

**ADVANCING THE RIGHTS OF  
HETEROSEXUAL LIFE PARTNERS  
IN RESPECT OF LOSS OF SUPPORT**

***Paixão v Road Accident Fund 2012 JDR 1749 (SCA)***

## **1 Introduction**

The advent of the Constitution (the Constitution of the Republic of South Africa, 1996, hereinafter “the Constitution”), as well as a reorientation in societal values, has seen old Western traditional rules being confronted with new challenges. The era of social change has consequently underscored the need for family law reform in certain areas of the law. A key aspect of family law and one that has come under constitutional scrutiny in recent times is that of persons living together as same-sex or heterosexual life partners (*Du Plessis v Road Accident Fund* 2003 (11) BCLR 1220 (SCA) (*Du Plessis* case); *Robinson v Volks* NO 2004 (6) SA 288 (CC) (*Volks* case); *Gory v Kolver (Starke Intervening)* 2007 (3) BCLR 249 (CC) (*Gory* case); and *Verheem v Road Accident Fund* 2012 (2) SA 409 (GNP) (*Verheem* case)).

Life partnerships have none of the *ex lege* consequences of a civil marriage (Heaton “An Overview of the Current Legal Position Regarding Heterosexual Life Partnerships” 2005 *THRHR* 662–663; Heaton “Termination of Post-divorce Maintenance for a Spouse or Civil Union Partner in Terms of a Settlement Agreement” 2007 *THRHR* 642; see also De Vos and Barnard “Same-sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga” 2007 *SALJ* 795; Meyerson “Who’s In and Who’s Out? Inclusion and Exclusion in the Family Law Jurisprudence of the Constitutional Court of South Africa” 2010 *Constitutional Court Review* 302–309; and Heaton *South African Family Law* 2010 243), and as such the consequences of a legally recognised marriage do not generally apply to life partners (Heaton *South African Family Law* 243). A range of statutes have, however, given rise to specific spousal benefits being awarded to life partnerships (Heaton 2005 *THRHR* 662–663), whilst, in the absence of same-sex partners being able to legalise their relationships, a number of *ad hoc* judgments have extended certain additional consequences of a civil marriage to same-sex life partners (Heaton *South African Family Law* 243; Smith and Robinson “The South African Civil Union Act 2006: Progressive Legislation with Regressive Implications?” 2008 *International Journal of Law, Policy and the Family* 356 and 369; and Church “Same-sex Unions Revisited: The Concept of Marriage in Transformation” 2006 *Fundamina* 100). The disparity in extending spousal benefits to same-sex life partners, to the exclusion of heterosexual life partners, raises the question of the tenability of the present legal position of

life partnerships in light of the fact that the Constitution of South Africa is underpinned by values of equality and non-discrimination.

Despite a decade of the aforementioned inequality, there seems to have been some movement made in restoring the dissimilarity of benefits afforded to same-sex life partners to the exclusion of their heterosexual counterparts. In this regard, the Supreme Court of Appeal has, of late, delivered judgments affording unmarried dependants in heterosexual life partnerships the *locus standi* to institute claims for loss of support arising from the wrongful death of a breadwinner (*Verheem* case; and in *Paixão v Road Accident Fund* 2012 JDR 1749 (SCA) (*Paixão* case)). In this regard the case of *Paixão* is of particular importance as the case factors in the *boni mores* of society by finding that a tacit agreement between heterosexual life partners establishes a contractual reciprocal duty of support that is worthy of protection (*Paixão* par 29). The *Paixão* decision therefore shows a willingness to advance South Africa's common law by affording protection to unmarried heterosexual life partnerships in line with their same-sex counterparts (*Du Plessis* case), as precipitated by the rights and values laid down in the Bill of Rights.

## 2 The current legal position in South Africa

As life partners have limited rights against each other during and after the relationship (Bonhuys "Family Contracts" 2004 SALJ 879 888; Heaton 2007 THRHR 642; Meyerson 2010 *Constitutional Court Review* 302–309; and Heaton *South African Family Law* 243), rights and duties can be extended by the use of mechanisms such as contracts, thereby regulating the legal consequences of their relationship (Bonhuys 2004 SALJ 880 and 900; Picarra "Notes and Comments – *Gory v Kolver* NO 2007 (4) SA 97 (CC)" 2007 SAJHR 563 567; and Heaton *South African Family Law* 244–247). As a result of such limited mechanisms, as well as the lack of legislative parameters regulating non-traditional family forms, the Constitutional Court has largely become the forum in which new societal norms have been established and challenged. Despite *ad hoc* Constitutional Court rulings affording limited rights to same-sex life partners, judicial intervention has been slow due to fears over the possibilities of judicial inconsistencies as well as conflicting tensions over the court's interference in private agreements (Bonhuys 2004 SALJ 889–900; Heaton *South African Family Law* 243; and Heaton 2005 THRHR 670). It was only in the case of *Fourie v Minister of Home Affairs* (2005 (3) BCLR 241 (*Fourie* case); De Vos and Barnard 2007 SALJ 798; Church 2006 *Fundamina* 100–104; and Picarra 2007 SAJHR 564) that the Constitutional Court ruled that non-nuclear families, such as same-sex life partners, are worthy of protection by law. The Court went on to say that the Marriage Act (s 30(1) of the Marriage Act 25 of 1961 (hereinafter "the Marriage Act"); De Vos and Barnard 2007 SALJ 806 and 822; and Church 2006 *Fundamina* 100–104) should be modified to make provision for same-sex marriages (Wildenboer "Marrying Domestic Partnerships and the Constitution: A Discussion of *Volks* NO v *Robinson* 2005 5 BCLR 446 (CC)" 2005 *South African Public Law* 459–466). In response to the *Fourie* case the Civil Union Act (17 of 2006 (hereinafter "the Civil Union Act")) came into operation, validating same-sex as well as

heterosexual civil unions, but omitting to address the position of other non-nuclear families, such as life partnerships (Heaton *South African Family Law* 244; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 356 and 379; and De Vos and Barnard 2007 *SALJ* 798–821).

Despite some legislative instruments embracing heterosexual life partners (Heaton *South African Family Law* 248–249; Estate Duty Act 45 of 1955; Pension Fund Act 24 of 1956; Income Tax Act 58 of 1998; Domestic Violence Act 116 of 1998; Rental Housing Act 50 of 1999; and the Maintenance Act 99 of 1998), the *ad hoc* judicial pronouncement of extending certain consequences of marriage solely to same-sex life partners (Heaton 2005 *THRHR* 663; Cooke “Choice, Heterosexual Life Partnerships, Death and Poverty” 2005 *SALJ* 542–557; and Bonthuys “The South African Bill of Rights and the Development of Family Law” 2002 *SALJ* 752) (on the premise that heterosexual life partners exercised their choice not to get married, hence cannot request the same extension (*Volks* case) has resulted in inequality. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (2000 (1) BCLR 39 (CC) (*National Coalition* case); and Heaton *South African Family Law* 251), the denial of immigration permits to a foreigner who was involved in a same-sex life partnership with a South African citizen was found to be discriminatory and unconstitutional on the grounds of sexual orientation, marital status and the right to dignity (Heaton *South African Family Law* 251). The Constitutional Court accordingly extended the benefit to same-sex life partners by amending section 25(5) of the Aliens Control Act (96 of 1991). The inclusion of the terms, “partner in a permanent same-sex partnership” nevertheless excluded heterosexual life partners.

A further extension of spousal benefits to same-sex life partners was evident in the case of *Satchwell v President of the Republic of South Africa* (2001 (12) BCLR 1284 (T) (*Satchwell* case); Cooke 2005 *SALJ* 543; Bonthuys 2002 *SALJ* 752; and Bonthuys 2004 *SALJ* 884–885), where it was held that certain sections of the Judge’s Remuneration and Conditions of Employment Act (88 of 1989) unjustifiably discriminated against life partners on the ground of sexual orientation. The said Act did not confer on the same-sex life partner the spousal benefits bestowed on to a heterosexual married couple even though one of the parties to the same-sex life partnership accepted a duty to support.

The factors set out in the *Satchwell* case highlighted the point that same-sex partners who had undertaken to support each another can also institute a common-law dependant’s action for loss of support, as confirmed in the *Du Plessis* case (Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 370–371; and Bonthuys 2004 *SALJ* 886). *Farr v Mutual and Federal Insurance Co Ltd* (2000 (3) SA 684 (CC)) also concluded that the phrase “a member of the policy holder’s family” in terms of an insurance policy included a policyholder’s same-sex life partner (Heaton *South African Family Law* 251), whilst expressly excluding heterosexual life partners.

Same-sex life partners were also afforded extensions of spousal benefits relating to parenting, as in the case of *Du Toit v Minister for Welfare and Population Development* (2002 (10) BCLR 1006 (CC); Bonthuys 2002 *SALJ* 755; and Heaton *South African Family Law* 251), where sections of the Child

Care Act and Guardianship Act (s 17(a), (c) and 20(1) of the Child Care Act 74 of 1958 (hereinafter “the Child Care Act”); and s 1(1) of the Guardianship Act 192 of 1993 (hereinafter “the Guardianship Act”); and Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 370) were declared unconstitutional on the basis that they unjustifiably discriminated against same-sex partners (Bonthuys 2004 *SALJ* 884–887; Heaton *South African Family Law* 251; and Bonthuys 2002 *SALJ* 755). It is important to note that section 231 of the Children’s Act (38 of 2005 (hereinafter “the Children’s Act”) has eradicated this anomaly by affording heterosexual life partners the right to adopt (Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 370; and s 231 of the Children’s Act providing that “a child may be adopted by partners in a permanent domestic life partnership”). In *J v Director General, Department of Home Affairs* (2003 (5) BCLR 463 (CC); and Bonthuys 2004 *SALJ* 887) the Court in citing *Du Toit* case as authority, found section 5 of the Children’s Status Act (Heaton *South African Family Law* 252; and the Children’s Status Act 82 of 1987) to be unconstitutional and discriminatory on the ground that it differentiated between married and unmarried couples (Heaton *South African Family Law* 252). The Children’s Act has subsequently repealed the Children’s Status Act, whilst section 40 of the Act re-enacted section 5 of the Children’s Status Act (Heaton *South African Family Law* 253–254; and s 40 of the Children’s Act). The effect is that children born as a result of artificial fertilisation by a married couple are regarded as children born from married parents, whilst children born from same-sex partners are regarded as children born from unmarried parents (s 40(1)(a) of the Children’s Act).

A further extension of spousal benefits in favour of same-sex life partners relates to the Intestate Succession Act (81 of 1987 (hereinafter “the Intestate Succession Act”)) that originally catered only for spouses of a civil marriage. In the *Gory* case (De Vos and Barnard 2007 *SALJ* 823; and Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 373) the ambit of the Intestate Succession Act was extended (Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 373–374) on the basis that the Act discriminated against same-sex life partners on the ground of sexual orientation (De Vos and Barnard 2007 *SALJ* 823–824; and Picarra 2007 *SAJHR* 564), as well as their rights to equality and dignity (Picarra 2007 *SAJHR* 563–565; and Heaton *South African Family Law* 252–253). In the *Gory* case, the Constitutional Court conferred intestate succession rights to same-sex life partners, whilst excluding such benefit to heterosexual life partners (Picarra 2007 *SAJHR* 563–565). The aforesaid ruling is of particular interest as it was delivered shortly prior to same-sex marriages being legalised (Picarra 2007 *SAJHR* 564). The Intestate Succession Act therefore applies to most marriage-like institutions, except for heterosexual life partnerships (Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 374).

In amplification of the disparity between spousal benefits being extended to same-sex life partners to the exclusion of their heterosexual counterparts, consideration must be given to the *Volks* case. In this case Mrs Robinson was confronted with the issue of the exclusion of heterosexual life partners from a statute, where the statute did not expressly include such life partners within its ambit (De Vos and Barnard 2007 *SALJ* 822; and Heaton *South*

*African Family Law* 248–249). Despite the High Court finding that excluding heterosexual life partners from the ambit of the Maintenance of Surviving Spouses Act (Lind “Domestic Partnerships and Marital Status Discrimination” 2005 *Acta Juridica* 113; and Maintenance of Surviving Spouses Act 27 of 1990 (hereinafter “the Maintenance of Surviving Spouses Act”)) was unconstitutional, the Constitutional Court denied Mrs Robinson the right to institute a claim in terms of the Maintenance of Surviving Spouses Act (Heaton 2005 *THRHR* 663; Cooke 2005 *SALJ* 542; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 371–372; and Heaton *South African Family Law* 248). The court reasoned that it was inapt to impose a duty of support on a permanent life partner’s deceased estate, in the absence of an *ex lege* duty to support his heterosexual life partner whilst he was alive (Heaton 2007 *THRHR* 642–643; Cooke 2005 *SALJ* 552–554; and Heaton *South African Family Law* 248–249). The Constitutional Court held that the Maintenance Act clearly differentiated between married and unmarried survivors but that such discrimination was deemed to be fair as both international and domestic legislation recognised the sanctity of marriage as an institution and its importance to family life (Lind 2005 *Acta Juridica* 114). This approach is in contrast with the progressive approach taken in the *Fourie* case (Cooke 2005 *SALJ* 542; Wildenboer 2005 *South African Public Law* 459; Lind 2005 *Acta Juridica* 124; Bonthuys “Race and Gender in the Civil Union Act” 2007 *SAJHR* 526; and Meyerson 2010 *Constitutional Court Review* 309). The result of the *Volks* case is that the judgment is paradoxical with same-sex life partners that choose not to register a union but are entitled to spousal benefits not afforded to heterosexual life partners (Cooke 2005 *SALJ* 542; Wildenboer 2005 *South African Public Law* 459; Lind 2005 *Acta Juridica* 124; Church 2006 *Fundamina* 106; Bonthuys 2007 *SAJHR* 526; De Vos and Barnard 2007 *SALJ* 823–824; and Meyerson 2010 *Constitutional Court Review* 309).

### 3 The dependant’s action

A claim for loss of support arising from the death of a breadwinner is recognised at common law as a “dependant’s action” and such an action may be instituted by the spouse and children of a breadwinner who may have suffered financial loss as a result of the wrongdoer who caused the death of the breadwinner (South African Law Reform Commission Report (Project 118) Report on Domestic Partnerships (2006) 110; and see also 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 *THRHR* 472). A “dependant’s action” is therefore restricted to parties that were legally married in terms of the Marriage Act.

A “dependant’s action” has, however, been judicially extended to a partner in a monogamous Muslim marriage (*Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) par 7–9 as well as Smith and Heaton 2012 *THRHR* 472), a widow in an African customary marriage (*Sibanda v Road Accident Fund* (GSJ) unreported case no 9098/07, delivered on 2009-02-03), and parties in a same-sex life partnership that have established a reciprocal duty of support towards each other (*Du Plessis*

case par 14). Despite the aforementioned movement in acknowledging non-nuclear family units by extending such action beyond a civil marriage, the *Meyer* case held that a survivor of a heterosexual life partnership could not institute a dependant's action (*Meyer* case par 42; and Smith and Heaton 2012 *THRHR* 472). In the *Meyer* case, Ledwaba J held that "to regard any relationship which has features of a marriage, as a marriage, would have a negative effect on the administration of justice, morality, the norms and values of society" (*Meyer* case par 30). In addition Ledwaba J held that "in view of the couple's choice not to marry, the survivor did not enjoy the same right to maintenance and loss of support as a surviving spouse" (*Meyer* case par 38–40). The heterosexual life partner's action for loss of support was therefore dismissed on the basis that the parties had a choice to marry, tying in with the "choice argument" and rationale followed in the *Volks* case (*Volks* case par 56 reads "no duty exists in the context of heterosexual life partnerships ...").

In the *Verheem* case, the court had to decide whether a life partner should be placed in the same position as a widow in respect of a claim for loss of support. Goodey AJ held that a dependant's action would arise in instances where the parties had entered into a binding contract with the intention of being legally bound to the life partnership (Smith and Heaton 2012 *THRHR* 475–476). In arriving at the judgment, Goodey AJ concluded that the parties were in a life partnership, the claimant was entirely dependent on the deceased as the sole breadwinner, and that they had undertaken reciprocal duties of support in respect of each other thereby resulting in a binding contract and legally enforceable duty of support established in light of the prevailing *boni mores* (*Verheem* case par 12). The elucidation of the basis for the loss of support action in respect of a heterosexual life partner was expounded further in the more recent case of *Paixão*.

#### 4 The *Paixão* case

Social tradition has brought about marriage, whilst societal change in norms and values is urging a shift from the traditional viewpoint of marriage to a more democratic viewpoint.

The dissimilarities in affording spousal benefits to same-sex life partners to the exclusion of their heterosexual counterparts, are representative of societal change in norms urging legislative reform reflecting both the doctrine of justice as well as the expectation of acknowledging all non-traditional family forms within a heterogonous society (Lind 2005 *Acta Juridica* 124; and Bailey-Harris "Equality or Inequality Within the Family? Ideology, Reality and the Law's Response" in Eekelaar and Nhlapo (eds) *The Changing Family: Family Forms and Family Law* (1998) 263). The *Paixão* case has managed to readdress the preferential treatment afforded to same-sex life partners, despite the "choice argument" *stictu sensu* also applying to same-sex life partners that choose not to marry. The *Paixão* case, in the absence of the legislator providing a legal framework for life partnerships, has at least managed to smooth out the indifference between same-sex and heterosexual life partners as far as a dependant's action is concerned.

#### 4.1 *Case summary*

The salient facts in the *Paixão* case were that the plaintiffs in the matter, Maria Angelina Paixão (Paixão) and her daughter Michelle Orlanda Santos instituted a claim for loss of support against the defendant, the Road Accident Fund, in terms of section 17(1) of the Road Accident Fund Act (56 of 1996; and *Paixão* par 2). The claim arose as a result of José Adelino Do Olival Gomes (the deceased) dying in a motor-vehicle collision during 2008 (*Paixão* par 2). The plaintiffs had been living with the deceased at the time of his death and he had been supporting them financially (*Paixão* par 7). The deceased moved into the home of Paixão after he fell ill in 2003, living in a “permanent life partnership” with Paixão until his death (*Paixão* par 7). The deceased intended to marry Paixão after his divorce had been finalised (*Paixão* par 10). The deceased divorced Mrs Melro according to South African law in June 2005 (*Paixão* par 9). The deceased, however, felt constrained not to marry Mrs Paixão before his divorce was also concluded and recognised in Portugal (*Paixão* par 9). A wedding date was set after the deceased and Mrs Paixão travelled to Portugal where the deceased introduced Mrs Paixão to his parents. The deceased and Mrs Paixão planned to be married in Portugal on 12 April 2008 (*Paixão* par 10). The deceased however tragically died a few months before the wedding date (*Paixão* par 10). The deceased and the plaintiffs were accepted as a family unit by their respective friends and families and the deceased even executed a joint will with Paixão in which they nominated each other as sole and universal heirs and referred to Paixão’s daughters as “our daughters” (*Paixão* par 9). The issue before the South Gauteng High Court was whether it was possible for an unmarried dependant in a permanent heterosexual life partnership to claim damages for loss of support from the wrongdoer who caused the death of the dependant’s breadwinner (*Paixão* par 2).

The High Court decided there was no legally enforceable duty on the deceased to support the plaintiffs even though the deceased had promised to take care of them (*Paixão* par 2). The High Court held that the duty of care did not extend to unmarried cohabitants, whilst also highlighting the need to protect the “institution of marriage” (*Paixão* par 2). The plaintiff’s claim was dismissed but leave to appeal to the Supreme Court of Appeal (SCA) was granted (*Paixão* par 2).

#### 4.2 *Findings of the Supreme Court of Appeal*

The main issue in this matter was whether or not the common law should be developed to extend the dependant’s action to permanent heterosexual relationships (*Paixão* par 1). In determining the aforesaid, the SCA had to firstly determine whether there was a legally enforceable agreement between the parties (*Paixão* par 18). The SCA held that the agreement between the partners could either be made expressly or tacitly and that the conduct of the parties was important when establishing whether a tacit contract was in existence (*McDonald v Young* 2012 (3) SA 1 (SCA) 11). The SCA found that there was compelling evidence to suggest that the parties had tacitly undertaken a reciprocal duty of support, and disagreed with the findings of the High Court in that regard (*Paixão* par 19). The evidence in the

form of the joint will, the financial support, the acceptance of their relationship by the community, family and friends all suggested that the deceased had regarded the plaintiffs as his family. The SCA, after taking into account the *boni mores* of the community, concluded that the community required the common law to be developed so as to protect unmarried persons in permanent heterosexual life partnerships where a reciprocal duty of care had been established (*Paixão* par 30).

It was held that the importance that society places on marriage as an institution coupled with principles of equity, justice, morality and the changing times dictated that protection be extended to relationships akin to family relationships arising from a legally recognised marriage (*Paixão* par 36). There was no need for the court to consider the constitutionality of affording protection to married couples whilst ignoring those in a heterosexual life partnership where a duty of support arose (*Paixão* par 37). The court refused to extend protection only to heterosexual relationships where there was an agreement to marry as this would have precipitated an arbitrary distinction to be drawn against most other relationships where there was no such agreement (*Paixão* par 39). The crucial question according to the court was whether a contractual reciprocal duty of support had been established (*Paixão* par 40).

### 4.3 Critical matters arising from *Paixão*

A lack of legislative guidance afforded to heterosexual life partners in recent times has exacerbated the uncertainty facing many South Africans who appear to have been chastised by a legal system that tends to differentiate between married and unmarried relationships in terms of judicial protection. Recent court decisions which highlight the sanctity of marriage tend to ignore other appropriate relationships which have mushroomed as a result of the wave of social change that has engulfed our country (on the influence of the Constitution on the development of family law in general, see Bonthuys 2002 SALJ 772–781; Church 2006 *Fundamina* 100–101; and Smith and Robinson “The South African Civil Union Act 17 of 2006: A Good Example of the Dangers of Rushing the Legislative Process” 2008 22(2) *Brigham Young University Journal of Public Law* 421–425) and on the impact of the Constitution on the development of customary marriages in South Africa generally (see Bekker and Van Niekerk “*Gumede v President of the Republic of South Africa*: Harmonisation, or the Creation of New Marriage Laws in South Africa?” 2009 *South African Public Law* 220–222).

The *Paixão* case provides a refreshingly different approach from earlier decisions where the courts have shied away from providing solutions to problems faced by heterosexual life partners (*Volks* case). Cachalia JA, in *Paixão* recognised the importance of the courts in developing the common law to fall in line with our evolving society as evident from the following words: “The courts have always had this duty and Section 173 of the Constitution now explicitly recognises it” (*Paixão* par 30).

Cachalia JA commented on the stance taken by the Constitutional Court in the *Volks* case, where it was held that it was not unfair to distinguish between the survivors of marriage and the survivors of heterosexual life



partnerships (*Paixão* par 26). He pointed out that, even though the Constitutional Court stated that no reciprocal duty of support arises by operation of law in respect of heterosexual life partners, it did not exclude a duty arising out of agreement between the parties (*Paixão* par 26). Unlike *Volks*, which looked at whether a spousal benefit should also be available to the surviving heterosexual life partner, *Paixão* focused on placing the partner in the same position in respect of support, that they would have been in had the deceased who owed a legally enforceable duty to maintain, not been killed. A criticism of the *Volks* case is that the court failed to see the importance of the Constitution in analysing and developing the common-law duty of support. The Constitutional Court's tapered focus on marital duty as compared to a "graded system" of support obligations favouring a diverse family system ignores the central fibre of transformation and diversity in an ever-changing social climate (Bekker and van Niekerk 2009 *South African Public Law* 220–222; see also Lind 2005 *Acta Juridica* 108 and 119; Schäfer "Marriage and Marriage-like Relationships: Constructing a New Hierarchy of Life Partnerships" 2006 *SALJ* 626 627–633; Wood-Bodley "Intestate Succession and Gay and Lesbian Couples" 2008 *SALJ* 46 52–53; Wood-Bodley "Establishing the Existence of a Same-sex Life Partnership for the Purposes of Intestate Succession" 2008 *SALJ* 259–269; and Smith "Rethinking *Volks v Robinson*: The Implications of Applying a 'Contextualized Choice Model' to Prospective South African Domestic Partnerships Legislation" 2010 *PELJ* 28–31 in respect of the "homophobia" argument and the choice argument).

*Paixão* has highlighted the need for the life partner to show more than that they were in a relationship when proving that a concomitant obligation existed. An important requirement for any successful claim by a dependant is proof that the partnership had similar characteristics to a marriage. Even in the absence of an agreement to marry, demonstrating a reciprocal duty of support would be crucial to proving that a life partnership existed. It is crucial for the dependant to prove that a contractual duty existed by providing the necessary evidence. The effect is that courts are likely to be inundated with similar loss of support claims which at times can prove complex and time-consuming when finalising such matters.

Despite recognising the importance of marriage within a family unit setting, *Paixão* looked at the realities facing some South Africans who are unable to marry because of "social, cultural or financial reasons" (Bekker and van Niekerk 2009 *South African Public Law* 220–222; see also Lind 2005 *Acta Juridica* 108 and 119; Schäfer 2006 *SALJ* 627–633; Wood-Bodley 2008 *SALJ* 52–53; 2008 *SALJ* 259–269; and Smith 2010 *PELJ* 28–31 in respect of the "homophobia" argument and the choice argument). Despite limited legal protection for heterosexual life partners in recent times, the extension of a claim based on loss of support to heterosexual life partners, as in the case of *Paixão*, is progressive. It is important to note that, despite the Constitutional Court ruling in *Volks* that no reciprocal duty of support exists between life partners, it did not preclude such a duty being fixed by agreement. It was this very aspect that the court in *Paixão* relied upon when overcoming this so called "barrier" to life partners created in *Volks*. The court could have decided to blindly follow the decision in *Volks* but it chose not to do so. The progressive approach could also have been precipitated by the

---

difference in facts of the two cases in that *Paixão* was concerned with the common-law dependant's action in third-party claims as compared to spousal benefits clearly outlined in *Volks*. The effect of *Paixão* is that anyone who can prove that a legally enforceable duty of support existed between the parties, will be entitled to claim for damages, in respect of loss of support, against a third party who wrongfully caused the death of the life partner.

## 5 Conclusion

In the absence of a legislative framework regulating unmarried cohabitation, the *Paixão* case provides legal guidance to heterosexual life partners in loss of support claims where a legally enforceable duty of care existed between them. The judgment also has far-reaching consequences in that loss of support actions can extend beyond the ambit of family law. Within the sphere of family law, the case provides legal guidance to life partners in a heterosexual relationship even if the parties did not intend to marry. The case reinforces the duty of our courts to develop the common law to accord with principles of justice. *Paixão* shows a willingness on the part of our courts to apply each case on its merits, taking cognisance of the dynamics of different family relationships and situations within a progressive environment.

Lizelle Ramaccio Calvino  
and  
Desan Iyer  
*University of Zululand, KwaDlangezwa*