

Short notes on:

DAMAGES: BREACH OF PROMISE TO MARRY

Introduction

Often people are bullied to believe that the breach of a promise to marry may not only be humiliating but may also hold serious financial implications for the guilty party. It's often said amongst people that engagement is a contract, two parties mutually reaching consensus on their lifelong commitment to marry one another. But what happens when things turn don't work out?

Contractual Damages

Is there any recourse available to the party who is at the receiving end of a breach of promise to marry. It is worth unpacking what the law of contract says about breach. General principles of contract allow for, once a contract is breached, the innocent party to claim damages, most notably the following heads:

- Past or actual loss
- Future loss (Prospective damages); and
- In some instance sentimental damages

In some instances, it is more practicable to place the innocent party in the position he / she would have been in had the breach not taken place. This principle is strictly in line with contractual damages and creates a hypothetical situation that places the innocent party in the position he / she would have been in had the contract been enforced.

Practical scenario

In applying the above to a cause of action of breach of a promise to marry, without looking at a factual scenario, the below is what an innocent party would have been entitle to, provided that it can be proven, on pure contractual damages principles:

1. Past loss for expenses incurred in anticipation of the marriage in the amount of R200 000 (furniture and other household goods)

2. Y would have benefitted out of the marriage as X is a member of a pension fund to the value of R400 000 and X's business would have grown substantially and Y would have benefitted from this had Y not committed the breach. Damages in the amount of R500 000.
3. General damages for the humiliation and the contumelious act by X for hurting Y's feelings, amount of damages R300 000.

The above scenario constitutes an action based purely on contractual damages for the breach of the promise to marry and delictual damages for hurting the feelings of Y. The above scenario, if a party were to be successful, would potentially bring about unfairness and a huge decline in people committing to marriage.

Nlapho v Zima and appropriateness of contractual damages

ADAM J found in the Gauteng division that the breach of promise to marry brings about two causes of action:

*"[15]. A breach of promise may give rise to two distinct causes of action. The one is the actio iniuriarum. The 'innocent' party is entitled to sentimental damages if the repudiation was contumelious...[16] The second cause of action is for breach of contract. An engagement may be cancelled without financial consequences if there is a just cause for the cancellation. Just cause is usually defined as any event or condition or actions of the other party which would jeopardise a long and happy marriage and which can induce any right – minded member of society to rescind the engagement."*¹

The court found that the claim for damages arising from the breach of promise to marry is limited, to avoid the two extremes above and in consideration of the boni mores of society ("die regsopvatting van die gemeenskap" or "the morals of society") the court referred to a judgement granted in the Western Cape Division:

*"[24]...that an action for prospective losses based on a breach of promise to marry no longer forms part of our law. Having answered this question in the affirmative, Henney J went on and found that, as our law stands at present, a party cannot claim for prospective losses as a result of a breach of a promise to marry."*²

ADAMS J went further and considered the comparative law and referred to Sinclair *Law of Marriage* at 314 (fn 8) and came to the following conclusion as to the position in other countries with regards to a claim of damages arising from breach of promise to marry:

¹ Para 15 – 16, Nhlapho v Zimu (2016/8478) [2017] ZAGP]HC 236

² Para 24

"In England, Scotland, Australia and most European jurisdictions breach of promise actions have been abolished. The main reasons for the abolition of actions based on breach of promise are that they give opportunity for claims of a 'gold-digging' nature, and that the "stability of marriage is so important to society that the law should not countenance rights of action the threat of which may push people into marriages which they would not otherwise undertake" . . . They are consonant with the substitution of irrevocable breakdown for fault as the basis of divorce in the above jurisdictions. South Africa has not, so far, followed suit in abolishing breach of promise actions, but it is suggested that it should..."³

The court further indicated that the morals of society no longer requires that a party who had breached a promise to marry to be held accountable to the same measure prescribed by contractual damages, the court indicated that:

"[30]. Clearly, to hold a party therefore accountable on a rigid contractual footing where such a party fails to abide by a promise to marry does not reflect the changed mores or public interest. Even more so if the law relating to damages that can be claimed on a breach of promise to marry is based on a pre – constitutional heterosexual definition of marriage which traditionally placed women on an unequal footing to men."⁴

Abolishment of the claim for prospective damages in case of breach of promise to marry

The court further found that it is not possible to claim prospective loss. Furthermore, back to the above scenario, had the parties agreed that they would be equally liable for furniture, and Y purchased all the goods and furniture in contemplation of the intended marriage. In this instance, Y must be placed in a position Y would have been in had the agreement not been concluded. This will entitle Y to a refund in pure contractual terms. What is clear is that the refund does not stem from the breach of promise to marry but stems from the agreement to purchase goods.

General Damages

With regards to the second cause of action relating to delict or wrongful act causing harm, the court made it clear that there must be a distinction between the causes of action:

"[49]. A breach of promise can only lead to sentimental damages if the breach was wrongful in the delictual sense. This means that the fact that the breach of contract itself was wrongful and without just cause does not mean that it was wrongful in the delictual sense, i e that it was injurious. Logically one should commence by enquiring whether there has been a wrongful overt act. A wrongful act, in relation to a verbal or written communication, would be one of an offensive or insulting nature."⁵

³ Page 314, footnote 8, Sinclair Law of Marriage

⁴ Para 30

⁵ Para 49

In this case the Plaintiff asked for general damages for sentimental loss (actio iniuria) and contumelia (insult). the Plaintiff claimed R500 000 for general damages and the court considered previous awards granted with similar facts and granted R25 000 after the court was satisfied that the Plaintiff had suffered a personality right infringement and contumelia. The total claim of the Plaintiff was R2 500 000 and the court only granted R123 149.63 with costs.

Conclusion

As far as breach of promise to marry is concerned, the courts are only concerned with what was actually performed by the claimant in consideration of the intended marriage, and It's clear that the courts are not willing to delve into damages which may arise in the future.

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