

***RH v DE* 2014 6 SA 436 (SCA)**

A case of anti-constitutional common-law development¹

1 Introduction

This case tells the story of an egotistical husband and the fading principle of the horizontal application of the Bill of Rights. The husband alleged that his wife had an affair with the managing director (“MD”) of her firm (par 3). He claimed damages for both loss of consortium and insult from the MD (par 2). After an eight day trial, luridly exposing the private sex lives of the three people involved, Vorster AJ held that the MD was liable to compensate the husband for both heads of damage (par 2). On appeal, Brand JA overturned that decision. There are two moments in the unanimous Supreme Court of Appeal (“SCA”) judgment.

The first moment involves an exposition of the common-law position: The husband did not prove that the MD incited the wife to leave the common household and, therefore, could not succeed with his claim for loss of consortium. The wife left of her own accord before the adulterous relationship occurred (parr 10 & 13). In principle, according to the court, the husband, however, did prove that the adulterous affair took place while they were married, albeit after the wife had moved out and after divorce proceedings had been instituted. At first glance, therefore, it

1 The financial assistance of the National Research Foundation (“NRF”) towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at, are those of the author and are not necessarily to be attributed to the NRF.

appeared that the husband could succeed with his claim based on insult (par 15).

The second moment of the judgment explains that even though it appeared that the husband could succeed in claiming for insult, that the court has to determine the foundational issue of whether the delictual claim for adultery still has a place in our law. In other words, should the common law be developed in such a way that the husband in this case should be left without a legal remedy for his bruised ego? The short answer, given by the SCA, is that the “changing mores of our society” demand that our law no longer recognise claims of this nature (par 40).

This short answer is commendable. However, the problem that I identify with regard to this case is the approach of Brand JA to common-law development – an approach that I describe as conservatively “anti-constitutional”, as I explain later in this piece. Consequently, I limit the analytical part of my discussion to this aspect of the judgment, and base my line of reasoning on the transformative method developed by Van der Walt (“Development of the common law of servitude” 2013 *SALJ* 722) in the context of property law.

2 Rising to the Occasion of Common-law Development

After emphasising that courts are under a duty to develop the common law in an incremental way, Brand JA provides two occasions upon which the common law may be developed (par 17). The first occasion is based on the decision in *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* (2001 4 SA 938 (CC) par 40) that the common law must be developed if the section 39(2) objectives so require. The second occasion is based on the guidance provided in *Du Plessis v De Klerk* (1996 3 SA 850 (CC) par 61) that the “common law [can and should be adapted] 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”. Two interrelated issues arise from this suggestion. Does *Du Plessis* have binding force in light of the fact that it was decided in terms of the 1993 Constitution and not the 1996 Constitution? Are the two occasions that prompt common-law development listed by the SCA really two very different and unrelated occasions? There is a relatively simple combined answer to these issues.

The above quotation from *Du Plessis* that was transcribed from the Canadian judgment of *R v Salituro* (1992 8 CRR (2d) 173 ([1991] 3 SCR 654)) has value, however it must be read with the following cautionary note. As Ackermann and Goldstone JJ point out in *Carmichele* (par 36):

Under our Constitution the duty cast upon Judges is different in degree to that which the Canadian Charter of Rights cast upon Canadian Judges. In South Africa, the [1993 Constitution] brought into operation, in one fell swoop, a completely new and different set of legal norms.

This evaluation reminds one of Cornell's ("Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence" 2008 *Acta Juridica* 19-22) interpretation of Laurie Ackermann's work to the effect that the new constitutional order brought about a substantive revolution: In line with the transformative metaphor of crossing a bridge from a politics of tyranny and violence to an ethical political environment, based on the justified use of power (see, e.g., Mureinik "A bridge to where? Introducing the interim bill of rights" 1994 *SAJHR* 31-32; Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 147).

The idea of a substantive revolution is especially important for the purposes of rethinking the role of the common law in a post-apartheid context (see, e.g., Van der Walt "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" 1995 *SAJHR* 169; Van Marle 'Reflections on legacy, complicity and legal education 2014 *Acta Academica* 196). The exercise of any power (including judicial power) should be justified in terms of the Constitution. To ensure that the judiciary complies with its justificatory mandate, Davis and Klare ("Transformative constitutionalism and the common and customary law" 2010 *SAJHR* 412) suggest that all common-law disputes must be constitutionally framed so that a transformative methodology is effectively utilised to bring about the social change that the Constitution requires. Not only is a transformative methodology missing from the SCA judgment, but there is a complete failure to substantively engage with the applicable provisions in the Bill of Rights.

The cautionary note that I have described is further supported by section 39(2) of the Constitution that requires a court to promote the spirit, purport and objects of the Bill of Rights when it develops the common law. The section 39(2) instruction is not qualified to be applied "now and then, if we feel like it": It is a clear and mandatory obligation of our courts to promote the spirit, purport and objects of the Bill of Rights whenever it develops the common law. In *Carmichele* (par 56) the practical effect of the interplay between the cautionary note and section 39(2) is explained as follows:

Under s 39(2) of the Constitution concepts such as 'policy decisions and value judgments' reflecting 'the wishes ... and the perceptions ... of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.

The deduction to be made is that the position on common-law development in *Du Plessis* cannot be read in a vacuum and that the two cases cannot be regarded as delineating two separate grounds on which the common law can be developed: Because the "changing mores" of a really diverse society can be found in the Constitution and is given effect to by section 39(2). In *Van Eeden v Minister of Safety and Security (Women's Legal Trust, as Amicus Curiae)* (2003 1 SA 389 (SCA) par 12) Vivier ADP explains that the Constitution cannot be regarded as the sole

embodiment of the legal convictions of the community, but accepts that all law, conduct and values must be consistent with the Constitution. In *Minister of Safety and Security v Van Duivenboden* (2002 6 SA 431 (SCA) par 17) Nugent JA also emphasises that even though the legal convictions of the community are not exclusively found in the Constitution, however extra-constitutional, legal convictions need to be consistent with the Constitution. Thus, even if one accepts for a moment that the legal convictions of society can be found in a logic extrinsic to the Constitution, morality must be consistent with the Constitution *and* must be so justified.

This is a crucially important point to make because apart from the statement that section 39(2) exists and, in principle, could affect the wrongfulness enquiry, the Constitution's role in this specific case is substantively ignored. In fact, Brand JA went so far as to say that he regards (par 40):

It 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.

To paraphrase: The Constitution could, but does not need to, have a substantive effect on the process of common-law development. This is an approach that is in conflict with an earlier article authored by Brand JA ("Influence of the Constitution on the law of delict" 2014 *Advocate* 42) in which he gives an overview of the impact of the Constitution on the law of delict, which I read to have a laudatory undertone. Giving due regard to the above explanation of the interaction between *Carmichele*, *Du Plessis*, *Van Eeden*, and *Van Duivenboden*, the above approach to the development of the common law should not be supported.

Because of an unfortunate oversight of the above interaction of cases, the SCA opted to develop the common law on the second ground, in other words, simply because societal norms have changed. From a holistic reading of the judgment it is clear that it is the view of the SCA that the Constitution has no direct and substantive role to play in determining the legal convictions of the community, despite Brand JA quoting *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* (2011 3 SA 274 (CC) par 122): "[T]he judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms". The judgment gives no explanation as to why the development in question is in accordance with constitutional norms or, at least, it is not explicitly given. The recognition of the Constitution as the guideline for determining the legal convictions of the community could keep many conservative and progressive private lawyers satisfied: Conservatives might now regard the open-ended test as being "more certain" because it can be determined from a more reliable source which respects and protects diversity and even minority groups (see, e.g., the pre-constitutional case of *Van Erk v Holmer* (1992 2 SA 636 (W) 649C)

where the morals of society were found, among other things, in the *Fair Lady* magazine and the *Sunday Times* newspaper), whereas progressives will take solace in the potential of the Constitution to direct private law in a more egalitarian direction. It is regrettable that the role meant to be fulfilled by the Constitution was replaced by extra-constitutional legal argumentation largely based on fashionable morals that dominated Europe in the 1970s.

Even though some of the extra-constitutional substantive reasons provided by the court as to why the claim is out of place in modern society are laudable, at the very least Brand JA should have explained why the suggested development fits comfortably in the objective normative framework of the Constitution (*Carmichele* par 54). In this regard one should be mindful of the fact that section 173 of the Constitution entrusts our courts with the *power* to develop the common law having regard to the interests of justice. As explained above, such a use of power must be justified with reference to the Constitution to give effect to the transformative goals of the supreme law. Failure to do so, which I argue is prevalent in the case under discussion, could be indicative of a use of judicial power amounting to anti-constitutionalism.

I borrow the term “anti-constitutionalism” from an earlier observation made by Roux (“Continuity and change in a transforming legal order: The impact of section 26(3) of the Constitution on South African law” 2004 *SALJ* 466). In Roux’s discussion of the case of *Brisley v Drotzky* (2002 4 SA 1 (SCA)), he notes that the SCA’s approach in that case to the issue of the impact of the Constitution on the common law was not “anti-constitutional” but rather “anti-vagueness”, in the sense that the court wished to avoid the situation in which the “Constitution exerts an indeterminate influence on the common law” (Roux *supra* at 492). It is my argument that the same defence cannot be tweaked to be raised in favour of the SCA in the case of *RH v DE*. In this case the goal of the court was not to uphold legal determinacy by sidestepping the Constitution. Here the court radically disrupted the “predictable” common-law scheme of rules pertaining to delictual claims based on adultery and, consequently, the judgment cannot be said to militate against the indeterminacy of law. The judgment, therefore, is not “anti-vagueness” or “anti-uncertainty”. Additionally, the court sidestepped the Constitution while creating this “unpredictable” result.

If a court creates uncertainty while avoiding the Constitution, it appears to me to be “anti-constitutional”, contrary to what Roux contends the court may have done in *Brisley*. I do not suggest that the court acted with *dolus directus* to betray the supremacy of the Constitution. But, at least, an inference could be drawn from the SCA’s failure to engage with the Constitution at a substantive level (despite there being ample authority for the important role that the Constitution must play in the development of the common law) that it had the *dolus eventualis* to act in an anti-constitutional manner. It is accepted by our

courts that *dolus eventualis* is proven by means of inference, as enunciated in *S v Sigwahla* (1967 4 SA 566 (A) 570D-E).

There are further good reasons for the rejection of the approach promoted in this case that become apparent upon a further exploration of the reasons for the decision (provided in the following sections). I reiterate again that it is not the outcome of this case that is problematic. It is the ideology reflected in the SCA's reasoning that is troubling.

3 The Claim for Adultery in Historical Context

The SCA noted that adultery has had a chequered history in South African law (parr 20-21). In 1904 the crime of adultery was abrogated by disuse (*Green v Fitzgerald* 1914 AD 88) and by 1944 the civil claim for adultery was put at the disposal of spouses of both sexes and no longer limited to its use by aggrieved husbands (*Rosenbaum v Margolis* 1944 WLD 147). By the time that the Divorce Act (70 of 1979) was promulgated, adultery was no longer regarded as a specific ground for divorce distinct from the irretrievable breakdown of a marriage. Despite the historical evidence to the effect that individuals, judges and Parliament have systematically regarded adultery as becoming less of a societal evil that deserves legal condemnation, it was held in *Wiese v Moolman* (2009 3 SA 122 (T)) that a civil claim based on adultery should still be recognised. Brand JA seems surprised at the decision in *Wiese* – because of the overwhelming academic support for a contrary conclusion. The dominant view is that such a claim is “outdated and archaic” (see the authority listed at par 21). This is the first extra-constitutional argument as to why the claim should not be recognised today.

Left in the air, without proper constitutional justification, on what basis should one determine whether a common-law rule is outdated or archaic? Should it be decided on the historical track record of the legal rule, read with academic criticism? On this whim, one could argue that the institution of marriage should also fall away because it is an archaic and outdated institution with formalities that show similarity to the Roman *mancipatio* and *in iure cessio* methods for the transfer of ownership of a slave to a man. There is academic support for the view that the institution of marriage should be abolished on constitutional grounds due to the inherent incompatibility of marriage and the equality clause (see Meyerson “Rethinking marriage and its privileges” 2013 *Acta Juridica* 385). However, if one is sensitive to the impact of the Constitution on the common law, one realises that the jurisprudence of the constitutional right to dignity actually respects the institution of marriage.

As articulated in *Dawood & Another v Minister of Home Affairs & Others* (2000 3 SA 936 (CC) parr 30 & 36) (a case that is referred to later in the judgment by Brand JA), marriage may provide individuals with a deep feeling of personal fulfilment, in the sense that our humanity is expressed through our relationships with one another. To this view I add that the

potential problems of inequality within the marriage and inequality produced by the nature of marriage can be mitigated by the constitutional right to equality as formulated in section 9 of the Constitution. Since the dawning of the Constitution we, for example, have seen the legal recognition that a husband can rape his own wife (section 56(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007) and the legal recognition of unions beyond the conventional one-man-one-woman marriage (for an overview see Robinson “The evolution of the concept of marriage in South Africa: The influence of the Bill of Rights in 1994” 2005 *Obiter* 488).

The key idea put forward, thus, is that the test to determine whether legal rules are archaic and outdated cannot be based on asking whether the rule has had a problematic history and has been subject to academic criticism, due to the fact, even though a rule or an institution may have a problematic foundation, that rule or institution could be transformed into something with a new, constitutionally justifiable rationale and meaning in the South African context (this insight is derived from Snyman “Interpretation and the politics of memory” 1998 *Acta Juridica* 320).

4 The Colony of South Africa

The next stage of the SCA's approach involved an evaluation of the stance of other jurisdictions on the question of a civil claim for adultery. It was explained by the court why Sonnekus has argued that a civil claim for adultery is based on English law and not on a Roman-Dutch model (par 24). The SCA argued that if one accepts English law as the true foundation of the claim, it is worth noting that an action based on adultery was abolished in England in 1970 by their Law Reform (Miscellaneous Provisions) Act (par 26). I concede that the logical force in this argument is that if the basis for one of our rules falls away, our courts should ensure that our rule follows suit. It reminds one of the Latin maxim, *cessante ratione legis cessat ipsa lex*, that conventionally, at most, lays the foundation for a restrictive interpretation of a statute or the abolition of an old law (*Nourse v Van Heerden NO and Others* 1999 2 SACR 198 (W) 208F-H). There is a snag to this point of logic. Before the English legislature intervened, the Court of Appeal in *Pritchard v Pritchard and Sims* (1966 3 All ER 601 (CA) 606-610) described the action as insensible and anachronistic because it was born in a patriarchal society in which men had a proprietary interest in their wives comparable to that in cattle. Yet, that court deferred the matter to the legislature and opted not to abolish the action (par 26). I will return to the issue of judicial deference below.

Brand JA observes, shortly after the developments in England, that the previous colonies of New Zealand and Australia also abolished the action; Scotland, most of Canada and most of the United States of America were next in line (par 27). However, it is not only the common-law jurisdictions that regard claims of this nature as being out of touch with

reality. The French, Dutch, Austrian and German legal systems also do not recognise civil claims for adultery, even though adultery once constituted criminal offences in those legal systems (par 24). Brand JA relied extensively on the reasoning of the Federal High Court of Germany (JZ 1973, 668) to bolster his arguments. The German reasoning is based on the following aspects: (a) when a spouse voluntarily embarks on an extra-marital affair, it is essentially a matter that must be resolved internally between the spouses and not by the law of torts/delict; (b) it is not acceptable to regard the liability of the unfaithful spouse as being regulated by matrimonial law, and the liability of the third party by delict, as if there are two very distinct acts committed by the two adulterers; (c) it is very tricky to decide which types of interference with the marriage should be punishable: Should one pretend that only penetrative sexual intercourse with a third party would bruise a spouse's pride?; (d) the legislature has prudently refrained from dictating to spouses how they should behave in their marriage and thus it is the view of the German population that family law provides enough protection to spouses and; (e) that the law should not interfere in a highly personal relationship such as marriage – a view that is in line with the German Constitution. Thus, the institution of marriage would not be given true protection by the recognition of a claim for adultery because, ultimately, marriages will fail if the spouses themselves are not committed to maintain it (par 25).

The dominance of foreign perspectives in the judgment deserves closer analysis. From the outset I wish to make it clear that I am not entirely against the use of the comparative method. There is great value in comparative legal study in terms of the sharing of ideas and lessons learnt in jurisdictions with similar normative frameworks to ours (see Ackermann "Constitutional comparativism in South Africa" 2006 *SALJ* 496). However, I caution that the laws of other countries should not dictate South African legal morality (a point also made in *Van Duivenboden supra* par 16). We should be mindful that South Africa has a peculiar history which creates the context for our morality. Even though we may find guidance for our decisions from other jurisdictions, we should contextualise those foreign positions in a South African materiality. It is not wise to follow international legal trends under the guise that our morality must be congruent with "most other jurisdictions". To some extent, Brand JA does realise this. For example, he states, if there is a disparity between our morality and that of ten other non-African states, that we should ask why this is the case (par 28). Yet, this question does not appear to be asked in light of the Constitution, but it is asked against the backdrop of extra-constitutional reasoning.

To be clear, I do not regard the reasoning of the German Federal High Court as being false: I agree that those reasons could usefully be incorporated into South African law. However, if a court wishes to develop the common law (and in the process wishes to adopt the law of another state), I have explained above that section 39(2) requires that court to frame the incorporated principles in light of the South African Constitution; which did not occur here. The adoption of a foreign legal

position, especially in the context of attempts at determining the legal convictions of the community, should be approached cautiously and with due regard for the history of colonialism in South Africa.

South Africa is no longer under colonial rule and our law should not be dictated by the laws of Europe. The South African situation, in part, has been shaped by physical and ideological colonial violence and there may be cases where our Constitution demands a break with Eurocentric views on the law. One thinks of the law of ownership in this regard. The need in South Africa for expropriation has drastically (even though not radically) changed the traditional conception of ownership that South Africa inherited from the Roman law tradition. Even though reference might be made to Western European law of private ownership in a judgment, those perspectives can be incorporated only on condition that they are compatible with our constitutional view on property which aims, partially, to redress the effects of colonialism and, what I call its theoretical progeny, “apartheid”. In this specific case our constitutionally-inspired morality might not differ greatly from the European perspectives quoted above, but the generalised implication in the SCA’s judgment that we should hesitate to differ from foreign jurisdictions should not be supported, especially if the incorporation of foreign legal principles is not properly justified in terms of our Constitution. A contrary view, prevalent in this case, would mean that foreign courts and foreign legislatures have a greater effect on South African law than to our supreme law. I argue that this position is a perpetuated form of objective (ideological) colonial violence and hegemony that our Constitution does not intend.

Drawing upon the work of Žižek (*Violence: Six sideways reflections* (2009)), I argue that the judgment is objectively violent in the sense that it operates at an invisible ideological level. Žižek identifies capitalism as the source of objective violence: The source here would be a colonially submissive failure to recognise the importance of the Constitution that solidifies our democratic transition. Even though some may hold the opinion that the Constitution is not a complete break from colonialism, I argue that it can be regarded as a sincere attempt to do so. Therefore the invocation of the Constitution in common-law matters shows a willingness to move in the direction of a symbolic rejection of a particular form of colonialism.

A pertinent point of criticism that could be raised against my argument is that the Constitution itself is symptomatic of a colonial hegemony over South Africa and thus its transformative possibility is inherently limited (Van Marle *supra* 198; Delpont “An ethical (anti)constitutionalism? Transformation for a transfigured public” 2014 *Acta Academica* 104). The concept of fundamental rights is not an African creation. My argument is that it is impossible to totally escape colonialism until the radical paradise comes: For the moment, we need to make the best of what we have (this view resonates with the “double-handed” approach suggested by Botha (“Equality, plurality and structural power” 2009 *SAJHR* 37), because,

despite the wide powers given to them, judges cannot abolish the Constitution.

The foregrounding of human rights has its roots in Europe, but South African courts have made attempts to Africanise them: Specifically, I am speaking here of the permeation of the value of *uBuntu* in our discourse on human rights (for an overview see Himonga, Taylor & Pope “Reflections on judicial views of *uBuntu*” 2013 *PER/LJ* 369). As Ramose indicates (*An African perspective on justice and race* (2001) 19), our Bill of Rights is far from a perfect reflection of an African jurisprudence, but from my perspective, it is a step closer in comparison with the legislation and court decisions of Europe. Williams (*The alchemy of race and rights* (1991) 154) has argued, even though fundamental rights may be criticised from various points of view, that rights have played a great symbolic role in the emancipation of oppressed groups. Williams specifically argues that before rejecting them we need to be sensitive to the black experience of rights: That rights are tools by means of which to demand the attention and respect of oppressors

A further critique to be raised in this case against the incorporation of foreign law, without constitutional verification of imported principles, is that in England the courts deferred the abolition of the action for adultery to the legislature regardless of how outdated the moral grounds may have been (par 26). In Germany the issue was whether a court should create a remedy based on adultery: The court refused to do so on the rationale that the German Parliament did not intend to create penal consequences for adultery committed by a third party and a court is in no position to interfere with that legislative decision (*RH v DE* par 25). If the SCA was concerned to heed the practices of their colleagues overseas, it is strange that it overlooked the fact that foreign courts have not regarded the abolition and creation of the civil claim for adultery as an “incremental change” that would justify judicial law-making. It seems that the SCA is desirous of the best of both worlds: An acceptance of foreign law without constitutional confirmation of the imported principles, as well as the extensive constitutional power given to South African judges to develop the common law. Through its failure, meaningfully and explicitly, to incorporate the rights and values of the Constitution, the SCA opened itself up to this criticism. In the next section I will explore how the foreign law and the aforementioned extra-constitutional reasoning could have been effectively constitutionally framed.

5 Constitutionally Justified Logic

Even though proponents of the civil claim for adultery stress the importance of protecting marriage as an institution and the personality rights of the aggrieved spouse, the SCA provided a number of extra-constitutional factors that outweigh the arguments of those proponents. These logical factors are closely related to the German arguments detailed above. The SCA explains these factors as follows. It is strange that the betraying spouse is not held delictually liable while that spouse's

conduct is more unacceptable than the behaviour of the third party in that the third party is not breaching a solemn vow (parr 29-30). If the spouses are married in community of property and do not get divorced in spite of the adultery, the misbehaving spouse would benefit from the damages accruing to the aggrieved spouse (par 30). The protection of marriage is of great importance, however, it is doubtful whether the possibility of a delictual claim for adultery will prevent its dissolution the spouses have already given up on the marriage. The view that adultery can only occur through sexual intercourse is flawed because non-sexual extra-marital relationships can be a serious breach of trust as well. Marriages do not break down simply because of adultery: The reality is more complicated than that. Besides, people should have the freedom to do with their bodies as they please. If the purpose of this type of claim is prevention, then it is odd that the crime of adultery has already been abolished (par 34). One cannot say that an objective observer will conclude that the aggrieved spouse has been insulted. In fact, it is the good name of the unfaithful spouse that suffers damage the moment that the adulterous behaviour comes to the fore (par 35). Historically, the claim for adultery has undergone numerous modifications, and it could be abolished now (par 38). Young children have experienced serious trauma from the court cases, which is against their best interests, the cross examination of the spouses delved deep into their most intimate spaces, and this case caused massive costs to be incurred, all for the sake of the husband's desire for revenge (par 39). If a court were to say that the conduct of the adulterers is "not wrongful", that does not mean that their conduct is "right". It simply means that the conduct does not attract delictual liability (par 32).

These arguments are powerful and deserve recognition. However, these arguments were never properly strengthened with reference to our rich constitutional jurisprudence. As the Constitutional Court has explained, the wrongfulness enquiry in delict could involve a proportionality exercise and such a balancing should take place through the prism of the spirit, purport and objects of the Bill of Rights (*Carmichele supra* par 43). The summative points of logic that the SCA relied on involve such a balancing exercise: Weighing up the interests of the aggrieved spouse against those of the community at large. In what follows I aim to illustrate how the Constitution could have been used to bolster Brand JA's balancing exercise.

There are two issues that go to the heart of the equality (s 9 of the Constitution) of joint wrongdoers: The fact that the adulterous spouse is not held liable, as is the third party, and the fact that the adulterous spouse could benefit from the conduct whereas the third party will lose money. Hidden in the text is an argument based on unfair discrimination on the grounds of marital status (see, e.g., s 9(3) of the Constitution and *Da Silva v RAF and Another* 2014 5 SA 573 (CC)). The fact that a person's right to determine the future of their marriage is given greater effect to than the institution of marriage itself, is rooted in the Constitutional Court's understanding of self-autonomy as a fundamental aspect of one's

dignity (see, e.g., s 10 of the Constitution and *Barkhizen v Napier* 2007 5 SA 323 (CC) par 57). This fact is linked to the right to physical integrity (section 12 of the Constitution) that includes the freedom that individuals have to make decisions regarding their own bodies, as opposed to the archaic situation in which women were regarded as slaves of their husbands (section 13 of the Constitution prohibits slavery and human servitude). The best interest of the child standard, as embodied in section 28 of the Constitution, has been interpreted to mean that children must be free from the type of emotional trauma that they were subjected to here (see, e.g., *S v Mokoena* 2008 5 SA 578 (T)). The right to privacy (section 14 of the Constitution) is infringed the moment that the opponents wish to delve into each other's private behaviour in the courtroom: This type of cross examination reminds one of earlier cases against homosexuals, who had committed the crime of sodomy, and who had their sexual histories laid bare (see the observation made in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) par 28). The vengeful nature of the husband's claim is exactly what Mokgoro J warned against in *Dikoko v Mokhatla* (2006 6 SA 235 (CC) par 68), because revenge is inconsistent with reconciliation and *uBuntu* that informs our constitutional right to dignity.

I am mindful of the fact that all of the extra-constitutional logical reasons provided by the court are in fact consistent with the Constitution. Would it have done any harm for the judge to acknowledge this fact, with appropriate constitutional authority? It would not have cost the SCA a tremendous effort to properly integrate the Constitution in its reasoning, especially when one considers the copious amount of non-constitutional authority referred to in the rest of the judgment. Nor would harm have been done to the integrity of the common law, as Van der Merwe once worried ("Constitutional colonisation of the common law: A problem of institutional integrity" 2000 TSAR 12), because, after the case of *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others* (2000 2 SA 674 (CC) par 44), there can be no doubt that there is one type of South African law and, that is, law under the Constitution. The classic purist debate has come to an end. Our common law has been shaped by a wide variety of sources and intellectual influences: The Constitution, as the supreme law, should be one of these, and that reality should be frankly acknowledged.

Giving tacit support to constitutional principles is good, but explicitly shaping the common law to abide by the normative framework created by the Constitution is better. It is unfortunate that the SCA proclaimed that the Constitution would not play a role in its substantive reasoning but, contradictorily, constitutional themes are hidden in the judgment, as has been illustrated above.

6 Concluding Thoughts

The leading textbook by Neethling and Potgieter on the law of delict (*Neethling-Potgieter-Visser Law of Delict* (2015) 22) explains the “indirect horizontal application of the Constitution” as the radiating effect that the Bill of Rights has on open-ended delictual principles, such as the *boni mores* test. In this case it seems that the SCA understands it to mean that the Constitution must be felt but not heard. It is my view that the failure to refer to the Constitution substantively in a case such as this is a subtle but influential neglect of the justificatory obligation that courts have in light of the wide constitutional power conferred on them to develop the common law. The development of the common law without a serious engagement with the Constitution should not be supported.

A colleague posed the question whether the above arguments can withstand the effect of the principle of subsidiarity. That is, that constitutional issues should be avoided if possible (*S v Mhlungu* 1995 3 SA 867 (CC) par 59). Van der Walt (*Property and Constitution* (2012) 37) has already made the point that subsidiarity should not be regarded as a restriction on the influence of the Constitution on all law. A proper reading of section 8 and section 39(2) of the Constitution provides methodological clarity on which sources to turn to in order to best give effect to constitutional rights. My further response is that subsidiarity was introduced by the Constitutional Court, in part, to limit the amount of cases that came before it because, at the time of the introduction of the principle, the court's jurisdiction was limited to constitutional matters (I read this as the subtext in the authority discussed by Du Plessis “Subsidiarity: What's in the name for constitutional interpretation and adjudication?” 2006 *StellLR* 216). Since then, section 167 of the Constitution has been amended to expand the jurisdiction of the Constitutional Court to all matters of general public importance that present an arguable point in law (Constitution Seventeenth Amendment Act of 2012). This move is indicative of South Africa's increasing awareness of the importance of the Constitution as an all-permeating normative-framework-creating document. Promoting steering away from constitutional issues will not assist the Constitutional Court in reducing its workload anymore: Suggesting that litigants should steer away from raising issues of “public importance” would seem quite ridiculous, because what type of legal issue is not significant to the public in some way or another?

Another point of concern from a conservative perspective may be that this issue of common-law development creates too much uncertainty in the law and is disastrous for litigants who are told by their legal advisors that they may have claims that are good in law. A brief response is that the American Legal Realists taught, early in the 20th Century, that laws (and facts established during trials) are indeterminate and it is irresponsible for lawyers to guarantee the success of cases that are decided by judges (see, e.g., Van Blerk *Jurisprudence* (1998) 55-81). With that said, Davis and Klare (*supra* 412) do not suggest that a

transformative methodology is completely against stability and the determinacy of rules. At the same time, a transformative methodology does not relegate transformation in favour of predictability. The importance of appropriate dispute resolution as an alternative to courts, with a sincere acknowledgement of the need for reconciliation with (as opposed to domination over) an opponent should be taken more seriously, bearing in mind the spirit of *uBuntu*.

I argue that it is our conservative legal culture that persists in championing a veneration of the common law that has led to South Africa falling behind the rest of the world with regards to delictual claims based on adultery. South African morality surely did not only change in 2014. In both *Wiese* and the trial court judgment of this case, the courts were preoccupied with staying as closely as possible in line with the common law: The court in *Wiese* used the Constitution as a rubber stamp for the common-law *status quo* (while failing to balance competing interests of various persons), while the SCA in *RH* sidestepped the substantive provisions of the Constitution. If the case under discussion reflected the transformative framing of all common-law disputes in constitutional terms, perhaps the judge would have been more open to the possibility of developing the common law with the proper justification that is required in our constitutional context. I concede that the mere constitutional framing of disputes will not automatically result in progressive outcomes, as we observe in *Wiese*. If the SCA applied a transformative framing coupled with a substantive appreciation of the Constitution and its transformative goals, it could have avoided the pertinent criticism that it has been so nostalgic over 1970s Europe that it has set a blueprint for an anti-constitutional approach to developing the common-law of delict.

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