Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

[REPORTABLE]

CASE NO: 6222/2010

In the matter between:

ELSIE SOPHIA CLOETE
Plaintiff

and

ANDRIES WILHELMUS JACOBUS MARITZ Defendant

JUDGMENT DELIVERED ON 24 APRIL 2013

HENNEY, J

Introduction

[1] The Plaintiff has instituted a claim against the Defendant which is based on a breach of promise to conclude a marriage relationship with her.

The Plaintiff alleges that on or about 10 March 1998 she and the Defendant agreed orally to marry each other within a reasonable time after such date. As a result of

this they became engaged in February 1999.

[2] On or about 24 April and 7 May 2009, the Defendant repudiated the said agreement by orally refusing to marry the Plaintiff. He also during those occasions informed the Plaintiff that he did not want to see her again and that he had someone new in his life.

[3] The Plaintiff also further alleges that the repudiation was wrongful and unlawful and the Defendant acted *animo iniuriandi* by conveying his refusal to marry the Defendant to her in foul and contumelious language. He also conveyed this, the Plaintiff alleges, to another female with whom he was in a relationship.

[4] The Plaintiff's claim as a result of the repudiation of the agreement consists of 3 separate components.

[5] Firstly, the Plaintiff claims an amount of R26 000,00 from Defendant based on donations made by the Plaintiff to Defendant ("Claim 1" in the summons).

[6] Secondly, the Plaintiff claims ("Claim 2" in the summons) from the Defendant loss of financial benefits of the marriage. In this regard, the Plaintiff's claim is based

on two legs, firstly, the right of enjoyment of an immovable property of a value commensurate with the lifestyle and standard of living enjoyed and maintained by the parties at the time, valued at R3 500 000,00 and secondly, her right to be maintained and supported at a cost of not less than R8 500,00 per month, over a period of 25 years representing the life expectancy of a female of Plaintiff's age with a total value of R2 550 000,00. The total amount claimed in respect of "Claim 2" is R6 050 000,00.

[7] The third component (Claim 3) is based on the breach of the Plaintiff's dignity and reputation by the alleged contumacious manner in which the Defendant breached the promise to marry.

[8] The Special Plea

In addition to his denial of the merits of the claim, the Defendant raised two Special Pleas. In respect of the first Special Plea, the Defendant essentially denies that a breach of promise is still a valid cause of action in our law. The Second Special Plea relating to the Court's denial of jurisdiction was abandoned.

[9] The essence of the Special Plea that remains to be considered is as follows:

"Having regard for the Constitution of the Republic of South Africa, 1996 and the current mores as recognised by the community at large, a claim based on breach of promise is contra bones mores and thus not a valid cause of action.

Breach of promise is moreover an unenforceable pactum de contrahendo which merely allows for a spatium deliberandi and therefore does not constitute a valid cause of action."

[10] The Defendant argues that the Special Plea is premised on the Supreme Court of Appeal's Judgment in *Van Jaarsveld v Bridges 2010 (4) SA 558 (SCA)*, a judgment which the Defendant argues this court is obliged to follow.

[11] In this Judgment *Harms DP* after referring to a judgment of this court by *Davis J* in respect of breach of promise, draws attention to a court's right, and importantly, duty to develop the common law, taking into account the interests of justice and at the same time to promote the spirit, purport and objects of the Bill of Rights.

[12] In the judgment referred to by *Harms DP* of *Sepheri v Scanlan 2008 (1) SA 322 at 330I – 331 A Davis J* remarks:

> "*In general I would agree with these views*[1]*, namely, that our law requires a reconsideration of this particular action. It appears to place the marital relationship on a rigid contractual footing and thus raises questions as to whether, in the*

[1]Davis J refers to Van Der Heever Breach of Promise and Seduction in South African Law (1954) at 120; Sinclair The Law of Marriage Vol 1 (1996) at 313 and 314; D J Joubert (1990) 23 De Jure 201 at 214.

constitutional context where there is recognition of diverse forms of intimate personal relationships, it is still advisable that, if one party seeks to extract himself or herself from the initial intention to conclude the relationship, this should be seen purely within the context of contractual damages".

Davis J goes further and states at 331:

"*However, I have to accept that this is not the existing legal position. Neither Mr Steenkamp, who appeared on behalf of defendant, nor Ms Davis, who appeared on behalf of plaintiff, argued in this fashion, nor in my own research have I found support that this action is no longer part of South African law. I am uncertain whether s 39(2) of the Constitution would afford a court the scope to change the law. Arguably, the highest courts may consider the position differently. It is obviously a matter for legislation rather than judicial engineering by trial courts".*

[13] *Harms DP* in the Van Jaarsveld judgment at 560 – 561 states that … "*I do believe that the time has arrived to recognise that the historic approach to engagements is outdated and does not recognise the mores of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise. In what follows I intend to give some guidance to courts faced with such claims without reaching any definite conclusion, because this case is not affected by any possible development of the law and can be decided with reference to two factual issues …".*

[14] *Harms DP* then goes on to discuss the two causes of action that a breach of promise gives rise to.

[15] The one would be delictual in nature based on the *actio iniuriaum*, where the innocent party would be entitled to sentimental damages if the repudiation was

contumelious. In such a case, according to *Harms DP*, it is required that the so-called "guilty party", in putting an end to the engagement, acted wrongfully in the delictual sense and *animo iniuriandi*. *Harms DP* further goes onto say that it does not matter whether or not the repudiation was justified. Rather, it is the manner in which the engagement was brought to an end according to *Harms DP* that matters. The mere fact that the feelings of the "innocent" party were hurt or that she or he felt "slighted or jilted" is not enough.

[16] *Harms DP* then further goes on to say that the second cause of action is for breach of contract, and that in considering this cause of action two aspects need to be considered. The first is that the engagement contract may be cancelled without any financial consideration if there is a just cause for cancellation. The second aspect that has to be considered and which is relevant to this special plea in the context of contractual damages, is the justification for placing an engagement as a "rigid contractual footing".

[17] According to *Harms DP* at paragraph [7] … *"It is difficult to justify the commercialisation of an engagement in view of the fact that a marriage does not give rise to a commercial or rigidly contractual relationship".*

[18] He says further that he is unable to accept that parties when promising to marry each other at that stage of their relationship would contemplate that a breach

of their engagement would have financial consequences as if they had in fact married.

[19] The assumption of the two parties is that their marital regime will be determined by their subsequent marriage. *Harms DP* then concludes that in his view an engagement is more of an unenforceable *pactum de contrahendo* providing a *spatium deliberandi* – a time to get to know each other better and in which they would decide whether or not to finally get married.

[20] The crux of *Harms' DP* judgment on which the Defendant relies in support of his special plea is set out on page 562 paragraphs 9 – 11 where it is eloquently stated:

> "One has to distinguish in this regard between claims for prospective losses and those for actual losses. It is not easy to rationalise claims for prospective losses. One of the problems concerns the intended marital regime. It would be unusual for parties to agree on the marital regime at the time they promise to marry each other. If nothing was agreed, on what assumption must the court work? I believe that the court cannot work on any assumption, especially not one that the marriage would on the probabilities have been in community of property. And if the agreement was to marry in community, can one party not change her or his mind without commercial consequences?
> *An agreement to enter into an antenuptial contract is not binding because it must be entered into notarially. How can legal consequences flow from the refusal to enter into the notarial agreement? And what would the consequences be if the parties cannot agree on the detailed terms of the agreement? The matter becomes more complicated if one considers the claim for loss of support. In divorce proceedings the award is a matter of discretion; but in a breach of contract situation it becomes a*

matter of commercial entitlement. Imponderables abound. Prospective losses are 'not capable of ascertainment, or are remote and speculative, and therefore not proper to be adopted as a legal measure of damage'. They depend on the anticipated length of the marriage and the probable orders that would follow on divorce, such as forfeiture and the like. I do not believe that courts should involve themselves with speculation on such a grand scale by permitting claims for prospective losses.

Claims for actual losses are easier to justify but difficult to rationalise in terms of ordinary principles relating to the calculation of damages in the case of breach of contract. What usually springs to mind are costs or losses incurred by agreement, actual or by necessary implication, between the parties, such as those relating to wedding preparations. These losses do not flow from the breach of promise per se, but from a number of express or tacit agreements reached between the parties during the course of their engagement. To be recoverable the losses must have been within the contemplation of the parties. The 'innocent' party must be placed in the position in which she or he would have been had the relevant agreement not been concluded; and what the one has received must be set off against what the other has paid or provided. Another example would be losses suffered by one, who, in agreement with the other, relinquishes a post in anticipation of the wedding and is unable to find another post. Bridges, it might be mentioned, based her claim for financial losses on exactly this footing".

[21] It is on the basis of this dictum that Mr Steenkamp acting for the Defendant submits that the Plaintiff's claim for prospective loss, ie. claim 2, the claim for loss of benefits of the marriage, should be dismissed with costs.

[22] Mr Steenkamp further submitted in addition to what was held by *Harms DP* that a wedding (or marriage) would not serve any purpose if the consequences of entering into an engagement is the same or even greater.

[23] The Plaintiff's case for dismissing the Special Plea

Mr Barnard on behalf of Plaintiff argued that the court should not uphold the special plea, because a cause of action based on breach of promise is fully recognised by the South African courts. This had been endorsed by the former South African Appellate Division as well as various divisions of the High Court.

[24] He argued that this Court, through the principle of *stare decisis*, is bound by earlier judgments of the Appellate Division. He further argued that unless recent judgments of the South African Supreme Court of Appeal specifically, and as part of the *ratio decidendi*, and not merely reflecting upon the validity of a cause of action in an obiter fashion, overruled earlier decisions of the Appellate Division, such earlier decisions still hold good.

[25] He argued that it would not be competent for this court as a trial court to make a finding that a certain cause of action no longer forms part of our law. The criticisms regarding the continued existence of a cause of action of a breach of promise are unfounded.

[26] Mr Barnard submitted that this court in *Sepheri v Scanlan 2008 (1) SA 322*

(C) at 331 confirmed the prerequisites for an award of damages based on breach of promise, on the authority of *Bull v Taylor 1965 (4) SA 29 (A)*. The Plaintiff further draws attention to the fact that in *Butters v Mncora 2012 (4) SA 1 (SCA)*, the Supreme Court of Appeal made reference to the judgment of the Court a quo, in which *Chetty J* awarded damages to a disgraced party who claimed damages for breach of promise, without making any adverse comment or suggestion that the award was made based on a cause of action that no longer existed in South Africa.

[27] The Plaintiff contends that neither the Supreme Court of Appeal nor any other division of the High Court in South Africa has at any stage overruled the principles upon which the Judgment of the Appellate Division in *Bull v Taylor* is based. It is submitted that on the principles of *stare decisis*, as set out in *Hahlo and Kahn*, *The South African Legal System and its Background 1973, chapter VII*, at page 252 – 253, are as follows … *"A judge sitting alone must follow a two-judge decision of his own division or a division of co-ordinated jurisdiction and, naturally, a decision of a larger court and of the appellate division … A lower court must naturally give priority to decisions of the A.D. and thereafter decisions of its own, as stated above … A court of a particular size (be it of one judge or two or more judges) will consider itself bound by one of its own previous decisions unless satisfied, it was clearly wrong, though it may indicate that it is not convinced that it was right. Naturally, if the earlier decision was rendered per incuriam or there was a later inconsistent enactment or decision of the A.D., or a fuller court, the previous judgment will be disregarded."*

[28] Plaintiff reasoned that this court therefore will not only be bound by the *Bull v Taylor* judgment but also by the judgment of *Davis J* given in *Sepheri v Scanlan (supra)* where it was held as follows:

> "*I have to accept that this is not the existing legal position. Neither Mr Steenkamp, who appeared on behalf of defendant, nor Ms Davis, who appeared on behalf of plaintiff, argued in this fashion, nor in my own research have I found support that this action is no longer part of South African law. I am uncertain whether s 39(2) of the*

Constitution would afford a court the scope to change the law. Arguably, the highest courts may consider the position differently. It is obviously a matter for legislation rather than judicial engineering by trial courts."

The Defendant according to Mr Barnard has proffered no reason as to why this court should disregard the Judgment of *Davis J*.

[29] The Plaintiff submitted that it had to be accepted that the above decisions were binding on the Defendant, and hence it had to be accepted by the Defendant that a finding against his position had to be made. He was though permitted to appeal such decision to the SCA which was in a position to overrule such decisions. Furthermore, it was argued that in the *Sepheri* judgment *Davis J* was of the view that this is the approach that should be adopted where he states that "Arguably, the highest courts may consider the matter differently and that it was not a matter for "judicial engineering by a trial court" to decide upon matters of the kind raised in the special plea, but rather a "matter for legislation".

[30] Mr Barnard further contends that the remarks by *Harms DP* in the *Van Jaarsveld* judgment on which the Defendant bases his argument were *obiter dicta.* These remarks did not amount to the *ratio decidendi* of the judgment. The Plaintiff drew attention to the below quotation from *Harms DP* as being determinative of the issue whether relevant comments made relating to breach of promise were *obiter* or the *ratio decidendi* of the court, and noted that such quotation was not dealt with by

the Defendant.

> "Davis J felt the time had come for a reconsideration of the action, but felt uncomfortable to take a lead in the matter. However, having had regard to the views expressed by the authors quoted by the learned judge (at 329G – I and 300H – I) (in the Sepheri matter, supra), to which can be added an incisive article by JMT Labuschagne, I do believe that the time has arrived to recognise that the historic approach to engagements is outdated and does not recognise the mores of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise. *In what follows I intend to give some guidance to courts faced with such claims without reaching any definite conclusion, because this case is not affected by any possible development of the law and can be decided with reference to two factual issues, namely in relation to iniuria, whether the breach was contumacious and, secondly, whether Bridges has suffered any actual loss as a result of the breach."* (emphasis added)

[31] Mr Barnard submits that this is an indisputable indication that the remarks made by *Harms DP* in relation to the existence of the cause of action based on "breach of promise" were purely obiter. *Harms DP* also, so Mr Barnard contends, did not state that the cause of action based on breach of promise is no longer part of one law, but merely said that our courts should reassess the law relating to breach of promise. Reassessment does not amount to an abolishment.

[32] That all statements in the *Van Jaarsveld* judgment relating to the cause of action based upon breach of promise amount purely to *obiter dicta*, Mr Barnard contends, is demonstrated by the fact that *Harms DP* in fact went on to specifically deal with the claim for damages based on breach of promise by analysing the

question whether the Plaintiff in that case (Van Jaarsveld) had proved the damages she had claimed.

[33] The Supreme Court of Appeal concluded that the Plaintiff's claim in that case should be dismissed on the basis that any injury she sustained was *de minimus* and can be discounted.

[34] Mr Barnard also contends that in the *Van Jaarsveld v Bridges*, *Harms DP* articulates his view that what he said was obiter when he remarked without reaching any definite conclusion since that matter could in that case be decided with reference to two factual issues, namely in relation to *iniuria* which was firstly whether the breach was contumacious and, secondly whether Plaintiff in that matter suffered any actual loss as a result of this breach.

[35] As such, according to Mr Barnard, the Bridges judgment did not advance our law beyond the stage where a cause of action based on "breach of promise" is firmly ensconced as part of South African law. He further notes that the Supreme Court of Appeal, despite every opportunity in the Bridges matter to make a definitive finding as to whether an action based on breach of promise is still part of our law, deliberately refrained from doing so.

[36] A reason according to Mr Barnard why the Supreme Court of Appeal did not make use of the opportunity to pronounce on the continued existence of the breach of promise cause of action was because, as *Davis J* indicated in the *Sepheri* judgment, Parliament, by means of appropriate legislation would be best suited to

deal with the abolishment of such a cause of action.

[37] Issues to be determined

1) Whether the pronouncement of *Harms DP* in *Van Jaarsveld v Bridges* can be

sufficiently regarded as binding authority that an action based on a breach of promise to marry no longer forms part of our law.

2) If so, whether a party can claim for prospective losses as a result of a breach of promise to marry.

I will now deal with these issues in turn.

[38] Analysis

I agree with the contention of counsel for Plaintiff that the statement of *Harms DP* relating to the breach of promise action amount to *obiter dicta*, and as such, are not binding on this court. The reason for my view follows.

[39] At its most fundamental level, the *ratio decidendi* of a judgment has been defined as "the reason of or for the decision", the decision being the order of court.[2] It has been suggested that the more accurate description is the "principle of the decision."[3] **The concept was dealt with in detail in the matter of *Kaplan v Incorporated Law Society, Transvaal [1981] 4 All SA 15 (T)* at page 43-44.**

> *"*IN HALSBURY *LAWS OF ENGLAND (HAILSHAM) 4TH ED VOL 26 PARA 573 AT 292 IT IS DESCRIBED AS THE GENERAL REASONS GIVEN FOR THE DECISION OR THE GENERAL GROUNDS ON WHICH IT IS BASED, DETACHED, OR ABSTRACTED FROM THE SPECIFIC PECULIARITIES OF THE PARTICULAR CASE WHICH GIVES RISE TO THE DECISION.*

IN *COLLETT V PRIEST* ***1931 AD 290 AT 302 DE VILLIERS CJ*** SAID THAT:

> *"WHATEVER THE REASONS FOR A DECISION MAY BE, IT IS THE PRINCIPLE TO BE EXTRACTED FROM THE CASE, THE RATIO DECIDENDI WHICH IS BINDING AND NOT NECESSARILY THE REASONS GIVEN FOR IT."*

> *IN PRETORIA CITY COUNCIL V LEVINSON 1949 (3) SA 305 (A) SCHREINER* AT *317 EXPLAINED THAT THE REASONS GIVEN IN A JUDGMENT, PROPERLY INTERPRETED, DO CONSTITUTE THE RATIO DECIDENDI, ORIGINATING OR FOLLOWING A LEGAL RULE, PROVIDED (A) THAT THEY DO NOT APPEAR FROM THE JUDGMENT ITSELF TO HAVE BEEN MERELY SUBSIDIARY REASONS FOR FOLLOWING THE MAIN PRINCIPLE OR PRINCIPLES, (B) THAT THEY WERE NOT MERELY A COURSE OF REASONING ON THE FACTS AND (C) (WHICH MAY COVER (A)) THAT THEY WERE NECESSARY FOR THE DECISION, NOT IN THE SENSE THAT IT COULD NOT HAVE BEEN REACHED ALONG OTHER LINES, BUT IN THE SENSE THAT ALONG THE LINES ACTUALLY FOLLOWED IN THE JUDGMENT THE RESULT WOULD HAVE BEEN DIFFERENT BUT FOR THE REASONS."*

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[2] *Fellner v Minister of the Interior* [1954] 4 All SA 304 (A) at 315.

[3] Hahlo and Kahn *The South African Legal System and its Background* (1968) at page 260.

[40] In my view, in applying the definition employed in the *Pretoria City Council* matter, and in particular, section (c) of the above definition, the guidelines must be viewed as obiter, and not the *ratio decidendi* of the decision. The decision reached by the court was based on the facts of the matter, i.e.Bridges had failed to prove the facts to support her claim. A decision on the law was not necessary for the court's order. The court's comments itself support such a characterisation, namely:

> "In what follows I intend to give ***some guidance*** *to courts faced with such claims* ***without reaching any definite conclusion****, because this case is* ***not affected by any possible development of the law and can be decided with reference to two factual issues****, namely in relation to iniuria, whether the breach was contumacious and, secondly, whether Bridges has suffered any actual loss as a result of the breach."*

As such, the guidelines above do not bind the courts. This however is not the end of the matter.

[41] Both *Davis J* in the *Sepheri* judgment and *Harms DP* in the *Van Jaarsveld* judgment expressed the view which is shared by other esteemed writers and experts on the topic of the law of marriage, that the law relating to this breach of promise to marry has to be reconsidered in the light of the prevailing *mores* and public policy considerations if regard is to be had to the

VALUES THAT UNDERLIE THE CONSTITUTION.

[42] IT IS MY VIEW THAT THIS REASSESSMENT IS NECESSARY. IT HAS BEEN HELD THAT COURTS NOT ONLY HAVE THE RIGHT, BUT ALSO THE DUTY TO DEVELOP THE COMMON LAW, TAKING INTO ACCOUNT THE INTERESTS OF JUSTICE, AND TO PROMOTE THE SPIRIT, PURPORT AND OBJECTS OF THE BILL OF RIGHTS. IN CONDUCTING THIS EXERCISE, COURTS MUST HAVE REGARD TO THE PREVAILING MORES AND PUBLIC POLICY CONSIDERATIONS.[4]

[43] The Court in the matter of *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal studies intervening) 2001 (4) SA 938 (CC)* however drew attention to the fact that the major driver of reform should be the Legislature and not the courts. In this regard the court had the following to say:

> *[36] In exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary. In this regard it is worth repeating the dictum of Iacobucci J in E R v Salituro, which was cited by Kentridge AJ in Du Plessis v De Klerk:*
>
> > *'Judges can and should adapt the common law 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.*

[4] *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) at paragraph [3] with reference to *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) ([2008] 2 All SA 493) at para 25; Constitution in s 39(2); and *Hurwitz v Taylor* 1926 TPD 8.

> *Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."*

In fulfilling this duty, it has been said that courts must adopt a two-stage process. In the matter of *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others 2004 (2) SA 56 (C)* this two-stage process was described as follows:

> "The first stage is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This requires a reconsideration of the common law in the light of s 39(2) of the Constitution and involves a careful examination of the existing principles which underpin the common-law rule and a comparison thereof with the key principles of the Constitution. If this enquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives. See *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995) in para [40] at 955I - 956C (SA); Rivett-Carnac v Wiggins1997 (3) SA 80 (C) at 87E - F and McNally v M & G E Media (Pty) Ltd and Others1997 (4) SA 267 (W) at 274G - 275C."*

[44] The legal convictions of the community or *boni mores,* as well the considerations of public policy, are continuously evolving and not static concepts. They are evaluated and influenced by the values underpinning our constitution of freedom, equality and human dignity as well as the rights enshrined in the Bill of rights. *Farlam J* (as he then was) in *Ryland v Edros 1997 (2) SA 690 CPD* at *708J-*

709A remarked ... "*I agree with the submission that the values of equality and tolerance of diversity ..... are among the values that underlie our Constitution. In my view those values 'irradiate', to use the expression of the German Federal Court cited earlier, the concepts of public policy as well and boni mores that our courts have apply."*

[45] Where the common law or a legal principle no longer is a reflection of the *boni mores* or public policy a trial court dealing with such a legal principle is entitled to deviate from the *stare decisis* rule that enjoins it to follow a decision of a higher court in the hierarchy of courts.

[46] The court in the matter of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) set out how the duty to develop the common law interacts with the doctrine of *stare decisis*, and specifically, the extent to which a High Court is permitted not to follow a decision of the Supreme Court of Appeal or previous appeal court. At the headnote of such judgment the following is stated:

> ". . . that it appeared from the judgment of the Court *a quo that that Court had been of the opinion that the principles of stare decisis as a general rule did not apply to the application of s 39(2) of the Constitution. That opinion was, at least as far as post-constitutional decisions were concerned, clearly incorrect."*

And further:

> ". . .as far as pre-constitutional decisions of the Supreme Court of Appeal regarding the common law were concerned, a distinction had to be drawn between three situations which could I develop in the constitutional context. First, the situation where the High Court was convinced that the relevant rule of the common law was in conflict with a constitutional provision. In that instance the Court was obliged to depart from the common law as the Constitution was the supreme law. *Secondly, the situation where the pre-constitutional decision of the Supreme Court of Appeal was based on considerations such as boni mores or public interest. If the High Court was of the opinion that such decision, taking constitutional values into account, no longer reflected the boni mores or public interest, the High Court was obliged to depart from the decision. Such a departure would not be in conflict with the principles of stare decisis as it had to be accepted that boni mores and considerations of public policy were not static concepts. Thirdly, the situation where a rule of the common law determined by the Supreme Court of Appeal in a pre-constitutional decision was not in direct conflict with any specific provision of the Constitution; the decision was also not reliant on any changing considerations such as boni mores; but the High Court was nevertheless convinced that the relevant common-law rule, upon the application of s 39(2) of the Constitution, had to be changed to promote the spirit, purport and object of the Constitution. In this situation, the principles of stare decisis still applied and the High Court was not empowered by the provisions of s 39(2) of the Constitution to depart from the decisions of the Supreme Court of Appeal, whether such decisions were pre- or post-constitutional."* (emphasis added)

[47] Finally, I wish to point out that while the guidelines set out in the *Van Jaarsveld* matter are perhaps not binding on another court, as the *obiter dicta* of the unanimous decision of the Appellate Division they can be seen as strong persuasive precedent. In this regard, *see Alternators (SA) (Pty) Ltd v Boulanger 1969 (3) SA 75 (W) at 79B-C, ANC Umvoti Council Caucus and others v Umvoti Municipality 2010 (3) SA 31 (KZP) at para [27] and Barclays Western Bank Ltd v Pretorius 1979 (3) SA*

637 (N) at 651D-E. Also see *Hahlo and Khan. The South African Legal System and its Background* at 270 – 271.

[48] I am of the view that the current approach to engagements does not reflect the current *boni mores* or public policy considerations based on the values of our Constitution which is to see a party's failure to honour his/her original promise to marry purely within the context of contractual damages.

Davis J in the *Sepheri judgment* at 329 states … *"An engagement is considered to be an agreement between a man and a woman to marry each other (the heterosexual component of the definition is decidedly pre-constitutional).*

[49] *Davis J* in the *Sepheri* judgment refers to *Sinclair: Law of Marriage* who at 314 (fn8) questions the justification for this action based on contract in the context of society's values at the end of the 20th century and in the beginning of the 21st century.

[50] *Sinclair,* also at *314* in referring to the position in England Scotland, Australia and most American jurisdictions, concludes *"[That], the appropriateness of the retention of this action, given the substitution of irretrievable breakdown for fault on the basis for divorce, is highly questionable*".

[51] *Sinclair* then says the following at 314 footnote 8:

> "In England, Scotland, Australia and most European jurisdictions breach of promise action has been abolished. The main reasons for the abolition of actions based on breach of promise are that they give 'opportunity for claimants of a ''gold-digging'' nature and that the ''stability of marriage is so important to society that the law should not countenance rights of action, the threat of which may push people into marriages which they would not otherwise undertake'' . . . They are consonant with the substitution of irretrievable breakdown of trust as the basis of divorce in the above jurisdictions.' South Africa has not so far followed suit in abolishing breach of promise actions but it is suggested that it should. Repudiation of a promise to marry is however no longer seen in the serious light that it was when marriage was regarded as the only proper course for all women and where breach of promise was likely to prejudice their reputation."

[52] *Davis J* also refers to *D J Joubert (1990) 23 De Jure 201* at *214* where the learned author says:

> *"Vrouens is in die moderne tyd nie op 'n huwelik aangewese vir hulle bestaanbeveiliging en behoeftesbevrediging nie. Daar is volop geleentheid vir deelname aan die ekonomiese lewe en vir selfverwesenliking. Daar is ook volop geleentheid vir die vind van 'n plaasvervanger huweliksmaat."*

[53] Similarly, *Harms DP* points out that society's values … have changed such that, now, divorce is available in the event of an irretrievable breakdown of the marriage, where in the past, it was available only in the event of adultery or

desertion. Guilt is no longer the issue. *Harms DP* went on to state that, likewise, lack of desire to marry should constitute a "*just cause*" to break an engagement, and similarly, guilt on the part of the other should not be a necessity. *Harms DP* went on to reason that it would be "*illogical to attach more serious consequences to the dissolution of an engagement than marriage*."

[54] Clearly, to hold a party therefore accountable on a rigid contractual footing where such a party falls to abide to a promise to marry does not reflect the changed mores or public interest. Even more so if the law relating to damages that can be claimed on a breach of promise to marry is based on a pre-constitutional heterosexual definition of marriage which traditionally placed women on an unequal footing to men as pointed out above.

[55] In this particular matter the Plaintiff in her "claim 2" seeks, on a purely contractual basis, damages based on the prospective losses she might have suffered, as a result of the Defendant's breach of promise. She seeks to be placed in a position she would have been if the defendant had not breached his promise to marry her. As pointed out by *Sinclair*, to hold a party liable for contractual damages for breach of promise may in fact lead parties to enter into marriages they do not in good conscience want to enter into, purely due to the fear of being faced with such a claim. This is an untenable situation.

[56] And further, as was pointed out by *Sinclair* and *Harms DP* it would be illogical to recognise the irretrievable breakdown of marriage as a ground for divorce, while not doing so in respect of the breaking of an engagement, and requiring guilt on the part of the other. It is my view that considerations of public policy and our changed *mores* cannot permit a party to be made to pay prospective damages on a purely contractual footing, where such a party wants to resile from a personal relationship and thus commits a breach of promise to marry. Such a situation in my view would be untenable.

As such, in applying the reasoning and guidelines as set out in the *Van Jaarsveld v Bridges* judgment to the extent that where it is held that to base a claim of breach of promise to marry on a rigid contractual footing, in the sense that a claim for prospective losses would be permissible is not a valid cause of action.

[57] For these reasons I am of the view that the position as set out in *Bull v Taylor* in respect of when a party can successfully claim prospective losses on the basis of breach of contract no longer forms part of our law.

For these reasons I would uphold the Special Plea.

[58] In the result therefore I would make the following order:

1) That the Special Plea in respect of claim 2 is upheld;

2) Costs to stand over for later determination.

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HENNEY, J

Judge of the High Court

Coram	**:**	**R.C.A. Henney, J**
Judgment by	**:**	**R.C.A. Henney, J**
For the Plaintiff	**:**	**Adv T A Barnard**
Instructed by	:	**De Klerk Van Gend Inc**
		(Ref. A E Human)
For the Defendant	**:**	**Adv J P Steenkamp**
Instructed by	:	Spencer Pitman Inc
		(Ref. AVP/TS/MAT2797)

Date(s) of Hearing : 28 JANUARY 2013

Judgment delivered on : 24 APRIL 2013