



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 867/2021

In the matter between:

C W

APPLICANT

and

G T

RESPONDENT

Neutral citation: *C W v G T* (867/2021) [2023] ZASCA 23 (13 MARCH 2023)

Coram: MOLEMELA, MAKGOKA and HUGHES JJA and MJALI and SIWENDU
AJJA

Heard: 16 November 2022

Delivered: 13 March 2023

Summary: Exception – delictual claim – patrimonial damages based on alleged fraudulent misrepresentation inducing marriage and resulting in wasted wedding expenses.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Fisher J, sitting as a court of first instance):

- 1 The application for leave to appeal is granted.
 - 2 The appeal is upheld with costs.
 - 3 The order of the high court is altered to read as follows:
'The defendant's exceptions to the plaintiff's claims premised on the *Lex Aquilia* and *Actio Iniuriarum*, respectively, are dismissed with costs.'
 - 4 The costs order of the high court in respect of the dismissal of the application for leave to appeal is set aside.
 - 5 The costs in respect of the application for leave to appeal in the high court and in this Court are to be costs in the action.
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JUDGMENT

Hughes JA (Molemela JA and Siwendu AJA concurring):

Introduction

[1] This is an application for leave to appeal against the upholding of an exception. The application concerns a claim for patrimonial damages instituted by the applicant, Ms W against the respondent, Mr T, on the ground of a fraudulent misrepresentation. The applicant alleges that such misrepresentation induced her to marry the respondent, as a result of which she incurred wedding expenses in an amount of R331 342.36.

[2] The applicant instituted two claims in the Gauteng Division of the High Court, Johannesburg (the high court), one being the *actio lex aquilia* and the other being the *actio iniuriarum*. The respondent raised exceptions to the applicant's claims. The

exceptions for the claim based on the *lex aquilia* were upheld, whilst the exceptions based on the *actio iniuriarum* claim were dismissed. The applicant launched an application for leave to appeal in the high court, which was refused. She petitioned this Court for leave to appeal. This Court directed that the matter be referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. Consequently, the parties were forewarned that they be prepared, if called upon, to address the Court on the merits of the matter.¹ The respondent elected to abide by this Court's decision.

[3] During the period between 8 November 2016 and 22 September 2018, the parties were in a romantic relationship. The applicant alleges that throughout their relationship, the respondent professed in words and deeds that he loved her, he wanted to marry her and remain married to her until parted by death. During the course of their relationship, he showered her with expensive gifts and lavish five-star holidays. On 31 March 2018, the respondent proposed to marry the applicant and presented her with an engagement ring worth R63 000. On 15 September 2018, the parties were married out of community of property with the accrual system. Thereafter, they jetted off on honeymoon to a private island off Pemba, in the Quirimbas Archipelago, Mozambique. This blissful relationship and union was short lived.

[4] From about 22 September 2018, their blissful matrimonial relationship took a turn for the worst. The applicant states that the respondent's conduct changed towards her. She alleged that he no longer showed her any love and respect, but instead he regularly abused and belittled her; he used profanity towards her; and generally treated her in contrast to how he treated her during their courtship. Furthermore, he often told her that she was 'the biggest regret of his life and that he regretted marrying her'. On 18 November 2018, the respondent ordered the applicant to leave the marital home. On 11 December 2018, the respondent instituted divorce proceedings against the applicant.

[5] The applicant alleges that on 24 December 2018 she became aware that the respondent had falsely represented to her, knowingly, that he loved and wanted to

¹ *MEC for Safety and Security (Eastern Cape Province) v Mtokwana* [2010] ZASCA 88; 2010 (4) SA 628 (SCA); [2010] 4 All SA 583 (SCA) at 629C-D.

remain married to her, when in fact he had known prior to the marriage that he considered the relationship between them to be 'over'. On 29 January 2019, and with this knowledge at hand, the applicant launched action proceedings in the high court. She claimed that she was induced to marry the respondent when he wrongfully and intentionally made the representations that he did. As a result of the representations, she incurred wasted wedding expenses in the amount of R331 342.36. For the sake of completeness, the second claim, which is not the subject of this judgment, was for an amount of R500 000 for the impairment of the applicant's dignity and reputation.

[6] The respondent raised nine exceptions to the applicant's particulars of claim, four in respect of the *lex aquilia* and five in respect of the *actio iniuriarum*. I do not propose to deal with each exception individually and maintain the characterisation by the high court as exceptions under the *lex aquilia* and under the *actio iniuriarum*, respectively.

[7] The issue before this Court is whether the high court was correct in upholding the exceptions to the claim under the *lex aquilia*.

[8] It is well established in our law that actions *ex delictual* are permitted *stante matrimonio* between spouses married out of community of property with the exclusion of marital power, as is the case in this matter. In *Rohloff v Ocean Accident & Guarantee Corp Ltd*,² Malan JA stated the following:

'I have considered all the available authorities with care and have come to the conclusion that actions *ex delicto* are, in our law, permitted *stante matrimonio* between spouses married out of community of property with exclusion of the marital power. Not only is this view supported by recognised Roman-Dutch commentators, but it appears to me, moreover, to be in accordance with justice, reason, common sense and public policy.'

Much later, in the Constitutional Court, in *Van Der Merwe v Road Accident Fund*,³ Moseneke DCJ stated:

'Equally trite is that in a marital property regime where each spouse has a separate estate, the common-law restrictions on claims in delict has no place. That explains why the bar to suing one's spouse does not extend to marriage out of community of property.'

² *Rohloff v Ocean Accident & Guarantee Corporation Ltd* 1960 (2) SA 291 (AD) at 304A.

³ *Van Der Merwe v Road Accident Fund* 2006 (6) BCLR 682 (CC); 2006 (4) SA 230 (CC) para 29.

[9] I deem it necessary to restate the general principles applicable when dealing with an exception. A decision to uphold an exception is final in effect and dispositive of the legal issues between parties.⁴ Therefore, when assessing an exception, it 'should be dealt with sensibly', as it is 'a useful mechanism to weed out cases without legal merit'.⁵ An exception is competent if the defect appears clearly *ex facie* the pleadings. The onus lies with the excipient to show that such pleadings are excipiable.⁶ When an exception is raised against the pleadings that do not disclose a cause of action, the averments pleaded by the plaintiff must be accepted as true.⁷ In *Luke M Tembani and Others v President of the Republic of South Africa and Another*,⁸ this Court restated that the test to be applied 'is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts'.

[10] Distilled to the bare minimum, the allegation is that the respondent proclaimed that he loved the applicant and that he wanted to spend the rest of his life with her, hence, he proposed marriage, which was accepted. At that time, when he made this proclamation he did not honestly believe it to be true. It was this proclamation and the conduct of the respondent that induced the applicant to accede to his marriage proposal which resulted in her expending an amount totalling R331 342.36 in respect of wedding expenses.

[11] I now turn to deal with the exception that was upheld by the high court relating to the claim in delict which constitutes the subject matter of this appeal. The high court

⁴ *Maize Board v Tiger Oats Ltd and Others* 2002 (5) SA 365 (SCA) at 373B-D; In *Pretorius v Transport Pension Fund* [2018] ZACC 10; 2018 (7) BCLR 838 (CC); [2018] 7 BLLR 633 (CC); 2019 (2) SA 37 (CC) (*Pretorius v TPF*) at 44E, the Constitutional Court stated:

'The dismissal of an exception is not usually finally dispositive of the legal issue at stake, unlike the upholding of an exception on the basis that the claim is bad in law.'

⁵ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 3.

⁶ *Luke M Tembani and Others v President of the Republic of South Africa and Another* [2022] ZASCA 70 (SCA) (*Tembani v President of RSA*) para 14.

⁷ *Marney v Watson and Another* 1978 (4) SA 140 (C) at 144.

⁸ *Tembani v President of RSA* fn 8 above para 14; *Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA); [2013] 1 All SA 648 (SCA); 2013 (3) BCLR 279 (SCA) (*Children's Resource Centre Trust*) para 36.

accepted these facts as correct and it considered the respondent's contention that the *lex aquilia* should not be extended. It proceeded from the premise that '[a] fraudulent misrepresentation leading to marriage and which results in pure economic loss is not recognised under the *lex aquilia*' and that there was '... no reason why the *aquilian* remedy should be extended to [the applicant] who must be regarded as having been in the position to both appreciate and manage the risks attendant on an unsuccessful marriage, but who decided not to do so'. The high court then concluded that the enquiry is one of wrongfulness and it reasoned that the case was one where '... social, economic and other costs are too high to justify the use of the law of delict for the resolution of the issue'. The high court was steadfast in its view that this sort of claim was not recognised in our law and it would not be in the public interest to extend the *lex aquilia* to allow such a claim.

[12] In the high court, the applicant contended that the case she made out was one of pure economic loss arising from a fraudulent misrepresentation, which was *prima facie* wrongful and unjust. Furthermore, the fact that such representation resulted in a marriage, does not change conduct that is *prima facie* wrongful into conduct that is lawful. The applicant stated that this affirmation is well established in our law. In support of this contention, the applicant relied on the decision in *Rex v Myers*,⁹ where it was stated that a person who makes a false statement without an honest belief in the truth thereof is guilty of fraud. In *Rex v Myers*, the court quoted with approval the English law decision of *Derry v Peek*, wherein Lord Herschell said:

'... [F]raud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.'¹⁰

[13] The applicant submitted that the high court misdirected itself when it struck out her claim for pure economic loss, as that claim had reasonable prospects of success.

[14] In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd (Lillicrap)*, this Court observed that South African law '... does not extend the scope of the Aquilian action to new situations unless there are positive policy considerations

⁹ *Rex v Myers* [1948] 1 All SA 354 (A); 1948 (1) SA 375 (A) at 382.

¹⁰ *Ibid.*

which favour such an extension'.¹¹ Expressing itself in the context of delictual liability for pure economic loss premised on a claim for damages allegedly suffered as a result of the respondent's negligence in the design of an aquarium, this Court in *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* explained that '[w]hen a court is requested in the present context to accept the existence of a "legal duty", in the absence of any precedent, *it is in reality asked to extend delictual liability* to a situation where none existed before. The crucial question in that event is whether there are any considerations of public or legal policy which require that extension'.¹² I am of the view that the present case falls into the realm of the circumstances described in the two cases mentioned above. The high court was indeed being asked to extend delictual liability to a novel situation for which there is currently no precedent in our courts.

[15] Another aspect for consideration, is the alleged claim of fraudulent misrepresentation made intentionally to induce the applicant. In the second judgment, my brother Makgoka JA deals with this extensively. Save to add that the loss suffered by the applicant need not have been intended by the respondent, it is sufficient that the applicant acted upon the fraudulent representation. This Court dealt with such delictual action in the context of a contract in *Standard Bank of South Africa Ltd v Coetsee*,¹³ and stated the following:

'In my view it is not necessary, generally, in a delictual action based on a fraudulent misrepresentation that it should be alleged and proved that the representor intended to occasion the loss which the representee suffered. All that is necessary to allege and prove is that the representor made a false representation which he intended, whatever his motive might have been, the representee to act upon. The loss or damages which the representee suffered need not have been intended by the representor, it must simply have followed as a result of the representee acting upon the false representation.'

¹¹ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* [1958] 1 All SA 347 (A); 1985 (1) SA 475 (A) at 504D-H.

¹² *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2007] 1 All SA 240 (SCA); 2006 (3) SA 138 (SCA) para 12.

¹³ *Standard Bank of South Africa Ltd v Coetsee* 1981 (1) SA 1131 (A) at 1145A-B.

[16] In *Country Cloud Trading v MEC, Department of Infrastructure Development*,¹⁴ the Constitutional Court summarised the approach our law takes to wrongfulness by pointing out that the wrongfulness enquiry focuses on ‘the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability’. As mentioned before, the respondent’s exception questioned the existence of a legal duty not to cause harm in relation to the specific facts of this case. The challenge for the respondent was that the averments made in the particulars of claim were insufficient for purposes of answering the crucial question posed in *Lillicrap*: whether there are any considerations of public or legal policy that require the extension of the Aquilian remedy to the circumstances of the case.¹⁵ That being the case, the respondent’s exception was misconceived.¹⁶ Based on the same reasoning, the respondent failed to establish that the particulars in support of the patrimonial damages claim were excipiable on every interpretation that can be attached to them.¹⁷ It is on that basis that the exception ought to have been dismissed. In any event, the issue concerning whether the net of the Aquilian remedy ought to be cast wider is an aspect that will, in due course, be dealt with by the high court during the trial.

[17] Therefore, for the reasons alluded to above and the principles laid down in the authorities mentioned above, it follows that the application for leave to appeal must be granted and the appeal must succeed.

[18] In the result, the following order is granted:

- 1 The application for leave to appeal is granted.
- 2 The appeal is upheld with costs.
- 3 The order of the high court is altered to read as follows:

‘The defendant’s exceptions to the plaintiff’s claims premised on the *Lex Aquilia*

¹⁴ *Country Cloud Trading v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC).

¹⁵ Compare *Trustees for the time being of Children’s Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA); [2013] 1 All SA 648 (SCA); 2013 (3) BCLR 279 (SCA) paras 36-37. Also see *Tembani and Others v President of the Republic of South Africa and Another* [2022] ZASCA 70 (SCA) paras 14-20.

¹⁶ *Ibid.*

¹⁷ *Telematrix (Pty) Ltd v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 2.

and *Actio Iniuriarum*, respectively, are dismissed with costs.’

- 4 The costs order of the high court in respect of the dismissal of the application for leave to appeal is set aside.
- 5 The costs in respect of the application for leave to appeal in the high court and in this Court are to be costs in the action.

W HUGHES
JUDGE OF APPEAL

Makgoka JA (Mjali AJA concurring):

[19] I concur in the order proposed in the judgment of Hughes JA (the first judgment). I write separately as my conclusion is based on a different approach. I engage the jurisprudential premise on which the high court’s judgment rests. I highlight my disagreement with the reasoning of the high court, and provide a juridical framework within which the exceptions should have been adjudicated upon. I set out the facts to the extent necessary to give context to this judgment.

[20] The parties were married out of community of property on 15 September 2018, after a courtship of close to three years. The applicant alleged that merely a week after the marriage was celebrated, the respondent started exhibiting distasteful conduct towards her, manifested in verbal and emotional abuse; threats and insults; and an accusation of theft. Just over two months later, the respondent ordered her to leave the matrimonial home, and shortly thereafter, the respondent instituted an action to end the marriage.

[21] In a separate action, the applicant claimed R331 342.36 from the respondent, being the monies she spent for the parties’ wedding celebration. The applicant alleged that when the respondent proposed marriage to her, he already considered their romantic relationship to have broken down, yet failed to disclose this fact to her. In

other words, he knew his presentation (the marriage proposal) to be false and that he no longer wanted to continue with the relationship. She only became aware of this fact in December 2018. In paragraph 7 of her particulars of claim, the applicant alleged that the respondent made the representation ‘ . . . wrongfully, intentionally, and with the intention of inducing [her] to marry him . . . ’. Accordingly, her claim was based on the respondent’s alleged fraudulent misrepresentation.

[22] The respondent met the applicant’s particulars of claim with four exceptions, the gravamen of which was this: our law did not recognise a claim for pure economic loss arising from a failed marriage, and as such, the particulars of claim did not disclose a cause of action. To find that his conduct was wrongful, the court would have to extend the *lex aquilia* to allow for such a claim, and that it would be contrary to the legal convictions of the community to do so.

[23] A claim for pure economic loss usually arises from a negligent causation (misstatement or omission) and is not regarded as prima facie wrongful.¹⁸ Its wrongfulness depends on the existence of a legal duty, the imposition of which is a matter of judicial determination involving criteria of public or legal policy.¹⁹ The respondent’s submissions found favour with the high court. As part of its policy considerations, the high court placed considerable emphasis on the choice of the parties’ marital property regime. It said that if the parties ‘ . . . *do not decide to enter into an ante-nuptial contract, they become, on their marriage, subject to a community of property regime which has, as its foundation, a fair and equal sharing of economic resources between the spouses*’. (Italics and underlining added.)

[24] It is not clear why the parties’ choice of a marital property regime became a focal point in the reasoning of the high court. The emphasised remarks in the preceding paragraph suggest that the Judge considered the parties to be married in community of property, and that, that constituted a bar to the applicant’s claim. This is

¹⁸ *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA); [2009] 1 All SA 525 (SCA) para 12; *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; 2006 (3) SA 138 (SCA); [2007] 1 All SA 240 (SCA) para 12.

¹⁹ *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); [1979] 2 All SA 270 (A) at 833D-834A; *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 568B-C.

despite the fact that the Judge had already mentioned, correctly so, that the parties are married out of community of property. In respect of such spouses, this Court, over six decades ago in *Rohloff v Ocean Corporation*,²⁰ removed the rule which barred delictual actions between them. Given this settled legal position, it is difficult to understand the high court's particular focus on this aspect, especially because it was not raised by any of the parties in their pleadings.

[25] The high court went on to explain that to allow an *aquilian* action in the circumstances of the case would impermissibly intrude into the parties' right '... freely to determine their financial relationships within their marriage. . .'. Such right of choice, the high court said, '... should be given pre-eminence over the right to be recompensed for economic loss which has accrued as a result of conduct which occurred before the marriage even if that conduct led to the marriage'. The issue, said the high court, impacted on the 'parties right to dignity – to be accorded the respect which will allow them the autonomy to regulate the financial consequences of their lives together'.

[26] The court expanded on its reasoning:

'The potential insecurity that such litigation would introduce into the operation of *the chosen property regime* of the parties to the marriage is also an important consideration. It would be difficult to allocate this liability in the context of the complex economic relationships that are engendered by marriage and are sought to be rationalized on its dissolution.' (Emphasis added.)

[27] There are several difficulties with some of the high court's pronouncements. First, it is not clear what the parties' 'financial relationships within the marriage' has to do with the applicant's claim. If anything, in a marriage, none of the parties is entitled to fraudulently misrepresent their intentions to the other, causing them loss. This case is about misrepresentation, which, if established, could potentially result in the annulment of the marriage as being voidable at the applicant's instance.

²⁰ *Rohloff v Ocean Accident and Guarantee Corporation Ltd* 1960 (2) SA 291 (A) at 310F.

[28] The unqualified statement by the high court that any conduct (even fraudulent) which leads to a marriage cannot give rise to a claim for loss, is of doubtful legal soundness. As I endeavour to demonstrate in this judgment, our law sets its face against fraudulent misrepresentation, and almost invariably, regards it as wrongful. As to the high court's reference to the parties' 'right to dignity', it is not at all clear in what context the Judge raised it.

[29] The high court also said that the applicant ' . . . must be regarded as having been in the position to both appreciate and manage the risks attendant on an unsuccessful marriage, but [had] decided not to do so'. The court continued:

'Indeed the premise of the fraudulent misrepresentation sought to be relied on by the [applicant] encompasses metaphysical questions as to the nature and meaning of love and, to my mind, whether such things are capable of proof in a court of law is questionable.'

[30] Again, with respect to the learned Judge, the applicant's complaint has nothing to do with the 'risks' associated with an unsuccessful marriage (to which the law attaches no consequence). There is nothing in her particulars of claim to suggest that the applicant complains as a bitter spouse because her marriage had failed. Her complaint is about the fact that she was induced into the marriage by the respondent's fraudulent misrepresentation. Had the applicant's allegation ended here, the high court's reasoning would have had some foundation. But the applicant goes further, and alleges that as a result of the misrepresentation, she incurred a loss which she would not have incurred, had the misrepresentation not been made. Thus, her complaint is about a fraudulent misrepresentation which induced a marriage and resulted in loss. At exception stage, the court was not called upon to decide on the merits of the applicant's claim and on issues whether indeed the respondent ever loved the applicant. It was to determine whether the necessary assertions were made in the particulars of claim in order to sustain a cause of action.

[31] Most of the policy considerations taken into account by the high court appear to be based on the concern about the negative impact a claim such as asserted by the applicant would have on a marriage relationship. But this ignores an important consideration: a claim of this nature would inevitably arise once a marriage relationship breaks down, as demonstrated by the facts of this case. The applicant only sued the

respondent once it was clear that the relationship had but all ended, and after the respondent had instituted divorce proceedings. Therefore, under such circumstances, there would be nothing left of the marriage relationship to preserve. In my view, therefore, none of the policy considerations discussed by the high court should have resulted in the upholding of the respondent's exceptions.

[32] Apart from the policy considerations, the high court went on to question what it perceived to be the applicant's poor judgment in: (a) electing to pay for the relevant wedding expenses; (b) not opting for what the learned Judge considered 'a less expensive wedding'; (c) not having dealt with such expenses in an ante-nuptial agreement. The learned Judge also expressed a view that '... it is common for parties to dictate that one or the other will be entitled to the wedding gifts in the event of divorce'.

[33] This being the exception stage, it was not open for the high court to go beyond the applicant's factual averments and question their efficacy. The issues raised by the high court were not part of the respondent's exceptions. The learned Judge brought to bear her own subjective views on (a) how wedding gifts should be regulated between spouses, (b) whether the wedding expenses should have been incurred in the first place, and (c) the reasonableness of such expenses. This is plainly impermissible.

[34] For purposes of determining the exception, the factual averments by the applicant must have been accepted as correct, unless they appeared to be manifestly false.²¹ Although the high court referred to this principle, it is clear from how it treated the applicant's averments that it merely paid lip service to it. Had it applied the principle, it would have accepted that: (a) the respondent made a fraudulent misrepresentation to the applicant (b) the misrepresentation induced the applicant into the marriage; (c) as a result of the misrepresentation she incurred the wedding expenses; (d) but for the misrepresentation she would not have incurred the expenses; (e) the wedding expenses were necessary and reasonable.

²¹ *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Limited* [2008] ZASCA 158; 2009 (4) SA 89 (SCA); [2009] 2 All SA 449 (SCA) para 55.

[35] I turn now to the respondent's exceptions, and how they should have been approached. As mentioned already, the respondent's exceptions were predicated on the contention that the applicant's particulars of claim did not disclose a cause of action. The test in this regard is trite: the court asks the question whether upon any construction of the particulars of claim, no cause of action is disclosed.²² The exceptions could only be upheld if this question was answered in the affirmative. The onus is on an excipient such as the respondent, to establish this.²³ This should have been the starting point for the high court in considering the exceptions. Unfortunately, it did not embark upon such an enquiry. I do so now, in the light of the averments in the particulars of claim.

[36] As mentioned already, the applicant's cause of action is based on fraudulent misrepresentation. In *Geary & Son (Pty) Ltd v Gove*,²⁴ the requirements of this cause of action were stated to be: (a) representation by the other party; (b) knowledge by the representor that the representation is false; (c) that the representation induced the representee to act; (d) that the representee suffered damages as a result.²⁵ Ordinarily, upon proof of these requirements on a balance of probabilities, wrongfulness is established.²⁶ This is because a fraudulent misrepresentation which causes pure economic loss to another has always been prima facie wrongful by virtue of the *actio dolii*.²⁷

[37] In the present case, the applicant has made all the necessary averments in her particulars of claim. Despite this, on the reasoning of the high court, the applicant's

²² See *Fairoaks Investment Holdings (Pty) Ltd and Another v Oliver and Others* [2008] ZASCA 41; 2008 (4) SA 302 (SCA); [2008] 3 All SA 365 (SCA) (*Fairoaks*) para 12; *Theunissen and Others v Transvaalse Lewendehawe Koop Bpk* 1988 (2) SA 486 (A) at 500E; *Trustees for the Time Being of the Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (3) SA (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) para 36.

²³ *Fairoaks* fn para 12.

²⁴ *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A).

²⁵ *Ibid* at 441D.

²⁶ In *Geary & Son* (fn 6) Steyn CJ suggested, in an *obiter dictum* that in addition, the claimant had to prove that the representor had intended to cause him the loss by the false representation. In *Standard Bank of South Africa Ltd v Coetsee* 1981 (1) SA 1131 (A) at 1145A-B, Joubert JA explained that this dictum was made in view of the special circumstances alleged in the pleadings in that case, involving as it did, unlawful competition. Otherwise, this was generally not a requirement in a delictual action based on misrepresentation.

²⁷ *Matthews and Others v Young* 1922 AD 492 at 505. See also, *Bill Harvey's Investment Trust (Pty) Ltd v Oranjezicht Citrus Estates (Pty) Ltd* 1958 (1) SA 479 (A).

particulars of claim do not disclose a cause of action. The only reason for that conclusion is that the parties were married. Taken to its logical conclusion, the result of the high court's reasoning would be this: had the fraudulent misrepresentation induced any other contract, the applicant's particulars of claim would have disclosed a cause of action, but because it induced marriage, and resulted in loss, no cause of action is disclosed.

[38] Differently put, the applicant should be non-suited *only* because her damage arose from the marriage contract. This, in my view, would result in an absurdity and an artificial differentiation between two categories of persons who had suffered loss, both due to misrepresentation. To my mind, the fact that the parties are married, should make no difference in the determination of wrongfulness on the facts of the present case. The reasoning of the high court ignores the prima facie wrongfulness of a fraudulent misrepresentation. As explained by this Court in *Minister of Finance and Others v Gore NO*:²⁸

'[I]t is hard to think of any reason why the fact that the loss was caused by dishonest (as opposed to bona fide negligent) conduct, should be ignored in deciding the [wrongfulness] question. We do not say that dishonest conduct will always be wrongful for the purposes of imposing liability, but it is difficult to think of an example where it will not be so.'²⁹

[39] As I see it, this is one of the cases where a finding of fraud 'inevitably leads to a finding of wrongfulness,' as remarked in *mCubed International (Pty) Ltd v Singer NNO*.³⁰ Were the case to be determined on this footing, there would be no need to extend the *lex aquilia*. In a different but not unrelated context, it was held in *Lillicrap v Pilkington Brothers*³¹ that when the existing law provided adequate means for the plaintiff to protect itself against loss, there was no call for the *lex aquilia* to be extended.³² This may well be the case here.

²⁸ *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA); [2006] ZASCA 98; [2007] 1 All SA 309 (SCA).

²⁹ *Ibid* para 87.

³⁰ *mCubed International (Pty) Ltd v Singer NNO* [2009] ZASCA 6; 2009 (4) SA 471 (SCA); [2009] 2 All SA 536 (SCA) para 34.

³¹ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) (*Lillicrap*). See also, *Trustees, Two Oceans Aquarium Trust* fn 1 above.

³² *Ibid* at 500H-I.

[40] However, should it be that wrongfulness cannot be established without the enquiry whether the *lex aquilia* should be extended, as postulated by the high court, there should be public policy considerations. As mentioned already, fraud unravels everything. It is therefore conceivable that in that enquiry, the respondent's fraudulent misrepresentation not only evokes moral indignation, but also that the legal convictions of the community demand that it be regarded as wrongful.³³

[41] In *Dawood and Another v Minister of Home Affairs and Others*,³⁴ it was pointed out that because marriage and the family are social institutions of vital importance, entering into marriage therefore is to enter into a relationship that has public significance as well. Therefore, the public has an interest that the institution of marriage is not brought about through fraudulent misrepresentation. Thus viewed, the respondent's fraudulent misrepresentation is inimical to all that a marriage encapsulates, among others, fidelity, trust, mutual support and loyalty. Given all these, public policy considerations could well result in the respondent's fraudulent misrepresentation being deemed wrongful.

[42] Professor Neethling³⁵ puts it well:

'There can be no doubt that when the defendant [respondent] proposed marriage to the plaintiff [the applicant] and had already considered that their romantic relationship had broken down irretrievably, he had a legal duty to disclose this to her (see the Attorneys Fidelity Fund case par 107 and *McCann v Goodall Group Operations (Pty) Ltd* 1995 2 SA 718 (C) 721 726 as to the failure to disclose information). This duty to speak was even stronger in light of the fact that marriage is a social institution of vital importance . . . and the defendant nevertheless fraudulently induced her into a marriage which was doomed from the start.'³⁶

[43] It must also be borne in mind what was said in *Absa v Moore*,³⁷ (in the context of fraud inducing a contract) that whether fraud unravels a contract, depends on its

³³ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B.

³⁴ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837.

³⁵ Neethling 'The Availability of the Actio Legis Aquiliae and the Actio Iniuriarum Between Spouses' 2021 TSAR 602.

³⁶ *Ibid* 607-608.

³⁷ *Absa Bank Limited v Moore and Another* [2016] ZACC 34; 2017 (1) SA 255 (CC); 2017 (2) BCLR 131 (CC).

victim, not the fraudster.³⁸ Thus, where the victim of fraudulent misrepresentation seeks relief, as is the case here, it does not lie in the mouth of the misrepresenter (the respondent in this case) to assert that the legal convictions of the community are such that his conduct should not give rise to a claim.

[44] Another important policy consideration in the enquiry whether aquilian liability for pure economic loss should be extended or not, is the risk of indeterminate liability. As explained in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*,³⁹ ‘. . . if claims for pure economic loss are too freely recognised, there is the risk of “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”’⁴⁰

[45] There would have been risk of indeterminate liability had the applicant based her claim *only* on the mere fact of the marriage having been unsuccessful due to conduct of the respondent. A need to limit liability could thus arise, lest the flood-gates open for spouses aggrieved by their failed marriages, resulting in indeterminate claims and amounts. However, on the facts of this case, there can be no issue of indeterminate liability. The basis for liability is clearly circumscribed and delineated by the applicant’s factual allegations, especially that of fraudulent misrepresentation. The loss suffered by the applicant is both finite and determinate. Also, as Professor Neethling⁴¹ correctly points out, there was no possibility of multiplicity of actions, as similar situations where fraudulent conduct induces a marriage will be few and far in between.

[46] Given all these weighty juridical and policy considerations, the judgment of the high court cannot stand. The judgment has received severe criticism in academic reviews, which criticism, based on the views expressed in this judgment, is with respect, trenchant.⁴² In all the circumstances, it cannot tenably be asserted that on

³⁸ Ibid para 39.

³⁹ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC).

⁴⁰ Ibid para 24.

⁴¹ Fn 15 above at 608.

⁴² See for example, Professor J C Sonnekus ‘Erkenning van deliktuele remedies: ‘n Bevestiging van ‘n beskermingswaardige regsbelang of tog ‘n bedreiging vir ‘n sosiale instelling soos modern huwelik? 2021 (84) THRHR and Neethling (fn 15 above).

every possible construction of the applicant's particulars of claim, no cause of action is disclosed. Accordingly, the exceptions should have been dismissed. For these reasons I agree with the order of the first judgment.

T MAKGOKA
JUDGE OF APPEAL

Molemela JA

[47] I have read the first and second judgments authored by my colleagues. I concur in the first judgment. My reasons are set out below.

[48] The factual matrix has already been correctly set out in the first judgment. Research conducted by our court's researchers revealed that there is currently no precedent for a delictual claim premised on facts similar to those presented in the particulars of claim in the context of fraudulent misrepresentation.⁴³ The notice of exception speaks for itself,⁴⁴ and the issues posed therein are self-explanatory. The

⁴³ We were referred to this Court's judgment in *Van Jaarsveld v Bridges* [2010] ZASCA 76, an appeal to this court arising from a delict in the context of a breach of promise.

⁴⁴ The Notice of Exception was, in relevant parts, formulated as follows:

'PLEASE TAKE NOTICE that the defendant hereby excepts to the plaintiff's particulars of claim on the basis that they fail to disclose a cause of action and/or are vague and embarrassing and/or that the court lacks jurisdiction to adjudicate the matter. The basis of the exception is set out below.

.....

First Exception

The plaintiff's particulars of claim do not disclose a cause of action in respect of her claim for wasteful expenditure for one or more or all of the following reasons:

- 8.1. The misrepresentations alleged by the plaintiff are not actionable;
- 8.2. No claim exists in law for a wrongful proposal of marriage in the circumstances pleaded by the plaintiff.
- 8.3. No cause of action for wrongful marriage is known in the law of contract or delict.
- 8.4. The defendant's expression of love towards the plaintiff even if later found to have been insincere, does not amount to an actionable misrepresentation.
- 8.5. The defendant's statement that he wished to marry the plaintiff cannot amount to a misrepresentation in that the parties did in fact get married consequent upon the statement by the defendant that he wished to marry the plaintiff.
- 8.6. The defendant's statement or representation that he wished to remain married to the plaintiff until parted by death, even if found to have been made with reservation or sincere, cannot in fact or in law amount to an actionable misrepresentation.
- 8.7. An insincere statement of love prior to parties becoming engaged and/or entering into a marriage cannot found an action for damages.

summons, to which the particulars of claim were attached, was the only pleading filed before the high court. On the averments alleged in the particulars of claim, there were insufficient facts before the high court to assist it in the determination of whether there are policy considerations that require the extension of the *lex Aquilia* in the specific circumstances of this case. It is for that reason that I agree that the issue whether the net of the Aquilian action is indeed being cast wider, as contended for by the respondent, is a matter that can only be tested and decided by the trial court with the benefit of all the pleadings and evidence. Implicit in this finding is that the respondent

Second Exception

9. It is not clear from the particulars of claim whether the actionable wrong relied upon is the alleged misrepresentations or the failure on the part of the defendant to disclose to the plaintiff before they got married that he considered the relationship between them to be 'over'.

10. In any event, doubts or reservations that the defendant may have had about the success of their marriage after the betrothal do not give rise to an actionable wrong.

11. The plaintiff does not specify the nature of the duty allegedly owed by the defendant to the plaintiff and the facts and circumstances in which such duty arises.

12. The particulars of claim do not allege, imply or infer a causal nexus between the alleged misrepresentations, namely an insincere expression of love, and the alleged breach of a legal duty to disclose that the relationship was over.

Third Exception

13. The alleged truth or otherwise of the representations are not reasonably capable of determination and cannot found a basis for action in damages against the defendant for wasteful expenditure. In this regard:

13.1. The plaintiff does not define what is meant by 'love' in the context in which it is pleaded.

13.2. An expression of love by one or both parties is not an essential element of a betrothal or of a marriage. Accordingly, the absence or an insincere expression of love by the defendant does not found a basis on which the plaintiff can hold the defendant liable in damages;

13.3. The defendant's statement that he loved the plaintiff is of a subjective nature. It is difficult to define, quantify, measure and prove and as such, the matters in issue (as pleaded by the plaintiff) are not reasonably and/or practicably capable of determination by a court of law;

13.4. No causal link has been alleged between the defendant's alleged insincere expression of love towards the plaintiff and the failure of their relationship and indeed, it would be unreasonable and impracticable for the court to embark on an examination as to whether the breakdown of their relationship (either before or after the marriage) was caused by the defendant's insincerity as regards his love for the plaintiff.

14. The *boni mores* of society and the legal convictions of the community do not extend the concept of wrongfulness to circumstances where one party after the breakdown and intended dissolution of the marriage complains that the marriage was induced by an expression of love made by the other party made which was not genuine.

....

16. The law ought to refrain from compelling and enforcing proper and/or ethical marital conduct directly or indirectly by legal measures. This includes claims for damages arising from expressions of love that are subsequently found not to have been genuine. Intimate and private personal relationships between consenting adults should not be regulated by law in the manner and to the extent contended for by the plaintiff.

....

19. The plaintiff's claim for wasteful expenditure is for pure economic loss. It is contrary to the *boni mores* and legal convictions of the community to extend claims to disappointed spouses based on the facts alleged by the plaintiff. This would open the flood gates of litigation and inundate our courts with an untold number of damages claims.

20. **IN THE PREMISES**, the facts alleged by the plaintiff do not give rise to a claim against the defendant in damages as alleged or at all alternatively, the particulars of claim are vague and embarrassing and prejudice the defendant.'

did not discharge the onus of showing that the particulars of claim are excipiable on every interpretation that could reasonably be attached to them.⁴⁵ On this ground alone, the appeal ought to succeed.

[49] Moving on to specific issues pertaining to the elements of the appellant's delictual claim, it is trite that wrongfulness is a requirement for liability that is separate from fault. Equally trite is the principle that 'fraud unravels all' and that 'a fraudulent misrepresentation that induces the conclusion of a transaction causing pure economic loss is a delict'. That said, due regard must be paid to the fact that in the context of the issues posed in the exception, the question is not only whether the alleged misrepresentation is actionable, but also whether a false representation was made. While it could, in the abstract, be argued that it is inconceivable that public policy considerations could dictate that the respondent be absolved from liability for his alleged fraudulent conduct because intention does not usually assume an important role in Aquilian liability for patrimonial loss, it must be borne in mind that this Court has recognised that there are instances where intention plays a pivotal role in the process of adjudicating a delictual claim, such that 'intent will then be an integral part of the element of wrongfulness'.⁴⁶ The judgments of this Court alluded to in paragraphs 15, 16 and 17 of the first judgment clearly illustrate the need to take context into account. Having considered all the issues posed in the exception against the backdrop of the context provided by the factual matrix, I am of the view that the paucity of facts in this matter is an impediment to a context-specific discussion on fraud and its ramifications. For all the reasons mentioned above, I agree with the reasoning and conclusion of the first judgment.

M B MOLEMELA
JUDGE OF APPEAL

⁴⁵ *Tembani v President of RSA* fn 8 above para 14.

⁴⁶ *Media 24 v SA Taxi Securitisation* 2011 (5) SA 329 (SCA) para 12.

Appearances

For applicant:	D Milne
Instructed by:	Van Rensburg Pillay Jonker Inc, Johannesburg Honey Attorneys, Bloemfontein
For respondent:	No appearance