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GUGGENHEIM v ROSENBAUM (2) 1961 (4) SA 21 (W)

Citation 1961 (4) SA 21 (W)

Court Witwatersrand Local Division

Annotations 

TROLLIP, J.

1961. *April* 4 - 12; *June* 26.

Flynote : Sleutelwoorde

Practice - Trial - Re-opening of case by plaintiff to call further evidence - Information to be furnished - Nature of - Husband and wife - Divorce - Validity of - Marriage - Breach of promise - Damages - Aggrieved party entitled to contractual and delictual damages - Assessment of - Factors to be taken into consideration.

Headnote : Kopnota

When application is made by a party to reopen his case to lead evidence after counsel for both parties have addressed the Court, it behoves the applicant to place full information before the Court as to how the proposed witness comes to tender his evidence, why he was doing so, why it is tendered during the course of the trial and what the circumstances are in which he came to offer himself as a witness. In addition information as to the nature of the evidence should also be furnished to enable the Court to assess not only the materiality but also the weight of the evidence. If the evidence of the witness is going to be disputed the Court in determining whether the evidence is 'likely to be weighty' must be informed of the above circumstances in order to satisfy itself that the witness is likely to be impartial and to assist the Court in arriving at the truth of the matter.

If a person is regarded by the law of his then domicile as divorced he would be regarded in our law as divorced.

Although the modern action for breach of promise is a composite one, combining both contractual and delictual elements, as a general rule these elements must be clearly separated in the pleadings and in the assessment of damages so as to avoid confusion. In regard to contractual damages, both the prospective loss of the benefits of the marriage and the actual monetary loss or expenditure incurred or to to be incurred can be awarded. The latter must either flow directly from the breach of promise or must be reasonably supposed to have been within the contemplation of the parties at the time the contract was entered into as a probable consequence of the breach. Therefore, expenditure reasonably incurred prior to the breach in contemplation of the promised marriage taking place and which is rendered useless by the breach can obviously be recovered. Expenditure or loss incurred or to be incurred after the breach can also be awarded if the above requisites are present, but only if such damage is not covered by an award of prospective loss. A duplication of damages in this respect must be safeguarded against. In regard to delictual damages these can be aggravated by any further contumelious or injurious conduct by or on behalf of the defendant at the trial itself but only if such conduct is a continuation of or is directly

connected with the contumelious or injurious conduct involved in the actual breach of promise, and is not an entirely separate and distinct *injuria*.

In an action for damages for breach of promise the evidence showed that the plaintiff, while domiciled in the State of New York, United States of America, was divorced at Reno in the State of Nevada. While residing in New York she met the defendant who was domiciled in South Africa. The defendant's proposal of marriage was accepted and it was arranged that the plaintiff would come to South Africa where the parties would be married. The plaintiff gave up her flat, sold her motor car, certain of her furniture - the rest being stored - and gave up her employment. When she arrived in Cape Town she was met by the defendant, the promise of marriage being repeated. When the parties arrived in Johannesburg, where the defendant resided, the defendant refused to marry the plaintiff. In his plea the defendant did not justify his refusal to marry but pleaded two special defences: *(a)* that, as the plaintiff and her husband were divorced in a State in which they were not domiciled, the divorce could not be recognised and it was legally ineffective: consequently at the time of the contract to marry the plaintiff was still married and accordingly the promise was void as being *contra bonos mores; (b)* that the law of the State of New York had to be applied and, according to the plaintiff in her reply to further particulars,

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damages could not be recovered in the New York Courts for the breach of the contract. The Court found that the plaintiff had discharged the *onus* of proving the contract to marry.

Held; as the parties had agreed to get married in South Africa, that the *lex loci solutionis* was that of South Africa.

Held, further, as the Reno divorce was recognised as effective by the law of the State of New York, that the plaintiff and her husband had therefore to be regarded as having been effectively divorced: accordingly the contract to marry was valid.

Held, therefore, that both defences failed.

Held, further, that the plaintiff was entitled to such contractual damages as had been proved and delictual damages in the sum of £500.

Case Information

Action for damages for breach of promise. Facts not material to this report have been omitted.

H. Schwarz, for the plaintiff.

E. Morris, for the defendant.

Cur. adv. vult.

Postea (June 26th).

Judgment

TROLLIP, J.: This is an action for damages for breach of promise. The plaintiff alleges that

on or about the 16th October, 1959, in New York, the parties agreed verbally to marry each other and that (by amendment granted at the opening of the trial) the agreement was confirmed or alternatively was concluded by the parties in Cape Town on or about the 12th February, 1960; and that in or about the first part of March, 1960, and in Johannesburg, the defendant repudiated that agreement by refusing to marry the plaintiff. The plaintiff claimed originally £5,600 as damages which were increased by amendment to £7,185 at the commencement of the trial.

The first and main defence to the claim is a denial of the agreement and I turn immediately to the consideration of that, the major issue in this case.

I start by giving a brief description of the main actors in this unhappy drama which has culminated in such bitter and protracted litigation in this Court.

The plaintiff was born in Berlin on the 25th August, 1917. Her father died in 1933, her sister in 1934, and her mother was killed during the last war. She was, therefore, left with no relatives except some cousins whose whereabouts she was not aware of. She appears to have received a good education in Germany and was sent to Switzerland to 'university' to learn such subjects as art, dressmaking, etc. This university was probably some kind of finishing school. In 1938, while she was in Switzerland, she met one Guggenheim. In 1939, at the age of 22 years, she emigrated to the United States and settled in New York. Guggenheim visited the U.S.A. in 1939, and eventually in 1940, he too decided to settle in New York where he met the plaintiff again. They were married in New York in February, 1942, and thereafter they continued to reside in New York as their permanent home. This marriage was obviously not a success because on the 14th September, 1943, she divorced him at Reno in the State of Nevada on the ground (according to the order of the Court) of 'extreme cruelty of a mental

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nature' by him towards her. She received no alimony from him.

Thereafter, she continued to live in New York. In the meantime she had gone to night school in New York to improve her English, her original language being German, and she attained a fair fluency therein. She also apparently learnt book-keeping and secretarial work, and from time to time she took work of various kinds in New York.

In October, 1959, she was living on her own in a modest but, judging by the photographs handed in during the trial, a neat and well-kept apartment at Forest Hills, New York, which was furnished with her own furniture, ornaments and pictures, most of which she had received from her parents in consequence of which they had much sentimental value for her as being, as she described it, a reminder of good times in the past. By October, 1959, she had been in New York for some 20 years. It was undoubtedly her permanent home. She had just taken on a new job as a model and book-keeper in an establishment selling furs at a salary of $85 per week. On this salary she was able to keep and run a fairly large motor car (a Chevrolet convertible) and generally maintain herself comfortably.

She had no relatives in New York but she had friends, of whom the Kingsleys, also living in New York, were apparently the closest.

By now too, she was 43 years old but she obviously carried her age well and must have appeared much younger and more personable than her true age would otherwise suggest. I am disposed to believe her when she says that she had received a few offers of marriage since her divorce in 1943 and that she refused them. Her refusal was not because she was against re-marrying as a result of her previous experience; on the contrary, she was, according to her evidence, ready to re-marry if she met the right person; and probably, with time slipping beneath her feet, she was, at 43 years of age, becoming anxious about whether she would ever re-marry.

The defendant is a stockbroker carrying on business in Johannesburg. He too is of German extraction. His parents are still alive and live in Chicago but his permanent home is in Johannesburg. His financial position was not canvassed in evidence but it was manifest from all the evidence that he is a man of some affluence. In October, 1959, he was about 45 years old. So far marriage had eluded him. His parents, especially his aged mother, and his relatives were concerned at his not having married. They were urging him to do something about it; to 'give himself a chance' to find the right marriage partner. He had himself become tired of the loneliness of bachelorhood and this loneliness had recently become accentuated by an illness caused by appendicitis in 1957. He was clearly ready to marry.

The defendant had first met the plaintiff on a visit to New York in 1954. They had then spent an evening together and she had also driven him out to see his relations, Mr. and Mrs. Steeg, at Connecticut. She had then met the Steegs. I do not think that there can be any doubt that on the occasion of this visit by the defendant to New York he became impressed and attracted by the plaintiff. As the defendant himself stated in his letter of the 26th November, 1959 (exh. 'M'), they both had more or less the same background and the same outlook on life. Consequently, in October, 1959, when he was again in New

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York on a short visit, he took the initiative in telephoning her shortly after his arrival.

The date of his arrival in New York must have been just prior to Saturday, the 10th October, 1959, because he says that he was in New York for some 10 to 12 days and it can be inferred from his letter of the 26th October, 1959 (exh. 'C') that he departed from New York about the 23rd October, 1959. This confirms the plaintiff's evidence that he telephoned her on the Saturday before the Jewish Day of Atonement. That was Monday the 12th October, 1959, so the Saturday must have been the 10th October, 1959.

The incidents that occurred during the defendant's short visit to New York constitute the origin and basis of this litigation. There is a dire conflict between their respective versions of almost every significant incident that occurred during that visit, and that conflict will have to be decided by reference to their credibility as witnesses and on the balance of probabilities in the light of what happened not only during but after that critical period.

On the main incidents that occurred during the defendant's visit, the plaintiff's version in broad outline is that the defendant telephoned her on Saturday, the 10th October, 1959, in consequence of which they met and dined together, not at the defendant's hotel which was the Barbizon Plaza, but at the Plaza Hotel, on Monday evening, October the 12th, 1959. They met every day thereafter. On the Wednesday, the 14th October, 1959, he proposed marriage toher. In doing so he explained that he felt lonely and he needed someone to look

after him; this loneliness and need had become more apparent as a result of his recent illness; that he had had a wide experience of women, including some unfortunate affairs, so he was in a good position to adjudge the right person for him to marry; and he had decided that it was she. He said that they had the same background and had much in common, including the same origin, and they spoke the same mother tongue.

The plaintiff says that she hesitated and explained that getting married was a big step and that before accepting she wanted to get to know him better but that she would consider the proposal. The proposal was repeated when they met again.

The defendant suggested that they should spend the night together to ascertain whether they were sexually compatible. She agreed. She says she was attracted by him physically and wanted to get to know him better. They spent Friday night, the 16th October, 1959, together and were intimate. And it was on that Friday night that she accepted his proposal. The following day he went to the American Express Company, presumably to ascertain what travel arrangements could be made for her to come to South Africa, but this is not clear from the evidence.

He first wanted to get married in New York but that fell away because he was not sure what the effect of the New York law would be on the proprietary rights of the marriage. The question was also mooted whether or not she should accompany him when he left New York for the United Kingdom and the Continent, where he had business to do, and their getting married when they arrived back in South Africa; but that did not suit him either for various reasons. Eventually

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it was agreed that she should follow him to South Africa after he had arrived back in this country, where they would then get married; and that he would make provision in South Africa for her to be provided with the necessary ticket for her sea passage. The idea was that she should follow him as soon as such arrangements could be made and that if possible she should arrive in South Africa before the end of the year so that they could spend the advent of the New Year together. According to her evidence the defendant felt and said that if she did follow him to South Africa that would be proof of her love for him.

They saw much of one another in New York. They were happy together and were intimate on several occasions. Once they went to see the Steegs. She says that she was referred to by the defendant in the presence of the Steegs as the girl he was going to marry.

He spent the last night of his visit in New York in her apartment because it was conveniently close to the airport. They were intimate again. The next morning she drove him to the airport. His plane, it appears, was delayed for about four hours which they spent together. While waiting, he telephoned his parents and called her to the booth, saying to his father that he wanted him to speak to the girl he was going to marry. She tried to speak to the father but he appeared to be hard of hearing and he could not hear her. The defendant departed for London on about the 23rd October, 1959.

The defendant denies the plaintiff's version in its main features. His version is not entirely consistent and is full of discrepancies and will have to be examined in some detail presently to determine his credibility. It is sufficient at this stage to say that he admits that he had

telephoned the plaintiff within a day or two after his arrival in New York, as a result of which they met and dined; and that thereafter they met on about eight occasions during his ten to twelve day visit.

He admitted that they were intimate on at least two occasions and that he became fond of her but he stated that this was mere infatuation and not love. He denies in particular that he proposed to her and that there was any agreement between them to marry. He says that he promised to pay her passage out to South Africa which she gladly accepted as she was keen to see the country. The object of his promise was to get to know her better in South Africa and if he did and if she then appeared to be the right marriage partner for him, then perhaps he might have proposed marriage to her. According to his evidence, that was as far as he had committed himself whilst in New York.

After the defendant left New York he went to the United Kingdom and the Continent and arrived back in South Africa about the 7th November, 1959 (see his letter of that date, exh. 'F').

After his departure the parties corresponded with each other frequently. All this correspondence was adduced in evidence and because it took place shortly after the New York visit and well before any prospect of litigation developed, it understandably forms an important feature of the case. It will have to be referred to in detail presently. It is sufficient to say here, in this general recital of the facts, that the letters of both parties were couched in endearing terms and show that despite their short time together in New York, the relationship

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which had developed between them was close and affectionate.

About the 27th November, 1959 (see exh. 'L'), defendant arranged through shipping agents in South Africa for a single ticket (see exh. 'RR') to be furnished to the plaintiff for her to travel by ship from New York to Cape Town. She then booked to leave New York about the 22nd January, 1960. Some time just prior to the 13th December, 1959, she applied to the South African consulate in New Ork for a visitor's visa to enter and visit South Africa which she obtained in due course. She gave up her employment and finally left New York on the scheduled date.

She took certain of her personal effects with her; but before leaving she placed other belongings in storage and sold most of her furniture and her motor car. The remaining assets she gave away. She also gave up her apartment.

She arrived in Cape Town on the 10th February, 1960, where she completed immigration forms, including the passengers' declaration form (exh. 'TTT'). She was met by the defendant who took her to the Clifton Hotel where he had booked a room.

He testified that in booking accommodation he had requested the hotel to book two separate rooms for them but when he arrived two days before she arrived, he found that only one room had been booked. He said that there was then nothing he could do about it and they stayed together in this room until they left for Johannesburg. They were intimate on the first night they spent together in Cape Town.

There is again a wide divergence between their versions as to what happened in Cape Town. It is common cause that they quarrelled but the causes for such quarrels are disputed. She had obviously been depressed by the monotony of the sea trip, and the change of climate and the heat in Cape Town obviously affected her. He testified that he noticed immediately he met her that she had changed appreciably from the person that he knew in New York. Probably their re-union in South Africa did not come up to his eager expectations as revealed by his letters. At any rate it is obvious that their re-union in South Africa did not get off to a good start and I think that from this time onwards his love for her probably began to 'sicken and decay'.

On the way to Johannesburg they stayed together in the same room in hotels at various stopping places such as the Wilderness, Beaufort West, and so on.

They arrived in Johannesburg on the 20th February, 1960, and went to his flat. They used the same bedroom for the first night but the defendant thereafter moved out and slept in the lounge.

In Johannesburg at first they often went out together to dinners, theatres, and other entertainments. They were intimate again on several occasions. But their relationship progressively deteriorated. Again there is a sorry conflict about what precisely occurred between them but it is clear that the defendant tried to get her to move out of the flat and even to leave South Africa which she refused to do.

About the 14th March, 1960 (see exh. 'DD') he arranged with the American Express Company in Johannesburg to hold available for her a one-way open-dated air ticket to New York *via* Berlin which she

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could take up at any time until the offer was withdrawn. She, however, did not want to leave him. She explained that she thought the deteriorated relationship was due to his business worries which he was admittedly experiencing at this time, and ordinary lovers' quarrels, exacerbated by his long-standing celibacy and she hoped that together they could overcome these difficulties and get married as originally planned.

On the 25th March, 1960, they saw his attorney, Mr. Dudley Kark, in an effort to settle their differences amicably on a basis which included her leaving South Africa. She says that she agreed to attend this conference because she thought Mr. Kark was some kind of a marriage counsellor who might be able to effect a reconciliation between them. This effort at a settlement failed because she refused to leave South Africa.

By now, it was obvious to her that they were completely irreconcilable; and it was clear to her that the defendant had no intention of marrying her. Moreover, both were intractable in their respective attitudes towards the dispute. Consequently, the plaintiff consulted her own attorneys and then moved out of his flat to a hotel in Johannesburg.

Correspondence then passed between the attorneys which was adduced in evidence and ultimately on the 8th April, 1960, the plaintiff issued summons for damages for breach of promise.

The defendant on several occasions telephoned the plaintiff and in the course of such

conversations he tried to get her to withdraw the action but without success. On one occasion, on the 23rd October, 1960, he also met her at the Post Office where he also tried to persuade her to do that but again without success. These conversations were canvassed by the plaintiff at some length in the presentation of her case to Court, but I do not think, for reasons I shall give later, that they take the case much further, except that they do have a slight bearing on defendant's credibility, as will be seen presently.

That completes in broad outline the background to the present dispute. I now turn to the consideration of the credibility of the parties as witnesses.

[The learned Judge analysed the evidence and proceeded.]

Consequently, it seems to me that on the probabilities canvassed above, her version of a promise to marry is correct.

It was, however, contended on several grounds that the other probabilities were against any such contract to marry having been concluded in New York.

[The learned Judge analysed the evidence and proceeded.]

It was common cause that the *onus* of proving the contract to marry alleged in the declaration to have been concluded in New York on the 16th October, 1959, could be discharged on the balance of probabilities. Having rejected the defendant's version, and having found the plaintiff to be a credible witness and that her account of what happened is supported by the probabilities, the correspondence, and Mrs. Gillward's evidence, I find that she has discharged that *onus* with the requisite degree of proof.

Before turning to consider the validity and enforceability of that

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contract to marry, I want at this stage to dispose of one further matter relating to the facts.

The final addresses by counsel were concluded on Tuesday, the 11th April, 1961, and judgment was reserved. On the 13th April, 1960, an application was made by petition by plaintiff for the re-opening of her case to adduce the evidence of one, Joy Wainwright, of Ndola, Northern Rhodesia. It was alleged that she could say that she had met the defendant in Eloff Street one day, that she had congratulated him on his forthcoming marriage, that he had accepted her congratulations, and that from what he had said she gathered that the girl would be coming from America in about three weeks' time and that he then would get married. The petition stated that the plaintiff only became aware of the availability of such evidence on the 11th April, 1961, through counsel's sister who was acquainted with Joy Wainwright and to whom the latter had conveyed the information. The application was opposed by the defendant. He stated in his replying affidavit that Wainwright was a casual acquaintance of his, that she knew from the publicity that the trial had received in the Press that the trial was taking place and who the plaintiff's attorneys were; that during the case she had telephoned the defendant, saying in an offensive manner,

'I see you are in lots of trouble. This place must be getting too hot for you. You will have to get out like I have to'

The defendant denied that he had ever made any such admissions to Wainwright. After hearing argument I refused the application with costs stating that I would give my reasons when I have judgment in the action. In view of the conclusion to which I have come on the facts in the action, my reasons for dismissing the application are now probably only academic, but in case that is not so, I here state them briefly.

The petition does not inform the Court how Wainwright came to inform counsel's sister of her testimony or why she had only revealed her testimony at such a late stage of the action. The trial had commenced on the 28th March, 1961, and had lasted until the 11th April, 1961. During that time it had received extensive publicity in newspapers, both local and in the Federation, and Wainwright must have been aware of the trial and must have known that her testimony might be of importance. Indeed, according to the defendant's replying affidavit, she was in Johannesburg at some stage during the trial. Yet, she only revealed her testimony from Ndola when the trial was about to be completed. I think that in applications of this kind it behoves the applicant to place full information before the Court as to how the proposed witness came to tender his or her evidence, why he or she is doing so, why it was not tendered during the course of the trial and what the circumstances are in which he or she comes to offer himself or herself as a witness. All this information should be revealed to the Court in addition to the information as to the nature of the evidence that can be given. The purpose of such information is to enable the Court to assess not only the materiality but also the weight of the evidence. In *Oosthuizen v Stanley*, 1938 AD 322 at p. 333, TINDALL, J.A., said that it is necessary, in such a case as the present, for the trial Court to be satisfied that the proposed evidence is material and

'likely to be weighty'. If the credibility of the witness will be disputed (as it would have been in the present case) the Court, in determining whether the evidence is 'likely to be weighty' must be informed of the above circumstances in order to satisfy itself that the witness is likely to be impartial and to assist the Court in arriving at the truth of the matter. In the present case, in the absence of information regarding the above-mentioned circumstances, I was unable to form any view of the likelihood of Wainwright's partiality or impartiality, and her usefulness therefore as a witness. On the contrary, it appeared from the defendant's replying affidavit that she might well be motivated by spite or vindictiveness against the defendant. Moreover, the absence of information regarding those circumstances precluded me from assessing her probable credibility as a witness, which was important in view of the fact that her evidence was going to be disputed by the defendant. I therefore was unable to find that her evidence was 'likely to be weighty' on the information in the application.

Moreover, I was not satisfied about the materiality of her evidence. It did not bear directly on the crucial point in the case, that is, whether or not there was a firm contract to marry. It was alleged that she could merely testify to an admission made by the defendant in a street in Johannesburg during the course of a casual conversation as between mere acquaintances some 15 months ago that related to a marriage of the parties. That in itself weakened the value of her testimony but when are added to that the facts that her version was disputed and her impartiality was not established, the materiality of her testimony was negatived. Moreover, no affidavit by Wainwright herself as to what the defendant was supposed to have said in the course of that casual conversation was or could be placed before me; the only information of the proposed testimony was that of plaintiff's attorney of what Wainwright

informed him over the telephone. In order to enable me to determine the materiality of her evidence it was necessary for me to be informed precisely of what Wainwright had said to the defendant and what the defendant was alleged to have said because of the conflict between the plaintiff's and defendant's respective versions. It is possible that Wainwright's actual testimony might have been equally consistent with either version and would therefore not have taken the matter any further. In the absence of such information I did not think that the plaintiff had proved the materiality of Wainwright's evidence. For those reasons I refused the application with costs.

It is clear that the defendant refused to marry the plaintiff. No justification for that refusal was put forward. Consequently, his breach of the contract has also been proved.

He, however, raised two special defences to the plaintiff's claim:

(*a*) That the plaintiff and Guggenheim were not domiciled within the State of Nevada at the time the divorce was granted; that as far as this Court was concerned that divorce could therefore not be recognised and was legally ineffective; that the contract to marry was consequently concluded at a time when the plaintiff was still married and it was in the premises void as being

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contra bonos mores (see Hahlo *Law of Husband and Wife*, p. 18, where the authorities are quoted).

(*b*) That the law of the State of New York had to be applied by this Court; that the plaintiff had admitted that by that law 'in October, 1959, and thereafter, the plaintiff could not have recovered damages in a New York Court for the breach of the said contract' (see the plaintiff's and better particulars dated the 9th November, 1960); and that this Court should therefore reject the plaintiff's claim for damages.

Those defences raise interesting points of private international law involving capacity to contract, status, public policy, and procedural law and the proper law of contract, all of which are fruitful of controversy amongst the authorities and would no doubt delight the experts to explore; but for the practical solution of the problem between the present litigants I think that the approach initially should be whether the proper law of the contract was and is the law of New York or our law. That approach does narrow down the enquiry and I think, therefore, that I should state my reasons for adopting it. They are as follows.

In (*a*) the defence of the contract being *contra bonos mores* raises the question of the essential validity (as opposed to the formal validity) of the contract. It does not involve the legal capacity of the plaintiff to enter into contracts generally or into this contract specifically. It, in fact, postulates that both parties were competent to contract but maintains that this particular contract was invalid because it was in the circumstances *contra bonos mores*. On that view, the special, and as yet uncertain, principles in the conflict of laws relating to legal capacity to contract, or more specifically to contract to marry, rising out of minority, marriage, etc. (see, for example, Dicey *Conflict of Laws*, 7th ed. pp. 769, 770) would therefore be irrelevant and unnecessary to consider.

In (*b*) the defence of the non-recovery of damages raises the question of the effect of the

contract, and the rights and obligations of the parties under it.

In ordinary contracts both questions of validity and effect are generally dealt with in English and our law by reference to the proper law of the contract (Halsbury *Laws of England* 3rd ed. vol. 7, para. 137, p. 72; *Dicey*, 7th ed. pp. 779, 780, 796; and I think that that is the effect in modern terminology of *Standard Bank of South Africa v Efroiken & Newman*, 1924 AD 171 at pp. 185 - 188; *Berman v Winrow*, 1943 T.P.D. 213 at p. 216). There is no reason why that should not also apply to contracts to marry.

Initially, therefore, I must ascertain what the proper law of the present contract was and is. If that law is our law then *cadit quaestio*. If, however, the conclusion is that it is the law of New York, then further questions might arise. For example, in regard to (*a*), whether this Court should, nevertheless, enforce a contract regarded as valid by the New York law but as *contra bonos mores* by our law (see *Halsbury, ibid*, para. 145 p. 78; Wessels on *Contract*, 2nd ed.; *Berman's* case at pp. 218 - 221); and in regard to (*b*), whether the New York law is purely procedural and limited in its application to suits in the New

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York Courts. Those further questions were canvassed in argument before me but in view of my conclusion, presently to be announced, that our law applies, those interesting questions need not be considered.

According to English and our law the proper law of the contract is the law of the country which the parties have agreed or intended or are presumed to have intended shall govern it; and in the case of a contract concluded in one country to be performed in another, then in the absence of an express term or any other indication to the contrary, it can be presumed that the proper law is the law of the latter (*lex loci solutionis)*. See *Halsbury, ibid*, paras. 137, 138, 139, pp. 72 - 4; Dicey pp. 717, 724, 731, 738 - 9; *Stewart v Ryall*, 5 S.C. 146 at pp. 154 - 156; *Hulscher v Voorschotkas Voor Zuid Afrika*, 1908 T.S. 542 at p. 546; *Standard Bank's* case, *supra; Shacklock v Shacklock*, 1948 (2) SA 40 (W) at p. 51, and *Berman's* case at pp. 216 - 7.

My view in the present case is that on the proved facts the proper law of the contract to marry was the law of South Africa. There was no express agreement by the parties that our law should govern their contract but it can either be inferred or presumed that they so intended. The details of what passed between them when the contract was entered into have been fully set out above. From them it is clear that it was agreed that they should get married in South Africa, so the *lex loci solutionis* was our law and the above presumption therefore operates. But apart from that there are indications that the parties intended that our law should govern their contract. Defendant was domiciled in South Africa. His business was located here too. When he entered into the contract he was merely on a short visit to New York and intended returning to South Africa. They agreed that she should follow him here as soon as she could. It was intended that such a move was to be permanent and that her home was to be in future in South Africa. One of the reasons why they agreed that the marriage should take place here was that the defendant did not know what the effect of the New York law would be on his marriage. The irresistible inference from all those facts is that both parties intended that the law of South Africa, where they were to re-join one another as soon as possible and arrange to get married, should govern their contract. They could not

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possibly have intended that the New York law should apply to their relationship. *Hansen v Dixon*, 23 T.L.R. 56, is strong support for the above conclusion.

Applying our law, therefore, I have to determine whether the defence set out in *(a)* above is good. In South African law, *Le Mesurier's* case, 1895 A.C. 517, has generally been followed, in consequence of which our Courts will not recognise a foreign decree of divorce unless the parties were domiciled within the jurisdiction of the Court granting the decree when the action commenced. (*Hahlo* at p. 459). That is also English law. The latter has, however, admitted an exception: If the Courts of the country wherein the parties were domiciled at the date of the foreign decree of divorce, recognise the decree as valid and effective, it will also be so recognised by the English Courts. This was laid down in *Armitage v Attorney General*, 1906 P. 135. That was a decision by a single Judge only, SIR GORRELL

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BARNES, P. But its correctness seems to have been generally accepted in England (see, for example, *Dicey* p. 314 and the authorities there quoted; *Halsbury, ibid* p. 114 para. 202; Cheshire *Private International Law*, 5th ed. pp. 83, 374 - 5). In regard to *Armitage's* case, *Dicey* says (p. 314),

'This exception is a logical outcome of the status theory of divorce. Its justification is that if the status of the parties is changed *or recognised as having been changed* in the country of their domicile, the change of status is entitled to recognition in England.'

(the italics are *Dicey's*)

At p. 375 *Cheshire* says:

'All questions of status are subject to the *lex domicilii*, and here was a decree, recognised by that *lex*, which patently affected the status of husband and wife.'

And at p. 83:

'Moreover, within the strict limits to which it is confined, it will no doubt remain unchallenged, for it is obviously of paramount importance that this particular aspect of marital status should be subject as far as possible to a common determining factor. The more universal the recognition granted to the view of the *lex domicilii*, the less danger there is that a person will rank as married in one country but unmarried in another.'

It has not yet been decided by any South African Court that that exception is or is not part of our law. Mr. *Morris* contended that as it conflicts with the principle in *Le Mesurier's* case, which our Courts have hitherto faithfully followed, it should not be accepted as being good in our law.

However, in our law too the principle is that if the question of a person's rights and duties at a particular time depend upon his status, which includes whether he was then married or unmarried, that question is to be generally resolved by reference to the law of his then domicile. A clear exposition of that principle is to be found in the old case of *In re*

Sandenbergh, (1843) 2 M. 353 at pp. 355, 356. At p. 356 this appears:

'It is true that when the Courts of this Colony are called on to decide causes brought before them involving questions as to whether any person does or does not possess any particular personal status which is recognised in the law of the Colony as a legal status, - e.g., whether AB is a minor or major, married or unmarried, parent or child, legitimate or illegitimate, sane or insane, - they will, acting according to the undoubted law of the Colony, in very many cases decide those questions according to what is the law of the country in which AB was domiciled at the time the events occurred which created, or out of which arose, the alleged status of AB, although the law of that country be, on that subject, in conflict with the law of this Colony.'

See too *Seedat's Executors v The Master*, 1917 AD 302 at pp. 309 - 314; *Mann v Mann*, 1918 CPD 89 at p. 93; and *Hulscher's* case at p. 545, in which particular aspects of the same general principles were dealt with.

I think that it is consistent with that general principle that if a person is regarded by the law of his then domicile as divorced, he would be regarded in our law as divorced. The decision in *Armitage's* case is therefore quite consistent with our law. That is also the view of Professor Hahlo at p. 459. And for that reason and those of expediency and principle, set out in the above quoted passages from Dicey and Cheshire, I think that *Armitage's* case should be adopted and followed by our Courts. I therefore apply it in the present case.

It was common cause that the Reno decree of divorce was recognised as effective by the law of the State of New York where

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the Guggenheims were domiciled at the time when it was granted. That being so, our law, in my view, must also regard the plaintiff as having been effectively divorced on the 14th September, 1943, and the contract to marry concluded between the plaintiff and the defendant on the 16th October, 1959, as valid.

Even if I am wrong in my above approach to the problem that it is the proper law of the contract that must be regarded, and that the correct approach is simply and directly to say that according to our law, as the *lex fori*, the validity of the contract to marry is merely dependent on either

(i) the plaintiff's capacity to contract, or

(ii) her status at the time it was entered into,

I think that, although the path I must then tread is much less clearly defined, the result would be the same. In that event, in (i) our law would then determine her capacity according to either the law where the contract was concluded (see *Greeff v Verreaux* (1829) 1 M. 151, a minor contracting to marry; *Hulscher's* case, *supra*, a married woman's contract of loan;) or the law of her then domicile (see *Dicey* p. 770; *Halsbury* paras. 132, 133). The citation from *Dicey* (p. 770) is worth quoting in full:

'The capacity of a person to promise marriage should, it is submitted, be governed by

the law of his or her domicile, no matter where the promise is made. If a man domiciled in England makes a promise of marriage in France (no matter whether it is made to an Englishwoman or a Frenchwoman, and no matter whether the parties intend to set up home in England or in France), his capacity to promise marriage should certainly be governed by English law.'

In either case the law applicable would be that of the State of New York, according to which the plaintiff would have been capable of contracting or promising to marry the defendant as it recognised her divorce as valid, and there is no suggestion or evidence of any other incapacity according to that law to contract to marry.

In (ii) our law would also determine her status according to the law of her then domicile (see the cases of *In re Sandenbergh*, etc. quoted above) with the same result.

Consequently, whatever approach is adopted the same conclusion is reached, that the contract to marry is, according to our law, valid.

In regard to the defence *(b)*, the non-recovery of damages, as I have held that the proper law of the contract was and is our law and not the New York law, this defence must fail. Here again, *Hansen v Dixon* is directly in point.

Consequently, the plaintiff is entitled to recover such damages as she has been able to prove and as the law allows her to recover.

The plaintiff claims general damages and particular items of actual and prospective loss and expenditure which she alleges were and will be caused by the defendant's breach of promise. Included under the latter items were the losses she said she had sustained in giving up her apartment and disposing of many of her assets. In regard to these items, it was contended by Mr. *Schwarz* that if it was held that she had failed to prove the actual loss that she had suffered, the Court could nevertheless take into account, in fixing the amount of general damages, that she had sustained some unascertained but appreciable loss in those respects. Furthermore, Mr. *Schwarz* contended that because

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of certain imputations against the plaintiff's character made by the defendant or on behalf of the defendant during the course of the trial, the *injuria* involved in the breach of promise was aggravated and therefore the general damages should accordingly be substantially increased.

In view of the amount and the nature of the claims for damages and the above-mentioned contentions, it is necessary to give close attention to the rules of our law governing the award of damages for breach of promise.

In English law, the breach of promise is regarded as being 'attended with some of the special consequences of a personal wrong' (*Finley v Chirney* (1888) 20 Q.B.D. 494 at p. 504), in consequence of which the plaintiff is presumed to have suffered damage as a result of the breach of promise itself. In nature and effect the damages are like those in libel actions. Mayne on *Damages*, 11th ed. p. 520, says that actions for breach of promise

'stand on a par with actions for libel as to the range of topics in which counsel are

allowed to indulge'

in regard to damages. The ordinary damages (i.e. other than any specific monetary loss which must be specially claimed) are not measured by any fixed standard but are almost entirely in the discretion of the jury (*Halsbury*, 3rd ed. vol. 19 p. 773 para. 1235). Like libel too (see Spencer Bower on *Actionable Defamation*, 2nd ed. p. 156) the damages which can be awarded are not necessarily compensatory but may also be of 'a vindictive and uncertain kind . . . to punish the defendant in an exemplary manner' (*Finlay's* case *supra; Quirk v Thomas*, 1916 (1) K.B. 516 at p. 338). Consequently, it follows logically that 'the conduct of the parties may properly be considered in aggravation . . . of damages' (*Halsbury, ibid* para. 1236) and I think that that conduct would most probably include the conduct of the defendant at the trial itself as in libel actions. In that regard *Spencer Bower* at pp. 166 - 7 says that any abortive attempt by the defendant at the trial of a defamation action to prove in mitigation of damages that the plaintiff has a bad character or reputation, may be taken by the jury into consideration as a ground for aggravating the damages.

In pure Roman-Dutch Law the action for damages for breach of promise 'remained rather undeveloped' (van den Heever on *Breach of Promise* p. 37) because the usual remedy was an order for specific performance of the marriage, but where it did lie it was to recover the plaintiff's *id quod interest* (i.e. the actual and prospective loss) as in ordinary actions for damages for breach of contract (*van den Heever, ibid; McCalman v Thorne*, 1934 NPD 86 at pp. 90, 91, and counsel's argument at pp. 87 - 8, where the authorities are canvassed; *Davel v Swanepoel*, 1954 (1) SA 383 (AD) at p. 387G - H). Mere breach of promise itself did not give rise to an *injuria* which would have entitled the plaintiff to include a claim for damages for personal wrong in her action; if the breach, however, was committed in circumstances that also constituted *injuria*, then doubtless she could have included such a claim as a separate cause of action (cf. *Jockie v Meyer*, 1945 AD 354 at pp. 367 - 8).

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Melius de Villiers on *Injuries* at p. 26 says:

'A breach of contract is not, in its nature, an injury. The duty of fulfilling one's contracts is one that does not arise from the respect due to the other parties thereto . . So also, a breach of promise of marriage is not necessarily an injury. The favourable inclination of a man towards a woman may turn to aversion from numerous other causes than those which reflect upon her character, and there may be cases where a breach of promise of marriage may be occasioned by reasons which are strictly honourable. It might, however, be an injury when a person wilfully enters into an engagement to marry another which he does not intend keeping with the object of exposing that other to ridicule, or when he justifies his action by giving reasons for his conduct which are slanderous and untruthful.'

It will therefore be seen that fundamentally Roman-Dutch Law differed from English law; but the early decisions of our Courts seem to have followed English law implicitly without any reference to or enquiry into Roman-Dutch Law (see, for example, *Triegaardt v van der Vyver*, 1910 E.D.L. 44; *Radloff v Ralph*, 1917 E.D.L. 86). In 1934, for the first time a full argument was addressed to a Court, the NPD (HATHORN, J. and CARLISLE, A.J.) in *McCalman's* case, *supra*, on the Roman-Dutch Law, and the difference between it and

English law; and the Court was urged to follow the former and accordingly to award damages only for pecuniary loss and none for *injuria*, as the *injuria* had not been specifically pleaded and the damages therefor claimed as a separate cause of action. It is a pity that the Court did not take the opportunity of establishing the action firmly on a Roman-Dutch Law basis. It held in effect that under the influence of English law the action had developed in our law into a unified or composite one comprising both contractual and delictual elements. At p. 91 it was said:

'The result was logical and practical. For the heads of damage stated in *Radloff's* case can be traced to two sources: first, the ordinary measure for breach of contract, which comprises *(a)* any monetary loss sustained by the plaintiff, *(b)* what may be called the prospective loss, where for instance the defendant is in a good financial position and through his or her breach of contract has deprived the plaintiff of the opportunity of any participation therein; and second, the ordinary measure for *injuria* arising out of the *contumelia* suffered by the plaintiff, for in civilised society in South Africa the wrongful putting an end to of a betrothal contract by one party is, in ordinary cases, regarded as an impairment of the personal dignity or reputation of the other party and is thus an *injuria*. Here regard will be had to the wounded feelings of the plaintiff and the social position of the parties.'

It was further held (p. 92) that there was no need, as a matter of practice and pleading, to separate the delictual from the contractual damages claimed in the action. Damages for both could be claimed in one lump sum.

McCalman's case has been followed in Natal (*Mymenah v Cassim Rahim*, 1943 NPD 229; *Combrink v Koch*, 1946 NPD 512) and it probably set the pattern for breach of promise cases in South Africa. In consequence, the delictual damages and the prospective loss in the contractual damages are now usually claimed in a lump sum as general damages, and any monetary loss is claimed and pleaded as special contractual damage. That was done in this case and no attempt was made in the pleadings or at the hearing to separate the delictual from the contractual general damages. That was probably due to *McCalman's* case.

Now *McCalman's* case appears to hold that the breach of contract itself gives rise not only to the contractual damages but also to the

delictual damages; in other words, that the mere breach of contract *ipso jure* constitutes an *injuria*. If it does mean that then, with great respect, I disagree with that part of it. I think that the plaintiff, in order to recover delictual damages, must prove not merely that the breach was wrongful but also that it was injurious or contumelious. Otherwise there would be an unnecessary subversion of the wholesome principle of Roman-Dutch Law set out in de Villiers on *Injuries*, quoted above. I think that that is also the effect of the view expressed so well and forcibly by the late Mr. JUSTICE VAN DEN HEEVER at pp. 30 - 31 in his *Breach of Promise. Inter alia* he said:

'It is submitted that those decisions of our Courts which seem to imply that breach of promise must necessarily contain a delictual element are unconsciously based on

English principles and have no support in Roman-Dutch Law. Unless a person who breaks off an engagement commits an actionable wrong 'the feelings of the plaintiff and the moral suffering she has undergone' are irrelevant to the question of damages . . . The notion that a woman necessarily loses social position or 'face' when an engagement is broken off in noninjurious circumstances seems to me to reflect the morals of a by-gone age when espousals constituted an inchoate marriage and repudiation was equivalent to malicious desertion.'

Consequently, contrary to what was held in *McCalman's* case, I think that it is generally advisable to separate in the composite action the contractual and the delictual elements and the damages claimed for each. That would conduce to clarity of thinking in assessing the general damages because each of the elements is governed by its own special principles that might be confused if not separately considered. For example, damages might be awardable for the contractual but not for the delictual remedy or *vice versa*, as appears from what I have just said above; the former has to be proved with that degree of precision required in breach of contract whilst the latter is in the Court's discretion; the latter is, whereas the former is not, subject to aggravation or mitigation according to the contumely of the defendant's conduct; and so on. Consequently, unless the two elements are kept well separated there is a risk of confusion with consequent injustice, as, for example, of mitigating the plaintiff's prospective loss because the defendant's conduct has not been contumelious, or of claiming aggravation of damages for the defendant's subsequent conduct when there is no delictual liability at all. I am therefore constrained to disagree with *McCalman's* case in that respect too, and to say that in my view, although the modern action for breach of promise is a composite one, combining both contractual and delictual elements, as a general rule these elements should be clearly separated in the pleadings and in the assessment of damages so as to avoid confusion.

These further points relating to damages are also relevant in the present case. In regard to contractual damages, both the prospective loss of the benefits of the marriage and the actual monetary loss or expenditure incurred or to be incurred can be awarded. The latter must either flow directly from the breach of promise or must be reasonably supposed to have been within the contemplation of the parties at the time the contract was entered into as a probable consequence of the breach. Therefore, expenditure reasonably incurred prior to the breach in contemplation of the promised marriage taking place and which is rendered useless by the breach can obviously be

recovered. Expenditure or loss incurred or to be incurred after the breach can also be awarded if the above requisites are present, but only if such damage is not covered by an award of prospective loss. A duplication of damages in this respect must be safe-guarded against (*van den Heever* at p. 38).

In regard to delictual damages, these can, I think, be aggravated by any further contumelious or injurious conduct by or on behalf of the defendant at the trial itself but only if such conduct is a continuation of or is directly connected with the contumelious or injurious conduct involved in the actual breach of promise, and is not an entirely separate and distinct *injuria* (cf. *Salzmann v Holmes*, 1914 AD 471 at pp. 481 - 2; *Black v Joseph*, 1931 AD 132 at

pp. 145, 146, 148 - 9).

Applying those principles I deal with the damages that are claimed by the plaintiff under the following headings:

(1) *Loss on sale of motor car*. The plaintiff purchased the motor car in 1954 for $2,381 and sold it in December, 1959, because of her departure to South Africa for $550 to the person who used to clean it for her. She claimed that when it was sold its value was $1,200 - $1,300. Apart from her evidence there was none to prove what its true value was in December, 1959. She admitted that she knew little or nothing about re-sale values of secondhand motor cars, and that it was a motor car dealer who had told her it was worth about $1,200. In exh. 'N' she said that she had 'looked around' and the best offer she could get was $400 - $600; and in exh. 'U' she admitted that in selling it to the private buyer for $550 she was selling it to the best advantage. There is, therefore, no evidence to prove that $550 was not a fair price for the motor car at the time it was sold. I therefore do not think that she has proved any loss under this heading.

(2) *Loss on disposal of her furniture*. She claims that it was worth approximately $4,000 and that it was disposed of for $742. The details are given in exh. 'SS' which she herself compiled. The values of the items are her own estimates but she admitted that she had no knowledge of the values of the items but that she had relied upon what others had told her at the time she was disposing of them. There was no other evidence adduced to prove this loss. I think that it is probable that she did sustain some loss but her own evidence in the circumstances is not sufficient to prove what the amount is and I can therefore not award her anything under this heading. This is not the kind of case in which the Court must estimate the *quantum* of damages as best it can on the evidence that has been adduced because here the plaintiff could and should have adduced better evidence to prove the *quantum* (see *Klopper v Mazoko*, 1930 T.P.D. 860; *Lazarus v Rand Steam Laundries*, 1952 (3) SA 49 (T) at p. 51; *Rangeland Ltd v Henderson*, 1955 (3) SA 134 (SR) at pp. 136 - 7; *Odendaalsrust Gold General Investments and Extensions Ltd v Naude, N.O.*, 1958 (1) SA 381 (T) at p. 344). According to the plaintiff's evidence, some dealers did see the furniture and make offers for some of it, and her friends, the

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Kingsleys, must have seen it often and actually received some of it by way of purchase and gift. It should have been possible to adduce some evidence from one or more of these persons as to the value of the items disposed of. The plaintiff did say that the taking of evidence on commission in New York was considered but decided against because of the cost. But having regard to the substantial amount of damages claimed under this heading, I do not think that the cost of the commission would have been disproportionate or unreasonable in relation to the issues involved, and that she was therefore absolved from the necessity of having to procure it. Moreover, as a last resort, she might have been able to procure some expert witness locally, and, by studying her evidence and the photographs, he might have been able to give the Court some more reliable evidence in estimating the value of the furniture or the loss incurred in selling it in New York. I

consequently cannot award anything to the plaintiff under this heading.

Nor is there any legal basis on which I can accede to Mr. *Schwarz's* submission that I should use the probable loss of some unascertained amount under this heading to inflate the 'general damages', i.e. the prospective loss or delictual damages.

(3) *The cost of packing and storing the plaintiff's belongings.* According to the plaintiff's evidence, she paid the State Cooperage Company of New York $222.67 for packing certain of her belongings and delivering them to the warehouse of Morgan & Brother of New York for storing (exhs. 'AAA' and 'BBB'); and the latter $6 for labour in handling the articles on arrival. Thereafter, the latter has charged her $10.50 per month for storage, including insurance, with effect from the 15th January, 1960 (exhs. 'CCC', 'DDD', 'EEE', 'FFF'). The reasonableness of these amounts was not contested. Subject to fixing the period for which she is entitled to claim storage, I think that she is entitled to recover these amounts. I think that it is a fair assumption to make that if the defendant had duly implemented his promise to marry, the parties would have been married by the 1st April, 1960. On that assumption it is probable that instructions would have been given to ship these belongings to the plaintiff in South Africa and that that would have been done by the 15th April, 1960. In my view, therefore, the plaintiff is entitled to claim storage for the period 15th January, 1960, to the 15th April, 1960, at $10.50 per month, amounting to $31.50. I do not think that she is entitled to claim storage for any period thereafter until she returns to New York and re-establishes her home there. The reason is that she is being awarded a substantial sum for the prospective loss of benefits of the marriage; that loss is awarded on the basis of the fulfillment of the promise to marry; and on that assumption the cost of storage would not have been incurred after the 15th April, 1960. To award damages for the cost of such subsequent storage would amount to a duplication of damages referred to above. The loss awarded under this heading amounts therefore

to $260.17. According to exh. 'XXX' which was handed into Court by agreement, the agreed exchange rate for the purpose of this case is $1.39 5/16ths to the rand. According to that rate of exchange the loss is about R187.

(4) *Loss of earnings.* Plaintiff was earning $85 per week in New York. She managed to come out on that but she did not save anything. From the time she embarked in New York, which was approximately when she gave up her employment, until she left the defendant's flat in Johannesburg towards the end of March, 1960, she was provided for by the defendant, firstly by means of the paid fare which covered everything, and secondly by maintenance. Thereafter, she had no means of subsistence until the 1st July, 1960, when she secured work in Johannesburg at £40 per month. She was then able to maintain herself pending the hearing of the action and until she could return to New York. Mr. *Schwarz* conceded in his argument that she had not proved that she was entitled to recover anything for the period up to the 1st April, 1960, but he claimed that an appreciable amount should be awarded on the basis of her New York salary for the period thereafter until the time when she can be reasonably expected to resume

work in New York, less what she had earned in Johannesburg.

I do not think that anything can be awarded under this heading. I agree that she has not proved any loss up to the 1st April, 1960. In regard to the period whilst she worked in Johannesburg and earned £40 per month, there is no evidence to prove that having regard to the respective costs of living in Johannesburg and New York, her salary in Johannesburg was less than the $85 per week in New York; and if so, by how much. And, in any event, on the assumption that I made previously that the parties would have been married by the 1st April, 1960, if the defendant had fulfilled his promise, the plaintiff would not have worked and earned any salary thereafter and the defendant would have continued to maintain the plaintiff. For the same reasons as is mentioned in para. 3 above, to award her any loss of earnings after the 1st April, 1960, would be to duplicate the damages with those awarded for prospective loss.

(5) *Loss of plaintiff's apartment*. The contention here is that the plaintiff lost her rent-controlled apartment for which she was paying $80.15 per month; in consequence, she will on her return to New York either have to pay a substantial premium to get a similar apartment (the amount of which she did not herself know) or she will have to hire an uncontrolled apartment which she said she could probably get at $150 per month. Here again I do not think that she really knew the true position regarding apartment rentals and premiums, so that her evidence cannot be used to estimate any loss; and there was no other evidence to assist the Court. But, in any event, if the defendant had implemented his promise to marry, the loss (if any) under this heading would not have occurred, and for the same reasons

given in paras. 3 and 4 above, no award should be made under this heading.

(6) *The cost of returning to New York*. According to exh. 'XXX' the reasonable cost of travelling 1st class from Johannesburg to Cape Town by train is R25.17 and by boat from Cape Town to New York, R358, the total of which is R383.17. I think that this item of damages can reasonably be supposed to have been within the contemplation of the parties at the time the contract was entered into as a probable consequence of the defendant's breach, and is therefore recoverable. Here again, however, to award it would amount to duplication of damages with the amount awarded for prospective loss; consequently, for the same reasons as given in the preceding paragraphs I make no award under this heading.

(7) *Prospective loss*. The probability is that the parties would have married with an ante-nuptial contract, excluding community of property and profit and loss. In the absence of proof to the contrary it must be assumed against the plaintiff that no marriage settlement would have been made on her in the antenuptial contract. It appears from the evidence, however, that the defendant is a man of some affluence and occupies a position in life that is superior to her own. She would therefore as his spouse, though married out of community of property and profit and loss, have derived material benefits from the marriage by way of status, maintenance, gifts, and otherwise, which she has now lost as a result of his breach of promise. The

defendant's own letters adduced in evidence for example mentions possible trips to America, Europe and Kenya that they might have taken together after they were married. For the loss of all these benefits she is entitled to be compensated (*van den Heever*, p. 40; *Davel v Swanepoel*, 1954 (1) SA 383 (AD) at p. 386 A - B and at p. 387 F - H). I think that her loss under this heading is substantial. It is correct, as Mr. *Morris* contended, that the evidence shows that the marriage would probably not have lasted very long, and that is a factor that must abate the loss to some extent; but I think that its force is somewhat lessened by this fact. The evidence shows that it would probably have been the defendant who would have deserted the plaintiff, and on the divorce the plaintiff would therefore probably have obtained either alimony or a lump sum payment in lieu thereof by virtue of the provisions of sec. 10 of the Matrimonial Affairs Act, 1953. The possibility of her getting married again must also be taken into account. She is, however, now nearly 44 years old which reduces her chances of marriage, but as I mentioned at the commencement of this judgment, she carries her age well and the possibility of her remarrying cannot consequently be ruled out altogether.

Taking all the circumstances into consideration, I assess her loss under this heading at R2,000.

(8) *Delictual damages*. The enquiry is first whether the defendant's breach of promise was committed in a manner or in circumstances

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stances that constituted it injurious or contumelious. Unfortunately, probably owing to *McCalman's* case, specific attention was not given to this aspect of the case either in evidence or in argument. The reasons the defendant gave for refusing to implement his promise were not fully investigated in evidence or cross-examination but I think that on the balance of probabilities shown by all the evidence adduced, the defendant must have stated that he refused to marry the plaintiff at the final stage of their relationship because he had never promised to do so. In his attorney's letter dated the 5th April, 1960, exh. 'GG' in answer to the plaintiff's claim for damages, it was stated that the defendant denied that he had ever agreed to marry the plaintiff. That was also the attitude that was taken up by the defendant in his pleadings and evidence in the case. I think, therefore, that it can be inferred that that was his attitude at all times relevant to this action. This is therefore not the kind of case where the defendant acknowledges the promise to marry but breaks the engagement in a sensible and non-contumelious manner in the interests of both parties (cf. *van den Heever* p. 30; *Mocke v Fourie*, 3 C.T.R. 313). Here the defendant promised to marry the plaintiff; caused her to uproot herself from New York and come to South Africa in contemplation of the promised marriage; and thereafter cast her out and refused to marry her by maintaining that he had not made any promise to marry her at all. I think that that constitutes injurious or contumelious conduct for which the plaintiff is entitled to damages. No specific evidence was, however, adduced to prove the extent of the injury to her feelings, her pride, or her reputation. She seemed to be more concerned during the trial with her contractual damages. But I think that it can be inferred that her feelings and pride were hurt at the time. However, although it is true that she is relatively unknown in Johannesburg and she intended returning to New York after the

conclusion of the trial, she will suffer some humiliation on returning to her circle of friends in New York after all the elaborate steps she had taken to wind up her affairs there in order to leave for South Africa to get married. On the other hand, she is a mature level-headed woman who has suffered somewhat similarly before when her marriage broke up, so the effect on her feelings and pride of the defendant's breach is not likely to have been as severe as it would have been on a younger unsophisticated person. I think in all the circumstances that the damages for the *injuria* should be R500 which I award.

It remains to consider whether those damages should be increased by reason of the statements concerning the plaintiff made by or on behalf of the defendant at various times during the course of the trial. These statements were to the effect that the plaintiff was a blackmailer, a fabricator of evidence, a person who cunningly schemed to ensnare him into matrimony, that she drank to excess and surrendered her virtue easily. None of those statements were proved to be true and on the evidence

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I heard they are without any foundation at all. Should they therefore inflate the damages awarded under this head? None of them had anything to do with the actual breach of promise itself. The defendant did not at the time of the breach, or in his pleadings, or in his evidence in the case, seek to justify his breach of promise because of the plaintiff's character. I do not think that I need canvass the actual or possible reasons for the making of the statements, save to say that they had no direct connection with the actual breach of promise. Consequently I do not think that those statements can be used to inflate the delictual damages. See *Salzman's* and *Black's* cases, *supra*. The above statements are *prima face* defamatory of the plaintiff but they would constitute a separate and distinct *injuria* for which the plaintiff could sue separately if she is so minded (cf. *Jockie v Meyer*, 1945 AD 354 at p. 368); in that event the defendant could then raise those special defences that are available to a defendant in cases of that kind and the question of his liability for those statements could then be properly determined. And lest it be thought that I am hereby encouraging the plaintiff to indulge in further litigation against the defendant, let me hasten to add that nothing is further from my mind than that. I merely mention such litigation to illustrate the principle I have applied and for no other reason.

The conclusion I have therefore come to is that there should be judgment for the plaintiff in the sum of R2,687 (two thousand six hundred and eighty-seven rand) with costs. The plaintiff is declared a necessary witness.

Plaintiff's Attorneys: *J. Kantor & Partners*. Defendant's Attorney: *D. A. Kark.*