

“MY SPOUSE CHEATED AND NOW HIS/HER LOVER IS GOING TO PAY!” THINK AGAIN...

In the recent Supreme Court of Appeal case of RH v DE (594/2013) [2014] ZASCA 133 the existence of the delictual claim for damages based on adultery between two spouses, came under the spotlight.

According to English law, which is the origin of the action for adultery, the action is linked to the institution of marriage and arises from the husband losing his wife's society and services. This was strongly influenced by the historic view that a husband had a proprietary interest in the person of his wife, her services, her earnings and her property. This view was brought forth by a time in which men were dominant figures over women. This is of course no longer the case and would offend our modern society in which men and women are considered equal. A wife is no longer seen as a piece of property that belongs to her husband and her infidelity can therefore no longer be said to offend her husband's honour and pride.

Historically, there are two reasons for the action for adultery. Firstly, the action protects the institution of marriage which forms the foundation of family life. But does the action really succeed in doing so? Adultery can sometimes be the result of marital problems, rather than the cause thereof. If parties are happily married, it is generally considered unlikely that a third party would be able to come between them. The conduct of the unfaithful spouse and the third party cannot be seen in isolation.

Secondly, the action serves as compensation for the insult to the innocent spouse's feelings. In our law, the claim for insult is viewed objectively and is tested against the prevailing norms of our society. In light hereof, it can be said that in our current time adultery would rarely lead to humiliation or insult to the innocent spouse. Society would rather think less of the unfaithful spouse than regard the innocent spouse in a negative light.

What has however been contradictory is that the action is only available against the third party and not against the unfaithful spouse. Surely the conduct of the unfaithful spouse is more blameworthy and hurtful to the innocent spouse? It does not even make a difference whether the unfaithful spouse initiated the adulterous relationship or not. It has been said that the remedy that the innocent spouse has against the unfaithful spouse, is the action for divorce, but this is no longer true. The innocent spouse can also claim a forfeiture of benefits in terms of Section 7 of the Divorce Act, but only in limited circumstances. The argument therefore lacks conviction.

Based on the above reasons and the changing norms and views of our society, the Supreme Court of Appeal concluded that the claim for adultery has become outdated and obsolete and should be abolished. Innocent spouses can therefore no longer claim damages from a third party based on insult or loss of society of his wife.

CONTACT US

- | | | |
|----------------------------------|--------------------------------------|------------------------------------|
| ■ CAPE TOWN
Tel: 021 406 9100 | ■ SOMERSET MALL
Tel: 021 850 6400 | ■ ILLOVO
Tel: 011 219 6200 |
| ■ CLAREMONT
Tel: 021 673 4700 | ■ TABLE VIEW
Tel: 021 521 4000 | ■ CENTURION
Tel: 012 001 1546 |
| ■ FISH HOEK
Tel: 021 784 1580 | ■ TYGERVALLEY
Tel: 021 943 3800 | ■ BEDFORDVIEW
Tel: 011 453 0577 |