CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 241/20

In the matter between:

JANE BWANYA	Applicant
and	
MASTER OF THE HIGH COURT, CAPE TOWN	First Respondent
AVROM IAN ALLEN KAPLAN N.O.	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
ODETTE GILLIAN MENDELSOHN	Fourth Respondent
JEREMY VICTOR RESNICK	Fifth Respondent
JONATHAN MAURICE RESNICK	Sixth Respondent
CHARMAINE SUSAN SILOVE	Seventh Respondent
LOUIS GERSHON HERMAN	Eighth Respondent
DAVID LEON RABINOWITZ	Ninth Respondent
JOEL SIMON RABINOWITZ	Tenth Respondent
and	
WOMEN'S LEGAL CENTRE TRUST	First Amicus Curiae
COMMISSION FOR GENDER EQUALITY	Second Amicus Curiae

Neutral citation: *Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgment: Madlanga J (majority): [1] to [95]
Mogoeng CJ (dissenting): [96] to [151]
Jafta J (dissenting): [152] to [203]

Heard on: 16 February 2021

Decided on: 31 December 2021

ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Western Cape Division, Cape Town and on direct appeal from the High Court of South Africa, Western Cape Division, Cape Town the following order is made:

1. The omission from the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 (Maintenance of Surviving Spouses Act) of the words "and includes 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" at the end of the existing definition is unconstitutional and invalid.
2. The definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act is to be read as if it included the following words after the words "dissolved by death"—

   "and includes 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."

3. The omission from the definition in section 1 of the Maintenance of Surviving Spouses Act of the following, at the end of the existing definition, is unconstitutional and invalid—

    (a) "Spouse" for the purposes of this Act shall include a person in a permanent life partnership in which the partners undertook reciprocal duties of support;

    (b) "Marriage" for the purposes of this Act shall include a permanent life partnership in which the partners undertook reciprocal duties of support.

4. Section 1 of the Maintenance of Surviving Spouses Act is to be read as though it included the following at the end of the existing definition—

    (a) "Spouse" for the purposes of this Act shall include a person in a permanent life partnership in which the partners undertook reciprocal duties of support;

    (b) "Marriage" for the purposes of this Act shall include a permanent life partnership in which the partners undertook reciprocal duties of support.

5. The orders contained in paragraphs 1, 2, 3 and 4 are suspended for a period of 18 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.

6. Should Parliament not enact legislation as contemplated in paragraph 5, the order of invalidity that shall come into operation 18 months after the date of this order shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date upon which the order of invalidity comes into effect.

7. The omission in section 1(1) of the Intestate Succession Act 81 of 1987 after the word "spouse", wherever it appears in the section, of the words

"or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support" is unconstitutional and invalid.

8. Section 1(1) of the Intestate Succession Act is to be read as though the following words appear after the word "spouse", wherever it appears in the section: "or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support".

9. The orders contained in paragraphs 7 and 8 are suspended for a period of 18 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.

10. Should Parliament not enact legislation as contemplated in paragraph 9, the order of invalidity that shall come into operation 18 months after the date of this order shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date upon which the order of invalidity comes into effect.

11. In the event that serious administrative or practical problems are experienced as a result of the coming into operation of paragraphs 1, 2, 3, 4, 7 and 8 of this order, any interested person may approach this Court for a variation of this order.

12. The Minister of Justice and Correctional Services must pay the costs of the applicant in this Court, such costs to include the costs of two counsel.

JUDGMENT

MADLANGA J (Khampepe J; Majiedt J, Pillay AJ, Theron J and Tlaletsi AJ concurring):

> "[S]hould a person who has shared her home and life with her deceased partner, born and raised children with him, cared for him in health and sickness, and dedicated her life to support the family they created together, be treated as a legal stranger to his

> estate, with no claim for subsistence because they were never married? Should marriage be the exclusive touchstone of a survivor's legal entitlement as against the rights of legatees and heirs?"[1]

Introduction

[1] Census data of 2016 reveals that approximately 3.2 million South Africans cohabit outside of marriage and that this number is increasing steadily.[2] The matter before us concerns two issues. The first is whether a surviving partner in a permanent heterosexual life partnership in which the partners had undertaken reciprocal duties of support is entitled to claim maintenance under the Maintenance of Surviving Spouses Act.[3] Currently the law has been interpreted to exclude permanent heterosexual life partners from claiming maintenance from the estates of their deceased partners.[4] The questions raised by Sachs J in *Volks* are at the centre of this first issue. The second issue is whether a surviving partner of a permanent opposite-sex life partnership[5] in which the partners had undertaken reciprocal duties of support is entitled to inherit from the estate of the deceased partner under the Intestate Succession Act.[6]

[2] These issues arise from a judgment of the Western Cape Division of the High Court. The applicant, Ms Jane Bwanya, seeks leave to appeal directly to this Court against the High Court's dismissal of a challenge to the constitutionality of the definition of "survivor" under section 1 of the Maintenance of Surviving Spouses Act. The challenge relates to the fact that the definition refers to a surviving "spouse" in a "marriage" dissolved by death. Based on jurisprudence that I will deal with later, the reference in this definition to "spouse" and "marriage" effectively excludes partners in

[1] These are the words of Sachs J in his dissent in *Volks N.O. v Robinson* [2005] ZACC 2; 2009 JDR 1018 (CC); 2005 (5) BCLR 446 (CC) (*Volks*) at para 148.

[2] See Community Survey 2016: An exploration of nuptiality statistics and implied measures in South Africa.

[3] 27 of 1990.

[4] See the majority judgment in *Volks* by Skweyiya J and the concurring judgment penned by Ngcobo J, which – with the exception of Skweyiya J – is concurred in by all the Justices who make up the majority.

[5] I use permanent opposite-sex life partnership interchangeably with permanent heterosexual life partnership.

[6] 81 of 1987.

a permanent heterosexual life partnership in which the partners had undertaken reciprocal duties of support from an entitlement to claim maintenance in terms of the Maintenance of Surviving Spouses Act. Ms Bwanya is also asking us to confirm a declaration by the High Court that section 1(1) of the Intestate Succession Act is constitutionally invalid to the extent that it excludes surviving partners in a permanent heterosexual life partnership in which the partners had undertaken reciprocal duties of support from inheriting in terms of the Intestate Succession Act.[7]

Background

[3] The uncontroverted facts of this case reveal that Ms Bwanya, who is originally from Zimbabwe, and the deceased, Mr Anthony S Ruch, were involved in a relationship that comprised most, if not all, characteristics of a marriage. They met and entered into a romantic relationship in 2014. Later that year Mr Ruch asked Ms Bwanya to move in with him on a permanent basis. Ms Bwanya obliged. From then onwards they split their time between Mr Ruch's Camps Bay and Seaways properties. Ms Bwanya retained her place at the Meadows where she was employed as a domestic worker.

[4] Ms Bwanya's and Mr Ruch's friends were aware of the relationship. The pair used to accompany each other to various social gatherings. Mr Ruch introduced Ms Bwanya as his wife to his friends. They often hugged and kissed in the presence of other people. Mr Ruch referred to Ms Bwanya's brother as his brother-in-law. By October 2015 the partners were contemplating "cementing the relationship with a baby".

[5] Mr Ruch bought all the groceries and other household necessities and paid for all other household expenses, while Ms Bwanya provided him with love, care,

[7] High Court's Order No 2.2 says:

> "It is declared that:
>
> > 'section 1(1) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid insofar as it excludes the surviving life partner in a permanent opposite-sex life partnership from inheriting in terms of this Act.'"

emotional support and companionship. Mr Ruch assisted Ms Bwanya in her efforts to obtain a driver's licence. To this end, he paid for her driving lessons. He intended to buy her a car which she was also to use in a cleaning business they planned to start together.

[6] In November 2015 Mr Ruch proposed to marry Ms Bwanya. She accepted the proposal. Preparations to travel to Zimbabwe began so that lobola negotiations could commence and Mr Ruch could meet Ms Bwanya's family. These preparations entailed selling the Seaways property. The proceeds were to be used to pay lobola and purchase a vehicle for the trip to Zimbabwe. The plan was for the pair to get married after the trip.

[7] On 23 April 2016, two months before the scheduled journey, Mr Ruch passed away. In his will he had nominated his mother as the sole heir to his estate. However, his mother had predeceased him. She died in 2013.

[8] Ms Bwanya lodged two claims against Mr Ruch's estate in terms of the Administration of Estates Act.[8] They were for maintenance in terms of the Maintenance of Surviving Spouses Act and for inheritance in terms of the Intestate Succession Act. She based the claims on the fact that her permanent life partnership with Mr Ruch was akin to a marriage and that they had undertaken reciprocal duties of support towards each other.

[9] The second respondent, the executor of Mr Ruch's estate, rejected both claims. This, on the basis that under the two Acts Ms Bwanya did not qualify for the claimed benefits. Ms Bwanya challenged the constitutionality of section 2(1) of the Maintenance of Surviving Spouses Act and section 1(1) of the Intestate Succession Act at the High Court.[9] She argued that the two Acts are unconstitutional to the extent that

[8] 66 of 1965.

[9] As respondents, she cited the executor, the Master of the High Court, the Minister of Justice and Correctional Services and seven individuals who are Mr Ruch's relatives (fourth to tenth respondents).

they exclude surviving partners in permanent heterosexual life partnerships, where the partners had undertaken reciprocal duties of support, from claiming maintenance and inheritance from the estates of their deceased partners. The basis of the claim was that the exclusions under the two Acts were violative of Ms Bwanya's rights to equality[10] and dignity.[11]

[10] Before the matter was disposed of by the High Court, Ms Bwanya, on the one hand, and the executor and fourth to tenth respondents, on the other, entered into a settlement agreement, which was made an order of Court. In terms of this agreement Ms Bwanya was awarded a settlement figure of R3 million in full and final settlement of the two claims she had lodged against the estate. Despite the settlement, Ms Bwanya persisted in seeking an order declaring section 2(1) of the Maintenance of Surviving Spouses Act and section 1(1) of the Intestate Succession Act unconstitutional. After considering the question of mootness, the High Court decided to entertain this issue.

[11] The High Court dismissed the challenge to the constitutionality of the Maintenance of Surviving Spouses Act. In the main, it did this on the basis that it was bound by this Court's judgment in *Volks*. It adjudged the Intestate Succession Act

[10] Section 9 of the Constitution provides:

> "(l) 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.
>
> (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."

[11] Section 10 provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".

inconsistent with the Constitution and declared it invalid to the extent of the mentioned exclusion. It made a reading-in meant to address the shortcoming in this Act.[12] Ms Bwanya is now before us seeking, first, leave to appeal directly to this Court against the dismissal of the one challenge and, second, confirmation of the declaration of invalidity.

[12] The Women's Legal Centre Trust (WLCT) and the Commission for Gender Equality were admitted as amici curiae (friends of the Court).

[13] The confirmation proceedings are properly before this Court. That is so because it lies with it to make a final decision on the constitutional validity of Acts of Parliament. And it must confirm any declaration of invalidity made by the Supreme Court of Appeal, the High Court or a court of a status similar to that of the High Court before that declaration may take effect.[13] Thus we need to consider the questions of jurisdiction and leave to appeal only in respect of the challenge to the validity of the Maintenance of Surviving Spouses Act. But before doing so, there is another issue that we must deal with. Does the fact that Ms Bwanya was paid R3 million in settlement of her claims not render this challenge moot?

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[12] For completeness, I quote the whole of that part of the High Court order relating to the declaration of invalidity:

> "2.2 Section 1(1) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid insofar as it excludes the surviving life partner in a permanent opposite-sex life partnership from inheriting in terms of this Act;
>
> 2.3 The omission in section 1(1) of the Intestate Succession Act 81 of 1987 after the words 'spouse', wherever it appears in the section, of the words 'or partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support', is unconstitutional and invalid;
>
> 2.4 The Intestate Succession Act is to be read as though the word spouse, wherever it appears in the section – 'or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support'."

[13] This is provided for in section 167(5) of the Constitution. Also, section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

Mootness

[14] Mogoeng CJ crisply said a matter is moot "where issues are of such a nature that the decisions sought will have no practical effect or result".[14] And an applicant for leave to appeal may be nonsuited on this ground alone.[15] Section 16(2)(a)(i) of the Superior Courts Act[16] is in line with this well-established jurisprudential position. Once the settlement agreement was concluded, Ms Bwanya effectively got what she set out to achieve when she instituted the maintenance related prong of her application. That rendered the constitutional challenge that was integral to this prong moot as its determination would no longer have any practical effect. But that does not necessarily spell the end of the challenge.

[15] If interests of justice so dictate, this Court has a discretion to entertain a dispute that is moot.[17] In *Democratic Alliance* this Court said:

> "In *Langeberg* we said that we have—
>
> > 'a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require.'
>
> And in *Shuttleworth* we said—
>
> > 'to the extent that it may be argued that this dispute is moot . . . this Court has a discretion whether to hear the matter. Mootness does not, in and of itself, bar this Court from hearing this dispute. Instead, it is the interests of justice that dictate whether we should hear the matter.'"[18]

[14] *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35; 2020 (1) SA 428 (CC); 2019 (11) BCLR 1403 (CC) (*Democratic Alliance*) at para 16.

[15] Id.

[16] 10 of 2013.

[17] *Democratic Alliance* above n 14 at paras 17-8.

[18] Id.

[16] It cannot be gainsaid that the constitutional challenge is of great import. It affects a substantial number of South Africans, particularly vulnerable women. I hope to demonstrate that some of these women find themselves in permanent life partnerships not out of true choice. Also, comprehensive and well prepared arguments were advanced before us. I must conclude that it is in the interests of justice to determine this challenge.

Jurisdiction and leave to appeal on the maintenance challenge

[17] The maintenance challenge plainly raises constitutional issues and, therefore, engages our jurisdiction. I need not belabour this point.

[18] This challenge comes before us as an application for leave to appeal directly to this Court. In *United Democratic Movement* this Court held that a "direct appeal is certainly not available for the asking. Proof of exceptional circumstances . . . must demonstrably be established".[19] The challenge at issue is closely linked to the confirmation proceedings which we must entertain. The two were brought as one application. Although it is a relevant consideration, on its own this would most likely not be enough to tilt the scales. On both prongs of the application, Ms Bwanya's arguments are founded on the same rights, equality and dignity. The central theme that undergirds both is a permanent life partnership. And the arguments are interlinked. With all this in mind, the two prongs are – as it were – joined at the hip. It makes practical sense to entertain them together. Doing so conduces to a saving in time and costs. When discussing mootness, I did say that the issues at hand are of great import. And as will soon become apparent, there are reasonable prospects of success. Thus, it is in the interests of justice to grant leave to appeal directly to this Court.

[19] *United Democratic Movement v Speaker, National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at para 23.

A brief history on permanent life partnerships through the cases[20]

[19] Most of the judgments I am going to deal with under this heading are about permanent same-sex life partnerships. Understandably so. Later, in particular in the context of factors relevant to proving the existence of permanent life partnerships, the need to discuss these judgments will become apparent. Although these judgments and a parallel ad hoc legislative process[21] typify endeavours by the legal system to improve the legal difficulties encountered by same-sex couples, at the same time they bring to the fore where same-sex couples have been and, in many ways, continue to be. To some, their sexual orientation meant so little that they saw no impediment to same-sex couples extricating themselves from the legal difficulties facing them by simply contracting marriages with partners of the opposite-sex. An argument was made along these lines in *National Coalition for Gay and Lesbian Equality*.[22] Ackermann J rightly dismissed this as being "true only as a meaningless abstraction".[23] This attitude means the sexual orientation of members of the LGBTQ+ community is something they can switch on and off at will, and when it has been switched off, they can freely have sexual or conjugal relationships with people outside of the sphere of their sexual orientation.

[20] This discussion does not purport to be comprehensive.

[21] See *Du Toit v Minister of Welfare and Population Development* [2002] ZACC 20; 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 at para 32. See also section 27(2)(c)(i) of the Basic Conditions of Employment Act 75 of 1997 providing for family responsibility leave in the event of death of a "spouse or life partner"; section 1 of the Domestic Violence Act 116 of 1998 referring to the definition of "domestic relationship"; and the definition of "spouse" in section 1 of the Estate Duty Act 45 of 1955 which has been amended by section 3(1)(a) of the Taxation Laws Amendment Act 5 of 2001 and now provides that "'spouse', in relation to any deceased person, includes a person who at the time of death of such deceased person was the partner of such person . . . in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent".

[22] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 34 and 38.

[23] Id at para 38.

Of course, members of the LGBTQ+ community cannot *happily*[24] ignore their sexual orientation.[25]

[20] At this stage, I will deliberately leave out a discussion of *Volks*. Suffice it to say, the majority in this matter held that the exclusion of a surviving partner of a permanent heterosexual life partnership from an entitlement to claim maintenance under the Maintenance of Surviving Spouses Act does not constitute unfair discrimination.

[21] It was in *National Coalition for Gay and Lesbian Equality*[26] in the context of permanent same-sex life partnerships that this Court first pushed the barriers to the legal entitlement to spousal rights. At issue in that matter was the constitutional validity of section 25(5) of the Aliens Control Act.[27] That section "facilitate[d] the immigration into South Africa of the spouses of permanent South African residents but [did] not . . . afford the same benefits to gays and lesbians in permanent same-sex life partnerships with permanent South African residents".[28] Although the section did not define the word "spouse", the Court held that it was not reasonably capable of an interpretation that could encompass same-sex life partners.[29] The Court held that the exclusion from

[24] I say this in recognition of the fact that there must surely continue to be members of the LGBTQ+ community, as Smith – relying on Wood-Bodley ("Intestate Succession and Gay and Lesbian Couples" (2008) 125 *SALJ* 54) and De Ru ("A Critical Analysis of the Retention of Spousal Benefits for Permanent Same-Sex Life Partners After the Coming into Operation of the Civil Union Act 17 of 2006" (2009) 23 *Speculum Juris* 120) – says, who, because of persisting homophobia, may be "dissuade[d] . . . from publicly 'outing' themselves by marrying one another". See Smith "Intestate Succession and Surviving Heterosexual Life Partners: Using the Jurist's 'Laboratory' to Resolve the Ostensible Impasse that Exists after *Volks v Robinson*" (2016) 133 *SALJ* 284.

[25] See *National Coalition for Gay and Lesbian Equality* above n 22 at para 34.

[26] Id.

[27] 96 of 1991.

[28] *National Coalition for Gay and Lesbian Equality* at para 1.

[29] Here is how Ackermann J explained this at paragraphs 25-6:

> "The High Court correctly concluded that 'spouse' as used in section 25(5) was not reasonably capable of the construction contended for by the respondents. The word 'spouse' is not defined in the Act, but its ordinary meaning connotes '[a] married person; a wife, a husband.' The context in which 'spouse' is used in section 25(5) does not suggest a wider meaning. The use of the expression 'marriage' in section 25(6) and the special provisions relating to a person applying for an immigration permit and 'who has entered into a marriage with a person who is permanently and lawfully resident in the Republic, less than two years prior to the date of his or her application' is a further indication that 'spouse', as used in section 25(5), is used for a partner in a marriage. There is also no indication that the word 'marriage' as used in the Act extends any further than those marriages that are ordinarily recognised by our law. In this regard reference may be made to the recent House of Lords decision in *Fitzpatrick (A.P.) v Sterling*

the benefits afforded by section 25(5) of permanent same-sex life partners with permanent South African residents unjustifiably limits the rights to dignity and not to be discriminated against unfairly.[30] The unfair discrimination was on the intersecting grounds of sexual orientation and marital status.[31]

[22] *Satchwell*[32] concerned benefits accruing to Judges' spouses in terms of sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act.[33] The applicant, a High Court Judge, was in "an intimate, committed, exclusive and permanent relationship"[34] with her same-sex partner. Section 8 of the Judges' Remuneration and Conditions of Employment Act provided that the surviving "spouse" of a Judge is entitled to two-thirds of the deceased Judge's salary. Section 9 provided for payment to the "spouse" of a deceased Judge a gratuity payable to the Judge in terms of this Act. As had been held in *National Coalition for Gay and Lesbian Equality*, the same-sex partners in *Satchwell* were not spouses. This Court held that the exclusion of permanent

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Housing Association Ltd where 'spouse' likewise could not be given such an extensive meaning and *Quilter v Attorney-General* where the statute at issue did not define 'marriage' but the New Zealand Court of Appeal unanimously held that textual indications prevented the term from being construed to include same-sex unions.

Had the word 'spouse' been used in a more extensive sense in section 25(5) of the Act, it would have been unnecessary to provide specifically in section 1(1) that marriage 'includes a customary union'. It is significant that the definition of 'customary union' namely:

> '. . . the association of a man and a woman in a conjugal relationship according to indigenous law and custom, where neither the man nor the woman is party to a subsisting marriage, which is recognised by the Minister in terms of subsection (2);'

is based on an opposite-sex relationship. Under all these circumstances it is not possible to construe the word 'spouse' in section 25(5) as including the foreign same-sex partner of a permanent and lawful resident of the Republic. The applicants were accordingly not able in law to pursue successfully a non-constitutional remedy, based on such a construction of 'spouse'. Accordingly, the respondents' contention that the constitutional issue was not ripe for hearing was rightly dismissed by the High Court."

[30] Id at paras 58-60.

[31] Id at para 40.

[32] *Satchwell v President of Republic of South Africa* [2002] ZACC 18; 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

[33] 88 of 1989.

[34] *Satchwell* above n 32 at para 4.

same-sex life partners from the enjoyment of the benefits under sections 8 and 9 unjustifiably infringed the applicant's right not to be discriminated against unfairly.[35]

[23] In *Du Toit*[36] the applicants were partners in a longstanding lesbian relationship. They lived as if they were married in community of property. As a way of formalising their permanent life partnership, they had even held a commitment ceremony at which a lay preacher officiated. Section 17(a) and (b) of the Child Care Act[37] made it impossible for the applicants as a couple to adopt two young children that had lived with them for a while and who regarded them as their parents. In terms of section 17(a) joint adoption was allowed only in respect of "a husband and his wife", which the applicants were not. And in terms of section 17(b) a single applicant for adoption could legally adopt a child. If she or he was in a permanent life partnership, the other partner could not legally have the rights and obligations of parenthood. Before this Court[38] a constitutional challenge to, in the main, the non-availability of joint adoption to same-sex life partners succeeded on the basis that it unjustifiably infringed: the right not to be unfairly discriminated against on the grounds of marital status and sexual orientation;[39] the right to dignity;[40] and the paramountcy of a child's best interests.[41]

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[35] Section 9(3) of the Constitution outlaws unfair discrimination on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Section 9(5) provides that discrimination on any of the grounds listed in section 9(3) "is unfair unless it is established that the discrimination is fair". Consequently, courts have often said discrimination on any of these grounds is "presumptively unfair" (see *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC) at paras 73 and 94 and *Wilkinson v Crawford N.O.* [2021] ZACC 8; 2021 (4) SA 323 (CC); 2021 (6) BCLR 618 (CC) at para 78). In *Satchwell* the unfair discrimination was held to be on the ground of sexual orientation.

[36] *Du Toit v Minister of Welfare and Population Development* [2002] ZACC 20; 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006.

[37] 74 of 1983.

[38] The matter came before this Court for confirmation of a declaration of constitutional invalidity by the Pretoria High Court.

[39] Section 9(3) of the Constitution.

[40] Section 10 of the Constitution.

[41] Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child".

[24] In *J*[42] this Court declared constitutionally invalid section 5(1)(a) of the Children's Status Act.[43] The applicants were lesbian partners in a permanent life partnership. The second applicant gave birth to twins who were conceived through artificial insemination. The sperm was donated by an anonymous man. The ova were provided by the first applicant. The second applicant, who – although she did not provide the ova – physically gave birth to the twins, was registered as their mother. Section 5(1)(a) of the Children's Status Act precluded the registration of the first applicant as a parent of the children. The section was held to discriminate on the ground of marital status which was inextricably linked to the applicants' sexual orientation, both of which constitute presumptively unfair discrimination.[44]

[25] Like one of the two prongs of the instant application, *Gory*[45] was about the constitutional validity of section 1(1) of the Intestate Succession Act. This section affords heterosexual married couples intestate succession rights. This Court confirmed a declaration of constitutional invalidity by the Pretoria High Court at the instance of a surviving partner in a permanent same-sex life partnership. It did this because, as same-sex partners were not legally entitled to marry, their exclusion from benefits under section 1(1) of the Intestate Succession Act amounted to discrimination on the presumptively unfair ground of sexual orientation.[46] Another basis of invalidation was inconsistency with the right to dignity.[47]

[26] Despite the likely damper that *Volks* must have put on the development by courts of the rights of permanent heterosexual life partners, the Supreme Court of Appeal came

[42] *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC).

[43] 82 of 1982.

[44] *J* above n 42 at paras 13-4. The Court found no justification under section 36(1) of the Constitution.

[45] *Gory v Kolver N.O. (Starke and Others Intervening)* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC).

[46] Id at para 19.

[47] Id. For both infringements, the Court found no justification under section 36(1) of the Constitution.

up with a welcome innovation in *Paixão*.[48] Mrs Maria Angelina Paixão and Mr José Adelino Do Olival Gomes were in a permanent life partnership. They met in 2002. At the time Mr Gomes was in an unhappy marriage and he and his wife were living apart. His relationship with Mrs Paixão grew. As it did, so did his bond with her three daughters. When Mrs Paixão's first daughter got married, Mr Gomes paid for the wedding. The couple began to cohabit when Mr Gomes took ill in late 2003. Mrs Paixão took care of him. She was retrenched in 2004. Mr Gomes did not want her to work again and he undertook to support her and her children. He was the sole income earner and paid for everything in the household. In addition, he paid Mrs Paixão's second and third daughters' university and high school fees, respectively. He did all this because he considered Mrs Paixão to be his wife. The community acknowledged that they lived as man and wife. And it accepted the two of them and the daughters as a family. He assured Mrs Paixão that he was going to marry her as soon as his divorce was through. In 2005 Mr Gomes and his wife got divorced. He was originally from Portugal and they had married there. He was reluctant to get married at that stage before his divorce was finalised in Portugal as well. That same year Mrs Paixão and Mr Gomes executed a joint will. In it they nominated each other "as the sole and universal heirs of our entire estate and effects of the first dying of us". The will also provided that, in the event that they died simultaneously, their assets must be consolidated and devolve upon "our daughters" in equal shares. The daughters referred to were Mrs Paixão's three daughters.

[27] In 2007 the divorce was finalised in Portugal. Mrs Paixão and Mr Gomes travelled to Portugal where Mrs Paixão was introduced to the family of Mr Gomes. Their wedding was to be in Portugal on 12 April 2008, the 50th wedding anniversary of the parents of Mr Gomes. Unfortunately, Mr Gomes died in a car accident here in South Africa a few months later. Mrs Paixão and her youngest daughter, who was still being supported by Mr Gomes, instituted a claim for loss of support against the Road Accident Fund. They were unsuccessful before the Johannesburg High Court.

[48] *Paixão v Road Accident Fund* [2012] ZASCA 130; 2012 (6) SA 377 (SCA).

[28] On appeal to it, the Supreme Court of Appeal embarked upon an extensive survey of the origins of the "dependants' action" at common law. That is a claim for loss of support suffered as a result of a breadwinner's death at the hands of a third party who then becomes liable to the claimant.[49] To succeed in a claim for loss of support, the dependant "must have a right *which is worthy of the law's protection*".[50] (My emphasis.) Whether the claimant has a right that is worthy of the law's protection depends on the dictates of public policy.[51] At the centre of this are "considerations of 'equity and decency'".[52] Also, "the dependants' action has had the flexibility to adapt to social changes and to modern conditions".[53] And "[u]nderpinning all of this are constitutional norms and values".[54] Mrs Paixão and her daughter contended that: there was an express or tacit agreement between them and Mr Gomes which imposed a legal obligation upon him to support them; and the relationship that existed between all of them, being akin to a family relationship, was deserving of legal protection. They argued that if their right to support was not recognised, that would constitute a violation of their rights to equality and dignity.

[29] Cachalia JA held:

> "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.

[49] Id at para 12.

[50] Id.

[51] Id at para 13.

[52] Id.

[53] Id.

[54] Id. What the Court is saying here is, of course, based on the fact that public policy is now founded on the Constitution (see *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54; and *Beadica 231 CC v Trustees, Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 35).

> 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. The fact is, however, that the nuclear family has, for a long time, not been the norm in South Africa. South Africans have lower rates of marriage and higher rates of extra-marital child-bearing than found in most countries."[55]

[30] The Court emphasised that "cohabitation outside of a formal marriage is now widely practised and accepted by many communities universally",[56] and said:

> "[Mr Gomes] in this case undertook a duty to maintain and support his adopted 'family' out of a deep, profound and loving sense of duty, and did so. I have found that the appellants tacitly established the existence of [a] 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."[57]

[31] The Court pointed out 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*".[58] (My emphasis.) Finally, held the Court, the dependants' claim of both Mrs Paixão and her daughter arose from the "*family relationship*" that obviously included Mr Gomes.[59] (My emphasis.)

[32] Understandably, a predominant refrain in this Court's reasoning in the cases I have discussed is that manifestations of families are many and varied and all are worthy of respect and legal protection. The Supreme Court of Appeal in *Paixão* makes the

[55] *Paixão* above n 48 at para 30-1.

[56] Id at para 35.

[57] Because of its development of the common law in this manner, the Court considered it unnecessary to decide the question of unfair discrimination.

[58] *Paixão* above n 48 at para 39.

[59] Id at para 41.

same point. I make particular note of this refrain as I will return to it later. Suffice it to say at this point, at the heart of each of the disputes in these cases and in the instant application were family units.

[33] With this discussion in mind, I next focus on the instant application.

Maintenance challenge

[34] Section 2(1) of the Maintenance of Surviving Spouses Act affords surviving spouses the right to lodge maintenance claims against the estates of their deceased spouses if they cannot support themselves. It provides that—

> "[i]f 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."

The Act does not define "marriage" and "spouse". Section 1 defines a "survivor" as the surviving *spouse* in a *marriage* dissolved by death.

[35] Of course, for the reasons proffered in *National Coalition for Gay and Lesbian Equality* in respect of permanent same-sex life partners, the words "marriage" and "spouse" do not include permanent heterosexual life partners; the words extend no further than "marriages that are ordinarily recognised by our law",[60] of which permanent heterosexual life partnerships are not a part. Dealing with this very provision in *Volks*,[61] this Court adopted what it had held in *Satchwell*,[62] which was that "spouse" relates "to a marriage that is recognised as valid in law and not beyond that"[63] and "a number of relationships are excluded, such as same-sex partnerships and permanent life

[60] *National Coalition for Gay and Lesbian Equality* above n 22 at para 25.

[61] *Volks* above n 1 at para 42.

[62] *Satchwell* above n 32.

[63] Id at para 9.

partnerships between unmarried heterosexual cohabitants".[64] *Volks* concluded this by holding that an interpretation that includes permanent life partnerships strains the language of section 2(1) and is thus not consonant with the *Hyundai* principle.[65]

[36] *Volks* explains the purpose of the Maintenance of Surviving Spouses Act.[66] One of the invariable consequences of marriage is the reciprocal duty of support.[67] The Appellate Division in *Glazer*[68] held that this duty did not extend beyond death and that, therefore, a surviving spouse in need could not claim support against the estate of the deceased spouse.[69] The Maintenance of Surviving Spouses Act was enacted to close this gap in the common law.[70] This Act "is intended to provide for the reasonable maintenance needs of parties to a marriage that is dissolved by the death of one of them. The aim is to extend an invariable consequence of marriage beyond the death of one of the parties".[71]

[37] Ms Bwanya argues that the exclusion of permanent heterosexual life partners from the benefit afforded by section 2(1) unjustifiably limits her right not to be unfairly discriminated against on the ground of marital status and her right to dignity. This challenge falls foursquarely within that which was considered by this Court in *Volks*.

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[64] Id.

[65] *Volks* above n 1 at paras 44-5. Langa DP held in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Limited: In re Hyundai Motor Distributors (Pty) Limited v Smit N.O*. [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24:

> "[I]t is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."

[66] *Volks* above n 1 at paras 36-7 and 39.

[67] Id at paras 39, 88, 91 and 113.

[68] *Glazer v Glazer N.O.* 1963 (4) SA 694 (A).

[69] Id at 707 B-D.

[70] *Volks* above n 1 at paras 36-7.

[71] Id at para 39.

There as well what was at issue was whether the section 2(1) exclusion violated these same rights. This Court dismissed the challenge. Ordinarily, that should be the end of the matter; the doctrine of precedent dictates that we should follow *Volks*.[72]

[38] The *Volks* challenge also arose from a permanent heterosexual life partnership. Mrs Robinson and Mr Shandling were partners in a permanent heterosexual life partnership. They jointly occupied a flat in Cape Town from 1989 until 2001 when Mr Shandling died. Mr Shandling, an attorney, had supported Mrs Robinson. She was a dependant on his medical aid. She was a freelance journalist and used her income to contribute to household necessities. They accompanied each other to social functions and "were accepted as a couple and had many mutual friends".[73] Mrs Robinson's claim under section 2(1) was rejected by Mr Volks, the executor, hence the constitutional challenge. Mrs Robinson succeeded, with the High Court making a declaration of constitutional invalidity. The matter came before this Court for confirmation and the determination of an appeal by Mr Volks against the declaration. By the time the matter was heard, Mr Volks was no longer pursuing the appeal and conceded the unconstitutionality of section 2(1). That, of course, did not mean automatic success for Mrs Robinson. The Court held, correctly, that "it [was] incumbent upon [it] to fully consider the question of constitutionality, despite the abandonment of the appeal".[74]

[39] Writing for the majority, Skweyiya J said that he was prepared to accept that the exclusion of permanent heterosexual life partners from enjoying benefits under

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[72] See *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) (*Camps Bay*) at para 28 where Brand AJ held:

> "The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."

See also *Turnbull-Jackson v Hibiscus Court Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at paras 57 and 72.

[73] *Volks* above n 1 at para 6.

[74] Id at para 27.

section 2(1) amounts to discrimination on the ground of marital status.[75] As such, the discrimination was presumed to be unfair in terms of section 9(5) of the Constitution. The majority next proceeded to consider whether the discrimination was, in fact, unfair. Quoting *Dawood*,[76] it emphasised the importance of marriage and family as social institutions.[77] It deduced that it followed from this and the international recognition of marriage as a social institution that "the law may distinguish between married people and unmarried people".[78] It went on to say:

> "Mrs Robinson never married the late Mr Shandling. There is a fundamental difference between her position and spouses or survivors who are predeceased by their husbands. Her relationship with Mr Shandling is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities. 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."[79]

[40] I make a few observations from this. First, the majority says "[t]he distinction between married and unmarried people cannot be said to be unfair when considered in

[75] Id at para 50. Although he was prepared to accept this, he did make the point that it was arguable whether the differentiation, in fact, amounted to discrimination.

[76] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC): 2000 (8) BCLR 837 (CC) at paras 30-1.

[77] *Volks* above n 1 at para 52.

[78] Id at para 54.

[79] Id at paras 55-6.

the larger context of the rights and obligations uniquely attached to marriage". This begs the question. At issue before us and in *Volks* itself is exactly why in *some* (not necessarily *all*) instances some rights and obligations should attach exclusively to marriage. It is not an answer to say that is because the people who enjoy the rights or bear the obligations are in a marriage.

[41] Second, the majority said "[t]he maintenance benefit in section 2(1) of the Act falls within the scope of the maintenance support obligation attached to marriage". This too does not assist because, as *Glazer* held, at common law the obligation to support ceases with the death of the spouse who bears the obligation.[80] Section 2(1) serves to alter that common law position, with the result that the surviving spouse has a claim for maintenance against the estate of the deceased spouse. So, it is incorrect to suggest that there would have been a "maintenance support obligation" beyond death. At common law the obligation to support, that exists by operation of law, dies with the obligation bearer's death.[81] There is simply no "scope of the maintenance support obligation" beyond the death of the obligation bearer.

[42] Third, at the risk of being unfair to the majority, there appears to be a suggestion in the statement that says "Mrs Robinson never married the late Mr Shandling" that she could have married him. In paragraph 58 reference is made to "[c]ouples who *choose* to marry". (My emphasis). Yet again, the suggestion seems to be that couples who do not marry *choose* not to. A concurring judgment penned by Ngcobo J and which – with the exception of Skweyiya J – is concurred in by all the Justices who make up the majority is more categorical on the question of choice:

> "The law places no legal impediment to heterosexual couples involved in permanent life partnerships from getting married. All that the law does is to put in place a legal regime that regulates the rights and obligations of those heterosexual couples who *have chosen* marriage as their preferred institution to govern their intimate relationship.

[80] *Glazer* above n 68 at 705 A-C.

[81] Id.

> Their entitlement to protection under the Act, therefore, depends on *their decision whether to marry or not*. The decision to enter into a marriage relationship and to sustain such a relationship signifies a willingness to accept the moral and legal obligations, in particular, the reciprocal duty of support placed upon spouses and other invariable consequences of a marriage relationship. This would include the acceptance that the duty to support survives the death of one of the spouses.
>
> The Act does not say who may enter into a marriage relationship. The Act simply attaches certain legal consequences to people *who choose marriage* as their contract. *There is a choice at the entry level*. *The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship*. Those who do not wish such consequences to flow from their relationship *remain free to enter into some other form of relationship* and decide what consequences should flow from their relationships.
>
> The other consideration is that *marriage is a matter of choice*. Marriage is a manifestation of that choice and more importantly, the acceptance of the consequences of a marriage."[82] (My emphasis.)

[43] Fourth, the majority placed emphasis on the fact that in a marriage the reciprocal duty of support between spouses arises *by operation of law*.[83] This, of course, was in contradistinction to the duty that arises from agreement in the case of life partners. The majority then concluded that—

> "it 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 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."[84]

[82] Volks above n 1 at paras 91-3.

[83] Id at para 56. Also see paras 60 and 62.

[84] Id at para 60.

[44] On the asserted violation of dignity, the majority held that Mrs Robinson was not being told that "her dignity is worth less than that of someone who is married".[85] The point was that with regard to maintenance, permanent life partnerships differ fundamentally from marriage.[86] The difference is that "people in a marriage are obliged to maintain each other by operation of law and without further agreement or formalities".[87]

[45] Consequently, the declaration by the High Court that section 2(1) is unconstitutional was not confirmed.

[46] As this Court already held in *Volks* that the exclusion of permanent heterosexual life partners from the benefit afforded by section 2(1) is not unfair, the doctrine of precedent is staring me in the face. For a variety of reasons – which I think are apparent in my reasoning above and below – I am convinced that *Volks* was wrongly decided. And I am fortified in this view by the meticulously reasoned minority judgment of Froneman J in *Laubscher N.O.*[88] But that is not enough. The doctrine of precedent stipulates that a court may depart from its previous decision if that decision was clearly wrong.[89] And whether a decision was clearly wrong is not a matter of personal preference, mere disagreement, misgivings, doubt, let alone whim. The test is a stringent one. And "mere lip service to the doctrine of precedent is not enough; . . . deviation from previous decisions should not be undertaken lightly",[90] for the doctrine of precedent is a core component of the rule of law,[91] without which deciding legal

[85] Id at para 62.

[86] Id.

[87] Id.

[88] *Laubscher N.O. v Duplan* [2016] ZACC 44; 2017 (2) SA 264 (CC); 2017 (4) BCLR 415 (CC). Of course, Froneman J took the view that *Volks* was clearly wrong. I rely on his reasoning to demonstrate only that *Volks* was wrong, but not necessarily clearly wrong.

[89] *Camps Bay* above n 72 at para 28.

[90] *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and Others as Amici Curiae)* [2011] ZASCA 117; 2011 (5) SA 329 (SCA) at para 34.

[91] *Camps Bay* above n 72 at para 28.

issues would be directionless and hazardous. I cannot resist borrowing from the eloquent words of Cameron JA in *True Motives*:

> "The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions."[92]

[47] Much as I am convinced that the *Volks* decision was wrong, I am unable to make the jump and conclude that it was clearly wrong. Does this mean I must reach the same conclusion as *Volks*? I think not.

[48] In this regard, I will place particular emphasis on two issues. Both are of singular importance because, post *Volks*, they present us with a different context that makes it possible for us to reach an outcome that differs from that reached in *Volks*. Those issues are the question whether there is always a choice not to marry (the "choice argument")[93] and the idea that the section 2(1) maintenance benefit need only be afforded to surviving spouses because – whilst their marriage subsisted – the right arose by operation of law. It is crucial to note that in *Volks* these two issues were dealt with in addressing the question whether the differentiation – for purposes of the section 2(1) maintenance benefit – between marriages and permanent life partnerships constituted unfair discrimination. Likewise, in dealing with these two issues, I too will be addressing that question. I come to these two issues later. First, I introduce the unfairness debate.

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[92] *True Motives 84 (Pty) Ltd v Mahdi* [2009] ZASCA 4; 2009 (4) SA 153 (SCA) at para 100.

[93] For authorities that have characterised this as the "choice argument" and gone on to grapple with it, see for example Smith "Rethinking *Volks v Robinson*: The Implications of Applying a 'Contextualised Choice Model' to Prospective South African Domestic Partnership Legislation" (2010) 13(3) *PELJ* 238; Smith and 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) 75 *THRHR* 474 and Calvino and Iyer "Advancing the Rights of Heterosexual Life Partners in Respect of Loss of Support: *Paixão v Road Accident Fund* 2012 JDR 1749 (SCA)" (2014) *Obiter* 162.

[49] Without doubt, the exclusion of permanent heterosexual life partners from the benefit afforded by section 2(1) amounts to discrimination on the ground of marital status.[94] The real question to answer is whether this discrimination is unfair. Like Mokgoro J and O'Regan J in their joint dissent and Sachs J in his dissent in *Volks*, I too cannot content myself purely with the rebuttable presumption created by section 9(5) of the Constitution that discrimination on the ground of marital status is unfair;[95] not on an issue so contentious and on which this Court has held that the discrimination is not unfair.

[50] I agree with the majority in *Volks* that "marriage and family are important social institutions in our society".[96] As did the majority, I too call in aid the words of O'Regan J in *Dawood*:

> "Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.
>
> The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the

[94] *Volks* above n 1 at paras 132-3 and 227. I see no problem with reliance on the minority judgments on this as the majority said nothing to the contrary on this aspect.

[95] Mokgoro J and O'Regan J and Sachs J felt constrained to deal with unfairness, and each of the two dissents did so extensively.

[96] Id at para 52.

> marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends. The importance of the family unit for society is recognised in the international human rights instruments referred to above when they state that the family is the 'natural' and 'fundamental' unit of our society."[97]

[51] Whatever I will say presently is not calculated to detract from this or to devalue the institution of marriage; not in the least. The institution of marriage is not that fickle. In fact, I do not see how giving deserved protection to surviving permanent life partners can devalue marriage. How exactly does that take away from the institution of marriage? More on this when I deal with justification.

[52] The reality is that as at 2016, 3.2 million South Africans were cohabiting outside of marriage and that number was reported to be increasing. Thus we find a substantial number of families within this category. Indeed, in *Paixão* the Court said "[t]he fact is . . . that the nuclear family [in context, using this term to refer to a family centred on marriage] has, for a long time, not been the norm in South Africa".[98] Unsurprisingly, *Dawood* says "families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."[99] Surely, this caution applies equally to the institution of marriage, which is foundational to the creation of one category of family. To paraphrase what was said about the family, we should be wary not to so emphasise the importance of the institution of marriage as to devalue, if not denigrate, other institutions that are also foundational to the creation of other categories of families. And this must be so especially because the other categories of families are not only a reality that cannot be wished away, but are on the increase.

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[97] *Dawood* above n 76 at paras 30-1.

[98] *Paixão* above n 48 at para 31.

[99] *Dawood* above n 76 at para 31.

[53] There is no question that all categories of families are definitely deserving of legal protection. The question is to what extent each category of family must be legally protected as a family. Therein lies the centrality of the question posed by Sachs J in the opener to this judgment, and it bears repetition:

> "[S]hould a person who has shared her home and life with her deceased partner, born and raised children with him, cared for him in health and sickness, and dedicated her life to support the family they created together, be treated as a legal stranger to his estate, with no claim for subsistence because they were never married?"[100]

[54] This question in no way suggests that marriage and permanent life partnerships must be collapsed into one institution. They are not the same. And for a variety of reasons some of those who are spouses or partners in one type of institution may even have an aversion to the other. But where the rationale for the existence of certain legal protections in the case of marriage equally exists in the case of permanent life partnerships, the question arises: why are those legal protections not afforded to life partners? That, to me, is the real question.

[55] After all, permanent life partnerships are intimate relationships that are meant to last until the death of one or both (in the case of simultaneous death) of the partners. Through agreement – express or tacit – these life partnerships often feature reciprocal duties of support. They too are the foundation of family life, whether with or without children.[101] *National Coalition for Gay and Lesbian Equality* cites *Peter* on the features of marriage, which—

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[100] *Volks* above n 1 at para 148, the Sachs J dissent.

[101] Although procreation features prominently in families, it does not necessarily define the idea of "family". Here is why according to *National Coalition for Gay and Lesbian Equality* above n 22 at para 51:

> "From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I

"embrace intangibles, such as loyalty and sympathetic care and affection, concern . . . as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in a support-generating business."[102]

To my mind these features are not foreign to permanent life partnerships.

[56] In all these respects, permanent life partnerships are very much akin to marriages. I am not unmindful of the differences, chief amongst which are the public solemnisation of a marriage and the formalities about termination.

[57] I want to sound another caution. The proscription in section 9(3) of the Constitution of unfair discrimination on the ground of marital status exists for a reason.[103] And the constitutional stipulation in section 9(5) that discrimination on this ground is presumptively unfair underscores that reason. We should be wary, therefore, not readily to accept as constitutional the differential treatment of institutions that are akin to marriage. Being overly permissive on differential treatment that is based on grounds that are presumptively unfair may unduly water down the reach of this proscription. The proscription is not only about distinctions in types of marriages. The words of Mokgoro J and O'Regan J in their dissent are apt:

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would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy."

[102] *Peter v The Minister of Law and Order* 1990 (4) SA 6 (E) at 9G.

[103] In *Volks* above n 1 this Court recognised as much, stating at para 107 that:

> "The law has tended to privilege those families which are founded on marriages recognised by the common law. Historically, marriages solemnised according to the principles of African customary law were not afforded recognition equal to the recognition afforded to common law marriages, though this has begun to change. Similarly, marriages solemnised in accordance with the principles of Islam or Hinduism were also not recognised as lawful marriages though this too is now altering. The prohibition of discrimination on the ground of marital status was adopted in the light of our history in which only certain marriages were recognised as deserving of legal regulation and protection. It is thus a constitutional prescript that families that are established outside of civilly recognised marriages should not be subjected to unfair discrimination."

> "We are unable to agree with Skweyiya J to the extent that he suggests that in determining whether discrimination on the grounds of marital status is unfair or not, one can take the view that it is not unfair to discriminate between relationships to which the law attaches the obligations of support and cohabitation and those relationships to which the law does not attach such consequences. In our view, this approach defeats the important constitutional purpose played by the prohibition on discrimination on the grounds of marital status. For if it does not constitute unfair discrimination to regulate marriage differently from other relationships in which the same legal obligations are not imposed upon the partners to that relationship by the law, marriage will inevitably remain privileged. We do not consider this would serve the constitutional purpose of section 9(3), and its prohibition of unfair discrimination on the grounds of marital status."[104]

[58] That is why – although of signal importance – advances in the recognition of African customary, Muslim and Hindu marriages[105] are not of much assistance on the point at issue. I say so because these are marriages just like marriages concluded by civil rites. They all fall under the generic category of "marriage". Their non-recognition was the result of racism. Indeed:

> "Even if the legal implications of the marriage differ depending on the legal regime that governs it, the personal significance of the relationship for those entering it and the public character of the institution, remain profound. In addition, many of the core elements of the marriage relationship are common between the different legal regimes."[106]

[59] Of importance for present purposes then, what – outside of marriages of whatever type – can adequately ground a challenge of unfair discrimination on the ground of marital status? Why is it that the exclusion of permanent heterosexual life

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[104] Id at para 118.

[105] *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 108; *Daniels v Campbell* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) and *MM v MN* 2010 (4) SA 286 (GNP).

[106] *Dawood* above n 76 at para 32. And the different legal regimes referred to include "African customary law, Islamic personal law and the civil or common law" (id).

partners from the benefit afforded by section 2(1) cannot ground such claim? Even *Fraser*, in which the *Volks* majority put much stock, acknowledged that it is not in all contexts that discrimination between married and unmarried persons will be justified.[107]

[60] In the context of this caution, I find the words of Sachs J in his dissent in *Volks* apposite. They are that we should not—

> "employ a process of definitional reasoning which presupposes and eliminates the very issue which needs to be determined, namely, whether for the limited socially remedial purposes intended to be served by the [Maintenance of Surviving Spouses] Act, unmarried survivors could have a legally cognisable interest which founds a constitutional right to equal benefit of the law."[108]

[61] Reverting to the two issues that I said present us with an opportunity not to follow *Volks*, I first deal with the question whether there is always a choice not to marry. This is not a legal question. It is a factual question: as a matter of fact, is there a choice to marry or not to marry? That being the case, I do not see why this Court's view in *Volks* on that question of fact should be binding on us. This is especially so as evidence on the subject was presented to us, and that evidence was not before this Court in *Volks*.

[62] 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 was that underlay each of their

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[107] *Fraser v Children's Court, Pretoria North* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC). This Court held at para 26:

> "In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with."

On my reading, the converse is true.

[108] *Volks* above n 1 at para 151.

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.[109]

[63] The first two reasons typify what is to be expected in a society that is dominated by men in virtually all areas of human endeavour. And life is not so mechanical that one may ask why, instead of walking away, women stay in permanent life partnerships if – in some of them – it is men that do not want to get married. Much as it may not take much for some to walk away, that is not necessarily how life works. A woman may have to be content with what in essence is the man's choice. A concurrence in *Miron*, a judgment of the Canadian Supreme Court, says "[f]or a significant number of persons in so-called 'non-traditional' relationships . . . notions of 'choice may be illusory'".[110] To suggest that everybody does have a choice is out of touch with reality.

[64] We should be wary of adopting a position of an armchair pontificator who is divorced from realities on the ground. After all, few situations present us with the absolute absence of choice. The question is not whether absolutely there is no choice. It is whether realistically choice may be exercised. A woman who is in a physically and emotionally abusive relationship and who is constantly under threat of being killed if she ever reports the abuse to the police or other authorities, or of being hunted down and killed if she dares leave does have a choice to report or leave regardless. But can we justifiably blame her if she is so consumed by fear that she cannot bring herself to do either? A lesbian who lives in a particularly homophobic area where killings of homosexuals and acts of so-called corrective rape are rampant does have a choice, regardless, to reveal her sexual orientation for all to see. But it is perfectly understandable why she would choose to remain closeted. Aptly, De Vos says:

[109] Colloquially, cohabitation in a life partnership is sometimes called a "common law" marriage. It is not a marriage by civil rites.

[110] *Miron v Trudel* [1995] 2 SCR 418 at para 22.

> "In a sexist, patriarchal and homophobic society, a society in which many individuals depend on others for their social and economic survival, it will often be difficult or even impossible for individuals to 'choose' to marry their same-sex sweethearts. Such a 'choice' would require an individual in some form of same-sex intimate relationship to come out of the closet and to openly live the life of a 'homosexual', thus inviting rejection, hatred and violence."[111]

[65] It is worth noting that even the *Volks* majority is empathetic to the plight of those women who find themselves trapped in permanent life partnerships. It expresses "a genuine concern for vulnerable women who cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships."[112]

[66] Thus I cannot agree with the "choice argument".

[67] I trust that I have debunked the notion of a supposedly across-the-board choice not to marry. I also trust that, instead, I have foregrounded the vulnerability of women in permanent opposite-sex life partnerships as one of the central reasons why some women find themselves in permanent life partnerships. But – if by doing so – an impression has been created that this is the end of the story in addressing the "choice argument", that will serve to devalue permanent life partnerships. Permanent life partnerships must be accorded the necessary respect as they are one of life's realities; an institution through which many in our society lead their lives, give and receive love in return, engage in love-making, find solace, seek and get protection and all manner of support, form families, enjoy some of life's myriad pleasures with those they love, and receive sustenance and – in the case of children born or raised within those relationships – nurture.

[111] De Vos "Same-Sex Sexual Desire and the Re-Imagining of the South African Family" (2004) 179 *SAJHR* 199.

[112] *Volks* above n 1 at para 68.

[68] So, I think the question whether parties to permanent life partnerships choose not to marry is the wrong question to ask. But I could not avoid addressing it because it is central to the reasoning in *Volks*. Outside of the reason – e.g. the lack of choice not to marry in some instances – that underlies each permanent life partnership, the question is: are permanent life partnerships – in and of themselves – deserving of constitutional and legal protection? That is the question that must be answered. In the *Miron* concurrence L'Heureux-Dubé J said:

> "It is inappropriate . . . to condense the forces underlying the adoption of one type of family unit over another into a simple dichotomy between 'choice' or 'no choice'. Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons — all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law."[113]

[69] Also, although in dealing with the choice argument I have emphasised the absence of choice in some instances, in other instances there is, in fact, choice. Our foundational constitutional value of freedom[114] requires respect for human agency in how we order our lives. Sachs J says:

> "Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote

[113] *Miron* above n 110 at para 102.

[114] Section 1 of the Constitution provides:

> "The Republic of South Africa is one sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

Human dignity, equality and *freedom* receive repeated mention in the Constitution. For example, section 7(1) of the Constitution provides that the Bill of Rights "is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and *freedom*." And in section 36(1) the Constitution pegs the limitation of rights in the Bill of Rights on what is reasonable and justifiable "in an open and democratic society based on human dignity, equality and *freedom*".

> respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them."[115]

[70] What I like about this quote is that it combines permanent life partnerships where there is a choice not to marry and those in which some of the partners do not really exercise a choice. This helps underscore the point that the real question is whether the institution of permanent life partnership is, indeed, deserving of constitutional and legal protection, a question I answer presently.

[71] Since *Volks* was decided, there has been a significant development in the common law. That development is key to answering this question. 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 *Paixão*. I accept that the context in that matter was different. But – as I will show shortly – that matters not. As stated above, *Paixão* 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*".[116] (My emphasis.) 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 could recognise a dependant's action where friends had similarly assumed – through agreement – reciprocal duties to support each other. What took centre stage in *Paixão* 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

[115] *Volks* above n 1 at para 156.

[116] Id at para 39.

values dictated this. With this development, it seems to me it can no longer be fitting to distinguish the duty of support existing 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 be simplistic to continue to hold that view. How else can the fact that similar protection (i.e. protection of the nature provided by the *Paixão* development) cannot be afforded to a maintenance agreement between friends be explained?[117]

[72] It is not an answer to suggest that permanent life partners can and must address their situation by making provision for the maintenance of their surviving partners in their wills. Such an attitude assumes that thinking about and, more importantly, executing wills is something that comes to most people's minds. If that were the case, the impugned section 2(1) should not have been necessary to address the problem that was magnified by the *Glazer* judgment. The Legislature should have adopted the attitude that, since spouses have a reciprocal duty of support, they must each make sure – by making the necessary provision in their wills – that this duty does not die with them, as it otherwise would in accordance with the *Glazer* principle. The very fact that this issue was legislated upon is indication enough that leaving it to people to make provision in wills was unrealistic and not enough of a safeguard. Surely then, that must apply equally to permanent life partners. It cannot realistically be expected that all will make the necessary provision in their wills.

[73] I am led to the conclusion that the denial of the section 2(1) maintenance benefit to permanent life partners constitutes unfair discrimination.

[117] I say nothing about future changes in public policy with regard to this aspect.

[74] Now the question of justification falls to be decided.[118] The purpose of section 2(1) is to protect surviving spouses from destitution.[119] That purpose is not in the least thwarted by the inclusion of surviving life partners who are similarly in need.[120] There is no clarity on why the protection is available only to surviving spouses.[121]

[75] Also of relevance under this heading are the problems associated with proving the existence of permanent life partnerships.[122] But I do not see how this should still be an issue. That horse has long bolted and – to use the words of one characteristically eloquent senior counsel – is a considerable distance away. I say so because, in the context of extending to permanent same-sex life partners benefits previously enjoyed only by spouses, this Court has already adopted the stance that these problems are not insurmountable. What it has done instead is to develop factors to be taken into account when proving the existence of permanent same-sex life partnerships.[123] I am not unmindful of the reality that the situation and vulnerability of same-sex life partners is different and not comparable to that of opposite-sex life partners. But on the limited question whether there was in existence a qualifying life partnership, what needs to be proved is the same. The difficulty of proof may be even worse in the case of permanent same-sex life partners, some of whom may – out of fear of, for example, physical violence or ostracism – not come out and be seen openly to be living as permanent life

[118] Section 36(1) of the Constitution provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

[119] *Volks* above n 1 at para 135, the joint dissent.

[120] Id.

[121] Id.

[122] Id at para 229, the Sachs J dissent.

[123] *National Coalition for Gay and Lesbian Equality* above n 22 at para 88.

partners. Notwithstanding that difficulty, this Court still grappled with and overcame this evidentiary hurdle. Thus, I would not understand any retrograde step that takes us to a pre-*National Coalition for Gay and Lesbian Equality* era; a step that would cause us to go back on this positive achievement. Just what would the principled basis be for suddenly seeing the evidentiary hurdle as insurmountable? I cannot conceive of any. If the basis would purely be because we are now concerned with permanent opposite-sex life partnerships, that would be the height of illogicality. It is either this Court accepts that the existence of permanent life partnerships can be proved or it does not, regardless of the type of permanent life partnership.

[76] The factors developed by this Court towards establishing the existence of permanent life partnerships in *National Coalition for Gay and Lesbian Equality* are—

> "the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep for the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another."[124]

[77] To the extent necessary, these factors may be adapted to suit permanent opposite-sex life partnerships. The Sachs J dissent adds to these: whether the cohabitants have children; and whether they have associated in public as an intimate couple.[125] The second and third quoted factors were particularly suited to same-sex cohabitants when they could not lawfully conclude civil unions.

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[124] Id.

[125] *Volks* above n 1 at fn 219.

[78] Grappling with difficult evidentiary material is a bread and butter issue of the court process. And the factors just referred to will assist a great deal in this regard. As I say, the difficulties attendant to proving permanent life partnerships are not insuperable.[126] Notably, the Sachs J dissent also highlights the fact that the South African Law Reform Commission Paper[127] acknowledges that problems of proof are not insuperable.[128] This dissent correctly points to the fact that since democracy, many statutes have now encompassed the rights of cohabitants and that this presupposes that "appropriate proof can be found".[129] This is significant.

[79] On the possible view that a departure from affording exclusive benefits to married couples "would undermine the institution of marriage, which must be supported at all costs",[130] it is not readily apparent "how marriage is dignified through the imposition of unfairness on those who for one reason or another live their lives outside of it".[131] The present challenge is narrowly tailored to address a specific need in a particular context. And that is in no way calculated to demolish, or detract from, the well-established institution of marriage.

[80] Thus the section 2(1) exclusion fails the justification exercise.

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[126] Id.

[127] The South African Law Reform Commission Discussion Paper 104 Project 118 on Domestic Partnership sought to address "mounting dissatisfaction with the failure of the law to adapt to changing patterns of domestic partnership" as domestic partnerships increased in prevalence and garnered greater societal acceptance referred to in *Volks* above n 1 at para 231. The discussion paper sought to answer the question whether domestic partnerships should be provided legal recognition and regulation and considered proposals for possible law reform in those areas.

[128] *Volks* above n 1 at para 231, the Sachs J dissent.

[129] Id.

[130] Id at para 233.

[131] Id.

Remedy on maintenance challenge

[81] From this, it follows that the exclusion from the impugned definition in section 1 of the Maintenance of Surviving Spouses Act[132] of permanent life partners who undertook reciprocal duties of support must be declared constitutionally invalid. Likewise, the conferral by section 2(1) of this Act of a maintenance benefit only on surviving spouses is constitutionally invalid. Although this application was brought by a survivor in a permanent heterosexual life partnership, it seems to me that – after the conclusion I have reached – similar relief in favour of survivors in same-sex permanent life partnerships would follow as a matter of course. It makes no sense then to grant relief that excludes survivors in same-sex permanent life partnerships. The exclusion would itself discriminate unfairly. The all-embracing order I propose is dictated by the exceptional circumstances I have just highlighted.

[82] The exclusions referred to in the preceding paragraph call for appropriate reading-in in the impugned definition, which I will do. It seems to me that the declaration of invalidity and reading-in must be suspended. This is complex terrain on which Parliament must first be afforded an opportunity to take corrective steps before what this Court comes up with takes effect.

[83] I will not reinvent the wheel. The order made here is modelled on the order that Mokgoro J and O'Regan J say, in their joint dissent, they would have made in *Volks*.[133]

Succession challenge

[84] The exclusion of survivors of permanent opposite-sex life partnerships also amounts to discrimination. It too is on the ground of marital status, a ground listed in section 9(3) of the Constitution, which makes the discrimination presumptively unfair.

[132] The definition of "survivor".

[133] *Volks* above n 1 at para 145.

Is it, in fact, unfair? At first blush, something said by Van Heerden AJ in *Gory* appears to offer a ready solution to this question. It is this:

> "[T]he rationale in previous court decisions for using reading-in to extend the ambit of statutory provisions applicable to spouses or married couples so as to include permanent same-sex life partners was that same-sex couples are unable legally to marry and hence to bring themselves within the ambit of the relevant statutory provision. Once this impediment is removed, then there would appear to be no good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession."[134]

[85] With the enactment of the Civil Union Act which makes it possible for same-sex couples to conclude civil unions, the impediment is gone. Therefore, if the statement from *Gory* were to be followed, an invalidation of section 1(1) of the Intestate Succession Act similar to that made in *Gory* should be made, but on the basis of discrimination against opposite-sex partners; what has been referred to as "equalising up".[135] A difficulty though is that the statement was *obiter* (by the way). One might be tempted to see *Laubscher N.O.*,[136] a judgment of this Court on section 1(1) which post-dates the enactment of the Civil Union Act, as an even firmer basis for equalising up. It is not. In it – and understandably, in context – Mbha AJ focused on a limited issue arising from *Gory*.[137] And the outcome of that focus did not amount to equalising up.

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[134] *Gory* above n 45 at para 29.

[135] See *Laubscher N.O.* above n 91 at para 31 where this Court explained the concept thus:

> "I agree that an inequality may exist between opposite-sex permanent partners and their same-sex counterparts by virtue of the *Gory* order. The question is whether same-sex permanent partners ought to be deprived of the *Gory* benefit or whether the benefit should be extended to include opposite-sex permanent partners. The respondent refers to this process as 'equalising up' versus 'equalising down' and contends that it is a task perhaps best left to Parliament."

[136] Id. This case was about who, between the deceased's brother and the respondent, was entitled to inherit from the deceased's intestate estate. The respondent had lived with the deceased in a permanent same-sex life partnership until the deceased's death.

[137] The limited issue concerned the interplay between this Court's decision in *Gory* to "read-in" into the provisions of the Intestate Succession Act, and the existence of the Civil Union Act.

[86] It seems to me, therefore, that I cannot avoid grappling with the question of unfairness. Wood-Bodley[138] and De Ru[139] argue against equalising up. They take the view that the extent of the all-pervading phenomena that are calculated to suppress homosexuality does cause some members of the LGBTQ+ community not to publicly "out" themselves. Despite the advances that have been made, these phenomena continue to be a driving force behind the vulnerability of gay and lesbian people. Wood-Bodley and De Ru argue that, as a result, the continued conferral of spousal benefits to unmarried permanent same-sex life partners is justifiable affirmative action and does not amount to unfair discrimination against opposite-sex couples on the ground of marital status.[140]

[87] The point about the continued vulnerability of members of the LGBTQ+ community cannot be overemphasised. Yes, on the legal front many advances have been made. It is mainly outside of the law that members of this community suffer untold abuse, degradation, the so-called corrective rape, other forms of physical harm and even death. All because of their sexual orientation; being themselves. The passage of time has not made matters any better. Although these egregious, inhuman acts cannot change who members of the LGBTQ+ community are, it may cause some to live a lie; to pretend to be what they are not. That is far from a wholesome life; a life of dignity. Without question, members of this community are amongst the most vulnerable in our society. Of course, many among them are courageous people who stand up for who they are and advocate for the unyoking of the community from the suffering and degradation its members presently experience. But that does not detract from their vulnerability.

[88] Although there is no comparison with this vulnerability, women in permanent opposite-sex life partnerships are also vulnerable. Some – even if desirous of getting

[138] Wood-Bodley above n 24 at 54-5.

[139] De Ru above n 24 at 125.

[140] Wood-Bodley above n 24 at 54-5 and De Ru above n 24 at 125.

married – cannot because their men partners' choice is not to get married. And there is nothing the women partners can do about it. And "[t]he reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property".[141] That gives men in the partnerships power and exacerbates the plight of women. This vulnerable group is deserving of legal protection. And this does not detract from the point made by Wood-Bodley and De Ru about the vulnerability of members of the LGBTQ+ community.

[89] Under the maintenance challenge I dealt with what Mokgoro J and O'Regan J say about the vulnerability of permanent opposite-sex life partners as a group.[142] That is equally applicable here.

[90] Also, based on this Court's reasoning in *Daniels*,[143] there is a way in which the right of a spouse to inherit on intestacy may be interpreted to be "need-based".[144] This Court held:

> "Widows for whom no provision had been made by will or other settlement were not protected by the common law. The result was that their bereavement was compounded by dependence and potential homelessness - hence the statutes. . . . The Acts were introduced to guarantee what was in effect a widow's portion on intestacy as well as a claim against the estate for maintenance. The objective of the Acts was to ensure that widows would receive at least a child's share instead of their being precariously dependent on family benevolence."[145]

[141] *Daniels* above n 105 at para 22.

[142] *Volks* above n 1 at paras 132-3.

[143] *Daniels* above n 105 at para 22.

[144] Smith above n 24 at 307-8. See also Smith "Rethinking *Volks v Robinson*: The Implications of Applying a 'Contextualised Choice Model' to Prospective South African Domestic Partnership Legislation" (2010) 13(3) *PER/PELJ* at 269-70.

[145] *Daniels* above n 105 at paras 22-3.

[91] A claim by permanent life partners that is narrowly tailored to need stands a better chance of success than one which is not.[146]

[92] I must come to the conclusion that the exclusion of surviving permanent opposite-sex life partners from enjoying benefits under section 1(1) of the Intestate Succession Act amounts to unfair discrimination.

[93] On this as well, I cannot conceive of any basis on which the unfair discrimination can be found to be reasonable and justifiable as envisaged in section 36(1) of the Constitution.

Remedy on succession challenge

[94] The remedy must be confirmation of the High Court's declaration of constitutional invalidity. As will appear presently, the confirmation order will contain some changes to the High Court order.

Order

[95] The following order is made:

1. The omission from the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 (Maintenance of Surviving Spouses Act) of the words "and includes 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" at the end of the existing definition is unconstitutional and invalid.

[146] Smith above n 144 at 260.

2. The definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act is to be read as if it included the following words after the words "dissolved by death"—

> "and includes 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."

3. The omission from the definition in section 1 of the Maintenance of Surviving Spouses Act of the following, at the end of the existing definition, is unconstitutional and invalid—

   (a) "Spouse" for the purposes of this Act shall include a person in a permanent life partnership in which the partners undertook reciprocal duties of support;

   (b) "Marriage" for the purposes of this Act shall include a permanent life partnership in which the partners undertook reciprocal duties of support.

4. Section 1 of the Maintenance of Surviving Spouses Act is to be read as though it included the following at the end of the existing definition—

   (a) "Spouse" for the purposes of this Act shall include a person in a permanent life partnership in which the partners undertook reciprocal duties of support;

   (b) "Marriage" for the purposes of this Act shall include a permanent life partnership in which the partners undertook reciprocal duties of support.

5. The orders contained in paragraphs 1, 2, 3 and 4 are suspended for a period of 18 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.

6. Should Parliament not enact legislation as contemplated in paragraph 5, the order of invalidity that shall come into operation 18 months after the date of this order shall have no effect on the validity of any acts performed

in respect of the administration of a deceased estate that has finally been wound up by the date upon which the order of invalidity comes into effect.

7. The omission in section 1(1) of the Intestate Succession Act 81 of 1987 after the word "spouse", wherever it appears in the section, of the words "or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support" is unconstitutional and invalid.
8. Section 1(1) of the Intestate Succession Act is to be read as though the following words appear after the word "spouse", wherever it appears in the section: "or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support".
9. The orders contained in paragraphs 7 and 8 are suspended for a period of 18 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.
10. Should Parliament not enact legislation as contemplated in paragraph 9, the order of invalidity that shall come into operation 18 months after the date of this order shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date upon which the order of invalidity comes into effect.
11. In the event that serious administrative or practical problems are experienced as a result of the coming into operation of paragraphs 1, 2, 3, 4, 7 and 8 of this order, any interested person may approach this Court for a variation of this order.
12. The Minister of Justice and Correctional Services must pay the costs of the applicant in this Court, such costs to include the costs of two counsel.

MOGOENG CJ

Introduction

[96] I have benefitted from reading the judgment of my Brother Madlanga J and readily embrace the factual and legal background set out therein. The reading of my

Brother Jafta J's judgment was an equally pleasurable exercise. On the reasoning and outcome, we part ways, but only to the extent that our differences are self-evident. Here is why and how.

[97] It would certainly be unconscionable, unjust and most insensitive to the plight of unmarried heterosexual couples to adopt a legal posture that seeks to preclude them from ever being entitled to be beneficiaries of maintenance and inheritance from their permanent life partners, regardless of the explicit or implicit terms of their demonstrably existent partnership.

[98] That said, the question is: when do heterosexual couples enter into a permanent life partnership or how does it come into being? What are the predictable requirements and commitments, entitlements or obligations that flow from it? And are all permanent life partnerships fundamentally the same, with particular regard to the entitlements or duties that flow from them? Does a permanent life partnership come into being by the effluxion of time or could it be concluded or elevated to that status in a matter of days, weeks, months or only after years of the two falling in love? In other words, does all this simply depend on what the partners commit to? How is all this to be ascertained?

[99] Can or does the common law make sufficient or comparable provision for the protection of partners to these relationships as it does for their children? If it can or does, is the discrimination, that flows from a statutory provision and the common law coupled with the terms of that cohabitation, reasonable and justifiable in an open and democratic society based on equality, dignity and freedom?

Background

[100] Ms Bwanya and Mr Ruch were lovers. They undertook to support each other according to their means and abilities. And they were on the verge of being married when Mr Ruch died. In other words, they had chosen to be married. Theirs was not a relationship whose maintenance- or inheritance-related challenges require a solution based on the development of principles that should govern permanent life partnerships.

This is self-evidently so because they did not choose to be permanent life partners. Deciding this case as if it has anything to do with a permanent life partnership is thus a deviation from what the case is really about. The issue of a permanent life partnership has thus been "forced" or "squeezed" in. It is nevertheless inescapable that I touch on the underlying differences between marriage and a permanent life partnership because of the approach adopted in the prosecution and overall handling of this matter.

[101] Marriage has a range of proprietary regimes attendant to it. And it cannot be correct to readily assume that in the case of unmarried permanent life partners only one preference or outcome with regard to maintenance and inheritance is inevitable. People and relationships are different and order the affairs of their lives in line with the peculiarities of their own circumstances and preferences. The possibility to tell how different the one arrangement of cohabitation is from the other, which is necessarily evidential in nature, is one of the key factors behind the differential treatment between married and unmarried couples that flows from the impugned legislation.

[102] Section 9 of the Constitution does hold out marital status as one of the many proscribed bases of discrimination and presumes it to be unfair unless otherwise demonstrated. I accept, without deciding, that the different treatment given to married couples and permanent life partners by the assailed provisions amounts to discrimination. Questions arise though, whether discrimination between married and unmarried couples in relation to maintenance and succession are indeed unfair in that (a) the Acts are manifestly directed at the impairment of unmarried couples; (b) the discrimination does impair unmarried couples' rights and in a serious way; (c) the Acts are aimed at achieving a worthy governmental or societal objective; or (d) the provisions do in reality constitute unfair discrimination on the ground of marital status.

[103] The need to explain the critical role of marriage in a family and society has been largely attenuated by the main judgment's ready endorsement of what this Court has said about marriage. Four issues demand attention here. And they are whether: (a) there is a fundamental difference(s) between marriage and other love relationships; (b) to be

married or to be single or to be in a permanent life partnership is indeed a consequence of choice; (c) the reciprocal duty of support between unmarried cohabitants is realisable by operation of law; and (d) Parliament's failure or initial disinclination to provide for the maintenance and succession of unmarried couples is a reasonable and justifiable limitation. The latter is the overarching issue whose determination is to be facilitated by all other topics.

Is this discrimination unfair?

[104] Is it reasonable and justifiable to make statutory provision for the maintenance and entitlement to inherit for a spouse but not for an unmarried life partner in our kind of democracy that is based on equality, dignity and freedom?

[105] This Court decided in *Volks* that discrimination on the basis of marital status in relation to intestate succession against unmarried heterosexual partners was not unfair.[147] A departure from this precedent may only be countenanced if the rigorous test that governs that departure has been met.

[106] For, in appreciation of the need for legal certainty, our courts have laid down a legal principle in terms of which a decision of any "precedent setting" court binds that court, and courts below it. Only when that decision is demonstrably wrong may it be deviated from. A decision of the highest court in the land may thus not be departed from without compliance with the high demands of our jurisprudence in this regard. In *Bloemfontein Town Council*,[148] the Appellate Division set a very high reversal of own judgment standard. It said:

> "The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding that is there has been something in the nature of a palpable mistake a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors – such preference, if

[147] *Volks* above n 1 at paras 56 and 60.

[148] *Bloemfontein Town Council v Richter* 1938 AD 195.

allowed, would produce endless uncertainty and confusion. The maxim "stare decisis" should, therefore, be more rigidly applied in this the highest Court in the land, than in all others."[149]

[107] In *Patmar Explorations*,[150] Wallis JA articulated this principle in these terms:

"It is surprising in the light of this submission that we were not referred to any of the cases dealing with the circumstances in which this Court will depart from its previous decisions on a matter of law. The basic principle is stare decisis, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. *A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous*. The cases in support of these propositions are legion. The need for palpable error is illustrated by cases in which the court has overruled its earlier decisions. Mere disagreement with the earlier decision on the basis of a differing view of the law by a court differently constituted is not a ground for overruling it."[151]

His Lordship went on to say:

"The Judge was only entitled to depart from the earlier judgment if satisfied that it was clearly incorrect. The proper approach was to ask whether Mothle J's judgment was a tenable interpretation of the Constitutional Court's decision and order. There could be only one answer to that question, namely, that it was, as the lengthy discussion of that very issue in the High Court's judgment amply demonstrated. And once that conclusion was reached nothing more needed to be said. NF Kgomo J was obliged to follow his colleague's decision and should have done so. *The test for departing from a judgment*

[149] Id at 232.

[150] *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) (*Patmar Explorations)*.

[151] Id at para 3.

> *from one's own court is set high so that it is only done in few cases and then only after anxious consideration*."[152]

[108] All of the above accord with the position adopted by Brand AJ in *Camps Bay*[153]:

> "The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong."[154]

[109] By a majority, this Court decided in *Volks* that discrimination on the basis of marital status against those who may in law get married but chose not to for whatever reason, was reasonable and justifiable in an open and democratic society based on dignity and freedom, and was therefore fair. That decision was largely based on the "choice argument" and the conclusion that the section 2(1) right to maintenance enjoyed by a surviving spouse arose by operation of law. The majority here has its eyes set on reversing that decision. As stated, it is legally impermissible to do so without demonstrating that the *Volks* majority was clearly wrong.

[110] That there is a noticeably strong attraction to or a preference for the minority judgment in *Volks* and the views expressed in *Miron*[155] cannot be denied. What is missing is a compelling explanation as to why this Court's binding decision in *Volks* could be said to be indubitably wrong or may permissibly be departed from in law. I grapple with this and related issues below.

Marriage versus a permanent life partnership

[111] Marriage is different from a permanent life partnership for a number of important reasons. The requirements to be met for it to come into being are clearly spelt out and

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[152] Id at para 8.

[153] See *Camps Bay* above n 72.

[154] Id at para 28.

[155] *Miron* above n 110.

therefore well-known or easily ascertainable. And public solemnisation is but one of those chief features. It is not the most important. The vows or commitments made by the parties and what they are about, which are settled or standard, is another. Furthermore, the propriety regimes that apply to marriage and how exactly the chosen one can be determined with relative ease are also very important matters of legal regulation. Documentary or electronic proof of its existence is readily available and it is known where to get a copy – Home Affairs. Apart from the officiating person, witnesses are also required to validate it. And the age one must have attained to enter into it, to avoid the exploitation of underage or young women, is also one of the key distinguishing features. Circumstances of more than one marriage are also regulated by law. And there is how to formally end marriage and secure proof of its effective termination. Broadly speaking, all these issues were satisfactorily factored into the majority's reasoning in *Volks*.

[112] A life partnership is not legally regulated and does not therefore have set requirements that partners have to comply with for it to come into being. Its coming into being is somewhat informal, unannounced and ordinarily unwitnessed. There is uncertainty about when it becomes permanent and how long it takes to rise to the level of permanence. A lot of work or information-gathering apparently has to be done to form a somewhat clear picture of the existence or otherwise of a permanent life partnership and what the partners had committed to.

[113] It thus appears that a life partnership closer to marriage in appearance and nature or that could attract similar reciprocal duties or obligations and entitlements as marriage, should be found to exist when key features of the underlying agreement justify the extension of that benefit. Apparently, some of the key considerations or factors sourced from *National Coalition for Gay and Lesbian Equality*[156] and inferential reasoning could be the following:

[156] *National Coalition for Gay and Lesbian Equality* above n 22.

(a) Partners' express life commitment to each other (but the issue still is how the court or any institution for that matter is to satisfy itself about that fact).

(b) The commitments, if any, made regarding maintenance and the partners' stake or entitlements in each other's property?

(c) The fact or presumption of the existence of a permanent life partnership as a consequence of the partners having been together for some time (but the issue is, for how long are they required to have been together for their relationship to qualify as a permanent life partnership).

(d) Whether there is a "prescribed" or acceptable age requirement?

(e) Is a ceremony, attended by relations and friends, required or merely advisable?

(f) Is a written partnership agreement that outlines its terms, necessary or merely recommended?

(g) In the absence of a written agreement and a ceremony, how is the evidential material concerning a permanent life partnership to be gathered and approached? Will the word of one in the absence or death of the other suffice?

[114] These appear to be but only some of the factors to which regard must be had. They do show why the existence of a permanent life partnership is not always easily ascertainable, and should thus not be readily assumed and treated as yielding the same entitlements or obligations as marriage. And the assertion that "the difficulties attendant to proving permanent life partnership are not insuperable",[157] is an acknowledgement of just how virtually murky and truly uncharted the permanent life partnership waters are for our courts to find a sailable way through them.

[157] See [78].

[115] The serious challenge with a permanent life partnership and seeking to subject it to the same maintenance and succession regimes as marriage, is precisely because of the paucity of clarity attendant to its conclusion, its terms and its termination. People may meet and be validly married within months or a year. Whether the same applies to the coming into being of a permanent life partnership is unknown. And its terms are generally undocumented and unknown.

[116] It is therefore fairly easy to tell what rights and obligations spouses owe to each other depending on the kind of marriage they have entered into, as will be borne out by the relevant documentation. And life partnerships cannot result in a one-size-fits-all scenario. Cases relied on by the majority are either of those people who had actually decided to marry, as was the case with Ms Bwanya and Mr Ruch, and Mrs Paixão and Mr Gomes, or where a commitment to take care of each other was inferred or actually made. It is somewhat difficult to tell what a court would have to make of those permanent life partnerships where men do not want to assume the same responsibilities as those who, together with their women partners, chose to enter into a marriage covenant. How would it be known what they have contracted themselves into? That is readily ascertainable in the case of marriage, hence the ease with which the statutory inclusion may be explained.

[117] Some of the features of the relationship of the parties here, and relationships in other cases sought to be relied on to prove that a permanent life partnership existed, do not really take the matter any further. That lovers hugged, attended social gatherings together, referred to each other as husband or wife, exchanged presents or that the one who is financially well endowed often bought gifts for the other, are admittedly relevant considerations whose significance should however not be overstated. Even high school or university or all others do or say that. But, to suggest that that establishes the existence of a permanent life partnership out of which rights and obligations similar to those of married couples ought to flow, would be to push the boundary lines between these partnerships and marriage much further than we can justify.

[118] The fundamental differences between marriage and a permanent life partnership explain the need for the existence of different regimes for each. An acknowledgement that they are different arrangements points to the possible acceptability of a different regime with regard to maintenance and inheritance. In grappling with this reality, it must also be emphasised that the mere existence of marriage does not automatically entitle a spouse to maintenance and inheritance. This principle ought to apply with equal force to a permanent life partnership.

Marriage as a choice

[119] Equality, the promotion of human rights and freedoms and non-sexism are some of the values foundational to our democratic State that feature prominently here. The current constitutional project is about the further entrenchment of fundamental rights or values. It does not seek to inadvertently perpetuate the opposite of what these values are about in our professed pursuit of their attainment. Women are in law equal to men and that should inform the development of our constitutional jurisprudence in this matter.

[120] Do women have the right to say no to a love proposal? Are they able to say no to a marriage proposal or permanent life partnership that does not accord with their best interests? Are job and business opportunities in this country condonably availed to citizens with a bias towards men? How should or do all of the above affect a woman's decision to be married or to be single or to be in a permanent life partnership? And how should all this affect our jurisprudential trajectory?

[121] Women, like men, have the power and the right to decide whether to be married, to be single or to be in a cohabitation. Even those who are married have a legal choice to stay in an unhealthy or abusive marriage relationship or to end it. To stay or to exit a cohabitation in which a partner is not willing to make a serious commitment regarding the obligations that would ordinarily and effortlessly flow from marriage is a choice open to both men and women.

[122] To say that there is a choice to stay married just as there is a choice to cohabit does not necessarily mean that it is or will always be an easy choice to make. It may at times be a very difficult judgement call to make. But, a choice it remains to be, however tough. To stray off a bit, I need to cite arguably extreme examples to make the point. Conscientious objection to the mandatory military service during apartheid and the enrolment in the liberation forces of yesteryears were career- or liberty-limiting and life-threatening decisions. This does not however detract from the fact that these were choices that had to be made. In a corrupt and unethical work or business environment, people have to decide to stand by or compromise principle at the risk of or to secure their jobs or business interests. That too is a choice.

[123] The main reason advanced for contending that marriage or cohabitation outside the auspices of marriage is not a choice is that men are, generally speaking, in a financially stronger position than women. Women are in effect at the mercy of men regarding the type of love-based life-time relationship they are to be in – marriage or cohabitation. As I understand this proposition, it is that some of these men are unwilling to commit to marriage because of the demands it imposes on them and what it has to offer women. They therefore leave women with little or no choice but to settle for the less desirable option that is a permanent life partnership, so goes the reasoning. This means that men are using their financial strength or advantage to give women a raw deal and the law must then step in to ensure that women who unwillingly stay in these life relationships are not disadvantaged. I see the alleged lack of bargaining power in a love relationship as another way of making the same point. The source of the so-called bargaining power can only be a man's financial means or material possessions and the consequential destitution that women would be opting for if they were to walk away. It is asserted that women who find themselves in that situation actually have no choice but to not walk away.

[124] It seems to be a serious challenge to substantiate the contention that choice is illusory in a love relationship or a permanent life partnership. At one point, it is accepted that choice does inform the decision to be married or to not be married

although other partners possibly do not have a choice. At another point, the argument seems to be that notions of "choice may be illusory". And it is not clear why this is believed to be so, apart from the issue of means of livelihood and lack of bargaining power.

[125] Again I ask rhetorically. Do South Africans have a choice to be married or not to be married? Are the impediments actual or perceived, legal, financial, or societal? Are the impugned provisions manifestly directed at disadvantaging unmarried couples? And do unmarried couples find themselves in a situation where they cannot access what is statutorily accessible to married couples as a result of circumstances beyond their control, in which they find themselves trapped?

[126] Accepting as we all should that there cannot be a wholesale discounting of the role of choice in remaining unmarried, and that the perceived absence of choice does not account for the inability of all other unmarried couples' to access what the impugned provisions have to offer, which they could if they were to get married, I remain unpersuaded that the notion of choice may be illusory and that women are sort of helplessly trapped in some of these relationships.

[127] Those couples who are married chose to be married and it is fair to assume that none of them were forced into marriage. Men did not force them to be married and that is why the regulatory framework and processes applicable to marriage require that couples be of a certain age, or if below should secure parental consent, before they may conclude a valid marriage contract. It also provides for objections to the wedding even by members of the public. Even the critical step that precedes marriage, namely falling in love or accepting a love proposition or engagement to marry is a consequence of choice. As stated, any of the parties may terminate a love relationship or an engagement before marriage, or walk away from marriage by filing for divorce. The law recognises and provides for the conclusion and termination of a marriage covenant, painful and disastrous as the latter often is. This allows women to exit abusive or hollow shells held out as the ideal marriage relationship. Although marriage might at times be a hollow

shell, the legal obligations that flow from it would still have to be fulfilled if it is not terminated. The same applies with equal force to any contract including the terms of a permanent life partnership agreement. All these options are provided for to ensure that even married couples get to enjoy peace, justice and life.

[128] Courts exist to breathe life into, among other things, the foundational values of our democratic State. In this context the promotion and actualisation of equality, non-sexism and freedoms. Our constitutional jurisprudence should not be grounded or anchored in the acceptance of women's victimhood as a norm that must form the basis for cohabitation attracting the same rights and obligations that flow from marriage. We must all discourage and fight conduct that engenders and seeks to normalise women's almost slavish dependency on unloving or uncaring men who do not want to commit to explicitly binding rights and obligations and are virtually holding women, who depend on them for financial and material support, to ransom by reason of their sheer manhood and financial advantage. Women must be free to enjoy and exercise their will-power or agency to say no to manipulation, abuse and being taken advantage of. If they prefer marriage but men will not budge because marriage imposes responsibilities too onerous for their liking, women must be encouraged to exit those relationships, even by courts and the law in general.

[129] There is a danger in inadvertently but effectively condoning or normalising the abuse of this "bargaining power" or "financial strength or advantage" by accepting it as a factor that may have contributed to the high number (millions) of unmarried couples, and then relying on that high number to conclude that there is an acceptable and ever-rising trend to settle for permanent life partnerships. It would be even more concerning to use that number as justification for the release of the same entitlements and obligations attendant to marriage, to cohabitants. Only a choice to enter into and remain in a permanent cohabitation should serve as a valid consideration for seeking to rely on the relatively high numbers of permanent life partnerships to demand a parallel recognition for them as an arrangement of equal status to marriage. Those who do not want to be part of that group, but are only forced by circumstances or are manipulated

into it, ought not to be included in that number for the advancement of that cause. In seeking to create a maintenance dispensation for those who are in an informal cohabitation, a clear line of demarcation must be drawn between those who prefer it and those who are in it by "compulsion", particularly when the numbers of those in it are sought to be relied on. Sadly, even that appears to be too difficult, if not impossible, a mission to accomplish.

[130] Just as women who are in abusive marriages are encouraged by society to - and do - walk away, and no jurisprudential excuse or justification is being offered to them to stay on, women in life partnerships that have no love, caring or commitment should not receive any legal incentive to stay on for the sake of the monetary or material benefits that sort of soften the unpalatability of the relationship while reinforcing the manipulation or subtle oppression. Equality, non-sexism and freedom, in a relationship, should be central to the future we craft even for unmarried couples. Men should not be "encouraged" to trap women in a relationship characterised by lack of express commitment to critical responsibilities. The effect of these foundational values, that must inform the development of our constitutional jurisprudence in this regard, should be to discourage and undo this abnormality which is the antithesis of their promotion. In any event that relationship cannot be equated to marriage because marriage gives couples the option to exit under prescribed circumstances. I ask rhetorically: why are people encouraged to walk away from marriage but not from cohabitation? Should that not be the aim of the development of our jurisprudence? We should seek to liberate unmarried people who are "forced" by insecurities to stay in an oppressive permanent life partnership rather than leave the door open for and inadvertently incentivise many more to enter into and stay entangled in that unequal and sexist bondage.

[131] Whatever practice, tradition, trend or tendency does not allow anyone, including women, to enjoy equality, and the freedom to choose, must be discouraged and rooted out. Nothing that enables or perpetuates it must be left intact. And that includes making a law that effectively gives it airtime by merely softening its blow, thus rendering it somewhat tolerable. Any life partnership that women would have loved to walk away

from if they had an easy choice should be spoken against, and discouraged rather than somewhat celebrated and given legal recognition. Any life partnership that women are forced, rather than freely choose to stay in, should not be allowed to count as a worthy contribution to the apparently soaring numbers of life partnerships and to the need for legal recognition and protection being contended for. We cannot be seen to be inadvertently endorsing or condoning any relationship that is oppressive, manipulative and irreconcilable with fundamental human rights and the values on which our democratic State is founded. When permanent heterosexual life partnerships are considered for legal protection, those that are a consequence of oppression by unloving and uncaring men who abuse the fact of being financially well-resourced, must be ruled out of contention and ways explored for their elimination or being walked away from. The foundation of the continued existence of such manipulative permanent life partnerships is rotten, flawed, cannot sustain what marriage is meant to sustain and should thus not be equated to marriage or attract what it has to offer.

[132] Our Constitution recognises the institution of marriage.[158] Marriage also enjoys universal recognition and that has been so for centuries. It is an institution so well structured and undergirded by appropriate family and other support systems. Its significance should therefore not be easily and effectively diminished, albeit unintentionally.

[133] Men and women are as free to enter into or walk away from any form of a love relationship as they are with regard to entering into a marriage or cohabitation. That as at 2016 more than 3.2 million people were in life partnerships other than marriage cannot without more serve as the basis for effectively equalising those relationships with marriage. The issue of choice or no choice, patriarchy and the apparently growing number of permanent life partnerships do not really contribute to finding the solution that partners in some of these permanent life partnerships actually deserve. And that solution is the answer to the question: what is to become of the plight of permanent life

[158] Section 15(3)(a)(i) of the Constitution of the Republic of South Africa, 1996.

partners whose relationship evince an express or tacit agreement between the parties to support each other for as long as they live, and the intention to have each inherit from the other. More directly, does the fact that the impugned Acts do not include permanent life partners mean that those partners would be left without a just, equitable and effective remedy should they end their relationship while both are still alive or in the event of the death of one of them?

[134] It is also not clear what would inform the conclusion that the majority decision in *Volks* is clearly wrong. It seems to be that contrary to what *Volks* says, to marry or not to marry is never a choice or it is not always a choice. Another reason advanced to find fault with *Volks* is, as alluded to above, that more than 3.2 million people are in cohabitations other than marriage and have set up families in terms of those arrangements. In other words, the proposition seems to be that there is a new or alternative way of life and of raising a family that our people have opted for which should therefore be given well deserved legal recognition and protection. Finally, it is contended that the recognition of a legally enforceable duty of support within the context of this arrangement should not be viewed or found proven on the basis of an agreement but as a consequence of its similarities with a marriage relationship.

Is a deserving permanent life partner without an effective remedy?

[135] Because marriage is markedly different from a life partnership, the discrimination in relation to the maintenance and succession regimes should be constitutionally tolerable and therefore fair, as long as the mere absence of exactitude or identicality or sameness does not herald injustice or iniquity to permanent life partners. Put differently, if permanent life partners are not without an effective remedy under deserving circumstances, then the discrimination cannot be unfair simply because the solution is not identical to that of married couples. More importantly, the purpose of the discriminatory provisions must, as stated, not be manifestly directed at disadvantaging unmarried couples and must demonstrably be designed to advance a worthy governmental or societal purpose or be reasonable and justifiable in our constitutional democracy. What the proscription of discrimination on the basis of

marital status seeks to achieve is the elimination of a denial of deserved benefits or treatment purely because one is not married. It is also a refusal to extend what should ordinarily be availed to the other in circumstances where it is not legally possible for them to be married.

[136] The purpose of the limitation is to provide for those who are married in order to give expression to their undertakings, clearly and expressly made in terms of the particular proprietary regime they have opted for. The worthy societal objective sought to be advanced is to facilitate the realisation of the undisputable consequences intended to flow from marriage. And it bears repetition that the law does not prevent any willing heterosexual couple from being married so as to partake of all the benefits that flow from marriage.[159]

[137] But, as stated our jurisprudence and lived reality suggest that it is not all permanent life partnerships that are intended to yield the same consequences as marriage. The uncertainties around permanent life partnerships not only necessitate that a line be drawn between them and marriage but also point to the inherent difficulty in readily extending the application of the impugned provisions to all or even some of them. If that blanket extension were to be made, it is a near-impossible task to establish what qualifications would then have to be imposed on them to fit into the legislative framework. 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.

[138] Common law principles will guide or help a court to determine whether it has been satisfactorily demonstrated that "a legally enforceable duty of support" exists in a permanent life partnership that bears at least some of the hallmarks of a marriage relationship. It would be inappropriate to infer a legally enforceable duty of support from the mere existence of a familial or spouse-like relationship. This is so because a

[159] *Volks* above n 1 at para 90.

familial or spousal relationship, except in terms of the operation of law as correctly articulated by the majority in *Volks*, does not inevitably give rise to a legally enforceable duty of support or the entitlement to inherit, in disregard for the proprietary regime opted for by the parties. How then can every permanent life partnership be assumed to yield more rights or benefits. How constitutionally sound and fair would that be?

[139] *Paixão* bears testimony to our constitutional dispensation's fundamental commitment to justice and equity. No one, including a woman in a permanent life partnership, will be left without legal protection in circumstances where her situation and needs qualify her for it. Where all the available and credible evidential material point to the existence of a legally enforceable obligation to maintain or support and inherit from each other, that explicit or implicit undertaking will and must be honoured. As stated, justice is not about making the obligations and entitlements or situation of unmarried couples identical to those of married couples without more. To do so would amount to needlessly pulling down or eroding the institution of marriage despite the availability of a just alternative and effective remedy. This, as stated, in circumstances where nothing in our law precludes heterosexual partners from getting married in order to gain access to the benefits held out by the impugned sections.

[140] The question should thus be, whether the law, common or statutory, makes adequate provision for unmarried couples who deserve to be supported. And the answer is yes – the common law does and will. *Paixão* has through the appropriate adaptation and application of our common law made this and other possibilities abundantly clear. And that is the legal protection or provision open to unmarried couples to resort to in case of need. As stated, justice and fairness are not about ensuring that all provisions or protection comes under an identical legal regime, regardless of circumstances.

[141] The concern raised by Mokgoro J and O'Regan J in *Volks* regarding when then would discrimination on the basis of marital status ever be regarded as unfair,[160] if not

[160] *Volks* above n 1 at paras 98-145.

in cases like this, demands attention. I do not think appropriate examples are necessarily difficult to come by, although we should never appear to be too desperate for one. It would for example be unfair to discriminate against unmarried couples in relation to maternity leave. In other words, not allowing a man who wants to be there for, and offer emotional and other support to, the mother of his child or children, in circumstances where his fatherhood is not disputed, just because he is not married, could, if legally permissible, constitute unfair discrimination on the basis of marital status. It would similarly be unfair to not give legal recognition to and enforce a declared commitment to support each other and to inherit under any circumstances just because these are undertakings made by partners who are not married. The express or tacit terms of their agreement must, under appropriate circumstances, be accepted and enforced. It may even be done in terms of legislation if Parliament ultimately so decides or in terms of the common law, as demonstrated by *Paixão*. Again I say, this should not be a pursuit of sameness or identicality. It is not about form. But, about substance — substantive justice through any viable or defensible avenue.

[142] The authorities cited in the main judgment point to the defining role that the express or tacit terms of the agreement entered into by the partners have to play in determining whether there is a legally enforceable reciprocal duty of support. They range from sharing accommodation, a motor vehicle(s), buying groceries or household necessities for one another or one for another, making express provision in a will for the other to inherit or making another a beneficiary in an insurance policy or taking a decision to be married or being involved together in a business venture or planning to do so. It is about "partners [having] undertaken reciprocal duties of support".[161] Other factors cited entail pooling the resources together, resolving to get married and providing for one partner's children to inherit from both. In *Paixão*, it was not just the apparent and unexplained similarity of their relationship to marriage that turned the tide in favour of Mrs Paixão. It was factors or actions that exemplified the terms of marriage, in the relationship or partnership concluded by the parties, that explain the outcome.

[161] Id at para 132.

[143] For example, as a loving and caring husband is expected to do, Mr Gomes supported Mrs Paixão's children, and paid for the university and high school education of two of them. He undertook to support her after her retrenchment and did not want her to work anymore. They both executed a joint will, nominated each other as heirs to their estate and provided for Mrs Paixão's daughters to inherit from both should these lovers die simultaneously. It is these express and tacit terms of their partnership, which they in any event wanted to translate into marriage, that informed the Supreme Court of Appeal's conclusion that a legally enforceable duty of support that flows from a relationship that is akin to marriage existed. It was more than a mere similarity to marriage or family, or existence of a permanent life partnership.

[144] It is necessary to underscore the point, that the examples cited in the main judgment as support for equal treatment of marriage and permanent life partnerships are not drawn from cases relating to permanent life partnerships of heterosexuals. They are all about people who actually wanted to and were planning to get married soon, when tragedy struck. We do not therefore have any permanent life partnerships of heterosexuals to draw from in support of what is being pursued on their behalf, here.

[145] Relevant as they are, it bears repetition that the fact of people in a love relationship hugging, kissing, engaging in acts of intimacy, referring to each other as my wife or husband or sharing accommodation or even having children together or promising marriage are far from conclusive in determining the existence of a legally enforceable duty of support or the entitlement to inherit. As stated, even teenagers, who are not legally entitled to marry without parental permission, say and do these things. But that would not necessarily give rise to a legally enforceable duty to maintain each other. Marriage is a more dependable reference point in determining the coming into being of a permanent life partnership and the obligations or entitlements that flow from it. Where the express or tacit terms of a love relationship or partnership bear striking similarities to marriage in relation to, say parties supporting each other financially, emotionally, sharing accommodation and making critical declarations or commitments

towards one another, then some bases for finding a legally enforceable duty of support would probably have been established.

[146] What cannot be conscionably or justly controverted is that the law ought to yield a just and equitable outcome to all, including parties to permanent life partnerships. This the law can do and does by ensuring that in every instance where it can be shown that those parties had expressly or tacitly agreed or undertaken to support each other even after the death of the other, as was the case between Mrs Paixão and Mr Gomes, the legal duty of support must be upheld and enforced. Whether that legally enforceable duty exists in a permanent life partnership, cannot be a blanket recognition. It is a consequence of a factual enquiry. And only when facts and circumstances point to the existence not only of a permanent life partnership but one that is characterised by a reciprocal duty of support, would it be appropriate "to extend the protection of the common law"[162] to those parties or to the one who needs and was intended to be supported throughout his or her life.

Conclusion

[147] The central question bears repetition. Why the discrimination? And is it reasonable and justifiable in an open and democratic society based on freedom, equality and dignity to discriminate? First, it bears repetition that the very existence of marriage is easily ascertainable. Second, the purpose, nature and intended proprietary consequences of marriage as well as rights and obligations that flow from each type of marriage are predetermined and known. Finally, its lawful and effective termination is consequential upon meeting set requirements and following a prescribed legal process to the end. The unregulated terrain that is permanent life partnerships render it extraordinarily difficult to tell what length of period determines its permissibility. Parental involvement does not seem to matter in the case of very young or under-age people. For, the requirements other than the willingness or at times even unwillingness to live together are unknown. How and when it comes into being is also unprescribed

[162] *Paixão* above n 48 at para 36.

as are its express or tacit terms. It all seems to be more about piecing scattered information together, and arguably speculative. And this is what explains the challenge attendant to wanting to readily equate all permanent life partnerships to marriage particularly in relation to its beneficial offshoots like maintenance and succession.

[148] What all of the above mean is that the law does not leave a permanent life partner cold and dry in the exact same circumstances, in terms of established commitments, where the interests of married couples are or would be catered for under the impugned provisions. The common law is well able to look after them. The absence of identical provisions in circumstances where a just, equitable and effective relief is provided for under the common law militates against the conclusion that the non-inclusion of unmarried permanent life partners as beneficiaries of the impugned provisions amounts to unfair discrimination on the basis of marital status. The common law has been and can still be sufficiently developed to cater for permanent life partnerships that are admittedly dissimilar to marriage. More importantly, no one is precluded from entering into a marriage relationship so as to enjoy the benefits held out by the provisions whose constitutional validity is under attack. It is a matter of choice, however difficult.

[149] It is of course open to Parliament to decide whether statutory provision should be made for permanent life partners. How to go about it is best left to Parliamentarians. Should they do so, they would do well to set out the requirements for entering into a permanent life partnership, how obligations and rights akin to those which flow from marriage arise, and when and how we would all become aware of its conclusion or termination.

[150] Unlike marriage, a permanent life partnership does not by its very existence render it easily determinable whether the duty to maintain even after the death of another or the right to inherit exists. When the legally enforceable duty of support has been established, then the common law will be triggered into operation to protect the interests of the affected permanent life partner. As a result, no injustice or unfairness

would eventuate simply because this treatment were not identical to that of married couples.

[151] I would thus set aside the declaration of unconstitutionality by the High Court. There is reasonable justification for the limitation of the right to equality, in an open and democratic society based on freedom, equality and dignity. The discrimination is fair and the impugned provisions are therefore constitutionally valid.

JAFTA J (Mhlantla J and Tshiqi J concurring):

[152] I have had the benefit of reading the first judgment prepared by my colleague Madlanga J and the second judgment penned by the Chief Justice. I agree with the first judgment that the declaration of invalidity made by the High Court should be confirmed. That Court has declared section 1(1) of the Intestate Succession Act to be invalid for being inconsistent with the Constitution. However, it declined to declare section 2(1) of the Maintenance of Surviving Spouses Act invalid.

[153] Ms Bwanya seeks to appeal against the latter decision. While I agree with the first judgment that leave to appeal should be granted despite the fact that the matter is moot, I disagree that the appeal should succeed. In my view the High Court was right in concluding that the decision of this Court in *Volks*[163] stands in the way of the claim for invalidity. In that matter this Court considered a constitutional challenge mounted against section 2(1) of the Maintenance of Surviving Spouses Act based on the equality right entrenched in section 9(3) of the Constitution.[164]

[163] *Volks* above n 1.

[164] Section 9(3) of the Constitution provides:

> "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."

[154] Following its interpretation of section 2(1), this Court concluded that the section does not constitute unfair discrimination and consequently that it is constitutionally compliant. However, the Court rendered a split decision. A majority comprising seven Justices produced and supported two judgments. The first of these was written by Skweyiya J.[165] The second judgment was penned by Ngcobo J and concurred in by the other Justices. Two dissents were also produced. The first was a joint judgment by Mokgoro J and O'Regan J. The second dissent was written by Sachs J.

[155] Under judicial precedent, the courts below were bound to follow the decision in *Volks* unless it did not apply to a particular case. This would be the position if that decision was distinguishable. But where the issues that arose in *Volks* are presented to a court, as it occurred here, the court in question was bound to follow the ratio in *Volks*. The interpretation given in *Volks* to the impugned provision had to be followed. What *Volks* did, was to determine whether section 2(1) can be interpreted in a manner that is consistent with section 9(3) of the Constitution and this Court concluded that the provision gave rise to fair discrimination. Accordingly, the High Court was bound by that interpretation.[166]

[156] The same interpretation is binding on this Court unless we are satisfied that the decision in *Volks* was clearly wrong. For we are entitled to depart from it only if it was clearly wrong. In terms of the principle of judicial precedent, courts are obliged to follow their previous decisions and may depart from them only if they were clearly wrong. In *Camps Bay* this Court affirmed the principle in these terms:

> "The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a

[165] With the concurrence of Chaskalson CJ, Langa DCJ, Moseneke J, Ngcobo J, Van der Westhuizen J and Yacoob J.

[166] *Ex parte Minister of Safety and Security: In re S v Walters* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) (*Ex parte Minister*) at paras 55-6 and 61.

> manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."[167]

[157] The high standard for departing from previous decisions only if they are clearly wrong prevents the chaos that may ensue if decisions are not followed at will. It is pitched higher so as to avoid a court overturning its previous decision merely on the basis that it does not agree with the reasoning in the decision in question. Judges often differ in the reasons furnished for their decisions. In collegial courts, the reasoning that attracts majority support becomes the decision of the court. *Volks* is a good example of this.

[158] The fact that this Court, as differently constituted, may now support the minority reasoning cannot justify a departure from the majority decision in *Volks* unless it concludes that it was wrongly decided. With regard to the ratio of a decision, it is not a matter of personal preference by individual Judges. Instead, it is whether the ratio in the majority decision is plainly wrong in law. This may occur if the decision to be departed from was based on wrong legal principles. Therefore, here we may depart from *Volks* only if we are satisfied that the majority decision was clearly wrong in law.

[159] In its analysis of *Volks*, the first judgment gives reasons for why it disagrees with the majority decision and agrees with the minority. It then concludes that the majority was wrong. I disagree. While it is true that the majority decision in *Volks* has been criticised by legal commentators and while one may also criticise some of the reasoning, this is insufficient for departing from that decision. Consequently, it is necessary for us to determine whether the majority in *Volks* was clearly wrong. This in turn requires us to carefully consider the majority decision and establish if it was based on wrong principles of law.

[167] *Camps Bay* above n 72 at para 28.

Context

[160] It is necessary to outline the backdrop against which *Volks* must be evaluated. The first relevant consideration is the objective principle of constitutional invalidity. This entails the proposition that the invalidity of a statutory provision does not depend on the facts of a particular case.[168] For if this were to be the position, depending on the facts, a statute would be valid on one day and invalid on the other day.

[161] The other factor to be taken into account is that the invalidity of a statute is determined with reference to the language of the impugned provision and its impact on the right relied upon. It must have the same impact on that right regardless of the facts of a particular case.

[162] A further consideration is the approach laid down by this Court in determining a claim of invalidity based on the rights in the Bill of Rights. A two-stage approach is followed. During the first leg of the inquiry, what needs to be determined is whether the impugned provision limits the right relied upon.[169] This is achieved by interpreting the provision in question to determine its content and scope. Once this is done, the provision is measured against the relevant right with the view to determine if it has an effect on the right. If no effect is established the conclusion must be that there is no limitation. That conclusion must result in the dismissal of the claim without any consideration of the second leg.[170]

[163] If a limitation of the relevant right is established, it becomes necessary to proceed to the second leg of the inquiry. This entails determining whether the limitation is reasonable and justifiable as contemplated in section 36 of the Constitution.[171] If the

[168] *Merafong City v Anglogold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC).

[169] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

[170] *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 3 at para 37; *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O.* [2017] ZACC 26; 2017 (6) SA 331 (CC); 2017 (10) BCLR 1303 (CC) at para 65; *Thebus v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 29; and *Ex parte Minister* above n 166 at para 26.

[171] Section 36(1) of the Constitution provides:

limitation is reasonable and justifiable, the claim for invalidity must fail. Otherwise if the limitation is not justifiable, the impugned provision must be declared invalid.

[164] If the interpretation of the impugned provision reveals that it is reasonably capable of two or more meanings and one of them is consistent with the Constitution, a claim for invalidity must also fail. This is because the court adjudicating the claim is obliged to give the impugned provision a meaning that is consistent with the Constitution.[172] With this background in mind we proceed to consider whether *Volks* was clearly wrong in law.

First majority decision

[165] Section 2(1) of the Maintenance of Surviving Spouses Act which was impugned in *Volks* 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."

[166] In the first majority judgment, Skweyiya J construed this provision to mean that only surviving spouses in a marriage are entitled to reasonable maintenance against the estate of the deceased spouse.[173] He traced the history of the Act to *Glazer*,[174] in which the Appellate Division declined to recognise such a claim. He defined the purpose of section 2(1) thus:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors."

[172] *Democratic Alliance v Speaker, National Assembly* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at paras 33 and 97-8.

[173] *Volks* above n 1 at paras 38-9.

[174] *Glazer* above n 68.

> "The purpose of the provision is plain. The challenged law is intended to provide for the reasonable maintenance needs of parties to a marriage that is dissolved by the death of one of them. The aim is to extend an invariable consequence of marriage beyond the death of one of the parties. The legislation is intended to deal with the perceived unfairness arising from the fact that maintenance obligations of parties to a marriage cease upon death. The challenged provision is aimed at eliminating this perceived unfairness and no more. The obligation to maintain that exists during marriage passes to the estate. The provision does not confer a benefit on the parties in the sense of a benefit that either of them would acquire from the State or a third party on the death of the other. It seeks to regulate the consequences of marriage and speaks predominantly to those who wish to be married. It says to them: 'If you get married your obligation to maintain each other is no longer limited until one of you dies. From now on, the estate of that partner who has the misfortune to predecease the survivor will continue to have maintenance obligations.'"[175]

[167] Having considered the text of the provision, Skweyiya J concluded that it does not bear a reasonable meaning which could render it compliant with section 9(3) of the Constitution.[176] The learned Justice proceeded to consider the challenge that was based on section 9(3) of the Constitution. The determination of this claim turned on whether the impugned provision amounted to unfair discrimination against unmarried couples in a permanent life partnership. Having accepted that the attack was based on marital status, he assumed without deciding that the impugned provision constituted discrimination. Following the test laid down in *Harksen*,[177] he held that since the claim was premised on a ground listed in section 9(3) of the Constitution, the issue to be determined was whether the impugned provision discriminated unfairly against partners in a permanent life partnership.[178]

[168] The learned Justice considered the differences between married persons and unmarried persons in permanent life partnerships to be crucial to determining whether

[175] *Volks* above n 1 at para 39.

[176] Id at paras 43-5.

[177] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

[178] *Volks* above n 1 at paras 48-9.

the discrimination in the impugned provision was unfair. With reference to *Fraser*,[179] he observed that Parliament may differentiate between married and unmarried people.[180] In *Fraser*, this Court accepted that laws would often justify discrimination between married and unmarried people.[181]

[169] Having pointed out the differences between those groups, Skweyiya J concluded:

> "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."[182]

[170] This approach by the majority is in accordance with the jurisprudence of this Court in cases like *Prinsloo*.[183] In that matter, this Court acknowledged that for a modern state to govern effectively it may even discriminate between groups of people, as long as it does not do so unfairly. In that case, this Court observed:

> "It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently."[184]

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[179] *Fraser* above n 107.

[180] *Volks* above n 1 at para 53.

[181] *Fraser* above n 107 at para 26.

[182] *Volks* above n 1 at para 56.

[183] *Prinsloo v Van Der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

[184] Id at para 24.

[171] This approach was followed in *Hugo*[185] and *Harksen*.[186] Indeed Parliament has chosen to regulate the institution of marriage through different pieces of legislation. Civil marriage has its own legislation that govern civil marriages only.[187] Customary law marriages have a statute dedicated to them alone.[188] And same-sex unions are also regulated through a statute that applies only to them.[189] Each of these statutes affords the group to which it applies benefits that differ from those enjoyed by other groups under the legislation relevant to them. On the jurisprudence of this Court, the different treatment of these different groups under these different pieces of legislation is constitutionally compliant, even if it amounts to discrimination. This is because the Constitution does not proscribe every discrimination, but only discrimination that is unfair.

[172] Once the majority in *Volks* accepted that the discrimination it was concerned with was based on a listed ground, it rightly defined the issue to be determined as whether the discrimination was unfair. In determining this question Skweyiya J considered a number of factors which militated against the conclusion that the impugned provision discriminated unfairly against surviving partners in a permanent life partnership. One of the shortcomings he emphasised in response to the minority was that in the case of a permanent life partnership, the nature and extent of the duty to support arise from the partners' agreement. It is the terms of each agreement that determines the content and duration of the reciprocal duty. And in accordance with the *pacta sunt servanda* principle, it is only the partners who may change the terms of the agreement. If, for example, the agreement envisages the duty to come to an end upon the death of one of the partners, Parliament may not change the agreement by extending the duty's duration without offending the partners' constitutional right to contract and themselves define the obligations arising from that contract.

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[185] *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (*Hugo*).

[186] *Harksen* above n 177 at paras 43-6.

[187] Marriage Act 25 of 1961.

[188] Recognition of Customary Marriages Act 120 of 1998.

[189] Civil Union Act 17 of 2006.

[173] In addressing this point the learned Justice stated:

> "In his judgment Sachs J envisages two categories of people within this broad class of unmarried cohabitants against whom the disputed law is unfairly discriminatory. The first category is the people who by written instrument or by necessary implication agree to live together, to maintain each other and to give each other support of every kind. It is contended that for the law not to oblige survivors of relationships in this category to be maintained entails unfair discrimination against the survivor simply because the survivor does not have the piece of paper which is the marriage certificate. That is an over-simplification. Marriage is not merely a piece of paper. Couples who choose to marry enter the agreement fully cognisant of the legal obligations which arise by operation of law upon the conclusion of the marriage. These obligations arise as soon as the marriage is concluded, without the need for any further agreement. They include obligations that extend beyond the termination of marriage and even after death. To the extent that any obligations arise between cohabitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement. The Constitution does not require the imposition of an obligation on the estate of a deceased person, in circumstances where the law attaches no such obligation during the deceased's lifetime, and there is no intention on the part of the deceased to undertake such an obligation."[190]

[174] The text of section 2(1) of the relevant Act plainly indicates that the provision does not create a new right and a corresponding obligation, but simply extends the duration of existing rights and obligations beyond their deadline under the common law. And since those obligations arise by the operation of law, their terms may be altered without violating the individuals' freedom to conclude contracts. The source of the obligations is the vital distinction between the groups of married and unmarried people.

[175] With reference to the minority, Skweyiya J readily accepted that there is a need for legislative reform to regulate permanent life partnerships. But he rejected the proposition that this could be done by extending the scope of section 2(1) to cover those

[190] *Volks* above n 1 at para 58.

partnerships. He pointed out that this would not address the plight of the more vulnerable members of such partnerships, those who have no agreements giving rise to the reciprocal duty of support.[191] This approach too is consistent with our jurisprudence. In *Carmichele* this Court emphasised the point that Parliament is the appropriate engine for law reform.[192]

[176] In concluding that the impugned provision did not constitute unfair discrimination Skweyiya J stated:

> "As I have already said, it is not unfair not to impose a duty upon the estate of a deceased where no duty of that kind arose by operation of law during the lifetime of that person. I have a genuine concern for vulnerable women who cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships. I do not think however that their cause is truly assisted by an extension of section 2(1) of the Act or that vulnerable women would be unfairly discriminated against if this were not done. The answer lies in legal provisions that will make a real difference to vulnerable women at a time when both partners to the relationship are still alive. Once provision is made for this, the legal context in which section 2(1) falls to be evaluated will change drastically."[193]

[177] Additional reasons supporting the same conclusion were furnished in the second judgment of Ngcobo J. He too considered the issue for determination to be whether the discrimination arising from the impugned provision was unfair.[194] Following a review of decisions of this Court and international law, the learned Justice held:

> "Once it is accepted that marriage is a constitutionally recognised institution in our constitutional democracy, it follows that the law may legitimately afford protection to marriage. And in appropriate circumstances the law may afford protection to married people which it does not accord to unmarried people. This seems to me to be the logical

[191] Id at paras 66-7.

[192] *Carmichele* above n 54 at para 36.

[193] *Volks* above n 1 at para 68.

[194] Id at para 75.

> consequence of the recognition of the institution of marriage. But there are other considerations that are relevant to the determination of the fairness or otherwise of the discrimination involved in this case."[195]

[178] He proceeded to take account of a number of considerations which were against the conclusion that section 2(1) constitutes unfair discrimination purely by not affording surviving partners in permanent life partnerships the protection extended to surviving spouses in a marriage. The first factor was the purpose of the impugned provision. In this regard he said:

> "The purpose of the provisions of the Act is manifestly not directed at impairing the dignity of the survivors of permanent life partnerships. It is primarily directed at ensuring that surviving spouses who are in need of maintenance and who are unable to support themselves, do get maintenance. One of the invariable consequences of marriage is a reciprocal duty of support. During the subsistence of the marriage, the deceased spouse is under a duty to support and maintain the surviving spouse. What the provisions of the Act merely do is to ensure that this duty continues after the death of one of the spouses. It does this by transferring this duty to the estate of a deceased spouse."[196]

[179] He concluded that if the reciprocal duty emanating from an agreement of partners in a permanent life partnership whose duration was by their consensus limited to the period when both partners were alive were to be similarly extended, "it would amount to the imposition of the will of one party upon the other"[197] which is equally unacceptable. He also noted that under customary law there was no need to extend the duty which passes from a husband to the heir by operation of law.[198] He observed that partners to a life partnership are free to include in their agreement a term that provides for the maintenance of the surviving partner.

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[195] Id at para 87.

[196] Id at para 88.

[197] Id at para 94.

[198] Id at para 89.

[180] Ngcobo J acknowledged that by not transferring the duty of support to the estate of the surviving partner, the impugned provision constitutes a disadvantage to the surviving partner. He stressed that the provision concerned "does not take away the right of a surviving partner of a permanent life partnership from receiving a sum of money from the estate of the deceased partner".[199] He declared:

> "Indeed, the provisions of the Act do not prevent partners in a permanent life partnership from leaving sums of money to each other in their respective wills, which can be used for maintenance. We know for example that the deceased in this case left Mrs Robinson a sum of money in his will."[200]

[181] The further considerations taken into account by the Justice were that the law places no impediment on heterosexual couples in a permanent life partnership from getting married and that marriage is a matter of choice. With regards to one's choice to get married, Ngcobo J said:

> "People involved in a relationship may choose not to marry for a whole variety of reasons, including the fact that they do not wish the legal consequences of a marriage to follow from their relationship. It is also true that they may not marry because one of the parties does not want to get married. Should the law then step in and impose the legal consequences of marriage in these circumstances? To do so in my view would undermine the right freely to marry and the nature of the agreement inherent in a marriage. Indeed, it would amount to the imposition of the will of one party upon the other. This is equally unacceptable.
>
> Another consideration that is relevant is the difficulty of establishing the existence of a permanent life partnership. The point at which such partnerships come into existence is not determinable in advance. In addition, the consequences of such partnerships are determined by agreement between the parties. Unless these have been expressly agreed upon, they have to be inferred from the conduct of the parties. What happens at the dissolution of such partnerships is far from clear."[201]

[199] Id at para 90.

[200] Id.

[201] Id at paras 94-5.

[182] It is plain from this statement that the choice to marry was one of several considerations that the majority took into account. It was not the main or determinative factor. It is equally evident from the same statement that the Court was alive to the fact that one of the partners in a permanent life partnership may choose not to be married in view of the legal consequences of a marriage, and that choice should be respected as a court may not force people to get married if they do not wish to do so. It was this statement that has attracted a lot of criticism of the majority decision. The critics pointed out that in the majority of cases and because of the unequal financial power, it is men who refuse to marry, exposing the surviving partner to hardship upon their death.

[183] While this may be true, the criticism is exaggerated in the case such as the present, which is limited to permanent life partnerships where there is an agreement to support each other during the partners' lifetime. It is in these sort of cases where the hazard of the unequal power play is attenuated by the willingness of both partners to agree on a reciprocal duty of support. It is unlikely that a man who is willing to assume that duty in his lifetime would refuse to have it transferred to his estate upon death. If anything, *Volks* illustrates that the opposite is more likely.

[184] Therefore, the criticism against the choice to marry factor is more potent in the case of a permanent life partnership where there is no agreement on the duty to support while both partners are alive. In that case women are placed in a more vulnerable position. But as the majority in *Volks* observed, this disadvantage cannot be addressed by expanding section 2(1) to cover that situation. This is because the section does not create a new right and an obligation. It merely extends the duration of the existing ones. And where there is no duty of support before death, there is none to be extended after death of one of the partners. This is the category of partnerships that calls for urgent legal reform from Parliament in view of the reality that about 3.2 million people cohabit out of marriage in this country.

[185] Returning to *Volks*, to the proposition that the impugned provision does not constitute unfair discrimination because partners in a permanent life partnership have other options to secure maintenance, one may add the fact that nothing prevents the surviving partners from enforcing a claim for maintenance against the estate of the deceased partner. This can be achieved by asking a competent court to develop our law to recognise such a claim. A similar development was undertaken in *Paixão*,[202] where a duty to support based on contract was extended beyond the death of the person against whom it was enforceable and was enforced against the wrongdoer who was responsible for the death of the deceased, as replaced by the Road Accident Fund.

[186] However, here Ms Bwanya has not sought the development of the common law to recognise a claim for support against the estate of her deceased partner. As the first judgment indicates, Ms Bwanya's claim for maintenance that was lodged against the estate was settled in the High Court and in terms of that settlement, she was paid a sum of money for maintenance. To a degree this was similar to what occurred in *Volks*, except that here the deceased did not agree to leave money to the surviving partner in a will. But what happened here underscores the point that payment of maintenance to the surviving partner in a permanent life partnership is already recognised by our courts, albeit in circumstances where the parties themselves agree to such a claim. This was one of the factors taken into account by the majority in *Volks* for concluding that the impugned provision did not constitute unfair discrimination.[203]

[187] The principle that the denial of a specific benefit based on one of the grounds listed in section 9(3) of the Constitution does not, without more amount to unfair discrimination, was laid down by this Court in *Hugo*.[204] In that matter the President of the Republic exercised his constitutional power to grant remission of sentences to "all mothers in prison on 10 May 1994, with minor children under the age of twelve (12)

[202] *Paixão* above n 48.

[203] *Volks* above n 1 at para 90.

[204] *Hugo* above n 185.

years".[205] Mr Hugo, who was a prisoner at the relevant time and had children below 12, challenged that decision on the ground that it discriminated against him unfairly on the bases of sex and gender. These bases were listed in section 8(2) of the interim Constitution, which was the equivalent of section 9(3) of the Constitution. This triggered the presumption that the discrimination complained of was unfair.

[188] Despite rejecting most of the reasons advanced by the President for treating male prisoners differently from female ones and denying them the benefit accorded to female prisoners, this Court held that the discrimination was not unfair. Among the reasons advanced for this conclusion was the fact that "no prisoner has the right to be pardoned, to be reprieved or to have a sentence remitted."[206] This Court proceeded to reason:

> "Where the power of pardon or reprieve is used in general terms and there is an 'amnesty' accorded to a category or categories of prisoners, discrimination is inherent. The line has to be drawn somewhere, and there will always be people on one side of the line who do not benefit and whose positions are not significantly different to those of persons on the other side of the line who do benefit. For instance there may be no meaningful difference between prisoners whose birthday was shortly before the cut-off date identified by the President, and who were 18 when the decision took effect, and those whose birthday was shortly after the cut-off date and were under 18 at the effective date. Indeed, there might well have been prisoners in the first category who, if assessed individually, might have been considered to be more deserving of a remission of sentence than persons in the latter category."[207]

[189] Rejecting the High Court's conclusion that the President had failed to establish that the discrimination was fair, this Court held:

> "In this case, two groups of people have been affected by the Presidential Act: mothers of young children have been afforded an advantage an early release from prison; and fathers have been denied that advantage. The President released three groups of

[205] Id at para 2.

[206] Id at para 29.

[207] Id at para 31.

> prisoners as an act of mercy. The three groups - disabled prisoners, young people and mothers of young children - are all groups who are particularly vulnerable in our society, and in the case particularly of the disabled and mothers of young children, groups who have been the victims of discrimination in the past. The release of mothers will in many cases have been of real benefit to children which was the primary purpose of their release. The impact of the remission on those prisoners was to give them an advantage. As mentioned, the occasion the President chose for this act of mercy was 10 May 1994, the date of his inauguration as the first democratically elected President of this country. It is true that fathers of young children in prison were not afforded early release from prison. But although that does, without doubt, constitute a disadvantage, it did not restrict or limit their rights or obligations as fathers in any permanent manner. It cannot be said, for example, that the effect of the discrimination was to deny or limit their freedom, for their freedom was curtailed as a result of their conviction, not as a result of the Presidential Act. That Act merely deprived them of an early release to which they had no legal entitlement. Furthermore, the Presidential Act does not preclude fathers from applying directly to the President for remission of sentence on an individual basis in the light of their own special circumstances. In his affidavit, the President made clear that fathers of young children could still apply in the ordinary way for remission of their sentences in the light of their particular circumstances. The Presidential Act may have denied them an opportunity it afforded women, but it cannot be said that it fundamentally impaired their rights of dignity or sense of equal worth. The impact upon the relevant fathers, was, therefore, in all the circumstances of the exercise of the Presidential power, not unfair. The respondent, therefore, has no justified complaint under section 8(2) of the interim Constitution."[208]

[190] It is evident from this statement that the Court applied the principle it had established in *Harksen*, to the effect that discrimination becomes unfair if it fundamentally impaired the rights of dignity or sense of equal worth. As Mr Hugo and other fathers had no legal entitlement to remission granted to female prisoners and the male prisoners could still apply individually for remission, the Court concluded that the impugned decision could not be unfair. It is also apparent from the judgment in *Hugo* that heavy reliance was placed on these facts for concluding that discrimination was not unfair. This was further elucidated in these terms:

[208] Id at para 47.

> "The harmful impact of the discrimination in this case was not experienced by mothers, but by fathers. However, in my view, that impact was far from severe. Fathers were denied an opportunity of special remission of sentence. There is no doubt that an early release from jail is beneficial. But in assessing the impact of the discrimination, it must be remembered that their imprisonment resulted, not from the President's act in denying them remission, but from their having been convicted of criminal offences. In addition, they still have the right to apply for special remission of sentence in the light of their own circumstances. The effect of the discriminatory act was, therefore, in my view not to cause substantial harm. That harm would have been far more significant in my view if it had deprived fathers in a permanent or substantial way of rights or benefits attached to parenthood."[209]

[191] In *Volks* too, the majority held the opinion that as a surviving partner in a permanent life partnership, Mrs Robinson had no legal entitlement to claim maintenance from the estate of her deceased partner. But in addition, the deceased had agreed to leave a sum of money in his will which could cover the need for maintenance. This is a reasoning similar to the one in *Hugo*.

[192] The difficulty that arose in *Volks* was that in its terms section 2(1) of the Maintenance of Surviving Spouses Act does not directly deny surviving partners in a permanent life partnership a legal right to maintenance. Instead, what it does is that the benefit it gives to surviving spouses in a marriage is not extended to surviving partners. This illustrated 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 too.

[193] In *Volks* in their minority judgment, Mokgoro J and O'Regan J lamented the absence of laws that govern the affairs of partners in permanent life partnerships and viewed that as the genesis for the unfairness of the discrimination in section 2(1). They said:

[209] Id at para 114.

> "Were there some regulation to provide equitable protection to cohabitants who have been in relationships which can be said to perform a similar social function to marriage, the provisions of section 2(1) may not have constituted unfair discrimination. Given however that there is no regulation to ensure some equitable protection for cohabitants, particularly those who have been in long-term relationships where patterns of dependence have been established, the failure of section 2(1) to apply to such relationships constitutes, in our view, unfair discrimination.
>
> It should be emphasised that this conclusion does not mean that the Legislature is required to regulate cohabitation relationships in the same way that it regulates marriage. In particular, the Legislature need not extend the provisions of section 2(1) to all cohabitation relationships. As indicated earlier, marriage is a particular form of relationship, concluded formally and publicly with specified and clear consequences. Many people who choose to cohabit may do so specifically to avoid those consequences. In our view, the Legislature is entitled to take this into account when it regulates cohabitation relationships. However, cohabitation relationships that endure for a long time can produce patterns of dependence and vulnerability which in the light of the substantial and increasing number of people in cohabitation relationships cannot be ignored by the Legislature without offending the constitutional prohibition on unfair discrimination on the grounds of marital status."[210]

[194] Manifestly this reasoning affirms that section 2(1) in and of itself is not the source of the constitutional defect. On the contrary, the issue of unfair discrimination came into existence only because no law protects the rights of cohabitants in permanent life partnerships. This minority even acknowledges that Parliament was not obliged to provide the necessary regulation in section 2(1).[211] The minority expressed themselves thus:

> "We have concluded that the discrimination is unfair. The next question that arises is whether that unfair discrimination can be said to be reasonable and justifiable within the contemplation of section 36 of the Constitution. The purpose of the legislation is to alter the common-law rules governing marriage to protect the surviving spouse from

[210] *Volks* above n 1 at paras 133-4.

[211] Id at para 134.

> penury upon the death of the other spouse. In our view, this is an important purpose. However, that purpose can be achieved without excluding surviving partners of cohabitation relationships in which duties of support had been mutually undertaken, whether tacitly or expressly, and where those surviving partners are in financial need, from similar protection. It is not clear why marriage only need be protected. The need to provide protection to such surviving partners is all the more acute in the light of the prevailing common-law principle that provides that such partners would not be able to enter into legally enforceable contractual obligations to support one another after the termination of their partnership by the death of one of them. The law prohibits contracts between individuals which seek to regulate their affairs or relationships posthumously. To the extent that the purpose of providing legal protection to a surviving spouse but not to a surviving cohabitant might be to preserve the religious attributes of marriage, this cannot be an acceptable purpose in terms of our Constitution. While marriage plays an important role in our society, and most religions cherish it, the Constitution does not permit rights to be limited solely to advance a particular religious perspective. We conclude therefore that the unfair discrimination is not justifiable within the terms of section 36."[212]

[195] This to me suggests that the real problem does not lie in how section 2(1) itself regulates its subject matter. Rather the problem is Parliament's failure to pass legislation that regulates the affairs of about 3.2 million people in permanent life partnerships. It is a matter that is located firmly in the domain of Parliament and its failure to act does not give this Court the power to intervene without encroaching upon the separation of powers principle. Understandably this causes huge frustration and anxiety, especially in vulnerable women who find themselves in permanent life partnerships. Their plight demands urgent attention from Parliament.

[196] But all of this does not justify embarking on the route to declare that section 2(1) of the Act is invalid just so the Court can assume the power to direct Parliament to do what it should have done ages ago. The foundation for the declaration of invalidity is so tenuous that it was rightly rejected in *Volks*. In dealing with the underlying problem here, our collective focus should be directed at once more nudging Parliament to pass

[212] Id at para 135.

the necessary legislation. It seems to me that this Court can do no more than recommend that Parliament should consider passing that legislation. And such recommendation cannot constitute a breach of the principle of separation of powers.

[197] In light of all these reasons I am not persuaded that *Volks* was wrongly decided and consequently, I cannot conclude that the decision that section 2(1) does not constitute unfair discrimination is clearly wrong. I have comprehensively demonstrated how the majority in *Volks* maintained fidelity to the jurisprudence of this Court, especially with regard to adjudication of equality claims based on unfair discrimination. The result must be that insofar as declaring section 2(1) invalid, the appeal must fail. This is because we are bound by the decision in *Volks* from which, as the first judgment rightly observes, we may depart only if we are convinced that it was clearly wrong. As this standard is not met, we are obliged, as the High Court here was, to conclude that on the authority of *Volks*, section 2(1) of the Maintenance of Surviving Spouses Act is constitutionally compliant.

Remedy

[198] If it had not been for the fact that here the claim for maintenance was settled, it could have been appropriate to develop the common law to recognise such claim. We know from *Volks* that a claim of that nature already exists under indigenous law.[213] But Ms Bwanya is not persisting in a consequential remedy for herself. Instead she is pursuing a general order that seeks to strike down section 2(1). And there are numerous obstacles against this relief.

[199] First, it bears emphasis that the minority in *Volks* on which heavy reliance was placed in support of that relief held that the section discriminates unfairly "against surviving persons of cohabitation relationships who are in financial need". This was said to arise from the fact that the section and other laws do not regulate "the rights of surviving partners to cohabitation relationships which were socially and functionally

[213] Id at para 89.

similar to [a] marriage" but the section and "other legal provisions extensively regulate the rights of spouses in the event of the termination of a marriage by death".[214] The difficulty here is that the defect relied upon arises from the fact that the section and other laws do not provide for the surviving partner's claim. If some other law regulated the rights of those partners upon death of one of the partners, there would have been no defect in the section. Now this raises a curious and complex question not addressed by the minority in *Volks.* This is whether it can be said that section 2(1) is invalid when seen through the lens of the common law, but valid when examined through the lens of indigenous law. How can the validity of a statute depend on what is said in other laws? Surely that cannot be right.

[200] However, since we have concluded here that we are bound by *Volks*, the declaration of invalidity cannot be competent. If the provision is constitutionally compliant, as was concluded in that case, this Court has no power to nullify it. Nor does it have the competence to extend its scope to cover surviving partners in permanent life partnerships who are in financial need.

[201] But even if we could competently declare the impugned provision invalid, formulating further relief would have proved difficult. This would have been compounded by the fact that in the case of surviving partners in permanent life partnerships, the source of the duty to support flows from what was agreed by the partners before one of them died. And if their agreement was that the duty should terminate upon death there would be no agreed duty to be extended by section 2(1) to the estate of the deceased spouse. Moreover, it would be unfair to impose such duty against the common intention of the partners. It must be recalled that the duty is activated only when a relevant party is unable to financially support himself or herself. Therefore, in a partnership it may not be activated before the death of one partner.

[214] Id at paras 135-6.

[202] It is plain to us that the underlying problem of women who find themselves in permanent life partnerships and are unable to support themselves is a broader problem that must be addressed by Parliament. The rights of these women must clearly be defined in law and be enforceable in our courts. Indeed, in *Volks* the minority acknowledged that Parliament was best placed to provide the remedy.[215]

[203] Consequently, we consider it appropriate to refer the matter to Parliament for it to consider passing legislation to address the affairs of the permanent life partnerships which we are now told involve more than 3.2 million South Africans. This is not to suggest that Parliament must give those partnerships the recognition and status of a marriage. They are not and Parliament is free to accord them the recognition it deems fit.

[215] Id at para 137.

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