

RESEARCH PAPER TOWARDS THE COMPLETION OF THE DEGREE

BACCULAUREUS LEGUM (LLB)

at the

UNIVERSITY OF SOUTH AFRICA (UNISA)

by

PIERRE JOHAN LOUW

04160703

in respect of the following topic in

PRIVATE LAW

to wit

"The justiciability of an action for contractual damages for breach of promise to marry in South African law in modern times, based on a critical analysis of relevant case law, with the view to determining whether the current legal position is sustainable or not"

Supervisor

PROF PIETER BAKKER

DEPARTMENT OF PRIVATE LAW

UNISA

MODULE CODE: HMLLB80

TABLE OF CONTENTS

1. INTRODUCTION

1.1	ENGAGEMENT, BREACH OF PROMISE AND CLAIMS FOR DAMAGES:.....	3
-----	--	---

2. BREACH OF PROMISE IN SOUTH AFRICAN LAW

2.1	THE POSITION BEFORE 2008:.....	4
2.2	RELEVANT CASE LAW BEFORE 2008:	
2.2.1	<i>Guggenheim v Rosenbaum</i> :.....	4
2.3	RELEVANT CASE LAW AFTER 2008:	
2.3.1	<i>Sepheri v Scanlan</i> :.....	5
2.3.2	Academic and judicial reception of <i>Sepheri v Scanlan</i> :.....	6
2.3.3	<i>Bridges v Van Jaarsveld</i> :.....	7
2.3.4	<i>Van Jaarsveld v Bridges</i> :.....	7
2.3.5	Academic reception of <i>Van Jaarsveld v Bridges</i> :.....	9
2.3.6	<i>Cloete v Maritz</i> :.....	11
2.3.7	Academic reception of <i>Cloete v Maritz</i> :.....	12
2.4	CONCLUDING OPINION:.....	13

BIBLIOGRAPHY:	14
----------------------------	----

ANCILLARY DOCUMENTS:

ACADEMIC DECLARATION:.....	16
MARKING RUBRIC:.....	17

1. INTRODUCTION

1.1 ENGAGEMENT, BREACH OF PROMISE AND CONSEQUENTIAL CLAIMS FOR DAMAGES:

An engagement to marry is a mutual undertaking between two parties, with the statutory and normative capacity to act, declaring in writing, verbally or by other form, their intention and consent to marry each other, thus creating a reciprocal duty to marry at a future date.¹ Van den Heever describes an engagement as contract "*uberrimae fidei*";² Potgieter as a "contract of engagement"³ and Smith as "a contract *sui generis*".⁴

A violation of a promise to marry, by either party without just cause,⁵ constitutes repudiation of a contract of engagement⁶ in the form of breach of promise.⁷ In this context, Potgieter refers to an unlawful breach of an undertaking to marry, which constitutes, not only breach of contract, but also an *iniuria* to the innocent party.⁸

Two claims for damages may arise as a consequence of a breach of a promise to marry being a claim for contractual damage and the *actio iniuriarum* as noted by Trollip J in *Guggenheim v Rosenbaum*.⁹ In this case the judge also emphasised that a party raising a delictual claim based on the *actio iniuriarum*, must prove that the breach is wrongful, injurious and contumelious.¹⁰ Potgieter accentuates that such breach should constitute an impairment of the fama, reputation, dignity, physical integrity and feelings of piety of an injured party.¹¹

Moreover, an action for contractual damage, may include actual substantiated patrimonial loss and (until recently) prospective patrimonial loss.¹² Unilateral repudiation is viewed as prima facie proof of the wrongfulness of the breach, unless the defendant can allege and prove justification of the repudiation.¹³ In *Cloete v Maritz* Henney J held that a claim for prospective loss *ex contractu*, no longer forms part of our law.¹⁴ This decision lies at the heart of our further debate herein.

¹ Heaton *Family Law* 7 to 9.

² Van den Heever *Breach of promise* 12, 26.

³ Potgieter, Steynberg, Floyd *Law of damages* 411.

⁴ Smith *Matrimonial law* 378.

⁵ Heaton *Family Law* 9, 10.

⁶ Hutchison and Pretorius *Law of contract* 297.

⁷ Heaton *Family Law* 9.

⁸ Potgieter, Steynberg, Floyd *Law of damages* 537.

⁹ *Guggenheim v Rosenbaum* (2) 1961 (4) SA 21 (W) 35H

¹⁰ *Idem* 36A.

¹¹ Potgieter, Steynberg, Floyd *Law of damages* 124.

¹² *Idem* 124.

¹³ *Bridges v Van Jaarsveld* [unreported] (3662/2006) [2008] ZAGPHC 342 p41.

¹⁴ *Cloete v Maritz* 2013 (5) SA 448 (WCC) [57].

2. BREACH OF PROMISE IN SOUTH AFRICAN LAW

2.1 THE POSITION BEFORE 2008:

The justiciability of breach of promise actions in our law has been debated with growing prominence for longer than 50 years.¹⁵ In 1946 Prof Hahlo held that our courts do not readily countenance breach of promise actions, and noted that it has been suggested that these actions had no place in modern law.¹⁶

In this context Van den Heever argued that, in the absence of an actionable wrong, moral suffering and the feelings of an injured party were irrelevant to the question of damages and reflected the morality of a bygone age.¹⁷

As postulated by Geduld and Dirksen above, our courts and academics progressively explored arguments for the revision of the prevailing *dictum*. This *dictum*, was best summarised by du Bois. Du Bois argued that unjust repudiation of an engagement, entitled the injured party to proceed with a single action for contractual and delictual damages. He qualified that the contractual and delictual elements were to be clearly separated in the pleadings - and duly substantiated.¹⁸ Concurrently, Van den Heever stated that the contractual component of the action for breach of promise was to recover the *id quod* interest of the plaintiff, which included actual and prospective loss.¹⁹

2.2 RELEVANT CASE LAW BEFORE 2008:

2.2.1 *Guggenheim v Rosenbaum* (2) 1961 (4) SA 21 (W) (hereinafter *Guggenheim*):

The prevailing *dictum* was applied in *Guggenheim v Rosenbaum*. In deciding on an action for breach of promise, Trollip J awarded R187 for actual loss-, R2 000 for prospective loss *ex contractu* and R500 for *iniuria*.²⁰ The plaintiff's alleged actual loss was diminished or partially refused by the judge on the basis that she either failed to substantiate her claims, or that an award for these claims would constitute a duplication of damages awarded for prospective loss.²¹ Importantly, Trollip J accentuated that, to justify a damages award *ex contractu*, actual monetary loss for expenses incurred must have been within the contemplation of the parties at the time the contract was concluded between them.²²

¹⁵ Geduld and Dirksen 2013 46(4) *De Jure* 964.

¹⁶ Hahlo 1946 (63) *SALJ* 388.

¹⁷ Van den Heever *Breach of promise* 30, 31.

¹⁸ Du Bois *Wille's principles* 235.

¹⁹ Van den Heever *Breach of promise* 37.

²⁰ *Guggenheim v Rosenbaum* (2) 1961 (4) SA 21 (W) 38H, 40H, 41G, 42D.

²¹ *Idem* 37C to 40H.

²² *Idem* 36H.

2.3 RELEVANT CASE LAW AFTER 2008:

2.3.1 *Sepheri v Scanlan* 2008 (1) SA 322 (C) (hereinafter *Sepheri*):

In *Sepheri v Scanlan* the plaintiff claimed contractual and delictual damages based on a breach of promise to marry. Alternatively she sought a declaration that a universal partnership existed between the parties for the period of their cohabitation.²³ Dealing with the question regarding the universal partnership, Davis J stated that the plaintiff claimed that a tacit agreement to a partnership between the parties existed.²⁴ Davis J pointed out that this was a claim to determine the existence of a *universum bonorum* establishing a partnership in community of property between the parties.²⁵ The judge made it clear that it would be stretching the evidence too far to conclude that an apology by the defendant constituted consensus to agree to a universal partnership.²⁶ Consequently he ruled that, in his view no universal partnership between the parties existed during the subsistence of their relationship.²⁷

Addressing the plaintiff's claims arising from the alleged breach of promise to marry, Davis J questioned the continued relevance of the action, considering the dynamic morality of society and public policy determinations, as informed by the Constitution of the Republic of South Africa 1996 (hereinafter referred to as the Constitution).²⁸

Arguing that the action for breach of promise requires reconsideration in our law, the judge found the fact that this action placed the marital relationship on a rigid contractual footing, unacceptable.²⁹ Referring to our Constitution which recognizes diverse interpersonal relationships, he also questioned the advisability of considering an extraction from an intention to conclude an interpersonal relationship, purely within the context of contractual damages.³⁰

Accepting that this argument, did not reflect the existing legal position, Davis J pointed out that neither councils for the plaintiff or the defence nor his own research, found support that this action was no longer part of South African law.³¹ The judge further expressed his uncertainty as to the authority of our courts to change the common law as envisaged in section 39(2) of the Constitution.³²

²³ *Sepheri v Scanlan* 2008 (1) SA 322 (C) 323B to 323D.

²⁴ *Idem* 338A.

²⁵ *Idem* 338A to 338C.

²⁶ *Idem* 338F, 338G.

²⁷ *Idem* 338H to 338J.

²⁸ Nkosi 2014 (77) *THRHR* 678.

²⁹ *Sepheri v Scanlan* 2008 (1) SA 322 (C) 330I.

³⁰ *Idem* 330J.

³¹ *Idem* 331A, 331B.

³² *Idem* 331C.

Remarking that our highest courts may rule differently, the judge stated that: "It is obviously a matter for legislation rather than judicial engineering by trial courts".³³

Davis J, having considered the age, vivacity, education and current emotional involvement of the plaintiff, awarded contractual damages at 50% of the plaintiff's claim, being R654 625 and £10 854 plus interest and costs, and R250 000 to the defendant for occupation of his property by the plaintiff, plus interest and costs for the eviction procedure against the plaintiff.³⁴ He rejected the plaintiff's claim for *iniuria*.³⁵

2.3.2 Academic and judicial reception of *Sepheri v Scanlan*:

Smith argued that it must be kept in mind that the judge based his decision on the probability that the relationship between the parties would have culminated in a marriage in community of property, but for the breach.³⁶

Referring to Davis J's reasoning in *Sepheri*, Smith reflected that the new constitutional dispensation has led to judicial and academic calls for outright abolition of the action for breach of promise in our law.³⁷ Contemplating this, still hypothetical position at the time, Smith warned that if South African law were to abolish all claims based on an agreement to marry, any person in the position of Ms Sepheri would be left with no remedy whatsoever. This, he said, left unmarried partners with only limited alternative remedies provided by the law of obligations at their disposal.³⁸

Whilst referring to Davis J's reluctance to invoke section 39(2) of the Constitution or to transgress the domain of the legislature, Nkosi viewed Davis J's reasoning as the first warning bells signalling the end of the action for breach of promise in our law.³⁹ Davis J's orbiter remarks that the action for breach of promise required reconsideration in our law, and his uncertainty regarding the authority of our courts to change the common law, prompted the Supreme Court of Appeal to broaden the scope of the appeal in *Van Jaarsveld v Bridges* merely two years later.⁴⁰ The appeal was initially limited to the issues of quantum by the court *a quo*, but the broadened appeal also considered the tenability of a claim for contractual damages in our law, and whether the breach was contumacious, a requirement for delictual damages.⁴¹

³³ *Sepheri v Scanlan* 2008 (1) SA 322 (C) 331B, 331C.

³⁴ *Idem* 337B, 337E, 341E.

³⁵ *Idem* 337H, 337I.

³⁶ Smith *Matrimonial law* 380.

³⁷ *Idem* 380, 381.

³⁸ *Idem* 381.

³⁹ Nkosi 2014 (77) *THRHR* 679.

⁴⁰ Heaton *ASSAL* 2010 445.

⁴¹ *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) [2].

2.3.3 *Bridges v Van Jaarsveld* (3662/2006) [2008] ZAGPHC 342:

The facts in this matter were that, merely four months and a week after an engagement between the parties to marry, the defendant Van Jaarsveld unilaterally terminated his engagement to Bridges on December 6th 2005, via sms.⁴² Bridges issued summons for the breach of promise by Van Jaarsveld, claiming that it was wrongful, injurious and contumelious.⁴³

Bridges claimed actual and prospective damages as in ordinary actions for damages in breach of contract⁴⁴ as well as delictual damages based on the considerable embarrassment and humiliation she suffered.⁴⁵ The plaintiff originally claimed R1-million, but this was later reduced to R648 000.⁴⁶ Finding for the plaintiff, the court awarded actual and prospective damages to her, totalling R282 413 *ex contractu* and *ex delicto* for *iniuria*, plus mora interest and costs.⁴⁷ Van Jaarsveld was granted leave to appeal only on the quantum of the damages.⁴⁸

2.3.4 *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) (hereinafter *Van Jaarsveld*):

As mentioned above, prior to considering the appeal by Van Jaarsveld against the quantum of damages, the Supreme Court of Appeal broadened the appeal, requiring argument to be presented as to whether the repudiation was contumacious, and whether the continuance of an action for contractual damages for breach of promise in South African law, should be reconsidered.⁴⁹

Harms DP (Nugent, Van Heerden JJA, Majiedt and Seriti AJJA concurring) at the onset clarified the authority of our courts to develop the common law as contemplated in section 39(2) of the Constitution. The Supreme Court of Appeal confirmed that our courts not only have the right but also the duty to develop the common law, taking into account the interests of justice, whilst concurrently promoting the spirit, purport and objects of the Bill of Rights. Thus, having regard for the prevailing mores of society and established public policy considerations.⁵⁰

In respect of the issue as to the continuance of an action for contractual damages for breach of promise in South African law, Harms DP remarked that:

⁴² *Bridges v Van Jaarsveld* [unreported] (3662/2006) [2008] ZAGPHC 342 2, 3.

⁴³ *Idem* 4.

⁴⁴ *Idem* 43.

⁴⁵ *Idem* 52.

⁴⁶ *Idem* 49.

⁴⁷ *Idem* 55.

⁴⁸ Heaton ASSAL 2010 445.

⁴⁹ *Idem* 445.

⁵⁰ *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) [3].

"[t]he time has arrived to recognise that engagements are outdated and do 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".⁵¹

Harms DP made it clear that his intention was to provide guidance without reaching a definite conclusion, qualifying that the appeal under consideration was not affected by the possible development of the law, but would be decided on two factual issues.⁵² These issues were: Whether the *iniuria* caused by the breach of promise, was contumacious, and whether Bridges suffered actual loss as a result.⁵³ Clearly, Harms DP's intended guidance was based on the facts, and is therefore *orbiter*.⁵⁴

Harms DP rejected the traditional view that an engagement may be terminated without financial consequences only if there is just cause for such termination. He reasoned that a new morality, wherein guilt is no longer an issue, had developed and that it appeared illogical to attach more serious consequences to an engagement than to marriage. Hence, he argued, there was no reason why the lack of desire to marry should not be a just cause for termination, irrespective of the guilt of a party.⁵⁵

Considering the contractual elements of an action for breach of promise, Harms DP was critical of the commercialisation of an engagement and placing it on a rigid contractual footing.⁵⁶ He rejected the contention that the financial consequences of a planned marriage, or the marital regime, was within the contemplation of the parties at the time of making their respective promises to marry.⁵⁷ Consequently he viewed engagements as an unenforceable agreement to contract at a future date affording the parties a period of time to get to know one-another and to consider whether to finally marry.⁵⁸

Turning to claims for prospective loss, Harms DP reiterated that the choice of a marital regime is remote and not within the contemplation of the parties at the time of their engagement. He held that our courts cannot make any assumption as to the marital regime the parties may choose in respect of their future marriage.⁵⁹

⁵¹ *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) [3].

⁵² *Idem* [3].

⁵³ *Idem* [3].

⁵⁴ Heaton ASSAL 2010 445.

⁵⁵ *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) [5], [6].

⁵⁶ *Idem* [7].

⁵⁷ *Idem* [8].

⁵⁸ *Idem* [8].

⁵⁹ *Idem* [9].

The judge stated that assumptions as to the duration of such marriage in order to consider the quantum of-, or for making an award for-, prospective loss *ex contractu*, was impossible.⁶⁰ He warned that the courts cannot consider remote and speculative future loss that is incapable of ascertainment as a legal measure of damage.⁶¹

Expanding his deliberations in respect of claims for contractual damages for wrongful breach of promise, Harms DP maintained that such loss does not flow from the breach of promise *per sé* but rather from a number of express or tacit agreements between the parties made during the course of an engagement.⁶² He further stated that, for this loss to be recoverable, the loss must have been within the contemplation of the parties at the time of an agreement.⁶³ He accentuated that the purpose of an award to the injured party would be to recover the *id quod* interest of the plaintiff which included actual loss, set off against what the other has paid or provided.⁶⁴

Rejecting the court *a quo*'s contention that Bridge's evidence had to be accepted uncritically, simply because Van Jaarsveld did not testify,⁶⁵ Harms DP held that Bridges had failed to substantiate her claim and highlighted various anomalies in her arguments. The court also highlighted various oversights in the judgement of the court *a quo*.⁶⁶ Consequently, the Supreme Court of Appeal unanimously absolved Van Jaarsveld from the instance with costs, based on the facts in the case.⁶⁷

2.3.5 Academic reception of *Van Jaarsveld v Bridges*:

Keeping in mind that Harms DP remarked that the world has progressed and morality has changed,⁶⁸ it is apt to note that Geduld and Dirksen, commenting on the judgement, asserted that the social assumptions upon which breach of promise was based, simply no longer apply.⁶⁹ They further argued that modern South African women have become self-sufficient, energetic and competent. In this context they remarked that the breach of promise action has been relegated to an outdated remnant of the common law, which was incapable of surviving the changing realities of the modern South African Society.⁷⁰

⁶⁰ *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) [10]

⁶¹ *Idem* [10].

⁶² *Idem* [11].

⁶³ *Idem* [11].

⁶⁴ *Idem* [11]. See also Heaton ASSAL 2010 447.

⁶⁵ *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) [29].

⁶⁶ *Idem* [25] to [28].

⁶⁷ *Idem* [30].

⁶⁸ *Idem* [6].

⁶⁹ Geduld and Dirksen 2013 46(4) *De Jure* 966.

⁷⁰ *Idem* 967.

Sharp and Zaal refer to the somewhat enigmatic judgement of the Supreme Court of Appeal, articulated by Harms DP in *Van Jaarsveld* and conclude that the judgement was merely a step towards the abolition of the outdated law on breach of promise actions.⁷¹ This, they said, reduced the scope for damages claims, but still left room for the continuance of these actions.⁷² They stated that it would be reading too much into the decision, so as to contend that the judgement established a clear precedent that fault based damages was no longer a part of breach of promise litigation.⁷³ The authors commended the court's *obiter dictum* as a step towards bringing our law in line with selected international jurisdictions, and orientating our law towards a no-fault approach in respect of the element of *iusta causa*.⁷⁴ They concluded that breach of promise actions should rather be judged in actions for unjustified enrichment.⁷⁵

Heaton lauded the court for its disapproval of claims for prospective loss due to breach of promise, and for the court's realistic position that the loss of desire to marry constituted just cause for the termination of an engagement. Stating that both these views would have a far reaching effect on the law, she accentuated that the latter view would impact most cases where an engagement to marry is terminated.⁷⁶ She further remarked that: should a court in future accept the *obiter*, but persuasive *dictum* of the Supreme Court of Appeal and elect to develop the common law, loss of desire will be considered as just cause for termination and would neutralise claims for contractual damages for breach of promise, in the majority of cases.⁷⁷

Clearly the scope of just cause for the termination of an engagement would be extended when the common law is developed in accordance with Harms DP's *obiter dictum*.⁷⁸ Heaton stated that as termination will be based on just cause, the repudiating party will no longer be punished by having to pay contractual damages.⁷⁹ She accentuated Harms DP's position that the repudiating party would still have to compensate the actual loss that was suffered by the jilted party as a result of the breach of ancillary agreements between the parties, and calculated in terms of the negative interest of the jilted party.⁸⁰

⁷¹ Sharp and Zaal 2011 (74) *THRHR* 333, 334.

⁷² *Idem* 334.

⁷³ *Idem* 338.

⁷⁴ *Idem* 339.

⁷⁵ *Idem* 340.

⁷⁶ Heaton *ASSAL* 2010 449.

⁷⁷ *Idem* 449.

⁷⁸ *Idem* 449.

⁷⁹ *Idem* 449.

⁸⁰ *Idem* 449, 450.

2.3.6 *Cloete v Maritz* 2013 (5) SA 448 (WCC) (hereinafter *Cloete*):

The facts: The parties were formally engaged during February 1999. The defendant terminated the engagement a decade later. The plaintiff alleged that the repudiation was wrongful. Claiming that the defendant acted with *animus iniuriandi* she issued summons at R6 050 000 for patrimonial and non-patrimonial damage.⁸¹

Subsequent to the submissions by council for the respective parties, Henney J identified the following issues to be determined, to wit: whether Harms DP's *obiter dictum* in *Van Jaarsveld* can be regarded as binding authority that an action based on breach of promise to marry no longer forms part of our law - and - whether a claim for prospective loss due to such breach, still persists.⁸²

The judge accepted the defence council's contention that Harms DP's *obiter dictum* was not binding on the court, citing Harms DP's own words describing his *dictum* as guidelines for future reference by courts.⁸³ He stated that he agreed with academic opinion and the positions taken by Davis J in *Sepheri* and Harms DP in *Van Jaarsveld* that the action for breach of promise to marry was out of step with the prevailing mores of society and public policy considerations of our courts, as informed by the values that underlie the Constitution.⁸⁴ Accordingly Henney J reasoned that a reassessment of the action for breach of promise in our law was necessary.⁸⁵

Henney J highlighted the position postulated by Harms DP in *Van Jaarsveld* that the courts not only have the right, but also the duty to develop the common law. This, he said, would be achieved by taking into account the interests of justice and promoting the spirit, purport and objects of the Bill of Rights.⁸⁶ He noted that the courts must have regard to the prevailing *mores* and public policy considerations, when developing the common law.⁸⁷ Henney J, responding to the issue that the court was bound by earlier judgements of the Appellate Division, held that where a common law principle no longer reflected the *boni mores* of society or public policy considerations, the trial court will be entitled to deviate from the *stare decisis* rule which bound it to follow decisions of higher courts within the hierarchy of courts.⁸⁸

⁸¹ *Cloete v Maritz* 2013 (5) SA 448 (WCC) [1] to [7].

⁸² *Idem* [37].

⁸³ *Idem* [40].

⁸⁴ *Idem* [41].

⁸⁵ *Idem* [42].

⁸⁶ *Idem* [42].

⁸⁷ *Idem* [43].

⁸⁸ *Idem* [24], [27], [45], [46].

Referring to the *dictum* of Davis J in *Sepheri* and Harms DP in *Van Jaarsveld* and other relevant academic opinion, Henney J concluded that the prevailing approach to engagements did not reflect the current *boni mores* or public policy considerations, based on the values of the Constitution.⁸⁹ Accordingly the judge rejected the notion that a repudiating party should be held accountable on a rigid contractual footing for breach of promise, stating that this notion did not reflect the changed *mores* or public policy considerations.⁹⁰ Making it clear that such determination would be untenable, Henney J also rejected the prevailing *dictum* which incites attribution of guilt and a greater penalty for breach of promise, than that for irretrievable breakdown of marriage.⁹¹

Concluding his judgement, Henney J rejected the position as set out in *Bull v Taylor* which held that a party can successfully claim prospective loss *ex contractu*, due to breach of promise.⁹² He stated unequivocally that this position no longer forms part of our law,⁹³ and accordingly upheld the defendant's special plea.⁹⁴

2.3.7 Academic reception of *Cloete v Maritz*.

Nkosi made it clear that Henney J's decision in *Cloete* only extinguished the first leg of a contractual claim arising from breach of promise, being a claim which deals with prospective loss.⁹⁵ Also critical of Harms DP's position in *Van Jaarsveld*, Nkosi argued that the judge's so-called guidance was unprecedented and contrary to established judicial policy which required the judge to consider only facts pertinent to the case before him.⁹⁶ On the other hand, he was also critical of Henney J's interpretation of section 39(2) of the Constitution, stating that the judge failed to consider facts which necessitated deference of the legal issue at hand to the legislature.⁹⁷

Nkosi labelled the Harms DP and Henney J decisions as unjustifiable judicial activism which failed to consider the effect of their judgements beyond the litigants before them. This, he held, not only threatened the common law, but constituted a defeat for the institution of marriage and further injured the plight of the jilted betrothed.⁹⁸

⁸⁹ *Cloete v Maritz* 2013 (5) SA 448 (WCC) [48].

⁹⁰ *Idem* [54].

⁹¹ *Idem* [56].

⁹² *Bull v Taylor* 1965 (4) SA 29 (A) 39H.

⁹³ *Cloete v Maritz* 2013 (5) SA 448 (WCC) [57].

⁹⁴ *Idem* [58].

⁹⁵ Nkosi 2014 (77) *THRHR* 678.

⁹⁶ *Idem* 679.

⁹⁷ *Idem* 680.

⁹⁸ *Idem* 685, 686.

2.4 CONCLUDING OPINION:

Until now, the binding authority established in *Cloete* eliminating claims for prospective loss *ex contractu* for breach of promise from our law, has not yet been subjected to scrutiny by the Constitutional Court. Whether an action will prevail in respect of the remaining contractual component for breach of promise depends on whether an engagement is seen by our courts as having established an enforceable contract within the contemplation of the parties thereto. Hutchison and Pretorius state that a contract subsists provided there is an intention to agree to contract and consensus exists regarding the material aspects of such agreement creating a lawfully binding, reciprocal and executable contract between the parties.⁹⁹

Academic writers refer to an engagement as a contract *sui generis*.¹⁰⁰ In my opinion this *sui generis* or unique nature, must lie in the fact that the consensus is based solely on a non-specific promise to marry at a future date, and nothing more. In *Ponelat v Schrepfer*, Meer AJA indicated that an intention to contract was an indispensable condition for establishing a universal partnership. He accentuated that such intention to contract is also an indispensable condition to establish a contract between parties, engaged to be married.¹⁰¹ The absence of consensus or intention to contract is borne out by Harms DP's argument that neither the marital regime nor the patrimonial consequences of a promise to marry at a future date, lie within the contemplation of the parties at the time of their engagement.¹⁰²

Harms DP's aptly stated that an engagement, at most constitutes an agreement to contract at a future date, affording the parties time to deliberate whether to marry at a later stage. Harms DP and Meer AJA's arguments clearly establish that a promise to marry normally would not constitute a contract in any form between the parties. Harms DP's view that the patrimonial consequences arise from a series of ancillary agreements between the parties and not from the engagement itself,¹⁰³ justifies support. Breach of these agreements should lie in actions for breach of contract, unjustified enrichment or delict for contumacious *iniuria*, and not in breach of promise.

Therefore, I concur with Henney J's dictum and maintain that the remaining actions are out of step with the *boni mores* and public policy considerations of our society as informed by the Bill of Rights, and should no longer be countenanced in our law.

⁹⁹ Hutchison and Pretorius *Law of contract* 6.

¹⁰⁰ Smith *Matrimonial law* 378.

¹⁰¹ *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) 20, 22.

¹⁰² *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) [8], [9].

¹⁰³ *Idem* [8]. See also Heaton ASSAL 2010 449, 450.

BIBLIOGRAPHY

Legislation:

Constitution of the Republic of South Africa 1996.

Case Law:

Bull v Taylor 1965 (4) SA 29 (A).

Bridges v Van Jaarsveld [unreported] (3662/2006) [2008] ZAGPHC 342.

Cloete v Maritz 2013 (5) SA 448 (WCC).

Guggenheim v Rosenbaum (2) 1961 (4) SA 21 (W).

Ponelat v Schrepfer 2012 (1) SA 206 (SCA).

Sepheri v Scanlan 2008 (1) SA 322 (C).

Van Jaarsveld v Bridges 2010 (4) SA 558 (SCA).

Articles & Research Reports

Geduld and Dirksen 2013 46(4) *De Jure*

Geduld A and Dirckson M "The right to say "I don't": The reception of the action for breach of promise" 2013 46(4) *De Jure* 964 - 967.

Hahlo 1946 (63) *SALJ*

Hahlo H R "Breach of promise actions in modern law" 1946 (63) *South African Law Journal* 379 - 390.

Heaton 2010 *ASSAL*

Heaton J "Family Law" - "Breach of promise to marry" 2010 *Annual Survey of South African Law* 435 - 496.

Nkosi 2014 (77) *THRHR*

Nkosi T "The life and times of the breach of promise to marry and the plight of a betrothed woman *Cloete v Maritz* 2013 (5) SA 448 (WCC)"

Vonisse 2014 (77) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 677 - 685.

Sharp and Zaal 2011 (74) *THRHR*

Sharp K and Zaal FN "Narrowing the scope for breach of promise actions: *Van Jaarsveld v Bridges* 2010 4 SA 558 (SCA) (May 6, 2011)". 2011 (74)

Tydskrif vir Hedendaagse Romeins-Hollandse Reg 334 - 340.

Books:

Du Bois *Wille's principles*

Du Bois F *Wille's principles of South African law* 9th ed (Juta Cape Town 2007).

Heaton *Family law*

Heaton J *South African family law* 3rd ed (LexisNexis South Africa 2010).

Hutchison and Pretorius *Law of contract*

Hutchison D, Pretorius C J eds *et al The law of contract in South Africa* 2nd ed (Oxford University Press 2010).

Potgieter, Steynberg, Floyd *Law of damages*

Potgieter JM, Steynberg L, Floyd TB Visser & Potgieter, *Law of damages* 3rd ed (Juta & Co Ltd Cape Town 2012).

Smith *Matrimonial law*

Smith BS *The development of South African matrimonial Law with specific reference to the need for and application of a domestic partnership rubric* (University of the Free State 2009) (LLD thesis).

Van den Heever *Breach of promise*

Van den Heever FP *Breach of promise and seduction in South African law* (Juta & Co Ltd Cape Town 1954).

Internet resources:

Case law:

Bull v Taylor 1965 (4) SA 29 (A)

<http://0-ipproducts.jutalaw.co.za.oasis.unisa.ac.za>
(Date accessed: July 24th 2015).

Bridges v Van Jaarsveld [unreported] (3662/2006) [2008] ZAGPHC 342

<http://www.saflii.org/za/cases/ZAGPHC/2008/342.pdf>
(Date accessed: July 23rd 2015).

Guggenheim v Rosenbaum (2) 1961 (4) SA 21 (W)

<http://0-ipproducts.jutalaw.co.za.oasis.unisa.ac.za>
(Date accessed: July 25th 2015)

Ponelat v Schrepfer 2012 (1) SA 206 (SCA)

<http://www.saflii.org/za/cases/ZASCA/2011/167.pdf>
(Date accessed: August 24th 2015).

Sepheri v Scanlan 2008 (1) SA 322 (C).

<http://0-ipproducts.jutalaw.co.za.oasis.unisa.ac.za>
(Date accessed: August 25th 2015).

Van Jaarsveld v Bridges 2010 (4) SA 558 (SCA)

<http://www.saflii.org/za/cases/ZASCA/2010/76.pdf>
(Date accessed: July 23rd 2015).

Articles and research reports:

Geduld and Dirksen 2013 46(4) *De Jure*

Geduld A and Dirckson M "The right to say "I don't": The reception of the action for breach of promise".

2013 46(4) *De Jure* 964 - 967

http://www.dejure.up.ac.za/images/files/vol46-4-2013/Chapter_7.pdf
(Date accessed - July 22nd 2015).

Hahlo 1946 (63) *SALJ*

Hahlo H R "Breach of promise actions in modern law" 1946 (63) *South African Law Journal* 379 - 390

<http://heinonline.org>

(Date accessed: July 28th 2015).

Heaton 2010 ASSAL

Heaton J "Family Law" - "Breach of promise to marry" 2010 *Annual Survey of South African Law* 435 - 496

<http://hdl.handle.net/10500/14013>

(Date accessed: July 23rd 2015).

Nkosi 2014 (77) THRHR

Nkosi T "The life and times of the breach of promise to marry and the plight of a betrothed woman *Cloete v Maritz* 2013 5 SA 448 (WCC)"

2014 (77) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 677 - 685

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600897

(Date accessed - July 30th 2015).

Sharp and Zaal 2011 (74) THRHR

Sharp K and Zaal FN " Narrowing the scope for breach of promise actions: *Van Jaarsveld v Bridges* 2010 4 SA 558 (SCA) (May 6, 2011)".

2011 (74) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 334 - 340

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2016905

(Date accessed - July 24th 2015).



ACADEMIC DECLARATION

I declare that this material, which I now submit for assessment, is entirely my own work and has not been taken from the work of others, save and to the extent that such work has been cited and acknowledged within the text of my work. I understand that plagiarism, collusion, and copying are grave and serious offences in the university and accept the penalties that would be imposed should I engage in plagiarism, collusion or copying.

I have identified and included the source of all facts, ideas, opinions and viewpoints of others in the assignment references and bibliography. Direct quotations from books, journal articles, internet sources, module text, or any other source whatsoever are acknowledged and the sources cited are identified in the assignment references and bibliography. This assignment, or any part of it, has not been previously submitted by me or any other person for assessment on this or any other module or course of study.

SIGNATURE: Pierre Johan Louw

DATE: September 24th, 2015.
