

The right to say “I don’t”: The reception of the action for breach of promise

Allison Geduld

LLB BA (Hons)

Junior Lecturer Faculty of law, North-West University

Marianne Dirksen

D LITT et PHIL

Associate Professor of Latin, North-West University

OPSOMMING

Die Reg om “Nee” te sê: die Resepsie van die Aksie vir Troubreuk

Hierdie artikel speur die ontwikkeling en aard van die aksie vir troubreuk na van sy Romeinse oorsprong af deur die Kanonieke-, Engelse- en Romeins-Hollandse reg heen tot by die Suid-Afrikaanse reg in die jaar 2013. Die sosiale konteks waarbinne die aksie toepassing gevind het, word ook telkens geskets om die interaksie tussen die reg en sosiale faktore te illustreer. Die volgende premis word deur hierdie oorsig bevestig: die toepassing van die aksie vir troubreuk binne ’n regstelsel weerspieël die *mores* van die eietydse gemeenskap. Die feit dat die aksie vir troubreuk langer as ’n halwe eeu onder dispuut in die Suid-Afrikaanse howe en onder regsgeleerdes is, dui daarop dat die aksie lank reeds nie meer strook met bogenoemde premis nie. Die wye nuusdekking wat die onlangse saak van *Bridges v Van Jaarsveld* geniet het en regter Harms se bedenking oor die paslikheid van so ’n aksie in ons tyd, het hierdie dissonansie opnuut aan die kaak gestel. Met regter Henney se uitspraak in die saak van *Cloete v Maritz* in April 2013 word daar eindelijk weggedoen met die aksie vir troubreuk in Suid-Afrika. Met Regter Harms se rigtinggewende *obiter dictum* as basis gee ons ’n opsomming van faktore wat bydra tot die aksie se ongewensdheid binne ’n moderne Suid-Afrikaanse konteks. Baie spesifieke omstandighede het veroorsaak dat dit lank geneem het vir sosiale kragte om ’n impak op die reg te hê, maar ten slotte kon die aksie vir troubreuk nie die veranderende houdings, gewoontes en realiteite van die Suid-Afrikaanse samelewing oorleef nie.

1 Introduction

This article will trace 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. The historical overview will serve to demonstrate “the interaction between the law and social forces”¹ with specific reference to the social purpose served by the engagement and the function of the action for breach of promise within each of these cultural and social environments.² The reception history will establish the following premise: The application

1 Lettmaier 2.

2 See Brockelbank “Nature of the promise to marry – a study in comparative law” 1946 *Ill LR* 1 2.

which the action for breach of promise found in a certain society at a specific time reflects the *mores* of that society. The final discussion regarding the relevance and suitability of the action for breach of promise within a modern day South African societal context is based on the premise which has been established and confirmed by the reception history.

2 Engagements in Roman Law

From the time of its inception the Roman marriage was preceded by a betrothal. It was the point at which the match-making negotiations between the parties or their *patresfamilias* or guardians were concluded.³ In essence it was a mutual promise of marriage and amounted to making a verbal contract (*stipulatio*). However, the liabilities ensuing from the breach of this mutual promise of marriage, varied from time to time in the history of Roman law.

There seems to be general agreement amongst scholars that the Roman betrothal was originally bilaterally actionable.⁴ The relevant action was the *actio ex sponsu*. Aulus Gellius mentions in his *Noctes Atticae* that either party had a right of action for breach of the "*sponsio*".⁵ Although specific performance could not be enforced with this action, damages could be claimed. Original sources on Roman law support the notion that actions for breach of promise were still possible in Latin cities other than Rome until the grant of citizenship in 90 BC, but that by the 1st century BC no actions based on such promises existed in Rome.⁶ Since marriage without *manus* was freely terminable at this time by either of the parties, there would be no point in regarding the betrothal as more binding than marriage itself and betrothal developed into a matter of simple consent. Any contract the parties entered into (such as arrangements for a dowry) was not strictly part of the betrothal itself and was made separately.⁷ A stipulation fixing beforehand the sum to be paid as penalty in case of non-performance of the contract was regarded as *contra bonos mores*.⁸

By the time of Justinian a betrothal was simply an indication of intent. Any one of the parties could repudiate the engagement before the actual marriage and neither one of the parties to the betrothal could claim specific performance. The engagement did, however, have some legal consequences: Two simultaneous engagements resulted in praetorian

3 Corbett *The Roman law of marriage* (1969) 1-2.

4 Corbett 12-13.

5 Aulus Gellius *Noctes Atticae* 4 4 2.

6 MacColla *Breach of Promise: Its History and Social Considerations, to which are added a few pages on the Law of Breach of Promise and a glance at many amusing cases since the reign of Queen Elizabeth* (1879) 2; Brockelbank 1946 III LR 1 3; Treggiari *Roman marriage: iusti coniuges from the time of Cicero to the time of Ulpian* (1991) 142-143.

7 Gardner *Women in Roman law and society* (1986) 45.

8 D 45 1 134; Lee *The elements of Roman law* (1956) 66. MacColla 2.

infamia, and a betrothal also set up a kind of legal affinity so that marriage between certain family members of the engaged couple were prohibited.⁹

During this time it had become practise for the man and woman to give something to guarantee the engagement (*arrhae*).¹⁰ Such gifts were exempt from the usual limitations on gifts to outsiders. If breach of promise occurred the gifts were forfeited, unless there was a just cause for the breach.¹¹ Gifts of this nature often included a ring (*annulus pronubus*) sent by the *sponsus* to his betrothed as a pledge of love and fidelity.¹² Formerly only gifts made *adfinitatis coeundae causa* could be reclaimed, but Constantine abolished any such distinction and all betrothal gifts were to be restored by any party breaking off the match while having no claim to gifts he or she had made.¹³ An action always lay where money was given as *dos* but the marriage fell through for whatever reason.¹⁴

2 1 The Impact of Societal Norms on the Nature of the Roman Engagement

It is fair to say that throughout the whole period of the maturity of Roman law the betrothal was merely a formless pact and no action could be brought for its breach¹⁵. This was a natural development as the absolute power of *manus* ceased to be assigned to the husband and as the free marriage and the liberty of divorce led to more equal relations.¹⁶

The impact of societal norms on legal customs becomes even more evident, when Roman law concerning betrothals is compared to that of the Germans in the 1st century AD. In Roman society women were to a large degree responsible for their own fates and they enjoyed freedom of choice as far as their future husbands were concerned. German women on the other hand were regarded as chattel, the objects of sale without rights or freedom of choice. Germanic betrothals were seen as a sale, not only of the bride but also of the *mund* or protectorship of the woman.¹⁷ Since the object of purchase (the bride to be) was already part of the property transferred, the engagement constituted an inchoate marriage.¹⁸ This inchoate marriage had the effect that specific performance could be claimed when the engagement was terminated and thus the claiming of damages was moot.

9 Gardner 40; Corbett 16-17.

10 Lee 66; Cod 5.1.

11 Manson "Breach of promise of marriage" 1910 *J Soc Comp Legis* 157; Treggiari 153; Corbett 18-19.

12 Treggiari 149.

13 Corbett 18-19.

14 Buckland *Manual of Roman private law* (1939) 316.

15 Brockelbank 1946 *Ill LR* 1 3.

16 Corbett 14, 108.

17 Manson 1910 *J Soc Comp Leg* 156; Brockelbank 1946 *Ill LR* 1 2.

18 Van den Heever *Breach of Promise and Seduction in South African Law* (1954) 5.

3 Canon law

Throughout Europe down to the middle of the sixteenth century, marriage was regarded as a consensual contract for which ecclesiastical intervention was not needed. Mere mutual consent, *coniunctio animorum* would constitute a contract and breach of this contract by disagreement or death would result in entitlement to all the rights and liabilities of the marriage. In or about the year 1563 the Council of Trent declared that a marriage would only be valid if celebrated *in facie ecclesiae*. The presence of a parish priest and two witnesses were required.¹⁹ Although the decree did not have reception in England (since Henry VIII had by that time already renounced the Pope's supremacy), it was accepted as the law of most Roman Catholic communities. The church followed the rule known as *consensus facit matrimonium* (agreement to marry constitutes marriage).²⁰ There were two types of consensus: The first was *sponsalia per verba de praesenti* which can literally be translated as "betrothal/pledge through words concerning the present" and therefore referred to a promise which was made in the present tense. *Sponsalia per verba de futuro* on the other hand, referred to a pledge pertaining to the future and meant that the marriage would take place at a future date, as is the case in modern engagements. Regarding the termination of the espousals, parties who promised *de praesenti* could be forced to get married by the Ecclesiastical courts, face excommunication or be imprisoned.²¹ In the case of a promise *de futuro*, non performance would merely lead to the paying of a penance.²² Only if the promise had been followed by sexual intercourse would promises to marry in the future tense be treated as a binding and indissoluble marriage. During the Interregnum (from 1649 when Charles I was beheaded to 1660 when the Stuart monarchy was restored under Charles II) the ecclesiastical courts were closed and the ecclesiastical remedies thereby suspended. Plaintiffs therefore began to bring their grievances up in the common law courts, phrasing their claim in terms of a simple executory²³ contract. Unlike the ecclesiastical courts, the common law judges had no power to compel the marriage, but based on the principle of contractually binding consensus, they could award damages to the disappointed party. Although the ecclesiastical courts were reopened after the Interregnum, the passage of Lord Hardwicke's Marriage Act²⁴ in 1753, deprived the ecclesiastical courts of the power to compel marriages, so that thereafter all a deserted fiancé(e) could hope for was to win damages in the civil courts.²⁵ The jurisdiction

19 MacColla 5.

20 Van den Heever 8.

21 Manson 1910 *J Soc Comp Leg* 58.

22 Lettmaier 23.

23 An executory contract is one that has not yet been performed on either side.

24 26 Geo II c33.

25 Lettmaier 23.

of the Ecclesiastical Courts fell into disuse and was finally abolished in 1857.²⁶

3 1 The Impact of Societal Norms on Actions for Breach of Promise (Canon law)

Canon law regarding breach of promise reflects the enormous influence the church had on society during this time. It based its doctrines regarding marriage on the notion that it is a remedy for concupiscence. The First Epistle of St Paul to the Corinthians 7: 7-9 states that the unmarried and widows do well if they abide in the same way as Paul, "But if they cannot contain, let them marry; for it is better to marry than to burn ..." After the engagement the conduct of the plaintiff had to be impeccable in order to assure the defendant a monopoly of the sexual rights.²⁷ However, unchastity of the plaintiff was very difficult to prove and the defendant often had no option but to marry or pay damages. "Unwilling parties were subject to admonition and censure and, at a time when one's standing in the church was all important, the threat was sufficient to bring about the proposed marriage."²⁸

4 English law

No remedy for a broken promise of marriage existed at common law in England prior to the mid-seventeenth century and the jilted party's only remedy lay in the ecclesiastical court.²⁹ Claims for damages were instead based on the action of *assumpsit*, since an implied contract clearly existed between the parties even if it was not in written form.³⁰ However, after Lord Hardwicke's Act abolished ecclesiastical jurisdiction over such suits, actions for breach of promise to marry were brought in the common law courts. Actions for damages to repair a broken heart ("heart balm" actions) were very common during the nineteenth and early part of the twentieth century. The action was both within the realm of contractual remedies and the law of tort which provides compensation for the commission of a personal wrong. Huge sums were often awarded as a pecuniary consolation for the injury done to the plaintiff's feelings³¹ and to avoid damage to the defendant's reputation.

4 1 The Impact of Societal Norms on Actions for Breach of Promise (English law)

The Case of *Orford v Cole* "presents in detail the way the breach-of-promise action was structured around nineteenth-century notions of

26 Brockelbank 1946 *Ill LR* 3.

27 Brockelbank 1946 *Ill LR* 7.

28 Brockelbank 1946 *Ill LR* 3.

29 Lettmaier 22.

30 Hadley "Breach of promise to marry" 1927 *Notre Dame LR* 191.

31 Lettmaier 21.

ideal womanhood".³² The wealthy Mr Cole, who had inherited a large fortune which included a mansion at Kirkland had proposed to Miss Orford, but married Miss Grimshaw in stead. This resulted in the highest English jury award for breach of promise in the nineteenth century, since Miss Orford "would have been the wife of a man with that fortune and with that establishment which would have belonged to her rank in society as his wife".³³ Marriages had significant economic ramifications and were arranged to enhance political, economic and social advancement.³⁴

In 18th and 19th century England, women were severely restrained by social and financial obstacles to education and independence. Women were in the same legal category as wards since the husband was the bearer of all rights in the marriage.³⁵ The popularity of the action for breach of promise in the 19th century mirrors these social conditions.

The Law Reform Act of 1970, a short Act of just seven paragraphs and one schedule, eventually abolished the action for breach of promise. The decision was mainly based on the following arguments:

- (a) The abolishment was to prevent so-called gold-digging actions and (b) the possibility of blackmail. (c) The risk that a girl whose engagement has been broken will be shunned by potential marriage partners had lessened greatly. (d) Since the purpose of the engagement period is to avoid a marriage that in all probability would fail, the policy to equate termination of the engagement with "fault" seems mistaken. (e) A person with less than a full matrimonial commitment should not be encouraged by a legal action to marry.³⁶

5 Roman-Dutch law

The Roman-Dutch legislation concerning marriage as practiced in Holland around 1580 after the reformation was a blend of Germanic, Roman and the modern Dutch law of the time.³⁷ The Dutch adopted Canon law, with slight adaptations, to suit protestant doctrine.³⁸ Canon law still influenced legal practice concerning marriage, since the union between a man and a woman was seen as sacred and therefore resorted under the authority of the Pope and the courts of the Holy See.³⁹ An engagement was regarded as a binding contract and specific

³² Lettmaier 16.

³³ *The Examiner* (1818-05-12) 228 <http://books.google.co.za/books?id=TMPPAAAAMAAJ&dq=Orford+v+Cole&ots=njxwWbWToU&jtp=227> (accessed 2012-03-17).

³⁴ Nolan and Wardle *Fundamental principles of family law* (2005) 180.

³⁵ Lettmaier 6.

³⁶ Law Commission Report: *The law relating to breach of promise of marriage*. http://www.lawreform.ie/_fileupload/consultation%20papers/wpBreachofPromise.htm (accessed 2013-01-30).

³⁷ Artzenius *Introduction to the Civil Law of the Netherlands* 2 1 5.

³⁸ Van den Heever 10; Robinson *et al Introduction to South African Family Law* (2008) 25.

³⁹ Artzenius 2 1 4.

performance could be enforced if the espousal was unilaterally terminated.⁴⁰ In special circumstances, for example where one of the parties had married another,⁴¹ damages could be claimed.

The “just reasons” the Roman-Dutch authors list for breaking off an engagement are, however, very interesting from a receptive point of view. Voet lists nine just reasons for breaking off an engagement and the strong influence of the church is clearly evident from the following: “infamy as a result of a crime”; “apostasy in favour of Judaism” and “paganism or heresy”. Surprisingly Voet also lists “implacable dislike” and “unjust and causeless dislike conceived on one side or the other” as valid reasons for breach of the promise to marry.⁴²

As a general rule Artzenius states that a party may lawfully repudiate if something emerges or occurs that would have persuaded him/her not to continue with the marriage had he/she been aware of it beforehand, but the influence of the church and moral high ground transpires when he adds “seduction by another man” and a “change of religion” to his list of valid reasons for repudiation. On a more sober note Artzenius also considers “deadly enmity between the parties” and “if the man turns out to be a different man than what the lady thought”⁴³ reason enough for the lawful termination of the contract. Brouwer’s argument that repudiation should be allowed regardless of whether it is lawful or not since forced marriages have tragic consequences,⁴⁴ is as valid today as it was in his time. He adds that if mutual agreement to terminate the engagement exists, anything given with the marriage in mind must be returned.

It is clear that the binding legal implications of an engagement at this time stem from the influence of Canon law and society’s obedience to the moral regimen and prescriptions of the church and the *Bible* after the reformation in the Netherlands. However, the mature and lucid insights of the Dutch authors seem out of sync with the community’s unquestioning obedience to the church and its prescriptions. This incongruence can perhaps be construed as a reflection of the widening gap between academics and the general public at this time.

6 The Action for Breach of Promise within a South African Context

The law relating to engagement in this country is based on Roman-Dutch law principles. The last reported case where specific performance was enforced, was in the case of *Joosten v Grobbelaar* in 1832, but since the Cape Marriage Order in Council of September 1838 an action for

40 Voet 23 1 12; Robinson *Family law* (2008) 25.

41 Van den Heever 11.

42 Voet 23 1 20.

43 Artzenius 2 1 39.

44 Brouwer D I C 25 1 9.

damages has been the only remedy.⁴⁵ If *iusta causa* could not be proven, the jilted party could claim for contumely and/or pecuniary loss.

The action for breach of promise has, however, been a bone of contention in South African courts and amongst legal scholars for more than half a century.⁴⁶ The extensive media coverage which the case of *Bridges v Van Jaarsveld*⁴⁷ received placed this common law action under the spot light yet again. The facts of the case provide a text book scenario for an action based on breach of promise: Bridges allegedly sold her house and gave up her singing career in view of her prospective marriage to Van Jaarsveld. Arrangements had already been made for the reception and the relocation to Van Jaarsveld's farm near Patensie when her prospective husband decided to terminate the engagement and informed her of his decision *via* mobile text message. Basing her claim on the action for breach of promise Bridges claimed more than R1 million, which was later amended to R600,000. The court *a quo* awarded a reduced amount of R282,413 as damages and satisfaction.⁴⁸

Judge Harms did not come to a final conclusion regarding the status of the action when the case went on appeal, but the following *obiter dictum* made his sentiments on the appropriateness and desirability of engagements and promises to marry abundantly clear:

I do believe the time has arrived to recognise that engagements are outdated and do not recognise the mores of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise.⁴⁹

Judge Harms's reasoning made the dissonance between the action for breach of promise and the realities of modern day South African society all too clear. We conclude this article with a summary of these realities which render the action for breach of promise undesirable or redundant in modern day South Africa.

6 1 Violation of Constitutional Rights

The constitution recognises diverse forms of intimate personal relationships, and this seems incongruent with the rigid contractual basis of the action which implies that a party who seeks to extract him- or herself from the initial intention to conclude the relationship, would be sued for contractual damages.⁵⁰ Within a 21st century context a person's

45 Hahlo & Kahn *The British Commonwealth The Development of Its Laws and Constitution The Union of South Africa* (1960) 392

46 See *Van Jaarsveld v Bridges* 2010 4 All SA 558 (SCA); *Sepheri v Scanlan* 2008 1 SA 322 (C); *Lloyd v Mitchell* 2004 2 All SA 542 (C); Labuschagne "Deinjuryering van verlowingsbreuk: Opmerkinge oor die morele dimensie van deliktuele aanspreeklikheid" 1993 *De Jure* 126; *Guggenheim v Rosenbaum* 1961 4 SA 21 (W).

47 *Van Jaarsveld v Bridges* 2010.

48 *Bridges v Van Jaarsveld* 2008 JOL 22795 (T) 55.

49 *Van Jaarsveld v Bridges* 2010 389.

50 See *Sepheri v Scanlan* 2001 1 SA 322 3301-331.

reasons for breaking off an engagement could easily fall within the highly personal realm and revealing the *iusta causa* for such a step would impinge on this right to privacy which is protected by section 14 of the Constitution of the Republic of South Africa, 1996.

6 2 Possibility of Abuse

There is little doubt that many claims have been made on the basis of extortion⁵¹ and that “[l]egally speaking, the woman, once engaged, has already made her economic establishment.”⁵² The abuse of this action by unscrupulous persons for gold digging or black mail led to the abolishment of the action in many countries.⁵³

6 3 Other Available Actions

Other grounds for actions are available to the injured party. The “indirect application” or “horizontal application” of the Bill of Rights⁵⁴ has rendered the action for breach of promise ineffective. Furthermore, the *actio iniuriarum* is also at the disposal of the injured party to claim satisfaction.⁵⁵ Where one of the parties was unjustifiably enriched at the expense of another, the wronged party can claim on the basis of unjustified enrichment. As far as gifts exchanged between the engaged couple are concerned, it is up to the court to decide whether it was a conditional or an absolute gift. Wedding presents given by third parties should be returned on the Roman law principle of *conditio causa data causa non secuta*. Another option open to the courts is to apply the same principles of law to disputes between ex-fiancés as to those which apply to disputes between husband and wife.⁵⁶

6 4 The Analogy with Divorce

Since divorce is available in the event of an irretrievable breakdown of a marriage, and guilt (adultery or desertion) is no longer the issue it does not make any sense to attach more serious consequences to an engagement.⁵⁷ If a possible legal battle persuades someone with less than a full matrimonial commitment to get married, there is a very real chance that the marriage will end in divorce. As early as in 1876 MacColla maintained that where the right of action for breach of promise

51 Brockelbank 1946 *Illinois LR* 1 13.

52 Brockelbank 1946 *Illinois LR* 1.

53 Brockelbank 1946 *Illinois LR* 1 15; Sinclair, Heaton & Hahlo *The Law of marriage* (1996) 314.

54 Neethling Potgieter & Visser *Law of Delict* (2001) 20.

55 Labuschagne 1993 *De Jure* 129 139.

56 This option was agreed upon in Ireland and the UK. See details of the law reform in these countries at: http://www.lawreform.ie/_fileupload/consultation%20papers/wpBreachofPromise.htmby (accessed 2013-03-04).

57 To quote Judge Harms: “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” (*Van Jaarsveld v Bridges* 2010 4 SA 558 (SCA)).

leads to semi-compulsory marriages, it demoralises society, and the law which permits such an action to be held *in terrorem* over the head of the unwilling party to the marriage, “creates and fosters a crime of no small magnitude”.⁵⁸

6 5 The Present South African Social Environment

The plaintiffs in most cases relating to breach of promise were women. This relates closely to the position occupied by women in earlier society.⁵⁹ Women had very little economic independence, could not work in many of the professions, were often seen as inferior to men and reliant on a future husband for financial support. If a man terminated a prospective marriage in the 19th century, this would have had a huge impact on a young lady’s own position in society and the termination of the engagement would have caused great humiliation and shame. The need for an action to protect women from associated humiliation, reflects the social circumstances and morals of a bygone age.⁶⁰ The action for breach of promise was based on a pre-constitutional heterosexual definition of marriage but today a woman is no longer dependant on a husband for her livelihood or status and the social assumptions on which the action for breach of promise were based are simply no longer valid. The demise of suits based on the action for breach of promise in England and America were likewise tied to changing cultural ideals for women that include independence and sexuality.⁶¹

With the emergence of the twentieth century vision of South African women as self-sufficient, energetic and competent, the breach-of-promise action has undoubtedly been turned into “an anachronism, a musty bit of common law machinery”.⁶²

7 *Cloete v Maritz*: The Final Chapter

In April 2013, in the case of *Cloete v Maritz*,⁶³ Judge Henney finally ruled that “the position ... in respect of when a party can successfully claim prospective losses on the basis of breach of contract no longer forms part of our law.” He regarded Judge Harms’ remarks “as strong persuasive precedent” and relied on the principle that a trial court is entitled to deviate from a decision of a higher court (or the *stare decisis* rule) where the common law or a legal principle no longer is a reflection of the *boni mores* or public policy if regard is to be had for the values that underlie the constitution. He added that these legal convictions of the community or *boni mores*, are continuously evolving and are not static concepts.

58 MacColla 3.

59 Labuschagne 1993 *De Jure* 129 137.

60 Van den Heever 30.

61 See Grossberg “Governing the Hearth: Law and the Family in Nineteenth-Century America” 1985 *St Leg Hist* 35.

62 Lettmaier 17.

63 2013 SA (WC) 6222/2010.

The fact that this action remained part of the South African legal system for such a long time, is significant. If we are to bring the reception history of the action with its clear line of social and legal interaction to its logical conclusion, we must accept that social and political factors played a role in this tardiness to change the law. We suggest two probable causes: (1) In section 4 and 5 we demonstrated the definitive impact of both religion and a male dominated society on laws pertaining to engagements and marriage in England and the Netherlands. During the years of apartheid in South Africa the ruling party was likewise firmly entrenched in reformed theology and male dominance,⁶⁴ epitomised by the secret white male Afrikaner Broederbond. This conservatism was reflected in the reluctance to change the common law and abolish the outdated action for breach of promise. (2) In the post apartheid period, section 39(2) of the Constitution created the opportunity for “judge-made law that is more faithful to reality”.⁶⁵ The opportunity has, however, been underutilised. Davis and Klare suggest that the training of jurists which dates back to a previous era, is to blame: “Jurists deeply committed to transformation reflexively fall back upon intellectual instincts inculcated in the course of their pre-Constitution professional training and socialisation”.⁶⁶

8 Conclusion

The law concerning breach of promise has come full circle: More than two thousand years ago actions based on breach of a promise to marry ceased to exist amongst the Romans. The action was revived under the influence of the church in the 16th century and during the next five centuries ever changing social norms determined the popularity of the action all over the Western world. Due to the very specific political, legal and social circumstances in South Africa, it took much too long for the premise of “interaction between the law and social forces”⁶⁷ to be realised, but in the final instance, the action for breach of promise could not outlive the changing attitudes, customs and realities of the South African society.

64 In the title of his book *The rise of Afrikanerdom. Power, Apartheid and the Afrikaner Civil Religion* (1975) Moodie refers to this influence as the “civil religion” of the three Reformed “sister Churches”. The fact that one of the three so called “sister churches” still does not permit women to be ordained as ministers is indicative of the traditional Afrikaner view of women as inferior and subservient.

65 Davis & Klare 2010 *SAJHR* 403 409.

66 2010 *SAJHR* 403 414.

67 Lettmaier 2.