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2018-10-19
Potchefstroom Electronic Law Journal
https://hdl.handle.net/10539/26836
Bonthuys,E.2018.A Duty of Support for All South African Unmarried Intimate Partners Part 2: Developing Customary and Common Law and Circumventing the Volks Judgment.PER/PELJ (21), pp.1-36.

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A Duty of Support for *All* South African Unmarried Intimate Partners Part 2: Developing Customary and Common Law and Circumventing the *Volks* Judgment

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Date of submission

8 February 2018

Date published

19 October 2018

Editor Prof M Carnelley

How to cite this article

Bonthuys E " A Duty of Support for *All* South African Unmarried Intimate Partners Part 2: Developing Customary and Common Law and Circumventing the *Volks* Judgment" *PER / PELJ* 2018(21) - DOI http://dx.doi.org/10.17159/1727-3781/2018/v21i0a4411

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DOI
http://dx.doi.org/10.17159/1727-3781/2018/v21i0a4411

Abstract

Part I of this two-part article argued that post-constitutional developments of the right to support have excluded the largest and most vulnerable sector of South African women – African women in invalid customary marriages and in intimate partnerships which do not resemble monogamous Western nuclear households. Part II explores the avenues to develop customary and common law to extend rights to support to these women. It argues that the current position discriminates against poor, rural African women on multiple intersecting grounds, which creates a duty for courts to develop the current legal rules. Customary law affords scope for development in relation to women in invalid customary marriages. Common law rights to support can be extended either *ex contractu* or *ex lege*. Because contractual support rights are of limited use to poor women, the legacy of the majority judgments in *Volks v Robinson* 2005 5 BCLR 446 (CC) (*Volks*) must be confronted to strengthen the legal basis for an automatic duty of support to all women in unmarried intimate relationships. The argument in *Volks* that, women choose to forego legal rights by not getting married is criticised. The minority judgment in *Laubscher v Duplan* 2017 2 SA 264 (CC) does, however, create potential for overturning this reasoning.

Keywords

Duty of support; customary law; contract; choice to marry.

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1 Introduction

Part 1 of this article[1] set out to show that the post-constitutional avenues for extending rights to support to unmarried intimate partners are either based on the existence of a marriage recognised by a major religion (in the case of Muslim marriages) or on a combination of the marriage-like quality of the relationship and undertakings or contracts to provide reciprocal support in the case of same-sex and unmarried opposite-sex relationships.

Using demographical statistics and anthropological studies, I also argued that the great majority of South African women, especially the most disadvantaged, are unlikely to benefit from these legal developments. As a residue of colonial and Apartheid policies African men and women continue to be involved in migrant labour, with significant impacts on African families which probably contribute to the extremely low rates of marriage amongst this part of the population. For the same reason many spouses and intimate partners do not share the same households on a permanent basis. Instead people may simultaneously be members of multiple households, while multiple long-term co-existing relationships are relatively common. Nevertheless, rural and impoverished African women and their children are particularly dependent on financial support from fathers and intimate partners to make ends meet.

The marriage-like qualities of relationships and the public policy arguments used in the jurisprudence to justify the extension of legal rights to unmarried partners are, however, predicated on a typically Western notion of marriage, including permanent cohabitation in the same household and monogamy. A large proportion of African women may therefore not qualify for rights to support against their intimate partners and may not be able to institute dependants' actions for loss of support against third parties who cause the death of their breadwinners.

Other issues which affect only African women arise from the complex nature of customary marriages, which happen over longer periods of time and involve many different steps. Women may find that their marriages are invalid because the requisite steps of the marriage process have not been correctly completed or spouses may die after the process has been initiated, but before completion. These women have no rights to support because

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My thanks to the members of my writing group for their valuable input on this paper.

1 See Bonthuys 2018 (Part 1) *PELJ* 2018(21) 1-32.

their marriages are not valid. Furthermore, the co-existence of customary and civil marriages or even the existence of multiple customary marriages may lead to legal invalidity for one or the other marriage, with the result that one of the wives will find herself without legal rights to spousal support. No cases have been litigated on these issues and the existing jurisprudence does not recognise rights to support in these circumstances.

Having established the lack of a right to support for these intimate partnerships, this part of the paper examines customary and common law to establish avenues by which the right to support may be developed so as to include all unmarried intimate partners, and not just those whose relationships closely resemble common law marriage.

2 The constitutional duty to extend the right to support to *all* South African unmarried intimate partners

Where common or customary law unfairly discriminates, section 39(2) of the *Constitution* requires courts to develop the law in order to "promote the spirit, purport and objects of the Bill of Rights." The discrimination argument was first made in relation to unmarried opposite sex partners in *Volks v Robinson*,[2] in which the majority of the Constitutional Court held that the failure of the *Maintenance of Surviving Spouses Act*[3] to include unmarried intimate partners in the definition of the term "spouse" did not constitute impermissible discrimination, nor infringe upon the dignity of the claimant. The discrimination argument was based on marital status,[4] and it was rejected, in the two majority judgments, on two grounds: first, that the special position and social importance of the institutions of marriage and the family, as recognised in previous Constitutional Court jurisprudence and in international law, justify legal differentiation between people who are married and those who are unmarried.[5] The second ground was the so-called "choice argument," that:

> [t]he 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.[6]

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2 *Volks v Robinson* 2005 5 BCLR 446 (CC) (hereafter the *Volks* case).
3 Section 2(1) of the *Maintenance of Surviving Spouses Act* 27 of 1990.
4 *Volks* case para 12.
5 *Volks* case paras 51-57, 80-87.
6 *Volks* case paras 92, 58.

This part of the article addresses the discrimination argument, making the point that the lack of legal rights does not discriminate only or even primarily upon the basis of marital status, but that it provides a classical instance of intersectional discrimination on the bases of marital status, sex, gender, sexual orientation, religion, culture, socio-economic status and race.

2.1 Intersecting grounds of discrimination

Substantive gender equality – as opposed to formally treating everybody the same - requires courts to consider the actual conditions of women's lives, to focus on the needs of the most disadvantaged women and to acknowledge the impact of past and current legal regimes on the most vulnerable women.[7]

> The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women. The 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.[8]

The real social conditions facing the majority of South African women[9] are that they are disadvantaged vis-à-vis men in relation to access to education and employment, earning capacity and land ownership. In addition, women bear the lion's share of caring responsibilities towards children and other vulnerable family members. The effect of the lack of a legal duty of support between intimate partners is that women are not entitled to economic contributions from their partners towards their own maintenance or that of the common household (if there is a common household). This renders women vulnerable during the subsistence of their relationships because, in the absence of legal rights, they must rely on their partners' benevolence towards them and this, in turn, may force them to endure physical and sexual violence rather than to take legal action against abusive partners. Because women have no legal rights to support after the termination of their relationships, they may have to remain in abusive relationships or face homelessness and economic destitution. Together with the absence of rights to share in partnership property, this means that older women who have spent many years taking care of their partners and their children, and who, as a result, have no careers or marketable skills, will be left destitute

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7 Albertyn and Goldblatt 1998 *SAJHR*; Albertyn 2007 *SAJHR.*

8 Sachs J in *Daniels v Campbell* 2004 5 SA 331 (CC) (hereafter the *Daniels* case) para 22.

9 See para 2 of part 1 of this article.

and will not be compensated for their contributions to their relationships. Furthermore, if relationships end as a result of the death of their partners, destitute women have no financial claims against the estates of their deceased partners, and they also have no rights to sue those who wrongfully caused their partners' death.

The absence of legal rights to support arguably constitutes unfair discrimination on four grounds: gender, race, marital status and sexual orientation.

The differentiation between married and unmarried women and, in some instances, between women married in terms of customary law and those who are married in civil law, illustrates the intersectional nature of the discrimination. First, this distinction between married and unmarried women unfairly discriminates on the basis of marital status by denying rights which are available to married women to unmarried women. A second argument is that the distinction between women married in terms of civil law and customary wives also indirectly discriminates on the basis of race by perpetuating the legal neglect of customary wives - a hallmark of the Apartheid legal system. A third basis for arguing discrimination on the basis of marital status and possibly also religion or belief is the legal differences between different groups of unmarried women. Women married in terms of Muslim law, but whose monogamous and polygynous marriages are technically not valid, have, as a result of the recognition of the Islamic marriage contract in case law, acquired rights to support *pendente lite*[10] after divorce[11] against third parties who cause the death of their breadwinners,[12] and in terms of the *Maintenance of Surviving Spouses Act*.[13] These rights are not available for women in all other forms of intimate relationships.

Another axis of discrimination is sexual orientation. The successful litigation strategy on behalf of same-sex cohabitants means that certain duties of support have been extended to same-sex couples,[14] but not to opposite sex couples. In other respects, like the dependant's action, same- and opposite-

10 *AM v RM* 2010 2 SA 223 (ECP); *Hoosein v Dangor* 2010 2 All SA 55 (WCC).
11 *Khan v Khan* 2005 2 SA 272 (T); *Rose v Rose* 2015 2 All SA 352 (WCC).
12 *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA).
13 *Daniels* case.
14 *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) (hereafter the *Satchwell* case).

sex cohabitants have similar rights to support.[15] Extending rights to cohabiting same-sex couples was often justified by referring to their inability to enter into legal marriage, but with the adoption of the *Civil Union Act*, this difference has been abolished – at least formally. Yet neither statute nor case law have subsequently withdrawn the fruits of the litigation from same-sex couples.[16]

These grounds of discrimination, namely gender, race, religion, culture, sexual orientation and marital status intersect in particular ways, reflecting the distinctive patterns of advantage and disadvantage associated with colonialism and Apartheid. The selective favouring of certain relationships and families over others, and of certain family members over others is neither co-incidental nor value neutral. Instead they ensure that the distribution of material goods, decisions about establishing or ending relationships, authority and decision-making within relationships, the distribution of work and responsibilities within relationships and, consequently, social and economic vulnerability within and after relationships favour men over women, white people over those who are not white, those who adhere to Judeo-Christian family patterns over others, and heterosexuals over those who have relationships with others of the same sex. In effect, the various grounds upon which rights are either allocated or denied to women in particular relationships create and reinforce those patriarchal, heterosexist, religious and racial hierarchies upon which colonial and Apartheid domination were grounded.[17]

The intersectional nature of discrimination on the bases of marital status, gender and race was recognised by Justice O'Regan in the *Harksen* case[18] and Justice Sachs in *Volks*, who pointed out that "it is women rather than men who in general suffered disadvantage because of their status of being married or not married" and that the Apartheid disregard of certain marriages and certain familial relationships had profoundly racist effects.[19]

These judgments are, unfortunately, exceptions in the South African family law jurisprudence, which generally prefers to focus on a single ground of discrimination, or to use an "add on model" of discrimination, according to which poor, black women experience racial discrimination in the same way

15 *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) (hereafter the *Du Plessis* case); *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA) (hereafter *Paixão* SCA).

16 *Gory v Kolver* 2007 4 SA 97 (CC); *Laubscher v Duplan* 2017 2 SA 264 (CC) (hereafter the *Laubscher* case).

17 Bonthuys 2016 *OSLS* 1309-1311, 1313.

18 *Harksen v Lane* 1998 1 SA 300 (CC) paras 64, 93-96, 121-124.

19 *Volks* case paras 199 and 206.

as black men, and gender discrimination similarly to economically privileged white women. This is not only inaccurate, but it means that courts thereby endorse essentialist views which take the experiences of the most advantaged members of the disadvantaged groups as the paradigm for everyone. In effect, the ways in which black men experience racism is essentialised and generalised as the experiences of all black people, and the experiences of privileged white women are regarded as the prototype for sexism. It is this way of thinking which allowed the majority of the court in *Volks* to argue that there was no discrimination on the basis of marital status because people could choose to access legal and material benefits by getting married.[20] In reality, however, the choices of privileged white women to marry or cohabit are not the same as those of impoverished rural African women, and the choices of African men to enter into multiple relationships or polygynous customary marriages are not the choices available to African women. A proper intersectional analysis of the various forms of discrimination and a serious consideration of the real contexts of the most disadvantaged rural African women are ways to circumvent the choice argument, to which this article turns in more detail in paragraph 4 below.

However, despite having a duty to develop discriminatory rules of common and customary law, courts also recognise certain constraints, articulated by Cloete JA in *Du Plessis v Road Accident Fund*[21] and applicable to both customary and common law alike:

> Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary…the Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

In part I of the article I discussed the potential of the *Draft Domestic Partnerships Bill* to alleviate the plight of disadvantaged unmarried intimate partners. I intimated that these women would generally be in unregistered partnerships, which don't afford automatic rights to support during relationships, but that after the end of the relationships, rights to support may be granted by courts. The extent of the right to support would therefore be limited and, moreover, it is not clear whether courts would generously interpret the criteria for unregistered partnerships to include women who do not fit the standard nuclear family and shared household model associated with Western marriage. While it may be strategic to lobby for the adoption

20 Bonthuys 2008 *Can J Women & L* 26-27.
21 *Du Plessis* case 36.

of the Draft Bill, it may also be necessary to expand the definition of unregistered partnerships and the extent of rights to support in terms of the legislation. In any event, Parliament has not passed this legislation in the twelve years since its recommendation by the Law Reform Commission and it therefore becomes necessary to investigate the extension of customary and common law rules instead.

3 Customary law

When courts are called upon to develop customary law there are particular considerations which result from the limited recognition given to customary law in colonial and Apartheid times and the fact that these rules were codified and administered by people who not only failed to grasp the value system underlying the rules, but who often treated customary law and its subjects with disdain.[22] In applying and adapting customary rules, therefore, courts:

> must remain mindful that an important objective of our constitutional enterprise is to be 'united in our diversity.' In its desire to find social cohesion, our Constitution protects and celebrates difference. It goes far in guaranteeing cultural, religious and language practices in generous terms provided that they are not inconsistent with any right in the Bill of Rights. Therefore, it bears repetition that it is a legitimate object to have a flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation.[23]

This entails that customary law should not merely be replaced with civil law rules, but that any developments of customary law should respect and give effect to the underlying values of the rules, even as they reflect current practices of customary communities.

In part I of this article[24] I highlighted those aspects of customary marriage which expose African women to the risk of finding themselves in the position of unmarried cohabitants without legal rights to property or support when they discover that their customary marriages are invalid. These include complicated and drawn-out marriage processes, the risk of invalidity of simultaneous customary and civil marriages and the requirements for polygynous customary marriages. In addition, customary marriages are

22 *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) (hereafter the *Gumede* case) paras 17, 20.
23 *Gumede* case para 22.
24 Part I para 2.

often unregistered, which leaves women unable to prove the existence of valid marriages, and therefore practically without legal recourse.[25]

None of the cases declaring such customary marriages invalid have extended legal relief to those women who have for years conducted themselves as wives. One relatively simple legal development would be the extension of the doctrine of putative marriage from common law to customary marriage to give wives access to property which was accumulated during the marriage.[26] Putative marriages do not, however, create duties of spousal support.

Due to the marriage-like nature of these relationships and the fact that a marriage (although invalid) was conducted, it may also be possible to litigate for the extension of rights to support on the basis that such rights have been extended to Muslim marriages and marriage-like same-sex relationships. The choice argument in the *Volks* case would not preclude such claims, but may actually assist such women because they clearly chose to be married, while the invalidity of their marriages is not usually due to factors within the women's control.

The other category of women in need of support is those who never went through a marriage ceremony, but who have long-term, intimate relationships with men. These relationships may sometimes co-exist with other intimate relationships or with customary or civil law marriages, and the women may or may not be aware of the existence of multiple relationships.[27] The question is whether a court would be inclined to develop the customary law to create a duty of support for these women.

Courts may well be reluctant to do so. First, there appear to be no cases nor any academic authority awarding or recognising rights to spousal support to cohabitants in customary law. Indeed, the clear customary principle appears to be that without marriage a woman does not become part of a man's family, even though the relationship may be of long standing. The man's family and the man himself have no duty to support such a woman. This also accords with the views of informants on customary

25 See part I para 2 and the references it contains.

26 The suggestion has been made by Mwambene and Kruuse 2013 *Acta Juridica* and Janse van Rensburg 2003 *TSAR.*

27 See part I para 2 and the references it contains.

practices, who insist that cohabiting women have no rights to support from men's families and that they will not receive support after a man dies.[28]

A second problem arises when maintenance is claimed after the unmarried intimate partnership has ended. Customary law did not originally recognise duties of support, even between spouses, after the marriage had ended.[29] The *Recognition of Customary Marriages Act* allows a court to make an order for spousal support at divorce, but the literature indicates that these orders are rare and seldom adhered to.[30] This, in relation to customary *marriages*, further diminishes the chances of holding that there is a duty to support after the end of a non-marital relationship.

Third, when customary and civil marriages co-exist, section 31(1) of the *Black Administration Act* and section 1 of the *Maintenance of Surviving Spouses Act* extinguish or limit the rights of certain customary wives to maintenance. These rules are remnants of the historical favouring of civil marriages over customary marriages and they are probably unconstitutional. However, what is relevant for this particular article is that, if there are no duties of spousal support in customary marriages which co-exist with civil marriages, then it's very unlikely that courts would award such rights in unmarried relationships which co-exist with civil marriages, or perhaps even with valid customary marriages. Nevertheless, there are precedents for extending rights to support in polygynous Muslim marriages[31] and in unmarried opposite-sex relationships,[32] which could support an argument in favour of extending rights to other polygynous relationships also.

There are two customary practices which could be explored for further legal development. The first relates to the payment of the compensatory *isondlo* beast in relation to women's work in providing care for children of the relationship. The practice of *isondlo* is already recognised by section 8(4)(e) of the *Recognition of Customary Marriages Act,* which allows a court which makes a maintenance order in a customary divorce to "take into account any provision or arrangement made in accordance with customary law".[33] It could be argued that a man has a duty to compensate a woman for her

28 Himonga and Moore *Reform of Customary Marriage* 91; Budlender *et al Women, Land and Customary Law* 33, 36, 38.
29 Bennett *Customary Law* 282-284.
30 Himonga and Moore *Reform of Customary Marriage* 211-214.
31 The *Hoosein*, *Khan* and *Rose* cases.
32 *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA) (hereinafter the SCA *Paixão* case.
33 Bennett *Customary Law* 284.

childcare work by using the analogy of the *isondlo* beast. However, a man cannot be compelled to pay *isondlo*, and courts would rather, in those circumstances, order child maintenance. Moreover, the *isondlo* beast is not paid to the woman herself, but to her family. I have also not found any evidence of such an extended use of *isondlo* in customary communities, so this avenue may fail.

A final possibility is to explore mechanisms to secure women's rights to remain on the land on which their houses are situated, at least for the duration of their lives. This could be done either through customary mechanisms for land tenure or through exploring compensation for the improvements which the woman had made on the land. The benefit of this approach would be that – if successful – it would represent an incremental increase of the rights of cohabitants, but one which would nevertheless have real practical and economic value for women who may otherwise lose their homes when their intimate relationships end.

4 Common law

In his minority judgment in *Volks*, Justice Sachs held that there are two groups of cohabitants whose duties to support one another deserve legal protection:[34]

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

In this group the legal duty of support is based upon the recognition and enforcement of the parties' undertakings or agreements: in effect, their contracts to support one another. In the second group the law recognises that the duty arises:[35]

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

The duty of support can therefore arise either *ex contractu* (the first scenario) or *ex lege* (the second instance).[36] I shall examine each in turn.

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34 *Volks* case para 214.
35 *Volks* case para 218.
36 Smith and Heaton 2012 *THRHR* 477.

4.1 Rights ex contractu

The recent jurisprudence creates the impression that, outside of marriage, contract is the only basis upon which a duty of support between intimate partners will be recognised. This interpretation rests upon the dictum by Skweyiya J in *Volks* that "no duty of support arises by operation of law in the case of unmarried cohabitants".[37] As a result of this judgment, the jurisprudence on the duty to support outside of marriage has become more overtly reliant on contract, even as remnants of public policy reasoning continue to influence courts' determination of whether or not the partners actually agreed to support one another.[38]

Contract appears to be an appropriate and expedient way to circumvent the strictures of *Volks,* because South African family law has traditionally allowed spouses to determine the property consequences of their marriages by way of antenuptial contracts. Engagements are also regarded as contracts, albeit subject to *sui generis* rules and remedies.[39] In addition, Muslim marriages, which apply to many of the cases in this area, are often characterised as contracts between the spouses.[40]

Indeed, the voluntary nature of marriage often leads to its being described as a contract, but this is not accurate[41] because the consequences of marriage extend far beyond what the spouses agree upon. In fact, those very same judgments which afford primacy to marriage over other family forms do not rely upon *pacta sunt servanda*, but recognise instead the importance of the many complex social functions which marriage fulfils. The majority judgment of Skweyiya in *Volks* quotes at length[42] from the *Dawood* case, in which O'Regan explained the significance of marriage as follows:[43]

> 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 marriage. These legal obligations perform an important social function.

37 *Volks* case para 56.
38 For more detailed exposition see para 3.3.2 of part I of this article.
39 Heaton and Kruger *South African Family Law* ch 2.
40 *Ismail v Ismail* 1983 1 SA 1006 (A); *Ryland v Edros* 1997 2 SA 690 (C); *Hoosein* case para 16.
41 Heaton and Kruger *South African Family Law* 13.
42 *Volks* case para 56.
43 *Volks* case para 31.

The disjuncture between family law and contract law reflects the difference between status and contract,[44] with family law regarded as status-based in the sense that legal rights and duties are ascribed to people on the basis of their status as wives, husbands or children - whether or not they agree to it. In contract law, by way of contrast, rights and duties derive from agreement. The adoption of contract as a mechanism to evade the consequences of the *Volks* judgment creates internal inconsistencies within family law, because the rules, precedents, assumptions and methods of proof associated with commercial contracts are oftentimes at odds with the ethos and underlying principles of family law.[45] An uneasy mix of status- and contract-related policies and rules has led to confusion about various aspects of the contracts to support which could hamper the ability of intimate partners to prove that there was a contract to support. In this paragraph I explore different facets of this problem.

4.1.1 Proving a contract to support

The contract to support can be concluded either expressly (i.e. in writing or verbally) or tacitly.[46] In Muslim marriages there would generally be an express marriage contract, while in the case of unmarried same- and opposite sex partners, agreements are most often tacit.

The party who relies on a contract bears the onus to prove it. To prove an express contract, a party must either produce and prove a document, or produce evidence of an oral agreement. The latter could take the form of oral testimony by the party or other witnesses, evidence of surrounding circumstances at the time of the conclusion of the contract and evidence of the parties' behaviour, both at the time of conclusion and while the contract was allegedly in force.[47] A court should find that an oral contract was concluded if this is the more probable inference from all the evidence.

Contracts between intimate partners to provide mutual support would rarely be written down. Although they may be verbal, they would more often be tacit. Tacit contracts are most difficult to prove, first because of courts' traditional reluctance to accept allegations of tacit terms.[48] Problems of

44 See Graveson 1941 *MLR.*
45 See Dewar 2000 *IJLPF*.
46 *Volks* case paras 136, 140, 214; *Paixão* SCA paras 17, 18.
47 *De Lange v Absa Makelaars* 2010 3 All SA 403 (SCA) para 21.
48 *Wilkins v Voges* 1994 3 SA 130 (A) 143H-I.

proof increase when a party alleges not only a tacit term in an otherwise express contract, but that the entire contract had been tacitly concluded:[49]

> In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus *ad idem.*

Within the family context, where people have moral, social and even religious obligations to behave in certain ways, and where they also act out of affection and altruistic motives, it becomes understandably difficult to prove that a contract to support is the only reasonable explanation for partners' behaviour. Basing the duty of support on contracts – and especially tacit contracts – therefore presents inherent obstacles to proving the existence of such a duty.[50]

4.1.2 Animus contrahendi *and mere undertakings*

The basis for the legal enforcement of a contract is agreement between the parties (consensus), which is accompanied by *animus contrahendi* – the intention to enter into a *legally binding* contract. *Animus contrahendi* distinguishes a contract from a mere social arrangement or moral obligation, which can't be legally enforced.[51] Parties to intimate relationships make many promises to one another, but only those which are made *animo contrahendi* are enforceable as contracts. While non-contractual social or moral obligations cannot be directly enforced, they may inform public policy, *boni mores* and the legal convictions of the community which may, in turn, influence a court's reasoning on the existence of an *ex lege* duty of support.

The jurisprudence on agreements to support one another is not always clear on whether the parties have *animus contrahendi* or have merely "undertaken" to support one another.[52] For instance, the word "contract" is not once mentioned in the *Satchwell* judgment, which speaks instead of "undertaking" duties of support,[53] while *Du Plessis* contains both the terms "undertake"[54] and "contract".[55] The latest cases tend to move towards a

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49 *Standard Bank of SA v Ocean Commodities* 1983 1 SA 276 (A) 292B-C.
50 See Bonthuys 2017 *SALJ*.
51 *Church of the Province of Southern Africa, Diocese of Cape Town v CCMA* 2002 3 SA 385 (LCC).
52 See the discussion in para 3.3.2 of part I of this article.
53 *Satchwell* case paras 24, 25, 37.
54 *Du Plessis* case paras 14, 16.
55 *Du Plessis* case paras 6, 16, 37.

more explicitly contractual terminology,[56] which may signify a shift in courts' reasoning on duties of support from public policy or *boni mores* towards contract. However, this shift is not complete, because the issue of *animus contrahendi* has not yet been settled. While some cases simply assume the existence of *animus* (by assuming that there is a contract), other cases like *Meyer*[57] and *Paixão a quo*[58] have held that agreements between intimate partners are merely moral or social in nature because of the lack of animus:[59]

> Experience has taught us that people make promises, not intending that those promises should be construed or elevated to *animus contrahendi*.

The developing jurisprudence on universal partnership contracts between unmarried partners may indicate an increasing acceptance of the idea of binding contracts between people in intimate relationships,[60] but this requirement places an additional burden upon women who allege a contract of reciprocal support with their intimate partners. Not only do they have to prove that they actually agreed with their partners, but that both understood that they would have legal recourse against one another if their agreement were breached. This constitutes an impediment for legal claims for support outside of marriage.

4.1.3 Public policy and simultaneous relationships

Another problem which emerges from the established jurisprudence on contracts between family members is the issue of intimate relationships which co-exist with marriages. In order to be valid a contract should be legal, and contracts which create rights for intimate partners while one of the contracting parties is already married to someone else would be regarded as contrary to public policy and thus void for illegality.[61] A contract whereby a married man undertakes to provide spousal support to a woman who is not his wife should therefore be invalid.

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56 *Verheem v Road Accident Fund* 2010 2 SA 409 (GP) (hereafter the *Verheem* case) paras 2, 12; *McDonald v Young* 2012 3 SA 1 (SCA) (hereafter the *MacDonald* case) para 16; *Paixão* SCA para 22.

57 *Meyer v Road Accident Fund* (TPD) (unreported) case number 29950/2004 of 28 March 2006 (hereafter the *Meyer* case) paras 38, 39.

58 *Paixao v Road Accident Fund* 2011 ZAGPJHC 68 (1 July 2011) (hereafter *Paixão a quo*) paras 30 31, 35.

59 *Paixão* a quo para 30.

60 Bonthuys 2016 *OSLS.*

61 *Staples v Marquard* 1919 CPD 181; *Friedman v Harris* 1928 CPD 43; *Karp v Kuhn* 1948 4 SA 825 (T); *Claassen v Van der Watt* 1969 3 SA 68 (T); *Lloyd v Mitchell* 2004 2 All SA 542 (C); *Benefeld v West* 2011 2 SA 379 (GSJ).

This was the basis for the decision in *Paixão a quo* that

> [i]t cannot be argued successfully that promises made during the subsistence of a marriage relationship can prevail over the marital obligations of the other spouse.[62]

The Supreme Court of Appeal's attempt in *Paixão* to bypass this conclusion by characterising the contract as "akin to *a pactum de contrahendo* is unconvincing because pacta de contrahendo must also comply with the usual rules on legality. If the main agreement, which the *pactum de contrahendo* anticipates is illegal, then the *pactum* itself must likewise fail.[64]

The only way around the issue of legality would have been for the Supreme Court of Appeal to overrule the established common law rule that an agreement to support by a married person is illegal because it undermines the institution of marriage. However, this would have involved a radical break with precedent.

Support for altering or abolishing this rule on legality can, however, be found in the cases on polygynous Muslim marriages. In *Khan v Khan* the court upheld a claim for maintenance after a *talaaq* (divorce) was issued in a polygynous Muslim marriage, holding that the duty to maintain was legally enforceable, despite the polygynous nature of the marriage, because of changes in public policy towards potentially polygynous marriages.[65] Moreover, the *Recognition of Customary Marriages Act* and several cases had recognised the rights of women in polygynous customary marriages to support.[66] Therefore:[67]

> the argument that it is *contra bonos mores* to grant a Muslim wife, married in accordance with Islamic rites, maintenance where the marriage is not monogamous, can no longer hold water. It will be blatant discrimination to grant, in the one instance, a Muslim wife in a monogamous Muslim marriage a right to maintenance, but to deny a Muslim wife married in terms of the same Islamic rites (which are inherently polygamous) and who has the same faith and beliefs as the one in the monogamous marriage, a right to maintenance.

While the *Khan* case involved simultaneous Islamic marriages, the Islamic marriage in *Rose v Rose* was concluded at a time when the man was already a spouse in a civil marriage. The two marriages overlapped for a period of ten years, after which the civil marriage was dissolved. Brembridge

62 *Paixão a quo* paras 29, 40 and 41.
63 *Paixão* SCA para 22.
64 *Brandt* v *Spies* 1960 4 SA 14 (E).
65 *Khan* case para 11, relying on the *Amod* case.
66 *Khan* case para 11.10.
67 *Khan* case para 11.11.

AJ[68] cited the dictum from *Hassam v Jacobs* which declared it impermissible to discriminate between monogamous and polygynous Muslim marriages:

> [t]he significance attached to polygynous unions solemnised in accordance with the Muslim religious faith is by no means less than the significance attached to a civil marriage under the Marriage Act or an African customary marriage. Similarly, the dignity of the parties to polygynous Muslim marriages is no less worthy of respect than the dignity of parties to civil marriages or African customary marriages.[69]

This, the court in *Rose* held, meant that the pre-existing civil marriage rendered the subsequent Islamic marriage polygynous, but it did not prevent the Muslim spouse from claiming legal relief in terms of the *Divorce Act*.[70] The application of the *Hassam* case in this decision is open to criticism, because *Hassam* involved co-existing Muslim marriages, while in *Rose* the Muslim marriage was concluded after a valid civil marriage. The principle in *Hassam* may therefore not be directly transferable to the facts in *Rose*.

The comparison to customary marriages in the quote from *Hassam* may also not be directly applicable to the issue of co-existing civil and customary or Islamic marriages. Historically customary marriages were invalidated when one of the parties entered into a civil marriage with another person, signifying both the superior status of civil marriage and the wish to maintain the essentially monogamous nature of civil marriage.[71] Currently no customary marriage can be concluded during the subsistence of a valid civil marriage to another spouse, nor a civil marriage to a third party while a valid customary marriage subsists.[72] Extended to Islamic marriages, this reasoning would entail that contractual undertakings could be contrary to public policy if enforcing them would undermine the integrity of *civil marriages*, which are in principle strictly monogamous.

It is further notable that the *Draft Domestic Partnerships Bill*[73] determines that all registered partnerships (which would create *ex lege* rights and duties of support) may not co-exist with civil marriages or civil unions or with other registered partnerships. In addition, courts will not be able to extend rights to support in unregistered partnerships which co-exist with either civil marriages, civil unions or registered domestic partnerships. By implication, duties of support could be granted in relationships which co-exist with

68 *Khan* case para 56.
69 *Hassam v Jacobs* 2009 5 SA 572 (CC) (hereafter the *Hassam* case) para 46.
70 *Rose* case para 58.
71 Bennett *Customary Law* 236-242.
72 Sections 10(4) and 3(2) of the *Recognition of Customary Marriages Act* 120 of 1990.
73 See para 3.3.3 of part I of this article.

customary marriages, Muslim marriages or unregistered domestic partnerships. In this respect the Draft Bill corresponds with contractual rules which uphold the monogamous nature of civil marriage.

It appears that the existence of a civil marriage with another woman may render any agreement to support the client invalid for being contrary to public policy. This would limit the usefulness of a contractual right to support for women whose partners are in simultaneous civil marriages.

4.1.4 Contractual rights and duties after conjugal relationships have ended

In *Volks* Skweyiya J held that:[74]

> [t]o 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.

This case dealt with the continued existence of a duty of support against the estate of a deceased partner. It is less clear whether a contract-based right to support can be asserted against a third party who caused the death of a breadwinner by way of the dependant's action. As the *Amod* case held, this question would be determined by the *boni mores* and in *Amod* the dependant's action was in fact extended to the contractual duty of support which arose from a monogamous Islamic marriage. The action has also been afforded to unmarried opposite-sex cohabitants who had contracted to support one another in the *Paixão* and *Du Plessis* cases. However, whether or not courts would be prepared to extend it further to unmarried intimate partners who do not necessarily cohabit remains to be seen, even when they had undertaken a reciprocal duty of support.

The next question is whether the contractual duty of support continues after the end of the intimate relationship, but while the defendant is still alive. In other words, can the contractual duty of support still be enforced against a partner even after the relationship has broken down? The answer will depend on the terms of the tacit contract – whether a court will find that the parties agreed that the defendant undertook to support the plaintiff for the duration of the relationship only, or that the support would continue after the end of the relationship.

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74 *Volks* case para 58.

The latter interpretation is very unlikely because, even within marriage, the duty of support ends when the marriage is terminated by divorce unless it is extended by way of a court order or settlement agreement. When a marriage ends as a result of death, the duty of support is likewise terminated unless the application of the *Maintenance of Surviving Spouses Act* causes it to continue.

None of the recent cases extending contractual duties of support outside of marriage has afforded a right to claim support against a living partner after the relationship has ended, except for the cases involving Islamic marriages in which the duty to maintain for the *iddaah* period is expressly stipulated in the Muslim marriage contract. In *McDonald v Young* the claim for post-relationship maintenance failed – not on the basis of principle, but because the contract was not proven. However, outside of Islamic marriage, recognising a duty to support when a relationship ended would require either a radical development of the law or an express (and probably written) contract. Tacit contracts, which are difficult to prove in any event, would probably not be able to achieve this.

4.1.5 Autonomy and bargaining power in contracts to support

Unlike *ex lege* remedies, which are automatically available to all those who meet certain criteria, contractual remedies are individualised in the sense that only those people who can prove the existence of a contract can claim support. Whether or not people can prove contracts, especially oral and tacit contracts, would depend on the individual circumstances of each case. The very notion of contract is therefore intrinsically more onerous for the party alleging a legal duty of support than an *ex lege* duty. Moreover, in order to prove a contract, an individual woman would need to approach a court – something which is not within the financial reach of all women, especially those who most need support. It is for these reasons that Goldblatt[75] has criticised the the Supreme Court of Appeal's *Amod* judgment:

> [b]y relying more narrowly on the contract between the parties, the judgment makes it harder for partners in intimate relationships to prove a legally enforceable duty of support so as to bring themselves within the scope of the dependant's action. A finding that the duty of support was a common-law consequence of certain, previously unrecognised family relationships would have meant that the dependant's action would have been automatically available to such families.

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75 Goldblatt 2000 *SAJHR* 143.

There is a deep irony in the courts' turning to contract to get around the choice argument in *Volks.* The central concept of contract and the main justification for legally enforcing contracts – consensus or voluntary agreement between the parties – in essence replicates elements of the very choice argument upon which the majority judgment in *Volks* was based. This means that all the improbable assumptions about individual autonomy and the ability of people to choose to advance their own interests, which are criticised in the *Volks* majority judgment, also apply to remedies based on contract. This is exacerbated by the fact that the law of contract and its rules, precedents and methods of proof are generally tailored to the commercial context. Agreements between family members and people in intimate relationships tend to be guided by different, often gendered norms of behaviour such as trust, altruism and a concern for mutual benefit rather than the ability to make a profit. This means that those, often women, who act according to altruistic norms tend to be disadvantaged when their behaviour is measured against the standards which were formulated for business contracts.

The next paragraph turns to the implications of the *Volks* judgment for the development of an *ex lege* right to support.

4.2 Ex lege rights to support and the choice argument

Although an *ex lege* duty of support would be preferable to a duty based on contract, the unequivocal statement in *Volks*[76] that "no duty of support arises by operation of law in the case of unmarried cohabitants" appears to have closed this avenue.

The judgment provides two justifications for this view. The first is that the *Constitution* and international law recognise the family as the basis for society. Differentiation between married and unmarried families is therefore justified and cannot amount to unfair discrimination.[77] The second justification, which amplifies the first, is the choice argument, that:[78]

> [t]he 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.

76 *Volks* case para 56.
77 *Volks* case paras 51-57, 76-79.
78 *Volks* case para 92 per Ncgobo J.

The unfair discrimination argument has been dealt with extensively by academic commentators.[79] The minority judgments point out that it both nullifies the constitutional prohibition of discrimination on the basis of marital status[80] and "presupposes and eliminates the very issue which needs to be determined".[81] It could further be countered by the argument that the lack of legal remedies for opposite-sex partners discriminates on the basis of sexual orientation,[82] and is replaced by an intersectional discrimination analysis, the outlines of which I sketched.[83]

In the remainder of this article I shall therefore focus on the use of the choice argument. I preface this discussion by observing that elevating choice over other considerations is foreign to family law, which has always imposed legal obligations against the wishes of family members; for instance, imposing maintenance obligations on reluctant parents and ex-spouses.[84]

4.2.1 Selective use of the choice argument

The fact that same-sex couples could not exercise the choice to marry their preferred partners was central to the extension of a range of marriage-like rights to these relationships.[85] In fact, their lack of choice was regarded as an affront to their dignity:[86]

> to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.

By comparison, the absence of the choice argument in several of the Muslim marriage cases[87] is therefore remarkable. None of these cases denied rights to Muslim spouses because they had the choice to conclude civil marriages in addition to their religious marriages – something which many Muslim couples actually do. The absence of the choice argument implies that Muslim couples don't have a choice to enter into civil marriage. These cases should be juxtaposed with the Constitutional Court's view in *Hassam*

79 MacConnachie 2015 *SAJHR;* Smith and Heaton 2012 *THRHR*.
80 *Volks* case para 188 per Mokgoro J and O'Regan J.
81 Per Sachs J, *Volks* case paras 150-151.
82 Smith and Heaton 2012 *THRHR* 482-483; Smith “Dissolution of a Life Partnership” 405; Kruuse 2009 *SAJHR*.
83 Para 2.1 above.
84 Lind 2005 *Acta Juridica* 124.
85 *Langemaat* case para 314A-B; *Satchwell* case para 4.
86 *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) (hereafter the *Fourie* case) para 72.
87 *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA) (hereafter the *Amod* case), *Daniels* case, *Khan* case, and *Rose* case.

v Jacobs that Muslim wives have no influence over their husbands' choices to enter into further polygynous marriages.[88]

The choice argument was used in respect of the Hindu marriage which had not also been solemnised in terms of the *Marriage Act* in *Singh v Ramparsad* to deny a wife maintenance when she sued for divorce,[89] but it was not used a year later in *Govender v Ragavayah,*[90] when a Hindu wife applied to be included as a spouse for the purposes of the *Intestate Succession Act*. An explanation for *Singh* is that there had been no claims for divorce by any of the other groups of unmarried partners. The court may have been wary of applying the *Divorce Act* to marriages which are not legally valid.[91]

The choice argument has thus far been used only in respect of unmarried opposite sex partnerships and in one Hindu marriage where the wife sued for divorce. This could indicate that courts recognise that the social contexts in which Muslim and same-sex couples find themselves would constrain their abilities to marry, but that the social and economic contexts of unmarried opposite-sex couples are not recognised. The inconsistency of this position is well illustrated by Kruuse's analysis of the 2007 judgment in *Gory v Kolver,* which retains the intestate succession rights of unmarried same-sex couples, despite the enactment of the *Civil Union Act,* which allows same-sex marriage. The result of this judgment,[92] Kruuse contends, is that the social impediments which prevent same-sex couples from being married precludes the choice argument from applying to them, while those social and economic impediments which affect women's ability to enter into marriage are either regarded as non-existent or not serious enough to refute the choice argument. She argues that there can be no logical basis for such a hierarchy of oppression.[93]

4.2.2 Formulating the choice

By phrasing the choice in a particular way a court can determine to a large extent the outcome of its own enquiry. In the *Volks* and *Meyer*[94] cases the choice was articulated as either getting married in order to access legal

88 *Hassam* case para 38.
89 *Singh v Ramparsad* 2007 3 SA 445 (D) 455I-J.
90 *Govender v Ragavayah* 2009 3 SA 178 (D).
91 But see the application of Rule 43 to Muslim marriages discussed in para 3.1 of part I of this article.
92 Also see the discussion of *Laubscher* case in para 4.2.5 below.
93 Kruuse 2009 *SAJHR* 385-386.
94 *Meyer* case paras 29, 32, 40.

benefits, or by remaining unmarried, to choose to forgo them. Formulated like this, the choice to access marital benefits can be made only by marriage and in no other way. [95] The particular formulation of the choice by the *Volks* majority judges may be the consequence of the limited discrimination argument – based on marital status only. An intersectional discrimination argument, aiming to achieve substantive gender equality could have curbed the majority's scope for formulating the choice in such a simplistic manner.

In any event, this particular formulation of the choice is not inevitable. For instance, the court *a quo* in *Robinson v Volks*[96] articulated the choice differently, asking whether, given the fact that the couple had lived together for a long time and shared their resources, they could thereby have chosen to forego the legal benefits, adding that there was no evidence that such a choice had actually been made. The court *a quo* therefore uses an "opt-out" model, which assumes that people would have chosen to acquire all available benefits unless they choose to forego them, while the Constitutional Court judgment uses an "opt-in" model, which assumes that people want none of the marital benefits unless they get married. This initial assumption is crucial and the opt-out model has been described as preferable.[97] It also accords with the research which shows that people usually believe that their long-term cohabitation relationships will have legal consequences.[98]

Another model of choice is found in Justice Sachs' minority judgment in *Volks*; he questions why the parties' choices to provide mutual support to one another should be disregarded.[99] In other words, did the parties' sharing behaviour during the relationship indicate a choice to support one another? It is not obvious why the choice not to marry should be regarded as more significant than the choice to support one another during the relationship in determining whether there was a reciprocal duty of support.[100] Given the real contexts of women's lives, it would be more accurate to articulate women's choice as being "between destitution, prostitution and loneliness on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other."[101]

95 Lind 2005 *Acta Juridica* 122.
96 *Robinson v Volks* 2004 6 SA 288 (C) 299E-G.
97 Goldblatt 2003 *SALJ* 617.
98 See para 4.2.3 below.
99 *Volks* case para 156.
100 Lind 2005 *Acta Juridica* 122.
101 Justice Sachs in *Volks* case para 225.

The way in which the choice is formulated by the majority in the *Volks* case evokes a curiously Victorian, punitive attitude towards the women who chose to cohabit, but who approach the courts to evade the consequences of their choices. According to Lind "[i]t is tempting to think of this problem as a problem of their own making, and its solution as one which was in their own hands".[102] The majority in *Volks* appears to have fallen prey to this temptation. Yet, this reasoning can be said to:[103]

> discriminate against the powerless and economically dependent party, now threatened with destitution, on the basis that she should either have insisted on marriage or else withdrawn from the relationship.

Even as this punitive notion of choice justifies existing discrimination, it fails to provide women with the real autonomy and real choices in respect of reproduction, childcare and family decisions which they have historically lacked.[104] Lind[105] describes the majority judgments as choosing not to alleviate the disadvantages faced by vulnerable female partners:

> While they were prepared to acknowledge the invidious gender based inequality operating in South Africa they perceived the task of alleviating that inequality to be so great — in the context of family relationships, at least — that they withdrew from their role in producing a solution.

4.2.3 Who makes the choice?

Refusing legal remedies on the basis of partners' supposed choices can be justified only if people actually make the choices described by the judges, and if they do so fully aware of the implications of their choices. This is not necessarily the case for many intimate partners, who may believe that the law attaches consequences to their long-term relationships, or who may erroneously believe that they are legally married when they are not.

Studies on contract show that people who contract with one another, especially in intimate relationships, harbour unrealistically positive expectations about the duration of their relationships and the behaviour of their partners – they enter relationships under conditions of so-called "cognitive distortion". Lind cites studies in 2001, 2002 and 2005 showing that large numbers of cohabitants in the United Kingdom believe that the legal consequences of marriage apply to their long-term cohabitation relationships. He argues that South Africans, who are under the impression

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102 Lind 2005 *Acta Juridica* 111.
103 Sachs J in *Volks* case para 222.
104 Bonthuys 2008 *Can J Women & L* 23.
105 Lind 2005 *Acta Juridica* 118.

that the new constitutional dispensation affords them extensive rights, are even more likely to think that they are legally protected.[106]

The issue of choice is further complicated by the complex South African marital regimes where people, especially in customary marriages, may not realise that their marriages lack full legal validity.[107] As a result of the continuation of the practice of migrant labour, women in customary relationships may be unaware that their partners had contracted other customary or civil marriages affecting the legal status of their own relationships. The assumption that they had made an informed choice to forego the legal benefits of marriage should therefore be thoroughly questioned in these circumstances.

Even when people have perfect knowledge of the legal consequences of their actions, marriage requires the consent of both spouses. In the *Volks* case there was evidence that Mrs Robinson wanted to get married, but Mr Shandling did not. This is no coincidence. In patriarchal societies men are the ones who make the choices to marry and to discard spouses or long-term partners,[108] while women lack the social and economic power to coerce men to marry them. It usually suits men not to formalise their relationships by way of marriage, and thereby to avoid legal responsibilities.[109] To reify the choice not to marry is, first, to pretend that this was the choice of both parties and, second, to give legal effect to the preference of the one who had the stronger bargaining power as a result of patriarchal privilege.[110]

> It is artificial to view a decision-making process that requires a meeting of minds between two individuals as generating a single 'choice'.[111]

Lind[112] therefore suggests that, in a situation where the parties want different things, the court should rather give effect to their *modus vivendi* – what they actually did during their relationship – which would more accurately represent the actual consensus which they reached during their relationship.

Like the use of the choice argument itself, ascribing the choice of one party to both is also selectively done. In *Hassam* the Constitutional Court

106 Lind 2005 *Acta Juridica* 116.
107 Hosegood 2013 *Acta Juridica* 147.
108 Sachs J in *Volks* case para 164.
109 Goldblatt 2003 *SALJ* 616.
110 Lind 2005 *Acta Juridica* 123.
111 Schäfer 2006 *SALJ* 642.
112 Lind 2005 *Acta Juridica* 123.

remarked of Muslim wives that "[t]hese women, as was the case with the applicant, often do not have any power over the decisions by their husbands whether to marry a second or a third wife".[113] Consistently applied, the choice argument would simply have been that a woman who did not want to live in a polygynous marriage should have chosen to divorce her husband. The failure to do so indicates her consent to the legal consequences.

4.2.4 The economic and social contexts of choices

The Constitutional Court has frequently pointed out the importance of historical, social and economic context in the unfair discrimination enquiry,[114] and the majority in *Volks* acknowledged women's economic vulnerability and dependency within the family.[115] However, in their reasoning on choice the majority failed to sustain the link between social context on the one hand and legal rules on the other hand. The majority also refused to admit empirical research by the Centre for Socio-Legal Studies (CALS) on the socio-economic conditions of cohabiting women because it was regarded as insufficiently incontrovertible.[116] The a-contextual nature of this judgment has been severely criticised by academics.

Schäfer[117] argues that the only context which the court took into account was whether there was a legal impediment to their marriage or not – that it replaced a concern with social context with a simple focus on legal context.

Another way of viewing the choice argument in *Volks* is that it is not completely a-contextual, but is instead based on the contexts of the most privileged people, as if these were universally applicable to everyone.[118] The rejection of the CALS evidence allows the majority judgments to disregard the contexts of the most disadvantaged women. The majority judgments' notion of choice is therefore permeated with unacknowledged and invisible class and racial privilege.[119] This tacit assumption of social and economic privilege justifies the "libertarian presumption of free choice".[120]

113 *Hassam* case para 38.
114 For instance *Hassam* case para 33.
115 *Volks* case paras 64-69.
116 *Volks* case paras 31-33.
117 Schäfer 2006 *SALJ* 640.
118 Bonthuys 2008 *Can J Women & L* 20.
119 Bonthuys 2008 *Can J Women & L* 24.
120 Goldblatt 2003 *SALJ* 616.

Justice Sachs' minority judgment in the *Volks* case draws attention to the past and present effects of racial and gender hierarchies on people's abilities practically to make the choice either to marry or not and to the legacy of Apartheid policies which created economic hardship and separated family members from one another.[121] This position needs to be expanded and more explicitly articulated to highlight conditions which structure the choices of the most disadvantaged women. Courts should therefore take cognizance of the statistical and empirical evidence on the living arrangements of the majority of South Africans. This includes acknowledging the fact that the majority of South Africans, and particularly the most disadvantaged sector of the rural African poor, do not live according to Western paradigms of cohabitation or colonial legal concepts of marriage. Instead, there are multiple modes of and reasons for unmarried intimate partnerships in South Africa.[122]

The family and reproductive lives of the majority of South Africans have the following characteristics:[123]

- long-term unmarried intimate relationships;
- multiple simultaneous relationships, often in rural and urban areas;
- labour migration of both women and men from rural to urban areas;
- no cohabitation or only sporadic cohabitation between intimate partners;
- non-conjugal, non-nuclear households;
- household membership doesn't necessarily indicate family status;
- multi-generational households, often headed by women;
- simultaneous and overlapping membership of multiple households;
- overwhelming female responsibility to care for children and dependent family members;
- adherence to customary concepts and processes of marriage and family formation;
- disputes and uncertainty about the status of customary marriages;
- blends of customary and civil elements in marriage;
- gender inequality in access to land, economic opportunities, education and access to resources.

The simplistic choice model adopted by the majority in *Volks* is hopelessly inadequate to capture the social, legal and moral complexities in unmarried intimate relationships. In its deliberate refusal to acknowledge the complex contexts of the real lives of the majority of South Africans, the choice argument reinforces the Apartheid and colonial disadvantages imposed on poor African, rural and unmarried women.

121 *Volks* case paras 157, 162, 165.
122 Goldblatt 2003 *SALJ.*
123 See the discussion in para 2 of part I of this article.

4.2.5 Re-visiting the choice argument in the Laubscher case

The Constitutional Court recently had two opportunities to re-visit the choice argument in the context of the *Intestate Succession Act*. The enactment of the *Civil Union Act* means that same-sex cohabitants can now marry, and a consistent application of the choice argument should therefore have precluded same-sex partners who choose not to marry from attaining marriage-like rights. In *Gory v Kolver* this question was easily skirted because the *Civil Union Act* was not in force at the time when one partner died intestate. The Constitutional Court held that the word "spouse" in the Act includes unmarried same-sex partners who had undertaken reciprocal duties of support. The remarks on the future use of the choice argument were therefore *obiter dictum*:[124]

> the rationale in previous court decisions for using reading-in to extend the ambit of statutory provisions applicable to spouses/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.

The unmarried same-sex partners in the subsequent case of the *Laubscher* case could, however, have married in terms of the *Civil Union Act* and the question was whether the ruling in the earlier *Gory* case withstood the choice argument from *Volks*. While the majority of the Constitutional Court once again avoided dealing directly with the *Volks* argument by focusing on the scope of the *Gory* judgment,[125] (distinguishing the issue of the maintenance of a surviving spouse in *Volks* from the issue of intestate succession in *Laubscher*[126] and holding that the legislature deliberately did not, in the *Civil Union Act*, revoke the consequences of earlier jurisprudence awarding rights to cohabiting same-sex couples)[127] Froneman J in his minority judgment decided to cut to the chase:[128]

> So this judgment meets Volks head-on, something I regard as inevitable. And it concludes that Volks cannot stand.

Apart from disagreeing with the majority on other issues, the heart of the minority judgment lay in its acknowledgement that *Volks* discriminates

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124 *Gory v Kolver* 2007 4 SA 97 (CC) para 29.
125 *Laubscher* case paras 22-24.
126 *Laubscher* case para 46.
127 *Laubscher* case paras 38-40.
128 *Laubscher* case para 60.

against unmarried same-sex and opposite sex couples who voluntarily undertake reciprocal duties of support.[129] Froneman J explained that:[130]

> [t]he initial obvious way to change our society's views on unmarried partnerships was to show that they exhibited the same characteristics as married partnerships. Central to this was the existence of reciprocal duties of support between partners in both married and unmarried relationships. The most comfortable way to ease the road to equality was to remove the impediment of formal marriage to previous unmarried partners. But that was only a pragmatic start on the road we need to travel. The logic of similar reciprocal duties of support does not necessitate equalisation in that particular way. To the contrary, it creates a new form of unfair discrimination against unmarried couples who do not wish to marry. The same reciprocal duties of support remain, but some are protected, others still not. That residual unfair discrimination cannot be allowed to stand.

There can be many points of criticism against this minority judgment. Characterising the *Volks* choice argument as an attempt to afford equal legal rights to all family forms strikes me as overly generous, given that this argument has not once been used to extend rights to opposite-sex cohabitants. It has benefitted same-sex partners and it has been mostly ignored for Muslim marriages. In the case of opposite-sex unmarried partners, however, the best that could be said is that the courts attempted, by way of this punitive approach to encourage people to attain rights by marriage. In cases where courts have extended rights – like *Paixão* – the issue of choice was ignored. Another problem with Froneman's judgment is that, like the *Volks* majority, he fails to provide a closely reasoned explanation of how and why the differentiation between married and unmarried couples amounts to unfair discrimination. Instead, he appears to regard the mere fact of different legal treatment as discriminatory. Nevertheless, the chink which it provides in the Constitutional Court solidarity on the *Volks* majority judgment presents a welcome opportunity for future litigation to dismantle the choice argument in its present form.

5 Conclusion

The aim of this series of two articles is to assess the efficacy of legal developments of the law of spousal maintenance to provide rights to support to the majority of South African women, who are African and often economically, educationally and socially disadvantaged. Social science research indicates that, as a result of the persistent consequences of Apartheid labour migrancy and other factors, these women's intimate

129 *Laubscher* case paras 85-87.
130 *Laubscher* case para 85.

relationships differ from the monogamous spousal and cohabitation models which are usually assumed in legal reform projects.

Part I addresses the development of the common law duty of spousal support by way of legislation and jurisprudence. I have argued that these developments, mainly in favour of Muslim spouses and unmarried same-sex and opposite-sex cohabitants, are based either on the fact that the parties are married in terms of a major religion, or that their relationships closely resemble monogamous conjugal relationships, or else that they contractually undertook to support one another. None of these are likely to benefit disadvantaged African women whose intimate relationships don't fit the template of conjugality or co-residence.

In Part II I therefore investigate other avenues to argue that the lack of a right to support for this group of women is unconstitutional and discriminatory. I formulate an argument that a right to support should be developed in customary and in common law. The argument that the lack of a duty of spousal support unfairly discriminates was rejected by the Constitutional Court in the *Volks* case. However, in that case the discrimination argument was based only on the ground of marital status. I argue that the lack of a right to support discriminates against the most disadvantaged and most numerous group of women on the intersectional grounds of marital status, sex, gender, sexual orientation, religion, culture, socio-economic status and race.

The opportunities for developing a customary duty to partner support are limited by the lack of a right to support after marriage and in unmarried intimate relationships. Research also indicates that customary communities are not sympathetic to the recognition of such rights. Nevertheless, empirical research could explore further possibilities in this area, including compensation for childrearing, the sharing of assets, and rights to land.

Turning to the common law, there are two avenues for developing a duty of support: either *ex lege* duty or based on contract. In the *Volks* judgment the Constitutional Court appears to have effectively closed down the first avenue, so the idea of a contractual duty of support seems at first the more promising prospect.

However, several rules and requirements of proof in contract law render it unsuitable for establishing a right to support for the most disadvantaged women, especially those whose relationships coexist with either customary or civil marriages. Moreover, the need to prove that a contract had been

concluded in each individual case places this remedy out of reach of disadvantaged women.

It therefore becomes necessary to confront the argument in *Volks* that the failure to marry indicates a voluntary choice to abandon the rights and remedies reserved for spouses. Choice has always had limited justificatory power in family law, which imposes many legal duties whether or not family members agree. Legally enforceable duties to maintain children, for instance, arise irrespective of parents' wishes or choices, as do all the other invariable consequences of marriage. Moreover, choice is selectively used in family law judgments. While courts have recognised that social and religious circumstances effectively precluded some women from choosing to marry, these circumstances were disregarded in other situations and in the *Volks* case itself. Moreover, framing the choice as one of either getting married and thereby acquiring spousal rights and duties, or not getting married or thereby consciously relinquishing these rights, is questionable. Another issue is that many people are unaware of the legal consequences of not getting married, and in any event, the power to choose not to marry is not always equally shared by both partners, but probably belongs chiefly to the party with the stronger bargaining position.

The choice argument should not apply to women in invalid customary marriages, because they would usually not be aware of the defects which render their marriages void, especially where the man is already involved in another customary or civil marriage.

Given these issues, which have been pointed out repeatedly by many academic commentators, the time has come to re-visit the choice argument in *Volks*. The minority judgment by Froneman J in *Laubscher v Duplan* presents an opportunity for re-evaluation, which should be further developed in future jurisprudence.

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List of Abbreviations

CALS	Centre for Socio-Legal Studies
Can J Women & L	Canadian Journal of Women and the Law
IJLPF	International Journal of Law, Policy and the Family
MLR	Modern Law Review
OSLS	Oñati Socio-Legal Series
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg