**PAIXÃO v ROAD ACCIDENT FUND Reciprocal duty of support unmarried persons**

[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.

**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.**

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**ORDER**

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**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.’

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**JUDGMENT**

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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

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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

**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 nonpecuniary

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).

4

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

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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.

6

[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*

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.

7

*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 also towards 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.

8

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.

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.

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[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

(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.

10

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.

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.

11

[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 support37 – an issue that arose in *Volks NO v*

*Roberson*.38

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 1996. This Act puts same-sex and heterosexual unions on the

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[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

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.

13

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 agreement42 – the case advanced by the appellants.

Second, the purpose of the Maintenance Act43 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.

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.

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[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.

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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 extramarital

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.

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.

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[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.

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.

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[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 by 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.

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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.

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(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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**A CACHALIA**

**JUDGE OF APPEAL**

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