CASE NOTE

A BRIEF NOTE ON THE PRIMACY OF THE CONSTITUTION IN THE COMMON LAW'S DEVELOPMENT:

DE V RH [2015] ZACC 18 / 2015 (5) SA 83 (CC) / 2015 (9) BCLR 1003 (CC)

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1. INTRODUCTION

In *E v H*[1] a husband successfully claimed R75 000 in damages from a man who committed adultery with his wife. On appeal, the Supreme Court of Appeal (SCA) in *RH v DE*,[2] on the law as it was, held that the husband could have succeeded with his claim for insult resulting from the adultery. However the SCA then proceeded to abolish the delictual claim for adultery on the basis that it was outdated in light of changing social norms.[3] The husband finally and unsuccessfully appealed to the Constitutional Court where the abolition of the claim was upheld but on modified grounds in comparison with those provided by the SCA.[4] In this note I briefly recapitulate (and problematise) the reasoning of the SCA on the common law's development in so far as it is relevant for purposes of properly appreciating the judgment of the Constitutional Court.

2. ANTI-CONSTITUTIONALISM IN THE SCA

Read as a whole the SCA's approach to the development of the common law can be described as being 'anti-constitutional'. It is anti-constitutional in the sense that Brand JA, writing for a unanimous bench, decided to develop the common law on a non-

1 (39407/2010) [2013] ZAGPPHC 11.

2 2014 (6) SA 436 (SCA).

3 See J Neethling, 'Owerspel as Gedingsvatbare Aksiegrond' (2015) 12 LitNet Akademies 397.

4 *DE v RH* [2015] ZACC 18 / 2015 (5) SA 83 (CC) / 2015 (9) BCLR 1003 (CC).

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL/index
Volume 31 | Number 1 | 2016 | pp. 232–239

https://doi.org/10.25159/2219-6412/2656
ISSN 2219-6412 (Print)
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constitutional ground and furthermore did not properly engage with the Constitution in the actual process of bringing about the radical change of abolishing delictual claims for adultery.[5]

After recognising that the common law may be developed either because the common law is deficient in promoting the objectives of section 39 (2) of the Constitution or because it is out of step with the changing social, moral and economic conditions of the specific point in time,[6] the SCA opted to develop the common law on the second ground in this case. Brand JA went as far as to say that it is 'unnecessary to consider the further contention advanced by some of our academic authors [...] 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'.[7] I argue that the judgment reflects an anti-constitutional approach to the common law's development because it appears as if the court is at pains to avoid a marriage between the common law and constitutional principles. In so doing the SCA avoided the fact that on the issue of horizontality our fundamental rights jurisprudence shows overwhelming support for a deeply, constitutionally-embedded method.[8] A choice exercised in favour of a complete disregard of the constitutionally-infused approach to common-law development is indicative of a type of anti-constitutional common-law purism. This theme of anti-constitutionalism had certain repercussions for how the rest of the judgment was framed.

What followed in the judgment was a treatise of the problematic history of delictual claims for adultery, a comparative analysis of the legal position on this topic in various non-African countries and a few logical reasons why claims of this nature should be abolished.

Analysing the historical trajectory of the law of adultery, the SCA noted that the general trend over the years has been a relaxation of social attitudes towards adultery. Adultery was abolished as a crime more than 100 years ago, the Divorce Act 70 of 1979 did away with adultery as a specific ground for divorce and the majority opinion of academic authors in our country indicates that the delictual claim based on adultery is antiquated.[9] It appears from the SCA judgment that the Constitution has no role to play in establishing whether our current social attitude towards adultery is in line with that trend.

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5 I developed this argument in an earlier note: E Zitzke, '*RH v DE* 2014 (6) SA 436 (SCA): A Case of Anti-Constitutional Common-Law Development' (2015) 48 De Jure 467. See also similar concerns raised by M Carnelley, 'Die Doodskoot vir of Slegs die Verwonding van die Eis teen die Derdeparty-Egbreker?' (2015) 12 LitNet Akademies 333; J Barnard-Naudé, 'The Pedigree of the Common Law and the "Unnecessary" Constitution: A Discussion of the Supreme Court of Appeal's Decision in *RH v DE*' (2016) 133 SALJ 16.

6 *RH* (n 2) [17].

7 ibid [80].

8 See *DE* (n 4) [17] and the discussion of *DE* below.

9 *RH* (n 2) [20]–[21].

After the historical study on the claim for adultery, the SCA proceeded to turn to foreign legal positions on similar matters. It is worth noting that the only foreign law consulted in this regard pertained to non-African countries such as the United Kingdom (and a few of its old colonies) as well as a *capita selecta* of Western European jurisdictions.[10] In the law of all of the jurisdictions consulted, civil claims for adultery against third parties either do not exist or have been abolished by the applicable legislatures. Brand JA argued that South Africa should follow this example. It appears from the SCA judgment that the importation of foreign legal positions into South African law would not involve a constitutional contextualisation or a test for normative compatibility with our own supreme law.

Lastly, the SCA provided a few logical or practical reasons as to why delictual claims for adultery should end. These logical reasons included the absence of any form of legal sanction against the adulterous spouse,[11] the potential financial benefit that the adulterous spouse could obtain if they remained married in community of property to the injured spouse who claimed damages from the adulterous third party,[12] the fallacy that the existence of a delictual claim for adultery prevents extramarital affairs, that extramarital affairs could take only a sexual form, that people should be entitled to make decisions regarding their own bodies and sexuality,[13] that the claim has been subject to many restrictive modifications in the past and therefore abolition would not be a drastic change,[14] that the children of the parents involved in this dispute have suffered serious forms of emotional trauma as a result of the court case and that the private spheres of the adulterers have been unnecessarily delved into and exposed in an open court.[15] For completeness sake, even though many of these logical or practical reasons have constitutional undertones, it appears from the SCA's judgment that the Constitution should not necessarily play a role in justifying judicious logic and a sense of practicality. Fortunately, the constitutional sheen that the SCA decision lacked was polished by the Constitutional Court on appeal.

3. THE CONSTITUTIONAL COURT DECISION

The Constitutional Court held that the key question in this case was whether 'nowadays the act of adultery meets the element of wrongfulness in order for delictual liability to attach'.[16] Madlanga J, writing for a majority of the Court, noted that the judgment of

10 ibid [24]–[27].

11 ibid [29]–[30].

12 ibid [30].

13 ibid [34].

14 ibid [38].

15 ibid [39].

16 *DE* (n 4) [11].

the SCA was ‘well-reasoned’ and that at most he could add constitutional flavour to the arguments.[17] My assertion is that the SCA judgment may have been extensively and systematically reasoned but the fact that it lacked constitutional lustre means that the judgment could not have been truly ‘well-reasoned’ or even meticulously or comprehensively reasoned. The imperatives of our transformative democracy set the bar higher for a judgment to be regarded as well-reasoned and conscientious in South Africa today. For a judgment to be well-reasoned, especially a judgment pertaining to the development of the common law, it would have to show a serious commitment to framing the legal problem at hand within the values and aspirations of the Bill of Rights.[18]

The Constitutional Court considered the problematically patriarchal nature of the claim that originated at a time when a wife was regarded as a husband’s possession.[19] However the Court simply used this problematic history to sketch an introduction to the real issue at hand — whether the claim can survive in light of the Constitution.[20]

Madlanga J observed that even though the power to develop the common law is not a new one, it has been transformed in light of the development clauses in the Constitution. The common law now has to be developed ‘in a manner that promotes the spirit, purport and objects of the Bill of Rights’.[21] This development of course involves a policy decision-making process that requires a consideration of the changing social, moral and economic fabric of society.[22] However, this public policy that must be considered in the process of the common law’s development is not determined instinctively by a judge’s legal intuition — ‘[p]ublic policy is now infused with constitutional values and norms’.[23] Relying on its earlier decision in *Barkhuizen v Napier*,[24] the Constitutional Court in the case at hand emphasised that public policy is ‘deeply rooted in our Constitution and the values which underlie it’ and that the content of public policy is now ‘determined by reference to the values that underlie our constitutional democracy as given expression in the provisions of the Bill of Rights’.[25] The common law thus meets the Constitution in the garden of public policy, which is a shared concern regarding the wrongfulness criterion in delictual cases and the questions of ‘whether’ and ‘how’ the common law

17 ibid [12].

18 See K Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 SAJHR 146, 148–149; D Davis and K Klare, ‘Transformative Constitutionalism and the Common and Customary Law’ (2010) 26 SAJHR 403, 412.

19 *DE* (n 4) [14].

20 ibid [15]–[16].

21 ibid [16].

22 ibid.

23 ibid [17].

24 2007 (5) SA 323 (CC).

25 *DE* (n 4) [17].

should be developed in light of the development clauses.[26] The Constitutional Court, in polite but firm terms, rejected the SCA's notion that the changing societal norms can be defined without any mention of the Constitution.[27] This is a welcome refutation of the anti-constitutional approach of the SCA and lays the foundation for a potentially transformative approach to the law of delict.[28]

With the centrality of the Constitution in mind, Madlanga J based his evaluation of the continued wrongfulness of claims based on adultery on three pillars: the changing local legal attitudes towards adultery in South Africa, the legal approaches to adultery in other jurisdictions and, most importantly, the impact of the Constitution in this enquiry.

In South Africa, the legal status of adultery has had an unstable history. The argument of the SCA is repeated in summative terms. We have come from a time when not only the adulterers but also the children born of adulterous relationships were socially and legally discriminated against,[29] to the position where adultery was eventually abolished as a crime,[30] with a great amount of academic support in favour of the abolition of civil claims for adultery.[31] Divorce laws also no longer make provision for adultery as a separate ground for divorce.[32] This does not necessarily indicate that the legal value of marriage has been diminished; it simply shows that the Catholic-style sanctity of marriage is no longer the approach that secular law supports.[33]

With reference to other jurisdictions Madlanga J cautioned that legal comparison should always take place through a careful exercise of contextualisation to the South African materiality which includes constitutional compliance.[34] The Constitutional Court, drawing on the SCA judgment, indicated that many Anglo-based and Western European jurisdictions do not recognise civil claims based on adultery.[35] The Constitutional Court added an important dimension to the comparative analysis in addition to the jurisdictions that the SCA considered: the Court took into account the legal attitudes towards adultery in a few African countries. In Cameroon adultery is still a crime, in Kenya, Zimbabwe, Namibia and Botswana the possibility of such a claim still appears to exist. On the other hand, the Seychelles is a jurisdiction that has clearly abolished the claim.[36]

26 ibid [17]–[19].

27 ibid [21].

28 See the foundations that I lay for a 'transformative approach' to delict in E Zitzke, 'Stop the Illusory Nonsense! Teaching Transformative Delict' (2014) 46 Acta Academica 52.

29 *DE* (n 4) [23].

30 ibid [24].

31 ibid [25].

32 ibid [26].

33 ibid [27].

34 ibid [28].

35 ibid [29]–[32].

36 ibid [33]–[36].

According to the Constitutional Court, the global trend is 'the abrogation of a civil claim following on the heels of the even faster paced international disposal of the crime of adultery'.[37] This statement deserves closer analysis in the sense that this may be the general trend in 'the West' but is not the case in the African jurisdictions surveyed. The African trend shows an upheld respect for delictual claims based on adultery. If one accepts that it is important to develop an African comparative jurisprudence, instead of slavishly following a Western approach,[38] it is valuable to ask the questions why the trend in Africa appears to differ from that in Western jurisdictions and how we should deal with this disparity.

Firstly, the Constitutional Court recognises that the study it conducted on African jurisdictions is not comprehensive but sketches a fair picture of general trends based on the 'available research tools'.[39] To paraphrase, there are certain structural difficulties in conducting up-to-date comparative studies in Africa that often impede obtaining a complete picture of the law applicable on the continent. Secondly, it was observed that the mere continued existence of the claim in many African countries should not be regarded as the actual and current legal attitude towards the topic. It is possible that the call for abrogation has not recently been raised in the jurisdictions surveyed and therefore simply has not received the attention of courts that write reportable judgments. Taking our own legal position as an example, were it not for the SCA that *mero motu* raised the issue of the common law's development on this topic, South Africa would have been on the list of African countries that still recognise a delictual claim based on adultery.[40]

My interpretation of these two observations made by the Constitutional Court is that searching for trends in comparative law, especially comparative law in Africa, is an inherently unempirical exercise fraught with inaccuracy. Furthermore, this factor reminds one of the criticism raised against the source of international law called 'general principles of law recognised by civilized nations' where a random selection of municipal laws is used as the basis for determining trends in international legal morality.[41] It is my contention that even though it may be interesting to identify a trend in the global community on a specific legal issue, the truly meaningful impact of comparative study lies in the evaluation of powerful legal reasoning and argumentation on similar issues in different jurisdictions. Our aim in a comparative legal study therefore should not be to become internationally fashionable and legally cosmopolitan. The aim should also not be to canvass an international trend simply by collating the 'answers' of different

37 ibid [37].

38 See E de Wet, 'The "Friendly but Cautious" Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks' (2004-5) 28 Fordham International LJ 1529.

39 *DE* (n 4) [33] n 62.

40 ibid [38].

41 See J Ellis, 'General Principles and Comparative Law' (2011) 22 EJIL 949.

jurisdictions to a specific legal question. If we turn to foreign law for guidance, its value should be sought in the justification (ie, the 'reasons' more than the 'answers') employed in the process of making legal decisions in jurisdictions with similar normative legal frameworks to ours. The attraction of comparative law for purposes of the common law's development is thus to contemplate the constitutional (or constitutionally compatible) reasoning utilised in other jurisdictions on similar questions of law.

The consideration given to African jurisdictions by the Constitutional Court is commendable. However, this comparative study might have been more effectively conducted if a clearer engagement was made with the underlying reasons why the delictual claims for adultery still persist in these jurisdictions and why we deem it fit to deviate from the general trend in Africa. At the same time, no one can be blind to the difficulties in accessing the law of other African countries, let alone finding the underlying policy reasons for a rule's continued existence.

With the difficulties of comparative law in mind, the Constitutional Court turned to the relevant constitutional principles that impact on the determination of the wrongfulness criterion in delict. South African constitutional jurisprudence attaches great importance to the institutions of marriage and the family, in so far as they allow our humanity to be expressed relationally and in community with other human beings.[42] This notion is supported in various international instruments to which we are signatories.[43]

The constitutional right to dignity is fundamental in ensuring the autonomy of legal subjects that affords them the opportunity to make decisions regarding their relationships (that may take on legal form, such as marriage) with others.[44] However, despite the importance that the law attaches to marriage and the family, the state cannot be obliged to prevent marriages falling apart. At best the state must ensure that the law does not stand in the way of parties making their own decisions regarding marriage.[45] The inference that I draw from this part of the judgment is that the offended spouse in a case dealing with adultery cannot invoke his or her right to dignity as being superior to the right to dignity of the other spouse in making decisions regarding their relationship. Other constitutional rights of the adulterers are potentially negatively affected in cases of this nature.

In matters dealing with adultery, the constitutional rights to freedom and security of the person (section 12), privacy (section 14), and freedom of association (section 18) of the adulterous spouse and the third party are violated.[46] The SCA explained these infringements as logical, extra-constitutional reasons bolstering the abolition of delictual claims based on adultery. To recap: people should be allowed to make decisions

42 *DE* (n 4) [39].

43 ibid [45]–[50].

44 ibid [40].

45 ibid [41]–[43], [49].

46 ibid [52]–[53].

regarding their own bodies, their most intimate sexual relations should not be displayed in public courts arbitrarily, and they should be allowed to associate with whomever they please. The Constitutional Court emphasised that these constitutional rights are not to be regarded as being less important simply because the two parties are adulterers.[47] Thus, even though the dignity of the offended spouse may be injured, this has to be weighed up against the collection of rights of the adulterers that will be violated if the delictual claim for adultery were to continue to exist.[48] As the state should not be allowed to interfere with the fundamental freedoms afforded to its subjects to privacy, freedom of association and security of the person, the Constitutional Court reasoned that those rights outweighed the dignity of the offended spouse in matters such as this.

4. CONCLUSION

In light of the arguments detailed above, it was the decision of the Constitutional Court that adultery committed by a third party is not wrongful in the delictual sense — neither for purposes of claiming insult nor for loss of consortium.[49] This finding and, more significantly, most of the reasoning of the Constitutional Court is a welcome response to the reluctance on the part of the SCA to properly engage with the Constitution in the common law's development. Finally, the Constitutional Court's judgment reveals, at a theoretical level, the importance of horizontality for the purpose of achieving a transformed vision of social life in South Africa today. Madlanga J concluded the judgment with the observation that 'it just seems mistaken to assess marital fidelity in terms of money'.[50] This ultimately is a statement in support of an 'uncommodified vision of social life' as Marx and Engels construe it in their critique of the reduction of intimate human relations to capital form:[51]

> The bourgeoisie, wherever it has got the upper hand, has put an end to all feudal, patriarchal, idyllic relations. It has pitilessly torn asunder the motley feudal ties that bound man to his "natural superiors", and has left no other nexus between man and man than naked self-interest, than callous "cash payment". It has drowned out the most heavenly ecstasies of religious fervour, of chivalrous enthusiasm, of philistine sentimentalism, in the icy water of egotistical calculation. It has resolved personal worth into exchange value, and in place of the numberless indefeasible chartered freedoms, has set up that single, unconscionable freedom – Free Trade. In one word, for exploitation, veiled by religious and political illusions, it has substituted naked, shameless, direct, brutal exploitation.

47 ibid [56].

48 ibid [60].

49 ibid [63].

50 ibid.

51 K Marx and F Engels, *The Manifesto of the Communist Party* (Progress Publishers 1848).