

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

25/11/2010
CASE NUMBER: 19026/08

In the matter between:

BELINDA VERHEEM

Plaintiff

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED. ✓	
25/11/10 DATE	<i>[Signature]</i> SIGNATURE

ROAD ACCIDENT FUND

Defendant

JUDGMENT

GOODEY AJ:

[1] INTRODUCTION:

(1.1) This is a RAF matter.

- (1.2) The essence of the matter is that the Plaintiff claims compensation from the Defendant for loss of support arising from the **death of her partner** whose death was caused by the negligence of an insured driver. [The Defendant conceded that there was negligence on the part of the insured driver].
- (1.3) The parties (by agreement) requested an order in terms of Rule 33(4) in terms whereof the only issue to be dealt with is the *locus standi* of the Plaintiff to claim an amount **for loss of support** from the Defendant. I made such an order.
- (1.4) The Plaintiffs particulars of claim read (par 7 thereof) as follows:

"7.1 At all relevant times and at the time of his death the deceased:

- (a) and the Plaintiff were partners in a lengthy permanent monogamous union worthy of protection by the law, as though they were husband and wife, living together as a family with their said children;*

- (b) *and the Plaintiff undertook reciprocal duties of support in respect of each other, which are worthy of protection by way of an action for loss of support;*
- (c) *supported and maintain the Plaintiff and, but for his untimely death, would have continued to do so for the remainder of her life, alternatively their joint life expectancy;*
- (d) *was under a legally enforceable duty of support towards the Plaintiff, whom the deceased had undertaken to support with the intention of being legally bound by such undertaking;*
- (e) *was a partner with the Plaintiff in a permanent life partnership;*
- (f) *was not unwilling but amenable to conclude a formal marital relationship with the Plaintiff.*

7.2 *In the light of the foregoing the culpable or negligent killing of the deceased constituted a wrongful act as against the Plaintiff.*

[2] **BACKGROUND / RELEVANT FACTS:**

(2.1) Only the Plaintiff testified;

(2.2) At the end of the day, the following were undisputed facts:

2.2.1 On 1 January 1990 the Plaintiff gave birth to a daughter Janice from a previous relationship which has ended prior to the birth of the said baby girl;

2.2.2 Shortly thereafter (early 1990) the Plaintiff met the deceased;

2.2.3 In the second half of 1990 the parties started living together as man and wife and did so until the deceased passed away on 23 July 2003;

2.2.4 In ±June 1992 their first daughter was born and in ±1994 the second;

- 2.2.5 The deceased brought up Janice (her daughter) together with his own daughters as his own and never differentiated between them;
- 2.2.6 She never worked and/or was never employed, but the arrangement/agreement was (with the deceased) that they would get married, she would look after the household and the three daughters and he would be (and was) the sole breadwinner;
- 2.2.7 The deceased was a boilermaker and later turned truck driver so as to earn a little bit more money. He was on long trips due to his employment as a truck driver, and she, according to the agreement between them, looked after the household and the upbringing of the three daughters. Because of this agreement she had with the deceased, she never ever tried to seek employment as her part of the agreement was looking after the household and the upbringing of the children;

- 2.2.8 She and her father's relationship was initially (when she first fell pregnant) not good and he didn't want to pay for a wedding;
- 2.2.9 She and the deceased didn't have enough money for a decent wedding and as the years have gone by, there were ever increasing expenses, especially the costs as to the upbringing of the three daughters who were more or less the same age;
- 2.2.10 Everybody considered them (Plaintiff and deceased) as man and wife and so did her and his relatives and in fact everybody else;
- 2.2.11 She had a contract with the deceased in the sense that she would look after the household and he would be (and was) the sole breadwinner and she was completely dependent upon him for support;
- 2.2.12 She persists that she was (for more than 13 years) totally dependent upon him as sole breadwinner as aforesaid.

(2.3) The Plaintiff alleges that she is a **“third party”** who should be placed in the same position as a widow who was legally married to the deceased. (She contends that she is entitled to be compensated for a loss of support). Most importantly, she contends that it is clear from the undisputed facts that she had an agreement with the deceased that he would (and has) supported her (and the children) and that this right is legally enforceable and worthy of protection. Further confirmation is also to be found in the fact that he brought up her daughter (from a previous relationship) as his own since birth and kept on doing so which is clear confirmation (so the argument goes) of the fact that they were a close knit and stable family.

(2.4) The Defendant on the other hand, contends that the Plaintiff is not in law, entitled to claim for loss of support since the Plaintiff and the **deceased were not legally married to each other.**

[3] **THE LAW:**

(3.1) Road Accident Fund Act 56 of 1996

3.1.1 Section 17 reads as follows:

"Liability of Fund and agents

- (a) *subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;*
- (b) *subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established the Fund shall, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner*

of the motor vehicle or of his or her employee in the performance of the employee's duties as employee."

3.1.2 Pertaining to section 17(1) (Act 56 of 1996) the following is said by Ledwaba J:

*"Section **17(1) of the Road Accident Fund Act 56 of 1996** recognises a claim of third parties who are entitled to claim against the fund who have suffered damages as a result of the death to a third parties breadwinner. **Te people who qualify as 'a third party' should be defined as set out in the Act and they refer to persons who are legally dependant on the deceased for maintenance."***

(My emphasis)

[Susara Meyer v RAF (unreported) case no. 29950/2004 NGH – judgment of the 28/03/2006 – I will deal with this judgment more fully hereinafter]

3.1.3 In paragraph [7] of his judgment LEDWABA J says the following:

"[7] *The Plaintiff's counsel submitted that the validity of the Plaintiff's claim for loss of support should satisfy the following test:*

- (i) *The Plaintiff must establish that the deceased had a duty to support the Plaintiff;*
- (ii) *It has to be a legally enforceable duty;*
- (iii) *The right of the Plaintiff to such support has to be worthy of protection by the law;*
- (iv) ***This element has to be determined by the criterion of boni mores".***

(My emphasis)

[See: Surara Meyer referred to above]

3.1.4 It is necessary to analyse the **case law** in the next sub paragraphs.

(3.2) **ZIMNAT INSURANCE CO LTD v CHAWANDA 1991(2) SA 825 (ZS):**

3.2.1 The headnote reads as follows:

*"The widow of an **unregistered customary union** whose husband has been killed by an act of negligence, or other unlawful act, has a claim in law for damages for loss of support against the person who caused the death or who employed the person who caused it or who had insured him against such contingency."*

3.2.2 Pages 832 and 833 read as follows:

*"The opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the interests of the country may present itself where a Judge is concerned with the application of the common law, **even though there is a spate of judicial precedents which obstructs the taking of such a course.** If Judges hold to their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand. In a famous passage Lord Atkin, referring to judicial precedents, said:*

'When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the Judge to pass through them undeterred.'

(3.3) **SANTAM BANK v HENERY 1999(3) SA 421 (SCA)**

The gist of this matter is that an action for loss of support was extended so as to cover a **divorced woman** to claim for damages for **loss of support** arising out of the negligent killing of her former husband.

(3.4) **AMOD v MULTILATERAL MOTOR VEHICLE ACCIDENT FUND (COMMISSION FOR GENDER EQUALITY INTERVENING) 1999(4) SA 1319 (SCA)**

3.4.1 A claim for loss of support arising out of a **marriage in terms of Islamic law** was recognised.

3.4.2 Par [20] reads of follows:

"[20] The crucial question which therefore needs to be applied is whether or not the legal right which the appellant had to support from the deceased during the subsistence of the marriage, is a right which, in the circumstances disclosed by the present case,

deserves recognition and protection by the law for the purposes of the hearing before us it was common cause that the Islamic marriage between the appellant and the deceased was a de facto monogamous marriage; that it was contracted according to the tenets of a major religion; and that it involved 'a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable'.

- (3.5) "[15] In the case of **NATIONAL COALITION FOR GAY and LESBIAN EQUALITY v MINISTER OF HOME AFFAIRS 2000(2) SA (1) CC**, another form of conjugal same-sex relationship was recognised. It is important to emphasise that the case dealt with **partners in permanent same-sex life relationship**. On page 35, in paragraph [60] at 35E-G, the court clearly stated the following:
- '[60] It is important to indicate and emphasise the precise ambit of the above holding. The Court is in the present case concerned only with partners in permanent same-sex life partnerships. **The position of unmarried partners in permanent heterosexual partnerships and their omission from the provisions of section 25(5) was never an issue**

in the case nor was my argument addressed thereon. The Court does not reach the latter issue in this case and I express no view thereon, leaving it completely open. Nor does the Court in this case reach the issue of whether, or to what extent, the law ought to give formal institutional recognition to same-sex partnerships and this issue is similarly left open". (My emphasis)

See: *Susara Meyer v RAF (above)* at par [15]

(3.6) **DU PLESSIS v ROAD ACCIDENT FUND 200491) SA 359 (SCA)**

3.6.1 In this matter the dependent's action was extended to **a partner in a same-sex permanent life relationship**. [The partner was killed in a motor vehicle accident and a claim for damages (loss of support) was allowed against the Defendant (RAF) by the surviving partner].

3.6.2 The Court (par 43 of the judgment) **left open the question pertaining to an action for loss of support in respect of unmarried persons in a heterosexual relationship**.

3.6.3 The **headnote** in this matter *inter alia* reads as follows:

"The plaintiff and the deceased had been partners in a same-sex union. The deceased was killed in a motor vehicle accident in September 1999. The primary question in the present appeal was whether the plaintiff should

be entitled to claim damages for loss of support from the defendant in terms of the Road Accident Fund Act 56 of 1996. A subsidiary question was whether the plaintiff had shown his entitlement to claim funeral expenses incurred in burying the deceased. The Court a quo dismissed both of the plaintiff's claims.

*The plaintiff and the deceased had lived together continuously since March 1988. In that year they had gone through a ceremony which was as close as possible to a marriage ceremony in the presence of numerous witnesses, conducted by a person who was a marriage officer (who did not act in that capacity, **but the plaintiff and the deceased would have married had the law permitted it**). The union between the plaintiff and the deceased had been stable. They had been acknowledged by family and friends as a couple. The plaintiff had been medically boarded in September 1994. Before then he had earned less than the deceased. Thereafter he had received a disability*

*pension which was not sufficient for his needs and the deceased had continued to earn a salary which was considerably in excess of the plaintiff's pension. They had continued to pool their income. **The deceased had to a large extent maintained the plaintiff financially for the five years after the plaintiff was boarded and before the deceased was killed. The deceased had also promised to continue to support the plaintiff after he was boarded.** The plaintiff and the deceased had made wills, each bequeathing his estate to the other. The parties agreed that the defendant was liable under the Act to pay the plaintiff 75% of such legally recoverable damages as the plaintiff might prove he has suffered arising out of the death of the deceased. In terms of s 17 of the Act the defendant or an agent was, subject to the provisions of the Act, obliged to compensate any person for any loss or damage which that person has suffered as a result of the death of any other person caused by or arising from the driving of a motor vehicle if the death was due to the negligence of the driver or owner of the vehicle. Section 19 (a) of the Act exempted the defendant from liability for loss or damage for which neither the driver nor the owner of the motor vehicle which caused the deceased's death would have been liable at common law. The defendant's case was that the plaintiff's claim for loss of support was not maintainable in law and that the plaintiff had not established a right to claim any funeral costs expended in burying the deceased. The plaintiff's submissions fell short of requesting the Court to extend the common-law definition of marriage which required*

that the union be between a man and a woman, to persons of the same sex. His submissions were rather directed to the narrower question whether the common-law action for damages for loss of support should be developed to include a person such as the plaintiff. It was trite that a widow who was legally married to the deceased was entitled to bring an action for the loss of support for the unlawful killing of her husband. It was the plaintiff's case that the common law should be developed to place him in the same position."

(My emphasis)

3.6.4 The Court, firstly dealing with the **duty to support**, found that there was such a duty on the part of the deceased. In this regard the Court *inter alia* says the following:

(i) Par [12]:

*"[12] A marriage gives rise to a reciprocal duty of support on the part of the parties to that marriage. However, the law currently only recognises marriages that are conjugal relationships between C people of the opposite sex. There is, nevertheless, in the words of Ackermann J in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) in para*

[35] 'another form of life partnership which is different from marriage as recognised by law. This form of life partnership is represented by a conjugal relationship between two people of the same sex'."

(ii) Par [15]:

*"[15] Further support for this finding is the fact that the plaintiff and the deceased **thereafter lived together as if they were legally married in a stable and permanent relationship until the deceased was killed some 11 years later**; they were accepted by their family and friends as partners in such a relationship; they pooled their income and shared their family responsibilities; each of them made a will in which the other partner was appointed his sole heir; and when the plaintiff was medically boarded, the deceased expressly stated that he would support the plaintiff financially and in fact did so until he died"* (My emphasis)

3.6.5 The next question the Court decided was whether the right of the Plaintiff to be supported was **worthy of protection**. In this regard the following is *inter alia* said in par [17]:

- (i) "[17] The next question to be decided is whether the right of the plaintiff to such support is worthy of protection by way of an action against the defendant, or, put differently, whether the killing of E the deceased should be considered to have been a wrongful act as against the plaintiff. In *Amod*, relying on *Henery*, it was said that the question had to be answered in the light of prevailing *boni mores*. In *Knop v Johannesburg City Council 1995 (2) SA 1 (A)* at 27G - I Botha JA adopted the following formulation of the nature of the enquiry:

'In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and G our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes'." (My emphasis)

- (ii) In par [19] the following is said:

"[19] The **constitutional values** relevant to the extension of the common law sought by the plaintiff are those contained in ss 9 and 10 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), namely, **equality and human dignity.**"

(My emphasis)

3.6.6 The importance as to the right to **equality** is confirmed – see par [20].

3.6.7 As to the right to **dignity** the following is said in par [21]:

"[21] The right to dignity is also important, as emphasised in Dawood, Shalabi, Thomas and Others v Minister of Home Affairs [2000(3) SA 936 (CC)] in para [35]:

'The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. A Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights - Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected'."

(3.7) **KHAN v KHAN 2005(2) SA 272 (T)**

3.7.1 In this matter I found that there is a **duty on a husband to maintain his ex-wife to whom he was married according to Muslim rites in a situation where marriage is in fact polygamous.**

3.7.2 The headnote reads *inter alia* as follows:

"The questions for consideration by the Court concerned whether there was a legal duty on the appellant, by virtue of the provisions of s 2(1) of the Maintenance Act 99 of 1998, to maintain the respondent, to whom he had been married by Muslim rites, accepting that the marriage was in fact a polygamous one. Held, that the preamble to the Maintenance Act emphasised the establishment of a fair and equitable maintenance system premised on the fundamental rights afforded in the Constitution of the Republic of South Africa Act 108 of 1996. (Paragraph [9.4] at 279D/E.) Held, further, that the common-law duty of support was a flexible concept developed and extended over time by the Courts to cover a wide range of relationships. The questions which Courts have considered in determining whether a particular relationship gave rise to a duty of support included whether the complainant required financial aid and whether the relationship between the parties created a duty to maintain. The times and society in which we live also needed to be considered. (Paragraphs [10.1] and [10.2] at 280D and 280F - G.) Held, further, that despite the lack of a formal marriage, the Constitutional Court had in Satchwell v President of the Republic of South Africa and Another 2002 (6) SA 1 (CC) (2002 (9) BCLR 986) found that duties of reciprocal support could be inferred from, inter alia, how others perceived the couple, whether family responsibilities were shared, and whether the couple had provided for one another upon death. The purpose of family law in general was to protect vulnerable family members and to

ensure fairness in disputes that arose at the end of relationships. (Paragraphs [10.4] and [10.5] at 281A - B/C.)"
(My emphasis)

3.7.3 Par [9] *inter alia* reads as follows:

- (i)
"9.5 The Act invokes the Constitution in its preamble. With regard to interpreting statutes in light of the Constitution, cognisance ought to be taken of the words of Langa DP as stated in the decision of *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (2000 (10) BCLR 1079) in paras [21] and [22]:

*'This means that all statutes must be interpreted through the **prism** of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. The spirit of*

transition and transformation characterises the constitutional enterprise as a whole.

. . . The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, insofar as is possible, in conformity with the Constitution.”

(My emphasis)

- (ii) “9.6 In the **Daniels decision** [2004(5) SA 331 (CC)]

Ngcobo J made the following comment with regard to the proper approach to legislative interpretation: 'Section 39(2) of the Constitution contains an injunction on the interpretation of legislation. It requires courts when interpreting any legislation "to promote the spirit, purport and objects of the Bill of Rights". Consistent with this interpretative injunction, where possible, legislation must be read in a manner that gives effect to the values of our constitutional democracy. These values include human dignity, equality and freedom. Thus where legislation is

capable of more than one plausible construction, the one which brings the legislation within constitutional bounds must be preferred.

(iii) 9.7 "Prior to the Daniels decision Yacoob J, in the decision of *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) (2001 (11) BCLR 1109) stated the following in para [24] with regard to statutory provisions which are capable of more than one construction:

'Where a statutory provision is capable of more than one reasonable construction, one which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity, provided such interpretation is not unduly strained'."

3.7.4 Par 10 *inter alia* reads as follows:

"[10] Social and economic context

10.1 The common-law duty of support is a flexible concept that has been developed and extended over time by our Courts to cover a wide range of relationships such as grandparents vis-à-vis grandchildren, and vice

versa, children to their parents, brothers and sisters to each other, divorcees towards each other, same-sex partnerships and most recently extending the duty of support of **an illegitimate child to its paternal grandparents**. See *Petersen v Maintenance Officer and Others* 2004 (2) BCLR 205 (C); *Lamb v Sack* 1974 (2) SA 670 (T); *Langemaat v Minister of Safety and Security* 1993 (3) SA 312 (T) (1998 (4) BCLR 312); *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) (2003 (11) BCLR 1220). 10.2

The questions that Courts consider in determining whether a particular relationship gives rise to a duty of support include:

10.2.1 Does the complainant require financial aid?

10.2.2 Does the relationship between the two parties create a duty to maintain? **The second leg must take account of the times and society in which we live. See the Langemaat decision (supra at 315G - H)."**

(3.8) **SUSARA MEYER v RAF**

(See paragraph 3.1.2 above)

3.8.1 In this matter, the Plaintiff based her case on being a "third party" who should be placed in the same

position as a widow who was legally married to the deceased.

3.8.2 The Defendant contended that the Plaintiff was not in law, entitled to claim for loss of support since the Plaintiff and the deceased were not legally married to each other.

3.8.3 The test that the Plaintiff had to satisfy was put as follows in paragraph [7] of the judgment:

"[7] The Plaintiff's counsel submitted that the validity of the Plaintiff's claim for loss of support should satisfy the following test:

- (v) The Plaintiff must establish that the deceased had a duty to support the Plaintiff;*
- (vi) It has to be a legally enforceable duty;*
- (vii) The right of the Plaintiff to such support has to be worthy of protection by the law;*

(viii) *This element has to be determined by the criterion of boni mores*".

3.8.4 It was pointed out that on the agreed facts, there is no allegation that they intended to enter into a marriage relationship in future. – See paragraph [13] of the judgment.

3.8.5 The Court found on the agreed facts, the deceased undertook to support the Plaintiff.

3.8.6 Pertaining to the question whether or not the undertaking to support was **worthy of legal protection** the following is said:

(i)

"[25] I should now determine if the undertaking made by the deceased is worthy of legal protection, also having regard to the Constitution, by way of an action against the defendant. The defendant is a statutory body which can only be held liable if the provisions of the act allows same – See paragraph [25]".

(ii)

*"[27] I do agree that **if parties have agreed on a morally acceptable thing** and one party breaches the agreement without any justification the other party can institute a claim." – See paragraph [27]*

3.8.7 As to the **boni mores** the following is said:

"[28] In my view, there is nothing morally wrong, if the deceased undertook to support the plaintiff but to extend such an undertaking to be protected against the third parties, particularly the defendant, should be scrutinised thoroughly."

3.8.8 On the facts, the following were found:

[29] Having regard to the agreed facts of this case there is no mention of the fact that:

- (i) The plaintiff and the deceased had a conjugal relationship.
- (ii) They owed each other a duty of support (according to the fact that the deceased undertook to support the plaintiff).
- (iii) The plaintiff and the deceased entered into a ceremonial 'marriage' or that their relationship

was regarded as a marriage in the presence of witnesses.

(iv) They intended to marry in future.

In my view, the abovementioned factors are important in determining whether the plaintiff is entitled to claim or not even if the court cannot draw inferences from the agreed facts.

See: **Municipality v Malati Park (Edms) Bpk 1982 (2) SA 127 (T) at 131 D**. There are **no grounds to justify an inference that the parties intended to marry in the future**. On the contrary, the plaintiff consciously chose to live with the deceased without entering into a marriage **although nothing stopped them to from marrying.**" – See paragraph [29]

(My emphasis)

3.8.9 As far as marriage as a social institution is concerned, the following is said in paragraph [30]:

"[30] In my view, **marriage is an important social institution** which needs to be protected and respected by our courts. Marriage is also recognised by the Constitution having regard to section **15(3)(a)(i) of the Constitution Act 106 of 1996**. To regard any relationship which has a feature of a

marriage, as a marriage, would have negative effect on the administration of justice, morality, the norms and values of our society."

(My emphasis)

3.8.10 The learned judge then came to the conclusion that there was nothing that "stopped" the parties from getting married. He says *inter alia* the following in paragraph [32]:

"[32] The plaintiff and deceased could have married if they wished to do so, there is **nothing on the facts which indicate that there was an obstacle which made them not marry.**"

(My emphasis)

3.8.11 I pause here to mention the following:

- (i) On the facts it was found that there was no obstacle which made the parties not to get married nor were there any grounds to make such inference – see paragraphs 3.8.8 and 3.8.10 above;

- (ii) The only deduction to be made is that the aforesaid was considered to be important and if the situation was different, it could / would impact on the **result**.

3.8.12 Sections 9 and 10 of the Constitution (**Equality and human dignity**) were considered.

3.8.13 **Discrimination** on the grounds of marital status was also considered. In this regard the following is said in paragraph [33]:

"[33] I need to also consider if there is any discrimination on the grounds of marital status. Subsection 9(5) states that the discrimination is unfair unless it is established that the discrimination is fair. This is an issue that needs to be decided cautiously, judicially and pragmatically. Hoffmann v South Africa Airways 2001 (1) SA 1 at Paragraph 27 on Page 16: "At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the

discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected and whether the discrimination has impaired the human dignity of the victim?"

3.8.14 Pertaining to the finding that **permanent life partners** had to be **included** in section 1 of the **Maintenance of Surviving Spouse Act**, the following is said:

*"[35] In the case of **Volks v Robinson 2005 (5) BCLR CC**, the constitutional court declined to confront the High Court decision of **Robinson and Another v Volks NO and Others 2004 (6) SA 288 (C)**, where the applicant who had been involved in a permanent life relationship had cohabitated with the deceased for more than sixteen years prior to the latter's death. Applicant sought an order declaring that she was entitled to lodge a claim for maintenance against the deceased estate alternatively an order that the Maintenance of **Surviving Spouses Act 27 of 1990** was unconstitutional and invalid, in that it violates sections 9 and 10 of the Constitution*

Act 106 of 1996. Davis J ordered that the defence of survivor 'spouse and marriage' in section 1 of the Maintenance of Surviving Spouse Act had to be read as including references to permanent life partners and to permanent life partnerships." – See paragraph [35]

3.8.15 The upshot is that LEDWABA J came to the conclusion that the Plaintiff could not be regarded as a person who could claim against the Road Accident Fund for the loss of support, in that (on the facts) the relationship did not fall within the category of persons who were intended by the legislature in terms of the RAF Act.

3.8.16 He cautions against including people merely staying together as claimants as though legally married. In this regard he says the following in paragraph [38] of his judgment:

"[38] To cast the net widely, to include relationships of people who merely stayed together, who one or both of whom undertook to support each other or even bequeath property to each other in their will, will, in my view cause serious problem to,

inter alia, the law of succession and can cause have serious problems in managing claims for loss of support lodged by claimants who were not legally married to the deceased, and to the institution of the marriage itself which, in my view, is an important element to the development of morality and/or the community."

(3.9) **B, M (born DP) v B, NG** (unreported) Judgment of **BRASSEY AJ** in the SGH – case number 2008/25274. (I am not certain about the date of the judgment).

3.9.1 In this matter Brassey AJ found it **not necessary to adopt a child in order to be liable for maintenance**.

3.9.2 In this regard he says the following:

(i) "22. **No need to characterize the relationship as a de facto adoption**

One can, if one wishes, say that the defendant, by making the promise, assumed a duty to support and maintain S. As a fact, this is so, but the words are typically

employed to designate duties arising out of status relationships recognized in family law and, as I have already said, I see no reason to say that S must be treated as though he were the defendant's child by adoption". – See paragraph 22 of the judgment.

(My emphasis)

"(ii) 23. Were it necessary for me to make this finding in order conclude that the defendant is bound to look after S, I should have little hesitation in doing so. As the decision in *Flynn v Farr NO & Others* 2009(1) SA 584(C) shows, **courts do recognize de facto adoptions and treat them, at least for some purposes, as the equivalent of legal adoptions**". – See paragraph [23]

(My emphasis)

3.9.3 Pertaining to the fact that **undertakings do not generate binding contracts**, BRASSEY AJ says the following in paragraph 15 of his judgment:

*"15. None of this supports an inference that, as between the two spouses, the defendant made a contractual commitment to pay the school fees. The decision was the product of a domestic arrangement and so does not sustain the inference that the defendant's concurrence was given with intention to contract. Pothier, according to RH Christie The Law of Contract 4 ed (2001) 34B, illustrates the extra-contractual nature of such arrangement by giving an example, instructive in the present case, of a father's promise to reward his son who does well at college. This, Pothier makes plain, may be an **undertaking** of sorts, but **it does not generate a binding contract** since it is not given *animus contrahendi*".*

(My emphasis)

[4] CONCLUSION:

(4.1) From the essence of the matter [par (1.2) above], the particulars of claim [par (104) above] and the undisputed facts [par (2.2) above], it is clear (in my view) that:

- 4.1.1 Since the second half of 1990 the parties started living together as man and wife and did so until the deceased passed away on 23 July 2003;
- 4.1.2 Together they had two daughters;
- 4.1.3 The deceased brought up Janice (her daughter) together with his own daughters as his own and never differentiated between them;
- 4.1.4 Everybody considered them (Plaintiff and deceased) as man and wife and so did her and his relatives and in fact everybody else;
- 4.1.5 She had a contract with the deceased in the sense that she would look after the household and he would be (and was) the sole breadwinner and she was completely dependent upon him for support;
- 4.1.6 She and the deceased didn't have enough money for a decent wedding and as the years have gone by, there were ever increasing expenses, especially the

costs as to the upbringing of the three daughters who were more or less the same age;

4.1.7 The parties wanted to get married;

4.1.8 Their behaviour confirms (or at least such inference can be made) that the agreement between the parties as to their duties (the deceased working and the Plaintiff looking after the household and children) has been established;

4.1.9 The parties were in a permanent life partnership;

4.1.10 The duty of support towards the Plaintiff by the deceased (over and above the permanent life partnership) was not merely an **undertaking** but was in fact a **binding contract** in that the deceased clearly did so with the intention of being legally bound and being part of this permanent life partnership and acted accordingly;

4.1.11 The parties and the three daughters were a close knit stable family;

4.1.12 The right of the Plaintiff to be supported by the deceased has been well established and is legally enforceable and worthy of protection.

4.1.12 The right of the Plaintiff to be supported by the deceased has been well established and is legally enforceable and worthy of protection.

(4.2) In view of the aforesaid, this matter is clearly distinguishable from the matter which *Ledwaba J* [par (3.1.2) above] dealt with and I am therefore not bound by it.

(4.3) I am therefore of the view that the Plaintiff has made out a case and has met the requirement of the **test** referred to in paragraph 3.1.3 above. Here I may add that especially in view of the permanent life partnership (and the other factors mentioned above) I am in any event of the view that, in the light of the developments in this field, life partners in a similar position as that of the Plaintiff, have a right that is worthy of protection.

(4.4) Consequently, I have come to the conclusion that the Plaintiff has *locus standi* to claim an amount for loss of support from the Defendant.

(4.5) I therefore make the following order:

1. It is declared that the Plaintiff has the necessary *locus standi* to claim an amount for loss of support from the Defendant;
2. The Defendant is ordered to pay Plaintiff's costs including the costs of ^{two}~~senior~~ counsel. 

GOODEY AJ