A Contract of Engagement as an Unenforceable *Pactum de Contrahendo* under South African Law: Distilling Lessons for Lesotho Courts

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Abstract

The enforceability of a contract of engagement has waned in many jurisdictions over time. Yet, the issue only reached South African courts in 2008 when it was raised mero motu by the High Court in Sepheri v Scanlan. *Several decisions followed the* Sepheri *matter but did not settle the law. In 2013, the question of whether a breach of a contract of engagement attracts contractual damages was eventually answered in the negative in* Cloete v Maritz. *It is now settled law that a contract of engagement is an unenforceable* pactum de contrahendo *providing the parties some time to become acquainted with one another and to decide whether to marry. Accordingly, its breach cannot attract contractual damages. This is largely premised on contemporary* boni mores *of society where a disappointed party in an engagement arrangement is no longer seen as a victim. Seemingly, the South African courts adopted an incremental abolition approach towards contractual damages for breach of engagement. This contribution provides a critical analysis of this approach and of the courts' application of concepts such as "irretrievable breakdown" to the law of engagements. In the process, the contribution distils lessons for the courts of Lesotho, which ordinarily borrow heavily from their South African counterparts. The contribution concludes that the courts of Lesotho should not be reluctant to judicially engineer the common law to bring it in line with contemporary* boni mores.

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1 INTRODUCTION

Both Lesotho and South African law have always recognised an engagement (also referred to as promise to marry) as an enforceable contract, the breach of which attracts contractual remedies, albeit truncated.[1] This is despite the fact that many jurisdictions have long abolished actions for breach of promise to marry, for a variety of reasons. These range from the contention that such actions give "opportunity for claimants of a 'gold-digging' nature" and that the "stability of marriage is so important to society that the law should not countenance rights of action, the threat of which may push people into marriages which they would not otherwise undertake."[2] The relevance and desirability of actions for breach of promise of marriage in modern society have long been pondered by South African legal scholars, inspired by, *inter alia*, trends in other jurisdictions. However, the issue only reached the South African courts in 2008, when the court *mero motu* raised it in *Sepheri v Scanlan*.[3] The same cannot be said about the Lesotho courts. They have hitherto not been presented with such an issue or *mero motu* raised it.

Although the high court raised the issue in *Sepheri*, it was somewhat loath to authoritatively pronounce on it. Davis J was in doubt as to whether section 39(2) of the South African Constitution imposed a duty on the court to develop the common law in circumstances where the parties had not raised the issue. He eventually suggested that the matter be left for "legislation rather than judicial engineering by trial courts."[4] The judge's reluctance begs the following questions. First, whether there is a constitutional duty to develop the common law *mero motu*, and secondly, which matters may or must be referred to the legislature and which ones are within the ambit of the courts' power to develop?

Two years after *Sepheri*, in *Van Jaarsveld v Bridges*[5], Harms DP was faced with an appeal for a claim of contractual damages arising out of a breach of promise of marriage and was of the view that "[t]he time has arrived to recognise that the historic approach to engagements is outdated and does not recognise the *mores* of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise."[6] In view of the fact that, as in the *Sepheri* matter, the parties in *Van Jaarsveld* had not raised the issue of whether the law required reconsideration, the court correctly extended the scope of the appeal by inviting them to address the issue as articulated in the dictum of Davis J in *Sepheri*. Judge Davis had stated *obiter* that:

> In general I would agree with these views, namely, that our law requires a reconsideration of this particular action. It appears to place the marital relationship on a rigid contractual footing and thus raises questions as to whether, in the constitutional context where there is recognition of diverse forms of intimate personal relationships, it is still advisable that, if one party seeks to extract himself or herself from the initial intention to conclude the relationship, this should be seen purely within the context of contractual damages.[7]

The parties in *Van Jaarsveld* addressed the issue and the court took the opportunity to provide "guidance" to other courts that may be faced with claims for breach of promise in the future. The court, however, only provided guidance, and did not reach any definite conclusion. This is because, according to the court, the case itself would not be affected by any possible development of the law. Importantly, the court stated, *obiter*, that "[a]n engagement is … more of an unenforceable *pactum de contrahendo* providing a *spatium deliberandi* – a time to get to know each other better and to decide whether or not to marry finally."[8]

Following these judgments was the *Ponelat v Schrepfer*[9] decision where the plaintiff sought

1 Du Bois *Wille's Principles of South African Law* 9 ed (2007) 234-235. Not all remedies for breach have been available. For instance, the remedy of specific performance has for a long time been unavailable to the innocent party.
2 The English Law Commission provided these reasons in its 1969 report on the Breach of Promise of marriage, cited by Cronje and Heaton *South African Family Law* 3 ed (2004) 10.
3 2008 1 SA 322 (C).
4 *Sepheri* 331.
5 2010 4 SA 558 (SCA).
6 *Van Jaarsveld* para 3.
7 *Sepheri* 322.
8 *Van Jaarsveld* para 8.
9 2012 1 SA 206 (SCA).

damages for breach of promise and recognition that a universal partnership existed between the parties while cohabiting. The parties had lived as a couple for more than 16 years and during that time the defendant presented the plaintiff with an engagement ring. The court held that indeed a universal partnership can exist between parties who are engaged to be married provided the necessary requirements for its existence are met, and this is regardless of whether the parties are married, engaged or cohabiting.[10] It has been observed that this case created a "new remedy to replace prospective damages as a means for gaining substantially from the assets of a person in breach of promise."[11] The case of *Butters v Mncora*[12] was decided along the same lines as *Ponelat*. The parties had lived together as husband and wife for nearly 20 years and half of that period as an engaged couple, needless to say the marriage never materialised. The next case on the same subject was *Cloete v Maritz*[13] where the court followed the *dicta* in both *Sepheri* and *Van Jaarsveld* and seemingly settled the law.

This contribution critically engages these judgments on the development of the common law regarding the action for damages for breach of promise. Thereafter, it pertinently asks whether the Lesotho courts should consider these decisions as persuasive authority when confronted with an action for damages for breach of promise or where an opportunity presents itself to *mero motu* raise and decide the issue. Finally, it distils lessons for the Lesotho courts on how to navigate issues presented by actions for breach of promise. This is particularly important given that the two jurisdictions have very similar legal systems and the Lesotho courts often borrow from their South African counterparts in line with an observation once made by Hahlo and Khan to the effect that "[i]deas have wings [and because of that] no legal system of significance has been able to claim freedom from foreign inspiration."[14] In the case of Lesotho, it would not be an overstatement to observe that the courts rely heavily on South African authorities thus making this contribution particularly apt.

This contribution also analyses the courts' reasoning and application of the concept of irretrievable breakdown in the context of engagements. It unpacks this concept as a ground for divorce, and provides an analysis of whether it has been properly applied in the context of engagements. In order to fully appreciate the courts' views that the *mores* of modern society and public policy considerations demand that the law on breach of promise to marry be revisited, the paper interrogates the nature of the contract of engagement, and provides a précis of its historical evolution.

2 JUDGMENTS IN *SEPHERI v SCANLAN*, *VAN JAARSVELD v BRIDGES* AND *CLOETE v MARITZ*

It is appropriate at this stage to state the salient facts of these cases.[15] In *Sepheri*, the parties got engaged in November 1998. At the time, the defendant was working in Helsinki, Finland, while the plaintiff was a student in Stockholm. Upon completion of her studies in 2001, the plaintiff went to Helsinki to join the defendant. She turned down two job offers in Sweden at the behest of the defendant. The defendant's employment contract ended at the end of December 2001, and they both moved to Sweden where they temporarily lived with the plaintiff's mother. At this time, they were contemplating buying a house in Sweden. They planned to get married in June or July 2002, but the marriage never materialised. They moved from Sweden to Cape Town where the defendant purchased a house in his name, a decision that made the plaintiff uncomfortable throughout the engagement. It is common cause that over the course of the engagement, the plaintiff tried to get the defendant to register the property in both their names, but in vain. The parties had several disagreements regarding the property, and accusations of infidelity were made from both sides, until the couple finally terminated the relationship in 2004.

The plaintiff moved the High Court for damages for breach of promise to marry. She sought contractual damages equivalent to half of the value of the defendant's estate, being her loss of

10 *Ponelat* para 21.
11 Epstein and Zaal "End of the Road for Breach of Promise Claims? *Cloete v Maritz* 2013 (5) SA 448 (WCC) and *Cloete v Maritz* SAFLII [2014] ZAWCHC 10" 2016 *Speculum Juris* 80-90, 82.
12 2012 4 SA 1 (SCA).
13 2013 5 SA 448 (WCC).
14 Hahlo and Kahn *The South African Legal System and its Background* (1973) 484.
15 The facts appear more fully in Davis J's judgment in *Sepheri* 323-329; Harms DP's judgment in *Van Jaarsveld* paras 12-18; and Henney J's judgment in *Cloete* paras 1-7.

the financial benefits that would have accrued to her by reason of them marrying in community of property. It may be argued that this claim for benefits that are equivalent to the defendant's estate when the parties were not yet married is somewhat indicative of the much criticised "gold-digging" nature of the action for damages for breach of promise. The plaintiff also claimed delictual damages for *iniuria* or *contumelia*.

Before addressing the relief sought by the plaintiff, the court first dealt with the relevance and desirability of the action, based on contract. It concurred with legal scholars that this type of action has no place in the context of the current society's values.[16] However, the court went further to state that, inasmuch as it agreed with the views of legal scholars, they did not represent the current legal position. The court was uncertain whether it had a constitutional duty, since neither party had argued that the action had no place in the current social and legal setting. It stated that the law of engagements should be reconsidered to reflect contemporary *mores*, but concluded that it is best left for legislation, rather than "judicial engineering" by trial courts.[17] The judge then went ahead and applied the law as it was. It was found that there was a contract of engagement and that the defendant had breached same. The plaintiff was awarded half of the contractual damages she had sought, because it considered that she still had good prospects of marriage.

Turning to *Van Jaarsveld,* the parties got engaged on 29 July 2005, and the wedding date was set for 14 January 2006. On 4 December 2005, the appellant ruefully advised the respondent by text message that he was no longer willing to continue with the marriage. He however vacillated the next day, and asked the respondent to send out wedding invitations. A day later, he sent her another text message, wherein he reverted to his original position and finally called the wedding off. The respondent accepted the repudiation and filed summons claiming contractual damages for breach of promise in excess of R1 million – another indication of the "gold-digging" nature of the action, it may be argued.

Even though the court in this case felt that the law of engagement had to be reconsidered, it held that the case before it could be disposed of without changing the law. It upheld the appeal and ordered absolution from the instance with costs. It held that it is difficult to rationalise claims for prospective losses in the event of breach of engagement, because the parties do not necessarily choose a marital regime at the time of engagement.[18] The vexed question with such claims is what regime should the court use in determining prospective losses in circumstances where the parties have in fact not decided? The other difficulty with prospective losses in this context is that they are "not capable of ascertainment, or are remote and speculative, and therefore not proper to be adopted as a legal measure of damage."[19] This is particularly the case when one considers that it is impossible to determine the length of a marriage that never materialised, for purposes of calculating the prospective losses. As far as actual losses are concerned, the court held that they "do not flow from the breach of promise *per se* but from a number of express or tacit agreements reached between the parties during the course of their engagement."[20]

On the law of engagements, the court made the following pertinent points, *obiter*: A party's unwillingness to marry should be considered as evidence of a just cause for ending an engagement. According to the court, this unwillingness is clear evidence that the engagement has broken down irretrievably. The court further observed that society's morals have changed to a point where termination of marriage is no longer seen from the perspective of the innocent and guilty spouse, and that the so-called guilt principle has given way to irretrievable breakdown of marriage. In the words of the court, "[i]t appears illogical to attach more serious consequences to an engagement than to a marriage", hence the introduction of the concept of irretrievable breakdown to engagements.[21] The court was at pains to point out that marriage does not create a commercial or rigid contractual relationship, and thus it is difficult to justify how the converse should be the position in the case of engagements.[22]

The fact that Harms DP only provided "guidance" to courts that may be faced with possible

16 *Sepheri* 330.
17 *Sepheri* 331.
18 For a dissenting view, see Bonthuys "Developing the Common Law of Breach of Promise and Universal Partnerships: Rights to Property Sharing for all Cohabitants?" 2015 *SALJ* 76-99, 84.
19 *Van Jaarsveld* para 10.
20 *Van Jaarsveld* para 11.
21 *Van Jaarsveld* para 6.
22 *Ibid*.

development of the law on engagements in the future, still leaves the question of whether a court may or must *mero motu* develop common law unanswered. This contribution evaluates the approaches in *Sepheri*, where the court felt that this was a matter best left for legislation, and in *Van Jaarsveld*, where the court only provided guidance through a *dictum*. This is in light of the Constitutional Court's jurisprudence on the subject of the development of the common law; in particular, the cases of *Carmichele v Minister of Safety and Security*[23] and *S v Thebus*.[24] We shall return to this issue later in this contribution.

Finally, in *Cloete v Maritz,* the plaintiff instituted a claim for breach of promise. In particular she alleged that the defendant's repudiation of the promise was wrongful and unlawful and that the latter acted *animo iniuriandi* by conveying his refusal to marry her to another female in a rather "foul and contumelious language."[25] The defendant raised a special plea essentially denying that an action for damages for breach of promise is still a valid cause of action in our law.[26] In this regard, he relied on the judgment of the SCA in *Van Jaarsveld*, which had in turn relied on the remarks of Davis J in *Sepheri*.[27] The plaintiff contended to the contrary that an action for damages for breach of promise was still very much part of the law. In buttressing this point, it was argued that the principle of *stare decisis* meant that the court was bound to follow earlier decisions that found a breach of promise actionable and that the decisions in *Van Jaarsveld* and *Sepheri* did not "abolish" the action for damages for breach of promise as part of their *ratio decidendi*, rather they merely reflected on the validity of the cause of action in an *obiter* fashion.[28] The court in *Cloete v Maritz* cited the *obiter* in both *Van Jaarsveld* and *Sepheri* with approval. Henney J held that:

> Clearly, to hold a party therefore accountable on a rigid contractual footing where such a party falls to abide to a promise to marry does not reflect the changed mores or public interest. Even more so if the law relating to damages that can be claimed on a breach of promise to marry is based on a pre-constitutional heterosexual definition of marriage which traditionally placed women on an unequal footing to men as pointed out above.[29]

Although the decision in *Cloete* seems to have delivered the proverbial final nail in the coffin of actions for breach of promise, it is important to analyse the incremental abolition approach adopted by the South African courts and reflect on whether this is an attractive approach worthy of emulation by the Lesotho courts.

3 THE CONCEPT OF "IRRETRIEVABLE BREAKDOWN" OF ENGAGEMENT

It is trite that one of the grounds for termination of an engagement is *justa causa*. Simply defined, a *justa causa* is an action or occurrence or physical or mental condition of one of the parties to an engagement which would, objectively viewed, jeopardise a happy and lasting marriage life.[30] The fact that one party is no longer in love with the other, is not a reason good enough (*justa causa*) to end the engagement. According to some commentators, if it were, the engagement would be a contract without obligations, but then this could be justified on policy considerations.[31] Harms DP adopted this reasoning when he stated, *obiter* in *Van Jaarsveld*, that an engagement is more of an "unenforceable *pactum de contrahendo*."[32] According to the judge, there is no reason why a party's decision not to continue with the marriage, because they are no longer in love with the other, should not constitute a *justa causa.* The court went further to state that a party's unwillingness to marry is indeed clear evidence that the engagement has broken down irretrievably.[33] By comparison, does the mere realisation that a spouse in a marriage is no longer in love with the other, a reason good enough to end a marriage? Put differently, is one spouse's realisation that they are no longer in love with

23 2001 4 SA 938 (CC).
24 2003 6 SA 505 (CC).
25 *Cloete* para 3.
26 *Cloete* para 8.
27 *Cloete* paras 10-22.
28 *Cloete* para 24.
29 *Cloete* para 54.
30 Cronje and Heaton *Family Law* 10.
31 *Ibid.*
32 *Van Jaarsveld* para 8.
33 *Van Jaarsveld* para 6.

the other, evidence that the marriage has broken down irretrievably? Has the court in *Van Jaarsveld* relaxed the concept of irretrievable breakdown, and if it has, can this be justified?

The concept of irretrievable breakdown was introduced in South African law by the Divorce Act.[34] In terms of the Act, marriage has broken down irretrievably if "the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them."[35] It is worth pausing here and noting that Lesotho has no comparable Act and the concept of irretrievable breakdown has still not been formally introduced into the law by statute although courts have innovatively started invoking it.[36] As far as legislation is concerned, Lesotho law is still based on the so-called "guilt principle".[37]

Turning back to the Divorce Act, it goes further to provide guidelines of what constitutes irretrievable breakdown in the context of marriage.[38] Harms DP, as correctly observed by others, does not, however, provide any guidelines on when and how the courts should apply the concept of irretrievable breakdown to engagements.[39] As far as irretrievable breakdown of marriage is concerned, the courts have expanded on the list provided in the Act.[40] Can it be argued that lack of desire to continue with marriage can, on policy grounds, be added to the list as an indication that the marriage has broken down irretrievably? This question was answered by Flemming J in *Swart v Swart*, when he stated that marriage has broken down irretrievably if one of the spouses no longer wants to be in the marriage; however, the mere intention of getting out of the marriage does not in itself prove the irretrievability of the breakdown.[41] It follows that evidence that the marriage has broken down irretrievably, has to be furnished.

In *Schwartz v Schwartz* the main issue on appeal was whether the finding of the court *a quo* that marriage had broken down irretrievably, was supported by evidence. The court held that:

> In determining whether a marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties it is important to have regard to what has happened in the past, i.e. the history of the relationship up to the date of trial, and also to the present attitude of the parties to the marriage relationship as revealed by the *evidence* at the trial.[42]

It follows that the realisation that a spouse simply no longer loves the other may, as suggested by Hahlo, be a *cause* of the irretrievable breakdown of marriage, but it is not in itself *evidence* of the breakdown.[43] Embracing Hahlo's views, the court held in *Coetzee v Coetzee,* that there has to be evidence of the breakdown of marriage – marriage does not break down as "a result of a mere *reservatio mentalis* or change of *animus* without an accompanying *factum*."[44] It is submitted, therefore, that Harms DP elevated a cause of the irretrievable breakdown of engagement to evidence of such breakdown, when he stated that "[u]nwillingness to marry is *clear evidence* of the irretrievable breakdown of the engagement."[45] This approach had the effect of relaxing the concept of irretrievable breakdown in the context of engagements. The issue is whether or not it can then be justified on policy considerations?

Although a civil marriage has been defined as a contract creating a life-long voluntary union between two people, it is much more than a contract – it is an institution, which, once created, cannot be modified, restricted or ended upon consent of the spouses. The converse is true with engagements. A promise to marry, although a contract between lovers, does not create an institution and can be ended by mutual consent. It is therefore clear that the two

34 70 of 1979.
35 s 4(1).
36 *Macaefa Billy v Majoane Billy* CIV/T/218/2005 (unreported) cited with approval in *Kheleli v Kheleli* (CIV/T/46/06) (CIV/T/46/06) [2009] LSHC 24 (10 March 2009) (unreported).
37 Mothokoa "Divorce Law in Lesotho: A Critical Appraisal of the 'Guilt Principle' and the Present Grounds for Divorce" 1991 *Lesotho Law Journal: A Journal of Law and Development* 21-48.
38 s 4(2).
39 Sharp and Zaal "Narrowing the Scope for Breach of Promise Actions: *Van Jaarsveld v Bridges* 2010 4 SA 558 (SCA)" 2011 *THRHR* 340.
40 See for example *Kruger v Kruger* 1980 3 SA 283 (C); *Swart v Swart* 1980 4 SA 364 (C); *Krige v Smit* 1981 4 SA 409 (C); *Smit v Smit* 1982 4 SA 34 (C); and *Singh v Singh* 1983 1 SA 781 (C).
41 1980 4 SA 364 (O).
42 1984 4 SA 467, 475 (emphasis added).
43 Hahlo *South African Law of Husband and Wife* 5 ed (1985) 333-334.
44 *Coetzee v Coetzee* 1991 4 SA 702 (C) 703.
45 *Van Jaarsveld* para 6.

are fundamentally different. Since an engagement is not an institution, it must be easier to end one, compared to a marriage. In the past, there was stigma attached to the "rejected lover", but it is now socially acceptable for people to break up their engagements.[46] It is on these bases, that the relaxation of the concept of irretrievable breakdown in the context of engagements may be justified.

It is submitted that the court in *Van Jaarsveld* was correct when it stated that "it is illogical to attach more serious consequences to an engagement than to a marriage",[47] and it is further submitted that it is similarly illogical to require the same high standard of proof of irretrievable breakdown used in the case of marriage when one is dealing with an engagement. The mere realisation that a party is no longer in love with the other, and consequently is not willing to continue into marriage, should be a reason good enough, a *justa causa*, to end the engagement. This should be considered both a *cause* and *proof* of the irretrievability of the breakdown of the engagement. It is therefore submitted that *reservatio mentalis* or change of *animus*, need not be accompanied by *factum*, as is the case in divorce. This will therefore appropriately lower the standard of proof in the context of engagements.

4 THE NATURE OF THE ENGAGEMENT CONTRACT

A perfunctory look at the law on breach of promise to marry shows that it was and still is a contract common to most legal systems, Lesotho included.[48] What is different and what has changed in many jurisdictions over time are remedies for its breach. It was, in early Roman times, not a contract between two persons intending to marry, but between their *patres familiarum*.[49] A comparison between American law on engagements and that of Germany, Austria, France, Brazil, Canada, Portugal, Argentina, Spain, Switzerland and Italy reveals that specific performance and contractual damages for breach were initially recognised but were abolished over time. Brockelbank observes that an engagement later became an informal contract with no enforceable obligations, as Roman law developed.[50] In England, the remedy of specific performance was abandoned when the temporal courts assumed jurisdiction over matters involving family relations.[51] The temporal courts continued with contractual damages for breach, until *Findlay v Chirney*, where Lord Esher declared that "an action for breach of promise … although in form an action for breach of contract, is really an action for breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff."[52] The result was that contractual remedies were no longer available to the promisee. In the US, several states opted to abolish contractual remedies for breach of engagement contracts through statutes, as early as 1936.[53]

The evolution of the contract of engagement in South Africa seems to have followed a similar trajectory. Roman-Dutch law afforded an "innocent" party (promisee) the remedies of specific performance and contractual damages. Specific performance was later abolished by statutes in several provinces, and what was left were contractual remedies of rescission and damages, as well as delictual damages for *solatium* based on *injuria*.[54] It is important to observe that the nature of the action for damages for breach of promise to marry is "hybrid and anomalous", in that it is "based on the hypothesis of a broken contract, yet is attended with some of the special consequences of a personal wrong."[55]

As already indicated, Harms DP stated that a contract of engagement is an unenforceable

46 Van der Heever *Breach of Promise and Seduction in South African Law* (1954) 30, and Lay "The Origin of Breach of Promise and its Application in Kentucky" 1962 *Journal of Family Law* 174 183.
47 *Van Jaarsveld* para 6.
48 Brockelbank "The Nature of the Promise to Marry – A Study in Comparative Law" 1946 *Illinois Law Review* 1-26.
49 *Ibid*; See also Geduld and Dircksen "The Right to Say 'I Don't': The Reception of the Action for Breach of Promise" 2013 *De Jure* 957-967, where the authors provide an elaborate account of the development and nature of the action for breach of promise from its Roman origins through Canon, English and Roman Dutch law to its current position in South African law.
50 Brockelbank 1946 *Illinois LR* 1-26.
51 *Ibid*.
52 *Findlay v Chirney* [1887] 20 Q. B. D. 494 498 cited in Brockelbank 1946 *Illinois LR* 1-26.
53 Lay 1962 *J of Family Law* 183.
54 See s 19 of the Cape Marriage Order in Council of 1838, s 19 of the Natal Ordinance 17 of 1846, s 17 of the Transvaal Law 3 of 1871 and s 20 of Orange Free State Law 26 of 1899 cited in Du Bois *Wille's Principles* 234-235.
55 White "Survival of Causes of Action" 1939 *Modern Law Review* 278.

pactum de contrahendo providing a *spatium deliberandi*.[56] In its simplest form, a *pactum de contrahendo* is a contract finalised with the aim of concluding another contract.[57] These kinds of contracts are usually concluded where parties have reached consensus on the conclusion of the main contract, but are unwilling or unable to conclude it immediately. They merely give a party the right to insist on the cooperation of the other party, towards the conclusion of the main contract. By declaring a contract of engagement an unenforceable *pactum de contrahendo*, Harms DP followed the position in many other jurisdictions, and also took the position back to Roman times, where it possibly originated. It can therefore be argued that the wheel has in fact turned full circle on the law of engagements.

Interestingly, the approach of Harms DP in *Van Jaarsveld* was different to that of Davis J in *Sepheri*. Harms DP seems to have adopted the English approach, where the courts felt it was within their power to develop the law by taking away contractual remedies on policy grounds. Davis J, on the other hand, seems to have favoured the approach that was taken in the US and different provinces of South Africa in the past, where specific performance was abolished through legislation. The important question is which of the two courts adopted the correct approach? It is submitted that abolition itself is perfectly justifiable on policy grounds. However, it is important to determine when and how courts can venture into the development of common law as required by the constitution. This question is particularly interesting, because in both cases the court was not called upon to develop the law by the parties.

5 THE CONSTITUTIONAL DUTY TO DEVELOP THE COMMON LAW

Section 39(2) read with section 173 of the Constitution, enjoins the South African courts to develop the common law when and where deficient. The deficiency may be that a common-law rule is inconsistent with the provisions of the Constitution, or it may be that the rule is inconsistent not with a specific constitutional provision, but does not pass muster with regard to the spirit, purport and objects of the Constitution.[58] The common law on engagements does not seem to be inconsistent with any particular constitutional provision, but, as lamented by the court in *Van Jaarsveld,* it is out of tune with contemporary *mores* and public policy.[59] Thus, it seems inconsistent with the spirit, purport and objects of the Constitution.

In *Carmichele* quoted with approval in *Thebus*, the court held that the "common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the constitution."[60] However, the Constitutional Court has failed to give content to this value system so it is difficult for other courts to harmonise the common with an undefined value system.[61]

As stated earlier, the court in *Sepheri*, *mero motu* raised the question of development of the common law, but at the end was of the view that this was a matter for "legislation rather than judicial engineering by trial courts."[62] On the face of it, this approach was correct given the doctrine of separation of powers, which gives law-making powers pre-eminently to the legislature. It was also in line with the caution sounded in *Carmichele* that courts must "be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary."[63] However, courts have to treat the development of the common law differently to that of legislation, precisely because the former is their "own" — it essentially being judge-made. The court affirmed in *Thebus*, that:

> Superior Courts are protectors and expounders of the common law. The Superior Courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society. That power is now constitutionally authorised and must be exercised within the prescripts and ethos of the Constitution.[64]

56 *Van Jaarsveld* para 8.
57 Van der Merwe et al *Contract: General Principles* 3 ed (2007) 77.
58 Currie and De Waal *The Bill of Rights Handbook* 5 ed (2005) 67.
59 *Van Jaarsveld* para 3.
60 *Carmichele* para 28 and 56.
61 Woolman et al *Constitutional Law of South Africa* 2 ed (2013) 1-8.
62 *Sepheri* 331.
63 *Carmichele* para 36.
64 *Thebus* para 31 (footnotes omitted).

In light of this, it is submitted that the approach taken in *Sepheri* was incorrect. The court was dealing with the common law and therefore ought to have developed it as required by section 39(2) read with section 173. The fact that the issue of development was not raised by the parties, is not an excuse. The Constitutional Court had already addressed this possibility in *Carmichele*, when it observed that development of the common law is not discretionary, rather it is a "general obligation" that arises whenever the common law is deficient.[65] The court went further to observe that "courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights … *whether or not the parties in any particular case request the Court to develop the common law* under section 39(2)."[66] It follows, therefore, that the court has a duty to *mero motu* develop the common law whenever there is a deficiency. According to *Carmichele*, whenever this is the case, a two-stage inquiry needs to be undertaken:

> The first stage is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of s 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives.[67]

The court in *Van Jaarsveld* heeded the *Carmichele* call, when it brought the *dictum* of Davis J in *Sepheri* regarding the deficiency of the common law, to the attention of the parties, and requesting them to address it on the issues raised in that *dictum*. The court was, however, of the view that the case before it could be decided without definitively deciding the fate of actions for breach of promise, hence its approach of only providing a *dictum*.

The "guidance" for courts faced with the issue of the development of the common law provided in *Van Jaarsveld* seems to be in line with the long-standing tradition of the Supreme Court of Appeal to develop the common law in an incremental fashion.[68] In both *Sepheri* and *Van Jaarsveld*, the court poignantly observed that the common law on engagements was out of tune with the *mores* of our time and was against the very spirit and purport of the Constitution. In the circumstances, the court, particularly in *Van Jaarsveld*, was therefore correctly activist in bringing the deficiency to the parties' attention.

On judicial activism, the court in *S v Lubisi: In re S v Lubisi,* cautioned that:

> The debate on the rewards to be reaped by imaginative orders made by activist Judges on the one hand, and the dangers associated with an overzealous approach to usurp the function of the Legislature, or to transgress into the domain of the Executive on the other, are the subject of ongoing and vigorous debates … In general, the conclusion may be drawn that an innovative approach is justified in all instances where it is motivated by a teleological interpretation of a constitution or treaty and has as its aim the proper realisation of the principles, ideals and values underlying the constitution or treaty concerned.[69]

It is submitted that the interests of justice strongly demanded that the issue of the development of the common law be raised in both cases. An incremental approach of highlighting the deficiency, and then providing guidance in a *dictum* and waiting for another day, was within the courts' powers, particularly because in *Van Jaarsveld* the matter could be decided without conclusively developing the common law. This was in line with what was stated in *Lubisi* where the court encouraged caution and circumspection when dealing with issues of common-law development.[70] Further, the approach in *Van Jaarsveld* heeded *Carmichele* where the Constitutional Court observed that "[n]ot only must the common law be developed in a way which meets the section 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm."[71] Thus, it is submitted that the provision of guidance in a *dictum* in *Van Jaarsveld* was the most appropriate manner of

65 *Carmichele* para 33.
66 *Carmichele* para 36 (emphasis added).
67 *Carmichele* para 40.
68 Woolman *Constitutional Law* 31-86.
69 2004 3 SA 520 (T) 532-533.
70 *Lubisi* 532.
71 *Carmichele* para 55.

developing the common law in the circumstances.

Subsequent to the *Van Jaarsveld* decision, the court in *Cloete* acknowledged that both *Van Jaarsveld* and *Sepheri* only provided guidance *obiter*, however, such guidance coming from a unanimous appellate court was highly persuasive.[72] The court then went on to deliver the final blow on actions for breach of promise when it held that:

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

Evidently, the court in *Cloete* benefited from the incremental approach that started way back with legal scholars highlighting the repugnance of actions for breach of engagement and later various courts adding their voice on the issue, albeit *obiter*.

6 REMEDIES

Although the *dictum* in *Van Jaarsveld* views an engagement as an unenforceable *pactum de contrahedo*, it does not suggest that a party who may have incurred actual costs in anticipation of or in preparation for marriage, and/or whose feelings are hurt, be left remediless. It rightly suggests abolition of contractual remedies directly flowing from the engagement, and provides a proper perspective for actual losses and retains delictual damages. A party who incurred actual costs in preparation or in anticipation of marriage is put back to the position they were in previously. Interestingly, the *Van Jaarsveld* court held that these "do not flow from the breach of promise *per se* but from a number of express or tacit agreements reached between the parties during the course of their engagement."[73] This approach protects both parties to an engagement. The one who breaks the engagement is protected from what has been dubbed "gold-digging" contractual claims, while the other is protected from undue actual loses. The latter also has delictual damages for *iniuria* or *contumelia*. Harms DP's *dictum* does not, however, address the issue of return of engagement gifts when the engagement is called off, but as correctly observed by Heaton, this issue is governed by the law of donations and not the engagement as a contract.[74]

It was demonstrated in *Ponelat* that a party to an engagement may also have remedies in the law of partnerships if the requisite elements of a partnership existed during the engagement.[75] The court held that during the cohabitation and engagement the parties were in a tacit universal partnership and that each was entitled to a share of their contribution upon termination of the engagement and partnership. It is therefore clear that courts are ready to entertain legitimate remedies that protect both parties' interests, however, they frown upon what are considered claims of a "gold-digging" nature such as contractual damages.

7 LESSONS FOR LESOTHO COURTS

This section of the paper reflects on lessons that may be distilled from the evolution of the action for damages for breach of promise in South African courts until its timely demise in *Cloete*. Particular attention is paid to how the courts have dexterously interwoven the concept of irretrievable breakdown into the law of engagements; how they have navigated the complex issue of *boni mores* in an incremental fashion leading to a definitive pronouncement in *Cloete*; and how they have in the process upheld their constitutional duty to develop the common law.

7 1 On Irretrievable Breakdown

As previously stated, the notion of irretrievable breakdown of either marriage or engagement is not part of the Lesotho law as per statute, but courts have begun to invoke it. Justice Majara "judicially engineered" the law and aligned it with policy considerations by introducing the concept of irretrievable breakdown of marriage in *Macaefa Billy v Majoane Billy* which was

72 *Cloete* para 47.
73 *Van Jaarsveld* para 11.
74 Heaton *JQR Family* (2010) 3.
75 *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA). See also Subramanien "A Note on 'Tacit Universal Partnerships': Clarity at Last: Ex-partner can get Slice of the Pie" 2013 *Obiter* 545-557.

later followed in *Kheleli v Kheleli*.[76] It is submitted that the same principle should be extended to engagements in Lesotho. It has been correctly observed that it would defy logic to require guilt for the breakdown of engagements yet recognise the irretrievable breakdown of marriage as a ground for divorce.[77] Since the courts in the cases cited above have already introduced the ground of irretrievable breakdown in the context of marriage, they should extend it to engagements. This means that they should consider a party's unwillingness to continue with an engagement as both a cause and proof of the irretrievability of the breakdown of the engagement. This would have the effect of lowering the standard of proof on breach of engagement and would be justifiable on policy grounds, as previously argued.

7 2 Incremental Abolition

The repugnance of actions for breach of promise was first highlighted by legal scholars a while ago and later the courts joined the debate. In joining the debate, the courts have been very careful to follow their tried and tested tradition of incrementally developing the common law, particularly where a drastic decision such as total abolition of an action is contemplated. Indeed, it is desirable to incrementally work towards abolition where the issues are complex and involve the *boni mores*. This is because a society's *boni mores* cannot be hastily determined. It is therefore submitted that where the issue of action for damages for breach of promise presents itself, the Lesotho courts should build on their earlier jurisprudence as well as persuasive authority from South Africa, highlighted in the next paragraph.

7 3 (In)compatibility with Contemporary *boni mores*

As previously observed, many jurisdictions have already taken the path of abolishing actions for damages for breach of engagements due to their incompatibility with contemporary *boni mores*. In the wake of the *Cloete* decision, South Africa joined the list of these progressive jurisdictions. Interestingly, Lesotho courts have, as far back as 1971, shown little sympathy for litigants who sue for *contumelia* as a result of adultery with their spouses, thus signalling that the *boni mores* of the country had shifted at least as far as the implications of adultery on the sanctity of marriage are concerned. This was the case in *Thabane v Thabane and Ntsukunyane* where Evans J was at pains to observe that "[u]nfortunately, cases such as this are now quite commonplace; morals have deteriorated to such an extent that it has become a matter of *public indifference*."[78] It is likely that presented with a similar case today, the courts will totally abolish the action for damages as a result of adultery based on the *Thabane* decision and also following the persuasive South African authority in *RH v DE* where the Supreme Court of Appeal held that the continued existence of delictual damages for adultery are no longer justified on policy grounds.[79]

It is submitted that if marriage is no longer held in the same regard as it used to be, as demonstrated above, it would defy logic to then consider engagements rather sanctimonious. Therefore, the Lesotho courts should not find it difficult to conclude that contemporary *boni mores* of the country have indeed evolved and are compatible with those of its neighbour and many other jurisdictions that have long abolished actions for damages for breach of engagements.

7 4 Duty to Develop the Common Law

Although the duty and power to develop the common law derives from section 39(2) read with section 173 of the South African Constitution, it is submitted that courts as custodians of the constitution have always had an inherent power to develop the common law in line with public policy considerations. In the case of Lesotho, the courts also enjoy an inherent power to advance the common law when a case presents itself where the law is deficient and at odds with public policy. Thus, the courts should not loath "judicial engineering" of the common law in line with society's contemporary *boni mores*.

76 *Macaefa Billy v Majoane* and *Kheleli v Kheleli.*
77 Sinclair *The Law of Marriage* (1996) 314.
78 *Thabane v Thabane* and Ntsukunyane 1971-1973 *Lesotho Law Reports* 145 (emphasis added).
79 *RH v DE* 2014 6 SA 436 (SCA). For an analysis of the case, see Carnelley "The Impact of the Abolition of the Third Party Delictual Claim for Adultery by the Constitutional Court in *DE v RH* (CCT 182/14) [2015] ZACC 18" 2016 *Speculum Juris* 1.

8 CONCLUSION

This contribution sought to trace the slow death of the action for damages for breach of engagement contracts under South African law and in the process, distil lessons for the Lesotho courts. In abolishing these actions, South African courts have been progressive but at the same time cautious. They have incrementally developed the common law, drawing insights from debates amongst legal scholars and developments in other jurisdictions. They have now definitively determined that the contemporary *boni mores* of society do not view a disappointed party as a victim in need of protection, and that an engagement should be seen simply as an arrangement that allows people to get acquainted well, with the hope of getting married, and not in any commercial light. It is suggested that the Lesotho courts should courageously follow these persuasive South African decisions and the attractive incremental manner in which they have developed the common law.