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They broke up my marriage – what now?



At the first consultation with a matrimonial/divorce lawyer, a client often blames the breakdown of the marriage on the adulterous spouse, but more so on a third party, ie the party with whom the adulterous spouse committed the adultery.

The client then wants to exact revenge on the parties financially, and to ruin the relationship between the adulterous spouse and the third party, if it still exists, using the courts and the divorce process to do so.

IN BROAD STROKES, WHAT DOES THE LAW SAY?

Earlier in the development of our law, if a person (party to a divorce) did not uphold and live a virtuous and exemplary lifestyle, the courts often found against them, without any regard for what was fair, just and equitable, or in the best interest of the children.

This was made worse, having regard to the social norms and mores of the time, by the attitude of the courts towards women who committed adultery, and – if they were the transgressor and thus not deemed worthy of the court's "protective paternalism" – they were treated far worse than men; they stood to lose not only their material possessions, but access to their children as well. This led to divorces that were not only discriminatory in nature, but both unfair and unjust.

The law has since moved to a non-guilt-based system (the Divorce Act, 70 of 1979, and the Children's Act, 38 of 2005) that recognises human fallibility, even if not directly, and places the focus on the best interest of the children, being the most vulnerable in such situations. This is accepted in Anglo-American, European Continental systems, as well as various international conventions, as where the focus should be.

Until September 25, an aggrieved spouse could lay a claim for damages against the third party for:

1. Damages for loss of consortium, which would include the patrimonial loss for care of the household and children;

2. The non-pecuniary loss of love, friendship and moral support; and

3. Loss of satisfaction due to the third party's infringement on the aggrieved spouse's right to dignity and emotional wellbeing.

The above claim was based in money, and generally courts awarded judgments ranging between R75 000 and R150 000, based on the amount of insult the aggrieved spouse suffered, as well as the financial means of the offending third party with whom the adultery was committed.

However, these claims were more difficult to litigate successfully than may appear at first glance, as the standard defence to such a claim was that the adultery was a symptom of marriage that had already irretrievably broken down, and was by no means the cause, as a person who is happily married ordinarily does not stray outside the bounds of marriage for company, comfort or intimacy.

HISTORY OF ADULTERY AS A DELICT (CLAIM FOR DAMAGES)

In her articles *Laws on Adultery and One hundred years of adultery-re-assessment required?*, Professor Carnelley traces the origins of adultery in Roman law, where a husband could claim damages against a third party for loss of consortium as well as patrimonial loss. (Note that action was not available to women whose husbands had committed adultery.)

The underlying basis for the above legal monetary sanction is that the wife's child by a stranger would become part of the household of the unsuspecting husband and have to be maintained by him.

Transgressions by the wife were punishable by death.

In Roman-Dutch law, as far back as the 12th century, a husband could claim damages against a third party for loss of consortium as well as patrimonial loss. (Note that action was not available to women whose husbands had committed adultery.)

The historical claim for damages based on adultery not being available to women, it is suggested, was based on the view that (i) men initiated sex and women were complacent partners, (ii) women to some degree were the property of men, and (iii) the damages payable to the aggrieved husband would act as a deterrent to predatory men. This view, of course, was often in conflict with the reality of the situation when women initiated the extramarital affair.

This claim was based on the (i) defilement of a married woman, (ii) the violation of another man's bed, and/or (iii) the corruption of another man's spouse.

As the social norms in South African society changed, the narrow definition of marriage was widened from heterosexual relationships to same-sex marriages, with customary unions and polygamous marriages now being allowed. With this expansion came a questioning of the reasoning for moderating loss of love with a monetary penalty.

In addition, the assumption that the adulterous party was the person responsible for the breakdown of the marriage was also often not the case in reality, as the marriage at the stage of adultery may already have broken down and been dysfunctional for a period of time, and, as such, both spouses had

played their part in the disintegration of their marriage. As stated above, if a party is susceptible to the advances of a party outside of the marriage, adultery would be a symptom and not the cause of the disintegration of the marriage.

Prof Carnelley, in two well-known articles used in *RH v DH, Supreme Court of Appeal (SCA)*, pointed out that as the blameworthiness of the disintegration and irretrievable breakdown of the marriage lay with the respective spouses, it also begged the question why a third party should then be held liable for damages.

“In most legal circles it is believed the claim for damages based on adultery against a third party will not succeed

The basis of the historical view of adultery, and to some degree its application by the courts in practice, as set out above, was, of course, also sexist, patriarchal and not in line with our constitutional value of equality as set out in the Constitution of South Africa, 1996, sections 9 and 39.

This has all changed radically now.

THE RECENT SUPREME COURT OF APPEAL CASE *RH v DE*

The recent case of *RH v DE*, in which the Supreme Court of Appeal gave judgment on September 25 this year, dealt specifically with the matter of whether a third party can still be held delictually accountable (cause of action No 3 above), and if the action of adultery, based on current public perception and mores, still forms a part of our law.

In this matter, the romantic and intimate relationship with the third

party had started after the consortium (relationship) had broken down between the spouses and they were living in separate homes (even though the parties did admit their reciprocal feelings for each other while the wife and husband were still living together).

The original trial court found that the defendant (the third party) had committed adultery and had enticed Ms H to leave the plaintiff (her husband), and awarded R75 000 damages with legal costs.

The Supreme Court of Appeal (SCA) abolished the delictual action for adultery based on the *contumelia* (No 3 above), and stated that such a claim for damages is no longer a part of our law going forward.

The SCA has clearly stated that it was not ruling on whether damages for loss of consortium (No 1 and 2 above) were still a relevant delictual action in our law, or on the possible constitutional issues related to the delictual actions. However, it is believed in legal circles that this judgment has “ripped out the guts” of this delictual cause of action in South African law.

In short, it is believed in most (not all) legal circles that if a court is approached under any of the above three grounds for a monetary award based on adultery to be paid to an aggrieved spouse, it will be treated similarly – if not in the initial court, certainly in the Supreme Court of Appeal, as in *RH v DE*.

Out of interest, note that this claim is still available in certain states in the United States, such as North Carolina, Michigan and Illinois, and some African countries.

WHAT PART DOES ADULTERY NOW PLAY IN DIVORCE LAW, IF AT ALL?

The Divorce Act has two sections where adultery may still be relevant, when it comes to the awarding of maintenance and the re-

distribution of assets, and one general section that specifically names adultery.

Before a court will grant a decree of divorce, the plaintiff must prove an irretrievable breakdown of the marriage, and in section 4(2)(b) the legislature states “that the defendant has committed adultery and that the plaintiff finds it irreconcilable with the continued marriage relationship”. So as far as a ground for divorce is concerned, adultery is still part of the legal landscape.

Section 7 of the Divorce Act, *Division of assets and maintenance of parties*, states the following when it comes to division of matrimonial assets: In 7(2) ... “the court may, having regard to the existing prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to divorce”, and here is the important part for purposes of the article, “and any other factor which in the opinion of the court should be taken into account, make an order which the courts finds just in respect of the payment of maintenance by the one party in favour of the other ...”

The writer would contend that adultery *vis-à-vis* maintenance payable by the one spouse to the other could be a relevant factor influencing the amount and the duration of maintenance payable.

Section 9, *Forfeiture of patrimonial benefits of the marriage*, section 1 states: “When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of another, either wholly or in part, the court having regard of the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties ...”

It is generally accepted that adultery is misconduct (as opposed to substantial misconduct), but the writer is of the opinion that there are circumstances where adultery, if coupled with arrogance, indifference and a genuine attempt to humiliate the aggrieved spouse publicly (for instance, by posting pictures of him/her and the third party on a public platform such as Facebook), and causing trauma for the aggrieved spouse and the children, could be construed as substantial misconduct.

In such circumstances, it could be argued that the adultery could be a factor causing the court to order a redistribution of assets (for instance, the former matrimonial home) from the one spouse in favour of the other.

CONCLUSION

It would appear that adultery as a delictual cause of action against a third party, in South African law, is no more, due to the recent judgment in *RH v DE (SCA)*, handed down on September 25.

Although the Supreme Court of Appeal was careful not to deal with all of the historical grounds of adultery, in most legal circles it is believed the claim for damages based on adultery against a third party will not succeed.

However, adultery as a factor for the court to consider regarding maintenance and redistribution of matrimonial assets is still relevant.

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