changed, and with them the monetary assessment of the factors of loss and injury, whose graphic descriptions increase the volume and enrich the literary quality of the older law reports.'

[27] The abolition of the action for criminal conversation in England was followed, so it appears, in most other common law jurisdictions which inherited that action from English law. In New Zealand and Australia it happened in 1975, in Scotland in 1976, in Ontario in 1978 and subsequently in almost all the provinces of Canada. In the United States of America the action has been abolished or severely restricted in 42 states and the District of Columbia either by what has been called 'anti-heart balm statutes' or by decisions of the State Supreme Courts. Indeed, North Carolina appears to be one of the last remaining states where tort claims for **adultery** are still recognised (see L McMillian '**Adultery** as tort' (2012) 90 *North Carolina Law Review* 1987 at 1988; JM Cary and S Scudder 'Breaking up is hard to do: North Carolina refuses to end its relationship with heart balm torts' (2012) 4 *Elon Law Review* 1). The reasons for the abolition in these jurisdictions are, in short, that the action is regarded as no longer in confirmation with considerations of morality, that it has grave disadvantages and that on balance, its continued existence is no longer justifiable.

[28] Experience teaches us that different jurisdictions provide more or less the same answer to a particular legal problem, albeit that they sometimes arrive at that answer in different ways. Where our law therefore gives an answer that appears to be directly at odds with what has happened in most other jurisdictions, it makes one stop to think: are the morals and the needs of our society so different from most others? And if so, why? Proponents of the continued existence of the action believe that in the main it serves two purposes: First, to protect marriage as an important institution of society and, second, to protect the personality rights of injured spouses by affording them compensation for the contumelia or injury they had suffered and (perhaps) for the wounded feelings they were made to endure. I shall return to these.

[29] What the proponents of the action have to admit, however, is the clear anomaly that the action is available against the third party only and not against the adulterous spouse, although a clearer case of a co-perpetrator is difficult to conceive (see for example Neethling *et al supra* 208; *Wiese supra* at 128C-H). This anomaly was advanced in the judgment of the Bundesgericht, from which I have quoted, as one of the reasons why this action should not be admitted as part of German law. It was also underscored by Van Zyl JP in *Asinovsky v Asinovsky* 1943 CPD 131 at 132-133 when he said:

'It is difficult to see why the act of a man committing **adultery** with another man's wife should amount to a delict towards the husband, but the **adultery** of a woman's husband should not be treated as a delict committed by him towards her.'

[30] The anomaly becomes even more stark when it is borne in mind that:

(a) If anything, the behaviour of the guilty spouse is patently more reprehensible than that of the third party and more hurtful to the innocent spouse. It is, after all, the guilty spouse, not the third party, who solemnly undertook to remain faithful and who is bound by a relationship of trust.

(b) According to the law as it stands, it makes no difference whether the guilty spouse initiates the relationship or whether he or she was the seducer or the seduced.

(c) Neither does it make any difference whether the two spouses subsequently carried on with their marital relationship or even that they were married in community of property with the result that the guilty spouse would share in the benefits of the award of damages.

[31] One answer to the anomaly which appears to be accepted in *Wiese supra* 198G-H is that the remedy of the innocent spouse against the guilty spouse lies in an action for divorce. But this is no longer the case. It is true that the former can obtain an order for forfeiture of benefits or maintenance against the latter in terms of s 7 of the Divorce Act, but this would only benefit the innocent spouse in limited instances. And, as I have said, the innocent spouse can condone the **adultery** of the guilty spouse, continue with the marriage and still sue the third party for damages.

[32] The further reason for the immunity of the guilty spouse advanced, for example in *Wiese* at 128F-G, is that it lies in considerations of legal policy. But this does not even begin to explain what those policy considerations may be. What it also fails to explain is the apparent conflict with the further statement in that judgment, that if the action against the third party were to be abolished, it would send out the unfortunate message that **adultery** is 'regmatig', ie not wrongful and therefore somehow condoned by our law (see *Wiese* at 128A). But that raises the question: why is the same message not conveyed by the immunity of the guilty spouse? The answer is, of course, in both instances, that when we say that conduct is 'regmatig', ie not wrongful, it only means that the defendant is immune from legal liability; that despite the possible moral blameworthiness of this conduct, the law has decided, for reasons of legal or public policy, that it would not impose legal liability on the defendant for that conduct (see for example *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 11 and 12). Thus understood, the statement that conduct is not wrongful does not convey any legal or moral condonation of that conduct at all.

[33] This brings me to the advantages of the action that are put forward by those who contend that it should be retained. First amongst these is that it protects the institution of marriage which our society holds dear as one of the most important bases for family life and which is recognised and protected as such by our Constitution. This advantage was underscored in *Wiese* (125F-H; 127C-G). It also formed the bulwark of the plaintiff's argument as to why the action should be maintained. In response and lest I be misunderstood, let me start by saying that I have no doubt that marriage is one of the most important institutions in our society which is and should be recognised and protected by our Constitution. That much was clearly confirmed by the Constitutional Court in a number of cases (see for example *Dawood & another v Minister of Home Affairs & others* [2000] ZACC 8; 2000 (3) SA 936 (CC) paras 30-33).

[34] But the question is: if the protection of marriage is one of its main goals, is the action successful in achieving that goal? The question becomes more focused when the spotlight is directed at the following considerations:

(a) First of all, as was pointed out by the German Bundesgericht in the passage from the judgment (JZ 1973, 668) from which I have quoted earlier, although 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 . . . consists in the readiness, founded in morals, of the parties to the marriage to create and to maintain it'. If 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.

(b) Grave doubts are expressed by many about the deterrent effect of the action. In most other countries it was concluded that the action (no longer) has any deterrent effect and I have no reason to think that the position in our society is all that different. Perhaps one reason is that **'adultery'** occurs in different circumstances. Ever so often it happens without any premeditation, when deterrence would hardly play a role. At the other end of the scale, the **'adultery'** is sometimes carefully planned and the participants are confident that it will not be discovered. Moreover, romantic involvement between one of the spouses and a third party can be as devastating to the marital relationship as (or even more so than) sexual intercourse.

(c) If deterrence is the main purpose, one would have thought that this could better be achieved by retaining the imposition of criminal sanctions or by the grant of an interdict in favour of the innocent spouse against both the guilty spouse and the third party to prevent future acts of **'adultery'. But, as we know, the crime of adultery'** had become abrogated through disuse exactly 100 years ago while an interdict against **'adultery'** has never been granted by our courts (see for example *Wassenaar v Jameson supra at* 352H-353H). Some of the reasons given in *Wassenaar* as to why an interdict would not be appropriate are quite enlightening and would apply equally to the appropriateness of a claim for damages. These include, firstly, that an interdict against the guilty spouse is not possible because he or she commits no delict. Secondly, that, as against a third party 'it interferes with, and restricts the rights and freedom that the third party ordinarily has of using and disposing of his body as he chooses; . . . it also affects the relationship of the third party with the claimant's spouse, who is and cannot be a party to the interdict, and therefore indirectly interferes with, and restricts her rights and freedom of, using and disposing of her body as she chooses' (at 353D-E).

(d) In addition, the deterrence argument seems to depart from the assumption that **'adultery'** is the cause of the breakdown of a marriage, while it is now widely recognised that causes for the breakdown in marriages are far more complex. Quite frequently **'adultery'** is found to be the result and not the cause of an unhappy marital relationship. Conversely stated, a marriage in which the spouses are living in harmony is hardly likely to be broken up by a third party.

[35] The second purpose of the action advanced in *Wiese* (125I-126A) is that it serves as a *solatium* (ie compensation) to the innocent spouse for the contumelia (ie insult) which he or she had suffered. It must, however, be borne in mind that in our law, the claim for insult or contumelia involves an objective criterion. As Harms DP explained in *Van Jaarsveld v Bridges supra* (para 19), it requires that the conduct complained of be tested against the prevailing norms of society. Even if that conduct is subjectively perceived by the plaintiff as insulting or hurtful to his or her self-esteem, it cannot give rise to an action for compensation unless it is, objectively determined, insulting. Unless the reasonable observer would also regard the conduct as humiliating or degrading, no action for *iniuria* or insult will lie (see for example *Delange v Costa* 1989 (2) SA 857 (A) at 861D-862G; *Le Roux v Dey supra* paras 177-180). Applying that test, it appears to me that in this day and age the reasonable observer would rarely think that the innocent spouse was humiliated or insulted by the **'adultery'** of his or her spouse. The passages from the judgments of the Court of Appeal in *Pritchard* that I have referred to express the view that in modern society the reasonable person would not regard the 'cuckold husband' with less respect. Or, as Diplock J put it, that the cuckold who still feels humiliated may find himself divorced from reality as well as from his wife. I think the position in our society would be no different. Perhaps, society will think less of the guilty spouse but not of the one who had been betrayed.

[36] Neethling's *Law of Personality supra* (at 209) contends that the action serves to protect another personality interest, namely 'die gevoelslewe', or wounded feelings of the innocent spouse. He regards this protection as part of the claim for loss of consortium. *Wiese* (126A-C) appears to endorse this notion, but regards it as part of contumelia. However, as far as I know, an action for wounded feelings as such had not as yet been specifically recognised by our law. Moreover, I am not entirely sure what the proposed action entails. Does it refer to the purely subjective feelings of the spouse? That would directly conflict with the established principle that our law does not concern itself with subjective feelings of hurt which are not regarded as objectively reasonable. In addition, if the law is to be extended to protect wounded feelings, where would we draw the line? Would it include the wounded feelings of a party whose agreement to marry had been broken or of a

man whose girlfriend had left him for another? If it can only be brought as part of the claim for loss of consortium, what about the spouse who has no claim for loss of consortium, but nonetheless feels deeply hurt?

[37] Another purpose rather obliquely advanced in *Wiese* (128A-B) is that **adultery** often gives rise to strong emotions and that, but for the availability of the action for damages, the innocent spouse may resort to self-help through unlawful means. I find the argument somewhat perilous. The law cannot be expected to create or maintain remedies with the sole purpose of preventing unlawful conduct, even if the motivation for that conduct is understandable. People often feel wronged by others without any available legal remedy to amend that wrong. Yet both the norms and the laws of civilised society expect them to restrain themselves from self-help by means of what would amount to unlawful revenge.

[38] In the end the history of the delictual action for **adultery** reveals its archaic origin. On the one hand it stems from the concept in old English law that the husband has some proprietary interest in the person and 'services' of his wife. That is why in common law the action for criminal conversation was always confined to the husband of an adulterous wife. According to some of our older judgments, on the other hand, the action was influenced by the biblical notion received from Canon law that both husband and wife in a marriage are entitled to the sole use of each other's body (see for example *Strydom v Saayman* 1949 (2) SA 736 (T) at 738; *Foulds v Smith supra* at 8), akin to some kind of servitude. When these archaic notions were exposed by changing norms of society, the law started looking for a new *raison d'etre*. This was found, on the one hand, in the protection of marriage as an institution and in the notion of a *solatium* for the insult of the innocent spouse, on the other. But as I see it, the time has come for our law to recognise, in harmony with most other legal systems, that in the light of changing *mores*, these reasons advanced for the continued existence of the action have now also lost their persuasive force.

[39] What is more, even if the action still performs some legitimate function which I may have overlooked, that notional advantage will be far outweighed by the hurt and damage that the action too often brings about. Some of these were well-illustrated in this case, and the list is clearly not exhaustive:

(a) First, the trial exposed the young children of the marriage to harmful publicity and emotional trauma which was manifestly not in their best interest. One day they may even be confronted by the evidence given at the trial and the cross-examination which delved into the extramarital sex life of their mother.

(b) The evidence normally led in **adultery** actions seriously impacts on the dignity and privacy of the defendant, and the spouse that is alleged to have committed **adultery**. In this case Ms H was subjected to embarrassing and demeaning cross-examination and 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.

(c) The clear impression one gains from the evidence in this case was that the plaintiff was motivated by considerations of anger at his wife for the breakup of their marriage. He found the defendant a convenient scapegoat and repository of his anger and his desire for revenge. So, instead of being moved by a need for solace and closure, the action was driven by a negative and destructive craving for revenge. I have no doubt that this is often the case.

(d) Actions for **adultery** are usually prosecuted in the high court and involve the parties in enormous costs. During the trial reference was made to costs incurred by the appellant alone which amounted to half a million rand. That of course is to be doubled to provide for the costs on both sides and it obviously did not include the costs of appeal. The actual award of damages thus paled into insignificance when compared to the costs. One suspects that these costs will be far beyond the means of most defendants who may then be compelled to suffer the consequence of a default judgment. Even from the plaintiff's perspective, the game can hardly be worth the candle.

[40] The conclusion I arrive at is that in the light of the changing *mores* of our society, the delictual action based on **adultery** of the innocent spouse has become outdated and can no longer be sustained; that the time for its abolition has come. In the light of this conclusion I find it unnecessary to consider the further contention advanced by some of our academic authors (see for example M Carnelley 'One Hundred Years of **Adultery**' *supra* at 199-201) which was subscribed to by the defendant in argument, that the continued existence of the action is in conflict with our constitutional norms. Suffice it to say that there could well be merit in some of these arguments.

[41] Finally, and in order to avoid confusion:

(a) My finding is that the action derived from the *actio iniuriarum* and based on **adultery**, which afforded the innocent spouse a claim for both contumelia and loss of consortium, is no longer wrongful in the sense that it attracts liability and is thus no longer available as part of our law.

(b) I make no comment on the other actions based on the *actio iniuriarum* which relate or are connected to the institution of marriage, such as the action for abduction, enticement and harbouring of someone's spouse. I leave the sustainability of their continued existence as the subject of consideration for another day.

(c) I also make no comment on the continued existence of the claim against a third party, based on **'adultery'**, for the patrimonial harm suffered by the innocent spouse through the loss of consortium of the adulterous spouse, which would include, for example, the loss of supervision over the household and children (see for example *Viviers v Kilian supra* at 455). This may well afford the innocent spouse a claim under the *lex Aquillia* (see for example *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd & others as amici curiae)* **2011 (5) SA 329** (SCA para 7).

Costs

[42] What remains are issues of costs. As to the costs of appeal, it appears to me that, even if we were to retain the action of **'adultery'**, the defendant would still have been at least partially, yet substantially successful on appeal because the award for loss of consortium should not have been made by the court a quo. In any event, he would therefore be entitled to these costs. But in the high court, the plaintiff would have been entitled to a costs order in his favour if we were to maintain the law as it stands. In the circumstances where we have now shifted the goal posts on appeal, I believe it would be fair to order that each party should pay his own costs in the high court.

[43] In the event:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

'Plaintiff's action is dismissed. Each party to pay his own costs.'

F D J BRAND

JUDGE OF APPEAL

APPEARANCES:

For the Appellant: S Kuny and Z Ndlokovane

Instructed by:

Friederich Inc, Pretoria

c/o Symington & De Kock, Bloemfontein

For the Respondent: D A Smith and J A van Tonder

Instructed by:

Terblanche Attorneys, Pretoria

c/o Lovius Block, Bloemfontein

[Context] [**Hide Context**]