

SOUTH AFRICA / JUDGMENT

Nhlapo v Zimu (2016/8478) [2017] ZAGPJHC 236 (1 September 2017)

[2017] ZAGPJHC 236

COURT

South Gauteng High Court, Johannesburg

BEFORE

Adams

CASE / FILE NUMBER

2016/8478

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE

NO: 2016/8478

In

the matter between:

NHLAPO,
FALICLITY
NONCEBO Plaintiff
and
ZIMU,
MTSHENGU
WILBEFORCE Defendant

Coram:

Adams J

Judgment:

Adams J
Heard
on: 1 & 2 June 2017
Decided
on: 1 September 2017

Summary:

Marriage —
Promise to marry — Breach —
Contractual damages — Law no longer permitting claim for
prospective loss.
ORDER
1.
The defendant
shall pay to plaintiff the sum of R123 149.63.
2.
The defendant
shall pay to plaintiff interest on the amount of R123 149.63 at
the legal rate of 10.5 per centum per annum from
date of judgment to
date of final payment.
3.
The defendant
shall pay the plaintiff's cost on the appropriate Magistrate's
Court scale

JUDGMENT

ADAMS J

[1]. In this action the plaintiff claims payment from the defendant of the following sums in the alternative: R2 620 631.80, alternatively R120 631.80, further alternatively R74 189.10, together with mora interest thereon and cost of suit. The plaintiff's claims are founded on two alternative causes of action. The first two

alternative claims are for damages for breach of promise and the third alternative claim is based on unjust enrichment.

[2]. Plaintiff's main cause of action is for damages, including both 'special damages' relating to certain out of pocket wasted expenses incurred by the plaintiff in anticipation of her marriage to the defendant and future losses to be suffered by the plaintiff as well as general damages in the form of contumelia for inuria, based on breach of promise.

[3]. In the alternative, plaintiff claims R120 631.80, being actual losses, including an amount of R104 131.80 for half of the wasted cost of the unsuccessful in vitro fertilisation treatment for the plaintiff at fertility clinics, also based on breach of promise.

[4]. Further alternatively, the plaintiff claims an amount of R74 189.10 based on unjust enrichment.

[5]. Before me Ms Bergenthuin appeared on behalf of the plaintiff and Mr Masipa appeared on behalf of the defendant.

[6]. The plaintiff's claims based on the defendant's alleged breach of his promise to marry her can also conveniently be

categorised into three groups, namely:-

- (a) Claims for contractual prospective losses arising from defendant's breach of promise;
- (b) Claims for contractual actual past losses arising from defendant's breach of promise; and
- (c) The plaintiff's claim for damages based on the *actio iniuriarum*.

[7]. Plaintiff alleges and testified at the trial that during or about September 2012 and at Pretoria the defendant orally proposed marriage to her, whereafter they had become engaged to get married. In terms of the oral agreement of engagement the parties had agreed to marry each other within a reasonable time, and that their marriage would have been in community of property. The plaintiff furthermore alleges that, in terms of the engagement agreement, the parties agreed to undergo in vitro fertility treatment, the cost of which would be borne by them equally. Pursuant to the engagement agreement and in preparation for their envisioned marriage the plaintiff incurred certain expenses, relating inter alia to improvements effected to the house of the defendant, to which she had relocated from Pretoria. Plaintiff also subjected herself to in vitro fertility treatment and paid all of the costs relating to such treatment. During 2015, so it is alleged by the plaintiff, the defendant breached his promise to marry her by getting romantically involved with another woman and by ordering her (the plaintiff) on or about the 23rd October 2015 to leave their common home.

[8]. By reason of the defendant's breach of his promise to marry her, the plaintiff alleges that she suffered damages totalling R2 620 631.80, which amount includes both actual and prospective losses, as well as general damages in the form of *contumelia for iniuria*.

[9]. In his plea the defendant denies that he promised to marry the plaintiff. It is alleged by the defendant that any engagement agreement existed only in the mind of the plaintiff and it was never his intention to agree to marry her. The plaintiff gave evidence in support of her claims that, after they moved in together during September 2013, and even before then, he promised her that they would get married as soon as his finances had improved. He had bought a new house, they had a house warming party and after they had moved in together, the defendant would always and inevitably introduce her (the plaintiff) to other people as 'his wife'. The defendant, according to the plaintiff, had also made a promise to her mother that he (the defendant) would marry her (the plaintiff). The foregoing was confirmed by the mother of the plaintiff, who testified that the defendant told her that he intended to get married to her daughter. She put it thus: 'He was the one who told me that he wants to get married to my daughter'. This evidence was uncontested and unchallenged by the defendant, who himself did not give evidence during the trial.

[10]. The parties were engaged during September 2012 although there was no formal ceremony to mark the occasion or to celebrate their engagement. The uncontested evidence of the plaintiff was that the agreement was that they would get married as soon as the defendant was financially

stable. Implicit in the agreement was consensus between the parties, so the plaintiff alleges, that the marriage would happen within a reasonable time. In my view, it is not a legal requirement that there should have been a formal ceremony or a ritual to bring into existence an engagement, nor is it a requirement that the engagement should be formalised by for example the exchange of engagement rings. It is not about the symbolism. What is important is that the plaintiff should prove that the defendant had promised, either expressly or tacitly, to marry the plaintiff. There are no specific formalities which need to be complied with in order for an engagement agreement to come into existence.

[11]. The plaintiff and the defendant, who are related in that the defendant is the uncle of the plaintiff's mother, started a romantic relationship on or about the 3rd August 2012. They had known each other for all of the plaintiff's life. As she puts it, the defendant who, at age 48, is much older than her, whose date of is the [...], making her 40 at present, saw her growing up. During September 2013 they moved in together. She relocated from her mother's home in Pretoria to the defendant's home in Witbank. Before then, the defendant had asked her to move in with him and he had also asked the permission of the plaintiff's mother for her to move in with him. The plaintiff testified that whilst living together in Witbank, they were in love and planning a life together. There would have been no legal or other impediments to them getting married. The defendant was a widower and she was a divorcee. It was during this time when they were staying together that the defendant again confirmed with the plaintiff that he intended marrying her as soon as they were financially sound. According to the plaintiff, they talked about getting married all the time. She specifically recall an incident during 2013, she was not very specific about the date though, when the defendant asked her in Pine Ridge, Witbank, to marry her. They wanted to have children and this was why they agreed that the plaintiff would receive in vitro fertilisation treatment.

[12]. In all of these circumstances I am satisfied that the plaintiff has proven that the defendant promised to marry her, which resulted in the conclusion of an engagement agreement. I am therefore persuaded that the plaintiff has proven the existence of an engagement agreement in terms of which the defendant promised to marry her.

[13]. During or about August 2015 the defendant breached his promise to marry her by engaging in a romantic relationship with another woman. The defendant also began treating the plaintiff really badly and with indignation. He showed no more love and affection towards her and showed absolutely no interest in and had no regard for her physical, medical and mental well – being. As an example of but one deliberate insult against the plaintiff, the defendant removed her from his medical aid and replaced her with his then new girlfriend. On or about the 25th September 2015 the relationship was finally severed when the defendant took the plaintiff back to her mother's home. It requires emphasising that all of the evidence of the plaintiff was uncontested in that the defendant chose not to testify in his defence.

[14]. The question then is whether the plaintiff is entitled to be compensated for any losses which she has suffered as a result of the defendant's breach of promise, and, if so, which of the losses she would be able to recover from the defendant.

[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. This requires that the 'guilty' party, in putting an end to the engagement, acted wrongfully in the delictual sense and *animo iniuriandi*. It does not matter in this regard whether or not the repudiation was justified. What does matter is the manner in which the engagement was brought to an end. The fact that the feelings of the 'innocent' party were hurt or that she or he felt slighted or jilted is not enough. I shall revert to this issue presently.

[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.

[17]. One has to distinguish in this regard between claims for prospective losses and those for actual losses.

Prospective Losses for Breach of Contract

[18]. I think it convenient to deal firstly with the plaintiff's prospective losses. In that regard the plaintiff has claimed the following sums under the following headings:

- (a) R500 000 – for loss of the benefits of being registered as a beneficiary on defendant's medical fund scheme for the duration of plaintiff's life.
- (b) R1 000 000 – in respect of the loss of the benefits of defendant's contributions to the communal household for the duration of defendant's life as well as loss of the benefit of the infrastructure of defendant's home and lifestyle.
- (c) R500 000 – for the loss of the benefit of defendant's pension fund.

[19]. As was said by Harms DP in *Van Jaarsveld v Bridges*, 2010(4) SA 558 (SCA), it is not easy to rationalise claims for prospective losses. One of the problems concerns the intended marital regime. It would be unusual for parties to agree on the marital regime at the time they promise to marry each other. If nothing was agreed, on what assumption must the court work? I believe that the court cannot work on any assumption, especially not one that the marriage would on the probabilities have been in community of property. And if the agreement was to marry in community, can one party not change her or his mind without commercial consequences?

[20]. Harms DP in *Van Jaarsveld v Bridges* at 560G – 561B and states that:

'I do believe that the 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. In what follows I intend to give some guidance to courts faced with such claims without reaching any definite conclusion, because this case is not affected by any possible development of the law and can be decided with reference to two factual issues . . . '

[21]. After discussing the two causes of action that a breach of promise gives rise to as alluded to by me supra, Harms DP at para 7 comments as follows:

'It is difficult to justify the commercialisation of an engagement in view of the fact that a marriage does not give rise to a commercial

or rigidly contractual relationship.'

[22]. He says further that he is unable to accept that parties when promising to marry each other at that stage of their relationship would contemplate that a breach of their engagement would have financial consequences as if they had in fact married. The assumption of the two parties is that their marital regime will be determined by their subsequent marriage. Harms DP then concludes that in his view an engagement is more of an unenforceable pactum de contrahendo providing a spatium deliberandi — a time to get to know each other better and in which they would decide whether or not to finally get married.

[23]. With reference to prospective losses, Harms DP's judgment further comments as follows at para 10:

[10] An agreement to enter into an antenuptial contract is not binding because it must be entered into notarially. How can legal

consequences flow from the refusal to enter into the notarial agreement? And what would the consequences be if the parties cannot

agree on the detailed terms of the agreement? The matter becomes more complicated if one considers the claim for loss of support. In divorce proceedings the award is a matter of discretion; but in a breach of contract situation it becomes a matter of commercial

entitlement. Imponderables abound. Prospective losses are not capable of ascertainment, or are remote and speculative, and therefore not proper to be adopted as a legal measure of damage. They depend on the anticipated length of the marriage and the probable orders that would follow on divorce, such as forfeiture and the like. I do not believe that courts should involve themselves with speculation on such a grand scale by permitting claims for prospective losses.

[24]. In interpreting and applying the dicta in *Van Jaarsveld v Bridges*, I find myself in agreement with the view adopted and the reasoning followed by the Western Cape Division of the High Court (Henney J) in *Cloete v Maritz*, 2013 (5) SA 448 (WCC). I have borrowed liberally from this judgment as I could do no better than to quote directly from Henney J's

judgment.

In that case Henney J answered the following question in the affirmative: Whether the pronouncement of Harms DP in *Van Jaarsveld v Bridges*, 2010(4) SA 558 (SCA), can be regarded as sufficiently binding authority 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.

[25]. As pointed out by Henney J, rightly so in my view, while the guidelines set out in the *Van Jaarsveld* matter are perhaps not binding on another court, as the obiter dicta of a unanimous decision of the SCA they can be seen as strong persuasive precedent. In this regard see *Alternators (SA) (Pty) Ltd v Boulanger*, 1969 (3) SA 75 (W) at 79B – C; *ANC Umvoti Council Caucus and Others v Umvoti Municipality*, 2010 (3) SA 31 (KZP) in para 27; and *Barclays Western Bank Ltd v Pretorius*, 1979 (3) SA 637 (N) at 651D – E. Also see Hahlo & Khan *The South African Legal System and its Background* at 270 – 1.

[26]. I agree with the view of the Western Cape High Court that the current approach to engagements does not reflect the current boni mores or public policy considerations based on the values of our Constitution, that is, to see a party's failure to honour his / her original promise to marry purely within the context of contractual damages.

[27]. Also, Sinclair *Law of Marriage* at 314 (fn 8) questions the justification for this action based on contract in the context of society's values at the end of the 20th century and in the beginning of the 21st century. The learned author at 314, in referring to the position in England, Scotland, Australia and most American jurisdictions, then goes on and conclude that 'the appropriateness of the retention of this action, given the substitution of irretrievable breakdown for fault as the basis for divorce, is highly questionable'.

[28]. Sinclair then says the following at 314 fn 8:

'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 irretrievable 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. . . . Repudiation of a promise to marry is however no longer seen in the serious light that it was when marriage was regarded as the only proper course for all women, and when breach of promise was likely to prejudice their reputation.'

[29]. Similarly, Harms DP points out in para 6 of *Van Jaarsveld v Bridges* that society's values have changed such that divorce is now available in the event of irretrievable breakdown of a marriage, where in the past it was available only in the event of adultery or desertion. Guilt is no longer the

issue. Harms DP goes on to state that likewise lack of desire to marry should constitute a 'just cause' to break an engagement and similarly guilt on the part of the other should not be a necessity. Harms DP went on to reason that it would be 'illogical to attach more serious consequences to an engagement than to a marriage'.

[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.

[31]. In this particular matter the plaintiff claims R2 000 000 damages, on a purely contractual basis, based on the prospective losses she might have suffered, as a result of the defendant's breach of promise. She seeks to be placed in a position she would have been if the defendant had not breached his promise to marry her. As pointed out by Sinclair, to hold a party liable for contractual damages for breach of promise may in fact lead parties to enter into marriages they do not in good conscience want to enter into, purely due to the fear of being faced with such a claim. This is an untenable situation

[32]. And further, as was pointed out by Sinclair and Harms DP, it would be illogical to recognise the irretrievable breakdown of marriage as a ground for divorce, while not doing so in respect of the breaking of an engagement, and requiring guilt on the part of the other. Considerations of public policy and our changed mores cannot, in my judgment, permit a party to be made to pay prospective damages on a purely contractual footing, where such a party wants to resile from a personal relationship and thus commits a breach of promise to marry. Such a situation in my view would be untenable.

[33]. Therefore, a claim for prospective losses founded on breach of promise to marry and based on a rigid contractual footing is, in my view, not sustainable and should no longer be permissible. In applying the reasoning and guidelines as set out in the *Van Jaarsveld v Bridges* judgment, such a claim is not a valid cause of action in our law any more.

[34]. For these reasons I am in agreement with the view of Henney J in *Cloete v Maritz* that a party to an engagement agreement is no longer legally entitled to claim prospective losses from a 'guilty party' on the basis of breach of contract arising from a breach of promise to marry. In other words, the principle that a party to an engagement agreement can successfully claim prospective losses on the basis of breach of contract no longer forms part of our law.

[35]. Accordingly and for all of these reasons, the plaintiff's R2 000 000 claim for prospective losses should fail.

Actual Losses for Breach of Contract

[36]. As Harms DP noted in *Van Jaarsveld v Bridges*, claims for actual losses are easier to justify but difficult to rationalise in terms of ordinary principles relating to the calculation of damages in the case of breach of contract. What usually springs to mind are costs or losses incurred by agreement, actual or by necessary implication, between the parties, such as those relating to wedding preparations. These losses 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. To be recoverable the losses must have been within the contemplation of the parties. The 'innocent' party must be placed in the position in which she or he would have been had the relevant agreement not been concluded; and what the one has received must be set off against what the other has paid or provided.

[37]. Under this head of damages, the plaintiff claims the following amounts:-

- (a) R104 131.80 – in respect 50% of the cost of in vitro fertilisation treatment at the MedFem Fertility Clinic during the period 2013 to 2014.
- (b) R10 500 – in respect of the cost of improvement to the defendant's house in preparation for the marriage.
- (c) R6 000 – being in respect of the cost of a new bed which the parties used in the common home.

[38]. The biggest claim under this head of damages is that relating to the cost of the in vitro fertility treatment which the plaintiff underwent with a view to enable them to conceive.

[39]. It is alleged by the plaintiff in her particulars of claim that she and the defendant had agreed that, in an attempt to conceive a child, the parties should subject themselves to in vitro fertility treatment at the MedFem Clinic in Johannesburg and that they would be equally responsible for the cost of such treatment. Pursuant to the aforesaid agreement, so the plaintiff alleges, she subjected herself to the in vitro treatment, at a total cost of R208 263.60, which amount she paid in full, with the defendant not making any contribution towards such costs.

[40]. In his plea, the defendant denies the agreement, as alleged by the plaintiff, relating to the in vitro treatment. He also avers that the plaintiff persisted with the treatment in Johannesburg after the initial treatment proved unsuccessful. She persisted despite his refusal to participate in the further procedures, and incurred the further costs without his approval and despite defendant's unwillingness to be a part of the further procedures. In amplification of his denial of the 'engagement agreement' and the agreement that he would be liable for half of the expenses relating to the in vitro treatment, the defendant alleges that, after the plaintiff was advised that the treatment would fail, he (the defendant) withdrew

his involvement from the procedures, but the plaintiff persisted. The only treatment, in respect of which he agreed to be liable for, was the initial treatment, which proved to be unsuccessful and which he paid for from his medical aid.

[41]. The plaintiff gave viva voce evidence that they, as a couple, had agreed to undergo in vitro fertility treatment and that the cost of such treatment would be borne by them equally. To that end, they approached a Fertility Specialist, and they also received counselling at the MedFem Clinic in Sunninghill, Johannesburg. In support of her claim that the defendant had agreed to pay half of the cost relating to the in vitro treatment the plaintiff referred in her evidence to 'MedFem Clinic' documents, which were all co – signed by her and the defendant during December 2013, which she interpreted to mean that he had agreed to the procedures and to share in the costs. Importantly, these signed documents belie the claim by the defendant that he had not agreed to the procedures at MedFem Clinic.

[42]. In total the charges by the MedFem Clinic in respect of the treatment came to R196 299.26. The plaintiff gave evidence indicating how this total amount is arrived at with reference to a schedule, supported by statements and invoices. Her evidence in that regard was not seriously challenged. She also confirmed that she paid the amounts due to MedFem Clinic without any assistance from the defendant,

[43]. Applying the principles enunciated in the Van Jaarsveld matter to these expenses, the questions which need to be asked are as follows. Were these costs or losses incurred by agreement, actual or by necessary implication, between the parties? Having regard to the uncontested evidence of the plaintiff, I am of the view that this question can safely be answered in the affirmative. These losses do not flow from the breach of promise per se, but from an express or tacit agreement reached between the parties during the course of their engagement.

[44]. To be recoverable, the plaintiff is required to prove that the losses must have been within the contemplation of the parties. Again, if regard is had to the evidence of the plaintiff and the documents handed up by her when she was giving evidence, there can be little doubt that the damages were within the contemplation of the defendant and the plaintiff.

[45]. The plaintiff must be placed in the position in which she would have been had the relevant agreement not been concluded. In order to achieve that the plaintiff should be refunded the amount of R98 149.63.

[46]. I am therefore satisfied that, applying the principles relative to loss for breach of contract arising from the defendant's breach of promise, the plaintiff should be compensated the amount of R98 149.63.

[47]. As regards the plaintiff's claims relating to the improvements to defendant's house and her acquiring a bed, I am not persuaded that the plaintiff has proven her entitlement to be compensated for those sums. The difficulty I have with these claims is that, on her version, the plaintiff confirms that between them, she and the defendant shared chores and expenses. For example, during March 2013 the plaintiff went onto the medical aid of the defendant, which meant that he paid for a period of time contributions to the medical aid on her behalf. The defendant also paid for the groceries in the common household, and he also transported the plaintiff to and from her place of work at his expense. Also, the plaintiff confirmed that, as far as the loan for R60 000 which they took out with Medifin goes, the defendant paid five of the

instalments payable, before she (the plaintiff) settled the debt with the proceeds from the sale of her shares in the company which was employed her at the time. In order for the plaintiff to recover her losses, relative to the bed and home improvements, such losses ought to be set off against what the defendant has paid or provided. That exercise had not been done by the plaintiff, and I am accordingly not persuaded that she has proven that the expenses she incurred in respect of these two items are recoverable by her.

The Delictual Claim

[48]. Plaintiff has claimed an amount of R500 000.00 being delictual damages based on the *actio iniuriarum*, in terms of which action the plaintiff, being the 'innocent party', would be entitled to sentimental damages if the

repudiation were contumelious.

[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.

[50]. The plaintiff, in respect of this claim, is required to allege and prove that the defendant, being the so – called 'guilty party', in putting an end to the engagement, acted wrongfully in the delictual sense and *animo iniuriandi*. What matters is the manner in which the engagement was brought to an end. In that regard, the plaintiff complies with the foregoing

requirement by alleging that the defendant acted *animo iniuriandi* in that he, before calling off the engagement and whilst they were still living together, started a romantic relationship with another woman, thus intending to injure and hurt her feelings, which he in fact then did. She also gave evidence in support of this allegation to the effect that the defendant, after starting an affair with another woman, kicked her out of the house, which was hurtful for her. She also subsequently had to face family, friends and colleagues, who all knew that she had relocated to Witbank to be with her 'new man', only to return during September 2015. This evidence was uncontested and uncontradicted, and I am satisfied that the plaintiff had succeeded in proving that the defendant acted wrongfully in the delictual sense. The repudiation was clearly contumelious.

[51]. The plaintiff felt hurt and insulted especially by the fact that, whilst they were still together, the defendant had her removed from his medical aid, which he had insisted she joined, and then to have her replaced by the new girlfriend. To add insult to her injury, the defendant also fathered a child with his new girlfriend.

[52]. Plaintiff's situation was aggravated by the fact that she is family of the defendant, and she was embarrassed in the extreme by being 'dumped' so unceremoniously by the defendant.

[53]. In determining whether or not the act complained of is wrongful the court applies the criterion of reasonableness. This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society. To address words to another which might wound the self – esteem of the addressee, but which are not, objectively determined, insulting (and therefore wrongful), cannot give rise to an action for iniuria. Importantly, the character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby.

[54]. Applying that test it appears to me to be clear that the action of defendant was objectively insulting and contumelious.

[55]. As regards the amount of the delictual damages to be awarded in favour of the plaintiff, there are no hard and fast rules. As with claims for iniuria and defamation, the amounts awarded generally are at best modest. I am therefore of the view that an award for damages for breach of promise should be made in favour of the plaintiff in the amount of R25 000.

The Claim for Unjust Enrichment

[56]. That then leads me to the plaintiff's third alternative claim based on unjust enrichment and negotiorum gestio. Here the plaintiff claims against the defendant an amount of R74 189.10, made up as follows: R57 689.10 paid by the plaintiff on behalf of the defendant in settlement of a loan debt incurred by the defendant with a financial institution, plus R10 500

paid by the plaintiff in respect of certain improvements to the home of the defendant and an amount of R6000 being for a bed bought by the plaintiff, which bed is now at defendant's house and he has the benefit of same.

[57]. It is alleged by the plaintiff that the defendant was unjustly enriched at her expense by the aforesaid sum of R74 189.10.

[58]. In view of my findings relating to the plaintiff's main claim, it is not necessary for me to deal with the plaintiff's aforesaid claim. Suffice to say, that, in my view, the plaintiff did not prove the elements of such a cause of action, which, as per *McCarthy Retail Ltd v Shortdistance Carriers CC*, 2001 (3) SA 482 (SCA), are the following:

- (i) the defendant must be enriched;
- (ii) the plaintiff must be impoverished;
- (iii) the defendant's enrichment must be at the expense of the plaintiff; and
- (iv) the enrichment must be unjustified (*sine causa*).

[59]. I therefore intend granting a monetary judgment in favour of the plaintiff for the sum R98 149.63, in respect of actual damages, and R25 000, in respect of R25 000, totalling R123 149.63.

Costs

[60]. In her summons the plaintiff has claimed an amount in excess of R2 000 000 from the defendant. The quantum of the judgment which I intend granting in favour of the applicant is for R123 149.63. The latter amount falls well within the monetary jurisdiction of the Magistrates Court.

[61]. I can think of no reason why these proceedings should not have been instituted in the Magistrates Court. I can think of no justification for the institution of proceedings in this court.

[62]. I am therefore of the view that the plaintiff should not be awarded cost on the High Court scale.

In the circumstances I make the following order:

1. The defendant shall pay to the plaintiff the sum of R123 149.63.
2. The defendant shall pay to the plaintiff interest on the amount of R123 149.63 at the legal rate of 10.5 per centum per annum from date of judgment to date of final payment.
3. The defendant shall pay the plaintiff's cost of this action on the appropriate Magistrate's Court scale

L ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 1st & 2nd June 2017

JUDGMENT

DATE: FOR THE PLAINTIFF: 1st September 2017 Adv B Bergenthuin INSTRUCTED BY: Gerhard, Bothe & Partners Inc FOR THE DEFENDANT: Adv R G Masipa INSTRUCTED BY: Mpya Attorneys

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