THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 640/11

Reportable

In the matter between:

MARIA ANGELINA PAIXÃO **FIRST APPELLANT**

MICHELLE ORLANDA SANTOS PAIXÃO **SECOND APPELLANT**

v

ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Paixão v Road Accident Fund* (640/2011) [2012] ZASCA 130 (26 September 2012).

Coram: Mthiyane DP, Cachalia, Tshiqi, Petse JJA and Southwood AJA

Heard: **10 September 2012**

Delivered: **26 September 2012**

Summary: **Dependants' action – Permanent heterosexual life partnership – reciprocal duty of support established by tacit agreement – Common law extended to afford protection to dependants.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Mathopo J sitting as court of first instance):

The appeal succeeds with costs. The decision of the high court is set aside and replaced with the following:

‘(a) The respondent is ordered to pay to the first appellant the sum of R1 707 612 million.

(b) The respondent is ordered to pay the second appellant the sum of R 451 626.

(c) The respondent is ordered to pay the appellants’ taxed or agreed costs of the action which costs are to include the costs of the actuaries, Clemans, Murfin & Rolland.’

JUDGMENT

CACHALIA JA (Mthiyane DP, Tshiqi, Petse JJA and Southwood AJA concurring):

[1] The main issue in this appeal concerns whether or not the common law should be developed to extend the dependants’ action to permanent heterosexual relationships.

[2] The appellants, Maria Angelina Paixão and her daughter Michelle Orlanda Santos, sued the respondent, the Road Accident Fund, under s 17(1) of the Road Accident Fund Act 56 of 1996, for loss of maintenance and support arising from the death of José Adelino Do Olival Gomes in a motor vehicle collision on 2 January

2008.[1] The deceased had been living with the first appellant (Mrs Paixão) and her children at the time and supported them financially. He had planned to marry her, but had not yet done so. The South Gauteng High Court, Johannesburg (Mathopo J)[2] found that the deceased had supported the appellants out of 'gratitude', 'sympathy' and 'kindness' in return for their assistance during his illness rather than from any legal duty, and also that it 'would be an affront to the fabric of our society . . . and seriously erode the institution of marriage' if the dependants' action were to be extended to the appellants. It therefore dismissed their claims against the fund but granted them leave to appeal to this court.

[3] The essential facts pertaining to the nature of the relationship between the appellants and the deceased are not in dispute. They emerge from the stated case and further evidence adduced by three witnesses who testified on behalf of the appellants – Mrs Paixão herself, Fatima Regina Santos Paixão, her eldest daughter and Mrs Theresa Goncalves, a close family friend. The fund adduced no rebuttal evidence. It's cross-examination of the three witnesses was aimed at impugning the appellants' assertion that the deceased had had a legal duty rather than merely a moral commitment to support them.

[4] The facts are these: Mrs Paixão was born in June 1957 on the Portuguese Island of Madeira, where she received her primary school education up to standard four. It is not clear when she came to South Africa. She married Manuel Paixão in

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[1] Section 17 of the Act provides: '(1) The Fund or an agent shall—

(*a*) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(*b*) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.'

[2] *Paixão and another v Road Accident Fund* [2011] ZAGPJHC 68 (1 July 2011).

1980. Three daughters were born of this union: Fatima, Marlize and Michelle, the second appellant. She is the youngest and was born in February 1991. Manuel Paixão died in June 2000. After his death Mrs Paixão commenced formal employment for the first time as a chef in a transport company where her husband had previously been employed.

[5] Two years later, in 2002, she met the deceased who she had engaged to do maintenance work on her house. They became good friends. At the time he was married to Mrs Healdina De Jesus Carreira Melro according to Portuguese law. They were unhappy and had been living apart for some time.

[6] The relationship between the deceased and Mrs Paixão grew as did his bond with her daughters. In May 2003, Fatima married. The deceased paid for the wedding. Fatima testified that he told her that he wished to pay because 'he felt responsible for us (and) he wanted to be part of our family . . . of our lives'.

[7] In October 2003, the deceased fell ill and was hospitalised. Upon his discharge from hospital Mrs Paixão offered to nurse and support him at her home until he was able to return to work. He accepted the offer and began living with her and her two unmarried daughters in a 'permanent life partnership'. He was not formally divorced from his wife at the time. But that marriage was, for all practical purposes, over.

[8] During their cohabitation, the deceased paid for everything. Mrs Paixão was retrenched in February 2004, and his was the sole income of their household. The deceased did not want her to work and undertook to support her and the children. He assured her that he would marry her as soon as his divorce from his wife was finalised. He also took care of her, as he had promised to do, by taking full responsibility for the family's food, holidays, university fees of the second daughter, Marlize, and Michelle's school fees. According to Mrs Goncalves he assumed this obligation 'because he was living with her (Mrs Paixão) and she was his wife'. By this

she meant that the community acknowledged that they were living together as if they were married.

[9] Two significant events occurred in June 2005. First, the deceased divorced Mrs Melro according to South African law. However, he felt constrained not to marry Mrs Paixão before his divorce was also concluded and recognised in Portugal. Second, he executed a Joint Will with Mrs Paixão in which they nominated each other 'as the sole and universal heirs of our entire estate and effects of the first dying of us'. The Will went on to say that in the event of their simultaneous deaths their assets were to be consolidated and Mrs Paixão's three daughters – referred to in the Will as 'our daughters' – were to inherit in equal shares. If the event happened before the daughters turned 21, a trust was to be created for their benefit.

[10] In June 2007 the deceased's divorce from his wife was concluded in Portugal. There were now no legal or practical impediments to his marrying Mrs Paixão and they began making arrangements to marry. They travelled to Portugal where he introduced her to his parents, who apparently approved of their relationship. They planned to be married in Portugal on 12 April 2008. The date was chosen to coincide with his parents' 50th wedding anniversary, which was to be celebrated in Portugal. To this end, in November 2007, he asked Mrs Goncalves to assist with the flight details. Sadly, he died two months later before they could make the journey. Mrs Paixão made arrangements for his body to be flown to Portugal for burial according to his wishes.

[11] The appellants contend that before and during the period of cohabitation the deceased had contractually undertaken to maintain and support them, was legally obliged to do so and would have done so for the remainder of Mrs Paixão's life and until Michelle became self-supporting. The fund maintains that the appellants did not establish a legally enforceable agreement between the deceased and Mrs Paixão, and even if they did, the agreement is not enforceable against a third party such as the fund.

[12] A claim for maintenance and loss of support suffered as a result of a breadwinner's death is recognised at common law as a 'dependants' action'.[3] The object of the remedy is to place the dependants of the deceased in the same position, as regards maintenance, as they would have been had the deceased not been killed.[4] The remedy has been described as 'anomalous, peculiar and *sui generis*' because the dependant derives her right not through the deceased or his estate but from the fact that she has suffered loss by the death of the deceased for which the defendant is liable.[5] However, only a dependant to whom the deceased, whilst alive, owed a legally enforceable duty to maintain and support may sue in such an action.[6] Put differently the dependant must have a right, which is worthy of the law's protection, to claim such support.[7] So if a dependant institutes a claim under the Act, she would be entitled to compensation from the fund for her proven loss if she establishes this right.[8]

[13] The existence of a dependant's right to claim support which is worthy of the law's protection, and the breadwinner's correlative duty of support, is determined by the *boni mores* criterion or, as Rumpff CJ in another context put it in *Minister van Polisie v Ewels*,[9] the legal convictions of the community. This is essentially a judicial determination that a court must make after considering the interplay of several factors: 'the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas of where the loss should fall'.[10] In this regard considerations of 'equity and decency' have always been important.[11] Underpinning all of this are constitutional norms and values. So the court is required to make a policy decision based on the recognition that social changes must be accompanied by legal norms to encourage social responsibility.[12] By making the *boni*

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[3] *Amod v Multilateral Vehicle Accidents Fund* 1999 (4) SA 1319 (A) para 6.
[4] *Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (A) at 614D-F.
[5] *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) at 429E-I.
[6] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838A-B.
[7] J Neethling, J M Potgieter and P J Visser *The Law of Delict* 5 ed at 257 n 39; *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) at 429C-D; *Amod v Multilateral Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) para 12. See the commentary on these cases by J Neethling and J M Potgieter 'Uitbreiding van die Toepassingsgebied van die Aksie van Afhanklikes' (2001) *THRHR* 484.
[8] Section 17(1) of the Road Accident Fund Act 56 of 1996.
[9] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).
[10] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27G-I.
[11] *Amod v Multilateral Vehicle Accidents Fund* 1999 (4) SA 1319 (A) para 10.
[12] Cf P Q R Boberg *The Law of Delict: Aquilian Liability* vol 1 at 214.

mores the decisive factor in this determination, the dependants' action has had the flexibility to adapt to social changes and to modern conditions.

[14] Although the precise scope of the dependants' action is unclear from the old Roman-Dutch jurists, there is a strong suggestion that it was not confined only to those classes of persons to whom the breadwinner had a legal obligation to support, but was also available to those whom the deceased 'was accustomed to support from a sense of duty'.[13] In *Amod v Multilateral Vehicle Accidents Fund*[14] Mahomed CJ put it thus:

'[7] The precise scope of the dependant's action is unclear from the writings of the old Roman-Dutch jurists. De Groot extends it to "those whom the deceased was accustomed to aliment *ex officio*, for example his parents, his widow, his children . . . ." This and other passages in De Groot's writings perhaps support his suggestion that the action was competent at the instance of any dependant within his broad family whom he in fact supported whether he was obliged to do so or not but this is unclear. The same uncertainty but tendency to extend the dependant's action to any dependant enjoying a *de facto* close familial relationship with the breadwinner is also manifest in Voet 9.2.11 who seeks to accord the dependant's action to the breadwinner's, "wife, children and the like" ("*uxori, liberis, similibusque*").'

[15] However, as this court observed in *Amod*, the old authorities appeared to be anxious to recognise the existence of a dependants' action for the 'family' members of the deceased.[15] But it cannot be stated conclusively that they intended only relationships by blood or marriage to fall within its ambit.[16] And given the *sui generis* character of the remedy there seems to be no proper reason to restrict it only to family or blood relationships when social changes no longer require this.

[16] I mentioned earlier that the remedy was given only to dependants to whom the deceased owed a legal duty to support or maintain, the courts nevertheless applied it flexibly. So, even though it did not occur to the jurists of the seventeenth

[13] *Amod* para 7 n 3.
[14] *Amod* para 7.
[15] *Amod* para 8.
[16] *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) at 426F-G.

century to extend the remedy to a husband, the court in *Union Government (Minister of Railways and Harbours) v Warneke*[17] was able to do so by adapting it to 'conditions of modern life'. The remedy was thus gradually extended to include new classes of persons that fell within its rationale. Hence the courts have recognised a husband's claim for the loss of his injured wife's support;[18] a claim of a divorcee, who had been receiving maintenance payments from her erstwhile husband pursuant to a court order at the time of his death;[19] a widow's claim arising from a marriage under African customary law;[20] a claim of a Muslim widow whose marriage under Islamic law had not been registered as a civil marriage under the Marriage Act 25 of 1961;[21] and a claim by a partner of a same-sex permanent life relationship, who had tacitly undertaken reciprocal duties of support with the deceased.[22] In extending the remedy to same sex partnerships Cloete JA said that this 'would be an incremental step to ensure that the common law accords with the dynamic and evolving fabric of our society as reflected in the Constitution, recent legislation and judicial pronouncements'.[23]

[17] The case for the appellants rests on two legs: first that an express or tacit agreement existed between the appellants and the deceased which created a binding obligation upon him to maintain and support them, and second, that the nature of the relationship, being akin to a family relationship, was such that it is deserving of the law's protection. In this regard, Mr Ancer, who appears for the appellants, submits that their constitutional right to equality and dignity would be violated if a duty of support is not recognised for permanent life partnerships, but is in the case of formal marriages.[24] Mr Steven Budlender, who appears for the fund, takes issue with both contentions.

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[17] Ibid para 9;*Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665.
[18] *Abbott v Bergman* 1922 (AD) 53 at 55-56.
[19] *Santam Bpk v Henery* 1999 (3) SA 421 (SCA).
[20] *Zimnat Insurance Co Ltd v Chawanda* 1991 (2) SA 825 (ZS).
[21] *Amod v Multilateral Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).
[22] *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).
[23] Ibid para 37.
[24] Section 9 of the Constitution provides:
'(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

[18] First it must be decided whether there was an agreement creating a binding legal obligation between the appellants and the deceased. An agreement may be made expressly or tacitly. An express agreement may be made orally or in writing. A tacit agreement is inferred from the surrounding circumstances and conduct of the parties. In either case it is for the court to decide whether a contract probably came into existence. The high court came to the conclusion that the deceased had merely promised to take care of the Paixão family, but had not undertaken a legally enforceable obligation to do so.[25]

[19] I disagree with this conclusion. In my view, the evidence indicating that the deceased and the Paixão family had, at least tacitly, undertaken a reciprocal duty of support is compelling. They began living together in October 2003 when Mrs Paixão had offered to nurse him at her home after his discharge from hospital. He accepted the offer and continued living with her after his recovery. The high court held that 'the inference that can be drawn from [her] gesture is that after [Mrs Paixão] and her children looked after him after his discharge from hospital, he felt obliged to repay their kindness by assisting them with monthly expenses'. I do not think that this is the 'most plausible probable inference' from a fair reading of all the evidence. [26]

[20] The evidence shows that after his recovery he lived with the Paixão family in a mature, committed and loving 'family' relationship. They were accepted by their relatives, community and friends as a family unit. They pooled their resources and, when she was retrenched, he supported the family financially as if they were his own. Indeed the evidence establishes that he expressly said that he regarded them

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(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, **marital status**, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.' (Emphasis added.)

Section 10 provides: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[25] *Paixão and another v Road Accident Fund* [2011] ZAGPJHC 68 (1 July 2011) paras 31-33.

[26] *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 164G-165G; R H Christie and G B Bradfield Christie's *Law of Contract in South Africa* 6 ed 86-87.

as his family. There can be no stronger indication that he regarded Mrs Paixão and her daughters as *his* family than from the content of their Joint Will – he not only made her the sole heir of his estate but provided for the massing of their estates in the event of simultaneous death and nominated 'our children' as their heirs also making provision for them to benefit from a trust. These provisions are common in wills of married people with children. The facts here are remarkably similar to those in *Du Plessis* where the court held that that the plaintiff had proved that the parties had tacitly undertaken a reciprocal duty of support to one another.[27]

[21] It is significant that the deceased assumed these obligations while planning to marry Mrs Paixão as soon as it was practically possible to do so. They would have married earlier if they were not confronted with the obstacle of his first having to be officially divorced in Portugal. Put another way there was clearly a tacit agreement that he would assume the obligation to support the family before the marriage – the marriage would change nothing except for the relationship being formally recognised.

[22] The court below held that a mere promise to marry did not attract any legal obligation on the deceased's part. This is correct.[28] However, 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.[29] 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.[30] I find that the most plausible probable inference from the facts is that the deceased undertook to support and maintain the Paixão family before formally entering into a marriage contract.

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[27] *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) paras 14-16.
[28] *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) para 8.
[29] Per Corbett JA in *Hirchowitz v Moolman* 1985 (3) SA 739 (A) at 765I.
[30] R H Christie and G B Bradfield Christie's *Law of Contract in South Africa* 6 ed 39-40.

[23] Of course the mere fact that the parties had a binding agreement *inter se* does not mean that it was enforceable against third parties such as the fund. Put another way the appellants had to establish not only that they had an enforceable agreement against the deceased but that the obligations created by the nature of their relationship were worthy of the law's protection.[31] As I have said this must be determined by reference to the *boni mores* criterion.

[24] Before I consider this question it is necessary to review the cases that have dealt with problems concerning the duty of support in permanent life partnerships. In *Du Plessis v Road Accident Fund,*[32] which concerned a dependant's action, this court said that to the extent that the common law denies a survivor of a permanent life relationship similar to marriage the right to claim support from the fund, but allows the claim for a spouse of a marriage, the differentiation unfairly discriminates against him and unjustifiably infringes his right to equality in s 9 of the Constitution.[33] It thus concluded that where same-sex partners have established a reciprocal legal duty of support that duty was worthy of protection,[34] but left open the question whether the dependants' action should be extended generally to unmarried parties in heterosexual relationships or to any other relationships.[35] In extending the protection of the common law to same-sex partnerships, the court found support in the judgment of the Constitutional Court in *Satchwell v President of the Republic of South Africa*[36] which had held that it was unfairly discriminatory to afford statutory benefits to spouses in heterosexual marriages but not to same-sex partners who had established a permanent life relationship similar to marriage. The Constitutional Court, however, emphasised that this did not mean that benefits provided to spouses in legally recognised marriages should be extended to same sex partners who had not undertaken reciprocal duties of support[37] – an issue that arose in *Volks NO v Roberson*.[38]

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[31] Neethling et al *The Law of Delict* at 259.
[32] *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).
[33] Ibid para 25.
[34] Ibid para 33.
[35] Ibid para 43.
[36] *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para 25.
[37] See generally D S P Cronje and J Heaton *South African Family Law* 3 ed at 249-252, which discusses the legal protection the courts have given to same-sex life partnerships. Parliament has since enacted the Civil Union Act 17 of 2006. This Act puts same-sex and heterosexual unions on the

[25] Here the Constitutional Court was concerned with whether the protection given to a 'survivor' of a marriage under the Maintenance of Surviving Spouses Act 27 of 1990 (the Maintenance Act), which grants to surviving spouses the right to claim maintenance from the estates of deceased spouses, should also be afforded to survivors in heterosexual permanent life partnerships. In this regard the court had to consider whether by excluding survivors of permanent life partnerships from such protection, the Maintenance Act unfairly discriminated against them on the ground of their marital status. The court concluded that it was not unfair to distinguish between survivors of marriage and survivors of heterosexual cohabitation.[39] It arrived at this conclusion because of the importance it attached to 'the legal privileges and obligations' by the law of marriage which accords benefits to married people but not to unmarried people. The maintenance benefit in s 2(1) of the Maintenance Act,[40] the court said, was one such benefit.[41] In coming to this conclusion the court said the following:

'There are a wide range of legal privileges and obligations that are triggered by the contract of marriage. In a marriage the spouses' rights are largely fixed by law and not by agreement, unlike in the case of parties who cohabit without being married.

. . . The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. Whilst there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in the case of unmarried cohabitants. The maintenance benefit in section 2(1) of the Act falls within the scope of the maintenance support obligation attached to marriage. The Act applies to persons in respect of whom the deceased person (spouse) would have remained legally liable for maintenance, by operation of law, had he or she not died.

. . . [I]t is not unfair to make a distinction between survivors of a marriage on the one hand, and survivors of a heterosexual cohabitation relationship on the other. In the context of the provision for maintenance of the survivor of a marriage by the estate of the deceased, it is

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same footing by allowing both to formalise their unions the effect of which is that they have the same legal consequences as a civil marriage concluded under the Marriage Act 25 of 1961.

[38] *Volks NO v Robinson* 2005 (5) BCLR 466 BC (CC).

[39] Ibid para 60.

[40] Section 2(1) provides**:**

'If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.'

[41] Ibid *Volks* paras 57-60.

entirely appropriate not to impose a duty upon the estate where none arose by operation of law during the lifetime of the deceased. Such an imposition would be incongruous, unfair, irrational and untenable.'

[26] For present purposes I make two observations about this judgment: First, although the court stated that no reciprocal duty of support arises by operation of law in the case of unmarried cohabitants it also said that this does not preclude such a duty from being fixed by agreement[42] – the case advanced by the appellants. Second, the purpose of the Maintenance Act[43] is very different from the rationale and development of the dependants' action at common law, which is *sui generis.* In the case of the former s 2(1) of the Maintenance Act provides for the reasonable maintenance needs of a party to a marriage from the estate of a deceased spouse. The issue before the court was therefore whether a spousal benefit arising from a legally recognised marriage should also be available to a surviving partner of a life partnership. The object of the remedy in a dependants' action, on the other hand, is to place the dependants of the deceased, to whom the deceased owed a legally enforceable duty to support and maintain, in the same position as they would have been, as regards support and maintenance, had the deceased not been unlawfully killed by a wrongdoer. The right of a dependant to sue for this loss arises because the wrongdoer unlawfully caused the termination of a legally enforceable duty of support – it is not a spousal benefit that accrues to a dependant only by virtue of a formally recognised marriage.[44]

[27] *Volks*, therefore, does not stand in the way of the appellants' submission that the common law may be developed to extend the dependants' action generally to unmarried parties in heterosexual relationships or to any other relationships – the question left open in *Du Plessis v Road Accident Fund.*[45] It is to this question that I must now turn.

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[42] Ibid para 58.
[43] Ibid paras 36-39.
[44] B Smith and J Heaton 'Extension of the dependant's action to heterosexual life partners after *Volks NO v Robinson* and the coming into operation of the Civil Union Act – thus far and no further?' (2012) *THRHR* 472 at 479.
[45] *Du Plessis v Road Accident Fund* 2004 (1) 359 (SCA) para 43. It follows too that to the extent that the court in *Susara Meyer v Road Accident Fund (*Unreported) Case No: 29950/2004 28/3/2006, found that *Volks* supported its rejection of a dependant's claim of a permanent life partnership, it erred.

[28] Mr Budlender submits that it is inappropriate for this court to develop the common law to include unmarried heterosexual relationships within its remit for two reasons: first, because of practical problems for defendants such as the fund to refute a plaintiff's reliance on a life partnership to support the assertion of a reciprocal duty of support; second, because the extension of legal protection to unmarried heterosexual partners should be dealt with comprehensively by parliament instead of the courts doing so thereby opening the floodgates to indeterminate liability.

[29] I appreciate that it is not always easy for defendants in the fund's position to refute evidence of a plaintiff dependant's assertion that the deceased had undertaken a duty to support him or her. But this concern, I think, is overstated. A plaintiff's assertion, without more, that he or she was in life partnership, cannot be taken as sufficient proof of this fact. (In this case the fund conceded that the relationship was a life partnership.) 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.[46] 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. Courts frequently undertake this exercise without much difficulty – as this and other cases such as *Amod*, *Satchwell* and *Du Plessis* demonstrate. Life partnerships therefore do not present exceptional evidential difficulties for defendants.[47]

[30] Mr Budlender's second reason, that the courts should not develop the common law to include heterosexual life partnerships, but rather leave their regulation to the lawmaker, is also not persuasive. We are not here embarking on an exercise that impinges on the lawmaker's responsibility for law reform in this area, which has commenced with the South African Law Commission's draft Domestic

[46] See D S P Cronje and J Heaton (above) at 243.
[47] Cf *McDonald v Young* 2012 (3) SA 1 (SCA) para 14.

Partnerships Bill, 2008;[48] we are performing a duty that falls properly within the province of the courts ie to decide 'on incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society'.[49] The courts have always had this duty and s 173 of the Constitution now explicitly recognises it.[50] What we are required to decide here is whether the evolving fabric of our society requires the common law to undergo an incremental change to extend the dependants' action to include heterosexual life partners. A failure to confront this question squarely, when the circumstances of this case and the interests of justice so require, would be an abdication of our judicial responsibility.

[31] Our courts have emphasised the importance of marriage and the nuclear family as important social institutions of society, which give rise to important legal obligations, particularly the reciprocal duty of support placed upon spouses.[51] The fact is, however, that the nuclear family has, for a long time, not been the norm in South Africa. South Africans have lower rates of marriage and higher rates of extra-marital child-bearing than found in most countries.[52]

[32] Millions of South Africans live together without entering into formal marriages. This is simply a fact of life, although, as Mokgoro J and O'Regan J observed in *Volks*, their circumstances differ significantly:

'Some may be living together with no intention of permanence at all, others may be living together because there is a legal or religious bar to their marriage, others may be living together on the firm and joint understanding that they do not wish their relationship to attract legal consequences, and still others may be living together with the firm and shared intention of being permanent life partners.'[53]

I would add that in addition to legal or religious constraints that the learned judges mention, many others are unable to marry for social, cultural or financial reasons.

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[48] For a critical discussion of this Bill see the LLD Thesis of Bradley Shaun Smith 'The development of South African Matrimonial Law with specific reference to the need for and application of a domestic partnership rubric' *University of the Free State* (2009).

[49] *Du Plessis & others v De Klerk & another* 1996 (3) SA 850 (CC) para 61.

[50] Section 173 of the Constitution provides:

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[51] *Volks NO v Robinson* 2005 (5) BCLR 466 BC (CC) para 52.

[52] D Budlender and F Lund 'South Africa: A Legacy of Family Disruption' (2011) *Development and Change* 925 at 927-932.

[53] *Volks NO v Robinson* 2005 (5) BCLR 466 BC (CC) para 120.

[33] Among the reasons for the decline in formal marriages is 'the legacy of family disruption' caused by apartheid's migrant labour system,[54] which remains a feature of South Africa's current economy. Many migrant workers enter into permanent relationships and have families, outside of their formal marriages, that they support and maintain.

[34] Life partnerships have therefore increasingly received legislative and judicial recognition reflecting the changing *boni mores.*[55] In line with this trend, in *Verheem v Road Accident Fund*,[56] the North Gauteng High Court recently extended the scope of the dependants' action to cohabiting partners in a heterosexual permanent life partnership in circumstances remarkably similar to those in this case.[57] I pause to mention that in the present case, Mathopo J held himself not bound by *Verheem* because the facts differed. But without considering and deciding that *Verheem* was clearly wrong, this was an incorrect basis to distinguish the cases.[58]

[35] I revert to the circumstances of this case. The facts show that the community accepted the deceased, Mrs Paixão and her children as a family and did not regard their cohabitation as opprobrious. Indeed, as I have shown, cohabitation outside of a formal marriage is now widely practised and accepted by many communities universally.[59] They had, however, chosen to get married, were committed to this course, and had commenced plans to this end. Crucially they had already undertaken reciprocal duties of support, agreed to formalise their relationship through marriage and executed a family will as evidence of their commitment to each other.

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[54] D Budlender and F Lund 'South Africa: A Legacy of Family Disruption' (2011) *Development and Change* 925 at 927-932.
[55] See D S P Cronje and J Heaton (above) Chapter 20 para 20.3.1.
[56] *Verheem v Road Accident Fund* 2012 (2) SA 409 (GNP).
[57] Ibid para 12.
[58] See generally B S Smith 'Extension of the dependant's action to heterosexual life partners after *Volks NO v Robinson* and the coming into operation of the Civil Union Act – thus far and no further?' (2012) *THRHR* 472; 'The dependant's action in the context of heterosexual life partnerships: A consideration of the *Verheem* and *Paixão* cases'. Paper presented at the Society of Law Teachers of Southern Africa Conference on 10 July 2012.
[59] *Volks NO v Robinson* 2005 (5) BCLR 466 (CC) para 119.

[36] I mentioned earlier there is some suggestion in the old authorities that the dependants' action was available even to persons to whom the breadwinner felt a 'sense of duty' to support and not only to those to whom a legal duty was owed. The deceased in this case undertook a duty to maintain and support his adopted 'family' out of a profound, deep and loving sense of duty, and did so. I have found that the appellants tacitly established the existence of legally enforceable duty of support. Having regard to the incremental extension of the dependants' action through the times, our ideas of morals and justice, and of equity and decency, I can see no reason of principle or policy not to extend the protection of the common law to the appellants here. In my view, the 'general sense of justice of the community' demands this.[60]

[37] Having come to this conclusion I need not consider the constitutional question referred to earlier in para 17 – whether it would amount to unfair discrimination for the law to give protection to the duty of support arising from a marital relationship but not to a relationship where the duty arises in the context of heterosexual permanent life partnerships.

[38] Mr Budlender submits further that if we are inclined to develop the common law so as to extend its protection to the appellants in the circumstances of this case, we should limit its effect only to instances where there is an agreement to be married. In considering this submission I am mindful of the cautionary remarks made by Corbett JA (as he then was), on the occasion of the Third Oliver Schreiner Memorial Lecture, that when developing the common law the court should confine itself to the particular legal problem under consideration rather than expound the law generally on the topic.[61]

[39] The difficulty I have with Mr Budlender's submission is that extending the protection of the dependants' action only to permanent heterosexual relationships where there is an agreement to marry requires us to draw an arbitrary line between

[60] *Schultz v Butt* 1986 (3) SA 667 (A) 679B-C.
[61] M M Corbett 'Aspects of the Role of Policy in the Evolution of our Common Law' (1987) *SALJ* 52 at 57.

those relationships and most others where there is no such agreement. The proper question to ask is whether the facts establish a legally enforceable duty of support arising out of a relationship akin to marriage. Evidence that the parties intended to marry may be relevant to determining whether a duty of support exists, as in this case. But it does not mean that there must be an agreement to marry before the duty is established. And once a dependant establishes the duty, the law ought to protect it.

[40] By coming to this conclusion I do not intend to demean the value or importance that our society places on marriage as an institution as the high court feared.[62] On the contrary, I am extending the protection afforded to the dependants of the deceased precisely because the nature of their relationship is similar to a family relationship arising from a legally recognised marriage. I therefore hold that the dependants' action is to be extended to unmarried persons in heterosexual relationships who have established a contractual reciprocal duty of support.

[41] Mr Budlender also contends that even if Mrs Paixão succeeds in her claim, her daughter, Michelle, should not. But once it is established that the deceased had undertaken to support Mrs Paixão and her children, including Michelle, and did so, I cannot see any reason why Michelle's claim should fail. Her claim, like her mother's, arose from the same 'family relationship'.

[42] The parties have agreed on the extent of the appellants' losses. In the result the appeal succeeds with costs. The decision of the high court is set aside and replaced with the following:

'(a) The respondent is ordered to pay to the first appellant the sum of R1 707 612 million.

(b) The respondent is ordered to pay the second appellant the sum of R 451 626.

[62] Above para 2.

(c) The respondent is ordered to pay the appellants' taxed or agreed costs of the action which costs are to include the costs of the actuaries, Clemans, Murfin & Rolland.'

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JUDGE OF APPEAL

APPEARANCES

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	Lovius Block, Bloemfontein
For Respondent:	S Budlender
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