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DEVELOPING THE COMMON LAW OF BREACH OF PROMISE AND UNIVERSAL PARTNERSHIPS: RIGHTS TO PROPERTY SHARING FOR ALL COHABITANTS?★

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In recent years the Supreme Court of Appeal has embarked on a rapid and far-reaching set of developments of the common law relating to engagements and universal partnerships between cohabitants, culminating in Butters v Mncora. *This series of cases is groundbreaking in four respects: first, in holding that engaged and cohabiting partners can enter into universal partnerships encompassing both commercial and non-commercial undertakings; secondly, that the partnership agreement does not have to be express, but can be inferred from the partners' conduct during the relationship; thirdly, that the test for the existence of such a partnership is 'whether it is more probable than not that a tacit agreement had been reached', and, finally, that non-financial contributions to the partnership, such as childcare and homemaking, should be taken into account. These cases have created an avenue by which cohabitants can circumvent the narrow approach adopted by the Constitutional Court in* Volks v Robinson NO *to lay claim to some of the financial assets which were accumulated during the existence of the partnership. This article traces the development of the law, and evaluates the law relating to engagements and universal partnerships respectively. It argues that the extension of property rights to cohabitants is accompanied by a simultaneous restriction on the rights traditionally available for breach of promise. These two areas of law remain marked by contradictory assertions that, on the one hand, breach of promise should not be treated like a commercial contract while, on the other hand, contractual principles are applied to limit the claims which had hitherto been available for breach of promise. Nevertheless, both in the case of breach of promise and universal partnerships the principles of contract law are not correctly applied, but instead are slightly altered to the detriment of claims by female cohabitants.*

I INTRODUCTION

The Constitutional Court's 2005 judgment in *Volks NO v Robinson*[1] has been widely regarded as a setback for the extension of legal rights to opposite-sex cohabitants. The majority of the court held that an unmarried opposite-sex cohabitant is not a spouse under the Maintenance of Surviving Spouses Act 27 of 1990.[2] According to Smith, this judgment 'effectively put paid to the

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[1] 2005 (5) BCLR 446 (CC).

[2] In *Daniels v Campell NO* 2004 (5) SA 331 (CC) the same court held that Muslim spouses are included in the definition of 'spouse' under the Act.

judicial extension of matrimonial law to unmarried opposite-sex cohabiting life partners'.[3]

The most trenchant and common critique of the case[4] has focused on the premise underlying the majority judgment, described by Ngcobo J in his separate concurring judgment in the following terms:

> 'The law places no legal impediment to [sic] heterosexual couples involved in permanent life partnerships from getting married. . . . Their entitlement to protection under the Act, therefore, depends on their decision whether to marry or not.'[5]

Albertyn positions the criticism of this reliance on individual choice in *Volks* in the context of the need for a jurisprudence of substantive equality that aims to transform and dislodge hierarchical social structures which disadvantage certain vulnerable groups within our society. She argues that

> '[a] transformatory approach to co-habiting relationships would acknowledge and understand the conditions that have shaped the legal exclusion of such relationships, as well as the social and economic inequalities that shape women's choices in relationships. It would also set terms for the recognition of a broader range of relationships, other than marriage, as fundamental to our society, and provide remedies that ensure the affirmation and protection of the parties in these relationships, and seek to enhance the choices of vulnerable parties within relationships.'[6]

While the majority judgment in *Volks* has indeed had a negative impact upon the transformatory project, its effects have been ameliorated from an unexpected quarter. In the past few years the Supreme Court of Appeal has embarked on a rapid and far-reaching set of developments of the common law relating to engagements and opposite-sex cohabitation. This series of cases, culminating in *Butters v Mncora*,[7] is groundbreaking in four respects: first, in holding that engaged and cohabiting partners can enter into universal partnerships encompassing both commercial and non-commercial undertak-

[3] Bradley Smith 'Rethinking *Volks v Robinson*: The implications of applying a "contextualised choice model" to prospective South African domestic partnerships legislation' (2010) 13 *PER* 238 at 238. See, however, the development of the common law represented in *Paixao v Road Accident Fund* 2012 (6) SA 377 (SCA).

[4] See, for instance, Smith op cit note 3; Craig Lind 'Domestic partnerships and marital status discrimination' 2005 *Acta Juridica* 108 at 122–3; Lawrence Schäfer 'Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships' (2006) 123 *SALJ* 626 at 632–3; Catherine Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253 at 266–7; E Bonthuys 'Institutional openness and resistance to feminist arguments: The example of the South African Constitutional Court' (2007) 19 *Canadian Journal of Women and the Law* 1 at 23–6; Marius Pieterse 'Finding for the applicant? Individual plaintiffs and group-based disadvantage' (2008) 24 *SAJHR* 397 at 410–12; Helen Kruuse '"Here's to you, Mrs Robinson": Peculiarities and paragraph 29 in determining the treatment of domestic partnerships' (2009) 25 *SAJHR* 380 at 384.

[5] *Volks NO v Robinson* supra note 1 para 91.

[6] Op cit note 4 at 265.

[7] 2012 (4) SA 1 (SCA).

ings;[8] secondly, that the partnership agreement does not have to be express, but can be inferred from the partners' conduct during the relationship; thirdly, that the test for the existence of such a partnership is 'whether it is more probable than not that a tacit agreement had been reached';[9] and, finally, that non-financial contributions to the partnership such as childcare and homemaking should be taken into account.[10] These cases have created an avenue by which cohabitants can circumvent the narrow approach in *Volks* to lay claim to some of the financial assets which were accumulated during the existence of the partnership, if not to a right to maintenance during or after the relationship.

Part II of this article will trace the development of the law relating to engagements and cohabitation, starting with a description of the common law as it stood, before discussing the four cases and the changes which they made to the common law. This will be followed by an evaluation of the law relating to engagements and universal partnerships respectively in part III. I will argue that, while property rights were extended to cohabitants who are also engaged to be married, this extension occurred alongside a parallel process restricting the ambit of claims which had formerly been available for breach of promise. Moreover, the courts' insistence that breach of promise should not be treated like commercial contracts is repeatedly contradicted by the application of contractual principles to limit the claims. Nevertheless, those contractual principles are slightly altered to limit the claims which the partners would have had, usually to the detriment of female cohabitants. In the conclusion I evaluate the disadvantages and benefits associated with the move from breach of promise to universal partnerships and the applicability of the paradigm of contract to intimate relationships in general.

II DEVELOPMENTS OF THE COMMON LAW RELATING TO ENGAGEMENTS AND OPPOSITE-SEX LIFE PARTNERSHIPS

Prior to the recent developments which will be discussed below, the remedies for breach of promise remained largely as set out in the 1965 case of *Bull v Taylor*.[11] Where an engagement was repudiated, the aggrieved party's remedies were a unique combination of delictual and contractual remedies,[12] including the return of gifts given in contemplation of the marriage. The main delictual remedy was a claim for sentimental damages, which were not awarded unless the aggrieved party could prove that her feelings or reputation were injured.[13] Where the engagement was terminated without a

[8] Ibid paras 15, 18.
[9] Ibid para 17.
[10] Ibid paras 19, 22.
[11] 1965 (4) SA 29 (A).
[12] Ibid at 37A–B.
[13] Ibid at 38F–H. In *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) at 36A–B it was held that the breach had to be 'injurious or contumelious' to found a claim for sentimental damages.

justa causa, contractual damages were awarded separately for actual loss (wasted expenditure) and prospective loss.[14] Actual loss would typically encompass expenditure on wedding preparations and loss of earnings where a party had given up her employment in contemplation of the marriage. Compensation for the financial benefits which would have resulted from the marriage could be claimed as prospective loss, but these claims were subject to reduction according to a range of factors such as the expected duration of the marriage, the probability of being married in community of property, and the plaintiff's chances of remarriage. It must be emphasised that although contractual damages were available for breach of promise, the sui generis nature of legal remedies for breach of promise meant that the calculation of these contractual damages did not follow the normal contractual principles and methods.[15]

An action for breach of promise was often accompanied by claims based on seduction, maternity expenses and maintenance where a child was born as a result of the relationship. The action for seduction was 'available to the virgin who has been seduced, that is, who has parted with her virtue at the solicitation of a man'.[16] This action, also available to people who were subject to customary law,[17] may have fallen into disuse because female virginity is no longer widely regarded as essential to the ability to conclude an advantageous marriage.[18]

Thus was the state of the common law before it was developed by the four cases which I discuss below. None of the four cases deal with the action for seduction or with claims flowing from the birth of children. These issues are therefore not considered in this article.

The constitutional obligation to develop the common law to give effect to the rights protected in the Bill of Rights, and the indirect horizontal application of the Bill of Rights,[19] have precipitated numerous changes to

[14] *Guggenheim v Rosenbaum* supra note 13 at 36–7.

[15] For further discussion, see the discussion and footnotes in part III(b) below.

[16] *Bull v Taylor* supra note 11 at 34B–C.

[17] *Ex Parte Minister of Home Affairs: In Re Yako v Beyi* 1948 (1) SA 388 (A).

[18] But see T W Bennett, C Mills & G Munnick 'The anomalies of seduction: A statutory crime or an obsolete, unconstitutional delict?' (2009) 126 *SALJ* 879, who argue that it served the purpose of protecting young women and children from sexual exploitation.

[19] Section 8(2), 8(3), 9(4) of the Constitution of the Republic of South Africa, 1996. See generally Alfred Cockrell 'Private law and the Bill of Rights: A threshold issue of "horizontality"' in *Bill of Rights Compendium* (Service Issue 10, 2001) para 3A2; A P H Cockrell 'Adjudication styles in South African private law' (1993) 56 *THRHR* 590; Alfred Cockrell 'Rainbow jurisprudence' (1996) 12 *SAJHR* 1; Johan van der Walt 'Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence' (2001) 17 *SAJHR* 340.

family law rules since 1994,[20] gradually aligning family law with the constitutional prohibition of discrimination on the bases of race, sex, gender, culture, religion, sexual orientation and marital status.[21] Particularly important for this article is the need for the rules relating to engagements and cohabitation to achieve substantive, rather than formal, gender equality.[22] Substantively equal legal rules would not merely treat men and women in the same way, but would take account of the current and historical disadvantage caused by the legal, social and economic contexts affecting women in their intimate relationships and would aim to overcome gendered disadvantage.[23] The concluding part returns to this issue in more detail.

(a) Sepheri v Scanlan[24]

Davis J's expressions of disquiet about the remedies for breach of promise in *Sepheri v Scanlan* (involving both an engagement and cohabitation) was a harbinger of the far-reaching changes subsequently wrought by the Supreme Court of Appeal. The case involved an engaged couple who had cohabited for eight years. The plaintiff had given up her employment in Scandinavia to follow the defendant to several countries where he worked, finally settling in South Africa, where the relationship came to an end.

Agreeing with Sinclair[25] and Joubert,[26] who argued for the abolition of the action for breach of promise, Davis J expressed the opinion that the current form of the action for breach of promise

> 'appears to place the marital relationship on a rigid contractual footing and thus raises questions as to whether, in the constitutional context where there is recognition of diverse forms of intimate personal relationships, it is still advisable that, if one party seeks to extract himself or herself from the initial intention to conclude the relationship, this should be seen purely within the context of contractual damages.'[27]

[20] For a discussion, see Elsje Bonthuys 'Commitments to gender equality in South African family law: "Unpredictable and sporadic?" ' in Jaya Sagade, Vedna Jivan & Christine Foster (eds) *Feminism in the Subcontinent and Beyond: Challenging Laws, Changing Laws* (2014) 193; Elsje Bonthuys 'The South African Bill of Rights and the development of family law' (2002) 119 *SALJ* 748.

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

[22] Cathi Albertyn & Beth Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248 at 251.

[23] See Albertyn & Goldblatt op cit note 22; Saras Jagwanth & Christina Murray 'Ten years of transformation: How has gender equality in South Africa fared?' (2002) 14 *CJWL* 255; Elsje Bonthuys 'Institutional openness and resistance to feminist arguments: The example of the South African Constitutional Court' (2008) 20 *CJWL* 1.

[24] 2008 (1) SA 322 (C).

[25] June D Sinclair & Jacqueline Heaton *The Law of Marriage* vol 1 (1996) 314n8.

[26] D J Joubert 'Die gevolge van troubreuk — 'n Kontemporêre beskouing' (1990) 23 *De Jure* 201 at 214.

[27] *Sepheri v Scanlan* supra note 24 at 330I–331A.

Davis J and the authors whom he quoted thus raised two issues around the action for breach of promise. The first is whether such an action should continue to be available in our law at all and, secondly, whether contractual remedies in the form of damages are appropriate for breach of engagement. Because he felt that reform of these rules should be undertaken by a higher court or the legislature, Davis J decided the case on the basis of the common law as it stood, and his remarks about the continued existence of these remedies are therefore obiter dicta.

The court dismissed the plaintiff's claim for sentimental damages. This was based on the fact that the defendant's behaviour in ending the relationship during the process of litigation, although hurtful to the plaintiff, resulted from the breakdown of the relationship and the normal conflict associated with acrimonious litigation.[28] Half of the claim for contractual damages for prospective loss was awarded on the basis that the plaintiff's chances of remarriage were good.[29] The claim was for 50 per cent of the defendant's assets, including the common home and furnishings, vehicles, shares and savings accounts. In effect, therefore, the defendant was awarded 25 per cent of the existing assets.[30] It must be noted that although the court treated this as a claim for prospective loss due to breach of promise, the amounts claimed do not in fact represent a share of assets to be accumulated in a future marriage. In fact, the plaintiff's claim was for a share of the defendant's *existing* assets, which did not fall within the historical understanding of the scope of claims for the breach of promise. The claim for a share of existing assets could be categorised as a claim for specific performance of a contract of universal partnership, rather than being based on breach of promise.

Although the plaintiff had at first lodged an alternative claim on the basis of universal partnership, she eventually abandoned this alternative claim. Nevertheless, the issue had to be decided because the defendant counter-claimed rental for the period during which the plaintiff occupied the common home after the end of the relationship, and for the eviction of the plaintiff from the home. The plaintiff argued that these claims should fail because she was a co-owner of the house as a result of the universal partnership. Foreshadowing the ruling in *Butters v Mncora*, Davis J held that a universal partnership could be established tacitly if this was the more probable inference from the evidence before the court.[31] Despite accepting the evidence that the parties had shared all their assets equally during the relationship and that the plaintiff had on several occasions spoken of sharing all the assets equally between the parties, there was no evidence that he had the necessary animus contrahendi to conclude a universal partnership.[32]

[28] Ibid at 337E–I.
[29] Ibid at 337C–E.
[30] Amounting in total to R654 625.00 and R10 854.00 in Finnish currency.
[31] *Sepheri v Scanlan* supra note 24 at 338E–F.
[32] Ibid at 339A–J.

The court's factual findings can be questioned. Despite holding that the defendant was an unreliable witness and the plaintiff a credible one, the court attached more weight to the defendant's steadfast failure to register the common home in the name of both parties than to the plaintiff's evidence that he had assured her on numerous occasions that they owned all the assets in common.[33] This failure on the part of the defendant also seems to have trumped the parties' sharing of their income in the earlier stages of the relationship and the fact that the plaintiff had given up a lucrative career to live abroad where the plaintiff worked.[34] Because a universal partnership was held not to exist, the court ordered an amount of R250 000 to be paid to the defendant as rent for the common home. This represented 38 per cent of the amount awarded to the plaintiff, leaving her with a total of R404 625 (in addition to some money in Finish currency). Given the costs of legal proceedings, it is probably safe to conclude that the plaintiff walked out of an eight-year cohabitation and engagement relationship without substantial financial assets, despite having given up her career for most of this time.

(b) Van Jaarsveld v Bridges[35]

Unlike the other cases under discussion, the parties in this case did not cohabit and were engaged for only six months. While the defendant was a relatively wealthy farmer, the plaintiff had a lucrative career in entertainment and had previously been married four times. She had also entered into a new relationship within a month of the termination of her engagement to the defendant.[36]

The Supreme Court of Appeal eagerly grasped the opportunity to provide guidelines for the future reform of the common law, with Harms DP holding that

> 'the time has arrived to recognise that the historic approach to engagements is outdated and does not recognise the *mores* of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise. In what follows I intend to give some guidance to courts faced with such claims without reaching any definite conclusion, because this case is not affected by any possible development of the law and can be decided with reference to two factual issues. . . .'[37]

In providing this guidance the Supreme Court of Appeal suggested restricting the availability of the existing common-law remedies in four respects: what constitutes a just cause for ending an engagement; the availability of sentimental damages; contractual claims for prospective loss; and the circumstances under which actual loss can be claimed.

[33] Ibid at 339H–J.

[34] See the discussion of *Butters v Mncora* supra note 7 in part II(d) below. The minority judgment in *Butters* treated the evidence in the same way. See also part III(c) for further discussion of this issue.

[35] 2010 (4) SA 558 (SCA).

[36] Ibid paras 12, 15.

[37] Ibid para 3.

In relation to a just cause for ending an engagement, the court compared the termination of an engagement with divorce, which is available on the basis of irretrievable breakdown, and held that there was no reason for a higher standard to be imposed for breach of promise. Any reason which would affect the chances of a successful future marriage should therefore be regarded as a just cause for ending an engagement, including, as was the case here, a simple unwillingness by one of the parties to enter into the marriage. What is interesting is the use by analogy of the concept of 'irretrievable breakdown of the engagement',[38] which confirms the idea that moral blameworthiness should be irrelevant for the purpose of breach of promise, at least to the extent that it has become irrelevant to the dissolution of a marriage.[39] Whether or not the termination of the engagement was justified is not decisive for the claim for sentimental damages.[40] However, because nothing was said in this regard, the lack of a just reason for the termination of the engagement may remain a factor in the claim for contractual damages. This raises the question whether a claim for actual loss, where, for instance, one party decides not to continue with the marriage a day before the wedding, would be frustrated by the fact that the termination of the engagement was justified.

The second set of suggestions places claims for sentimental damages on an equal footing with other actions for iniuria. The requirements for such claims would be wrongfulness of the conduct, tested objectively against the ground of reasonableness, and animus iniuriandi on the part of the person who breaks off the engagement. The subjectively-wounded feelings of the plaintiff are therefore not sufficient to found the claim.[41] These suggestions would limit the availability of sentimental damages in situations where the plaintiff perceives the conduct as hurtful and humiliating, but where, objectively speaking, they are not regarded as such. Placing breach of promise on the same footing as other instances of iniuria implies that the emotional and reputational damage incurred is no different from iniuria issuing from any other source. Together with the suggested developments in relation to contractual breach, the effect is to reduce[42] the distinctiveness which had hitherto characterised the legal response to intimate personal relationships, by treating them as if the parties had been strangers engaged in impersonal

[38] Ibid para 6.

[39] Although the main ground for divorce no longer rests on morally or sexually reprehensible conduct, guilt continues to play a role in forfeiture of benefits, maintenance and redistribution of assets at divorce, and adultery provides evidence of the breakdown of a marriage. To say that guilt plays no role in divorce is therefore an overstatement.

[40] *Van Jaarsveld v Bridges* supra note 35 paras 4, 19.

[41] Ibid.

[42] It does not place them on a par with dealings between strangers in all respects, as will become clear from the discussions below.

transactions. Arguably, this is problematic. I shall return to this issue later in this article.[43]

The judgment is most sweeping in its suggestion that contractual claims for prospective loss should not be entertained in future. Three sets of arguments are provided for this conclusion, with the first relating to the practical difficulties of proving the duration of the marriage and the property regime to which the marriage would have been subject.[44] These difficulties are, of course, not insurmountable as illustrated by contractual claims for prospective loss in non-familial contexts. Harms JA merely states that

> 'the court cannot work on any assumption, especially not one that the marriage would on the probabilities have been in community of property. And if the agreement was to marry in community, can one party not change her or his mind without commercial consequences?'[45]

However, it could be argued that, in the absence of contradictory evidence, the court should assume that the parties would have married in community of property, since this is the default matrimonial property system. The absence of evidence that the parties would have concluded an antenuptial contract means that the presumption of a marriage in community is not rebutted, not that no assumption can be made at all.

The second argument is that '[a]n agreement to enter into an antenuptial contract is not binding because it must be entered into notarially'.[46] This appears to reflect the well-known contractual rule that where formalities are required for the conclusion of a contract, an agreement which does not comply with these formalities is not valid.[47] However, in the context of family law, the established rule has long been that an unregistered antenuptial contract, while not binding upon third parties, is binding upon the spouses.[48] Moreover, neither the common law nor legislation contains any formal requirements for an agreement to enter into an antenuptial contract, which seems to be that to which the court is referring. The court's reasoning on this point is therefore open to challenge.

Directly contradicting the thrust of the second argument is the final justification: that an engagement should not be treated on a rigidly contractual footing. It is in this context that the court made the radical suggestion[49] that

> '[i]t is difficult to justify the commercialisation of an engagement in view of the fact that a marriage does not give rise to a commercial or rigidly contractual relationship. An engagement is in my view more of an unenforcable *pactum de*

[43] See part III below.
[44] *Van Jaarsveld v Bridges* supra note 35 paras 9, 10.
[45] Ibid para 9.
[46] Ibid para 10.
[47] *Johnston v Leal* 1980 (3) SA 927 (A).
[48] *Ex parte Spinazze* 1985 (3) SA 650 (A).
[49] *Van Jaarsveld v Bridges* supra note 35 paras 7, 8.

> *contrahendo* providing a *spatium deliberandi* — a time to get to know each other better and to decide whether or not to marry finally.'[50]

This contradiction illustrates the tension between treating an engagement as a mere social arrangement, on the one hand, and applying the principles of the law of contract, on the other hand. The court's ambivalence about the legal nature of an engagement becomes even more patent in its suggestion that in order for claims for wasted expenses to succeed,

> 'the losses must have been within the contemplation of the parties. The "innocent" party must be placed in the position in which she or he would have been had the relevant agreement not been concluded; and what the one has received must be set off against what the other has paid or provided.'[51]

This is a summary of the contractual rules for negative interesse damages and the authority used by the court (*Probert v Baker*[52]) is derived from contract law.

The suggestions by the Supreme Court of Appeal about the future legal developments were obiter dicta. Nevertheless, these suggestions for a drastic curtailment of the remedies for breach of promise and the reasoning on which they are based have already been followed almost verbatim by the high court in *Cloete v Maritz*,[53] holding that a claim for prospective loss no longer exists. The judgment in *Van Jaarsveld v Bridges* is also noteworthy for its contradictory stance on the legal nature of an engagement. On the one hand, there are strong indications that engagements should not be treated like commercial contracts, while, on the other hand, the judgment is explicitly framed in terms of contractual concepts and principles. Both positions are used simultaneously and interchangeably to justify the limitation of existing rights upon breach of promise. The case therefore raises important issues about the nature both of engagements and marriage to which I shall return below.[54]

(c) Ponelat v Schrepfer[55]

Two years later an appeal was heard in a matter involving an elderly couple who were engaged and had cohabited for sixteen years. The female plaintiff claimed a portion of the defendant's assets on the basis that a universal partnership existed between them. Alternatively, she claimed maintenance.

[50] Pacta de contrahenda in the form of options and pre-emptions are, in fact, enforced in contract law. Agreements to negotiate may be enforceable, but the law is not yet settled. See *Everfresh Market Virginia v Shoprite Checkers* 2012 (1) SA 256 (CC); *Indwe Aviation v Petroleum Oil and Gas Corporation of South Africa* 2012 (6) SA 6 (WCC). See also D Bhana 'The contract of pre-emption as an agreement to agree' (2008) 71 *THRHR* 568.

[51] *Van Jaarsveld v Bridges* supra note 35 para 11.

[52] 1983 (3) SA 229 (D).

[53] 2013 (5) SA 488 (WCC).

[54] In part III(b).

[55] 2012 (1) SA 206 (SCA).

Her second claim was for iniuria due to breach of promise.[56] The court a quo had dismissed the claims for maintenance and iniuria, but had found that a universal partnership existed between the parties. The appeal related to the latter finding only.

The facts showed that the plaintiff had contributed her income, the proceeds of the sale of her house, and substantial administrative labour to various business ventures owned by the defendant, in addition to performing housekeeping tasks. Applying the requirements for establishing a universal partnership as set out by Pothier,[57] the Supreme Court of Appeal held that the plaintiff had succeeded in establishing the existence of a universal partnership, and awarded her a 35 per cent share of the partnership assets. It held that a universal partnership can be concluded tacitly and that it can co-exist with a marriage or an engagement.[58] The test for the existence of such a tacit universal partnership was drawn from *Mühlmann v Mühlmann*[59] and was formulated by the court as follows:

> '"whether it was more probable than not that a tacit agreement had been reached". It was also stated [in *Mühlmann*] that a court must be careful to ensure that there is an *animus contrahendi* and that the conduct from which a contract is sought to be inferred is *not simply that which reflects what is ordinarily to be expected of a wife in a given situation*.'[60]

Based on the conduct of the parties and the nature and duration of the plaintiff's contributions the court found that such a partnership had indeed been established,[61] adding that 'plaintiff's conduct was not simply what is ordinarily to be expected from a cohabitee'.[62] I shall deal with the issue of proving a universal partnership below.[63]

(d) Butters v Mncora[64]

The final case in the series involved a twenty-year cohabitation relationship between parties who had also been engaged for half of that time. Unlike the *Ponelat* case, the female plaintiff could not establish that she had made a significant financial contribution, but she had maintained the home and cared for the defendant, his child from another relationship and the two young children who had been born to the parties.

[56] Ibid paras 2–15.

[57] Ibid para 19: '(1) that each of the partners bring something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit (Pothier *A Treatise on the Contract of Partnership* (Tudor's translation) 1.3.8).'

[58] Ibid para 22.

[59] 1984 (3) SA 102 (A) at 124C–D.

[60] *Van Jaarsveld v Bridges* supra note 35 para 20 (emphasis added).

[61] Ibid para 23.

[62] Ibid.

[63] See part III(c).

[64] Supra note 7.

The most noteworthy aspect of the case is the extension of the universal partnership from commercial ventures to include the home-life of the parties. Relying on the authority of Felicius-Boxelius the court held that, not only could a universal partnership result from a tacit agreement,[65] but it could encompass benefits which were not commercial in nature.[66] For this reason, non-commercial contributions, such as childcare and homemaking, should be considered when evaluating the parties' entitlements to partnership assets.[67] The recognition of the kinds of relationship contributions which women most often make was based on the 'greater awareness in modern society of the value of the contribution of those who are prepared to sacrifice the satisfaction of pursuing their own careers, in the best interests of their families'.[68]

The minority judgment of Heher and Cachalia JJA professed to agree with the majority exposition of the law, but held that the plaintiff had not discharged the onus to show that a tacit universal partnership had been concluded. They cited the plaintiff's failure to participate in the defendant's business affairs and the oft-quoted dictum from *Mühlmann v Mühlmann* to assert that

> '[w]hen parties cohabit in a state of amity over a long period, as here, and a family results, it is likely that certain things will happen: the principal breadwinner will contribute substantially, either regularly or on an ad hoc basis, to the needs of the family by providing accommodation, food, clothing, education, transport and healthcare. To these will usually be added vacations and presents of various kinds. The other party, usually the woman, will stay at home or engage in lesser employment and oversee the needs of the family and the upbringing of the children. *These are the normal incidents of cohabitation, just as they are of marriage.* That they happened in the case under consideration contributes nothing to the present enquiry because they are at best equivocal, absent some evidential feature that links them to the special intention that attaches to a universal partnership.'[69]

Apart from substantially deviating from the majority view that non-commercial contributions should be taken into account, this assertion amounts to the imposition of an additional, sexist requirement upon female partners in universal partnerships. I will return to the gendered implications of this view below.

In his majority judgment Brand JA declined to use the 'normal incidents' argument from *Mühlmann*, distinguishing that case on the basis that it dealt with marriage, where the duties of wives are generally agreed upon and cannot be directly imposed upon cohabitation relationships.[70] The majority also held that the universal partnership, like any other contract, is subject to

[65] Ibid para 15.
[66] Ibid paras 18, 20.
[67] Ibid paras 19, 22.
[68] Ibid para 22.
[69] Ibid para 37 (emphasis supplied).
[70] Ibid para 29.

good faith and that a mental reservation by the defendant to the effect that he would not share any material assets at the end of the relationship would therefore not benefit him.[71] The minority, by contrast, held that the defendant 'said and did nothing to treat the respondent as other than an ad hoc recipient of the fruits of his labours according to his own generosity (or tight-fistedness) at any given time'.[72]

III AN EVALUATION OF THE JURISPRUDENCE ON BREACH OF PROMISE AND UNIVERSAL PARTNERSHIPS

(a) Overview

An overview of the legal progression in the four cases shows how the court in *Sepheri* questioned the continued existence of the common-law action for prospective loss for breach of promise, while its final award amounted to a share of *existing* partnership assets rather than damages for loss of *future* (prospective) benefits. This was followed by the narrowing of the action for sentimental damages and extension of the concept of a just cause for ending an engagement in *Van Jaarsveld*. This case also placed claims for actual loss on a more contractual footing, while at the same time strongly suggesting that claims for future loss should no longer be entertained. The most startling suggestion in this case was that engagements should no longer be treated as legally enforceable agreements, but as unenforceable pacta de contrahendo. The first two cases therefore represent the application of general contractual and delictual principles to limit the sui generis common-law remedies for breach of promise, while also proposing that these remedies should be further curtailed and possibly entirely discarded. However, they simultaneously hint at the possibility of using universal partnerships to share property amassed by one party to an engagement or cohabitation relationship.

Ponelat represents an expansion of the remedies available to certain groups of engaged people and cohabitees by allowing for a tacit universal partnership. The group of potential beneficiaries was confirmed and further extended in the majority judgment in *Butters* by the finding that a universal partnership could extend beyond commercial ventures, and that homemaking and childcare should be regarded as contributions to a universal partnership.

Although I do not suggest that the developments in the four cases under discussion represent a conscious strategy to this effect, read together, they limit existing remedies for breach of promise and place the remaining remedies on a more rigidly contractual footing. This reduces the number of people able to claim on the basis of breach of promise. Simultaneously, however, the courts have created an opportunity for cohabitants in a universal partnership to acquire some benefit from (particularly a woman's) family labour. This remedy is available to all cohabitants, including those

[71] Ibid para 27.
[72] Ibid para 44.

who are engaged. We see, therefore, both a contraction and an expansion of potential remedies, and a shift in the basis on which remedies are awarded from the 'status' of being engaged, to contract, both in the guise of a universal partnership agreement and the more strict application of contractual rules to engagements. Various obiter dicta, but especially the obiter dictum from *Van Jaarsveld*, question the traditional enforceability of remedies for breach of promise,[73] presaging a more complete shift from status to contract in the future. In the parts of this article below I analyse various aspects of these judgments.

(b) The legal nature of engagements and the remedies for breach of promise

Viewed together, this line of cases raises two questions about engagements. The first is whether engagements are normal contracts with contractual remedies, or whether they retain something of the sui generis nature, as was reflected in the common-law remedies.

In its assessment of the claim for actual loss, the court in *Van Jaarsveld* gave two strong indications that engagements should be treated in accordance with the rules of contract. The first is the use of the negative interesse principle to calculate damages where the contract has been cancelled, and that the plaintiff is to be placed in a hypothetical position — namely the position she would have occupied, had the contract not been concluded. These rules are adopted from a claim for wasted expenses in the contracts case of *Probert v Baker*.[74] The second indication is the use of the contemplation principle,[75] which can be used in the law of contract to judge the availability of special damages.[76] Using the contemplation principle in this situation is questionable, since wasted expenses relating to wedding preparations and so forth should probably be categorised as general damages for breach of promise — that is, the kinds of losses which are naturally and generally expected to flow from a breach of promise, to which neither the contempla-

[73] See the text at note 50.

[74] Supra note 52. Although the courts in *Mainline Carriers v Jaad Investments* 1998 (2) SA 486 (C) and *Emadyl Industries CC t/a Raydon Industries v Formex Engineering* 2012 (4) SA 29 (ECP) held that a plaintiff in a contractual suit could generally claim negative interesse, as long as this did not exceed her positive interesse, other courts have held steadfastly that a contractual claim should be based on positive, rather than negative interesse: see *Hamer v Wall* 1993 (1) SA 235 (T). Claims for negative interesse are usually allowed where a misrepresentation led to the conclusion of a contract. Generally on this issue, see Dale Hutchison 'Back to basics: Reliance damages for breach of contract revisited' (2004) 121 *SALJ* 51.

[75] That is, that damages can be claimed if, at the time of the conclusion of the contract, the parties contemplated that breach of the contract would result in this kind of loss.

[76] Although the contemplation principle is favoured in some contractual cases, it seems that the convention principle remains applicable in South African law. See generally *Lavery & Co Ltd v Jungheinrich* 1931 AD 156; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA); *Transnet Ltd t/a National Ports Authority v Owner of* MV Snow Crystal 2008 (4) SA 111 (SCA).

tion nor the convention principle should apply. Nevertheless, the court's use of contractual concepts in relation to wasted expenses suggests that an engagement should be treated like any other contract, which is most often concluded at arms' length between strangers in a commercial setting.

A third set of dicta which contradict the contractual approach in relation to wasted expenses, and which is also internally contradictory, is to be found in the courts' reasoning that claims for prospective (future) loss should no longer be available. On the one hand, the court in *Van Jaarsveld* uses the argument that the agreement to conclude an antenuptial contract is not enforceable because this contract must be notarially concluded — a formalities argument from the law of contract. On the other hand, it suggests that breach of promise should not be treated on a 'rigidly contractual' basis because of the difficulties associated with proving prospective loss. Prospective loss is claimable in contract despite the associated evidentiary problems.[77] In fact, the normal measure for assessing contractual damages (positive interesse) aims to place the plaintiff in the position she would have been in had the contract been properly fulfilled.[78] This would include future loss, subject to the plaintiff's duty to mitigate her loss.

My analysis shows that, at least in *Van Jaarsveld*, the Supreme Court of Appeal vacillated between treating an engagement as a normal contract and failing correctly to apply the normal rules of contract. Most importantly, both the application of contractual rules and the refusal to apply them were used in ways that limit the claims of plaintiffs in breach of promise cases, who are, for the most part, women. On the one hand, the strict application of contractual rules limits claims for wasted expenses. On the other hand, a refusal to apply normal contractual rules and remedies also limits claims for prospective loss.

The second, more fundamental question raised by these cases is whether engagements should be regarded as mere social arrangements without legal consequences, as Harms DP suggested in *Van Jaarsveld v Bridges*. The court in both the subsequent cases of *Ponelat* and *Butters* awarded relief on the basis of universal partnerships rather than breach of promise. What are the benefits and disadvantages of replacing claims for breach of promise with claims based on universal partnerships?

Most obviously, universal partnerships are not limited to people who were engaged, and the claimants could therefore be expanded to unmarried cohabitants and possibly even to people married out of community of property.[79] Moreover, a universal partnership could conceivably exist even where one of the parties was married to another person. According to the common law no action for breach of promise would be available in these

[77] *SDR Investment Holdings Co (Pty) Ltd v Nedcor Bank Ltd* 2007 (4) SA 190 (C).
[78] *Hamer v Wall* supra note 74.
[79] *Mühlmann v Mühlmann* supra note 59; *Ponelat v Schrepfer* supra note 55 para 27.

circumstances.[80] However, in *Zulu v Zulu*[81] a claim for a universal partnership was brought against the deceased estate of a man who was involved in a bigamous marriage. The existing marriage was in community of property and the wife in the second, invalid marriage argued that a universal partnership existed between her and the deceased. Hugo J held that where the existing marriage was in community of property, no universal partnership could exist with the second spouse because that contract would be unlawful and because the deceased could not have had the intention to conclude a universal partnership with the second wife involving assets which belonged to the joint estate of the legal marriage. The courts' reasoning could be said to create the possibility of a universal partnership co-existing with a lawful marriage which is *out* of community of property. Then again, it may be argued that such a universal partnership would be contra bonos mores and thus illegal, being similar to an engagement concluded with a spouse in an existing marriage.

Another difference between universal partnerships and breach of promise is that the former gives a claim to the assets already accumulated in the relationship, rather than a share of potential future benefits. This means that a claim based on a universal partnership will not be reduced by speculating about the probable duration of the marriage or the plaintiff's chances of remarriage, as would a claim for prospective loss under breach of promise. The quantum of a claim based on a universal partnership would therefore be easier to establish. There is, however, a potential problem in the fact that the cases based on universal partnership have awarded relatively low percentages of the partnership assets to the plaintiffs. I will discuss this below.[82]

Additionally, the rules of universal partnership do not allow for compensation for wasted expenses in cases where engagements are terminated shortly before the intended marriages. It seems that the sui generis action for breach of promise remains necessary at least to claim wasted wedding expenses and that for this reason it should not be entirely discarded. Similarly, there are circumstances in which the termination of the engagement would be so insulting that a claim for iniuria should continue to be recognised.

(c) Universal partnerships

The most significant aspect of the Supreme Court of Appeal's jurisprudence on breach of promise and universal partnerships is that it signals a diminished role for the *status* of being engaged in favour of regulating relationships on the basis of a *contract* of universal partnership.[83] Like marriage, engagements

[80] *Claassen v Van der Watt* 1969 (3) SA 68 (T); *Benefeld v West* 2011 (2) SA 379 (GSJ). Where the plaintiff did not know that the defendant was married, she may, according to *Snyman v Snyman* 1984 (4) SA 262 (W), still claim under the actio iniuriarum.

[81] 2008 (4) SA 12 (D).

[82] Part III(c).

[83] For further discussion, see Stephen Cretney 'The family and the law — Status or contract?' (2003) 15 *Child & Family LQ* 403, and Elsje Bonthuys 'Family contracts' (2004) 121 *SALJ* 879 in the South African context.

have always contained elements of contract, because of the requirement that they be voluntarily entered into by the parties. However, like marriage, engagements were regarded as sui generis in giving rise to claims for iniuria,[84] claims for the return of gifts, and in not being subject to claims for specific performance.[85] Basing property remedies on universal partnerships represents a more purely contractual paradigm than the sui generis remedies hitherto available for breach of promise. However, the rules of universal partnership, as articulated by the Supreme Court of Appeal, remain infused with, and subordinate to, the familial status associated with marriage. This is so in several respects.

First and most obviously, the *Butters* judgment has extended the nature of partnership property and partnership contributions to create a hybrid between commercial and domestic partnership. This hybridisation is crucial to addressing the financial dependencies which arise as a result of family relationships, and is therefore to be welcomed unequivocally.

More problematic, however, are issues of proof which reflect the same sexist assumptions and stereotypes which pervade the law of marriage, and which contradict the idea that engagements are henceforth to be regulated purely by the law of contract. I highlight the following four issues in the cases under discussion: the question whether the universal partnerships were orally or tacitly concluded; the evidentiary weight of the failure of the men to transfer property to their female partners; the absence of reasonable reliance in the cases; and the characterisation of female cohabitants' household and childcare labour as simply 'what can be expected' from them.

Pothier's requirements for universal partnerships do not include any formalities and they must, therefore, be capable of being entered into orally. In both *Sepheri* and *Ponelat* the plaintiffs gave evidence of verbal statements to the effect that the partners would share equally in the accumulated assets. Nevertheless, and despite apparently accepting the plaintiffs' evidence to this effect, both courts insisted on treating the partnership agreement as tacit, rather than one which was orally concluded. This means that, instead of the plaintiff's evidence of an oral agreement being sufficient to establish the existence of the partnership, the courts could consider a range of additional factors to establish whether the parties intended to conclude a partnership contract.[86]

Treating these contracts as tacit in the face of evidence of oral agreements places additional evidentiary burdens on the female plaintiffs, while providing further opportunities for the defendants to cast doubt on the existence of

[84] Sentimental damages are not available for breach of contract: see *Administrator, Natal v Edouard* 1990 (3) SA 581 (A).

[85] In Roman-Dutch law the wronged party could claim an order for specific performance of the engagement contract: see F P van den Heever *Breach of Promise and Seduction in South African Law* (1954) 5, 11; R W Lee *An Introduction to Roman-Dutch Law* 5 ed (1953) 51.

[86] *Reigate v Union Manufacturing Co* [1918] 1 KB 592 at 605; *West End Diamonds Ltd v Johannesburg Stock Exchange* 1946 AD 910; *Wilkins v Voges* 1994 (3) SA 130 (A).

the contract. One of the factors which were held to indicate that there was no universal partnership in *Sepheri* and the minority judgment in *Butters* was the defendants' failure to act in accordance with their oral statements that all property was held in common. This failure was taken to indicate a lack of animus contrahendi on the part of the defendants and thus to show that the parties had no consensus on the universal partnership. The majority in *Butters* disagreed with this approach, holding that the defendant's unexpressed mental reservation should not protect him from a claim that a universal partnership existed.[87]

One of the ways to resolve the issue in the law of contract would be to use the doctrines of reasonable reliance and mistake to establish whether the parties had indeed entered into a contract of universal partnership. The plaintiff's argument would be that she had relied upon the appearance of consensus between the parties that there was a universal partnership and that her reliance was reasonable. The appearance of consensus would have been created both by the verbal assurances that the partners would share everything equally and by the actual sharing during the relationship. The defendant, in contrast, could refute the existence of a universal partnership if he had been under a mistaken impression caused by the plaintiff or of which the plaintiff was aware or should reasonably have been aware.[88] In all of these cases, this argument would not have availed the defendants, whose mistakes were in fact the result of either an unexpressed mental reservation[89] or a change of heart when the relationship started to falter. The defendants' mistakes would therefore not have been justus and the contract of universal partnership would have been allowed to stand.

Instead of using the contractual doctrine of reasonable reliance to support the plaintiffs' assertion of a universal partnership, the court in *Ponelat* and the minority in *Butters* required that the plaintiffs show that their contributions were over and above what could have been expected from a wife or cohabitant in the plaintiff's situation. This directly contradicts and undermines the idea of valuing the kinds of family contributions which women generally make, as expressed by the majority in *Butters*. It draws upon and reinforces the sexist devaluation of women's caretaking work within the family, in particular the assumptions that it is not 'real' work, and that it should not be remunerated or financially compensated,[90] which is at the root of women's poverty after divorce and separation. Moreover, this test is

[87] Supra note 7 para 27.

[88] *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA).

[89] This was, in effect, decided by the majority in *Butters v Mncora* supra note 7 para 27 where it held that '[a]n unexpressed mental reservation on the part of the defendant, that he was willing to share in the benefits derived from the plaintiff's contribution, but not in the surplus fruits of his own' would not assist the defendant in escaping the contract of universal partnership.

[90] Elsje Bonthuys 'Labours of love: Child custody and the division of matrimonial property at divorce' (2001) 64 *THRHR* 195.

derived from the law of marriage,[91] and is therefore at odds with the law of contract.

In addition to the problems of proving the existence of a universal partnership, another serious problem with the jurisprudence on universal partnerships is the percentages of the partnership assets awarded to the female plaintiffs. In *Butters* the plaintiff received 30 per cent, and in *Ponelat* 35 per cent of the partnership assets. The court in *Sepheri* awarded 25 per cent of the partnership assets to the plaintiff, albeit under the guise of loss of future financial benefits. These low percentages indicate that even though value has to be placed on the non-financial contributions which women typically make, their contributions are still undervalued in comparison with the purely financial contributions typically made by their male partners. Moreover, the female plaintiffs in these cases were, in one case, close to retirement, and in the other case, had given up most of her economically productive years to take care of children. The low percentage awarded in *Sepheri* illustrates that younger women or childless women may be regarded with less sympathy despite having made similar contributions to their family lives, and may receive little or no part of the accumulated assets.

The claim based on a universal partnership provides no rights to maintenance after the dissolution of the relationship. The question must then be asked, given the low percentages which the courts have awarded thus far, and the lack of maintenance rights, whether claims for a portion of the assets already amassed based on universal partnerships are preferable to claims for actual and prospective loss based on breach of promise. For some engaged cohabitants, the latter claims may have been more advantageous, especially where it could be proven that the marriage would have been in community of property.

(d) Future developments of universal partnerships within and without marriage

It could be premature to speculate about future developments of the law of universal partnerships so soon after the decision in *Butters*. However, it might be useful to point to issues and questions which may need to be resolved in future.

Given that the court in *Ponelat* agreed that universal partnerships could be formed between people who are married to one another,[92] and given that it was used in a marriage out of community of property in *Mühlmann v Mühlmann* to award a share of the husband's business to his wife, universal partnerships could potentially provide a mechanism to overcome the iniquitous consequences of complete separation of property in circumstances where the Divorce Act 70 of 1979 does not allow for a redistribution order.[93] Although this has not been done after the *Mühlmann* case, the Supreme

[91] Derived from *Mühlmann v Mühlmann* supra note 59 which dealt with a marriage out of community of property.

[92] Supra note 55 para 22.

[93] Section 7(3) of the Divorce Act.

Court of Appeal's willingness to use universal partnerships in cohabitation relationships may signal a revival of this mechanism, and the court's willingness to take homemaking and caring work into account may extend the applicability of this case to marriages where the wife's contribution was not primarily financial. This would go some way towards the general redistributive discretion in relation to marital property long advocated by academic commentators.[94] However, in *JW v CW* [95] the court held that a tacit universal partnership could not exist where it contradicts the terms of an antenuptial contract that the marriage is out of community of property. This decision reflects a fear that universal partnerships will be used to circumvent the chosen matrimonial property regime, which may limit the use of the universal partnership as a redistributive mechanism in marriages out of community of property.

A related question is whether the universal partnership can be used where one of the parties is married to another person. This would not only provide a property claim where an action for breach of promise has been held not to exist,[96] but could also bypass the decision in *Zulu v Zulu*,[97] which denied the wife in a bigamous marriage an action where she was unaware of the prior existence of a valid marriage.

The jurisprudence on same-sex cohabitants established that partners can have reciprocal rights and duties of support if they 'undertake' them.[98] In *Paixao v Road Accident Fund*[99] the Supreme Court of Appeal extended the reasoning regarding the undertaking of a duty of support to opposite-sex cohabitants in the context of dependents' actions for loss of support. Logically, this argument should also extend to a general right to maintenance for parties in opposite-sex cohabitation relationships who can prove that they have agreed to support one another, at least for the duration of the relationship and, depending on the terms of the agreement, possibly even after the termination of the relationship. Whether the courts would be prepared to go this far remains to be seen.

IV CONCLUSIONS: STATUS OR CONTRACT?

The changes in relation to opposite-sex cohabitation and engagements discussed in this article must be seen in the context of two other sets of developments in family law. The first is the extension of rights to same-sex cohabitants by the courts before the enactment of the Civil Union Act 17 of

[94] Brigitte Clark & Beth Goldblatt 'Gender and family law' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, Law and Justice* (2007) 195, 224; Jacqueline Heaton 'Striving for substantive gender equality in family law: Selected issues' (2005) 21 *SAJHR* 547 at 556, 562.

[95] 2012 (2) SA 529 (NCK).

[96] *Claassen v Van der Watt* supra note 80.

[97] Supra note 81.

[98] *Satchwell v President of the RSA* 2002 (6) SA 1 (CC) paras 23, 24; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) para 14.

[99] Supra note 3. See also *Verheem v Road Accident Fund* 2012 (2) SA 409 (GNP).

2006. As a result, it has been argued that opposite-sex cohabitants are now in a less favourable position and that similar rights should be afforded to them. The second is the Law Reform Commission's Discussion Paper on the rights of cohabitants which contains suggestions and draft legislation for affording rights to a range of cohabitation relationships, including registered and de facto relationships.[100] After the adoption of the Civil Union Act, these proposals seem to have been placed on the backburner, perpetuating both the legal gap with regard to the property rights of opposite-sex cohabitants and the unequal treatment of same-sex and opposite-sex cohabitants. The jurisprudence of the Supreme Court of Appeal on universal partnerships represents a development of the common law which attempts to address these issues.

Another thread which can be detected in the cases reforming the law applying to engagements and cohabitation is that the existing common-law rules were outdated and did not accord with changed social practices, especially the position of women in contemporary society. In *Van Jaarsveld v Bridges* the court held that the 'historic approach to engagements is outdated and does not recognise the mores of our time',[101] while Davis J in *Sepheri v Scanlan* quoted with approval the following statement of Joubert (translated here in English):

> 'In modern times women are not dependant on marriage for economic survival and the satisfaction of their needs. There is ample opportunity for them to take part in economic life and for self-realisation. There are also many opportunities to find alternative life partners.'[102]

This is a claim which seems to have been equally popular throughout the ages, as evidenced by the dictum in the 1967 seduction case of *Lourens v Van Biljon*[103] that women at that time valued careers more than marriage. In the 1950s Lord Denning was reported to have said that '[the wife] is now indeed the spoilt darling of the law, and [the husband] the patient pack-horse'.[104] At one level these claims embody the truism that social circumstances have

[100] South African Law Reform Commission Discussion Paper 104 (Project 118) *Domestic Partnerships* (2003). In March 2006 a Report on Domestic Partnerships was published, which differed somewhat from the Discussion Paper. The first version of the Civil Union Bill 26 of 2006 corresponded to the draft legislation suggested in the Discussion Paper, while the final version of the Bill, which corresponded to the Civil Union Act, was Bill 26B of 2006. The final version of the Bill and the Act omitted the provisions relating to opposite-sex cohabitants.

[101] Supra note 35 para 3.

[102] *Sepheri v Scanlan* supra note 24 at 330H quoting Joubert op cit note 26 at 214. The original reads: 'Vrouens is in die moderne tyd nie op 'n huwelik aangewese vir hulle bestaanbeveiliging en behoeftesbevrediging nie. Daar is volop geleentheid vir deelname aan die ekonomiese lewe en vir selfverwesenliking. Daar is ook volop geleentheid vir die vind van 'n plaasvervanger huweliksmaat.'

[103] 1967 (1) SA 703 (T) at 705F–H.

[104] Quoted from *The Times*, 13 May 1950 by Julia Brophy & Carol Smart 'From disregard to disrepute: The position of women in family law' (1981) 9 *Feminist Review* 3 at 6.

changed from those prevailing at the time when Roman-Dutch law was received into South Africa. On another, more fundamental, level they also assert that women have become socially and economically equal to men, and that this requires legal rules which treat them on a basis of formal equality with men.

Despite the abolition of such patently patriarchal concepts as the husband's marital power, social, economic and legal gender equality remains an aspiration rather than a social reality, especially in the context of intimate relationships. The fallacious nature of claims of legal and social equality is of course amply illustrated by the requirement in some of the judgments that, for a woman to show that there was a universal partnership, she has to have contributed more than that which could be normally expected of a wife. The very same courts which claim to be treating women and men equally impose additional burdens upon female partners by requiring that they should make both financial and uncompensated family labour contributions.

This phenomenon is also illustrated by the facts of the cases. In two of the four cases the courts accepted the plaintiffs' evidence that their male partners had requested them to give up paid employment to either work in the men's businesses or to take care of their children. In another case the female partner gave up her employment to follow her fiancée to the many foreign countries in which he worked. These women did not give up their employment simply because they were foolish. They did so in compliance with powerful social and even religious norms which require women to serve their partners and their children rather than pursue lucrative careers for their own financial benefit. These norms apply in cohabitation relationships as they do in marriages.[105] In fact, the courts' requirement that women do more than what is to be expected from wives is an articulation of this very expectation. Moreover, social science research and statistical data confirm that women are less likely to be employed than men and when they are employed, they generally occupy less senior positions and earn less.[106] In South Africa these inequalities are also racialised so that although white women on average earn more than black men, all women earn less than men in the same racial categories, with African women being worst off. Within families, power and money are unequally distributed with men most often retaining control over resources, and male authority is far-too-often backed up by domestic violence.[107]

Given this social context of gendered family roles and unequal economic power within families, what then would be a transformatory legal response to

[105] Lind op cit note 4 at 112.

[106] See the sources cited in note 107 below.

[107] Generally and for further authority, see Catherine Albertyn & Elsje Bonthuys 'Introduction' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, Law and Justice* (2007) 7–8; Clark & Goldblatt op cit note 94 at 198–200; Elsje Bonthuys 'Gender and work' in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, Law and Justice* (2007) 244–9; Law Reform Commission Discussion Paper 104 op cit note 100 paras 2.2.3–22.

the distribution of property at the end of cohabitation and engagement relationships?

The expanded notion of a universal partnership and, especially, the recognition of the value of the caring work traditionally undertaken by women as set out in the majority judgment in *Butters* go a long way towards valuing these relationships and protecting parties who have become financially vulnerable as a result of undertaking caring duties. It represents a welcome deviation from the much-criticised logic of the majority judgment in *Volks*, which insisted that heterosexual cohabitants 'choose' to forego legal rights by not entering into marriage. However, the universal partnership does found a contractual remedy, based fundamentally on agreement between the cohabitants. As such it is conceptually related to the concept of choice which was held, in *Volks*, to limit the availability of remedies. On the one hand, this is a positive development inasmuch as it indicates that even where people 'choose' not to get married, that does not mean that they 'choose' to be without any legal protection. It thus extends the range of choices which, according to *Volks*, cohabitants have. On the other hand, the individualistic, contractual framework of contract on which the universal partnership is based, falls short of recognising that people's relationship choices are profoundly influenced by patriarchal social expectations, and that legal remedies based on individual choices may not assist many of those women most in need of legal rights.

A purely contractual basis for property distribution represents a change in the law, but it does not actually challenge the social paradigms which expect women to provide unpaid family labour. Instead, it merely obscures gender inequality behind a smokescreen of formally equal partners concluding agreements at arms' length. Moreover, I have shown that, where contractual rules would benefit women, courts hesitate to apply the rules of contract to these relationships as they would in a purely commercial setting.

A 'relational' understanding of contracts may enable contract law to better respond to the needs of female cohabitants.[108] Nevertheless, basing property rights for cohabitants on contract means that remedies will have to be sought on a case-by-case basis and thus would be available only to those women who can afford to litigate against their former partners. Moreover, the amounts awarded tend to be relatively low and depend on the ability of the trial court to understand the gendered dynamics of family life and to abandon sexist stereotypes of what can be expected from a typical wife or cohabitant. The adoption of a statutory framework which defines cohabitation relationships and sets out clear rights would benefit a far larger group of women,

[108] See, for instance, Robert Leckey 'Relational contract and other models of marriage' (2002) 40 *Osgoode Hall LJ* 1; L Hawthorne 'Legal tradition and the transformation of orthodox contract theory: The movement from formalism to realism' (2006) 12 *Fundamina* 71; L Hawthorne 'The first traces of relational contract theory: The implicit dimension of co-operation' (2007) 19 *SA Merc LJ* 234. This issue is, however, beyond the scope of this article.

most particularly those who cannot afford to litigate. It would bring legal certainty to cohabitants in general. Finally, it would demonstrate a wider social understanding of the gendered dynamics and dependencies which flow from cohabitation relationships, and would place a high value on the caring work which women undertake.

In the absence of legislation, however, the courts' treatment of unmarried same-sex cohabitation shows that undertaking financial and other caring responsibilities and sharing financial benefits is evidence of an agreement that financial benefits should be equally shared at the end of the relationship.[109]

[109] See *Paixao v RAF* supra note 3, *Verheem v RAF* supra note 99 and the accompanying discussion.