# A Duty of Support for *All* South African Unmarried Intimate Partners Part I: The Limits of the Cohabitation and Marriage Based Models

E Bonthuys*

P·E·R
Pioneer in peer-reviewed, open access online law publications

**Author**

Elsje Bonthuys

**Affiliation**

University of Witwatersrand
South Africa

**Email** Elsje.Bonthuys@wits.ac.za

**Date of submission**

8 February 2018

**Date published**

19 October 2018

**Editor** Prof M Carnelley

**How to cite this article**

Bonthuys E "A Duty of Support for *All* South African Unmarried Intimate Partners Part I: The Limits of the Cohabitation and Marriage Based Models" *PER / PELJ* 2018(21) - DOI http://dx.doi.org/10.17159/1727-3781/2018/v21i0a4410



**DOI**
http://dx.doi.org/10.17159/1727-3781/2018/v21i0a4410

## Abstract

The democratic Constitutional dispensation has led to the gradual extension of spousal duties of support to unmarried couples who hitherto could not legally claim support from their partners or from third parties who had unlawfully caused the death of their partners. The new recipients of rights to support can be divided into three groups: wives in Muslim religious marriages, partners in same-sex intimate relationships and unmarried opposite sex cohabitants whose relationships closely resemble civil marriage in both form and function. However, certain distinctive features of customary marriage, the continuing consequences of apartheid policies for African families and certain distinctive patrilineal features of traditional African families have largely excluded African women – who constitute the largest and most economically vulnerable group of women – from the benefits of these developments. Part one of this two-part article analyses the trajectory of the developing right to support intimate partnerships which appear to be based either on marriage (in the case of Muslim marriages) or relationships similar to marriage, including monogamy and permanent co-residence in the case of same-sex and opposite sex partners. This leaves no room to extend rights to unmarried intimate partners whose relationships do not fit the template of civil marriage and, in particular, excludes many disadvantaged African women from obtaining legal rights to support from their relationships.

## Keywords

African women; duty of support; maintenance; unmarried opposite sex partners; same-sex partners; Muslim marriage; customary law.

.....

# 1 Introduction

The duty to provide spousal support is usually regarded as an invariable consequence of marriage, arising from the *consortium omnis vitae* between spouses.[1] The duty continues for the duration of the marriage, unless extended by a court order at divorce.[2] It can also be extended to the estate of a deceased spouse in terms of the *Maintenance of Surviving Spouses Act*.[3] A third party who unlawfully causes the death of a spouse may be delictually liable to compensate the surviving spouse for loss of support, thus further extending the right to spousal support after the subsistence of a marriage.[4] This latter incidence of the duty of support is particularly important to indigent spouses who would otherwise be left destitute by the death of their breadwinners.

Customary law establishes duties of support between family members which extend far beyond those found in the common law. Wives and children born in wedlock are the responsibility of paternal families while unmarried women and their children are the responsibility of maternal families.[5]

Initially the courts refused to recognise the duty of a customary husband to support his wife as a basis for a dependant's claim,[6] but this was amended in 1963[7] to afford customary widows, including widows from polygynous marriages, whose husbands are not also in civil marriages to other women, dependants' actions for loss of support[8] and the *actio funeraria*[9] against third parties who wrongfully killed their husbands. Customary wives are regarded as spouses for the purposes of the *Maintenance of Surviving Spouses Act*[10] and their rights to support against deceased husbands' heirs and deceased estates have been recognised.[11]

---

* Elsje Bonthuys. BA LLB LLM (Stell) PhD (Cantab). Professor, School of Law, University of the Witwatersrand, South Africa. E-mail: Elsje.Bonthuys@wits.ac.za.
My thanks to the members of my writing group for their valuable input on this paper.

1 *EH v SH* 2012 4 SA 164 (SCA) paras 12 and 13.
2 Section 7 of the *Divorce Act* 70 of 1979.
3 *Maintenance of Surviving Spouses Act* 27 of 1990.
4 Clark and Van Zyl *Handbook* para 1.5.
5 Bennett *Customary Law* 308-310.
6 *SANTAM v Fondo* 1960 2 SA 467 (A).
7 Section 31(1) of the *Black Laws Amendment Act* 76 of 1963.
8 *Mayeki v Shield Insurance* 1975 4 SA 370 (C).
9 *Finlay v Kutoane* 1993 4 SA 675 (W).
10 Section 1 of the *Maintenance of Surviving Spouses Act* 27 of 1990.
11 *Wormald v Kambule* 2006 3 SA 562 (SCA).

When customary marriages end by divorce, the *Recognition of Customary Marriages Act*[12] determines that a court dissolving the marriage may make an order for post-divorce maintenance. This in effect creates a right to post-divorce spousal maintenance which did not originally exist in customary law.[13] The rights to spousal support enjoyed by customary wives are therefore on a par with those of wives from civil marriages, with the caveat that wives whose husbands are also married to other women in terms of civil law are sometimes unprotected.[14] Nevertheless, orders for spousal maintenance appear to be rarely made at divorce, often leaving women who are still caring for children destitute.[15]

Since the advent of the interim *Constitution*,[16] the duty of support has been extended to people whose Muslim marriages were not also accompanied by civil marriages and to same-sex couples in long-term intimate relationships. It has also been extended to some unmarried opposite sex-intimate partners. However, a survey of the cases shows that those relationships which have qualified for an extended duty of support closely resemble the Western model of marriage as monogamous, stable, and based on a shared household, possibly with children.

The question which this article raises is whether this trajectory of developing the duty of support adequately responds to the needs and situations of the majority of people who are in long-term intimate relationships, who are African and often economically disadvantaged. It does so first by describing the demographic information on cohabitation, which shows that for the largest part of the South African population intimate relationships do not necessarily coincide with sharing a household or with the behavioural and spatial patterns which epitomise monogamous, Western marriage – what I would term the cohabitation model of family life upon which legal relief is often premised.

The next section analyses the legal mechanisms and arguments by which the duty of support has been extended to Muslim spouses, same-sex intimate partners and unmarried opposite-sex intimate partners. It argues that their status as married is the central motivation for extending rights to Muslim spouses, while in the case of same- and opposite-sex cohabitants,

12 Section 8(4)(a) of the *Recognition of Customary Marriages Act* 120 of 1998.
13 Bennett *Customary Law* 282; Himonga "Dissolution of a Customary Marriage" 259.
14 Section 31(1) of the *Black Laws Amendment Act* 76 of 1963; definition of "spouse" in s 1 of the *Maintenance of Surviving Spouses Act* 27 of 1990.
15 Himonga and Moore *Reform of Customary Marriage* 208-216.
16 *Constitution of the Republic of South Africa* 200 of 1993.

the extension of duties of support rests upon the similarity of their relationships to civil marriage. This leaves no room to extend rights to unmarried intimate partners whose relationships do not fit the template of civil marriage, and in particular excludes many disadvantaged African women from obtaining legal rights to support from their relationships.

The second part of the article will examine the legal avenues to fill this legal lacuna, exploring the space offered by customary law and common law to extend rights to intimate partners who do not cohabit. The rights of people who cohabit but who do not have any form of intimate relationship, like family members or long-time friends fall outside the scope of this piece.

## 2 Context: Unmarried intimate relationships in South Africa

Official statistics show a general decline in the number of civil and registered customary marriages after 2008,[17] even though the population increased from 40.6 million in 1996 to 55.6 million in 2016.[18] However, South African statistics must always be disaggregated by race. Statistics South Africa reveals that, while only 38% of African women are married or cohabiting, 64% of white women live together or are married. 48% of adult African women have never been married, as compared with only 17% of white women.[19]

It must be borne in mind that official statistics and even well-designed surveys don't necessarily present an accurate picture of marriage and cohabitation. First, the social value placed on marriage means that people could say that they are married when, in fact, they are cohabiting. Second, people's perceptions of their marital status do not necessarily accord with legal definitions, and they may report being married because they feel that this describes the permanence of their relationships or because they don't realise that, legally, their marriages are not fully valid.[20]

Inaccurate statistics also ensue if the survey categories and questions are at odds with the lived experiences of respondents and the nature of marital practices within particular groups. Statistics about marital status are particularly problematic for the largest population group, African people. Official statistics which are based on the number of registered customary

17 Stats SA *Marriages and Divorces 2015* tables 1, 6.
18 Stats SA *Community Survey 2016* 23.
19 Stats SA *Vulnerable Groups* table 3.1.2.
20 Hosegood 2013 *Acta Juridica* 147.

marriages are particularly unreliable because few customary marriages are registered,[21] especially marriages which preceded the enactment of the *Recognition of Customary Marriages Act*. Unregistered customary marriages, although valid,[22] would not usually be included in registration-based statistics.

Another challenge to accurate statistics lies in the multiple, time-consuming processes for customary marriage.[23] This means that people may regard themselves as married when certain rituals and practices have been concluded, while other people would dispute the validity of the marriage at that stage.[24] Moreover, the Act's broad and rather vague requirement that a customary marriage "must be negotiated and entered into or celebrated in accordance with customary law"[25] has led to the proliferation of challenges to the validity of customary marriages at death and divorce.[26] If an essential customary requirement has not been met, a woman could find that instead of being a spouse in a valid customary marriage, she is an unmarried cohabitant without legal rights to property or maintenance. This is also the case for women in polygynous marriages where the consent of first wives was not obtained.[27]

Further complications flow from the Act's provisions on simultaneously existing customary and civil marriages, which have the effect of invalidating one of the marriages, depending on sequence and the status of these marriages.[28] This position stands, despite serious academic criticism,[29] and it means that one of the women would be legally classified as a cohabitant, despite believing for years that she was a wife.

The provisions of the *Recognition of Customary Marriages Act* and their interpretation by courts therefore mean that large numbers of women who believe that they are partners in valid customary marriages may discover

---

21 Himonga and Moore *Reform of Customary Marriage* 106-107; Makiwane *et al Families in Mpumalanga* 39-40; Budlender *et al Women, Land and Customary Law* figure 11; De Souza 2013 *Acta Juridica.*

22 Section 4(9) of the *Recognition of Customary Marriages Act* 120 of 1998.

23 Himonga and Moore *Reform of Customary Marriage* 93-96.

24 Hosegood 2013 *Acta Juridica* 147, 149; Makiwane *et al Families in Mpumalanga* 39-40.

25 Section 3(1)(b) of the *Recognition of Customary Marriages Act* 120 of 1998.

26 *Mabena v Letsoalo* 1998 2 SA 1068 (T); *Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ); *Fanti v Boto* 2008 5 SA 405 (C).

27 *MM v MN* 2013 4 SA 415 (CC).

28 Sections 3(2) and 10(4) of the *Recognition of Customary Marriages Act* 120 of 1998. *Thembesile v Thembesile* 2002 2 SA 209 (T); Bennett *Customary Law* 236-242.

29 Kovacs, Ndashe and Williams 2013 *Acta Juridica*; Himonga and Pope 2013 *Acta Juridica*; Mwambwene and Kruuse 2013 *Acta Juridica*.

only when their relationships end that they are unmarried and therefore have no rights to family property and spousal maintenance.

Another group of opposite sex cohabitants are those who have not entered into any form of religious or cultural marriage, but who cohabit nevertheless. Arguments about the legal regulation of heterosexual cohabitation usually presume that women who knowingly cohabit outside marriage freely choose to do so and that they deliberately shun marriage. However, even within this group the picture is more complex and racially differentiated as a result of Apartheid policies and practices.

Colonial and apartheid policies encouraging migrant labour by African men resulted in the breakdown of African families[30] and have been blamed for the fact that, in South Africa, Africans have the lowest rates of marriage and the highest age at first marriage.[31]

"The Apartheid migrant labour system casts a shadow into the present day,"[32] with the result that both African men and women continue to migrate from rural homes to work and live in urban areas. This means that African people may simultaneously be members of multiple households and that households tend to be fluid and often intergenerational.[33] In particular, it means that African people who share long-term sexual, emotional, and economic relationships do not necessarily live together in the same households on a permanent basis, or even for the greater part of the time.[34]

Russell's work on the structure of African households contends that the significance of sharing a household in Western families is not replicated in African societies. In Western thinking marriage and adult sexual pairing are the basis for both family membership and household formation: "in the West, household and family coincide".[35] By way of contrast, the African system is one based on patrilineal kinship, rather than on sharing households or marriage.[36] Russell's view is borne out by statistics indicating that only 20%

30 Posel 2006 *History Workshop Journal*; Posel and Rudwick 2013 *Acta Juridica* 175; Yarbrough 2015 *SARS*; Makiwane *et al Families in Mpumalanga* 9.

31 Hosegood, McGrath and Moultrie 2009 *Demographic Research 292*; Hosegood 2013 *Acta Juridica* 144, 158; Posel and Rudwick 2013 *Acta Juridica* 170-171.

32 Makiwane *et al Families in Mpumalanga* 29.

33 Makiwane *et al Families in Mpumalanga* 20, 23.

34 Hosegood, McGrath and Moultrie 2009 *Demographic Research* 296; Hosegood 2013 *Acta Juridica* 148.

35 Russell 2003 *Social Dynamics* 11.

36 Russell 2003 *Social Dynamics* 9, 10; Hosegood, McGrath and Moultrie 2009 *Demographic Research* 299.

of African households are headed by married or cohabiting couples, as compared with 60% of white households.[37]

The concept of cohabitation implies living together or sharing a household, and extending rights to people on this basis may misunderstand and misrepresent sexual and social arrangements in the largest part of the South African population. It may also reflect a Western understanding of family status and either deliberately ignore or neglect the nature of relationships amongst African people. For these reasons Hosegood *et al* suggest replacing cohabitation with a broader concept of conjugal relationships in statistical information about marriage and families in South Africa.[38] It may be a sensible strategy also for the formulation of legal rights and duties of support, since a legal strategy which extends rights only to cohabiting couples who resemble Western-inspired nuclear families in the sense of permanently and exclusively sharing a single household not only excludes the majority of South Africans, but also relies on the Western assumption that nuclear families are the norm which all other families should replicate in order to be worthy of legal recognition.

Because of the decrease in the incidence of marriage, particularly amongst African people, and the fact that many African people do not necessarily cohabit with sexual partners in a single household, African women may be in long-term relationships with men even though they don't share a household. These men may contribute financially to their partners' households, even though they do not live in them permanently. The women may also be in long-term relationships with men who are also married or who cohabit with other women.[39]

Of this group of women, those who live in woman-headed and multi-generational (ie, containing more than two generations) households are particularly vulnerable. Nuclear, single or two-generation families occur most frequently amongst the higher socio-economic classes, while poorer households tend to be multi-generational and headed by women.[40] The latest statistics show that 43% of African households are female-headed as

37 Amaoteng and Heaton 2015 *SARS* 69.

38 Hosegood, McGrath and Moultrie 2009 *Demographic Research* 294; Hosegood 2013 *Acta Juridica* 161.

39 Goldblatt 2003 *SALJ* 613.

40 Stats SA *Income Dynamics* table 3; Makiwane *et al Families in Mpumalanga* 9; Hosegood 2013 *Acta Juridica* 162.

compared with 40% of Coloured, 30% of White and 28% percent of Indian households[41].

Whereas 46% of male-headed households are nuclear, 48% of female-headed households are extended.[42] The disadvantage experienced by extended female-headed households may result from gender disparities within the population in which formal employment and educational achievement are markedly higher for men than for women and lower for people of African descent than for other population groups.[43] Households headed by men will benefit from the educational and employment advantages of their heads, while female-headed households tend to lack these benefits. However, the evidence also shows that while 19% of male-headed households have no employed members, 39% of female-headed households are in this position, which reduces the economic resources available to female-headed households. This effect is even more pronounced for African female-headed households.[44] For this reason female-headed households tend to rely to a greater extent on remittances from migrant family members,[45] which would include financial support from intimate partners.

Another disadvantage faced by female-headed households is their disproportionate responsibility for children. While female-headed households tend to be extended families,[46] statistics also show that 65% of African children live in extended family households and only 32% in nuclear families. While 40% of South African children live with their mothers only, only 3% live with their fathers only and 34% in nuclear families.[47] This implies that households headed by women have greater responsibilities for day-to-day childcare and the financial provision for children. Moreover, both within families which contain fathers and within those which don't, women bear a disproportionate responsibility to care for children and vulnerable family members.[48] This caring work is unpaid and reduces women's and girls' opportunities to continue their education and access formal employment.

41 Stats SA *Vulnerable Groups* table 3.2.1.
42 Stats SA *Vulnerable Groups* table 3.2.2.
43 Stats SA *Vulnerable Groups* tables 3.3.6, 3.6.2.
44 Stats SA *Vulnerable Groups* table 3.3.2.
45 Makiwane *et al Families in Mpumalanga* 30.
46 Stats SA *Vulnerable Groups* table 3.2.2.
47 Stats SA *Vulnerable Groups* tables 1.2.3, 1.2.4; Posel and Rudwick 2013 *Acta Juridic*a 174-175.
48 Makiwane *et al Families in Mpumalanga* 52, 53.

In this section I have used statistics to demonstrate that, while there is a general decline in marriage, African women find themselves in a uniquely detrimental position. First, certain characteristics of and requirements for customary marriage means that many African women may erroneously believe that they are married. When it emerges that their marriages are invalid, they have no rights to support from their partners. Second, many African women may be in long-term intimate relationships which do not involve permanent cohabitation. Finally, many African women who are in intimate relationships nevertheless live without their intimate partners - in multi-generation and woman-headed households, often together with other female family members. These households are significantly poorer than couple-headed and male-headed households and they bear a disproportionate burden of care for dependent family members like children. They are therefore more dependent on financial contributions from other family members, including intimate male partners. The existence of a legal duty of support can go some way towards alleviating their financial distress, not only by creating rights against partners during the existence of intimate relationship, but also by extending to them the dependants' action for loss of support when male partners are killed.

In the next sections I will briefly sketch the contours of the post-constitutional extensions of the duty of support to unmarried intimate partners. These extensions, I argue, do not make provision for the women described in this paragraph.

## 3 Post-constitutional developments in the spousal duty to support

After the enactment of the interim *Constitution*, the common law duty of support has been gradually extended to three categories of previously excluded relationships: Muslim marriages, same-sex cohabitants and unmarried opposite sex cohabitants. I will first discuss Muslim marriages and same-sex cohabitants and then give a more detailed exposition of the cases extending rights to opposite-sex unmarried intimate partners. My aim is to analyse whether the legal arguments and mechanisms by which rights have been extended to these groups could also be used to extend rights to African women

### *3.1 Spouses in Muslim marriages*

The pre-constitutional position is found in *Ismail v Ismail,*[49] in which the Appellate Division declined to enforce the terms of the Muslim marriage contract (including the husband's duty to support) on the basis that the potentially polygynous nature of the marriage rendered the contract *contra bonos mores* and thus void. The 1997 judgment of *Ryland v Edro*s invoked the interim *Constitution* to uphold the provisions of the marriage contract, which created a duty to pay maintenance, on the basis that:[50]

> Can it be said, since the coming into operation of the new Constitution, that a contract concluded by parties which arises from *a marriage relationship entered into by them in accordance with the rites of their religion* and which as a fact is monogamous is `contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society' or is `fundamentally opposed to our principles and institutions'? … [I]t is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it.

This prominence of the need legally to recognise marriages which were conducted in accordance with a major religion also motivated the decision in *Amod*, which related to a claim for loss of support by a widow in a monogamous Muslim marriage.[51] The Constitutional Court in *Daniels v Campbell*[52] confirmed that the word "spouse" in the *Maintenance of Surviving Spouses* Act includes widows from monogamous Muslim marriages and that such wives therefore had rights to maintenance, while *TM v ZJ*[53] recognised the spousal duty of support in the context of a Rule 43 application.

In *Amod* the court emphasised the fact that, although potentially polygynous, the marriage was in fact monogamous,[54] but subsequent cases extended the duty of support also to polygynous marriages, including maintenance subsequent to an Islamic divorce.[55]

---

49 *Ismail v Ismail* 1983 1 SA 1006 (A).
50 *Ryland v Edros* 1997 2 SA 690 (C) 707E-H, my emphasis.
51 *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA) (hereafter the *Amod* case) para 20-23.
52 *Daniels v Campbell* 2004 5 SA 331 (CC) (hereafter the *Daniels* case).
53 *TM v ZJ* 2016 1 SA 71 (KZD). Also see *AM v RM* 2010 2 SA 223 (ECP).
54 *Amod* case paras 20, 24.
55 *Khan v Khan* 2005 2 SA 272 (T) (hereafter the *Khan* case); *Rose v Rose* 2015 2 All SA 352 (WCC) (hereafter the *Rose* case).

The cases extending duties of support to monogamous Muslim spouses tend to focus on the fact that these relationships establish marriages which merit legal recognition in terms of the changed *boni mores* and the need to overcome discrimination on the bases of religion[56] and gender,[57] rather than the enforcement of the marriage contract.[58] Cases which extend rights to spouses in polygynous marriages have also used this argument,[59] but in addition they have relied upon the constitutional case judgment in *Hassam v Jacobs*[60] to argue that granting fewer rights to wives from polygynous Muslim marriages than those which are afforded wives from polygynous customary marriages, infringes the dignity of Muslim widows and by implication unfairly discriminates against them on the basis of marital status.[61] Although the contractual nature of Muslim marriages is recognised, the more prominent reasons for extending rights and duties of support are based on normative concerns about equality, non-discrimination and affording legal legitimacy to Muslim rules around marriage and family formation.

### *3.2 Same-sex intimate partners*

Whereas courts recognising rights to spousal support in Muslim marriages focus on the celebration of the religious marriage, courts granting rights to same-sex couples have emphasised both their functional similarity to marriage and the fact that the partners had "undertaken" reciprocal duties of support to one another. The simultaneous reliance on these somewhat contradictory motivations is well illustrated in the *Satchwell* judgment:[62]

> Inasmuch as the provisions in question afford benefits to spouses but not to same-sex partners who have established a permanent life relationship *similar in other respects to marriage, including accepting the duty to support one another*, such provisions constitute unfair discrimination. I should emphasise, however, that s 9 generally does not require benefits provided to spouses to be extended to all same-sex partners where no reciprocal duties of support have been undertaken. The Constitution cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations.

---

56 *Amod* case paras 20, 24.

57 *Daniels* case para 22.

58 See, however, *Hoosein v Dangor* 2010 2 All SA 55 (WCC) (hereafter the *Hoosein* case) para 16, which holds that the *Amod* case merely recognised the "contractual duty of support which arises from a Muslim marriage".

59 *Khan* case para 10.

60 *Hassam v Jacobs* 2009 5 SA 572 (CC) para 46, about the constitutionality of the *Intestate Succession Act* 81 of 1987.

61 *Rose* case paras 52, 56, 57.

62 *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) (hereafter the *Satchwell* case) paras 23, 24, my emphasis.

This ambivalence is reflected throughout the cases recognising duties of support for same-sex couples. While *Langemaat*[63] emphasised the marriage-like qualities of the relationships, the *Du Plessis* case was based both on the marriage-like nature of the relationship, including an unofficial marriage ceremony,[64] and the parties' undertaking of reciprocal duties of support.[65] In fact, the argument went, the marriage-like nature of the relationship provided evidence that the parties had undertaken (or contracted) to support one another.[66]

Courts in these cases frequently refer to the fact that the same-sex partners were not able marry, thereby forestalling arguments that opposite sex cohabitants should receive rights similar to those of same-sex couples. In *Satchwell* the court cautioned that:[67]

> Same-sex partners cannot be lumped together with unmarried heterosexual partners without further ado. The latter have chosen to stay as cohabiting partners for a variety of reasons, which are unnecessary to traverse here, without marrying although generally there is no legal obstacle to their doing so. The former cannot enter into a valid marriage.

Their lack of a choice to marry is therefore often used to justify the extension of duties of support to same-sex couples.

### *3.3 Unmarried opposite-sex intimate partners*

#### *3.3.1 Domestic Partnerships Draft Bill*

Even before the enactment of the *Constitution,*[68] legal rights and obligations were afforded to unmarried opposite-sex partners by way of legislation, and further legislative amendments followed upon the extension of legal rights to same-sex partners.[69]

In 2006 the South African Law Reform Commission Report recommended a Domestic Partnerships Act which would afford rights to both same-sex and opposite-sex unmarried partners under two legal regimes established for registered and unregistered domestic partnerships respectively.

---

63 *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T) (hereafter the *Langemaat* case) 314B, 316E-I.

64 *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) (hereafter the *Du Plessis* case) paras 12, 15, 25.

65 *Du Plessis* case paras 13, 16.

66 *Du Plessis* case paras 14, 15.

67 *Satchwell* case para 16.

68 *Constitution of the Republic of South Africa*, 1996.

69 See generally Heaton and Kruger *South African Family Law* 261-266.

However, following the enactment of the *Civil Union Act*,[70] the implementation of the provisions affording rights to unmarried same- and opposite-sex partners was delayed and captured in a separate *Draft Domestic Partnerships Bill* in 2008 which has not yet been enacted.[71]

The Draft Bill distinguishes between registered and unregistered domestic partnerships. Registered partnerships cannot exist at the same time as valid civil or customary marriages or other registered partnerships[72] and are therefore essentially monogamous. These partnerships give rise to automatic (*ex lege*) duties of support between partners, which may be extended after the dissolution of the partnership if the parties agree or by way of a court order for post-dissolution maintenance. The *Maintenance of Surviving Spouses Act* would apply to survivors of such partnerships.[73]

Registered partnerships would grant the strongest rights to support, but they may be of limited use for the most vulnerable women, first because they must be registered. Even if poor rural women have information about these partnerships, they may be unable to persuade reluctant partners to register their relationships for the same reasons as they are unable to insist on the registration of customary marriages,[74] and they may be unable to afford the time and costs associated with registration, which would presumably be conducted in a Home Affairs office or a satellite office. Moreover, the requirement of monogamy for registered partnerships would exclude those women whose partners are also married or partners in other registered partnerships.

Unregistered partnerships, on the other hand, do not give rise to a duty of support, but partners may, after the partnerships have ended as a result of either death or separation, apply to a court for maintenance.[75]

Unlike the definition of a registered partnership, the definition of an unregistered partnership does not exclude those partnerships which co-exist with marriages or registered partnerships. However, clause 26(4) determines that:

---

70 *Civil Union Act* 17 of 2006, allowing same-sex couples to marry.

71 For more detailed discussion of the Draft Bill see Smith 2011 *SALJ*; Smith "Dissolution of a Life Partnership" 467-475.

72 Clause 4 of the *Draft Domestic Partnerships Bill*.

73 Clauses 9, 14, 18, 19 of the *Draft Domestic Partnerships Bill*.

74 See De Souza 2013 *Acta Juridica*. Because clause 6(1) of the Draft Bill requires "any two persons" to register their partnership, women cannot register a partnership by themselves.

75 Clauses 26-29 of the *Draft Domestic Partnerships Bill*.

> [a] court may not make an order under this Act regarding a relationship of a person who at the time of that relationship, was also a spouse in a civil marriage or a partner in a civil union or a registered domestic partnership with a third person.

This effectively precludes a court from granting rights to support to an unregistered cohabitant in a relationship which co-exists with a valid marriage or a registered partnership. Presumably the partners may still agree upon post-relationship support, but in the case of disputes courts may not intervene. This provision does not, however, preclude court orders if a partner is involved in another unregistered partnership, or a customary marriage, but that would not assist the large numbers of women who are in partnerships with men who are simultaneously married in civil law or are in other registered partnerships.

Another issue is the definitional criteria for unregistered partnerships, which, according to clause 1 of the Draft Bill, "means a relationship between two adult persons who live as a couple and who are not related by family". The factors to determine whether a court will grant relief to unmarried partners are set out in clause 26(2) as:

> (a) the duration and nature of the relationship;
> (b) the nature and extent of common residence;
> (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the unregistered partners;
> (d) the ownership, use and acquisition of property;
> (e) the degree of mutual commitment to a shared life;
> (f) the care and support of children of the domestic partnership;
> (g) the performance of household duties;
> (h) the reputation and public aspects of the relationship; and
> (i) the relationship status of the unregistered partners with third parties.

Some of these factors, especially (b) and (i), could be interpreted in ways which would deter non-cohabiting intimate partners from being afforded legal rights against one another. On the other hand, courts which have a more accurate understanding of how intimate partnerships function outside of Western, middle-class, urban norms may also rely on the wider picture presented by the other factors to extend relief to partners who do not permanently cohabit or whose relationships co-exist with other intimate relationships. In any event, clause 26(3) determines that:

> [a] finding in respect of any of the matters mentioned in subsection (2), or in respect of any combination of them, is not essential before a court may make an order under this Chapter, and regard may be had to further matters and weight be attached to such matters as may seem appropriate in the circumstances of the case.

This sub-clause would assist courts to formulate a more extensive notion of what constitutes an unregistered domestic partnership, and the Draft Bill may therefore provide a promising avenue through which to afford rights to all women in unmarried intimate partnerships. It may therefore be a useful strategy to lobby or litigate for the enactment of the legislation. On the other hand, the wording of the Draft Bill may equally well be interpreted to exclude women who don't share a permanent household with their partners or whose relationships coincide with other relationships. This is plausible because it would echo the current and past legal interpretations, which have extended rights mainly to those partnerships which most closely resemble monogamous Western, nuclear families, to which I turn below.

### *3.3.2 Volks v Robinson and its consequences for the common law*

The extension of rights to support to unmarried opposite-sex cohabitants ran into difficulties as a result of the two majority judgments in the *Volks v Robinson*[76] case, in which an unmarried opposite-sex cohabitant of some 16 years sought to institute an action for maintenance against the estate of her deceased partner in terms of the *Maintenance of Surviving Spouses Act*.

The gist of the judgments by Constitutional Court Justices Skweyia and Ncgobo, with whom the majority judges agreed, was that, even if it were accepted that the exclusion of unmarried cohabitants from the Act discriminated on the ground of marital status, this discrimination should not be regarded as unfair. Because the centrality of marriage is recognised in our *Constitution* and in international law, the state may legitimately differentiate between married and unmarried couples by granting rights and benefits to married couples only.[77] Although Skweyiya J recognised the dire economic and social circumstances faced by some female cohabitants, he held that this inequality was not created by the *Maintenance of Surviving Spouses Act* and that it was therefore not the task of this statute or of the court in this matter to cure their social and economic ills.[78] Crucial to both judgments was the argument based on choice, which was so central in extending rights to same-sex couples, namely that:[79]

> [t]he law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship. Those who do not

76 *Volks v Robinson* 2005 5 BCLR 446 (CC) (hereafter the *Volks* case).
77 *Volks* case paras 50-57, 80-87.
78 *Volks* case paras 59, 64-69.
79 *Volks* case para 92.

> wish such consequences to flow from their relationship remain free to enter into some other form of relationship and decide what consequences should flow from their relationships.

By way of contrast, although the court a quo in *Robinson v Volks* also focused on the partners' choices, it held that failing to give effect to people's choices about important aspects of their lives negates their fundamental human dignity.[80] This court's view of the nature of the choice was directly opposed to that of the Constitutional Court. It held that, given the couple's sharing of resources over many years, it would be illogical to rule that the mere failure to marry was an indication that they did not want any financial consequences to flow from their relationship.[81] The focus in the court a quo was therefore on the implications of the choice to share resources over time, while the Constitutional Court majority focused on the choice not to marry.

Despite being criticised by Justices Mokgoro and O'Regan for undermining the very purpose of the constitutional prohibition of discrimination on the basis of marital status and by Sachs J for its narrowness and the essentially circular nature of the arguments,[82] the Constitutional Court majority view stands, and together with it, the liberal view of choice upon which it is premised. Any future litigation will either have to find a way around this argument or persuade the courts that this vision of choice fails to reflect the real-life options of many South Africans. I deal in more detail with this issue in part II of this article.

Notwithstanding rigorous academic criticism,[83] the Constitutional Court's reasoning in *Volks* has since been applied strictly to deny an unmarried opposite sex partner the right to institute the dependant's action for loss of support.[84] Nevertheless, academic commentators have argued that the *Volks* judgment does not extend to all incidents of the duty of support. Smith and Heaton have contended that the impact of the *Volks* judgment is limited to the duty of support as between the partners and would not necessarily apply to the dependant's action for loss of support, which aims to impose

80 *Robinson v Volks* 2004 6 SA 288 (C) 295I-J (hereafter the *Robinson* case).

81 *Robinson* case 299D-G.

82 *Volks* case paras 118, 150, 151.

83 See Lind 2005 *Acta Juridica*; Schäfer 2006 *SALJ* 632-633; Albertyn 2007 *SAJHR* 266-267; Kruuse 2009 *SAJHR* 384; Smith 2010 *PELJ*; Smith and Heaton 2012 *THRHR*.

84 *Meyer v Road Accident Fund* (TPD) (unreported) case number 29950/2004 of 28 March 2006 (hereafter the *Meyer* case).

liability on a third party who had wrongfully caused the death of a breadwinner.[85]

A further argument is that the duty of support can arise either *ex lege* or as a result of an "undertaking" or a contract between the partners.[86] According to this view *Volks* eliminates only the *ex lege* duty of support, but it does not preclude unmarried couples from creating duties of support by way of contract.[87]

This argument, and the solution it offers to get around the constraints imposed by choice argument in the *Volks* majority judgment, appears to have found favour on the bench. Although it held, on the facts, that the plaintiff was an unreliable witness whose testimony that there was an agreement to support should not be believed, the Supreme Court of Appeal in *McDonald v Young* held that the decisions in *Amod*, *Du Plessis*, *Satchwell* and *Khan* were based on the recognition of a contractual duty of support between the cohabitants.[88] Subsequently, in a dependant's action for loss of support, the court in *Verheem v Road Accident Fund* emphasised that the agreement to support "was not merely an undertaking but was in fact a binding contract in that the deceased clearly did so with the intention of being legally bound."[89]

Following upon the emphasis on contract in the *McDonald* case, the Supreme Court of Appeal in *Paixão v Road Accident Fund*[90] issued an extremely puzzling judgment in a dependant's action for loss of support, where the deceased was party to another marriage until shortly before his death in a vehicle accident. The final divorce was granted only months before his death.[91] Nevertheless, while being married to another woman, the court held, he became engaged to the plaintiff and undertook a duty to maintain the plaintiff and her children and in fact maintained them for a number of years. The unacknowledged conundrum is the long-established common law rule that an engagement by a married person is illegal because

85 Smith and Heaton 2012 *THRHR* 479.

86 The distinction which forms the basis of this argument originates from Justice Sachs' minority judgment in the *Volks* case paras 214-9.

87 Smith and Heaton 2012 *THRHR* 477.

88 *McDonald v Young* 2012 3 SA 1 (SCA) paras 15, 16 (hereafter the *McDonald* case).

89 *Verheem v Road Accident Fund* 2010 2 SA 409 (GP) para 12. This distinguishes the case from the *Meyer* case para 27, in which Ledwaba J held that the parties had merely "undertaken" to support one another, but that this did not constitute a legally binding contract.

90 *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA) (hereafter *Paixão* SCA).

91 *Paixão* SCA paras 5, 9.

it is contrary to public policy.[92] Moreover, contracts which are closely associated with other illegal contracts[93] and contracts which undermine the institution of marriage[94] are likewise invalid. These rules would invalidate both the "engagement" between the deceased and the plaintiff and also the agreement to support the plaintiff while still a spouse in a valid marriage.

For this reason, the court a quo[95] held that the agreement to support was void for illegality. The Supreme Court of Appeal must have been aware of these rules, because it held that:[96]

> this case does not concern breach of a promise to marry, but requires us to consider whether or not the nature of the relationship between the parties gave rise to a reciprocal duty of support which the law must protect. In my view, the obligations undertaken by the deceased were akin to a *pactum de contrahendo*, which is an agreement to make a contract in the future. This is different from a mere promise to contract, which is not binding. In a case of a *pactum de contrahendo* one or both parties may undertake to perform certain duties before the 'main agreement' comes into effect. Such undertakings are enforceable…

It is not entirely clear from the paragraph whether the classification of the agreement as "akin to a *pactum de contrahendo*" refers to the promise to marry or to become engaged in future, or to the contract to support an intimate partner by an engaged person. Both versions would be problematic, since *pacta de contrahendo* are subject to the same public policy concerns as all other contracts and would be invalid for the same reasons.

This whole aspect of the judgment is questionable, but it can be explained by the need to get around the *Volks* judgment. On the one hand, *Volks* holds there can be no *ex lege* duty of support, but on the other hand the contract, which would have allowed the SCA to evade *Volks*, is invalid because it co-exists with a valid civil marriage to another person. What is significant in the *Paixão* decision is that the court distinguishes this case from *Volks*, first on the basis that this was a contractual claim, while *Volks* involved the

92 *Staples v Marquard* 1919 CPD 181*; Friedman v Harris* 1928 CPD 43; *Claassen v Van der Watt* 1969 3 SA 68 (T); *Lloyd v Mitchell* 2004 2 All SA 542 (C); *Benefeld v West* 2011 2 SA 379 (GSJ).

93 *Richards v Guardian Assurance* 1907 TH 24; *Pietzsch v Thompson* 1972 4 SA 122 (R).

94 *Braude v Braude* (1899) 16 SC 565; *Chadwick v Chadwick* 1914 CPD 1008; *Karp v Kuhn* 1948 4 SA 825 (T); *Martens v Martens* 1952 3 SA 771 (W); *G v F* 1966 3 SA 579 (O); *Maseko v Maseko* 1992 3 SA 190 (W).

95 *Paixao v Road Accident Fund* 2011 ZAGPJHC 68 (1 July 2011) para 29 (hereafter *Paixao a quo)*.

96 SCA judgment in *Paixão* para 22.

question[97] "whether a spousal benefit arising from a legally recognised marriage should also be available to a surviving partner of a life partnership" and, second, on the basis of the *sui generis* nature of the dependant's action for loss of support, which had been developed to reflect community perceptions and public policy.[98]

The most important avenue for circumventing the effects of the *Volks* majority judgment has been to base the duty of support on a contract between the partners rather than to extend the *ex lege* duties of support. The jurisprudence on unmarried opposite-sex relationships indicates a gradual move away from an initial emphasis on the ambiguous concept of "undertakings" in earlier cases like *Satchwell* – which can create non-legal moral obligations rather than legally enforceable obligations - to more explicitly contractual terminology, concepts and rules. The most recent cases of *McDonald* and especially *Paixão* appear to have crystalised and solidified the shift towards contract and the use of contractual terminology and concepts.

However, despite adhering to the rhetoric of the agreement as the basis of duties of support between unmarried intimate partners, there appears to be a degree of residual ambiguity which is reflected in the factors which courts take into account in deciding whether a contract has been proved. There appears to be a mixture of factors which would indicate the conclusion of tacit contracts together with other factors which are more indicative of community legal convictions and *boni mores*.[99] The confusion is illustrated in the SCA judgment in *Paixão*:[100]

> Proving the existence of a life partnership entails more than showing that the parties cohabited and jointly contributed to the upkeep of the common home. It entails, in my view, demonstrating that the partnership was akin to and had similar characteristics — particularly a reciprocal duty of support — to a marriage. Its existence would have to be proved by credible evidence of a conjugal relationship in which the parties supported and maintained each other. The implied inference to be drawn from these proven facts must be that the parties, in the absence of an express agreement, agreed tacitly that their cohabitation included assuming reciprocal commitments — ie a duty to support — to each other.

The following categories of factors have been considered in the cases:

---

97 SCA judgment in *Paixão* para 26 in which it summarises the legal question in the *Volks* case.

98 Paras 12, 13, 36.

99 Also see the factors listed by Smith "Dissolution of a Life Partnership" 425.

100 *Paixão* SCA para 29.

The nature of the relationship:

- the marriage-like or *conjugal nature* of the relationship;[101]
- the *duration of the relationship*;[102]
- the fact that the couple *shared a household*;[103]
- whether the parties *had children together*;[104] and
- the fact that one partner had contributed to *raising the other partner's children*.[105]

Undertaking duties of reciprocal support:

- *actions of reciprocal support* over time;[106]
- the *financial dependence* of one party upon the other;[107] and
- the contents of the *partners' wills*;[108]

Community perceptions of the relationship:

- the fact that the parties were *regarded as a committed couple* by family members and friends;[109]
- the fact that many *statutes* include unmarried cohabitants;[110]
- the fact that the parties had concluded an *Islamic marriage*;[111] and
- changes in the *boni mores*.[112]

The partners' marital status:

- whether the parties *planned to get married* in future, but had been prevented from doing so;[113]

---

101 *Meyer* case para 29; *Volks* case paras 122, 193; *Du Plessis* case paras 15, 25; *Langemaat* case paras 314B, 316G; *Satchwell* case paras 4, 23.

102 *Volks* case paras 3, 121; *Meyer* case para 31; *Du Plessis* case para 3; *Langemaat* case 316H-I; *Satchwell* case para 25.

103 *Verheem* case para 2; *Langemaat* case 316H-I; *Satchwell* case para 5.

104 *Verheem* case para 2; *Volks* case para 3.

105 *Verheem* case para 2, *Meyer* case para 3.

106 *Paixão* SCA para 8, 19; *McDonald* case para 21; *Volks* case para 5; *Du Plessis* case para 4; *Satchwell* case para 25.

107 *McDonald* case para 21; *Volks* case para 128; *Du Plessis* case para 4; *Khan* case para 10; *Satchwell* case para 5.

108 *Paixão* SCA para 20; *McDonald* case para 21; *Volks* case para 7; *Meyer* case para 31; *Du Plessis* case para 4; *Satchwell* case paras 5, 25.

109 *Verheem* case para 2; *Meyer* case para 29; *Du Plessis* case para 3; *Paixão* SCA para 20; *Satchwell* case para 4.

110 *Volks* case para 178; *Rose* case paras 40-47.

111 *AM v RM* 2010 2 SA 223 (ECP) para 5, 6; *Amod* case para 20; *Rose* case paras 49, 50.

112 *Amod* case para 23; *Khan* case para 11; Paixão SCA para 13; *Meyer* case para 28.

113 *Verheem* case para 2; *Paixão* SCA para 21; *Meyer* case para 29.

- the fact that the partners were *unable to enter into a legal marriage*;[114]
- the fact that the parties *had not married*, even though there was nothing preventing them from doing so;[115] and
- the fact that one of the partners was *simultaneously married* to another person.[116]

Factors which would typically prove contractual consensus:

- the *existence of a document* confirming the agreement;[117]
- *express statements* that the one would support the other;[118]
- the existence of *other contracts* between the partners;[119] and
- the *reliability or unreliability of the litigants' testimony*.[120]

Most of these factors are more relevant to the existence of an *ex lege* duty of support than to the question of whether the parties had a contract to support one another. However, this apparent confusion may be the result of the fact that many of the cases deal with enforcing the duty of support against third parties in the dependants' action.

According to Smith and Heaton's analysis, the dependants' action comprises two separate questions – first whether there is actually a duty of support between the partners, whether *ex contractu* or *ex lege*.[121] Once a duty of support has been established, the question arises whether this duty of support should be recognised for the purposes of the dependant's action – which is to be decided according to public policy or the *boni mores*. Because courts often deal with both aspects simultaneously, the contractual and public policy factors tend to be mixed up. This would have provided a plausible explanation for the mixture of factors used by the courts, had the public policy or *boni mores*-related factors been used only in the cases on the dependants' action for loss of support. However, they are found throughout all the cases.

114 *Du Plessis* case paras 3, 14; *Langemaat* case 314B; *Satchwell* case paras 4, 16.
115 *Meyer* case paras 29, 32; *Volks* case paras 3, 91-94.
116 *Paixão a quo* paras 29, 40, 41; *Rose* case paras 20, 30.
117 *McDonald* case para 4.
118 *Du Plessis* case para 15.
119 *McDonald* case para 22.
120 *McDonald* case para 11.
121 *Smith and Heaton* 2012 *THRHR* 476-478.

## 4 Potential for extending rights to support to African women in unmarried opposite-sex intimate relationships

Having surveyed and analysed the three strains of cases developing the rights to support for unmarried intimate partners, I can now begin to answer the question posed in this article: to what extent do existing legal developments in this area address the needs of the largest and most vulnerable groups of women in unmarried intimate relationships?

It would be fair to say that the essential justification of the cases which extend duties of support to Muslim wives and widows is the need to recognise and give effect to the Islamic marital relationship. These relationships are recognised and consequences are afforded to them essentially *because they are marriages* conducted in terms of a recognised, major religion. The gist of this view is summarised in the *Rose* case, which summarised the ratio of the Constitutional Court in *Daniels v Campbell* as follows:[122]

> The Constitutional Court held that parties to a Muslim 'marriage' were to be considered spouses because they were married, albeit that their marriages were not solemnised under the Marriage Act and not recognised as valid under South African law.

This justification for extending rights to support could provide an avenue to argue that women who find, after many years, that their customary marriages are invalid – either because some formality has not been satisfied, or because, unbeknownst to them their husbands were simultaneously married to other women either in customary or civil law - were essentially married and should therefore have rights to support from their spouses. The central problem is, however, that unlike Muslim marriages, which are fully valid in religious terms, these marriages are not valid according to contemporary customary law, as reflected in the *Recognition of Customary Marriages Act* and its associated jurisprudence. The more accurate analogy to Muslim marriages would be unregistered customary marriages, which do receive full legal recognition. Affording rights to support on the basis of marriage would not serve to extend rights to those women who never went through any part of a customary marriage ceremony, of whom there are many. The jurisprudence on Muslim marriages does therefore not assist those women described in section 2 of this article.

---

122 *Rose* case para 47, which gives the court's summary of the ratio of the *Daniels* decision.

Turning to the reasoning in the same-sex cases, my analysis shows a combination of the choice-based or contractual rationale and the marital rationale for extending duties of support. On the one hand, courts hold that same-sex couples should receive legal protection to counterbalance the fact that they cannot choose to marry, and because they demonstrated their commitment to one another by choosing or undertaking to support one another. On the other hand, they should also receive protection because their relationships are so marriage-like. The injustice of being unable to choose marriage whilst having such evidently marriage-like relationships justifies extending rights to certain same-sex couples. The simplistic argument based on either having or not having a legal choice to marry, which was so central to the reasoning in the same-sex cases, foreshadows the same one-dimensional use of choice in the unmarried opposite-sex cases.[123]

Furthermore, we should interrogate the precise nature of the marriage-like relationships which these same-sex couples have. All the litigants to whom rights and duties of support have been afforded resemble monogamously married heterosexual couples. None of their relationships co-existed with civil marriages or other cohabitation relationships; all shared a household as a sexual and family unit. Fundamentally they conformed to the Western notion of life-long, committed, monogamous, sexually exclusive marriage as an indication of family status. Academics have commented that this shows the continued centrality of Western, Christian marriage as the template for the extension of conjugal rights to other intimate relationships.[124] The Western paradigm of marriage remains the basis for what constitutes a sufficiently conjugal relationship and for what is defined as a family and, for this reason, this line of reasoning would exclude the majority of African women who have intimate relationships outside of marriage.

Exactly the same is true for the cases which have extended the duty of support to unmarried opposite-sex partners, all of which involve relationships which approximate the ideals of Western, Christian marriage and nuclear, household-based family structure to a remarkable extent. Even though these cases are supposedly based on contract, the marriage-like qualities of these relationships feature prominently in the list of factors which courts use to decide whether the parties have concluded agreements to support one another. The true reason for the inclusion of the wide array of

123 The effect of choice on the issue was brought to the fore in the subsequent cases of *Gory v Kolver* 2007 4 SA 97 (CC) and *Laubscher v Duplan* 2017 2 SA 264 (CC). That issue will be discussed in part 2 of this article.

124 For instance De Vos 2004 *SAJHR;* De Vos 2007 *SAJHR;* Bonthuys 2007 *SAJHR.*

non-contract-related factors in these cases may well be to assess and regulate the extent to which the relationships in question comply with Western norms of family formation and marital status. Many African women who need support from their long-term intimate partners would not be able to meet these criteria, both because their relationships don't involve permanent cohabitation and because their intimate relationships may co-exist with other relationships, whether customary or civil marriages, or with other unmarried intimate relationships.

The only exception is provided by the Supreme Court of Appeal judgment in *Paixão*, where the deceased had been married to a woman in Portugal, but the marriage relationship seemed to have been dysfunctional for a long time. What is interesting in this case is not only the tortuousness of the attempts to get around the common law rules on illegality discussed above, but the Court's curious treatment of the Portuguese marriage. Cachalia JA remarked that, before the divorce the deceased "*felt constrained* not to marry Mrs Paixao before his divorce was also concluded and recognised in Portugal" but that once the divorce was granted "[t]here were now no legal *or practical impediments* to his marrying Mrs Paixao."[125] By playing down the seriousness and legal consequences of the existing marriage these dicta contradict the unqualified and indisputable common law rules against agreements to enter into marriage by people who are in existing civil marriages.

However, the dicta raise the difficult issue of the extent to which duties of support can exist when one of the same- or opposite-sex cohabitants is also married or in another cohabitation relationship, or put differently, the question of polygamous cohabitation relationships. Despite the Paixao judgment, it is difficult to imagine courts treating existing South African civil marriages as lightly if the plaintiff were asserting a right to support from an intimate partner with whom she neither lived, nor was married to. The reasoning in the *Paixão* is therefore not likely to assist African women whose partners are also married in civil law. I say this because the legal history of the privileging of civil marriages over customary marriages, to the extent of a civil marriage to another woman at times invalidating an existing customary marriage,[126] would most likely dissuade courts from similar reasoning, especially when the customary relationships in question are not marriages but unmarried intimate relationships.

125 *Paixão* SCA paras 9, 10, my own emphasis.
126 See Bonthuys and Pieterse 2000 *THRHR* and cases cited.

I have argued that the factors which courts take into account to determine the existence of contractual duties of support in opposite-sex intimate relationships mix public policy considerations with factors which would normally be considered to prove the existence of a contract. Even a strict application of contractual reasoning would not, however, favour African women in unmarried intimate relationships, since they may have limited bargaining power due to their financial and social vulnerability. Rather, public policy-related factors like the duration of relationships, the birth and care of children, and financial dependence would tend to favour women claimants.

On the other hand, many of the status-based factors reflect Western ideals of conjugality, which in turn are equated with co-residence in the typical Western ideal of marriage and family life. The very terms "domestic partnership" (used in the Draft Bill) and "cohabitation relationship" confirm this fundamental connection. Courts have not yet extended typically marriage-like rights and duties to people whose family relationships radically diverge from the Western model. I anticipate that this would be a stumbling block for African women.

## 5 Conclusion

I have argued that the recent developments of the duty to support have excluded the largest and most vulnerable group of South African women. In the next part of the paper I will argue that their exclusion constitutes unfair discrimination on the grounds of sex, gender, sexual orientation, race, culture and socio-economic status, and I will explore developments of customary and common law rules to cure this. However, as Cloete JA recognised in *Du Plessis v Road Accident Fund*:[127]

> [j]udges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary…the Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

The first prize would therefore be properly drafted legislation granting rights to support to all South African intimate partners. One potential avenue for legal development is a lawsuit to compel government to enact the *Draft Domestic Partnerships Bill*. As I indicated above, however, several aspects of this Draft Bill would limit its usefulness for the most disadvantaged South African women. In lieu of statutory reform, strategic litigation is needed to

127 *Du Plessis* case para 36.

develop remedies in customary and common law. The second part of the article is about avenues and arguments for developments in the common and customary law.

## Bibliography

### Literature

Albertyn 2007 *SAJHR*
Albertyn C "Substantive Equality and Transformation in South Africa" 2007 *SAJHR* 253-276

Amaoteng and Heaton 2015 *SARS*
Amaoteng AY and HeatonTB "Changing Race Differences in Family Structure and Household Composition in South Africa" 2015 *SARS* 59-79

Bennett *Customary Law*
Bennett TW *Customary Law in South Africa* (Juta Cape Town 2004)

Bonthuys 2007 *SAJHR*
Bonthuys E "Race and Gender in the Civil Union Act" 2007 *SAJHR* 526-542

Bonthuys and Pieterse 2000 *THRHR*
Bonthuys E and Pieterse M "Still Unclear: The Validity of Certain Customary Marriages in Terms of the Recognition of Customary Marriages Act" 2000 *THRHR* 616-625

Budlender *et al Women, Land and Customary Law*
Budlender D *et al Women, Land and Customary Law* (Community Agency for Social Enquiry Johannesburg 2011)

Clark and Van Zyl *Handbook*
Clark B and Van Zyl L *Handbook of the South African Law of Maintenance* (LexisNexis Durban 2016)

De Souza 2013 *Acta Juridica*
De Souza M "When Non-registration Becomes Non-recognition: Examining the Law and Practice of Customary Marriage Registration in South Africa" 2013 *Acta Juridica* 239-272

De Vos 2004 *SAJHR*
De Vos P "Same-sex Sexual Desire and the Re-imagining of the South African Family" 2004 *SAJHR* 179-206

De Vos 2007 *SAJHR*
De Vos P "The 'Inevitability' of Same Sex Marriage in South Africa's Post-Apartheid State" 2007 *SAJHR* 432-465

Goldblatt 2003 *SALJ*
Goldblatt B "Regulating Domestic Partnerships – A Necessary Step in the Development of South African Family Law" 2003 *SALJ* 610-629

Heaton and Kruger *South African Family Law*
Heaton J and Kruger H *South African Family Law* 4th ed (Juta Cape Town 2015)

Himonga "Dissolution of a Customary Marriage"
Himonga, C "The Dissolution of a Customary Marriage by Divorce" in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta Cape Town 2014) 231-275

Himonga and Moore *Reform of Customary Marriage*
Himonga C and Moore E *Reform of Customary Marriage, Divorce and Succession in South Africa* (Juta Cape Town 2015)

Himonga and Pope 2013 *Acta Juridica*
Himonga C and Pope A "*Mayelane v Ngwenyama and Minister of Home Affairs*: A Reflection on Wider Implications" 2013 *Acta Juridica* 318-338

Hosegood 2013 *Acta Juridica*
Hosegood V "Women, Marriage and Domestic Arrangements in Rural KwaZulu-Natal, South Africa" 2013 *Acta Juridica* 143-168

Hosegood, McGrath and Moultrie 2009 *Demographic Research*
Hosegood V, McGrath N and Moultrie T "Dispensing with Marriage: Marital and Partnership Trends in Rural KwaZulu-Natal, South Africa 2000-2006" 2009 *Demographic Research* 279-312

Kovacs, Ndashe and Williams 2013 *Acta Juridica*
Kovacs RJ, Ndashe S and Williams J "Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 is Failing Women in South Africa" 2013 *Acta Juridica* 273-291

Kruuse 2009 *SAJHR*
Kruuse H "'Here's to You, Mrs Robinson:' Peculiarities and Paragraph 29 in Determining the Treatment of Domestic Partnerships" 2009 *SAJHR* 380-391

Lind 2005 *Acta Juridica*
Lind C "Domestic Partnerships and Marital Status Discrimination" 2005 *Acta Juridica* 108-130

Makiwane *et al Families in Mpumalanga*
Makiwane M *et al A Baseline Study on Families in Mpumalanga* (Human Sciences Research Council Pretoria 2012)

Mwambene and Kruuse 2013 *Acta Juridica*
Mwambene L and Kruuse H "Form over Function? The Practical Application of the Recognition of Customary Marriages Act 1998 in South Africa" 2013 *Acta Juridica* 292-317

Posel 2006 *History Workshop Journal*
Posel D "Marriage at the Drop of a Hat: Housing and Partnership in South Africa's Urban African Townships, 1920s-1960s" 2006 *History Workshop Journal* 57-76

Posel and Rudwick 2013 *Acta Juridica*
Posel D and Rudwick S "Changing Patterns of Marriage and Cohabitation in South Africa" 2013 *Acta Juridica* 169-180

Russell 2003 *Social Dynamics*
Russell M "Understanding Black Households: The Problem" 2003 *Social Dynamics* 5-47

Schäfer 2006 *SALJ*
Schäfer L "Marriage and Marriage-Like Relationships: Constructing a New Hierarchy of Life Partnerships" 2006 *SALJ* 626-647

Smith "Dissolution of a Life Partnership"

Smith B "The Dissolution of a Life or Domestic Partnership" in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta Cape Town 2014) 389-475

Smith 2010 *PELJ*

Smith B "Rethinking *Volks v Robinson*: The Implications of Applying a 'Contextualised Choice Model' to Prospective South African Domestic Partnerships Legislation" 2010 *PELJ* 238-300

Smith 2011 *SALJ*
Smith B "The Interplay between Registered and Unregistered Domestic Partnerships under the Draft Domestic Partnerships Bill, 2008 and the Potential Role of the Putative Marriage Doctrine" 2011 *SALJ* 560-593

Smith and Heaton 2012 *THRHR*
Smith B and Heaton J "Extension of the Dependant's Action to Heterosexual Life Partnerships after *Volks v Robinson* and the Coming into Operation of the Civil Union Act –Thus Far and No Further?" 2012 *THRHR* 472-484

Stats SA *Community Survey 2016*
Statistics South Africa *Community Survey 2016* (Statistics South Africa Pretoria 2016)

Stats SA *Income Dynamics*
Statistics South Africa *Census 2011: Income Dynamics and Poverty Status of Households in South Africa* (Statistics South Africa Pretoria 2015)

Stats SA *Marriages and Divorces 2015*
Statistics South Africa *Marriages and Divorces 2015* (Statistics South Africa Pretoria 2017)

Stats SA *Vulnerable Groups*
Statistics South Africa *Vulnerable Groups Indicator Report 2016* (Statistics South Africa Pretoria 2017)

Yarbrough 2015 *SARS*
Yarbrough MW "South African Marriage in Policy and Practice: A Dynamic Story" 2015 *SARS* 5-23

**Case law**

*AM v RM* 2010 2 SA 223 (ECP)

*Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA)

*Benefeld v West* 2011 2 SA 379 (GSJ)

*Braude v Braude* (1899) 16 SC 565

*Chadwick v Chadwick* 1914 CPD 1008

*Claassen v Van der Watt* 1969 3 SA 68 (T)

*Daniels v Campbell* 2004 5 SA 331 (CC)

*Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA)

*EH v SH* 2012 4 SA 164 (SCA)

*Fanti v Boto* 2008 5 SA 405 (C)

*Finlay v Kutoane* 1993 4 SA 675 (W)

*Friedman v Harris* 1928 CPD 43

*G v F* 1966 3 SA 579 (O)

*Gory v Kolver* 2007 4 SA 97 (CC)

*Hassam v Jacobs* 2009 5 SA 572 (CC)

*Hoosein v Dangor* 2010 2 All SA 55 (WCC)

*Ismail v Ismail* 1983 1 SA 1006 (A)

*Karp v Kuhn* 1948 4 SA 825 (T)

*Khan v Khan* 2005 2 SA 272 (T)

*Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T)

*Laubscher v Duplan* 2017 2 SA 264 (CC)

*Lloyd v Mitchell* 2004 2 All SA 542 (C)

*Mabena v Letsoalo* 1998 2 SA 1068 (T)

*Martens v Martens* 1952 3 SA 771 (W)

*Maseko v Maseko* 1992 3 SA 190 (W)

*Mayeki v Shield Insurance* 1975 4 SA 370 (C)

*McDonald v Young* 2012 3 SA 1 (SCA)

*Meyer v Road Accident Fund* (TPD) (unreported) case number 29950/2004 of 28 March 2006

*MM v MN* 2013 4 SA 415 (CC)

*Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ)

*Paixao v Road Accident Fund* 2011 ZAGPJHC 68 (1 July 2011)

*Paixão v Road Accident Fund* 2012 6 SA 377 (SCA)

*Pietzsch v Thompson* 1972 4 SA 122 (R)

*Richards v Guardian Assurance* 1907 TH 24

*Robinson v Volks* 2004 6 SA 288 (C)

*Rose v Rose* 2015 2 All SA 352 (WCC)

*Ryland v Edros* 1997 2 SA 690 (C)

*SANTAM v Fondo* 1960 2 SA 467 (A)

*Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC)

*Staples v Marquard* 1919 CPD 181

*Thembesile v Thembesile* 2002 2 SA 209 (T)

*TM v ZJ* 2016 1 SA 71 (KZD)

*Verheem v Road Accident Fund* 2010 2 SA 409 (GP)

*Volks v Robinson* 2005 5 BCLR 446 (CC)

*Wormald v Kambule* 2006 3 SA 562 (SCA)

**Legislation**

*Black Laws Amendment Act* 76 of 1963

*Civil Union Act* 17 of 2006

*Constitution of the Republic of South Africa* 200 of 1993

*Divorce Act* 70 of 1979

*Intestate Succession Act* 81 of 1987

*Maintenance of Surviving Spouses Act* 27 of 1990

*Marriage Act* 25 of 1961

*Recognition of Customary Marriages Act* 120 of 1998

**Government publications**

*Draft Domestic Partnerships Bill* (Gen N 36 in GG 30663 14 January 2008)

## List of Abbreviations

| | |
|---|---|
| PELJ | Potchefstroom Electronic Law Journal |
| SAJHR | South African Journal on Human Rights |
| SALJ | South African Law Journal |
| SARS | South African Review of Sociology |
| Stats SA | Statistics South Africa |
| THRHR | Tydskrif vir die Hedendaagse Romeins-Hollandse Reg |