

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 12272/2022

In the matter between:

EW Applicant

and

VH Respondent

WOMEN'S LEGAL CENTRE TRUST *Amicus Curiae*

Coram: Cloete, Wille *et* Slingers JJ

Heard: 20 January and 9 February 2023, further notes filed on 17 and 24 February 2023

Delivered electronically: 17 March 2023

JUDGMENT

CLOETE *et* SLINGERS JJ (majority), WILLE J (minority)

CLOETE *et* SLINGERS JJ:

Introduction

[1] The applicant and respondent (save where otherwise indicated “the parties”) were previously involved in a romantic relationship for a period of 8 to 9 years until 6 April 2022 when the respondent vacated the erstwhile common home.¹ Three young children were born from their relationship. When the parties commenced their romantic

¹ In the application before us the parties are not in agreement as to when they commenced their romantic relationship. The applicant alleges it was in 2013, while the respondent alleges it was in 2014.

relationship they were still entangled with their previous partners. The applicant had not yet terminated her relationship with her former partner/boyfriend and the respondent remained married until 2019.

[2] On 25 July 2022 the applicant instituted an action in this court under the same case number as the present application in which she seeks the following orders:

'a. ...declaring that the Plaintiff and the Defendant were partners in a permanent opposite-sex life-partnership in which the partners had undertaken reciprocal duties of support and which partnership was terminated when the Defendant vacated the common home in April 2022;

b. ...directing the Defendant to maintain the plaintiff for a period of 10 years or until her death or remarriage, whichever occurs first, by payment to the Plaintiff of such amount as the above Honourable Court deems appropriate, due regard being had to, inter alia, the factors referred to in paragraph 10 above;

c. In the alternative to prayer (a) above, and in the event that this Court should find that the common law does not currently recognise an ex lege duty of support for unmarried opposite-sex life partners, an order:

i. developing the common law in a manner that promotes the spirit, purport and objects of the Bill of Rights by recognising an ex lege duty of support for unmarried opposite-sex permanent life partners;

ii. declaring that the Plaintiff has a claim against the Defendant for the provision of her reasonable maintenance needs insofar as she is not able to provide therefor from her own means and earnings; and

iii. directing the Defendant to maintain the Plaintiff for a period of 10 years or until her death or remarriage, whichever occurs first, by payment to the Plaintiff of such amount as the above Honourable Court deems appropriate, either as a lump-sum award or in the form of monthly payments, due regard being had, inter alia, to the factors referred to in paragraph 10 above;

d. *Costs of suit;*

e. *Further and/or alternative relief.'*

[3] The respondent has defended the action and delivered a plea on 31 August 2022.² The primary issue in dispute on the pleadings is whether or not the parties' relationship was a permanent life-partnership in terms whereof they had undertaken reciprocal duties of support towards each other as the applicant alleges. Pleadings closed on 12 September 2022. The action remains pending.

[4] On 27 October 2022 the applicant launched the present application for hearing on an expedited basis. The Judge President allocated the matter for hearing before us as a Full Court of first instance on 28 November 2022. It was then agreed that the application would be heard on 20 January 2023, with a timetable for the filing of further papers and heads of argument. This arrangement also accommodated the required 20 day notice period in rule 16A(1)(d) which only commenced on 15 November 2022 and ran until 14 December 2022.

[5] In her notice of motion the applicant sought the following orders:

'1. Declaring that the common law recognises the existence of a duty of support between partners in unmarried opposite-sex permanent life-partnerships and that, on account of the existence of the duty of support during the subsistence of the life-partnership, such parties are entitled, in terms of the common law, to claim maintenance from one another insofar as they are not able to provide therefor from their own means and earnings, following the termination of the said life-partnership;

2. In the alternative to prayer 1 above, developing the common law in a manner that promotes the spirit, purport and objects of the Bill of Rights and declaring that partners, in unmarried opposite-sex permanent life-partnerships, in

² He has also delivered a counterclaim which relates only to issues concerning the children, to which the applicant has pleaded.

which the partners had undertaken to each other reciprocal duties of support during the existence of the life-partnership, are entitled to claim maintenance from one another following the termination of the life-partnership, insofar as the said life partner is not able to provide therefor from his/her own means and earnings;

3. *Pending the final determination of the action between the parties in the above Honourable Court, under the abovementioned case number, ...the Defendant/Respondent be ordered to maintain the Plaintiff/Applicant as follows, namely by: ...'*

[6] The applicant sought cash maintenance of R56 000 per month with effect from 1 May 2022 and payment of inter alia her medical and motor vehicle expenses. She also sought an order, as part of her maintenance claim, that the respondent pay an amount of R1 million as an initial contribution towards her costs in the pending action, to be paid within 10 calendar days of the granting of an order to that effect, as well as the costs of the application itself.

[7] The Women's Legal Centre Trust ("WLCT") applied to be admitted as *amicus curiae*. The applicant consented but the respondent took the view that, while he abided the court's decision, the submissions which the WLCT sought to make in supporting the relief claimed by the applicant were misdirected and unhelpful in various respects (we return to this aspect later).

[8] After hearing the *amicus* application we were informed by counsel for the applicant that she did not persist with prayer 1 of the notice of motion (the "ex lege relief") and furthermore that prayer 2 (the "development of the common law relief") was '*undoubtedly final relief*'. We ruled that the *amicus* be admitted to the proceedings before us (we are obviously not seized with the pending action) on the basis that its submissions may assist the court in determining the matter, subject to the weight to be attached thereto, if any.

[9] During his main argument on the merits counsel for the applicant (with no objection from the respondent and with leave of the court) amended prayer 2 of the

notice of motion by substituting the words *'undertaken to each other reciprocal duties of support'* with *'factually and reciprocally supported each other'*. After counsel for the applicant concluded his address, counsel for the *amicus* commenced with hers. It was by then clear to all concerned that the matter would not finish in one day as the parties originally contemplated and (after exchanging availability dates) the matter proceeded on 9 February 2023.

[10] On 1 February 2023 we (along with the respondent and *amicus*) received a supplementary note from counsel for the applicant annexing a draft order setting out *'her proposed wording for the development of the common law'*. The draft order understandably no longer made reference to prayer 1 of the notice of motion (which had been abandoned). Prayer 2 was renumbered as prayer 1 and again reformulated in the following terms:

'1. Declaring that partners, in life-partnerships in which the partners had, during the existence of the life-partnership, undertaken to each other reciprocal duties of support, alternatively factually reciprocally supported each other, are entitled to claim maintenance from one another, following upon the termination of the life-partnership, the extent and duration of such maintenance, if any, to be determined by the court, the court having regard to all of the circumstances of the life-partnership, including:

1.1 The duration of the life-partnership;

1.2 The existing or prospective means of each of the partners, their respective earning capacities, financial needs and obligations;

1.3 The age of each of the partners;

1.4 The standard of living of the partners prior to the termination of the life-partnership;

1.5 The partners' conduct insofar as it may be relevant to the breakdown of the life-partnership; and

1.6 *Any other factor which in the opinion of the court should be taken into account, make such order as the court finds just, for any period until the death or remarriage of, or the conclusion of a further life-partnership by, the partner is whose favour the order is given, whichever event may first occur.'*

[11] Although the new prayer re-introduced what had already been abandoned as a consequence of the amendment sought and granted on the first day of the hearing, and couched what was substituted in its stead as an alternative, no amendment was sought with leave of the court. Counsel for the applicant was emphatic that the simple handing up of a draft order was perfectly acceptable, which it was not, given that neither the respondent, the *amicus* nor the court had requested it. (Draft orders are of course often exchanged in such circumstances). Be that as it may, and in order to move the matter along, it was accepted by the respondent, *amicus* and the court that this would be regarded as a further amendment to the notice of motion.

[12] The adoption of most of the factors listed in s 7(2) of the Divorce Act³ did however provide the respondent, *amicus* and the court with some idea of what the applicant considered to be an appropriate remedy, which had been absent from the previous versions of the notice of motion, and was one of the concerns raised at the previous hearing by some members of the court.

[13] This is because an enquiry into the development of the common law imposes duties on litigants who seek it. The Supreme Court of Appeal made this plain in *EFF v Manuel* ('*Manuel*):⁴

'The need to follow this process imposes duties on litigants when they seek to persuade a court that a development of the common law is required. They have a responsibility to present to the court their understanding of the current state of the law and the reasons for it by reference to the relevant authorities. The current rule must be assessed in the light of the spirit, purport and objects of the Bill of Rights. The parameters of the proposed development must be clearly expressed

³ No 70 of 1979.

⁴ *Economic Freedom Fighters and Others v Manuel* 2021 (3) SA 425 (SCA) at para [61].

and the consequences of amending the law in that way examined. Very often this will require evidence to enable the court to determine what the likely consequences will be.'

(Emphasis supplied).

[14] We say that the adoption of most of the s 7(2) factors provided the court with some idea because in the note on argument in reply we were informed by counsel for the applicant that *'We could just as well have "borrowed" from the factors contained in the Matrimonial Causes Act (England) or from the Draft Domestic Partnership Bill, which has itself "borrowed" from the Divorce Act, or from statutes of other countries... This Court can "borrow" factors from anywhere it so chooses in developing the common law'*. This unfortunately misses the point as was made clear in *Manuel*. It is not for the court to pick and choose a remedy for a litigant where the litigant herself has not clearly expressed the parameters of the proposed common law development, nor provided sufficient evidence to enable the court to determine what the likely consequences will be.

[15] Ultimately it appears to us that there are 3 central issues, although of course they overlap to some extent:

15.1 First, whether the applicant is entitled to final relief (development of the common law) to ground a claim for interim maintenance when substantially the same final relief is sought in the pending action between the parties;

15.2 Second, whether development of the common law is required and appropriate in the matter before us;

15.3 Third, whether the applicant should succeed in her claim for interim maintenance and a contribution towards her costs.

The first issue: final relief sought in interlocutory proceedings in a pending action where substantially the same final relief is sought

[16] When this was raised with senior counsel for the applicant he first responded that, were we to find in her favour, the pending action would be withdrawn. After some

debate he then informed us that if this court decides not to develop the common law, that would be the end of the pending action as well as the interim relief.

[17] Our difficulties with this approach are twofold. First, the applicant herself elected to proceed by way of action. She could instead have proceeded from the outset with an application for final relief. That she did not do so is telling. She must have anticipated that, given the evidentiary burden she was required to discharge, there would indeed be material disputes of fact about the existence or otherwise of the parties' permanent life-partnership which could only properly be resolved by way of a trial. In addition, by the time the current application was launched she could have been under no illusion, based on the pleadings which had closed, that a fundamental dispute exists between the parties as to whether or not such a partnership existed.

[18] Second, the approach of applicant's counsel in fact prejudices her, since if the final declaratory relief sought in the matter before us is not granted, she may be non-suited in circumstances where our courts have repeatedly been prepared to entertain, and grant, relief based on a proven, or undisputed, existence of an undertaking of support. She may be deprived of the opportunity to advance, and possibly prove, an entitlement to maintenance. That could never be in her interests, or in the interests of justice.

[19] However that being said, it is not for this court to advise the applicant. Moreover both counsel for the respondent and the *amicus* appeared to be tolerant of the stance adopted by applicant's counsel despite the pending action. It is also not for us to speculate why this is so, since there may be any number of reasons, including strategic ones. It would therefore not be prudent for us to take this any further.

The second issue: whether development of the common law is required and appropriate in the instant case

[20] The applicant argues that the lack of legal recourse for life partners to claim maintenance from one another following the termination of their partnership is constitutionally unacceptable since it discriminates on the basis of inter alia marital status and gender and constitutes unequal protection before the law.

[21] She correctly points out that the common law duty of support between spouses terminates upon divorce but that such a spouse has been afforded legislative relief by s 7 of the Divorce Act which applies to all civil marriages, civil unions (i.e. same-sex marriages) concluded in terms of the Civil Union Act⁵ and recognised customary marriages in terms of the Recognition of Customary Marriages Act.⁶

[22] In addition, where a marriage is terminated by death of a spouse the other is given similar legislative relief in terms of the Maintenance of Surviving Spouses Act.⁷ Spouses in certain customary marriages are included in the definition of “survivor”. In *Daniels v Campbell*⁸ the Constitutional Court confirmed that the word “spouse” in that Act includes widows from monogamous Muslim marriages; and in *Bwanya v The Master of the High Court and Others*,⁹ the same court held that the exclusion of life partners from the operation of that Act was unconstitutional and invalid. It accordingly ordered that the definition of “survivor” be read to include ‘...*the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner’s estate*’. However, the applicant submits, parties in life-partnerships are “left out in the cold” when it comes to maintenance following the breakdown and consequent termination of their relationships.

[23] The applicant also correctly submits that courts are the ‘*protectors and expounders*’ of the common law and have inherent jurisdiction to ‘*refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society*’.¹⁰ Moreover s 39(2) of the Constitution requires courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law.¹¹

⁵ No 17 of 2006, s 13.

⁶ No 120 of 1998, s 8(4)(a).

⁷ No 27 of 1990, s 2.

⁸ 2004 (5) SA 331 (CC).

⁹ 2022 (3) SA 250 (CC).

¹⁰ *S v Thebus and Another* 2003 (6) SA 505 (CC) at para [31].

¹¹ *Thebus* at para [25]; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674.

[24] The applicant referred to the following paragraph in *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another*.¹²

'[39] Before a court proceeds to develop the common law it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.'

[25] We note however that the Constitutional Court went on to say the following in the next paragraph of that judgment:

'[40] In Carmichele¹³ Ackermann J and Goldstone J stated that "where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation. The court reminded us though that, when exercising their authority to develop the common law, "(j)udges should be mindful of the fact that the major engine for law reform should be the Legislature and not the judiciary". The principle of separation of powers should thus be respected.'

(Emphasis supplied).

[26] The applicant maintains that since the publication of the draft Domestic Partnerships Bill in 2008¹⁴ *'nothing has been done'* by the legislature to protect the rights of those who bear the brunt of non-recognition, and who are predominantly women. (We note that s 18 of that Bill provides for a court to *'make an order which is just and equitable in respect of the maintenance by one registered partner to the other for any specified period or until the death or remarriage of the registered partner in whose favour the order is given...'*).

¹² 2016 (1) SA 621 (CC); see also *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) at para [31].

¹³ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC).

¹⁴ GG 30663 dated 14 January 2008.

[27] However that nothing has been done by the legislature since 2008 is simply incorrect. As pointed out by counsel for the respondent, the South African Law Reform Commission (“SALC”) has been engaged for several years in researching, receiving submissions and developing proposals for legislative reform to regulate all domestic partnerships. As recently as January 2021, the SALC issued *Discussion Paper 152: Single Marriage Statute* (under Project 144) for comment.

[28] The 2021 Single Marriage Statute Discussion Paper proposes considerably more far-reaching legislative developments than the 2008 Bill. The Discussion Paper includes draft legislation, with two legislative options proposed for comment. The first option is contained in the Protected Relationships Bill, and the second in the Recognition and Registration of Marriages and Life Partnerships Bill. The objects of the Bills are to rationalise the marriage laws pertaining to all types of relationships (described as protected relationships in the first Bill, and as marriages and life-partnerships in the second Bill); to prescribe the validity requirements; to provide for the registration of protected relationships or marriages and life-partnerships; and to provide formal recognition of protected relationships or marriages and life-partnerships, so as to facilitate and enable enforcement of rights. In addition, a separate project by the SALC (Project 100) is presently investigating the issues of spousal support and maintenance.

[29] Notably, in proposing the legislative recognition of life-partnerships, the SALC recommends that these should be defined as ‘*any life partnership where the parties cohabit and have assumed permanent responsibility for supporting each other*’. The SALC proposes a regime for the registration of life partnerships, and the imposition of a duty on partners to a life partnership to register their relationship.¹⁵

[30] In our view the work of the SALC is the type of necessary evidence which the Supreme Court of Appeal had in mind in *Manuel* to enable us to determine what the likely consequences of the development proposed by the applicant will be, particularly in circumstances where, as was held in *Mighty Solutions*, we must also take into account ‘*the wider consequences of the proposed change on that area of the law*’.

¹⁵ See pp89 to 95 of the SALC’s Single Marriage Statute Discussion Paper 152. This is followed by a discussion on unregistered life-partnerships, in section L, pp95 to 101.

[31] That there is express recognition by the legislature of the need to protect vulnerable life partners upon termination of their partnerships is amply demonstrated by the lengthy process upon which the SALC has embarked. That the issue is complex and policy-laden is probably one of the reasons why the process is taking as long as it has. But we can only assume that this is the case since the applicant took no steps to join, or obtain evidence from, the Minister of Justice and Constitutional Development (who is responsible for the work of the SALC) in these proceedings. This valuable evidence is thus not before us.

[32] *Carmichele* cautions us that there is a balancing act between developing the common law to conform with the Bill of Rights while at the same time remaining aware that the major engine for law reform should be the legislature and not the judiciary. Although there is no frontal challenge to any legislation before us, there is a well-advanced parallel process upon which the legislature has embarked.

[33] Had the Minister been joined or had the applicant approached him in another way to provide evidence, he would have been afforded the opportunity to explain the proposed legislative scheme, how much longer it is likely to take for it to be implemented, and place his views before us about the appropriateness or otherwise of the applicant's proposed development and its wider consequences.

[34] In *Carmichele* the Constitutional Court held that particularly '*where the factual situation is complex and the legal position uncertain*' issues involving the development of the common law should be decided only once '*the facts on which the decision has to be made [are] determined after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors*'.¹⁶

[35] The factual evidence which the SALC could have provided would no doubt include the results of its research. In her founding affidavit the case made out by the applicant for development of the common law was contained in the following paragraphs:

¹⁶ At para [28].

'45. I contend that the relationship which endured with the Respondent constituted a permanent opposite-sex life-partnership in which the Respondent and I had undertaken reciprocal duties of support, to each other, the existence of which is established by the factors set out above. I further contend that, on account of the duty of support that existed during the subsistence of the life-partnership, I am entitled, in terms of the common law, to claim maintenance from the Respondent following the termination of our life-partnership. Alternatively, should this Honourable Court find that the common law does not entitle me to such a claim, I contend that the common law should be developed in a manner that promotes the spirit, purport and objects of the Bill of Rights by recognising my entitlement to claim maintenance from the Respondent, following the termination of our life-partnership and insofar as I am not able to provide therefor from my own means and earnings...

49. I am advised that all married spouses have reciprocal support duties, the existence of which are an invariable consequence of marriage that arise by automatic operation of law. I am further advised that our Courts have previously held that the law does not impose a similar automatic reciprocal support duty on unmarried partners in life-partnerships, but that this position has changed in the light of recent legal developments.

50. In the case of Paixão v Road Accident Fund...¹⁷ the Supreme Court of Appeal found that the common law "dependant's action", which entitles a claimant to claim for maintenance and loss of support suffered as a result of a breadwinner's death, had been extended to a claim by a surviving partner of a permanent opposite-sex life partnership in which the partner had undertaken reciprocal duties of support with the deceased, despite such reciprocal duties of support not having been assumed by express agreement between the parties. The Supreme Court of Appeal held that the deceased had indeed had a legally enforceable duty to support the claimant even though the parties were in an unmarried life-partnership. The enforceable duty arose from a tacit contract for reciprocal support, which the court inferred from the couple's conduct and

¹⁷ 2012 (6) SA 377 (SCA).

surrounding circumstances. In the recent case of Bwanya v Master of the High Court, Cape Town and Others...¹⁸ the Constitutional Court found that Paixáo was not ultimately based on a tacit contract for reciprocal support, but rather that the core of the Supreme Court of Appeal's decision was the court's view that "[t]he proper question to ask is whether the facts establish a legally enforceable duty of support arising out of a relationship akin to marriage".

51. *The Constitutional Court in Bwanya thus concluded that it was no longer correct in law to draw a distinction between reciprocal support duties that arose by autonomic [presumably this was meant to read "automatic"] operation of law as an invariable consequence of marriage and support duties that arose by agreement in the context of permanent life partners.*

(Emphasis supplied).

[36] Accordingly, on the applicant's own version, there is in any event no need to develop the common law. This has already been done in *Bwanya*. But she appears to misunderstand the extent of the further development in that case, and seems to suggest that she must limit herself to proof of an "agreement". We return to this below.

[37] The *amicus* provided narratives of women describing the circumstances and reasons behind their life-partnerships to illustrate the extent of intersectional discrimination absent legislative protection. We have no quibble that many people in this country are currently victims of such discrimination and that the majority are women who inter alia lack equal bargaining power. But this has already been explicitly recognised by our courts, most recently by the Constitutional Court in *Bwanya*.¹⁹

'At the outset, I must say there is no question that some opposite-sex couples do exercise a free choice to cohabit as life partners. That says nothing about many other couples in permanent life partnerships. Before us arguments were presented by virtually all those that are for the invalidation of section 2(1) that in many permanent life partnerships the choice not to marry is illusory. The WLCT presented evidence based on narratives by a number of women about what it

¹⁸ See fn 9 above.

¹⁹ At para [62].

was that underlay each of their permanent life partnerships. The reasons differed and included: the women's lack of bargaining power in the relationship; the dependence of women and children, if there be any, on the financial strength of the men in the relationships; and the mistaken belief by one or both partners in a permanent life partnership that they are in a legally binding "common law" marriage'.

[38] To put what was held in *Bwanya* in proper perspective it is necessary to quote directly from the judgment:

'[71] Since Volks²⁰ was decided, there has been a significant development in the common law. That development is key to answering this question [i.e. whether the institution of permanent life-partnership is deserving of constitutional and legal protection]. And it is the second of the two issues that opens a window for us not to follow Volks. The development came with the Supreme Court of Appeal judgment in Paixáo. I accept that the context in that matter was different. But – as I will show shortly – that matters not. As stated above, Paixáo concerned a dependants' action. It is plain that the familial nature of the relationship at issue was central to the Supreme Court of Appeal's conclusion on the prosecutability of the dependants' action by a surviving opposite-sex life partner against the Road Accident Fund. The nature of the relationship informed the development of the common law. The court held that "[t]he proper question to ask is whether the facts establish a legally enforceable duty of support arising out of a relationship akin to marriage...". The fact that the duty of support arose from an agreement took a back seat. And that this was so is plain because I cannot imagine that a court would recognise a dependants' action where friends had similarly assumed – through agreement – reciprocal duties to support each other. What took centre stage in Paixáo was the fact that the duty existed, and it existed in a familial setting. And it is that familial and spouse-like relationship that made it necessary that the right be afforded legal protection. To the court, public policy as undergirded by constitutional values dictated this. With this development, it seems to me it can no longer be fitting to distinguish the duty of support existing

²⁰ *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

in the two categories of familial relationships (i.e. marriage relationship and permanent life partnership) purely on the basis that one arises by operation of law and the other arises from agreement. Today it would simplistic to continue to hold that view...”

(Emphasis supplied).

[39] The Constitutional Court also: (a) made clear that problems associated with proving the existence of permanent life-partnerships are not insurmountable; (b) identified factors which, amongst others, may be taken into account in determining whether the existence of a life-partnership has been proven; and (c) clearly indicated that evidence is required to prove the existence or otherwise of the life-partnership in issue.

[40] To sum up: we are not persuaded, given the approach adopted by the applicant in this matter, that we are in a position to make a properly informed decision about whether the common law development she seeks is required. Nor are we persuaded that development of the common law in the manner proposed by her is necessary or appropriate.

[41] The applicant already has a common law remedy and her entitlement or otherwise to maintenance rests squarely on that remedy. She must first prove facts establishing that the duty of support existed, and that it existed in a familial setting. If proven, her right to legal protection will be established. The pending action affords her the perfect opportunity to do so. It is in that forum that the fundamental dispute between the parties – whether or not a permanent life-partnership existed – can be fully canvassed, and the trial court will be ideally placed to make that factual finding. It is therefore also from that factual finding that her entitlement or otherwise to maintenance, and the extent and duration thereof, will flow.

[42] In reaching these conclusions we make it clear that they pertain only to the particular case presented to us by the applicant. Our conclusions are most certainly not intended to be of some broader implication or consequence. It thus of course remains open to anyone to approach court for declaratory relief of the nature which the applicant

has sought in this matter and it is hoped that, should that occur, this judgment may provide assistance as to the manner in which such an approach should be made.

The third issue: whether the applicant should succeed in her claim for interim maintenance and a contribution towards her costs.

[43] On the case advanced by the applicant the interim relief for maintenance and a contribution towards costs was squarely based on a finding in her favour for final declaratory relief. Given our conclusions on that issue that is really the end of the matter before us. To this we add that counsel for the applicant correctly did not suggest that a claim for a contribution towards costs somehow arises separately from a duty of support, this being the trite legal position.

[44] However we briefly deal with two points raised on her behalf. The first is her reliance (raised for the first time in oral argument) on *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others ('Eskom')*²¹ where the Constitutional Court held, inter alia, that there is no impediment to a court finding that '*...prima facie there is enough pointing to the determination of the legal question in the applicant's favour in the envisaged later proceedings*' to ground a basis for interim relief.²² Counsel for the applicant submitted, correctly in our view, that the effect of *Eskom* is that an interim interdict may be granted pending the determination of final relief on a legal issue.

[45] But this does not assist the applicant for the reason that she herself insisted, despite a pending action for substantially the same relief, that we determine that final relief (the declarator) upfront so that she could pin the basis for her interim relief on that final relief.

[46] The second is the submission made on her behalf that, unless this court comes to her assistance on a *pendente lite* basis, she will be left '*destitute*'. This submission was made in the face of the following pertinent common cause facts. On 27 October 2022 the applicant obtained an interim order in the Eastern Circuit Local Division in respect of the children's maintenance for payment of: (a) R60 000 per month cash;

²¹ 2022 [ZACC44], delivered on 23 December 2022.

²² At para [251].

(b) all of their educational expenses; (c) all of their medical expenses; and (d) the rental of R28 500 per month as well as the monthly utilities in respect of the home in which she and the children reside. In addition her father has tendered R750 000 as security in the event of this court awarding her interim maintenance.

[47] Leaving aside various other factors on the papers, which we need not determine, this is not the picture of someone who will be left destitute pending finalisation of the pending action. To this we add that rule 37A(1) of the uniform rules of court makes provision for a matter to be referred to judicial case management at the request of a party at any stage after a notice of intention to defend is filed. This provides the applicant with the opportunity to pursue an expedited process under judicial case management to secure (with leave of the Acting Judge President) a preferential date for trial.

The dissenting judgment

[48] In having regard to the dissenting judgment, we note that it is stated that:

[59] In this case, the respondent conceded under oath that he was in a permanent romantic relationship with the applicant for nine years. It is so that the applicant only raised this latter issue in the form of a replying note with the leave of the court. The respondent was allowed to deal with this allegation and declined to do so. Thus, this allegation is left untouched and must be accepted. Given the nature of this application (and taking into account, among other things, the case studies admitted into the record by the amicus), I would have called for the production of all the proceedings in the George Court. However, the majority in this connection overruled me.'

[49] The inference is then drawn from the above apparent concession that the respondent's position will probably worsen at the trial.

[50] We respectfully disagree. The replying note was an indulgence afforded to the applicant's counsel to file written argument in reply. It was not an invitation to introduce new facts extracted from separate proceedings that are not before us. Furthermore, the applicant's counsel elected to selectively quote from the respondent's affidavit and not

to attach the relevant affidavit wherein the concession was purportedly made.²³ In the absence of the full record, more particularly the affidavit wherein the concession was allegedly made being placed properly before us, we are equally unable to properly contextualise this and refrain from speculating thereon.

[51] In addition, a *'permanent romantic relationship'* is not synonymous with a permanent life partnership wherein the parties undertook reciprocal duties of support to one another within the context of a familial setting. Our understanding of the case law referred to herein is that a *permanent romantic relationship'* does not per se equate to proof of the assumption of a reciprocal duty of support in a familial setting.

Costs

[52] Having given the matter careful consideration it is our view that it would not be in the interests of justice to mulct the applicant with a costs order despite her lack of success. She clearly relied on legal advice throughout; she should be permitted to use the security offered by her father of R750 000 to advance her case in the pending action so as to ensure, as far as reasonably possible, equality of arms at the trial; and the respondent is, on his own version, a man of substantial means.

[53] In the result the following order is made:

'The application is dismissed with no order as to costs.'

J I CLOETE
H M SLINGERS

WILLE, J: (*dissenting*)

Introduction

[54] I have read my colleagues' considered and thorough majority judgment. While I agree with most of their reasoning, I would have granted a different order in the result. This is primarily because, in my respectful view, this is a matter mainly consisting of

²³ The relevant portion of the replying note reads: *'We respectfully submit that the Respondent's contentions that his life-partnership with the Applicant was somehow not serious or permanent, is without merit and not honest. In this regard, we refer this Honourable Court to the Respondent's own allegation in his application in the George High Court, in which he describes his relationship with the Applicant as "a permanent romantic relationship...for the past 9 years."*

constitutional ingredients and revolves around the granting only of interim financial relief to the applicant.

[55] When dealing with issues with a constitutional flavour, a court must guard against applying 'black-letter' law. I believe that the focus should instead be on the actual wrong that needs to be remedied. The eloquent reasoning in the majority judgment in *Eskom* fortifies my view in which it was held that:

'... I see no legal impediment to a judge in such circumstances reaching a conclusion that says prima facie there is enough pointing to the determination of the legal question in the applicant's favour in the envisaged later proceedings...'

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Overview

[56] The applicant and the respondent were involved in a serious romantic relationship for over nine (9) years. Three (3) minor children were born in this relationship. The applicant contends that the respondent took care of all her and the minor children's maintenance needs and that they were entirely financially dependent on the respondent. I will, in due course, elaborate on the issue of dependency as this is but one of the critical constitutional ingredients that require the application of a constitutional lens for a just determination of this matter. An amount of approximately R100 000,00 per month was historically paid to the applicant by the respondent. These funds she used towards household expenses and maintenance. A trust paid the rent for the former family home. The trust is under the respondent's control. The applicant and the minor children are, *inter alia*, also beneficiaries of this trust.

[57] The relationship between the parties came to an end just more than a year ago. The applicant feared terminating their relationship as the respondent threatened that she would be destitute if she left him.

[58] Following the termination of the relationship, the respondent has: (a) drastically reduced the monthly amount paid to the applicant; (b) threatened to cancel the lease in

²⁴ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZA CC 44 para [251].

respect of the former family home, and (c) launched an application threatening to take the children away from the applicant.²⁵

[59] In this case, the respondent conceded under oath that he was in a permanent romantic relationship with the applicant for nine years. It is so that the applicant only raised this latter issue in the form of a replying note with the leave of the court. The respondent was allowed to deal with this allegation and declined to do so. Thus, this allegation is left untouched and must be accepted. Given the nature of this application (and taking into account, among other things, the case studies admitted into the record by the amicus), I would have called for the production of all the proceedings in the George Court. However, the majority in this connection overruled me.

[60] The case for the applicant is that she was in a permanent life partnership with the respondent, which resulted in a reciprocal duty of support. The applicant says the permanent life partnership was established, among other things, by the following: (a) the parties were involved in a romantic relationship for over nine (9) years; (b) the parties took part in a ceremony akin to a wedding; (c) three minor children were born from their partnership; (d) they shared a common home for over seven (7) years; (e) the general public believed their relationship to be a marriage; (f) the parties referred to each other as husband and wife; (e) the respondent provided financial support to the applicant and maintained the applicant; (f) the parties shared responsibility for the upkeep of their common home following their respective means; (g) the parties provided emotional support, love and affection to each other and; (h) the applicant attended to raising the children born of their relationship.

[61] The applicant now finds herself in a challenging position of needing more recourse to claim interim financial relief from the respondent. The respondent denies that he owes the applicant any duty of support and refuses to contribute towards her maintenance. The applicant has no assets and income and cannot make ends meet without the respondent's financial assistance.

²⁵ This was heard in the Civil Circuit Court held at George (the 'George' Court).

[62] The common law recognizes a reciprocal legal duty of support between spouses during the subsistence of a marriage, and it is regarded as an invariable consequence of marriage. Thus, following the breakdown of a marriage and the institution of divorce proceedings and before its termination, spouses in marriages can enforce this duty of support on an interim basis utilizing the procedures provided for in the court rules. However, parties in life partnerships are left with no remedy regarding interim financial relief during the subsistence and following the termination of their relationships.

[63] There are pending action proceedings against the respondent in which the applicant avers that the relationship endured with the respondent constituted a permanent life partnership. Accordingly, the applicant's case is that this court is encouraged to develop the common law in a manner that gives effect to the extent that the common law and legislation do not adequately do so. This must be done by recognizing a legal duty of support for unmarried permanent life partners following the termination of the said life partnership.

[64] To achieve this, the applicant launched an application for interim maintenance, pending the determination of the action, as well as a contribution to her costs in pursuing the action. The applicant advances that she has no alternative remedy to enforce her entitlement to maintenance from the respondent following the termination of their life partnership. In summary, the applicant advances that she cannot afford to wait until the termination of the pending action as she will be left destitute in the interim, and she has no other funds to prosecute her maintenance claim in the pending action. She avers that she has taken extensive loans from family and friends in the interim to assist with her dire financial position.

Relief

[65] The applicant seeks an order that this court develops the common law declaring that partners in unmarried opposite-sex permanent life partnerships, in which the partners had undertaken reciprocal duties of support during the life partnership, alternatively factually reciprocally supported each other, are entitled to claim maintenance from one another following the termination of the life-partnership. This is insofar as the said life partner cannot provide for this from his or her means and earnings.

[66] Further, pending the final determination of the action between the parties, the respondent is ordered to maintain the applicant as follows, namely by the payment to the applicant in an amount of R56 000,00 per month as cash maintenance and bearing the costs of retaining the applicant on her current medical aid scheme. In addition, the applicant seeks an initial contribution towards the costs in the pending action in the amount of R750 000,00.

[67] The applicant has tendered security for the repayment of these amounts should the court dealing with the trial action find that the applicant and the respondent were not in an unmarried opposite-sex permanent life partnership and that no duty of support falls on the respondent to pay any maintenance to the applicant. The respondent believes that the security tendered by the applicant needs to be improved.

Consideration

[68] One of the core issues to be considered is whether it is appropriate for the development of the common law to be determined in this application for interim financial relief. The respondent contends that it is inappropriate because it is a question of fact whether a legal duty of support arises out of a permanent life partnership. The respondent's case is that a duty of support arises from the facts giving rise to a contract to support. The respondent advances that unlike in a marriage, where the existence of the marriage is capable of ready determination regarding a marriage certificate and where the consequences thereof flow by operation of law, a permanent life partnership, and the nature of the obligations undertaken in the partnership must be proved concerning the partners' agreement and these facts cannot simply be presumed or be shown on a *prima facie* basis.

[69] The applicant avers that, on the respondent's version, a permanent-life partnership existed between the applicant and the respondent. The applicant argues that if established, the duty of support between life partners during the subsistence of the life partnership is implied as a matter of law from the existence of the said life partnership.

[70] This must be considered against the objective of interim relief, which is to restore the *status quo* between the parties pending the action. The court must make that legal determination before granting any interim relief. Put another way, it is advanced that the court cannot postpone the decision on the legal issues because the court is obliged to decide the legal issues as to whether the common law should be developed in the manner sought and whether the legal duty of support between life partners falls to be developed in our law.

[71] By elaboration, the applicant contends that these legal issues require a final determination. This notwithstanding the facts of the life partnership between the applicant and the respondent are subject to a *prima facie* determination at this stage. To succeed on this score, the applicant avers that she needs only to establish the following on a *prima facie* basis, namely, that: (a) a life partnership existed between her and the respondent; (b) the respondent maintained her during the subsistence of the life partnership; (c) the respondent is capable of maintaining her according to the standard of living approximating that which they enjoyed during the permanent life-partnership and; (d) she is unable to maintain herself according to the standard of living approximating that which they enjoyed during the permanent life-partnership. The facts establishing whether or not the applicant and the respondent were undoubtedly in a permanent life partnership at this stage of the litigation need only be determined on a *prima facie* basis. In a recent case in Kenya involving cohabitation and the legal consequences thereof, the court remarked that:

*'...courts could presume the existence of any fact which is thought likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of a particular case.'*²⁶

[72] The legal issue requires a final determination because there is no alternative remedy, and the applicant will suffer prejudice if the application is not granted. The prejudice the applicant will suffer significantly outweighs the prejudice the respondent will suffer if the interim financial relief is granted. Thus, irreparable harm is established.

²⁶ *Mnk v Pam Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) page 3 at para [3].

This argument is, to some extent, fortified by the security the applicant's father tendered if the trial court eventually finds that no life partnership existed between the applicant and the respondent. Finally, it must be so that discretion vests in this court to grant the interim financial relief sought by the applicant. On the issue of discretion in these circumstances, our jurisprudence indicates that:

*'...in the exercise of its discretionary power, the court may impose such terms as it may think fit upon the grant or refusal of interim relief...'*²⁷

[73] It is a common cause between the applicant and the respondent that affordability is not an issue in this application. Undoubtedly, the applicant was accustomed to a luxurious lifestyle while in a relationship with the respondent. The trigger for the reduction in maintenance paid to the applicant was the applicant's termination of the relationship.

[74] A core issue for me in this application is the issue of prejudice. It goes without saying that the applicant will suffer if the interim financial relief is not granted to her. This must be weighed against the prejudice the respondent will suffer if interim relief is granted.

[75] The applicant's father has tendered security for the amounts payable by the respondent (in the form of interim financial relief) if the applicant is unsuccessful in the pending action. It is contended that the applicant needs an adequate alternative remedy to enforce her entitlement to interim financial relief from the respondent following the termination of their life partnership. The point is that the applicant cannot afford to wait until the termination of the pending action, as she will be left somewhat destitute in the interim. Most importantly, she has no funds to prosecute her maintenance claim in the pending action.

[76] Equally important, for me, is the applicant's claim for a contribution towards her legal costs on an interim basis. I say this because the applicant has no means to fund the pending action as she has no assets and earns no income. She has thus far

²⁷ *Chopra v Sparks Cinemas (Pty) Ltd & another 1973 (4) SA 372 (D)* at 379 D to 380 A.

managed to pay a portion of her legal costs by borrowing money from friends and family, as evidenced by the loan agreements and the amounts received from her father and her friends.

[77] To the contrary, the respondent has conceded the affordability of the applicant's claims for purposes of this application. Moreover, the applicant will require the services of a forensic accountant in preparation for the trial. The respondent advances that the applicant can maintain herself, and she will accordingly require an industrial psychologist's services for the trial.

[78] The general constitutional approach to the development of the common law is that our courts are enjoined: (a) to determine what the existing common-law position is; (b) to consider its underlying rationale; (c) to enquire whether the current common-law position is constitutionally offensive; (d) if it does so offend, consider how development ought to take place and; (e) to consider the broader consequences of the proposed change on the relevant area of the law.²⁸

[79] When dealing with the development of the common law within a constitutional context, regard should be had to all the provisions of our constitution that may find application, and the enquiry should be holistically addressed. The issue is whether the interpretation contended for by the applicant would serve the integrated and wholesome nature of equality as envisaged by our constitution. I hold the view that it would.

[80] I am supported mainly in my view for developing the common law in these circumstances by the penchant remarks and the conclusion drawn by our previous Chief Justice in the minority judgment in *Bwanya*.²⁹ He says the following:

*'...The "exclusion" of permanent life partnerships strikes me as something that could be dealt with on an incremental basis by developing the common law to meet the identifiable needs...'*³⁰

²⁸ *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) para [39].

²⁹ *Bwanya v The Master of the High Court and Others* 2022 (3) SA 250 (CC).

³⁰ *Bwanya v The Master of the High Court and Others* 2022 (3) SA 250 (CC) para [137] F-G.

[81] The applicant contends that insofar as the common law does not currently recognize a legal duty of support between life partners during the subsistence of the life-partnership, this lack of recognition is constitutionally unacceptable because it discriminates based on both marital status and gender. Thus, it constitutes unequal protection before the law. As a matter of pure logic, it must be so that many partners find themselves in positions like the applicant and are left without legal recourse when their life partnership terminates. The discrimination here maintains the traditional power structure in which a male partner dictates the nature of the relationship and, therefore, the consequent entitlement to legal benefits flowing from the relationship.

[82] The issue of choice is limited to either getting married with legal benefits or remaining unmarried without them. This is also based on the incorrect assumption that people in long-term permanent relationships make an informed choice to forego the legal benefits of marriage. It must be so that people in long-term cohabitation relationships harbour the belief that their relationships have beneficial legal consequences. The discrimination is further entrenched in the one-dimensional formulation of choice because it does not capture the social and legal complexities of unmarried intimate relationships.

[83] This calls for an analysis of our jurisprudence cited in the argument on behalf of the respondent to the objections to developing the common law. I will now deal briefly with recent developments in our law concerning some of what I believe are the most significant case authorities.

[84] In the minority judgment in *Volks*³¹, it was indicated that there are two groups of cohabitants whose duties to support one another deserve legal protection:

*'...The first would be where the parties have freely and seriously committed themselves to a life of interdependence marked by express or tacit undertakings to provide each other with emotional and material support...'*³²

³¹ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

³² *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para [214].

[85] The legal duty of support here is based upon recognizing and enforcing the parties' undertakings or agreements. In the second group, the law recognizes that the duty arises:

*'...from the nature of the particular life partnership itself. The critical factor will be whether the relationship was such as to produce dependency for the party who, in material terms at least, was the weaker and more vulnerable one (and who, in all probability, would have been unable to insist that the deceased enter into formal marriage). The reciprocity would be based on care and concern rather than on providing equal support in material or financial terms...'*³³

[86] Our law has developed somewhat in this connection culminating in the majority judgment in *Bwanya*.³⁴ The reasoning adopted in this judgment moved considerably forward (considering current norms and standards) in recognizing a legal duty of support between life partners during the subsistence of a life partnership. I say this because, in the familial context, people have moral, social and even religious obligations to behave in specific ways toward one another. Where they also act out of affection and altruistic motives, a contract to support cannot be the only reasonable explanation for maintaining their partner. It must be so that there is an overlap between contractual and familial relationships.

[87] Here, a legal duty of support comes into being. The overlap between contractual and familial relationships is reflected in the factors a court should consider in deciding whether a tacit contractual undertaking to support has been proved and which elements overlap with other factors developed by the courts in determining whether a qualifying life partnership has been proved or not. Again, our previous Chief Justice in *Bwanya* illustrates this point most eloquently as follows:

'...Common law principles will guide or help a court to determine whether it has been satisfactorily demonstrated that a "legally enforceable duty of support"

³³ *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at para [218].

³⁴ *Bwanya v The Master of the High Court and Others* 2022 (3) SA 250 (CC).

*exists in a permanent life partnership that bears at least some of the hallmarks of a marriage relationship...'*³⁵

[88] Thus, it is no longer appropriate to distinguish between reciprocal support duties that arise by autonomic operation of law as an invariable consequence of marriage and support duties that arise in the context of permanent life partners. It must be that permanent life partnerships deserve some constitutional and legal protection.

[89] As the common law does not currently recognize such a legal duty between life partners, such lack of recognition is unconstitutional as it discriminates on the grounds of marital status and thus is constitutionally offensive. What is required is a development of the common law to recognize a legal duty of support between life partners during the subsistence of the life partnership, which duty arises from the existence of the life partnership. The development of the common law will enable life partners to evoke the machinery to enforce maintenance obligations during the subsistence of the life partnership. If this duty was to be recognized, there can be no rational reason why such life partners should not also be entitled to claim maintenance from one another following the termination of the said life partnership.

[90] I say this because there have been significant judicial interventions regarding extending rights to life partners to claim maintenance following the death of one of the partners. Significant judicial interventions have also been made in recognizing different religious marriages and the 'marital' consequences thereof. Some of these previously excluded parties have now been brought into the fold.

[91] However, parties in life partnerships still need to be included regarding maintenance following the termination of their relationships. The current legal position of life partners and the lack of recognition of the rights of life partners, upon the termination of life partnerships, in comparison to spouses (as broadly defined), in all other marriages, is unequal and discriminatory.

³⁵ *Bwanya v The Master of the High Court and Others* 2022 (3) SA 250 (CC) para [138] G-H.

[92] I see an overwhelming need for the common law to be developed following the breakdown of a life partnership, and in the absence of any agreement reached between the parties regarding maintenance, permitting a court, having regard to the existing or prospective means of each of the partners, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the partnership, the standard of living of the parties before the termination, their conduct in so far as it may be relevant to the break-down of the partnership, to make an order which the court finds just in respect of the payment of maintenance until the death or remarriage of the partner in whose favour the order is given, whichever event may first occur.

[93] The respondent eloquently argues that this cannot be done on an interim basis as more facts may come to light after evidence is presented at the trial. This may be so, although I doubt the respondent's case will improve after the trial action considering what he stated under oath in the care and contact application.³⁶ Given what the respondent stated under oath, the respondent's position will probably worsen at the trial.

[94] Given the penchant reasoning adopted in the majority judgment in *Eskom*, I am inclined to grant interim financial relief.³⁷ I say this because this judgment clarifies the preferred legal position when dealing with temporary relief drenched with an overwhelming constitutional ingredient. In summary, a court should be alive and prepared to grant interim relief in situations that dictate that a constitutional wrong falls to be corrected. I say this because our courts are enjoined to develop the common law so that effect is given to discriminatory rights to the extent that legislation does not give effect to such rights.³⁸

[95] This is so because our courts must provide a remedy where there is discrimination, and no other remedy is available. Relationships between life partners have changed considerably over the last four decades on social, economic, and many other levels.³⁹ Given these developments, the issue for consideration is whether life partners should be afforded similar and equal protection to spouses insofar as

³⁶ This in the Civil Circuit Court held in *George*.

³⁷ *Eskom* at para's [194], [213], [244], [245], [246], [249] and [251].

³⁸ Section 8(3)(a) of the Constitution of the Republic of South Africa.

³⁹ Since the Divorce Act, 70 of 1979.

maintenance is concerned. Our courts are the protectors and expounders of the common law and share an inherent jurisdiction to:

*'...refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society...'*⁴⁰

[96] Put in another way, the absence of any protection for life partners undoubtedly constitutes unfair discrimination against a group that has been traditionally disadvantaged and marginalized. Marital status and gender are listed grounds of discrimination, and thus discrimination against unmarried, co-habiting women is presumed to be unfair. Our courts are vested with the power to formulate an entirely new remedy and procedure in circumstances where the legislature has failed to do so.⁴¹

[97] Another issue which bears scrutiny is whether maintenance for spouses upon divorce has any foundation in our common law. Historically, it was generally accepted that, save in terms of an agreement between spouses, the courts had no power to award maintenance on divorce. Uncertainty remained until this position was finally resolved by way of legislative intervention.⁴² Thus, the concept of maintenance for a spouse upon divorce predates legislation and has some originating features in our common law. This goes to the core complaint piloted by the respondent that the applicant should have challenged our current legislation by way of a frontal challenge. This is the issue that I will now attempt to deal with. In this case, the issue is that we need more legislation. The challenge here is not directed against the invalidity of any specific legislation.

[98] A frontal challenge to legislation would also involve challenging the constitutionality of multiple statutes and the definition of marriage. This was clearly illustrated in the minority judgment in *Bwanya* as follows:

⁴⁰ *S v Thebus and Another* 2003 (6) SA 505 (CC) at par [31].

⁴¹ *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA).

⁴² Section 10 of the Matrimonial Affairs Act 1953, now Section 7 of the Divorce Act, 70 of 1979.

‘...that the defect is not located within section 2(1), but flows from the fact that our law, as a whole, fails to govern the rights of people in permanent life partnerships. This is the real problem here...’⁴³

[99] A frontal challenge would ask the court to overhaul a system of interacting statutes to bring life partnerships within the scope of the current marriage legislation. Thus, to bring life partnerships into the fold of existing marriage legislation would require a far-reaching overhaul of the existing marriage legislation. The respondent contends the applicant must advance a full-blown frontal challenge to obtain interim financial relief. The applicant submits that what she requires is not a complex development of the common law.

[100] By contrast, the question of a frontal challenge to the existing marriage legislation is complex. The applicant argues that she only seeks similar protection to ‘spouses’ upon terminating a life partnership insofar as maintenance is concerned. Further, the applicant is not seeking similar rights to spouses insofar as a division, forfeiture or redistribution of assets is concerned. It is not the applicant’s case that she wants equal rights to spouses in all respects and for her life partnership to be considered a marriage for all intents and purposes.

[101] On the contrary, she only seeks the same protection awarded to spouses upon divorce insofar as maintenance is concerned. The appropriate legislation regulating life partnerships may be the perfect solution in the fullness of time. Undoubtedly, in this case, it would have been desirable if the unconstitutional situation had been resolved by legislative intervention without litigation. This has yet to happen despite the passage of an inordinate period. In the circumstances, the power to protect constitutional rights is conferred upon our courts with the discretion to reflect on the required development.

[102] The factors that our courts must consider in deciding whether a life partnership, in which reciprocal duties of support arose during the partnership, reflect a mixture of factors that indicate the conclusion of a tacit contract and other factors more indicative of the communities’ legal convictions. The applicant’s case is that she was under the

⁴³ *Bwanya v Master of the High Court and Others* 2022 (3) SA 250 (CC) at [192].

incorrect impression that she had some rights under the permanent life partner relationship between herself and the respondent. The applicant says that she thought she had some rights under the type of relationship she was in and that the contract proposed by the respondent would take even those rights away from her and leave her in a worse position.

[103] The applicant considered her relationship status a type of marriage under which she had acquired some rights and protections. The respondent needs to engage extensively with this factual position. Most importantly, she was in a worse bargaining position than the respondent. I say this because: (a) she did not earn an independent income; (b) she had no assets of her own; (c) she was a mother of three young children, and (d) she was entirely financially dependent on the respondent.

[104] Accordingly, the applicant's case is that the duty of support in life partnerships goes well beyond undertakings (although there are elements of undertakings of reciprocal duties of support present in her relationship with the respondent). The applicant and the respondent partook in a wedding ceremony abroad akin to a wedding. They manifested their intention to be bound together in a permanent relationship in the presence of witnesses. They received a wedding certificate.

[105] The fact that the applicant could borrow funds does not detract from her right to claim maintenance, nor does this morph into an alternative remedy available to her. No doubt it would be safer and more appropriate to decide the issue of the existence or not of the life partnership between the applicant and the respondent at the trial. However, given the security offered by the applicant, I see no reason not to grant interim financial relief to the applicant. The respondent advances that the security tendered needs to be increased. The court's registrar may determine this dispute if the parties cannot agree on the amount of security tendered. This is a manageable hurdle to the interim relief being granted.

[106] I need to deal with some of the issues raised by the *amicus*. It is submitted that maintenance was traditionally developed through common law developments. On this, I agree. In addition, the legislature has taken steps to address the refusal to develop

specific areas of the common law relating to maintenance.⁴⁴ This does not mean that a court cannot develop the common law in the present circumstances.

[107] If the legislature eventually decides to enact different legislation from the development of the common law, it is free to do so. I cannot envisage any legislative developments placing the applicant in a worse position than she currently finds herself in. I say this because any legislative development will always be subject to constitutional scrutiny and validity.

[108] The *amicus* produced invaluable case studies showing the different faces of women who may need to approach the courts for similar relief. These case studies show that many women referenced in the case studies and many others are left with the choice to invariably remain in unhealthy or unhappy relationships or be left without a home or means of support. It is argued that providing redress to these many faceless women will be a step in the right direction to redress the most vulnerable women in our society.

[109] Finally, it was advanced that providing redress to the applicant, in this case, would significantly impact the plight of these many faceless women in our society. Thus the case between the applicant and the respondent cannot be viewed in isolation. On this, I also agree.

[110] I say this because every judicial and legislative development since being introduced has provided financial relief to women left vulnerable at the termination of their intimate relationships. Further, it was eloquently advanced on behalf of the *amicus* that it is common for a court to borrow from the legislature's language without a frontal challenge to the legislation. The applicant is not seeking a divorce or any consequential proprietary relief. The applicant seeks only interim financial relief.

[111] Thus, it is submitted that the applicant, in these circumstances, would face some insurmountable hurdles in challenging specific legislation in isolation.⁴⁵ Again, on this, I agree. I can see no difficulty in a court borrowing from the language of existing

⁴⁴ By way of example, by the enactment of the Maintenance of Surviving Spouses Act, 27 of 1990.

⁴⁵ Namely section 7(2) of the Divorce Act, 70 of 1979.

legislation to provide a limited right in specified circumstances to allow for the applicant and those many different faces of women referenced in the case studies presented by the *amicus* to claim interim financial relief from their permanent life partners.

[112] There are adequate safeguards as a court hearing such a claim will consider, among other things, the length of time since the alleged termination of the relationship in deciding whether or not to exercise its discretion in favour of a claimant. The court will also consider all the evidence to decide whether and when a life partnership existed and for how long it subsisted. This is what courts do.

[113] In conclusion, the following:

*'...The protective rationale of family law buttressed by the constitutional goal of achieving substantive equality requires that economically vulnerable dependent parties should not be left impoverished at the termination of dependence-inducing relationships...'*⁴⁶

[114] In all the circumstances, I would have made an order in the following terms, namely:

1. That it is with this declared that partners, in life partnerships in which the partners had, during the existence of the life partnership, undertaken to each other reciprocal duties of support, alternatively factually reciprocally supported each other, are entitled to claim interim financial relief from one another, following upon the termination of the life partnership.
2. The respondent shall pay the applicant the sum of R45 000,00 per month *pendente lite* in cash maintenance for the applicant. The first payment shall be made on or before 1 April 2023 and monthly after that on or before the 1st day of every subsequent month, free of deduction or set-off, by way of electronic funds transfer into a bank account as the applicant may nominate from time to time, in

⁴⁶ Amanda Barratt – “In Which the Partners Undertook Reciprocal Duties of Support” – A Discussion of the Phrase as Used in *Bwanya v Master of the High Court, Cape Town*, at page 22. PER/PELJ 2022(25).

writing. The amount set out above shall increase annually each year, following the percentage increase in the headline inflation Consumer Price Index, as published by Statistics South Africa, during the preceding year, the first increase effective from 1 April 2024.

3. The respondent shall bear the costs of retaining the applicant on the current medical aid scheme and shall bear the costs of all reasonably incurred medical, dental, surgical, hospital, orthodontic and ophthalmological treatment required by the applicant, any sums payable to a physiotherapist, practitioner of holistic medicine, psychiatrist/psychologist and chiropractor, the cost of all prescribed medication and the provisions where necessary of spectacles or contact lenses. The respondent shall pay such expenses promptly within seven days of invoice or shall reimburse the applicant for any expenses she may have paid within seven days of providing him with copies of the relevant invoices or receipts.

4. The respondent shall pay an initial contribution of R350 000,00 *pendente lite* towards the applicant's legal costs in the trial proceedings. Such sum shall be paid directly to the applicant's attorney of record as follows:

a. R200 000,00 by no later than the last day of April 2023.

b. R150 000,00 by no later than the last day of July 2023.

5. The applicant shall provide security to the respondent for the maintenance amounts paid to her *pendente lite* and the amounts paid as a contribution towards her costs *pendente lite* in the amount and form as agreed between the parties, alternatively in the form and the amount as directed by the registrar of this court.

6. The costs of and incidental to this application shall stand over for later determination in the trial action.

E.D. WILLE

Judge of the High Court

Cape Town

For applicant: Adv B Pincus SC and Adv A Thiar

Instructed by: Maurice Phillips Wisenberg (Mr B Preller)

For respondent: Adv B Gassner SC, Adv J Bleazard and Adv L Bezuidenhout

Instructed by: BDP Attorneys (Mr G De Beer)

For Amicus Curiae: Adv A Christians

Instructed by: The Women's Legal Centre Trust