IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 06/12356

In the matter between:

FALCKE, KEITH Plaintiff

and

SMITH, CAROL Defendant

J U D G M E N T

KGOMO, AJ:

INTRODUCTION

[1] The plaintiff has instituted action against the defendant for:

1.1 an order declaring his engagement to the defendant terminated or confirming such termination;

1.2 an order for the defendant to return the engagement ring she received from the plaintiff, alternatively, payment of the sum of R8 500,00 being the amount he paid for it;

1.3 an order that the amount of R94 701,80 be deducted and paid to him before the residue of the selling price of their joint property is divided equally between them;

1.4 payment of the amount of R179 237,53 being the money he expended on a Mitsubishi Pajero 4X4 gift for the defendant;

1.5 interest on the amounts claimed above at the rate of 15,5% from date of service of summons herein to date of payment.

GENERAL OVERVIEW AND BACKGROUND

[2] The plaintiff and the defendant were engaged to become married to each other during or about April 2005.

[3] During or about July 2005 they jointly purchased an immovable property situated at 103 West Road North, Morningside, Sandton for a purchase price of R3,2 million. I will refer to this property hereinafter as "*the Morningside property*".

[4] The Morningside property was registered in the joint names of the parties and they began staying therein together during September 2005; each bringing children from their previous marriages along to stay with them.

[5] Before residing in the Morningside property together life between the parties was harmonious but from the moment they consorted together things changed for the worse. By December 2005 matters between them had so deteriorated that the defendant decided to terminate the engagement. Somehow, the plaintiff sweet talked the defendant with nice presents and they went on holiday together in Kenya and ultimately patched up their differences and made up.

[6] Their resumption of cohabitation was short -lived because their problems resurfaced and ultimately the engagement was gasping for air. They agree that it is terminated. They have separated and the Morningside property has been sold for R3 500 000,00.

[7] The parties are not agreed as to:

7.1 when the engagement was terminated;

7.2 at whose instance or by whom it was terminated;

7.3 what the reasons are or were for the termination of the engagement.

[8] The plaintiff alleges that it was terminated because right from the beginning they drifted apart, had squabbles and quarrels over children or other aspects of their family lives and by mutual agreement came to the conclusion that the engagement should be terminated.

[9] The defendant in turn alleges that the engagement was terminated by the plaintiff for unjustifiable causes, among others, ill-treatment of her and her children, physical and sexual abuse as well as unacceptable and/or unjustifiable demands by the plaintiff on her.

[10] In the pleadings, the plaintiff set out the issues relating to this breakdown of their engagement among others as follows:

10.1 The parties' engagement during or about April 2005 tacitly or impliedly brought about a universal partnership which had specified consequences, among others, that in the event of it failing, then the assets, liabilities and expenses incurred during its duration should be shared by both parties on a 50-50 basis.

10.2 The parties terminated (meaning mutually terminated) their engagement during or about January 2006.

10.3 As a result he prayed for the return of gifts he gave to the defendant or their value as well as a refund of 50% in respect of all purchases, expenses and disbursements he made for or on behalf of the defendant or the estate.

[11] The defendant in her plea responded as follows:

11.1 She admitted the plaintiff's allegations that they (both parties) terminated the engagement.

11.2 Later in the plea, specifically in her plea to the plaintiff's paragraph 23 of his summons, the defendant denied the allegation that the engagement was terminated by mutual consent.

11.3 It is only in the defendant's answer to the plaintiff's pre-trial minutes that was filed on 12 November 2007 that the defendant stated that the engagement

> "… *was terminated pursuant to the Plaintiff's repudiation of the betrothal. Such repudiation constituted a breach of promise on the part of the Plaintiff, without just cause*."

[12] In the alternative the defendant pleaded that:

> "… *The engagement was terminated by the parties as a result of the plaintiff's conduct, which amounted to breach of contract to marry*."

[13] At the start of the trial, the plaintiff abandoned his allegations of a universal partnership.

IMPROVEMENTS, DISBURSEMENTS AND EXPENSES MADE AND INCURRED DURING THE ENGAGEMENT

[14] Plaintiff purchased an engagement ring for the defendant. Although valued at R16 500,00 he paid R8 500,00 for it as it was made by a friend.

[15] Plaintiff arranged for the trade in of the defendant's Toyota Prado 4X4 which was valued at R200 000,00 for a Mitsubishi Pajero. After settling the balance owing on the Prado totalling R28 905,53 he paid R182 132,00 for the Pajero. He is claiming an amount of R179 237,53 plus interest thereon at 15,5% *a tempore morae*.

[16] Plaintiff procured services in respect of and/or paid for the following improvements or maintenance works in or around the Morningside property:

- Asatico Civils = R97 550,00

  Improvements or renovations in relation to servant's quarters.

- Edenvale Locksmiths = R1 600,00

  Changing locking system of whole house from multiple keys to one key system.

- Outdoor Security = R11 150,34

  Repairs, service and/or work on electric fencing, electric motors, pumps, gadgets and gates.

- H Maurer = R5 300,00

  Melamine shelving and general maintenance work.

- Poolmark CC = R7 255,00

- Channel 7 DSTV = R3 360,00

  Installation of complete DSTV system.

- Electric World = R8 116,78

  General electrical maintenance.

- Clark Horticulture CC = R2 286,51

  Garden sprinkler system installation and maintenance.

- Krazi Door Company = R350,00

  Maintenance and service of roll-up doors.

- Supreme Electrical = R2 450,00

  General electrical maintenance work.

- N J van Zyl Repairs = R2 500,00

  Payment for drawing up of building plans plus passage through bureaucratic channels.

[17] Plaintiff abandoned the claim for lights and lighting purchased from Lighting Warehouse, Meadowdale amounting to R4 521,20.

THE LAW INVOLVED

[18] The golden thread or general rule going through the law governing gifts or donations exchanged or given in anticipation of marriage is that such gifts or donations must be returned if the marriage does not take place.

[19] From the time of Roman Law and Roman-Dutch Law, the predecessors of our legal system, the above principle was recognised and applied. They were called *arha sponsalibus* which are understood in the sense that "*… die woord(e) verstaan moet word in die sin dat daar 'n verwagting van 'n huwelik moet wees omdat daar 'n verlowing was*". See Wesels J in *MacKenzie v Mutual Life Insurance Co of New York, and Bilbrough* 1906 TS, 116.

[20] *Voet* 23.1.19 illustrates it as follows:

> "*We have said above that when an engagement is broken, then, if indeed this has happened through the clear fault of any one party, such party loses the earnest which he has given, and repays twofold those which he has received.*"
>
> "*Then again the innocent party puts to gain any generosity in connection with the betrothal which he or she has received, and recovers what he or she has given.*"
>
> "*But if the thing has been done by common consent, then, when nothing to the contrary has been arranged, what has been given in the hope of future marriage must be returned on both sides.*"

[21] *Grotius* : 3:2:20 puts it in the following manner:

> "*t Geen geschonken word ten inzichte van een gehoopt huwelijk, moet wedergegeven worden, het huwelijk niet volgende.*"

[22] *The Digest* in D.39:5:1:1 puts it as follows:

> "*1. Therefore, when we may say that a donation between betrothed persons is valid, we use the term in its correct sense, and we understand by it anything given by a person who bestows it for the sake of liberality in order that it may immediately become the property of the one who receives it, and that, under no circumstances, he desires it to be returned to him. And when we say that a man gives a donation to his betrothed with the understanding that, if the marriage should not take place, the gift may be returned, we do not contradict what was previously stated, but we mean that a donation can be made between such persons, and may become void under a certain condition.*"

[23] During the rule of the Roman Emperor Justin, the father of Justinian, gifts were governed by the so-called *donatio ante nuptias*. This related to gifts given to a woman before marriage to cover the necessary costs that occurred after marriage.

[24] During the rule of Jusinian, the *donatio propter nuptias* was used. This applied to gifts given before marriage with the express condition that it is refundable or returnable if the marriage does not go on.

[25] The above Roman Law remedies have become obsolete but the underlying principles have endured and have found application in latter day jurisprudence.

[26] As far back as 1906, Wessels J said the following in *MacKenzie v Mutual Life Insurance Co of New York, and Bilbrough*, 1906 TS, 116:

> "*Solank die skenker die geskenke gee omdat sy die hoop gekoester het dat die begunstigde met haar sou trou en sy handelswyse sulks was dat sy met regverdiging daardie hoop kon koester, die geskenk teruggegee moet word indien die huwelik nie voltrek word nie.*"

[27] In the later decision of *Van Dyn v Visser* 1963 (1) SA 445 GWPD, Potgieter J held that where parties are engaged and gifts are given to each other with a view to marriage, then in the event of the marriage not taking place, the gifts must be returned. He stresses that the parties must be

engaged before this principle can apply. The exchange of rings is immaterial. At 447D-E the learned judge puts it as follows:

> "*Vir alle praktiese doeleindes was die partye dus, toe die geskenke gegee is, verloof. Die feit dat daar nie 'n verlowingsring gegee was nie, maak in ons reg geen verskil nie. 'n Verlowing ontstaan sodra daar 'n wedersydse belofte is om met mekaar in die huwelik te tree.*"

> "*Daar is ook geen beletsel in ons reg dat 'n verlowing tot stand kan kom onderhewig aan 'n voorwaarde nie.*"

[28] The learned judge clearly was of the view that the above principles are not only a correct restatement of our law but are also complementary to the principles laid down in old Roman and Roman-Dutch Law. He held, and I agree with him, that there is no contradiction in the law and its application to gifts exchanged during the period when parties are engaged in contemplation of marriage.

[29] At 449A he states as follows:

> "*Nog in D.39.5.1.1 nog in Inst. 3.7.2 word dit gestel dat 'n geskenk wat gegee word omdat die partye verloof is of omdat die skenker hoop of verwag dat 'n huwelik voltrek sou word, teruggegee moet word as die huwelik nie voltrek word nie.*
>
> *Die Digesta plaas waarna verwys word, wat hierbo aangehaal is, kom slegs daarop neer dat 'n geskenk wat deur verloofdes aan mekaar gedoen word wettig is, maar dat sodanige geskenk ook voorwaardelik kan geskied, naamlik dat indien daar geen huwelik volg nie, die geskenk teruggegee moet word.*"

[30] Gifts or presents given during the duration of an engagement may thus be said, by implication or impliedly, to become *per se* returnable once the condition under which they were given, viz marriage is not fulfilled.

[31] The learned judge in the *Van Dyn v Visser* case (*supra*) puts it as follows at 450A-D:

> "*Waar Grotius derhalwe neerlê dat wat gegee word met die oog op 'n verwagte huwelik teruggegee moet word myns insiens verstaan word dat volgens, in die Republiek geldende Romeins-Hollandse reg, dit deur die reg inbegryp is dat wanneer 'n geskenk gegee is tussen verloofdes met die oog op 'n huwelik, daardie geskenk gegee is op voowaarde dat die huwelik voltrek word en dat dit teruggegee moet word indien die huwelik nie voltrek word nie.*"

[32] The honourable court further stressed that it is an implied condition of the giving of the gift under these circumstances that it is refundable once marriage does not follow.

[33] At 450D-E he states as follows:

> "*Ek is dit gevolglik nie eens met (raadsman of regsman) dat eiseres moet bewys, óf uitdruklik óf stilswyend dat die geskenk gegee is onderhewig aan die voorwaarde dat, indien die huwelik nie plaasvind nie, die geskenke teruggegee moet word nie.*"
>
> "*Sodra eiseres bewys dat die partye verloof was toe die geskenke gegee is met die hoop op 'n verwagte huwelik omdat die partye verloof was, dit vanweë regte impliseer word dat die geskenk gegee is onderhewig aan die voorwaarde dat dit teruggegee moet word.*"

[34] It is so that the plaintiff has abandoned his reliance on a partnership between the parties herein that has ended. I am of the view that mention should be made of some salient features about the law governing termination of such partnerships (including universal partnerships). The defendant in its plea and heads of argument takes time to dwell on this aspect and as such deserves a response.

[35] In *Krull v Sangerhaus* 1980 (4) SA 299 ECD, Eksteen J stated and held that for a plaintiff to succeed in a claim based on breach of contract to marry, it should show that there was a sufficiently serious cause, not a frivolous one, justifying such a claim and that mere allegations of a dispute between the parties' parents, which also involved the parties, regarding the venue or arrangements of a wedding reception are too frivolous to qualify as *justa causa*. He further held that such just cause must appear from the defendant's pleadings.

[36] From the above, my understanding of the situation in this present case is that when pleading to the plaintiff's summons herein, the defendant should not only have tendered a bare denial of the "*mutual termination*" of the engagement. The defendant should have specifically pleaded the circumstances it alleged the plaintiff terminated the engagement, clearly why it alleges the alleged unilateral repudiation was unjustifiable so as to justify the refusal to return any gifts received.

[37] At 301F-H in the *Krull* case the learned judge (Eksteen J) stated as follows:

> "*It is common cause that … an agreement to marry is a contractual relationship of considerable importance to the parties, so much so that its unjustifiable repudiation may attract, and often does attract, both contractual and delictual damages …*
>
> *Unilateral repudiation of such an agreement by one of the parties could only be lawful if done for a just cause.*
>
> *Where disagreement between the parties is relied upon for a repudiation of the agreement, it must be of so a serious nature as to interfere wholly or partially with the aims of marriage or with its anticipated harmony or happiness.*"

[38] In *Robson v Theron* 1978 (1) SA 841 (A) Joubert JA re-affirmed the continued validity of invoking the old Roman Law remedies of *actio pro socio* and *actio communi dividundo* where partnerships are dissolved, especially by agreement between the parties. The *actio pro socio* deals with the liquidation of goodwill while the *actio communi dividundo* is applicable to the liquidation of both the goodwill and the other assets through liabilities of the partnership. The latter remedy became applicable also to goodwill in addition to other assets by the *utilis actio communi dividundo* remedy.

[39] The last aspect on points of law I wish to touch on, is the content and implications of the terms "*implied or tacit*" terms in an agreement, in this case, engagement agreement.

[40] Terms to be held as "*implied*" should be as much part of the agreement as a matter of law just like express terms thereof and may not be excluded by a clause or rider or qualification by any of the parties at its whim any time. Consequently the implied terms of an engagement must be such that they will be part of the essence and repercussions of the engagement agreement irrespective of whether or not one of the parties wishes to have them excluded.

[41] In *Van Nieukerk v McCrae* 2007 (5) SA 21 (WLD), Goldblatt J held that the courts have the inherent power to develop, where necessary, new terms to be implied *ex lege*, as long as that power is exercised in accordance with the dictates of justice, reasonableness, fairness and good faith. Importantly, the learned judge further held that a term should be regarded as "*implied*" only if that term was good law in general, rather than merely because it was good in a particular case.

[42] In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A), Corbett AJA held as follows at 531D-H:

> "*In legal parlance the expression "implied term" is an ambiguous one in that it is often used, without discrimination, to denote two, possibly three, distinct concepts. In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual consensus: it is imposed by the law from without. Indeed, terms are often implied by law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contract. … Such implied terms may derive from the common*

> *law, trade usage or custom, or from statute. In a sense "implied term" is, in this context, a misnomer in that in content it simply represents a legal duty … imposed by law, unless … It is a naturalium of the contract in question.*"

[43] Once implied terms have been recognised, they are implied into all agreements if they are of general application, or into all contracts of a specific class, unless they are specifically excluded.

[44] In an engagement agreement it is settled law that once it fails, gifts given and received or disbursements made in good faith and as in the nature of things in such situations, become returnable or refundable. Therefore, even where it is alleged that no such terms were expressly agreed to, they will as of law be implied in such an agreement. Any person averring that such *naturalia* of an agreement have been excluded, should come up with express or clear proof to the contrary and such person's behaviour patterns and mannerisms will play a part in determining whether such terms were excluded or not.

[45] In this case the parties have not expressly excluded any consequences of their agreement.

APPLICATION OF ABOVE PRINCIPLES TO THIS CASE

[46] Plaintiff was divorced for 12 years and the defendant had just been divorced from her husband when they met. Defendant was still awaiting the

proceeds of the sale of her previous matrimonial home in Morningside. She had already purchased an erf in a cluster complex at Glenfilian Estate. The plaintiff sold his previous home at Edenvale and both jointly purchased the Morningside property. They settled in it, as they say, like husband and wife.

[47] From the defendant's own evidence, from the very moment the parties started staying together in the Morningside property things started going astray and down hill. According to her, the plaintiff was curt and harsh to and with her, he was the epitome of racism and racial intolerance and made life so difficult for her that she terminated the relationship and engagement in December 2005. After the plaintiff persuaded her with gifts of a golf cart and the re-decorated engagement ring, she forgave him and they even went on holiday together with some of their children and friends to Kenya. When they returned from Kenya, the defendant went on another vacation with her sister and the children to Sabi-Sabi Game Reserve in the Mpumalanga area. When she was still there, the plaintiff phoned her and proposed that she sell him 50% of the common home. She agreed to discuss that issue when she returned home.

[48] Pursuant to this cohabitation, plaintiff did certain things and paid for them. At this stage, the defendant did not have the cash as her divorce settlement had not yet been paid out. From the evidence led, it became clear that R2 725 000,00 was deposited into the defendant's bank account on 16 March 2006. She promptly settled her part of the bond on the Morningside

property on 20 March 2006. She transferred R1 447 866,65 for that purpose. She then invested R1 242 000,00.

[49] It is common cause that there was an engagement between the parties with a view to marriage. The engagement was terminated at the latest in January or February 2006. Plaintiff's version is that it was mutually terminated. The defendant says it was unilaterally terminated or repudiated by the plaintiff through his abusive and intolerant behaviour.

[50] In the face of the defendant's insistence that the termination of the engagement was the unilateral fault of the plaintiff it is necessary this aspect is re-visited.

[51] In her plea the defendant first admitted the termination was by both parties. Later in the plea she cancels her admission by denials. At the end of her plea it was not very clear what she admitted or denied.

[52] In her answer to the pre-trial minutes she advances another reason: breach of promise through misconduct by the plaintiff. This ground cannot stand. According to the defendant herself, she had forgiven the plaintiff for all abuses and misconducts by the time they went to Kenya in December 2005. The only question remaining is whether the discussions at Santy's Restaurant constituted a misconduct. The defendant had agreed to discuss the issue of percentages in or equitable division with the plaintiff when she was still at Sabi-Sabi in January 2006. The Santy's meeting was a continuation of the

agreement to discuss. It cannot be a misconduct. More so, it is uncontradicted evidence that the parties were staying in the same house but not according each other conjugal rights since December 2005 or January 200t. This would mean that by December 2005 or January 2006 the engagement was terminated. This situation negates the defendant's version that the repudiation took place in February 2006.

[53] What compounds the matter further is the grounds that were advanced by the defendant in her affidavit in opposition of an application for summary judgment in this matter dated 31 July 2006 and filed on 1 August 2006.

In paragraph 10 thereof the defendant stated that:

> "*… In February 2006, the plaintiff and I decided to terminate our relationship and the plaintiff vacated the property in May 2006.*"

[54] No matter how one tries to read all these statements by the defendant, one cannot escape the conclusion that she agrees that the engagement was terminated by both parties mutually.

[55] This is fortified by the defendant's answers during cross-examination when she among others said:

> "*I said mutual consent meaning that we both agreed to break the engagement.*"

[56] During cross-examination by the plaintiff's advocate, the defendant stated that the only reason for the repudiation of the engagement was the insistence of the plaintiff at a subsequent meeting around February 2006 at the latter's restaurant, The Santy's, that she sell to him 50% of the matrimonial property for R1,5 million. After agreeing when she was still at Sabi-Sabi, to discuss this matter with the plaintiff, it is difficult for the court to understand why she would be shocked, flabbergasted, horrified and distraught to the extent that she would storm out of the meeting. Ultimatum or no ultimatum, the discussions around this issue are not so far-fetched and removed from reality around this couple that they should precipitate the ending of an engagement, more so that such engagement had previously survived racism, abuse and harassment. Such a ground does not constitute a just cause to avoid the consequences of the termination of an engagement.

[57] Taking into account the plaintiff's stated grounds of breakdown, among others, the drifting apart, the defendant's obsession with her golf and the abuse he allegedly endured from the defendant, and comparing it with the defendant's version among others as set out above, it becomes clear that it was the wish of both parties that this engagement be terminated. The fact that the parties even stayed in the same house from December 2005 until June 2006, when the plaintiff moved into a bed and breakfast facility, without according each other conjugal rights is indicative of the serious breakdown in relations. This is viewed in the light of evidence from the defendant that their sexual activity was previously so intense that she would be awoken in the

dead of the night for that purpose and that the activity would as a rule happen up to three times a night. She regards this as abusive also.

[58] The inescapable conclusion I come to is that the engagement of the parties was terminated by mutual consent or agreement. As a rule, gifts made or received should be returned or refunded, under such circumstances.

[59] Having arrived at this finding, the question of the fate of the gifts exchanged between the parties and the improvements or disbursements made during the subsistence of the engagement falls to be determined.

[60] The general rule, as stated above, is that such gifts are returnable and the value of the disbursements made is refundable unless there was an agreement to the contrary or the recipient or beneficiary shows a cause justifying his/her refusal to so return or refund them. The principles hereof have been set out above.

[61] The issue of the engagement ring is straight forward. It should be returned to the plaintiff or the amount paid for it refunded with interest. The defendant indicated during her evidence that should it be found that she is obliged to return the ring or pay for its purchase price, she would opt to return it.

[62] With regard to the other services paid for or maintenance work performed, the defendant's position is ambivalent. She does not deny that services were rendered and payments therefor made. Her problem is that it is not clear whether all the alleged maintenance work or installations or improvements were adequately or properly rendered or made; alternatively, she has a gripe with the fact that expert evidence was not led by the plaintiff to prove that the services were indeed rendered as quoted and that payment was received.

[63] The above disclaimer is not in accord with the evidence that she led: Throughout her cross-examination of the plaintiff as well as during her testimony, her version was of specific services that were indeed rendered. Her problem was that she was not consulted when the services were procured. Her other problem was that the services were procured or the maintenance work done in the face of her clear and repeated objections and her standing order that no services be ordered where she would be expected to contribute to them as she was impecunious.

[64] She furthermore avers that all the work performed on the property, except the renovations to the servant's quarters, was unnecessary, luxurious or a frolic of the plaintiff's who just wanted to have the gadgets or fixtures that he had at his previous home. She added that the Morningside property was fault free and needed no upgrading, irrespective of clear evidence that lightning had incapacitated some electrical equipment or whether or not such renovations were dictated by security considerations or clear convenience.

[65] In the nature of things, the type of services rendered should determine whether they were necessary and essential or luxurious or voluptuarious. In my view, judicial notice can be taken of the fact that people acquiring and occupying a pre-owned home may need to re-arrange some structural aspects or improve on some security installations or upgrade some aspects of the dwelling and definitely repair and/or replace defective and/or dysfunctional equipment. Although it may be courteous to consult with the other party, it may at times be unreasonable to expect that whenever a light bulb is to be replaced or pool sand and consumables are to be purchased, a meeting should be organised by people staying together as husband and wife to vote over such services. That would not be in the ordinary order of things of this nature. Surely, the defendant was being pampered by a suitor and they contemplated marriage. It is thus improbable that issues of impecuniosity would arise at a time when roses still smelt so sweet and before they became acutely aware of the thorns on the rose bush.

[66] Which brings us to the aspect of the specific improvements, alterations, maintenance works made and disbursements related thereto.

[67] Improvements to servant's quarters: R96 350,00

It is not disputed that these improvements were made to the property. It enhanced its value. The plaintiff claimed R111 207,00 originally but reduced it to R96 350,00 during evidence. The defendant agrees only to R95 000,00. She alleges that that is the amount verbally communicated to her by the plaintiff. She further averred that she never saw any written quotation. She

also stated that the renovations were done without approval plans. When asked if she verified the latter aspects with the local authorities she answered in the negative. In short, her defence to this claim was that she heard of this from neighbours. Secondly, she says anything more than R95 000,00 was never discussed and agreed with her. From our discussion above, these were necessary improvements that were paid for by the plaintiff and he is entitled to restitution of 50% thereof, i.e. half of R96 350,00. Defendant herself verified R80 000,00 worth of payments with the contractor. A R16 350,00 cheque was later proved by the plaintiff.

[68] N T van Zyl Repairs : Plans and Drawings: R2 500,00

From what was said above, it is not in dispute that the plans for the renovations have been procured and paid for by the plaintiff. As a result, the claim of R2 500,00 is allowed. The plaintiff is entitled to re-coup 50% thereof from the defendant.

[69] Edenvale Locksmiths: R1 600,00

These improvements were effected. Security at a new home is important. When one receives the keys from the previous owner or the agents, the inescapable apprehension or suspicion will be that the combinations or numbers of the locking system will have been known to people other than the new occupants. As a result, changing a locking system of a new house is not a luxurious expense. It is necessary. This expense is allowed in the claimed amount of R1 600,00. 50% thereof should go to the plaintiff before the proceeds of the Morningside property are distributed.

[70] Outdoor Security: R11 150,36

Electric World: R8 116,78

Supreme Electrical: R2 450,00

The defendant alleges that the general maintenance, installations and repairs to the electrical system was unnecessary because the premises were in good repair. She nevertheless admits that aspects would be affected by lightning or would be dysfunctional at times. Whether premises are new or not, faults to electrical circuits, boards, lights, plugs, wiring and appliances and motors may be found and should be attended to. Security fencing is a necessity in the present climate of crime infestation. Consent of the other party may not be essential to embark on general electrical maintenance and works. It can happen as a matter of courtesy but cannot render the work done unlawful or unnecessary. These expenses are allowed.

[71] H Maurer: R5 300,00

It is not disputed that this expense was to install melamine shelving in the garages. Defendant avers it is luxurious. I do not find shelves in a garage to be a luxury. An upper middle class house like the Morningside property should have come standard with such fittings or fixtures. To install them is not a luxury. This expense is allowed with the proviso that the amount allowed is R4 300,00, not R5 300,00 because R1 000,00 for a bed is deducted. The plaintiff bought and alienated the bed.

[72] Channel 7 DSTV: R3 360,00

Plaintiff's evidence is that this service was procured by the defendant herself. He found the work done and the invoice was presented to him. He settled the account. The defendant's protestations cannot be reasonable. This expense is allowed.

[73] Clark Horticulture CC: R2 286,51

This was for the sprinkler system in the garden. Defendant alleges that it was not necessary to upgrade the sprinkler system. From her evidence it was clear that she never inspected the system. Consequently, she has no valid grounds for stating that the upgrading was luxurious. She agreed that prior to the upgrading it was a period of heavy rains and that only when it became necessary to irrigate after the rains had subsided could it be necessary to work on the irrigation system. This expense was necessary. It is allowed.

[74] Krazi Door Company: R350,00

To service a roll up garage door should not be discussed or disputed. This expense is allowed.

[75] Poolmark CC: R7 255,00

Defendant avers that there was nothing wrong with the pool and avers that the chlorinator and other accessories installed or purchased were luxurious. A high class suburban house in Morningside must have or always has a pool. Both parties agree that the pool would occasionally turn green after rains. But to aver that a chlorinator is a luxurious item for a pool in Morningside is an

unreal statement. Defendant highlighted such a need when she stated that after the plaintiff had vacated the property the pool turned green because she could not operate the chlorinator. This is no excuse or justification to disallow the expenses incurred on the swimming pool. Defendant testified that she could easily clean the pool herself without the extra gadgets procured by the plaintiff. From her own evidence, this was impossible or difficult. Defendant complained that she has a 07h00 to 17h00 job at her shop, has to attend to her golfing needs on Tuesdays and Saturdays and attend also to the mothering of her children and the plaintiff. These were some of her reasons why the engagement could not go on. Where would she get time to attend to the needs of a swimming pool? A chlorinator automatically does the job. These expenses are allowed. They were not luxurious.

[76] Mitsubishi Pajero: R179 237,57

- It is not in dispute that the defendant's Toyota Prado 4X4 was traded in for a new Mitsubishi Pajero valued at R350 332,00. The trade in value of the Prado was R200 000,00. There was a balance of R28 905,53 outstanding on the Prado and that was settled by the plaintiff. The latter was reimbursed later of this settlement amount.

- Although the plaintiff paid out a total of R182 132,00 he is claiming the amount of R179 237,57.

- Defendant avers that although she accepted this motor vehicle as a gift, she is not to be penalised for its value because she did not want it originally. That despite the fact that her old car needed some repairs to its cylinder head that could cost several thousand rand, yet she says she did not require a new vehicle.
- In the realistic world, a gift remains a gift, appreciated or not. The defendant is still driving the vehicle even today. In the light of the consequences of the mutual termination of the engagement, it is returnable. R179 237,57 is allowed.

[77] The nett effect of the allowing of the disbursements mentioned above is that I find them necessary disbursements in the light of the social standing of the parties, and the area in which the property is situated. The fact that the property was very clean and well maintained when acquired does not mean that the new owners could not adapt and upgrade it to their specific requirements. I find it difficult to understand why people cohabiting and sharing everything should first have a sit-down meeting every time a maintenance aspect on the property should be embarked upon. It is so that major alterations or renovations should be agreed upon or discussed but the abovementioned alterations, upgrades, installations, maintenance works and repairs were of a routine nature that would be expected to be done under normal circumstances in similar situations.

[78] It will not therefore be out of place to say that it was an implied term of this engagement that the necessary improvements and/or renovations or maintenance works be done or effected to the property. They were not luxurious or voluptuarious improvements.

COSTS

[79] A successful litigant will usually be awarded the costs of a suit.

[80] Only where exceptional circumstances dictate will a successful litigant be deprived of its entire costs or part of those costs.

[81] In the present case, the plaintiff substantially succeeded in his claim save for some minor adjustments of amounts or abandonment of some aspects of the particulars of claims lodged or prayed for.

[82] The substantive law governing engagements is such that it is mostly settled and the defendant ought to have realised that this is a matter for settlement out of court rather than out and out litigation.

[83] Although there is no legal bar on the defendant to persist with her vigorous defence, the weight of evidence and the balance of convenience coupled with the probabilities herein is such that the plaintiff should be awarded the costs of this action, which I do.

ORDER

[84] AFTER HAVING read the papers and documents filed of record herein; and

AFTER HEARING *viva voce* evidence led; and

HAVING LISTENED TO ARGUMENT BY COUNSEL on both sides; and

HAVING CONSIDERED THE MATTER;

IT IS ORDERED that:

(a) The engagement between the parties be and is hereby terminated;

alternatively,

its termination is hereby confirmed.

(b) The defendant is to return the engagement ring to the plaintiff within 20 (twenty) days of date of this judgment, alternatively, pay to the plaintiff the amount of R8 500,00.

(c) The R3 500 000,00 selling price of the jointly owned property, i.e. erf 103 West Road North, Morningside, Sandton, be divided as follows:

(i) The following amounts to be deducted and paid to the plaintiff before division:

(ia) R179 237,57 in respect of the purchase of the Mitsubishi Pajero;

(ib) R69 359,36 in respect of disbursements for renovations and services paid for.

(ii) Interest on the amounts mentioned in paragraphs 3.1.1, 3.1.2 and possibly 2 if engagement ring was not returned as ordered above, at the rate of 15,5% per annum from the date of service of summary herein, i.e. 12 June 2006, to date of payment.

(iii) The residue or remaining balance of R3 250 403,07 (if ring was returned) or R3 241 903,07 (if ring was not returned) to be divided equally between the parties.

(d) Defendant to pay the costs of the suit.

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F N KGOMO
ACTING JUDGE OF THE HIGH COURT
(WITWATERSRAND LOCAL DIVISION)

FOR PLAINTIFF	ADV J J ROESTORF
INSTRUCTED BY	KEITH SUTCLIFFE & ASSOCIATES INC
FOR DEFENDANT	ADV L SEGAL
INSTRUCTED BY	WERKSMANS ATTORNEYS
DATE OF HEARING	8 AUGUST 2008
DATE OF JUDGMENT	23 SEPTEMBER 2008

SUMMARY JUDGMENT

Gifts given by and between people engaged in contemplation of marriage. When returnable.
Principles relating to the gifts given when marriage is contemplated and ultimately fail to take place.

Universal partnership – impact of implied or tacit terms of agreement

REMARKS

Judgment was handed down on August 2007. Judge is of view that it contains aspects that need to be brought to attention of others.