REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 3198/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. NO

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DATE SIGNATURE

In the matter between:

T G Defendant (Excipient)

and

W C Plaintiff

EXCEPTION JUDGMENT

Summary

***Held* -A claim in delict based on a fraudulent misrepresentation leading to a marriage and which results in pure economic loss is not recognised in our law and it is not in the public and legal interest that that the *lex aquilia* be extended to allow for such claim; exception taken to such a claim thus upheld.**

***Held* -a common law rule to the effect that claims for damages between**

spouses based on the *actio iniuriarum* are barred is not part of our law; exception taken to such claim not upheld.

FISHER J:

Introduction

[1] This is judgement deals with exceptions taken to the plaintiff's particulars of claim on the basis that the two claims pleaded disclose no cause of action. The claims are for damages in delict and are based on the *lex aquilia* and the *actio iniuriarum* respectively. Both claims are brought *stante matrimonio* and this is the source of the complaints in each case.

[2] Both claims focus on an inquiry into the legal and social convictions which are implicated in that most complex of institutions: Marriage.

The plaintiff's pleaded case

[3] The parties are currently married to each other out of community of property and according to the Accrual Regime, but are in the throes of divorce. They were married after a courtship which lasted two years and eight months during which the defendant by his conduct and verbally expressed love for the plaintiff. The defendant proposed marriage on 15 September 2018, which proposal the plaintiff accepted, believing that the defendant loved her because he had represented to her that he loved her and wished to spend the rest of his life with her. They married and the plaintiff expended money on the wedding in an amount of R 331 342. But the marriage relationship was short lived. Approximately a week after the marriage, the defendant began conducting himself towards the plaintiff in an intentionally insulting and denigrating way and this culminated in him asking her to leave the matrimonial home. Thereafter the plaintiff discovered that when the defendant proposed marriage to her he already considered that their romantic relationship had broken down

irretrievably. He failed to disclose this to her. In so misleading her she claims that he made a fraudulent misrepresentation which induced the marriage.

[4] Based on these pleaded facts the plaintiff raises two causes of action:

(a) A claim under the *lex aquilia* based on the fraudulent misrepresentation for which she claims, as special delictual damages, the costs associated with the wedding, which she pleads that she would not have expended but for the misrepresentation.
(b) A claim based on the *actio inuriarum* for the impairment of her dignity and reputation arising from the conduct and circumstances described and the fact that such circumstances became public knowledge amongst the parties' social milieu.

The exceptions

[5] The defendant raised nine exceptions which can be distilled into two objections. Both focus on an inquiry into wrongfulness. The first argument is in relation to the claim under the *lex aquilia* for wasted wedding costs and is to the effect that it would be contrary to public and legal policy to extend the *lex aquilia* to allow such a claim. The second argument is that there is a long standing rule at common law which precludes claims based on the *actio iniuriarum* between spouses for being contrary to legal and public policy.

[6] I will deal with each of the claims in turn with reference to these objections.

The claim under the lex aquilia

[7] A fraudulent misrepresentation leading to a marriage and which results in pure economic loss is not recognised under the *lex aquilia*. Mr Steyn who appeared for the plaintiff argued for liability to be extended to such a claim. Mr Kuny SC, who appeared for the defendant, argued that such a claim should not be entertained. As I

have said the enquiry is in relation to the element of wrongfulness. Its focus is on whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable that liability flow from the conduct in issue. In essence, it questions the reasonableness of imposing liability.

Discussion

[8] Public policy is now infused with the fundamental values and rights contained in the Constitution.[1] In sum, to say that conduct is wrongful means that public or legal policy considerations require that the conduct is actionable if there is fault and, if conduct is not wrongful, that public or legal policy considerations require that such a person should not be subjected to a claim for damages, notwithstanding his or her fault.[2]

[9] In cases of pure economic loss – i.e. where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property[3] - the criterion of wrongfulness assumes special significance. Conduct causing pure economic loss is not prima facie wrongful[4] and there is no general right not to be caused pure economic loss.[5]

[10] Our law is generally reluctant to recognise claims for pure economic loss, especially where it would constitute an extension of the law of delict.[6] It is understood that, if claims for pure economic loss are too freely recognised, there is the risk of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class.'[7]

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[1] *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 53.

[2] T*rustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; 2006 (3) SA 138 (SCA) at para 12. See also *Gouda Boerdery BK v Transnet Ltd* [2004] ZASCA 85; 2005 (5) SA 490 (SCA) at para 12 and *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) at para 12.

[3] In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* [1984] ZASCA 132; 1985 (1) SA 475 (A) at 498, Grosskopf AJA defined pure economic loss as "loss which was caused without the interposition of a physical lesion or injury to a person or corporeal property".

[4] *Two Oceans Aquarium* supra n 3 at para 10.

[5] *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) (*Trust Bank*) at 833A-B.

[6] *Two Oceans Aquarium* supra n 3 at para 20, citing *Lillicrap* supra n 4 at 504D-H.

[7] Cardozo CJ in *Ultramares Corporation v Touche* 174 NE 441 (1931) at 444.

[11] The enquiry as to wrongfulness requires the identification of the implicated norms and the balancing of those norms – the one against the other/s - to determine the pubic and/or legal policy considerations which come into play.[8]

[12] In *Dawood* [9] O'Regan J eloquently encapsulated the public significance of marriage thus :

'Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well'[10].

[13] Central to the defendants objections to both claims is that, to allow them, would have the potential to have a negative impact on marital relationships which are vital to societal health and wellbeing.

[14] To my mind, this approach fails to take account of developments in the law and societal convictions which are founded on the recognition of the importance of the freedom of choice and autonomy involved in the modern marital condition.

[15] The laws enabling divorce have long been relaxed to allow parties legally to dissolve their marriage if their relationship has deteriorated to a point where they choose not to remain married to each other. Before the relaxation, divorce could only be obtained on circumscribed grounds: adultery, malicious desertion, incurable insanity, and habitual criminality. This was altered by s 3 of the Divorce Act[11] which

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[8] *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) at para 12.

[9] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837.

[10] *Dawood* ibid at para 30.

[11] 70 of 1979.

made it possible for a marriage to be dissolved on the basis that it had broken down irretrievably.

[16] Room must be made in the inquiry for an acknowledgement of the role that the institution of marriage has in the past played in the subjugation of woman and the entrenching of patriarchal norms. There have been constant developments in the law over time in order to regulate the respective rights and obligations between spouses which operate during the course of a marriage and on its dissolution. Much of the development in the law has been concerned with ensuring economic parity between the spouses and more especially with allowing woman to achieve a position of equality before the law in the context of the choices they make as to the financial consequences of their marriages. Most notably, this gender equality was achieved legislatively by the Matrimonial Property Act[12] which, inter alia, abolished the marital power and established the Accrual Regime. Any remaining inequality will obviously not bear scrutiny under Constitutional prescripts.[13]

[17] Thus, those who decide to marry in accordance with South African law have a choice of property regimes which are well described both in statute and at common law. Parties may contract with a view to their intended marriage and, in their antenuptial contracts, opt to keep completely separate estates, adopt the Accrual Regime and/ or deal with any special features which they deem appropriate to their personal circumstances. If they do not decide to enter into an antenuptial contract, they become, on their marriage, subject to a community of property regime which has, as its foundation, a fair and equal sharing of economic resources between the spouses.

[18] From a general perspective, I can see no reason why the *aquilian* remedy should be extended to a plaintiff who must be regarded as having been in the

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[12] 88 of 1984.

[13] See for eg A S and Another v G S and Another (D12515/2018) [2020] ZAKZDHC 1; [2020] 2 All SA 65 (KZD); 2020 (3) SA 365 (KZD) (24 January 2020) which declared the provisions of s 21(2) *(a)* of the Matrimonial Property Act to be unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination, created by s 22(6) of the Black Administration Act 38 of 1927 ('the BAA'), in that the marriages of black couples, entered into under the BAA before 1988, are automatically out of community of property.

position to both appreciate and manage the risks attendant on an unsuccessful marriage, but who decided not to do so. It does not take much wisdom to understand that the vagaries of the human condition and marital relationships are such that there are no guarantees that love will last or that it was there in the first place. Indeed the premise of the fraudulent misrepresentation sought to be relied on by the plaintiff encompasses metaphysical questions as to the nature and meaning of love and, to my mind, whether such things are capable of proof in a court of law is questionable. I have however proceeded on the usual basis adopted in exceptions – being that I accept the facts pleaded as true.

[19] In this case the plaintiff, like anyone embarking on this important rite of passage, was in a position to make a series of choices. Should she pay for the relevant expenses for the wedding or should she lay these costs at the feet of her intended spouse? Should she opt for a less expensive wedding or even the registry office? Should she deal with outlays and acquisitions which flow from the nuptial celebrations in an antenuptial contract? For example it is common for parties to dictate that one or the other will be entitled to the wedding gifts in the event of divorce.

[20] To my mind, this is a case where the social, economic and other costs are too high to justify the use of the law of delict for the resolution of the issue. To do so would, to my mind, be an impermissible intrusion into an area of the law where the parties respective rights freely to determine their financial relationships within their marriage should be given pre-eminence over the right to be recompensed for economic loss which has accrued as a result of conduct which occurred before the marriage even if that conduct led to the marriage. The question touches on the parties right to dignity - to be accorded the respect which will allow them the autonomy to regulate the financial consequences of their lives together.

[21] The potential insecurity that such litigation would introduce into the operation of the chosen property regime of the parties to the marriage is also an important consideration. It would be difficult to allocate this liability in the context of the complex economic relationships that are engendered by marriage and are sought to be rationalized on its dissolution.

[22] Thus there is no cause of action on this claim.

The claim under the actio iniuriarum

[23] The second exception relates to the claim for general damages under the *actio iniuriarum.*[14] Similar considerations apply to claims for defamation.

[24] Mr Kuny contends that, in terms of the common law, a claim based on the *actio iniuriarum* between spouses is barred. He argues that what is sought by the plaintiff is that the common law be extended to permit of the claim. He argues that such extension would lead to a proliferation of litigation and that it is against public policy Mr Steyn on the other hand argues that such a rule does not exist in our law and it is to this question to which I now turn.

Does such a rule exist?

[25] *Mann v Mann*[15] is one of very few instances in the early twentieth century of an action taken by a wife against a husband arising from his assault of her. This is notwithstanding that such treatment of women was , regrettably, as commonplace as it is today and is, in no small part, by reason of the fact that it was condoned in certain legal and societal quarters. The approach in *Mann* is a case in point. After a detailed analysis of the Roman and Roman-Dutch writings on the subject of the rights of women to sue their husbands for non-patrimonial damages, the court came to the conclusion that, as the claim was based in the *actio inuriarum* , it was not competent. The judgment has been criticised for failing to regard the physical consequences of the assault as definitive of the cause of action. Had these physical

[14] This is the general remedy for the infringement of personality rights. Its main aim is to protect plaintiffs against wrongful and intentional infringement of these rights and allow for the recovery of damages if infringement is proved. Under Roman-Dutch law, the personality rights protected by this action are bodily integrity (corpus), dignity (*dignitas*) and reputation (*fama*). See also *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 27, where the Constitutional Court found that "no sharp line can be drawn between these injuries to personality rights" and that constitutional values are the foundation of our understanding of these rights.

[15] 1918 CPD 89.

aspects been accorded their due significance, the Court could have found that the claim was, in fact, brought under the *lex aquilia.*

[26] Some forty years later in the Southern Rhodesian (as Zimbabwe was then known) case of *C v C*[16] the question came again to be considered. The Court after examining the old authorities and with reference to *Mann*, also came to the conclusion that a wife had no claim against her husband under the *actio iniuriarum*. An analysis of the Roman and Dutch authorities as it emerges from this judgment, identifies the basis for this exclusion as the underlying principle of loss of status or honour (*infamia*) on the part of a husband so charged. The Court, whilst accepting that the principle of *infamia* as a basis for the rule no longer existed, held that there were nonetheless policy considerations which favoured the retention of the rule. It found these policy considerations in the concept of the 'unity of the flesh' between man and wife. This concept, it said, had religious significance from a Christian perspective as well as broader significance in relation to the societal perceptions of the marital relationship. The court held further that, as actions based on the *actio iniuriarum* are essentially of a personal character 'they are more likely to cause ill-feeling and resentment and to disrupt family life than other forms of civil actions'[17].

[27] Mr Kuny relies on this authority to argue that the rule and the policy considerations underpinning it have survived in our law. He argues that claims for defamation and *iniuria* are of a nature that spouses should not be allowed to bring against each other because of the intimate nature of marital relations and the fact that misbehaviour of the kind involved in these claims is best and adequately accommodated in the law pertaining to divorce.

[28] He seeks to rely on the Constitutional Court decision in *RH v DE* and *DE v RH*[18] which, in finding that the delictual claim for *contumelia* and loss of consortium under the *actio iniuriarum* arising from the adultery of a spouse had become abrogated in our law, recognised the complexity of the marriage relationship and that there was an international trend away from the interference in the intimate relationships and private affairs of marriage. This trend, so the argument goes, is in

[16] 1958 (3) SA 547 (SR) 1958 (3).
[17] Ibid at 552.
[18] CCT 182/14) [2015] ZACC 18; 2015 (5) SA 83 (CC); 2015 (9) BCLR 1003 (CC) (19 June 2015).

keeping with maintaining the rule against allowing a claim for damages based on defamation and the *actio iniuriarum* between spouses. Put simply, the argument is that the law should be slow to allow claims which have the potential to create familial and marital discord and the *actio iniuriarum* is consummately such a claim.

[29] Mr Steyn argues that, in fact, the question as to whether or not the rule is part of our law has definitively been put to rest in the 1960's by the Appellate Division (as the Supreme Court of Appeal was then known) in *Rohloff v Ocean Accident and Guarantee Corporation Ltd*.[19] In *Rohloff* the legal question raised on exception was whether a wife, married out of community of property, is entitled to sue her husband for damages suffered by her as a result of his negligence. The facts of *Rohloff* are similar to those in the Constitutional Court decision in *Van der Merwe v Road Accident Fund and Another.* [20]In both cases the wife did not sue the husband directly but the question was whether the husband was liable as insured in that the insurer's liability was in dispute. *Van der Merwe* dealt with a constitutional challenge to s18(*b*) of the Matrimonial Property Act which excluded claims for damages for patrimonial loss between spouses married in community of property.[21] The Court found that such a provision was unconstitutional and s 18(b) was subsequently amended to allow spouses married in community of property to make claims against one another for pure economic loss flowing from bodily injuries.[22] The Court in *Van der Merwe* did not deal with s18(a) nor with the common law. Whilst the enquiry as to whether the statutory provision passed constitutional muster entailed a focus on the proprietorial consequences involved in circumstances where the parties have one

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[19] 1960 (2) SA 291 (A)

[20] *CCT48/05) [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) (30 March 2006)*

[21] Section 18 previously read as follows:

" Notwithstanding the fact that a spouse is married in community of property–

(a) any amount recovered by him by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him, does not fall into t

(b) he may recover from the other spouse damages, **other than damages for patrimonial loss,** in respect of bodily injuries suffered by him and attributable eit

[22] Section 18 (b) as amended pursuant to the pronouncements in Van der Merwe reads as follows:

'(b) he or she may recover from the other spouse damages in respect of bodily injuries suffered by him or her and attributable either wholly or in part to the fault of that spouse and these damages do not fall into the joint estate but become the separate property of the injured spouse.'

undivided estate, the Constitutional Court also discussed general considerations of justice and fairness which are germane to delictual claims *stante matrimonio* and *Van der Merwe* thus adds helpfully to the inquiry being undertaken here in relation to the common law. I will say more about this later.

[30] Reference to the Roman and Roman-Dutch authorities shows that archaic and distasteful notions of male honour, power and privilege lie at the heart of the resistance to affording a wife the most basic of protections against her dignity and person.[23] I have dealt above in relation to the extension of the *lex aquilia* with the fact that there have been significant developments in the law relating to marriage and divorce in South Africa. That the legal convictions of our society relating to gender based rights have changed momentously hardly needs to be addressed at this point in our history. As I have mentioned above, the Matrimonial Property Act made important inroads into the theoretical unity of the joint estate and recast the common law of marriage. The introduction by the Matrimonial Property Act of 'separate property' in the context of a joint estate[24] is important to the inquiry at hand. It creates, in the context of the claiming of damages by one spouse against another, a situation which is similar to the position of couples who do not have a community estate.

[31] The trend is thus to acknowledge that, in getting married, a person does not lose his or her rights in delict – regardless of whether the claim is in respect of an injury to the physical person of the spouse or his or her personality interests such as dignity, mental integrity, bodily freedom, reputation, privacy, feeling, and

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[23] See for eg Brouwer, an authority on the law of Holland, who in his De Jure Connuborium, 2.29.12, says: *'The jurisconsults deny the actio injuriarum, which is 'famosa', to a wife who has been severely and excessively beaten, without reason, but they allow the actio in factum, to the effect that the husband pay compensation for the injuries he has brought upon her. The former is correct, but the latter is not, for the law has provided a fixed penalty for this delict, and we ought to be content with the punishments contained in the laws.'* ; Huber,2.6.10.21 (Gane, p. 418), says: *'It should finally be noted that, for the sake of decency, no action for injury lies between husband and wife, the more so that in the Imperial law he who is found guilty of injury loses his honour, or at least is more or less damaged therein, a thing which ought not to apply between spouses' ;* There are also a number of old authorities who deal with the wife's legal remedies for injuries done to her by her husband, but who do not mention among those remedies the civil remedy of a claim for damages. It is a fair inference from this that had those writers thought that the wife had such a remedy they would have mentioned it when reciting her other remedies – see for eg Grotius, Groenewegen, and van der Keessel .

[24] See sections 1, 17(1)(a) and (b), 19 and 20.

identity. A wrongful infringement into these personality interests or rights entitles the victim to non-patrimonial damages.

[32] Significantly, in *Van der Merwe* the Constitutional Court found that it was trite that in marriages out of community of property the common law restriction on claims in delict has no place.[25]*Rohloff* is cited for this proposition and specifically the following passage approved:

‘ I have considered all the available authorities with care and have come to the conclusion that actions ex delicto are, in our law, permitted *stante matrimonio* between spouses married out of community of property with exclusion of the marital power. Not only is this view supported by recognised Roman-Dutch commentators, but it appears to me, moreover, to be in accord with justice, reason, common sense and public policy.’[26]

[33] Importantly, there is no limitation proposed as to these action *ex delicto*. A claim for damages or *iniuria* is as much of a delictual claim as one which arises from bodily injury.

[34] Recall that central to the argument of the defendant is the contention that *RH v DE* is authority for the proposition that adherence to the constitutional prescripts of dignity and the right to privacy means that there is a normative movement away from allowing claims which have the potential to interfere in the complex marriage relationship and towards fostering familial relationships.

[35] To my mind, this argument misconstrues the basis for the approach in *RH v DE.* The privacy considerations which were dealt with there were based on the acceptance that the obligation to protect and maintain the marriage relationship rests pre-eminently with the spouses themselves and not with the law.[27] Madlanga J writing for the majority, recognised that notions of patriarchy had previously been at the heart of the claim based on adultery. He stated as follows:

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[25] *Van der Merwe* Supra n 20 at para 29.
[26] See *Rohloff* Supra n 19 at 302
[27] RH v DE supra n18 at para 44.

‘ The origins of the claim are deeply rooted in patriarchy. Originally only a man had the right to pursue a claim against a third party that had committed adultery with his wife. Wives were viewed as mere chattels. And that probably explains why the claim was available only against the third party, and not the wife who – in essence – was a co-wrongdoer. As time went on, South African courts began questioning the discriminatory nature of the claim. Making contentions based on Christian principles of fidelity, which are applicable both to husbands and wives, Barlow advocated that the delictual claim be available to wives as well. Not long thereafter the case of *Rosenbaum v Margolis* declared that the claim was available to wives. The Appellate Division confirmed this in *Foulds*.’[28] (footnotes omitted)

[36] It must be understood that the claim for alienation of affection whilst being brought against the adulterous third party, involves public scrutiny of the intimate lives of the parties and especially that of the spouse charged with the adultery. The right to privacy of all involved is impinged upon. The decision to enforce these rights against a third party thus inevitably requires a legal examination of the personal affairs of the family in a manner which casts the adulterous spouse as wrongdoer in a cause that is not his or her own. In contrast, the claim inter -spouse for rights in contract and delict serves to preserve the dignity of the spouses and foster the adherence to values such as mutual respect and temperance within the family.

[37] In my view, to deny a spouse his or her rights under the *actio inuriarum* would militate against the preservation of dignity of the spouses and would impinge negatively on the family structure. Without redress to ordinary legal prescripts between parties as to liability for wrongdoing, the power relations with the marriage would inevitably be affected. A sense of impunity in marital relationships where personality rights are at stake is self-evidently not conducive to the maintenance of rights within a marriage.

[38] In examining this potential for injustice and illogicality which would arise if the right to sue for damages in delict were withheld from a spouse, Malan J held as follows in *Rohloff*:

[28] Ibid at para 14.

'If the right to sue during the subsistence of the marriage in the case of contract is conceded, it is illogical and manifestly unjust to withhold such right in the case of delict. The wrong caused by breach of contract usually involves less serious consequences to the innocent party than the commission of a delict and there is greater justification for granting an immediate remedy to a spouse upon whom serious bodily injury has been inflicted, or who has been grossly defamed, than in the case of a breach of contract which may involve a paltry sum of money.'[29] '

[39] Mr Kuny seeks to distinguish *Rohloff*. He argues that it relates only to special damages for pure economic loss and that the reference to general damages for defamation is obiter. Thus he says that it does not relate to damages under the *actio iniuriarum*. I do not agree. The case is clear authority for the view that even more than thirty years before the advent of the Constitution, our courts found that to disallow a wife's basic right to claim from her husband damages for loss of dignity and reputation as a result of his abusive conduct to be repugnant and inapposite.

[40] As I have said, the Constitutional Court in *Van der Merwe* was in apparent agreement that *Rohloff* is authority for a general proposition as to damages as opposed to one which separated claims for personality infringements from bodily injury. Although the Court in *Van der Merwe* declined to deal with the common law position as to a claim for damages inter- spouse it put emphasis on the fact that a rule which sought to prevent a spouse from making a claim against another by virtue of the marriage relationship was constitutionally questionable. Madlanga J said as follows:

'The rule in effect ousts legalredessfor delictual loss of any kind arising from the wrongdoing of a spouse against another. The amicus (third respondent) argues, *and it must be right, that this rule owes its origin to the boundless patriarchy*
in a setting where the husband wielded marital power over the wife … and was the exclusive administrator of the joint estate. As long as the marriage endured, the estate was deemed to be one, indivisible and subject to one command.'

[29] Rohloff at p 302

[41] Thus, regardless of the matrimonial property regime in issue, the principle is the same – such a rule would have the effect of ousting redress from a spouse – which it is clear from *Van der Merwe* will not be countenanced in a constitutional democracy.

[42] It is important to add that with the advent of social media the potential for profound and widespread abuse of the dignity of intimate partners has increased exponentially. A phenomenon which has come to be called 'revenge pornography' refers to the sharing or distribution of nude or sexually explicit material of someone without their consent and with the express purpose of humiliating them. Victims may now lay criminal charges against anyone who distributes or shares this material on social media, in text messages, via any electronic communication or on pornographic websites.[30]

[43] One would be hard pressed to think of a basis for prohibiting civil redress in such circumstances. In *Rohloff* it was found that the denial of a delictual claim would lead to absurd results if the wronged spouse could bring criminal charges against the other spouse but was barred from claiming damages based on precisely the same wrongs complained of in the criminal case. It found that effect the role of a spouse as complainant in a criminal case is not very different from that of plaintiff in a civil action.[31]

[44] Thus, if indeed this unfortunate rule had found its way to our common law by route of the Roman and Roman-Dutch law – it did not stand the test of time, even in

[30] See 24E of Films and Publications Amendment Act 11 of 2019 which reads as follows:
(1) of Any person who knowingly distributes private sexual photographs and films in any medium including the internet and social media, without prior consent of the individual or individuals in the said sexual photographs and films with the intention to cause the said individual harm shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.
(2) Any person who knowingly distributes private sexual photographs and films in any medium including through the internet, without prior consent of the individual or individuals and where the individual or individuals in the photographs or films is identified or identifiable in the said photographs and films, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R300 000 or to imprisonment for a period not exceeding four years or to both a fine and such imprisonment.

[31] Rohloff p 302

our pre-constitutional history and, if it had, it certainly would not withstand scrutiny under the Bill of Rights.

[45] Thus I find that there is no bar in SA law to a claim by a wife against her husband based on the *actio iniurarum.*

[46] Accordingly this exception fails.

Costs

[47] Each party has achieved a measure of success. The defendant argues that the late clarification by amendment of the fact that what is relied on is the *actio iniuriarum* and not a claim based on defamation led to the defendant having to deal also with defamation and the confusion which he alleges existed in the pleadings before the amendment. I do not believe that the amendment was necessary. It seems to me that the pleaded case was clear in the first place and the amendment was made out of unnecessary caution. To my mind a proper award is that each party bear their own costs.

Order

[48] My order is thus as follows:

1. The exception to the plaintiff's claim for patrimonial damages succeeds and this claim is struck out.
2. The exception to the plaintiff's claim for general damages under the *actio iniuriarum* fails.
3. Each party is to pay their own costs of the exception.

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FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 20 August 2020.

Judgment Delivered: 28 September 2020.

APPEARANCES:

For the Defendant (Excipient)	**:** Adv S Kuny SC.
Instructed by	**:** Blake Attorneys.
For the Plaintiff	**:** Adv H Steyn.
Instructed by	**:** Van Rensburg Pillay Jonker Inc.