REPORTABLE

CASE NO: SA 77/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JAMES SIBONGO **Appellant**

and

LISTER LUTOMBI CHAKA **First Respondent**

RUTH MASILILO MUKONO **Second Respondent**

Coram: SHIVUTE CJ, MAINGA JA and SMUTS JA
Heard: **15 July 2016**
Delivered: **19 August 2016**

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and MAINGA JA concurring):

[1] The appellant in this appeal is cited as the second defendant in an action for damages for adultery brought against him by the respondent as plaintiff. This claim was introduced as part of a divorce action between the plaintiff and the first defendant. But the divorce action became settled and the plaintiff had obtained a restitution order against the first defendant on an unopposed basis at the time when the trial between the plaintiff and second defendant had started. For the sake of convenience, the parties are referred to as the plaintiff and second

defendant. Although the first defendant is cited as second respondent in this appeal, it is not clear to me why this is the case. The first defendant was no longer a party to the action between the plaintiff and the second defendant when the matter proceeded to trial.

Factual background to the appeal

[2] This appeal served before us in rather unusual circumstances.

[3] The plaintiff instituted a divorce action against the first defendant on 1 July 2011. It became defended. On 26 September 2012, the plaintiff amended his claim to join the second defendant and introduced a claim against him of committing adultery with the first defendant. In it, the plaintiff claimed N$100 000 in damages against the second defendant. It was broken down as N$50 000 claimed for *contumelia* and N$50 000 for loss of 'consortium, society and services' of the first defendant. In the particulars of claim, the plaintiff sought condonation for his own adultery committed 'during or about June 2011 to August 2011 and again since February 2012 and at Windhoek'.

[4] The action was defended by the second defendant. In his plea, the second defendant denied committing adultery with the first defendant and also denied knowledge that the plaintiff and first defendant were married to each other until service of the summons.

[5] The trial in the High Court is not yet completed. The plaintiff closed his case after giving evidence, replete with inadmissible hearsay evidence, and after calling another witness.

[6] An application for absolution from the instance was dismissed with costs. The second defendant gave his evidence and then gave notice that he intended to call the first defendant as a witness. The plaintiff objected to her giving evidence on two grounds. Firstly, it was stated that no witness summary had been provided in accordance with the rules governing case management. In the second instance, it was contended that the first defendant was not a competent witness against the plaintiff on the grounds of marital privilege. It was pointed out that although a restitution order had been granted, the parties were not as yet divorced at the time of the trial and the plaintiff had not waived his right to this privilege.

[7] The High Court ruled in favour of the plaintiff and refused to permit the first defendant to testify against her husband, the plaintiff, while the marriage was still in subsistence on the grounds of marital privilege. The High Court ruled that whatever happened between them was protected by law and that the privilege had not been waived by the plaintiff.

[8] The second defendant's legal representative then brought an application for leave to appeal against this ruling from the bar. That was refused. A postponement was then sought to enable the second defendant to petition the Chief Justice for leave to appeal. The High Court adjourned the matter to the next day for the parties to consider the further conduct of the trial.

[9] On resumption the next day, the presiding judge informed the parties that he had further considered the matter and that his research had revealed that there was nothing prohibiting the second defendant from calling the first defendant as a witness and that there was no absolute embargo upon one spouse testifying against the other. He however indicated that he considered himself to be *functus officio* on the issue and afforded the parties a further opportunity to consider their positions by granting a further brief postponement. It would seem that his intention was to afford the plaintiff the opportunity to abandon the ruling. But the plaintiff did not do so.

[10] A postponement was granted to enable the second defendant to petition the Chief Justice for leave to appeal against the refusal to permit him from calling the first defendant as a witness in his defence of the plaintiff's claim. Leave to appeal was granted by this court in an order on 22 September 2014, subject to a condition specified in para 2 of the order of this court. Shortly stated, the condition required the second defendant as appellant to request the plaintiff in writing to abandon the order of the High Court within a period of seven days. In the event of failing to abandon the order, certain time periods were set out to file a notice of appeal and copies of the record.

[11] The second defendant did not however comply with the time periods referred to and those in the rules of this court and was obliged to seek condonation for these failures. In the supporting affidavit, correspondence was

attached which showed that the plaintiff had declined to abandon the ruling, despite more than one request directed at him to do so.

[12] After a date for the hearing of this appeal was allocated, the parties were requested to address both written and oral argument on the question as to whether the first respondent's delictual cause of action for adultery pursued against the appellant was still sustainable in law.

Issues

[13] The issues to be determined by this court are thus whether the first defendant could give evidence against the plaintiff in respect of the claim against the second defendant and secondly whether the claim itself is still sustainable in law.

[14] The further question as to whether a punitive costs order should be made against the plaintiff for failing to abandon the ruling in his favour, even though he did not oppose the appeal against that ruling, no longer arises. Mr Tjombe, counsel for the second defendant, indicated at the outset of the hearing that his client no longer sought a special costs order against the plaintiff on those grounds. He added that the second defendant did not even seek any costs order against the plaintiff in respect of the appeal. In view of this surprising development, it is not necessary to consider the scale of costs to be awarded despite the objectionable conduct in question. Whilst it is clearly within the domain of parties to waive their rights to pursue costs against each other, the approach of the plaintiff to this appeal is certainly deserving of censure, given the fact that he did not oppose the

appeal against the ruling made at his instance, yet failed to abandon the ruling in his favour after being expressly invited to do so by this court. That conduct resulted in the incurrence of considerable further unnecessary costs and delay. It also resulted in the appeal being enrolled and entertained by this court in circumstances where this need not have occurred.

The ruling on marital privilege

[15] Mr Tjombe argued that the ruling of the court below was incorrect and that it misconceived the nature of marital privilege. Mr Namandje, who appeared for the plaintiff (although heads of argument had been prepared by Ms I Visser), confirmed that the plaintiff did not oppose the appeal against the ruling.

[16] As was also acknowledged by the court below afterwards, the ruling is incorrect and the objection to the second defendant calling the first defendant as a witness should have been dismissed.

[17] In terms of s 10 of the Civil Proceedings Act 25 of 1965, a spouse cannot be compelled to give evidence against the other spouse to disclose any communication made to that spouse during their marriage. A similar provision applies in criminal proceedings.[1] This form of marital privilege is now entrenched in Art 12 (1)*(f)* of the Constitution as part of a fair trial. It provides:

> 'No person shall be compelled to give testimony against themselves or their spouses. . . .'

[1] Section 198 of the Criminal Procedure Act 51 of 1977.

[18] The privilege itself can also not be invoked against the calling of a witness. It precludes a spouse from being compelled to disclose a communication made to the other spouse during the marriage. It would need to be raised and would only arise when evidence of a communication (in this case by the plaintiff to the first defendant) was sought to be adduced. This is quite apart from the fact that the first defendant had not in this case been compelled to give evidence.

[19] Marital privilege as set out in the Civil Proceedings Act and the Constitution thus did not prevent the first defendant being called by the second defendant as a witness in the trial in the court below.

[20] It follows, as has correctly been acknowledged by all concerned, that the appeal against that ruling must thus succeed. No more need be said on the subject.

Whether the delict of adultery is still sustainable in law

[21] This court addressed this question to the parties by reason of the fact that the ruling appealed against was acknowledged by the High Court to be incorrect and not supported by the plaintiff on appeal. If the delict of adultery were no longer sustainable, this court would in my view err if it were to remit the matter to the High Court for the continuation of the trial.

[22] The parties were given adequate notice to prepare and file argument on the question. The letter to the parties by the Deputy Registrar requesting argument on the question was sent to them on 21 June 2016 and the appeal was heard on 15

July 2016. Both parties filed detailed written heads of arguments on the issue in advance of the hearing. Both parties referred to recent authority of both the South African Supreme Court of Appeal (SCA) in *RH v DE* 2014 (6) SA 436 (SCA) and the further appeal in that matter to that country's Constitutional Court in *DE v RH* 2015 (5) SA 83 (CC).

[23] In his oral argument, Mr Tjombe expressed unease that the issue should be determined by this court without a prior decision from the High Court on that issue. He argued that the Attorney-General should possibly have been cited or the views of the Law Reform and Development Commission been sought and evidence possibly put before court. He did not explain the nature of the evidence except by referring to the views of society being obtained. He also informed this court that this question had been ventilated in argument in a separate matter in the High Court in 2015 and that judgment had been reserved and was expected to be delivered in August 2016. This court was unaware of this development when posing the question to the parties in June 2016.

[24] The question posed by this court concerns the continued existence of the delictual action of adultery. A similar question was coincidentally also *meru motu* (of its own accord) posed by the SCA in *RH v DH.*[2] The SCA set the context for setting the question to the parties in its closely reasoned judgment thus:

> '[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

[2] Para 15 and confirmed in *DE v RH* para 4.

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; and that we cannot perpetuate legal rules that have lost their social substratum (see, for example, *Du Plessis & others v De Klerk & another 1996* (3) SA 850 (CC) (1996 (5) BCLR 658; [1996] ZACC 10) para 61; *Carmichele v Minister of Safety & Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995; [2001] ZACC 22 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 injuriarum*. In *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) (2011 (6) BCLR 577; [2011] ZACC 4) 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 & Security & others* 2012 (1) SA 536 (CC) (2012 (3) BCLR 244; [2011] ZACC 37) 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, i.e. whether delictual liability should follow, courts are more sensitive to the dynamic and changing nature of the norms of our society.'[3]

[3] Paras 17 – 18.

[25] This court has recently reaffirmed this approach in the context of determining wrongfulness in delictual claims[4], albeit in a different delictual context.

[26] Mr Tjombe argued that the Namibian Constitution does not include a provision such as s 39(2) of the South African Constitution which enjoins the courts to develop the common law as to promote the spirit, purport of the Bill of Rights in that constitution. Whilst there is no express provision along those lines in the Constitution, there is a clear implication to that effect. But the starting premise is however that it is in any event well established that it has always been open to the courts to develop the common law.[5]

[27] The role of the courts in developing the common law was also aptly described in the oft quoted passage by Iacobucci J in the Canadian Supreme Court in *R v Salituro:*[6]

> 'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'[7]

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[4] *Van Straten & others v Namfisa & another* SA 19/2014, delivered on 8 June 2016.
[5] *DE v RH* para 16; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992(3) SA 579 (A) at 590G-H. See also the illuminating address by Corbett JA 'Aspects of policy in the evolution of the common law' 104 SALJ 54 (1987).
[6] (1992) 8 CRR (2nd) 173, also [1991] 3 SCR 654.
[7] Quoted with approval by Kentridge AJ in the South African Constitutional Court in *Du Plessis & others v De Klerk & another* 1996 (3) SA 850 (CC) para 61 and in *Carmichele v Ministry of Safety & Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) 938 (CC) para 36.

[28] Whilst our Constitution contains no express enjoinder to the courts to develop the common law with extant public policy, the courts in this country have the duty to do so whenever that is warranted, and specifically in this context, as was eloquently explained by the SCA in *RH v DE.*

[29] The development of the common law can raise complex questions. It is no doubt of importance for the development of jurisprudence that this court should have the benefit of a High Court judgment on an issue of this nature.

[30] But does the fact that this issue has been raised in a matter pending in the High Court mean that this court should defer its ruling on this issue, despite the fact that full written and oral argument was provided on the subject? In my view not.

[31] Firstly, it is not certain that judgment on the issue would then be given. We were told it had been previously scheduled but had been postponed. The matter could also settle. In the second place a divergence of views could in due course arise at the High Court. It is incumbent on this court to provide guidance and certainty on legal issues. Thirdly and dispositively, given the conclusion I reach below, it would be entirely inappropriate to refer the matter back to trial at the High Court if the delict is no longer sustainable in law. Indeed, this court would in my view err to do so. A pending ruling on the issue at the High Court on the question would not impel this court to decline to refer the matter back. The court below may consider that ruling to be clearly wrong and decline to follow it. On the contrary,

this court would need to reach its own view on that issue in deciding whether or not to remit the matter to trial. It has also been raised and fully argued before this court.

[32] Although this court is at a disadvantage considering an issue when not dealt with by the High Court, it can and does happen that issues are identified on appeal for the first time by this court which need to be addressed in argument, giving the parties adequate notice to prepare both written and oral argument on an issue, as occurs with other courts of appeal and indeed in the appeal of *DE v RH* before the SCA. This court recently in *Moolman & another v Jeandre Development CC* Case No SA 50/2013, 3 December 2015 at paras 63-67, raised the question as to whether a contract enforced in the High Court was indeed enforceable on the grounds of being against public policy.[8] After inviting and receiving argument on the issue, this court in *Moolman* found that the contract in question was unenforceable as being against public policy.[9] This court in *Moolman*, following South African Constitutional Court authority[10] held that public policy, embodying the legal convictions of the community, is to be determined with reference to the values and norms embodied in the Constitution.[11]

[33] Public policy also informs the element of wrongfulness in delictual liability.[12] This was also acknowledged by this court in the context of the Aquilian action.[13]

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[8] Para 74.
[9] Para 74.
[10] *Barkhuizen v Napier* 2007(5) SA 323 (CC) paras 28-29.
[11] See also *Brisley v Drotsky* 2000(4) SA 1 (SCA) paras 92-94 (per Cameron JA concurring).
[12] *DE v RH* para 17. *Le Roux v Dey* 2011(3) SA 274 (CC) paras 120–122.
[13] *Van Straten* paras 84-85.

[34] The enquiry is thus whether the act of adultery is wrongful for the purposes of the delictual claim in question, as was also posited by both the SCA and the Constitutional Court in *DE v RH.*[14] If not, there would be no delictual claim without wrongfulness. As I have said, the element of wrongfulness is determined with reference to the legal convictions of the community and public policy which is now informed by our constitutional values and the changing nature of the prevailing norms of society. This enquiry is ultimately whether public policy means that a claim founded on adultery should still form part of our common law.[15]

[35] This court is in a position to make determinations on public policy. The common law context and nature of the enquiry – being a dispute between the plaintiff and the second defendant – does not require an input from the Attorney-General, as was eventually conceded by Mr Tjombe. It would in any event not be apposite. Even where a common law rule has been challenged on the grounds of being in conflict with the Constitution that has not been found to be necessary or apposite.[16] Even less so where the question is posed as to whether conduct should be regarded as wrongful as a matter of the changing nature of norms of society or the legal convictions of the community – and not as a direct challenge as being in conflict with constitutional provisions.

[36] After a detailed analysis of the action in common law – its origin and development – and after a thorough comparative survey, the SCA in *RH v DE* concluded that:

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[14] Para 22.
[15] *DE v RH* at para 51.
[16] *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC); *Frans v Paschke* 2007(2) NR 520 (HC) (full bench).

'. . . 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.'[17]

[37] The SCA further found that it was unnecessary to analyse the continued existence of the action in the context of constitutional norms. The Constitutional Court in *DE v RH,* whilst borrowing extensively from the cogent common law analysis performed by the SCA,[18] however further held that any analysis of the *mores* or norms of society must include an assessment of constitutional norms as stated in *Barkhuisen,*[19] adding that 'public policy is now steeped in the Constitution and its value system'.[20] The Constitutional Court, after interrogating public policy with reference to constitutional norms, likewise unanimously concluded that public policy dictated that the act of adultery by a third party lacks wrongfulness for the purpose of a delictual claim of *contumelia* and loss of consortium, adding:

> 'In this day and age it just seems mistaken to assess marital fidelity in terms of money.'

[38] As already said, public policy and the legal convictions of the community are of relevance and significance in determining the element of wrongfulness, a prerequisite for delictual liability.

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[17] Para 40.
[18] Para 12.
[19] Para 21.
[20] Para 21.

[39] As I have also said, this court has likewise made it clear that public policy and the legal convictions of the community are informed by our constitutional values and norms. An examination of the origin of the action and its development reveals that it is fundamentally inconsistent with our constitutional values of equality in marriage, human dignity and privacy. That examination also demonstrates that the action has also lost its social and moral substratum and is no longer sustainable.

[40] As was pointed out by the SCA in *RH v DE*, the action for adultery against a third party has its origin in an archaic English action called 'criminal conversation' which was abolished in England in 1970.[21] That action was rooted in the antiquated notion of a husband's property rights in his wife – essentially viewing wives as mere chattels who are to provide services.[22] The action was not only abolished in England as no longer justifiable, but shortly afterwards in most common law jurisdictions which inherited that action, as is pointed out by the SCA.[23] Its continued existence was already questioned by a South African court in 1944.[24] But it formed part of the common law applied to Namibia before independence and continued to be applied after independence by virtue of Art 140 of the Constitution.

[41] Both the SCA and Constitutional Court (in *RH v DE* and in *DE v RH*) refer to the changing societal attitude to adultery and children born of adulterous

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[21] *RH v DE* para 26.
[22] *RH v DE* para 26, *DE v RH* para 14. *Pritchard v Pritchard and Sims* [1966] 3 All ER 601 (CA).
[23] *RH v DE* para 27.
[24] *Rosenbaum v Margolis* 1944 WLD 147.

relationships in both South Africa and elsewhere.[25] The action has been abolished in common law jurisdictions (such as New Zealand, Australia, Scotland, most provinces of Canada and in most states of the United States of America – mostly in the 1970's). Other common law jurisdictions followed suit, including Ireland, Barbados, Jamaica and Trinidad and Tobago.[26] The SCA and Constitutional Court also point out that an action of this nature does not exist in France, the Netherlands, Germany or Austria. In its comparative survey, the Constitutional Court noted that the action was still operative in a number of African jurisdictions including Zimbabwe, Botswana and Namibia although it had been abolished in Seychelles.

[42] The High Court in *Van Wyk v Van Wyk & another* [2013] NAHCMD 125 however noted a softening of societal attitudes to adultery in this country:

> 'It may well be that in this age, society views with less disapprobation than in the past the commission of adultery. There are also degrees of reprehensibility in the delict of violating the marital relationship ranging from the isolated chance encounter to the sustained continuing invasion of the sanctity of the marital relationship. It must however be remembered that marriage remains the cornerstone and the basic structure of our society. The law recognises this still today and the court must apply the law. One can also not ignore the possibility that a married person meets someone else, develops feelings for that person and falls out of love with his or her spouse without intending to. But the way in which the "guilty" spouse and third party behave thereafter, due regard being had to the innocent party's personality rights, will determine the extent of an award of damages in an action for damages against the guilty party.'

[25] *RH v DE* paras 27-28, *DE v RH* paras 23-44.
[26] *DE v RH* para 32.

[43] The right to marry and found a family is one of the foundational values entrenched in our Constitution.[27] Article 14(3) further states:

> 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'

[44] In his argument in support of the action, Mr Namandje stressed the importance of protecting marriage as an institution in Art 14(3).

[45] But does the action protect marriages from adultery? For the reasons articulated by both the SCA and the Constitutional Court, I do not consider that the action can protect marriage as it does not strengthen a weakening marriage or breathe life into one which is in any event disintegrating.[28] The reasoning set out by the SCA is salutary end bears repetition:

> '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:
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> (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 —
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> > '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.

[27] Article 14(1).
[28] *DE v RH* para 49.

(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. Every so often it happens without any premeditation, when deterrence hardly plays 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 353E.]

(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.'

[46] The SCA also referred to the anomaly that the action is only available as against the third party and not against the adulterous spouse in these terms:

> '(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.
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> (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.'

[47] Another aspect of the action demonstrated as outdated by the SCA[29] is that it serves as a *solatium* (compensation) for *contumelia* (insult) suffered by the non-adulterous spouse. The test for determining *contumelia* is objective and viewed against the prevailing norms of society. In current times, I agree with the SCA that it should seem that a reasonable observer would rarely consider that an innocent spouse has been insulted or humiliated by the adultery of his or her spouse. On the contrary, society may instead think less of a guilty spouse than the one who has been betrayed.[30]

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[29] *RH v DE* para 35.
[30] *RH v DE* para 35.

[48] Further relevant factors were also enumerated by the SCA. These include the hurt and damage often brought about by the action. Young children of marriage would be exposed to harmful publicity and emotional trauma which would not be in their best interests. The alleged adulterous spouse is furthermore exposed to embarrassing and demeaning cross-examination, impacting upon her dignity and privacy.[31]

[49] As in *RH v DE*, the plaintiff in this matter would appear to have been motivated by vindictiveness and anger, looking to the second defendant as a scapegoat for that anger.[32] The actual award for damages would hardly justify a lengthy High Court trial. In this case, the plaintiff had in both his pleadings and in evidence admitted his own adultery after or even at the time of the breakdown of his marriage.

[50] The main thrust of Mr Namandje's argument as I understood it was with reference to Art 66 of the Constitution. It provides:

> '(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.
>
> (2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.'

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[31] *RH v DE* para 39.
[32] *RH v DE* para 39.

[51] Mr Namandje argued that Art 66 means that the common law became frozen on independence and could only be changed thereafter by legislation.

[52] That argument does not however take into account the fundamental principle of the common law itself concerning the role of the courts to develop the common law. This principle was in force on the date of independence and continued to apply after independence under Art 140. But that argument is also based upon misinterpretation of Art 66 and how it has been interpreted by the courts.

[53] As was stated by Strydom CJ in *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC) at 261 D-E:

> 'The language of the article means what it says namely that customary and common law in force on the day of independence only survive in so far as they are not in conflict with the Constitution.'

[54] In *Myburgh,*[33] this court found that the common law rule relating to the disability brought about by a marriage in community of property which rendered a wife subject to the marital power of the husband ceased to exist upon independence by reason of its conflict with the equality provisions in the Constitution.[34]

[55] But ultimately, it is in respect of the determination of wrongfulness – with reference to the legal convictions of the community informed by our constitutional

[33] At p 266 J.
[34] See also *Frans v Paschke & others* 2007(2) NR 520 (HC) (full bench) para 17.

values and norms - that it is no longer reasonable to impose delictual liability for a claim founded on adultery. Whilst the changing societal norms are represented by a softening in the attitude towards adultery, the action is incompatible with the constitutional values of equality of men and women in marriage and rights to freedom and security of the person, privacy and freedom of association. Its patriarchal origin perpetuated in the form of the damages to be awarded are furthermore not compatible with our constitutional values of equality in marriage and human dignity.

[56] In a concise concurring judgment, Mogoeng CJ in *DE v RH* referred to the essence of marriage captured in the Bundesgerichtshof quoted by the SCA (and in para [45] above) and approved of the SCA's statement that where parties to a marriage have lost that moral commitment, their marriage will fail and an action to mete out damages upon a third party is unlikely to change that.[35]

[57] Like Mogoeng CJ and the SCA, I too believe:

> 'It bears emphasis that marriage essentially hinges on the "readiness, founded in morals, of the parties to the marriage to create and to maintain it". Like the Supreme Court of Appeal, I also believe that parties' loss of moral commitment to sustain marriage may lead to its failure. For abuse of one by the other and other factors that could lead to the breakdown of marriage are in my view likely to creep in when that commitment ceases to exist.
>
> The law cannot shore up or sustain an otherwise ailing marriage. It continues to be the primary responsibility of the parties to maintain their marriage. For this reason

[35] Para 68.

> the continued existence of a claim for damages for adultery by the "innocent spouse" adds nothing to the lifeblood of a solid and peaceful marriage.'[36]

[58] The conclusion I reach is that the act of adultery by a third party lacks wrongfulness for the purposes of a delictual claim of *contumelia* and loss of consortium. Public policy dictates it is no longer reasonable to attach delictual liability to it. The action is thus no longer sustainable.

Relief and costs

[59] Mr Tjombe stated that the second defendant does not seek the costs of appeal. He did not refer to the costs in the High Court. In view of the fact that this point was raised on appeal for the first time and not by the second defendant in the High Court, it would only be fair if no order as to costs is made in respect of all proceedings, including in respect of the costs order made in refusing absolution.

[60] The order refusing absolution with costs would need to be set aside (as the action should have been put to an end then), as well as the ruling on marital privilege.

Order

[61] The following order is made:

1. The ruling of the High Court upholding the objection against the second defendant calling the first defendant as a witness is set aside.

[36] Paras 70-71.

2. The order of the High Court refusing absolution from the instances with costs is set aside and replaced with the following order:

‘Absolution from the instance is granted with no order as to costs.’

3. No order as to the costs of appeal is made.

_____
SMUTS JA

_____
SHIVUTE CJ

_____
MAINGA JA

APPEARANCES

APPELLANT:	N Tjombe Instructed by Tjombe-Elago Inc
RESPONDENTS:	S Namandje Instructed by Sisa Namandje & Co Inc