IS THERE STILL DEFAMATION BASED ON ADULTERY UNDER SOUTH AFRICAN LAW? A CRITICAL REVIEW

J v J (4918 2012) [2016] ZAKZDHC 33 (*unreported*)

1 Introduction

On 22 July 2016, the Durban High Court ruled (*per* Masipa J) that there is no longer an action for defamation founded on the publication of allegations of adultery against another person (*J v J* (4918–2012) [2016] ZAKZDHC 33, hereinafter *"J"*). The court solely based its finding on the earlier judgment of the Constitutional Court (CC) in *DE v RH* (2015 (5) SA 83 (CC); 2015 (9) BCLR 1003 (CC), hereinafter "*DE"*). Earlier, in June 2015, in the *DE* judgment, the CC had unanimously struck down delictual action for *contumelia* and loss *of consortium* damages founded on adultery. In annulling this action, the CC held that the common-law action for *contumelia* and loss *of consortium* was no longer viable and that it was incompatible with the Constitution of the Republic of South Africa, 1996 ("the Constitution", see par 62–63 of the CC judgment). Still, a question that was never considered by the courts prior the judgment of *J* is whether the *DE* judgment has automatically abolished other delictual actions aimed at protecting personality rights, specifically an action for defamation, and in general, actions for invasion of privacy and impairment of dignity, all founded on allegations of adultery. In this judgment, the court held that in view of the decision of *DE*, "public opinion no longer considers adultery as tabooed... a statement to the effect that a person committed adultery can no longer convey a meaning with the propensity to define a person …" (par 88). Nevertheless, when the opportunity to definitively answer this question ultimately presented itself, albeit in relation to defamation of character (or the protection of reputation), the court in *J* failed to satisfactorily address this vital question. As it will be demonstrated in this contribution, the judgment of Masipa J in the *J* judgment does not appear to be legally sound. Primarily, no authority, other than the CC judgment of *DE*, is used to support the judgment of *J*. As a result, the judgment has not even succeeded in dealing with the question of defamation, let alone other actions (namely, privacy and dignity) – all founded on adultery. Instead, the judgment creates confusion whether the judgment of *DE* extends to an action for defamation, and possibly to privacy and dignity. The objective of this note is to provide a critical analysis of the high court judgment in *J*. The critique is undertaken in light of the reasoning in *DE* and other like judgments. It begins by setting out the background to the ruling of the high court, followed by a commentary on

the judgment. The commentary is undertaken in the form of a comparative analysis between the approaches adopted by the court in *DE* and in *J*, highlighting the striking differences in approaches by the two courts, when they develop the common-law. In addition, the critique of the high court judgment is made in light of the interests that the judgment of *DE* sought to protect when it abolished an action in adultery, and those that were at issue in the judgment of *J.* Thereafter, a conclusion is provided. The stance that the note adopts is that the CC in *DE* did not repeal defamation action founded on allegations of adultery; and that even if such action were to be annulled privacy and dignity ought to remain, as of necessity.

2 Background

In *J,* the plaintiff, SJ sued for divorce against his wife, PJ (the first defendant) on the basis that she had committed adultery (par 1). In the process, SJ also sued for damages for *contumelia* and loss of *consortium* against Dr H (the second defendant), the man who had been allegedly involved in an intimate adulterous relationship with PJ (par 1). However, before the court could deal with SJ's matter, the CC ruled in *DE* that adultery was no longer an actionable cause of action for purposes of SJ's claim (par 1). As SJ no longer had a cause of action for his claim, he tendered to withdraw his claim against Dr H (par 1). While Dr H accepted a tender by the husband to withdraw his claim against him, he nevertheless filed a counterclaim for defamation against the husband (par 1). Three disclosures had been made regarding the alleged adultery: Firstly, SJ had made the disclosure to his mother (par 21). Secondly, SJ had also disclosed to Dr H's wife, SH, as a courtesy upon suing Dr H (par 18). Lastly, SJ's mother was alleged to have publicised the alleged adultery further to Dr H's nursing assistants (par 21–23). The high court dismissed Dr H's counterclaim. In its findings in this regard, the court ruled that a reference to a person as having been involved in an adulterous relationship is no longer defamatory in the light of the judgment of *DE* (par 85). In addition, the court held that the doctor had failed to prove that his reputation had been injured as a result of the husband's allegations that the doctor was intimately involved in an adulterous relationship with his wife (par 89). In essence, the latter reason is founded on causation. However, this is beyond the scope of this note.

3 The Commentary

One cannot begin to understand the correctness or otherwise of the judgment of *J* without first comprehending the CC judgment of *DE*. It is therefore imperative that this analysis of the high court's judgment of *J* is undertaken in the light of *DE*. In *J,* the high court simply held that it was not reasonable to attach delictual liability to an act of publicising allegations of adultery against another person, because of the CC ruling in *DE* (par 85). Other than some factual findings that the court made, nothing more was said by the court in support of the abolition of defamation founded on allegations of adultery. I am not in agreement with the approach of the high court for various reasons discussed hereunder.

When the CC abolished an action for *contumelia* and loss of *consortium* in *DE*, it based its decision on several solid grounds. Primarily, its judgment was informed by the changing *boni mores* (*DE,* par 51), coupled with the position in other countries (*DE,* par 52). In addition, the court's decision was as a result of a quest to give effect to the constitutional rights of "innocent" spouses (*DE,* par 53–54). The abolition of this delict was also informed by the realities of life, namely, that the "innocent" spouse might well have been responsible for driving the other spouse to adultery (*DE,* par 55). The court was also cognisant of the reality that marriage may at times not work and that the other party (who commits adultery) may just be wanting to associate with another (a third party being sued by the aggrieved marriage partner) – freedom of association (*DE* par 63). Thus, in the latter case, the third party may be an innocent victim of the circumstances by finding himself or herself entangled between fighting marriage partners.

Of particular importance is the conclusion that Madlanga J reached in the *DE* judgment. Madlanga J states, at par 63:

> "I am led to the conclusion that the act of adultery by the third party lacks wrongfulness for purpose of a delictual claim of *contumelia* and loss of *consortium* …"

Clearly, from the above-mentioned passage, the CC was more precise that adultery is no longer wrongful (thus actionable) for purposes of *contumelia* and loss of *consortium*. The conclusion reached by Madlanga J was informed, *inter alia*, by the need to protect the constitutional rights of a spouse and third parties involved in an adulterous relationship and the changing attitudes towards adultery (par 62). The court confined its decision to the issue at hand, namely adultery in relation to the protection of the marriage institution (see par 53–55 and 61 for the context of the conclusion of the Court). Therefore, anyone who intends to extend the precedent in *DE* to any other delictual claim, other than *contumelia* and loss of *consortium*, ought to support such extension with the necessary reasoning and authorities. The CC's judgment of *DE* is well researched, well-reasoned and legally sound.

For instance, the court sought guidance from the comparative Western and African authorities (as required by s 39 of the Constitution, 1996) prior to abolishing a delictual action for *contumelia* and loss of *consortium* (par 28–38). The Court also interrogated South African jurisprudence and South African's attitudes towards marriage and adultery (par 23–28). Moreover, the Court sought direction from international law instruments (par 45–50). Conversely, the same cannot be said about the high court judgment of *J*. Unlike the CC, which inquired into domestic, international and foreign law, Masipa J made no attempt to consider either South African, international and/or foreign authorities. In fact, the *J* judgment neither refers to nor cites any authorities, except the judgment of *DE*. Granted, being the judgment of the highest court in the land, *DE* would have sufficed to support Masipa J's conclusion. However, *J* was not on all fours, as it was, with the *DE* judgment. Hence, I submit that when Masipa J imported the judgment of *DE* without providing any authority in support for such extension may have taken the principle of *DE* beyond its intended application. It is not for a moment argued

that the high court ought not to have adopted the principle in *DE* at all. I only am challenging the learned judge's lack of reasoning and authority in support of its extension of the judgment of *DE* to defamation.

Moreover, when Masipa J abolished defamation founded on allegations of adultery in *J*, the judge was effectively developing the common-law, as did the Constitutional Court in *DE.* Indeed, the high court was within its legal right to develop the common-law, in terms of section 39(2) of the Constitution. In fact, in terms of the law, all higher courts have inherent power to develop the common-law to harmonise it with the spirit, purport and objects of the Bill of Rights where the common-law deviates therefrom (see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), par 33 and 37). However, developing the common-law is a weighty obligation bestowed upon the higher courts. In the exercise of this constitutional function, the courts are expected to make a value judgment, which cannot be discharged when judges fail to engage law authorities at their disposal (see, eg, how the CC exercised this constitutional mandate in *Carmichele v Minister of Safety and Security supra* par 44–49). Without a doubt, the high court in *J* case fell short in its constitutional duty.

The part that follows examines some South African case law authority that could have assisted the court in *J* when it decided to strike down adultery-based defamation. It explores the reasoning in such authorities, starting first with local jurisprudence.

3 1 Jurisprudence

There are a couple of case law authorities that the high court in *J* could (and should) have used to reason on its judgment. For example, the court could have considered the judgments of *Le Roux v Dey* (2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC); BCLR 446 (CC) hereinafter "*Le Roux"*) and *NM v Smith* (2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) hereinafter "*NM"*). In *Le Roux*, for instance, the action was based on defamation and impairment of dignity, emanating from imposing heads of both the school principal and the deputy principal on two gay bodybuilders who were seated in a sexually suggestive manner (par 1). The CC, by the majority (*per* Brand AJ), allowed an action, even though the judgment had the potential to perpetuate the stigma against same-sex persons (par 83, 101, 108 and 115). The majority was also amenable to finding that the sexually suggestive image amounted to the impairment of the dignity of the respondent (par 39–43 and 142). The minority (Froneman and Cameron JJ's judgment), while finding that the image in question was not defamatory for fear of perpetuating the stigma based on sexual orientation, held that they would have found that the material had impaired the dignity of the respondent (par 167, 174 and 180–190). Ultimately, of the eleven Constitutional Court justices who heard the matter in *Le* Roux, only two judges (the other minority judgment of Yacoob and Skweyiya JJ) held that the image in question was neither defamatory nor impairing of dignity (par 70–71). Perhaps the two justices were also conscious of the constitutional guarantee of equality based on sexual orientation. Thus, there was general agreement among the judges of the CC that some action lied in the image with homosexual connotations,

notwithstanding the constitutional prohibition of sexual orientation-based discrimination.

However, if Masipa J's approach in the *J* judgment was adopted, the CC ought to have unanimously dismissed Dey's action in *Le Roux* by concluding that there was no longer any action for defamation or impairment of dignity, stemming from insinuations of homosexuality (that is, one engaged in a homosexual act or that were gay). Such a ruling would have had far-reaching consequences. It could have meant that persons who opted to keep their sexual orientation private were no longer allowed to sue for unauthorised disclosure of their sexual orientation. Actually, as far back as 1998 (prior to the judgment of *Le Roux)*, the Constitutional Court had confirmed the invalidity of the common-law offences of sodomy and of the commission of unnatural sexual act, in a landmark ruling in the *National Coalition for Gay and Lesbian Equality* (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC)), on the basis that they were inconsistent with the Constitution (s 9 of the Constitution, 1996). This earlier CC judgment could have prevented the Constitutional Court from finding the learners in *Le Roux* liable in delict for impairing Dey's reputation and/or possibly his dignity. Yet, the CC still confirmed the liability of the learners for the said image insinuating homosexuality.

Similarly, in *NM* case, which dealt with unauthorised disclosure of persons HIV status in an autobiography, the CC held that there was nothing impairing about being HIV-positive (par 48, 92 and 138–140). Nevertheless, still mindful of the stigma associated with being HIV-positive, the Court held that to disclose someone's HIV status without their consent amounted to a violation of their privacy and an affront to a person's dignity (par 47, 48, 54 and 81). Instead of totally denying an action based on breach of confidentiality in respect of HIV-positive persons, the Court urged courts to strive to strike a balance (par 141). Therefore, as evident in *NM* and *Le Roux* judgments, it is possible that a conduct that is not wrongful for one action may constitute wrongfulness for another action. For example, to say that one is HIV-positive is not wrongful delictually (under defamation), but such conduct may make that person liable for an invasion of privacy where that was done without consent (as was the case in *NM*). In addition, to state that one is gay may not (arguably) incur liability for defamation, but it may still amount to an impairment of dignity (as was held by both majority and some minority in *Le Roux* judgment). Such utterance, I submit, may also constitute a violation of another's privacy when it is done without the other's consent. It is for these reasons that I take issue with the judgment of *J.* Therefore, the high court in *J* could have sought guidance from these judgments when disposing of the issue of defamation based on an allegation of adultery. However, it fell short in this regard. It was also within the court's power to do so, as did the CC in *DE.* In terms of section 39 of the Constitution, the high court could also have sought guidance from international law and foreign law.

Moreover, the approach of the high court in *J* appears to disregard the fact that defamation and loss of *consortium* are dissimilar in nature. Thus,

what applies in respect of the action for *contumelia* and loss of *consortium* may not necessarily apply in respect of an action for defamation, as the next section shows.

3 2 Loss of consortium and defamation

Although the loss of *consortium* and defamation (fama) is an action that seeks to protect personality interests, they are distinct actions. They differ materially in terms of interests that they protect. As the CC in *DE* correctly observed, the action for adultery (loss of *consortium)* was intended to protect marriage against interference by third parties (par 26). On the other hand, an action for defamation is premised on protecting the reputation (which is a personality right). As such, the two actions differ with regard to the manner in which infringement is committed. An action for adultery is committed through an act of inference with the other's marital relationship. With regard to defamation of character, it is settled law that a violation of reputation may only be committed through a publication of defamatory material that refers to another person.

Thus, declaring adultery to be not unlawful for all delict actions may pose hurdles for other personality rights, such as privacy and dignity protections. This issue is canvassed in detail below. It is thus submitted, in view of the above, that it would be an error to indiscriminately import the judgment of *DE* in order to justify the abolition of adultery-based defamation, as Masipa J did, especially when it was done without any further ado. In my opinion, defamation should fail on the basis that the traditional defences, such as truth for public benefit or fair comment, rather than a declaration of lack of wrongfulness adopted by the high court in *J*.

3 3 The unintended implications of J judgment

It is also significant that one of the reasons why the CC abolished an action for *contumelia* and loss of *consortium* in *DE* was to protect the rights of adulterous spouses and of third parties (par 53, 58 and 62). Among others, development of the common-law was intended for the protection of their privacy and intimacy (par 53 and 58). One may also add by necessary implication, the decision was intended for the protection of the parties' dignity. However, the judgment of *J* could have a possible negative effect on the other two actions that protect personality interests; namely, dignity and privacy. In other words, the use of the *DE* judgment in the manner that Masipa J did, could inadvertently have negative consequences for the constitutional protection of individual rights and for the law of delict. The protection of personality rights of the parties involved in adultery was central to the abolition of delictual action of adultery; however, the same parties would be left without protection as a result of the judgment of *J*. It could, for example, mean that allegations of adultery against another person may no longer entitle that person to sue for invasion of privacy or even impairment of dignity, for lack of wrongfulness. Such a consequence could hardly have been the intention of the Court in *DE.* Such consequences will also be contrary to the values enshrined in the Constitution. After all, it is these

values and the rights in the Bill of Rights which the judgment of *DE* sought to uphold (par 53–54). It is possible that adulterous parties may be unable to succeed with a defamation, as Masipa J concluded in *J.* Still, I submit, the same parties should be able to sue in delict for the invasion of their privacy and for impairment of their dignity. However, this remedy will be impeded if adultery were declared to lack wrongfulness for all purposes.

Again, the argument is not so much that the high court was not entitled to apply the principle in *DE* in its judgment. Instead, the submission is that the high court should have, at least taken us into its confidence by examining authority at its disposal to reach its decision. This was especially the case in view of the serious implications inherent in the *J* judgment, as has been argued above.

4 Conclusion

To conclude, it is my argument that Masipa J erred on two fronts in her judgment of *J.* The learned judge erred when she concluded that, to succeed with an action for defamation in general, the plaintiff needed to prove that his reputation has been impaired by the alleged defamatory remarks. Lastly and most importantly, when the high court imported the judgment of *DE* judgment that nullified an action for adultery as the authority for annulling defamation based on allegations of adultery, the court failed in its duty to apply the law properly. The court failed to engage any jurisprudence, internationally, regionally or domestically. It was vital for the court to justify the importation of the authority of *DE* to nullify defamation founded on allegations of adultery because the precedent of *J* could have far-reaching implications for other personality rights, namely dignity and privacy. Ultimately, it is not being argued that the court should not have applied the precedent in *DE*. Instead, the court ought to have reasoned with available authorities when it imported *DE* to justify its annulment of defamation action based on insinuations of adultery against another person. The question that is raised in this note is whether there is still defamation based on the utterances of adultery under South African law? In answer, it can be argued that to the extent that the judgment of *J* is only based on *DE*, without any reasoning or authority, there is still an action for defamation founded based on allegations of adultery. Put differently, it would seem *J* has not provided the last word on this issue as it is highly susceptible to attack (but not necessarily overturning) by other courts due to its lack of nuance and limited reasoning.

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