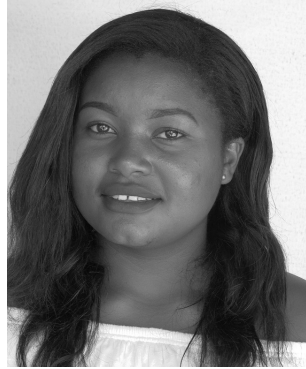


# DAMAGES FOR ADULTERY: A LEGAL MISFIT OR A NECESSITY?

by *Shantel E. Ndebele\**



## 1 History of the law of adultery in Zimbabwe

To attempt any debate or discussion on the law of adultery in a Roman Dutch common law jurisdiction, without tracing the development of the law in this regard under Roman law would be a gross injustice. This is because the common law in Zimbabwe is largely Roman Dutch law with graftings of English principles.<sup>1</sup> This is the law that was applied at the Cape of Good Hope as at 10 June 1891, as evidenced by section 89 of the old Zimbabwe Constitution.<sup>2</sup> It would be of no benefit to explore English Law in this discussion for the simple reason

\* Third year LLB student, Midlands State University, Zimbabwe. This insightful article, with intense scrutiny, traces the history of adultery from the medieval Roman law era of the *lex Julia* as well as its development into modern Zimbabwean law. Also to be critically explored will be the transition of the law on adultery from the confines of criminal law to the sphere of private law in Zimbabwe, paying specific attention to the nature of damages that attach to adultery. The main argument is whether damages for adultery should remain part of Zimbabwean law in light of the moral convictions of modern day society or whether Zimbabwe ought to delete them from its law like most of its neighbouring jurisdictions.

1 Section 192 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

2 The Constitution of the Republic of Zimbabwe 1979 (as amended 2005).

that in England, all references to adultery have been deleted from the law.<sup>3</sup> It is no longer a crime, no longer gives rise to a third party claim for delictual damages and is no longer included in the divorce statutes.<sup>4</sup>

Since Roman Dutch law is the foundation of our common law, it is important to understand the *lex Julia* which was the cornerstone of matrimonial law under Roman law.<sup>5</sup> The *lex Julia* was an ancient Roman Law which was a moral code of conduct. It was a creation of patriarchy. Roman law was sometimes extreme when it came to adultery and it gave the husband powers of self-help.<sup>6</sup> One cannot over-emphasise how serious adultery was perceived in the Roman law society. Adultery was a crime so serious that it attracted a severe punishment, sometimes even capital punishment, and this could be executed either by the couples' guardian or the husband.<sup>7</sup> Although murder is an unfathomable punishment for any marital misdemeanour, adultery included, it was justifiable under the circumstances.<sup>8</sup> The law cannot however afford to stay stagnant hence, these ancient harsh penalties no longer find a place in our current Zimbabwean society as shall be highlighted below.

### 1.1 Present-day Zimbabwean Society

Because of the history of progression in society, which was largely catalysed by Christianity, as positivism superseded naturalism, the law evolved and adultery seized to be a crime.<sup>9</sup> Be that as it may, certain consequences are still attached to such conduct such as, being sued for damages by an innocent spouse. Since 'wrongful conduct' does not always equate to 'unlawful conduct', in current Zimbabwean law adultery does not amount to criminal conduct but an adulterer may be required to compensate an aggrieved spouse.<sup>10</sup> It naturally follows that since adultery is not a criminal offence, it is restricted to the sphere of private law. Parties can sue under the law of delict for *actio injuriarum* (injury to personality). It is the nature of these damages that I will explore below.

3 M Carnelley 'Laws on adultery: comparing the historical development of South African common-law principles with those in English law' (2013) 19 *Fundamina* 185.

4 Carnelley (n 5 above) 185.

5 Section 192 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 states that the law to be administered by the courts in Zimbabwe is the law that was applied at the effective date as subsequently modified.

6 A Jacobs 'Maritus v Mullier: The double picture of adultery laws from Romulus to Augustus' (2015) 21 *Fundamina* at 283. The husband of an unfaithful wife could judge his wife and sentence her to death, assisted by her family.

7 Jacobs (n 6) above.

8 Lawhub (n 2) above.

9 *Green v Fitzgerald* 1914 AD 652.

10 *Makururu v Vori* HH 174/16.

## 2 Adultery as a delict

A delict may be defined as a wrong committed against a person for which damages may be claimed as compensation.<sup>11</sup> In order to succeed with a damages claim, a plaintiff must satisfy the following requirements:

- (1) The wrongfulness/unlawful requirement: Wrongfulness is tested against the *bonae mores* of society in other words conduct should be *contra bonae mores*.<sup>12</sup>
- (2) There must be a nexus between the alleged wrongdoer and the conduct complained of<sup>13</sup> and
- (3) There must be an injury/harm/loss suffered by the plaintiff.<sup>14</sup>

Damages for adultery are not meant to restore the diminished state of the marriage neither are they intended to stop adultery, as it would take much more than damages to stop a cheating spouse.<sup>15</sup> To believe that one would be grossly misdirecting themselves. Damages for adultery serve the purpose of vindicating the sense of justice of the innocent spouse, in other words remedying the sense of being wronged.<sup>16</sup>

Surely a man who is slapped and in whose respect no contrition is shown cannot be equated to a man who has been slapped, but compensated for the humiliation. One cannot possibly think that the two scenarios are the same. Compensation does not undo the damage but it can greatly mitigate the pain or feeling of being injured or wronged as it can make bearable a very humiliating, painful and uncomfortable situation. It is for this reason that an innocent spouse may claim in terms of the delictual *actio injuriarum* for adultery, in the form of contumelia and loss of consortium.<sup>17</sup> The case of *Chinyadza v Phiri*,<sup>18</sup> defined *contumelia* as follows: 'Contumelia is equated to the injury, hurt, insult and indignity inflicted upon a plaintiff by adultery committed by a defendant with his or her spouse.'

Ncube defines consortium (*consortium omnis vitae*) as love, companionship, comfort and exclusive sexual intercourse (conjugal rights).<sup>19</sup>

A party who sues for these damages has obviously suffered a sense of indignity and infringements of their rights. However, defendants have

11 G Feltoe, *A guide to Zimbabwean law of delict* (2012) 6.

12 *Musadzikwa v Minister of Home Affairs & Another* 2000(1) ZLR 405.

13 *Mushonga v Zinumwe* HH 519/15.

14 *Jhamba v Mugwisi* HB 01/10.

15 *Tanyanyiwa v Huchu* HH 668/14.

16 As above.

17 *Raitehwi v Venge* HH 152/11.

18 HH 76-09.

19 W Ncube *Family Law in Zimbabwe* (1989) 153.

often argued, on fundamental constitutional grounds, a violation of the section 51 right to human dignity, section 57 right to privacy, section 58 right to freedom of association and the section 52 right to personal security, as was the case in *Njodzi v Matione*.<sup>20</sup> This is because the claim involves a disclosure and scrutiny of a third party's sexual life. Nonetheless, the law recognises that not all rights are absolute. The limitation clause then applies in this respect, in order to do justice between man and man.<sup>21</sup> Section 86(1) and 86(2) of the Constitution provides that:

- (1) The fundamental rights and freedoms set out in this chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons. (emphasis added)
- (2) The fundamental rights and freedoms set out in this chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity equality and freedom, taking into account all relevant factors including (a) the nature of right or freedom concerned (b) the purpose of the limitation, in particular whether it is necessary in the interest of ... public morality ... or the general public interest.

The courts take the position that the dignity of the adulterer need not be more important than that of the innocent spouse. The court in *Njodzi v Matione* held:

In circumstances where a third party is prepared to violate the marriage institution, they cannot be seen to complain of their dignity being impaired when they would have violated the very institution they vowed to protect through the constitutional values. The invasion of a marriage by a third party in the Zimbabwean context is an attack on the dignity of the innocent party. The dignity of the adulterer ought not to be more important than that of an innocent party to a marriage. (My emphasis).<sup>22</sup>

The lesson which is to be drawn from the court's position is that constitutional rights are not absolute and are to be enjoyed responsibly in order to respect the rights of others. Hence, a third party who violates an innocent spouse's right to dignity cannot seek to enforce and protect their own dignity in a court of law because their rights are not more important than those of the innocent spouse's.

20 HH 37/16.

21 Section 86 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 provides that rights and freedoms in the bill of rights may be limited to the extent that the limitation is fair, reasonable and justifiable in a democratic society.

22 HH 37/16.

### 3 The marriage contract

It is important that one understands the very nature of the marriage contract including the legal relationships that it creates for the parties involved, whether the marriage is monogamous or polygamous. This serves to establish whether or not parties have a right to sue third parties for damages on the grounds of adultery in respect of the marriage. Marriage is a constitutionally protected institution whose very existence is regulated by the law – it is a right that is protected under section 26 of the Constitution on Marriage Act under the national objectives, read with section 78 on marriage rights.<sup>23</sup> Furthermore, in the interpretation of the rights contained in the Constitutional Bill of Rights, there is a mandate on the courts to take into consideration International Conventions.<sup>24</sup> The Unilateral Declaration of Human Rights (UDHR), also imposes an obligation of the state to protect the family.<sup>25</sup> The UDHR provides: ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State’.<sup>26</sup>

Marriage is a *sui generis* contract which means that it is a contract like no other as it is governed by legislation, although general principles of contract law, such as privity and sanctity of contract, apply.

Whilst a marriage is between two people, it is one such contract in whose enforcement the state and the courts have an interest. The reasons are common cause, in that it is not any ordinary contract owing to the terms on which it is based namely, its exclusivity as expressed in the statements, ‘to have and to hold’ and ‘till death do us part’. It is this sanctity of the marriage contract that adultery damages seek to protect according to the UDHR. A third party is deemed to have infringed the normal flow of the marriage and affected the rights and obligations that would have normally accrued to the parties had the infringement not occurred.<sup>27</sup>

### 4 Rationale for damages of adultery

The basis for damages for adultery stems from the fact that adultery is a recognised ground for divorce at law. Section 5 of the Matrimonial Causes Act provides for adultery as one of the factors to meet the

23 Section 78 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

24 Section 46(1)(d) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

25 UDHR is document which affirms an individual’s rights, for example right to dignity, life, among others.

26 Article 16(3) of the Unilateral Declaration of Human Rights.

27 *Mahachi v Zimba* HH 315/17.

divorce requirement of irretrievable breakdown.<sup>28</sup> Section 5(1) and 2 (b) of the Matrimonial Causes Act reads as follows:

- (1) An appropriate court may grant a decree of divorce on the grounds of irretrievable break down of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of restoration of a normal marriage relationship between them.
- (2) Subject to subsection (i) and without prejudice to any other facts or circumstances which may show the irretrievable break-down of a marriage, an appropriate court may have regard to the fact that
  - (a) ...
  - (b) The defendant has committed adultery which the plaintiff regards as incompatible with the continuation of a normal marriage relationship.

This particular provision is similar to Botswana's section 15(1) of its Matrimonial Causes Act.<sup>29</sup> Section 10 of the Maintenance Act also provides that adultery committed by a spouse is a basis on which the courts can deny a party spousal maintenance.<sup>30</sup> Section 10 of the Maintenance Act states:

Where a spouse is proved to have committed adultery before or after making an order and such adultery has not been condoned, the maintenance court may refuse to make an order for maintenance in favor of such spouse or may discharge an order for maintenance made in favor of such spouse.

The general consensus is that adultery is frowned upon in modern day Zimbabwean society as it is deemed to be contrary to the *bonae mores* of society.<sup>31</sup> The convictions of society are the utmost consideration of the courts when adjudicating disputes before them, including those of adultery. In the case of *Zimnat Insurance Co Ltd v Chawanda*, the court emphasised that the judiciary has the mandate to develop the common law to make it flexible taking into consideration the dynamic needs of society.<sup>32</sup>

#### 4.1 Who can sue?

It is evident that when adultery is committed there is an infringement of rights of an innocent spouse. These rights include the right to dignity (section 51 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013) and the right to personal security (section 52).

28 Section 5 of the Matrimonial Causes Act [Chapter 5:13].

29 Matrimonial Causes Act [Chapter 29:06].

30 Maintenance Act [Chapter 5:09].

31 The values that the Constitution seeks to protect in the founding values of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013's section 3.

32 1990 (2) ZLR 143 (S).

In a civil marriage where spouses marry under the Marriages Act, either the husband or the wife can sue a third party for damages for adultery.<sup>33</sup> This is because of the monogamous nature of this union.

In a marriage solemnised under the Customary Marriages Act, a different approach is taken.<sup>34</sup> A husband can sue a third party for damages for adultery from a third person who commits adultery with his wife but a wife cannot sue third parties who commit adultery with her husband. This is because this is a potentially polygamous marriage and the husband can marry many wives if he so wishes. In *Mukono v Gwenzi*, the court affirmed that there is no right reposing on women in customary marriages to claim damages for adultery.<sup>35</sup>

The requirements for suing damages under the Customary Marriages Act apply *mutatis mutandis* to an Unregistered Customary Law Union (UCLU) because this type of marriage satisfies all the requirements of a customary law marriage save for registration.<sup>36</sup> The law recognises an UCLU husband's right to claim for damages for adultery in respect of his wife as stated in *Carmichael v Moyo*.<sup>37</sup> However an UCLU wife cannot sue in respect of her husband.

Although this position seems *prima facie* discriminatory on the female spouse in an UCLU marriage, this is justifiable in the sense that the marriage is of a polygamous nature hence, there is no restriction whatsoever on the male spouse should he wish to marry many wives.

## 5 Is the continued existence of adultery damages justifiable?

Section 56 of the Constitution is the equality/ non-discrimination clause and it provides that all persons are equal before the law. It has been submitted on behalf of most defendants in adultery cases that, these damages are discriminatory and invasive on third parties. This is because the third party is the one who is sued always and as one cannot sue their own spouse, according to the UDHI.

Upon assessing the law as it stands, one can oftentimes wonder if there is any fairness at all where these damages are concerned in the instance of the third party. If sanctity and privity of contract matter at all, then this means that obligations of fidelity are consequences which accrue to the spouses themselves. The obligation to protect the matrimonial institution rests on the spouses therefore, one wonders why a third party should be sued since they are not a party to the

33 Marriages Act [Chapter 5:11].

34 Customary Marriages Act [Chapter 5:07].

35 1999 (1) ZLR 117.

36 *Hosho v Hasisi* HH-419-15.

37 1994 (2) ZLR 176.

marriage contract. This is the position that the South African Constitutional court took by emphasising that in South Africa adultery no longer meets the wrongfulness requirement and hence no delictual liability attaches to it.<sup>38</sup>

Zimbabwean courts maintain that suing one's own spouse does not make sense. Suing one's own spouse could be a source of marital conflict and catalyse irretrievable damage to the marriage it is alleged. Whilst adultery is in itself evidence of disrespect by the third party to a marriage, it however suffices to say that it is the spouses themselves who undertake to be married to each other and to be faithful, 'for better for worse'. Therefore the plaintiff, in this case the innocent spouse, should not sue the third party as he or she is not a party to the plaintiff and defendant's marriage contract.

Doing away with these damages would ultimately mean that the only two remedies left for an aggrieved spouse would be either divorce or reconciliation. Furthermore, if the damages were to be done away with, this could further perpetrate the spread of HIV/AIDS. The need to guard against these problems is the basis for justifiable discrimination against third parties which is allowed by the law.<sup>39</sup>

## 6 Assessment of damages

The amount to be awarded as damages to an aggrieved spouse is based on the discretion of the court and is normally decided on a case by case basis in light of the circumstances and the measure of justice the case requires.<sup>40</sup> There are also certain guidelines that the courts will normally take into account – for example, the state of the marriage at the time adultery was committed, and this directly affects the amount of damages.<sup>41</sup> If the adulterous affair has resulted in a significant decrease in the guilty spouse's level of commitment in the marriage, then evidence of such will normally increase damages.<sup>42</sup> On the contrary, if the marriage had already broken down, the plaintiff is entitled to fewer damages.<sup>43</sup> Other considerations are the duration of the adulterous affair, whether the third party showed any remorse, and whether the affair resulted in the birth of children.

Other factors to be assessed are the social and economic status of the plaintiff and the defendant as set out in *Muhwati v Nyama*.<sup>44</sup> The *quantum* should by all means be proportionate and should be a

38 *DE v RH* CCT 182/14.

39 Section 56(4) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

40 *Dlamini v Nkomo* HB 15/18.

41 *Muhwati v Nyama* 1996(1) ZLR 434.

42 *Tanyanyiwa v Huchu* (n 17) above.

43 *Johnson v Joubert* 1976 (1) PH B 2.

44 2011(1) ZLR 634(H).



reflection of the circumstances surrounding the adultery.<sup>45</sup> Knowledge of a long stretching adulterous relationship on the instance of the plaintiff also has an effect of reducing the amount of damages to be awarded to a spouse. In *Jhamba v Mugwisi*, the plaintiff sued the defendant for damages stemming from a 20 year adulterous relationship between the plaintiff's husband and the defendant, a relationship that had resulted in the birth of four children to the plaintiff's knowledge.<sup>46</sup> The court observed that it could not be said that the plaintiff had no knowledge in such circumstances and hence she could not be awarded the full damages she had initially sought.

It is evident that the criteria for the *quantam* of damages is a reflection of what delictual damages are meant to achieve, and this is to compensate the aggrieved spouse for loss of benefits they ought to have enjoyed had the third party not interrupted the marriage.

## 7 Conclusion

As a result of Zimbabwe being a Roman Dutch common law jurisdiction, decisions of other Roman Dutch common law jurisdictions are of persuasive authority and the Zimbabwean courts are not bound by them.<sup>47</sup> In light of this, the South African Constitutional Court's decision in *DE v RH* stirred the waters in Zimbabwe and offered a ray of hope to the so called 'small houses'.<sup>48</sup> 'Small houses' is a Zimbabwean colloquial term for parties involved in extramarital affairs. The excitement was however short lived upon the realisation that Zimbabwean courts would not be following suit. In other words, there was need to read the decision in *DE v RH* whilst taking into account the legal and moral convictions that prevail in South Africa compared to those in Zimbabwe. The *bonos mores* of the Zimbabwean society are what qualify adultery as being wrongful. Third party delictual liability for adultery has also been scratched off in Botswana following the judgment by Justice Moroka in the Botswana High Court in *Kgaje v Mhotsha* where the court stated that although adultery remains a sin from a religious perspective, a spouse can no longer claim delictual damages from a third party because of the obvious fact that adultery cannot take place without the obvious participation of a spouse.<sup>49</sup> In this judgment, the learned Judge agreed with the decision of the Namibian Supreme Court in *Sibonga v Chaka & Another* to do away with adultery damages.<sup>50</sup>

45 *Gore v Chiware* HH-14-276.

46 HB-01-10.

47 *Grey & Another v Registrar of Deeds* HH 114/10.

48 CCT 182/14.

49 CVHFT-000237/17.

50 SA (77/2014) [2016] NASC 16.

Despite the developments in the neighbouring jurisdictions, Zimbabwean courts remained unmoved as they gave affirmation to the validity of these damages in *Njodzi v Matione*.<sup>51</sup> There is no denying that the decision to do away with third party delictual liability for adultery in South Africa, Botswana and Namibia is an obvious sign that there might be a need to follow suit in Zimbabwe. There is a need for reform in this area of our law as some delicts have now been rendered archaic. Adultery is a delict rooted in a foundation which may have lost relevance in Zimbabwean Law.

Third party adultery damages are still valid and claimable in Zimbabwe. The law maintains that there is a need to deter third parties from interfering with marriage hence, an innocent spouse may sue in respect of such wrongful conduct. There is no protection whatsoever for third parties. In other words, the law assumes that by involving themselves with a married spouse, a third party voluntarily assumes the risk that they may be held liable by the innocent spouse.<sup>52</sup> Once the court satisfies itself that the defendant had prior knowledge then the maxim *ignorantia iuris non excusat* (ignorance of the law is not an excuse) applies. This means that a third party who commits adultery with a married person is not allowed to rely on the defense that they were ignorant of the law relating to third party adultery.

This is to the exception of third parties who act *bona fide*, i.e., those without knowledge that they are involving themselves with married spouses. Until such a time that the Constitutional Court decides to scrap it off from our law and reverse the decision in *Njodzi v Matione*, it is blatant that no small house is safe, for they may be pounced on by an angry spouse and brought before the court to account for their misdemeanours.

There is evidently so much good that comes with the existence of damages for adultery in our law but perhaps the law could be more beneficial if it looked in another direction and implemented a number of reforms to the already existing delict. For instance, spousal damages which an innocent spouse can claim from the guilty spouse and not third parties. This is because, in essence, the spouses are the ones who are the parties to the marriage contract and as such have the obligation of fidelity, which is consequential to the marriage contract.

51 HH 37/16.

52 *Chinyadza v Phiri* (n 20) above.