

He or she broke up my marriage – what now:

Let's set the scene:

A Matrimonial / Divorce Lawyer quite often is confronted at the first consultation by a client that blames the breakdown of the marriage on their adulterous spouse but more so on a third party, i.e. the party with whom the adulterous spouse committed the adultery.

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

What does the law say in broad strokes?

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

The above was made worse by, having regard to the social norms and mores of the time, the attitude of the courts towards woman whom committed adultery and they (if they were the transgressor and thus not deemed worthy of the courts “protective paternalism”) were treated far worse than men and stood to lose not only their material possessions as well as access to their children. This led to divorces that were not only discriminatory in nature¹ but both manifestly unfair and unjust².

The law has moved to a non-guilt based system (Divorce Act 70 of 1979 and Children's Act 38 of 2005) that recognises human fallibility, even if not directly, and places the focus on the best interest of the children³, being the most vulnerable in

¹ Heaton J “Striving for substantive gender equality in family law: Selected Issues” 2005 *SAJHR* page 549 and *Brink v Kitshoff* 1996 (4) SA 197 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *Bannatyne v Bannatyne (Commissioner for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC).

² M O'Sullivan “Stereotyping and Male Identification – Keeping Woman in their Place” in C Murray (ed) (footnote 8) 185. 185, *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C) para 7, *Pincus AJ*

³ Children's act 38 of 2005, section 7

such situations and which is accepted in Anglo American, European Continental systems as well as various international conventions as where the focus should be.

Until September 25th an aggrieved spouse could lay a claim for damages against the 3rd party for:

1. Damages for loss of consortium, which would include the patrimonial loss for care of household and children and;
2. The non-pecuniary loss of love, friendship and moral support;
3. Loss of satisfaction due to the 3rd party's infringement on the aggrieved spouse's right to dignity and emotional well-being.

The above claim was based in money and generally courts awarded judgements, in the experience of the writer ranging between R 75 000, 00 to R 150 000, 00, based on the amount of insult the aggrieved spouse suffered as well as the financial means of the offending 3rd party with whom the adultery was committed.

Note however that these claims were more difficult to litigate successfully than may appear on 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 whom is happily married, ordinarily does stray outside the bounds of marriage for company, comfort or intimacy.

History of Adultery as a delict (claim for damages):

In her article *Laws on Adultery*⁴, and *One hundred years of adultery re-assessment required?*⁵ Professor Carnelly, traces the origins of adultery in Roman law where a husband could claim damages against a 3rd party for loss of consortium as well as patrimonial loss. (Note that action was *not* available to woman whose husbands had committed adultery).⁶

⁴ Professor Carnelly, "Laws on Adultery" 2013 Fundemina, section 2 2 page 196 and in Clarks Attorneys Conference Notes compiled by the Law Offices of Bev Clark Attorneys (Family Law Conference held on 2 -3 October 32014) page 163

⁵ Professor Carnelly, "One hundred years of adultery re-assessment required" in Centenary Celebrations at the School of Law in 2010 (edited by SV Hoctor and M Kidd) p183

⁶ Clarks Attorneys Conference Notes compiled by the Law Offices of Bev Clark Attorneys (Family Law Conference held on 2 -3 October 32014) page 163 - 169

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 3rd party for loss of consortium as well as patrimonial loss. (Note that action was *not* available to woman whose husbands had committed adultery).⁷

The historical claim for damages based on adultery not being available to woman, it is suggested, was based on the view that (i) men initiated sex⁸ and woman were complacent partners, (ii) woman to some degree being the property of men and that (iii) the damages payable to the aggrieved husband would act as a deterrent to predatory men. This view was of course often in conflict with the reality of the situation where woman 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 with the widening of the narrow definition of marriage from the narrow, 2 person heterosexual relationships to same sex marriages, customary unions and polygamous marriages now being allowed. With this expansion came questioning of the reasoning for moderating loss of love with a monetary penalty⁹.

The above as well as the assumption that the adulterous party was the person responsible for the breakdown of the marriage (which was also often not the case in reality), as the marriage at the stage of adultery had already been broken down and been dysfunctional for a period of time and as such both spouses had played their part as such in the disintegration of their marriage.

⁷ Clarks Attorneys Conference Notes compiled by the Law Offices of Bev Clark Attorneys (Family Law Conference held on 2 -3 October 2014) page 163 - 169

⁸ Fn 6 *ibid* page 166 at 17.7

⁹ *Godfrey v Campbell* 1997 (1) SA 570 (C), *Wiese v Moolman* 2009 (3) SA 122 (T), *Van der Westhuizen v Van der Westhuizen and Another* 1996 (2) SA 850 (C)

As stated above that 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 Carnelley¹⁰, 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 and also begged the question why a 3rd party should then be held liable for damages.

The historical view of adultery, to some degree its application by the courts in practice, as set out above, and its basis 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.

All of the above has now radically changed.

[The recent Supreme Court of Appeal case RH v DE handed down on 25 September 2015:](#)

The recent case of *RH v DE* in which the Supreme Court of Appeal gave judgment on September 25th, 2014, dealt specifically with the matter if a 3rd party can still be held delictually accountable (cause of action no 3 above) and if the action for 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 3rd 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 whilst the wife and husband were still living together).

The original trial court found that the defendant (the 3rd party) had committed adultery and had enticed Ms H to leave the plaintiff (her husband) and awarded R 75 000, 00 damages with legal costs.

The Supreme Court of Appeal (SCA) abolished the delictual action for adultery

¹⁰ Ibid fn 4, 5 and 6 above

based on the *contumelia* (no 3 above) and stated that such a claim for damages is not a part of our law going forward any more.

The SCA has clearly stated that it was not ruling on whether damages for loss of consortium (no 1 and 2 above) was still a relevant delictual action in our law or on the possible constitutional issues related to the delictual actions. It is however believed in legal circles that this judgement 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 3 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 but certainly in the Supreme Court of Appeal as in *RH v DE*.

For sake 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 ¹¹ has two sections where adultery may still be relevant when it comes to the awarding of maintenance and the redistribution 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*”, hence as far as a ground for divorce, adultery is still a 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*

¹¹ Act 70 of 1979

*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 a vi* 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, if the court having regard, **the circumstances which gave rise to the break-down 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 publically (for instance by posting pictures of him / her and the 3rd party on a public platform like Facebook) and causing trauma for the aggrieved spouse and the children, it could be construed as *substantial misconduct*.

In such a circumstance it could be argued that the adultery, seen in conjunction with surrounding circumstances, could be substantial misconduct and hence 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 spouse.

Conclusion:

It would appear that adultery as a delictual cause of action against a third party sounding in money, in South African law, is no more due to the recent judgement in *RH v DE (SCA)* of handed down on 25 September 2014.

Although the Supreme Court of Appeal was careful not to deal with all the historical grounds of adultery, in most legal circles it is believed that the claim for damages based on adultery, against a 3rd party will not succeed.

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

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