LEXONOMICA
Vol. 17, No. 2, pp. 203–246, December 2025

THE CONSTITUTIONALITY OF THE NON-RECOGNITION OF DOMESTIC PARTNERSHIPS IN SOUTH AFRICA: REVISITED

Accepted
28. 8. 2025

Revised
15. 10. 2025

Published
19. 12. 2025

RAZAANA DENSON
Nelson Mandela University, Faculty of Law, Port Elizabeth, South Africa, Razaana.Denson@mandela.ac.za

CORRESPONDING AUTHOR
Razaana.Denson@mandela.ac.za

Abstract Marriage has traditionally been defined as the legally recognized voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts. Whether this definition still holds true for South Africa is questionable as major changes in societal attitudes and behaviour reflect a growing number of different or alternate lifestyles. Currently, there is an increasing number of couples who choose to live together without formalizing their relationship in the eyes of the law. These relationships where couples live together and set up a common household are. referred to as domestic partnerships. South African family law only affords legal protection and recognition to civil marriages solemnised in terms of statutory law. The protection afforded to civil marriages does not extend to domestic partnerships. The question which arises is whether the law's refusal to grant legal recognition and protection to domestic partnerships can be regarded as unconstitutional.

Keywords
domestic partnerships, civil marriages, South African family law, constitutionality, legislative reforms

https://doi.org/10.18690/lexonomica.17.2.203-246.2025

1 Introduction

Marriage has traditionally been defined as the legally recognized voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts (Sinclair & Heaton, 1996: 305).[1] The traditional definition of marriage has undergone changes after the enactment of the Constitution.[2] The definition of marriage at present includes same-sex unions which enjoy legal recognition and protection since the enactment of the Civil Union Act[3]. Customary marriages are also granted legal recognition and protection in terms of the Recognition of Customary Marriages Act.[4] Notwithstanding these profound changes to the definition of marriage, it is, however, still questionable whether the revised definition of marriage holds true for South Africa. Major changes in societal attitudes and behavior in South Africa indicate that there is a growing number of different or alternate lifestyles prevailing in modern day South Africa.[5] There is an increasing number of couples who choose to live together without formalising their relationship in the eyes of the law. These couples live together, set up a common household, which may or may not include children, some with the intention of entering into a marriage at a later stage whilst others choose to give the institution

[1] See also *Hyde v Hyde and Woodmansee* (1866) LR 1 P and D 130 at 133: "Marriage as understood in Christendom, may…be defined as the voluntary union for life of one man and one woman to the exclusion of others"; *Bronn v Frits Bronn's Executors* (1860) 3 Seale 313 at 332; *Seedat Executors v The Master (Natal)* 1917 AD 302 at 309; *Ex parte Soobiah: In re Estate Pillay* 1948 1 SA 873 (N) at 879-880.

[2] The Constitution of the Republic of South Africa, 1996.

[3] 17 of 2006.

[4] 120 of 1998.

[5] The administrative data on civil marriages indicates a notable downward trend in marriage registrations. As outlined in the Marriages and Divorces report for 2022 (Statistics South Africa, 2024), there has been a significant decline of 29,5% in the number of civil marriages recorded between 2013 and 2022. Even when considering the impact of COVID-19 restrictions on gatherings, which led to reduced marriage registrations in 2020 and 2021, the overall trend still indicates a decline in the number of marriages. From 2013 to 2022, the highest number of marriages was recorded in 2013 (158,642) and the lowest number in 2020 (89,338). While official statistics on the exact number of domestic partnerships are not readily available, data indicates a rise in the number of people living together without being formally married.

of marriage a miss altogether. These relationships are referred to as domestic partnerships, life partnerships, *de facto* marriages, concubinage or cohabitation.[6]

The position at present in South Africa is that only those unions which comply with the formalities as prescribed by statute, namely, the Marriage Act[7], the Civil Union Act and the Recognition of Customary Marriages Act, are regarded as valid marriages and are afforded protection and the privileges which automatically arise as a result of such marriages. For example, a reciprocal duty of support automatically arises between spouses who are married in terms of the above-mentioned statutes. South African marriage law, therefore, grants spouses' protection and financial security.[8] These automatic legal consequences flowing from a civil marriage does not arise where the parties are merely living together in a domestic partnership without formalising or legalising their relationship.[9] In other words, domestic partnerships are currently not legally recognized or regulated in South Africa.[10]

In terms of section 9(3) of the Constitution, the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, *inter alia*, marital status. The question that this paper seeks to address is whether the law's refusal to grant legal recognition to domestic partnerships can be regarded as unconstitutional.

---

[6] Preference is, however, given to the term 'domestic partnership as this is the term used by the South African Law Reform Commission and it is also the term used in the draft Domestic Partnership Bill 2008.

[7] 25 of 1961.

[8] In terms of the common law, there is a reciprocal duty of support between spouses married in terms of civil law. This is one of the invariable consequences of the civil marriage and parties cannot change or vary the invariable consequences of their marriage. The invariable consequences apply automatically the moment the marriage is solemnized.

[9] It must, however, be noted that certain legal consequences which would normally only apply to civil marriages, has been extended to apply through legislation to domestic partnerships. For example, in terms of the Rental Housing Act 50 of 1999, domestic partners may rely on the provisions of the Act, so that they are not unfairly discriminated against on the basis of marital status and sexual orientation. In terms of the Domestic Violence Amendment Act 14 of 2021, domestic partners are offered protection against domestic violence. Furthermore, the courts have also provided *ad hoc* protection to domestic partners. The South African judiciary has also come to the assistance of partners to a domestic partnership. See the discussion under number 4 of this article. It is important to note that the protection offered by certain statutes and the judiciary is on an *ad hoc* basis.

[10] *Bwanya v Master of the High Court* 2022 (3) SA 250 B (CC) Par 195.

In order to answer the above question, the following issues are discussed, namely: the definition of domestic partners; the reasons for why parties enter into a domestic partnership; the legal regime of the domestic partnership relationship; the consequences as a result of the refusal to grant legal recognition to domestic partnerships; and lastly, recommendations in respect of the recognition and regulation of domestic partnership.

2 Definition of domestic partnership

In definition assigned to domestic partnership is of vital importance as it is submitted that legal protection should only be afforded to partners who are in a permanent life partnership characterised by a conjugal relationship, as opposed to those relationships that only persist for a short period of time and which is characterised as a 'fling'.[11] In other words, the domestic partnership under discussion is not one of a casual or intermittent character, but rather one with a considerable degree of permanence and stability. These elements present in a permanent life domestic partnership, therefore, coincide to a large extent with the concept of consortium inherent to marriage which includes loyalty, affection, sympathetic care, financial support and physical care (Schwellnus, 1955: 134).[12] The conjugal aspect serves to differentiate the domestic life partnership from people who are merely roommates sharing a common home as a conjugal relationship between partners does not only refer to sexual relations but indicates a "relationship of some permanence, where individuals are financially, socially, emotionally and physically interdependent, where they share household and related responsibilities, and where they have made a serious commitment to one another."[13]

---

[11] See: "have a fling". In *Cambridge Dictionary*. https://dictionary.cambridge.org/dictionary/english/have-a-fling (accessed: 26. 6. 2025).

[12] The *consortium omnis vitae* which means partnership in all of life is the most important invariable consequence of a civil marriage. The law regards the *consortium omnis vitae* as being worthy of legal protection and as such, the law protects the *consortium omnis vitae* from threatened interference and also make provision for remedies when a loss to or damage has been caused to the *consortium omnis vitae* between spouses.

[13] Government of Canada. "*Conjugal relationships",* https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes/family-class-determining-spouse/assessing-conjugal.html (accessed: 26. 6. 2025).

Hahlo (1972: 321) defines a domestic partnership in terms of the Oxford English Dictionary, as the cohabiting of a man and a woman who are not legally married (See also Hutchings & Delport, 1992: 122; Thomas, 1984). Therefore, traditionally a domestic partnership refers to the relationship between a man and a woman who live together, ostensibly as man and wife, without having gone through a legal ceremony of marriage.[14]

In terms of the above definition, a domestic partnership can take two forms, namely:

a) A man and a woman who live together as husband and wife without having gone through a legal marriage ceremony; and
b) A man and a woman who go through a legal marriage ceremony, but whose marriage is invalid for some reason.

The definition as set out by Hahlo is restrictive in the sense that it excludes a domestic partnership relationship between two men or between two women. Schwellnus suggests that a more acceptable definition of domestic partnership would be "the stable, monogamous living together as husband and wife of persons who do not wish to or are not allowed to marry" (Schwellnus, 2001). From the above definition the following elements which are essential for the creation of a domestic partnership, can be distinguished, namely:

a) A sexual relationship between the couple;
b) A factual cohabitative relationship;
c) A measure of durability and stability of the relationship; and
d) A sense of responsibility for each other (Schwellnus, 1995: 134).

The draft Domestic Partnership Bill defines a domestic partnership as "a registered domestic partnership or unregistered domestic partnership between two persons who are both 18 years of age or older."[15]

---

[14] Mention must also be made of the fact that a domestic partnership is not the sole prerogative or privilege of unmarried persons. For example, a married man may leave his wife to live with an unmarried woman or a married man may leave his wife to live with another man's wife.

[15] The definition of domestic partnership in the draft Bill is inherently circular as it defines a domestic partnership with reference to a domestic partnership. The definition provided by the draft Bill is somewhat problematic as it fails to give content or meaning to the term.

The definition of domestic partnership as an intimate (sexual) relationship between two people living together without concluding a marriage has found favour in South African law (Madzika, 2020: 396). Case law also appears to demonstrate that the more a domestic partnership aligns with that of a civil marriage, the more likely it is to be viewed as a permanent life partnership from which legal benefits may flow.[16] This is evident from the decisions of the Supreme Court of Appeal in *Paixao v Road Accident Fund*[17] and the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[18] where the courts looked at the similarities between a civil marriage and the domestic partnership in question to establish whether it was indeed a permanent life partnership.

3. Reasons for domestic partnerships

Before undertaking an examination of the legal regime and the consequences of domestic partnerships, the reasons why more and more people are cohabiting is discussed. This may be indicative of the societal, and ultimately legal, response to the institution of marriage in terms of the Marriage Act. The enquiry requires a distinction to be drawn between persons who do not wish to marry and persons who are not allowed to marry. Examples of couples who are not legally permitted to marry are the following:

a) The couple may be related within the forbidden degrees of relationship;
b) One of the partners to the relationship is already married to someone else; or

where parties into a domestic partnership practice this deliberately, this may be done for a number of reasons, namely (Hutchings & Delport 1992):

a) One or both of the parties to the domestic partnership may have been involved in a previous unhappy marriage;
b) The parties may feel that their relationship may be spoilt by the formality of marriage;

---

[16] *Satchwell v President of Republic of South Africa* 2002 (6) SA 1 Par 4. *Paixao v Road Accident Fund* 2012 (6) SA 377 (SCA), Par 19, Par 29, Par 39.

[17] *Paixao vRoad Accident Fund* 2012 (6) SA 377 (SCA).

[18] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* [1999] ZACC 17 para 88.

c) The parties may reject the notion of a traditional marriage contract regulated by the state;
d) The parties may wish to enter into a marriage but only after finishing their training or obtaining employment or advancing their individual careers;
e) Marriage may have a detrimental effect on the parties' financial position, for example, a divorced person or surviving spouse receiving a maintenance or income from an annuity may choose to cohabit rather than lose the financial benefit of the maintenance or annuity on remarriage; or
f) As independence and equality are of the utmost importance to modern marriages, traditional marriage is often seen to enforce inequality owing to the fact that marriage is often associated with male domination. Domestic partnership presents a more flexible, free and equal relationship.

A discussion of the legal regime of the domestic partnership which includes the legal consequences of domestic partnerships as well as the protective measures available to domestic partners namely, that of universal partnership and domestic partnership contracts, will be undertaken.

4. The legal regime of the domestic partnership

South African law treats domestic partnerships like a non-marriage and as such there is no legislation to regulate the relationship between the partners to a permanent life domestic partnership in the same sense as there is a law of husband and wife (Clark, 2002: 637). When parties enter into a marriage in terms of the Marriage Act or a civil partnership in terms of the Civil Union Act several concomitant and participatory rights and duties are automatically conferred upon spouses (Schwellnus 1995). For example, a reciprocal duty of support arises automatically between spouses and an automatic right of inheritance exists where one of the spouses dies intestate. Furthermore, spouses are entitled to share all their property in a joint estate unless they enter into an antenuptial contract which excludes community of property. It can, therefore, be deduced that South African marriage law provides substantial financial security and protection for those parties who choose to enter into a marriage (Barratt, Denson, Domingo, Mahler-Coetzee & Osman, 2023). In contrast, the law attaches no automatic consequences to a domestic partnership, no matter how long the relationship has lasted. This in effect also means that parties to a

domestic partnership can invoke none of the protective and supportive measures which are available to spouses.[19] Although South African law does not prohibit domestic partnerships, it does not enjoy any noteworthy legal protection since the law does not recognise it as a legal relationship (Hutchings & Delport 1992; Thomas, 1984; Schwellnus, 1995). Domestic partners have been forced to resort to other protective measures to regulate their relationship. These protective measures are now discussed.

4.1 Tacit universal partnerships: *societas universorum quae ex quaestu*

Up until 2012[20], within the law of contract, the concept of universal partnership which has been used by the South African courts to come to the assistance of partners to a domestic partnership by recognizing that the partners had entered into a "universal partnership" and, therefore, used the rules for the *societas universorum quae ex quaestu*.[21] The courts were prepared to do this, despite the fact that s*ocietas universorum quae ex quaestu* is usually reserved for and limited to commercial dealings. In terms s*ocietas universorum quae ex quaestu*, the parties agree that all they may acquire to put in during the existence of the partnership, from every kind of commercial undertaking, shall be partnership property.[22] To be afforded the use of s*ocietas universorum quae ex quaestu* to grant recognition to their domestic partnership, the

[19] Some of the legal consequences of marriage have been extended to domestic partners in selected legislation. An example of an exception to this general rule is section 22 as read with section 1(C) of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993.

[20] In *Butters v Mncora* 2012 (4) SA 1 (SCA), the court held that a *societas universorum bonorum* existed between the parties in this matter and that it was no longer necessary to apply rules of *societas universorum quae ex quaetsu veniunt* which is essentiially applicable to commercial dealings.

[21] In *Fink v Fink and Another* 1945 WLD 226 the court decided that the parties may by conduct (in the absence of an express agreement) establish a partnership between them. This will, however, only be the case where the woman made a substantial financial contribution. See also *Mühlmann v Mühlmann* 1984 (3) SA 102 (A).

[22] *Butters v Mncor*a 2012 (4) SA 1 SCA para 114.

requirements as set out by Pothier[23] had to be proven, with the qualification that the aim of the universal partnership was not necessarily aimed at making a profit.[24]

Universal partnerships can be used to give both parties a right to share in all property acquired during and even before the commencement of the relationship if such partnership was created either tacitly or expressly. In the event of a tacit agreement, reference will be made to the conduct of the parties as well as whether it is more probable than not that a tacit agreement had been reached between the parties to enter into a partnership (Schwellnus 1995).[25] Regard must be given to the true contract and intention of the parties as appearing from all the facts of the case.[26] The objective of the accumulation of an appreciating joint estate was held to be sufficient proof that the object of the partners was to make a profit, thus the option of a universal partnership is made available even though the parties have no joint business venture apart from the fact of cohabiting.[27] In *Ally v Dinath*[28] the court held that it would be sufficient if the domestic partners intended to save money by running a joint household.[29]

In *Isaacs v Isaacs,*[30] the court held that where the relationship is terminated and the parties have failed to enter into an express agreement as to how the assets should be divided, the said assets should be divided in proportion to the partner's contribution.[31] Furthermore, the court held that where both partners to the domestic

[23] For a valid universal partnership to come into existence certain legal requirements have to be met, namely:

a) The aim of the partnership must be to make a profit of some kind, which must be for the joint benefit of both partners.
b) Both parties must contribute to the enterprise. This can take the form of money, skill, enterprise or labour and can furthermore include domestic services rendered in the household.
c) The partnership must operate for the benefit of both parties; and
d) The contract between the parties must be legitimate. Both parties must have the necessary capacity to enter into a partnership agreement. If a partner is unable to enter into a partnership, for whatever reason, such partnership will not be valid and enforceable.

[24] *Ally v Dinath* 1984 (2) SA 451 (T).

[25] *Ally v Dinath* 1984 (2) SA 451 (T) 453-455.

[26] *Fink v Fink* 1945 WLD 226 at 228.

[27] *Ally v Dinah* 1984 (2) SA 451 (T) at 455.

[28] *Ally v Dinath* 1984 (2) SA 451 (T).

[29] Ally v Dinath 1984 (2) SA 451 (T) at 455.

[30] *Isaacs v Isaacs* 1949 (1) SA 952 (C).

[31] *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 961.

partnership had devoted all their time to the success of their joint enterprise, the assets should be shared equally between the domestic partners.[32]

As indicated above, the courts have on numerous occasions been called upon to apply the rules of s*ocietas universorum quae ex quaestu*, in order to pronounce whether a tacit universal partnership can be extended to parties who are in a domestic partnership. A brief discussion of the case law dealing with universal partnership is undertaken below.

In *Ally v Dinath* the issue arose of whether a universal partnership existed between parties who had lived together as husband and wife for a period of fifteen years.[33] The wife as the plaintiff alleged that she was entitled to half of the parties' combined wealth as they had shared a joint household and had therefore entered into a universal partnership.[34] The defendant excepted to the allegation on the ground that there had been no express agreement between the parties to create a universal partnership, and there was also no agreement that the objective of the relationship was to make a profit.[35] The court dismissed the exceptions and stated that, if a clear contract of partnership is proven, such a partnership is valid and such partnership can arise from a tacit or express agreement.[36]

A universal partnership was also held to have been tacitly established in *V* (also known as *L) v De Wet NO*,[37] where a man died after cohabiting with a woman as her husband for twenty-one years, and the woman had worked in the man's painting and decorating business and had performed all the household duties.[38]

In *Botha v Deetlefs*[39] the first respondent, who had been living with the deceased from 1999 until the death of the deceased on 17 May 2006, contended that there existed

[32] *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 961.
[33] *Ally v Dinath* 1984 (2) SA 451 (T) at 452.
[34] *Ally v Dinath* 1984 (2) SA 451 (T) at 452.
[35] *Ally v Dinath* 1984 (2) SA 451 (T) at 452.
[36] *Ally v Dinath* 1984 (2) SA 451 (T) at 454.
[37] 1953 (1) SA 612 (O).
[38] *V (also known as L) v De Wet NO* 1953 (1) SA 612 (O) at 616-617.
[39] 2008 (3) SA 419 (N).

a universal partnership between her and the deceased.[40] She furthermore contended that she and the deceased administered a joint household to the extent that she contributed towards the running of the household and contributed to the payment of the mortgage bond.[41] Whilst the court held that an universal partnership existed between the parties, the respondent only had the right to an undivided half share in the partnership and this was not necessarily co-extensive with a half share in the immovable property of the deceased estate.[42]

In *Ponelat v Schrepfer*[43] the issue which had to be decided on appeal was whether a tacit universal partnership had been entered into between the parties.[44] The facts[45] before the court were that the parties had lived together as husband and wife and had subsequently shared a common household. Prior to moving to the defendant's house, the plaintiff sold her furniture and her car. The proceeds of the said sale went towards establishment of the joint household. After the parties started living together the defendant's domestic worker was discharged and the plaintiff took over all household responsibilities and domestic chores. This she continued to do for the sixteen years that the parties lived together. In addition to this, the plaintiff assisted the defendant in his electrical business by doing administrative tasks after hours and during lunch times when this was required. The defendant in turn, contribution towards the universal partnership was his electrical business, financing the purchase of the various properties and provision of financial security. The SCA held that based on the facts before it and as a result of the discussions between the parties prior to them cohabiting and their intent during the time they were cohabiting, that an intention to form an universal partnership was established.[46] Furthermore, it was held that the pooling of resources, the joint investments and the activities engaged in by both parties for their joint benefit indicated that a universal partnership existed between the parties.[47] The decision of the Eastern Circuit local division of the High

[40] *Botha NO v Deetlefs and Another* 2008 (3) SA 419 (N) at 420.
[41] *Botha NO v Deetlefs and Another* 2008 (3) SA 419 (N) at 421.
[42] *Botha NO v Deetlefs and Another* 2008 (3) SA 419 (N) at 423.
[43] 2012 (1) SA 206 (SCA).
[44] *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at 207.
[45] *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at 208-210.
[46] *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at 215.
[47] *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at 214.

Court, namely, that a universal existed between the parties whereby the plaintiff's share was 35 percent and the defendant's share being 65 percent, was confirmed.[48]

Despite the fact that proving the existence of a tacit universal partnership is difficult, the court will more likely than not find that a partnership exists between parties who cohabit. However, in *McDonald v Young*[49] and *Francis v Dhanai*[50] the applicants failed to prove that a universal partnership had existed. In *McDonald v Young* the court held that despite the fact that the parties had cohabited for seven years, it could not infer from the facts before it that a tacit universal partnership existed between the parties.[51] As such the appellant's claim for maintenance was dismissed since there is no reciprocal duty of support between cohabitants.[52] In *Francis v Dhanai* the parties lived together as husband and wife for a period of ten years. The plaintiff alleged that the parties had entered into a universal partnership in terms of an oral agreement or failing this into a tacit universal partnership. She furthermore alleged that both she and the defendant had contributed equally to the acquisition of assets and payment of liabilities during the time that they had cohabited. It was however, held that the plaintiff, despite the fact that a factual relationship existed between the parties, failed to prove that a universal partnership existed between them.

A similar decision was reached by the Constitutional Court in *Volks NO v Robinson*[53] as the court held that the fact that the parties have lived together for a lengthy period of time does not translate into a default marriage and does not afford the parties legal protection as is the case with a marriage. In this case, the parties lived together in a permanent life partnership from 1985 until 2001 when one of the parties died.[54] The surviving cohabitant instituted a claim for maintenance against the deceased's estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990. The court *a quo*, the Cape High Court, held that the exclusion of the survivor of a permanent life partnership from the provisions of the Maintenance of Surviving Spouses Act was unconstitutional on the basis that it unfairly discriminated against such survivor

[48] *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at 215.
[49] 2012 (3) SA 1 (SCA).
[50] [2006] JOL 18401 (N).
[51] *McDonald v Young* 2012 (1) SA 1 SCA at 11.
[52] *McDonald v Young* 2012 (1) SA 1 SCA at 11.
[53] 2005 (5) BCLR 446 (CC).
[54] *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at para 3.

on the basis of marital status and as such violated the right to equality and dignity.[55] The order of the court *a quo* was referred to the Constitutional Court for confirmation, and an appeal was lodged against the said order.[56] The Constitutional Court refused to confirm the order. The majority of the Constitutional Court judges held that it would be inappropriate to impose a duty of support on the life partner's estate when such a duty never arose while the parties were alive.[57] In this case, the court failed to come to the assistance of the surviving domestic partner as the majority judgement ruled that the definition of the word "spouse" in the Maintenance of Surviving Spouses Act being restricted to married spouses in terms of civil law only, did not infringe on unmarried domestic partners' constitutional rights to equality or dignity.[58]

Mention must, however, be made of the decisions in *Gory v Kolver,*[59] and *Laubscher v Duplan*[60] where the court held that same-sex domestic partners may benefit from their partner's estate through inheritance. From these decisions[61], it can be concluded that whilst same-sex partners who could marry in terms of the Civil Union Act but chose not to do so where offered the protective measures reserved for spouses to a civil marriage. The same was not applicable to heterosexual domestic partners. As such, heterosexual domestic partners were thus being discriminated upon on the basis of marital status as well as their sexual orientation.

Despite criticism (see Kruuse, 2009; Meyerson, 2010) levelled against the Constitutional Court decision in *Volks v Robinson*, this decision governed the position of heterosexual domestic partners for almost twenty years until the Constitutional Court decision in *Bwanya v The Master of the High Court.*[62] In this case, Ms Bwanya, a survivor of a domestic partnership lodged a claim under both the Intestate Succession Act and the Maintenance of the Surviving Spouses Act that the definition of the word "spouse" in the Intestate Succession Act should include the words "or

[55] *Robinson v Volks NO* 2004 (6) SA 288 (C).
[56] *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) para 1.
[57] *Robinson v Volks NO* 2005 (5) BCLR 446 (CC) para 60.
[58] *Robinson v Volks NO* 2005 (5) BCLR 446 (CC) para 60.
[59] *Gory v Kolver* 2007 (4) SA 97 (CC).
[60] *Laubscher v Duplan* 2017 (2) SA 264 (CC).
[61] *Gory v Kolver* 2007 (4) SA 97 (CC) Par 66 (f)(1) and *Laubscher v Duplan* 2017 (2) SA 264 (CC) para 87.
[62] 2022 (3) SA 250 (CC).

partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support."[63] The Constitutional Court agreed with the claim lodged by Ms Bwanya and ruled that the definition of the word "spouse" in the Intestate Succession Act should be amended to include "or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support."[64] However, insofar as amending the definition of the word "spouse" in the Maintenance of Surviving Spouses Act was concerned, the Constitutional Court acknowledged that whilst the decision in the *Volks* case was directly applicable to the claim lodged by Ms Bwanya, the court was not bound by the precedent set by the *Volks* decision.[65] As such, the Constitutional Court held that the definition of the word "spouse" in the Maintenance of Surviving Spouses Act should be amended to include the words "or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support."[66]

4.2 Tacit universal partnerships: *societas universorum bonorum*

As stated above, despite the fact that the courts were prepared to use the rules of s*ocietas universorum quae ex quaestu* to assist partners in a domestic partnership, this form of universal partnership is not essentially 'universal" and is usually reserved for and limited to commercial dealings. For this reason, the court in *Butters v Mncora*[67] found that the recognition of domestic partners entering into a universal partnership in the form s*ocietas universorum bonorum* was a more appropriate remedy as it is not restricted to commercial undertakings and is a partnership of the common property of the parties, both present and future.[68] The main distinguishing difference between s*ocietas universorum quae ex quaestu* and s*ocietas universorum bonorum* is that for the latter it is not required for both partners to the domestic partnership to have made a contribution to the business side of things.[69]

[63] *Bwanya v The Master of the High Court* 2022 (3) SA 250 (CC) para 1 & 2.
[64] *Bwanya v The Master of the High Court* 2022 (3) SA 250 (CC) para 92.
[65] *Bwanya v The Master of the High Court* 2022 (3) SA 250 (CC) para 47.
[66] *Bwanya v The Master of the High Court* 2022 (3) SA 250 (CC) para 81.
[67] 2012 (4) SA 1 (SCA).
[68] *Butters v Mncora* 2012 (4) SA 1 (SCA) 6.
[69] The running of the household and caring for the children would be regarded as a contribution.

The decision in *Butters v Mncora* finally settled the following issues; firstly, as to whether a tacit universal partnership extends beyond commercial undertakings; and secondly, whether the contribution by each party to the partnership must be confined to profit making. The facts of the case were that the appellant and respondent lived together as husband and wife for a period of twenty years without formalizing their relationship through marriage, despite being engaged for a period of ten years.[70] In the court *a quo,* the Eastern Cape High Court, a decided in favor of the applicant (respondent) and held that a universal partnership existed between the parties. As a result, the court awarded the applicant an amount equal to 30 percent of the appellant's (defendant's) net asset value at the date the partnership ended.[71]

On appeal, the SCA confirmed that the requirements for a partnership as established by Pothier had become a well-established part of South African law and that it has been applied to universal partnerships in respect of domestic partnerships.[72] As such domestic partnerships does not give rise to special legal circumstances.[73] However, the court held that a partner to a domestic partnership can invoke the remedies available in private law, provided that the requirements for that remedy can be established. In this matter the respondent based her claim on the law of universal partnership, alleging that she and the appellant had lived as partners for nearly twenty years. Mention must be made of the fact that the only question for determination on appeal was whether a tacit universal partnership existed between the appellant and respondent.[74] In other words, that the parties were not only living together as husband and wife but were in fact also partners in the legal sense.

In order to determine whether an universal partnership did indeed exist the SCA considered the three essential elements of partnership,[75] namely, that each of the parties brings something into the partnership or bind themselves to bring something into the partnership; secondly, that the partnership business must be carried on for

[70] *Butters v Mncora* 2012 (4) SA 1 (SCA) para 2.
[71] *Butters v Mncora supra* 2012 (4) SA 1 (SCA) par 3.
[72] *Butters v Mncora supra* 2012 (4) SA 1 (SCA) par 17.
[73] *Butters v Mncora* 2012 (4) SA 1 (SCA) para 17.
[74] *Butters v Mncora* 2012 (4) SA 1 (SCA) para 3.
[75] The South African courts have over the years accepted the formulation by Pothier in respect of the essential elements of a partnership (see Pothier, 1853).

the joint benefit of both parties; and thirdly, that the object of the partnership should be to make a profit.[76] In its consideration of the first element, the SCA undertook a historical analysis of the law of universal partnership and established that Roman-Dutch law also recognized universal partnerships, including universal partnerships between cohabitees. Two kinds of universal partnerships are recognized, namely, ones where the parties agree to put in common all their property present and future; and those where the parties agree that whatever is acquired during the existence of the partnership from every kind of commercial undertaking, will be partnership property. The SCA stated that the requirements for a partnership as formulated by Pothier had become a well-established part of our law and have as such been applied by the courts to universal partnerships in general and universal partnership between cohabitees in particular. The SCA furthermore stated that there was therefore no need to establish special requirements for universal partnerships between cohabitees.[77] When applying Pothier's first element, the SCA accepted that a universal partnership can extend beyond purely commercial undertakings and, furthermore, that the contributions of the parties need not match each other from a commercial perspective. In this matter the appellant, Butters, spent his time establishing and growing a very successful commercial venture which was registered solely in his name. It was accepted that the respondent's contribution to the appellant's business was insignificant as the respondent admitted during cross-examination that she had virtually nothing to do with the business and had in fact never entered the premises of the business in Grahamstown.[78] However, the respondent's contribution to the notional partnership enterprise was taken into consideration by the SCA as she devoted her time, energy and effort in promoting the interests of both parties by maintaining their common home and taking care of their children.[79] In essence, the partnership entered into between the cohabitees comprised the commercial enterprise of one partner, their common home and their family life.

With regard to Pothier's second element which requires that the partnership must be carried on for the joint benefit of both parties, the SCA held that in circumstances

[76] *Butters v Mncora* 2012 (4) SA 1 (SCA) para 11.
[77] *Butters v Mncora* 2012 (4) SA 1 (SCA) para 17.
[78] *Butters v Mncora* 2012 (4) SA 1 (SCA) para 9.
[79] *Buuters v Mncora* 2012 (4) SA 1 (SCA) para 19.

where the parties were in a cohabitative relationship of a long standing nature, it had no conceptual difficulty with concluding that a partnership agreement existed. The SCA was satisfied that a partnership which comprised of both their family life and the commercial enterprise which was carried on for the joint benefit of both parties, existed between the parties. Recognition was therefore given that one partner's non-financial contribution towards their joint family life was just as valuable, if not more so, than a negligible monetary contribution. The court in fact mentioned that it was with some sense of relief that it was freed from the restraints of regarding universal partnerships as being confined to commercial enterprises as this allowed the court to evaluate the contribution of those in the same position as the respondent in its true perspective.[80]

Applying the third element which required that the object of the partnership should be to make a profit, the SCA held that on the evidence it was clear that the all-embracing venture pursued by the parties, was aimed at a profit; a profit which the parties had tacitly agreed to share.

The appeal was accordingly dismissed with costs. From the judgment in *Butters v Mncora* the following with regard to universal partnerships has been confirmed:[81]

a) "Universal partnerships which extend beyond commercial undertakings were part of Roman and Roman-Dutch law and still form part of our law.
b) A universal partnership of all property does not require an express agreement and can come into existence by tacit agreement derived from the conduct of the parties.
c) The requirements for a universal partnership of property, including universal partnerships between cohabitees, are the same as those which were formulated by Pothier for partnerships in general.
d) In situations where the conduct of the parties is capable of more than one inference, the test to determine the existence of a tacit universal partnership is whether it is more probable than not that a tacit agreement had been reached."

[80] *Butters v Mncora* 2012 (4) SA 1 (SCA) para 22.
[81] *Butters v Mncora* 2012 (4) SA 1 (SCA) para 18.

The decision in the *Butters v Mncora* paved the way for the extension of protection for domestic partners as shortly after this decision, the Supreme Court of Appeal in P*aixao v Road Accident Fund*,[82] once again assisted the surviving partner of a domestic partnership who lodged a claim for benefits from the Road Accident Fund where her partner was killed in a motor car accident. Using the principles for a dependants' action for loss of support that was established in *Santam Bpk v Henery,*[83] The Supreme Court of Appeal that the deceased had a duty to support Ms Paixao and that this duty was legally enforceable because the deceased and Ms Paixao had concluded a tacit contract for mutual support which was inferred from examining the history circumstances and conduct of Ms Paixao and the deceased partner.[84] The court, furthermore, concluded that in respect of whether Ms Paixao right to support was worthy of legal protection, that this was indeed the case, in fact, the general sense of justice in the community demanded this.[85] The court stated that due to a change in the *boni mores*, domestic partnerships are commonplace and no longer frowned upon by the community as disgraceful behaviour.[86]

As discussed above, the decision in *Bwanya v Master of the High Court* also further improved the untenable situation in which domestic partners find themselves.

Besides the courts coming to the assistance of domestic partners, the domestic partners can also themselves regulate the patrimonial aspects of their partnership by entering into a contract. The following section deals with domestic partnership contracts.

4.3 Domestic partnership contracts

Mention must be made of the fact that where parties rely on implied universal partnerships it entails major risks for such parties. The better option for domestic

---

[82] 2012 (6) SA 377 (SCA).

[83] 1999 (3) SA 421 (SCA). A dependant can bring a claim for loss of support provided the following requirements are met, namely, the deceased had a duty to support the claimant, the duty was legally enforceable, and, the claimant's right to support was worthy of legal protection as determined by the *boni mores* (the legal convictions of the community).

[84] P*aixao v Road Accident Fund* 2012 (6) SA 377 (SCA) paras 18 & 19.

[85] *Paixao v Road Accident Fund* 2012 (6) SA 377 (SCA) para 36.

[86] *Paixao v Road Accident Fund* 2012 (6) SA 377 (SCA) para 35.

partners would be to regulate the various aspects of their relationship by means of a domestic partnership contract either to keep separate or to pool their resources, or to provide for some other mechanism for sharing their property, and the regulation of their affairs (Sinclair & Heaton, 1996: 281). Provided that the domestic partnership contract complies with the general requirements of contract and it is not *contra bonos mores*, the parties can regulate almost anything by contract (Barratt, Denson, Domingo, Mahler-Coetzee & Osman, 2023: 333). It is however advisable that the domestic partnership contract include the following provisions, for example:

a) If the common home is co-owned, co-ownership including the proportion of the respective shares must be reflected in the deed or if the property is owned by one partner exclusively, arrangements should be made for reimbursements to the non-owner for any improvements done to the property at the latter's expense.
b) A procedure for the division of household goods at the termination of the relationship should also be included in the contract.
c) Provision should also be made for maintenance after the relationship is terminate.
d) Provisions regulating financial matters during the relationship should also be included in the domestic partnership contract.[87]
e) Where the parties wish to make arrangements regarding succession, a valid will should be drafted (Schwellnus, 2001).

The entering into of domestic partnership contracts obviously has many advantages, but it should not be regarded as the panacea for the problem of regulating domestic partnerships, for the following reasons:

a) Contractual regulation is reserved largely for the sophisticated, literate middle class and rarely caters effectively for the most vulnerable members of society.
b) Couples who enter into a domestic partnership contract at an early stage of their relationship may not be willing to think of the consequences of a possible breakdown of the relationship.

[87] This should be limited to the division of expenses on a pro-rata or equal basis unless the parties agree that the one cohabitee is to support the other party during the relationship if such partner is unemployed or staying at home to take care of children born from the relationship.

c) The domestic partnership contract which is concluded at the beginning of the relationship may not make provision for changed circumstances, for example, the birth of a child from the union.
d) Where intimate relationships are concerned, partners to such relationship seldom bargain on an equal footing and more often than not it is the women who are more risk averse than the men (Sinclair & Heaton, 1996: 281).

The reality of gender inequality in South Africa, especially the lived realties of many women who find themselves in a domestic partnership cannot be ignored.[88] Gender inequality is further entrenched by not granting legal recognition to domestic partnerships as non-recognition means that very little or no legal protection is afforded to the economically vulnerable domestic partner when the relationship is terminated. To this extent, the court in *Volks NO v Robinson* stated that it was the duty of the legislature to enact legislation to regulate domestic partnerships in order to ensure that economically vulnerable domestic partners are 'not unfairly taken advantage of'.[89]

Despite the above distinct disadvantages of the domestic partnership contract, the latter may have a very important role to play in regulating domestic partnerships in South Africa as planning should ultimately help the relationship work in that it clarifies the expectations of the partners and could also serve as an early warning of possible future problems.

5 The consequences of domestic partnerships

As a general rule the law attaches no automatic consequences or special legal consequences to domestic partnerships, no matter how long one relationship has lasted. However, as mentioned earlier, the reality of domestic partnerships is that it does have consequences, especially when the relationship is terminated either by the death of one of the partners or where the partners decide to break up. For this reason, it is, therefore, submitted that legal recognition should be afforded to domestic partnerships. These legal consequences will be discussed hereunder.

[88] *Volks NO v Robinson* 2005 5 BCLR 446 (CC) para 110.
[89] *Volks NO v Robinson* 2005 5 BCLR 446 (CC) para 65.

5.1 Property acquired prior to and during the relationship

Domestic partnership *per se* does not give rise to any automatic property rights in the sense that in the absence of a proven universal partnership property acquired prior or during the domestic partnership belongs to the party who so acquired the property. In other words, no community of property is established. This can present a major problem since of the consequences of establishing a permanent and lasting relationship is the sharing of a joint home.

More often than not, where both parties to the relationship are separate homeowners, the one gives up and sells his or her home to live with the other party. Over the years, the proceeds of the sale may be spent and used for the benefit of the new household. When the relationship is terminated, the following questions arise:

a) Whether the non-owner party is entitled to any part of the joint home; and
b) If he or she is so entitled, to what percentage of the joint home is she/he entitled to?

In South Africa where the law has not seen it fit to relieve the plight of cohabitants, it is suggested that domestic partners themselves enter into contracts to govern the financial and other consequences of their relationship. This contract should ideally be reduced to writing, witnessed and signed, either by the parties on their own or with the assistance of a legal advisor. Where immovable property is purchased and paid for by both parties, such property should be registered jointly in their names so that they become joint owners of the property. The same principle should be applicable when they lease property - the lease should be entered into by both parties. In the event of property already being registered in the name of one of the cohabitees as sole title holder, the entitled holder could consent to an alteration of the deed of property so that the property can be registered in both their names where the parties acquire goods jointly and they are unable to agree upon the manner in which the goods are to be divided upon termination of the relationship, either one of the parties may approach the court for relief by instituting the *actio communi dividundo*. The court has a wide discretion and may make any order that it deems to

be fair and equitable in the circumstances.[90] In addition to the suggestions as to what the parties themselves can do to protect themselves within the domestic partnership, there is also a need for legislative reform to regulate the rights of cohabiting partners as is the case, for example, in Sweden where the Cohabitees (Joint Home) Act 1987 created a distinct proprietary regime for cohabitants, which in some respects resembles deferred community of property Sinclair & Heaton, 1996: 297). It applies mainly to the common home and household goods acquired for joint use. On termination of the domestic partnership these goods are, in principle, shared equally. However, the court has a residual discretion to allow either party to retain more than half of his or her property if it is unreasonable for the property to be transferred to the other party. The Act also empowers the court to transfer rights to accommodation held in tenancy.[91] The Act also applies to homosexual cohabitants. The cohabitants are also at liberty to exclude the operation of the Act in a written contract.

5.2 Maintenance and loss of support

Where the couple is married, there exists a legal duty to support each other during the subsistence of their marriage.[92] The general rule as far as maintenance between cohabitants is concerned, is that neither party can claim maintenance from each other, either while they are living together or after the termination of the relationship (Clark, 1999: 254). In other words, no reciprocal duty of support exists between domestic partners as in the case of spouses because the domestic partnership is never fully equated with marriage (Hutchings & Delport, 1992: 122). In other words, a duty of reciprocal maintenance does not arise automatically at common law between domestic partners. However, a duty of support between domestic partners can exist for the purposes of the Maintenance Act[93] provided they have agreed to this.[94]

---

[90] The court may order the one partner to pay a certain amount to the other in order to equalize the division or award the said property to one cohabitee subject to the condition that he pay compensation to the other cohabitee.

[91] For a discussion of the Cohabitees (Joint Homes) Act see Bradley "The Development of a Legal Status for Unmarried Cohabitation in Sweden" 1989 *Anglo-American LR* 322.

[92] *Union Government (Minister of Railways and Harbours v Warneke* 1911 AD 657 at 663; *Wiham v Minister of Home Affairs* 1989 1 SA 116 (ZH) at 131. See Clark, 1999: 235.

[93] 99 of 1998.

[94] *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

Whatever money has been spent during the course of the relationship cannot be reclaimed by one cohabitee from the other unless a claim for unjust enrichment can be proved (Schwellnus, 1995: 142). For example, where the relationship of an unmarried couple is terminated during the parties joint lives, and the one party has rendered him or herself financially dependent on the other party, he or she would only be entitled to a contribution for services rendered on the grounds of unjust enrichment in order to achieve "justice between man and woman" (Hutchings & Delport, 1992: 123).

Neither party to a domestic partnership may bind the other in contract for household necessities, unless the one has appointed the other as his or her agent.[95]

Where a cohabitee has been previously married and a maintenance order has been awarded against him or her, such maintenance order is not affected by virtue of the fact that he or she is now cohabiting with someone else. The maintenance order can be subject to a stipulation that the person to whom maintenance has been granted, would cease to receive maintenance if he or she should enter into a cohabitative relationship with another person. Where no such stipulation exists, maintenance normally ceases at the death or remarriage of the receiver of such maintenance.[96] Where such stipulation does indeed exist, the meaning of "living together as man and wife include:"

a) Living together under the same roof;
b) Establishing, maintaining and contributing to a joint household; and
c) Maintaining an intimate relationship, in respect whereof sex is not an essential concomitant (Schwellnus, 2001).

Where the person who is obliged to pay maintenance enters into a cohabitative relationship, such relationship will have no effect on his ability to pay maintenance to an ex-spouse, the general rule being that a second wife or partner should accept the new partner as they find him or her, with the obligations to ex-spouses not being influenced by the new relationship (Midgley, 1984: 54).

---

[95] *Thompson v Nodel Steam Laundry Ltd* 1926 TPD 674; Sinclair & Heaton, 1996: 284.

[96] *Drummond v Drummond* 1979 1 SA 161 (A); *Ex Parte Dessels* 1976 1 SA 851 (D) in which a similar provision in a will was found valid and enforceable.

As the fact of domestic partnership does not create a duty of support between domestic partners, the general rule is that there is no action for loss of support against a third party who unlawfully causes the death of a cohabitant who has been supporting his or her partner. This is the position even where parties have *inter se* agreed to support each other because the law states that a claim for damages as a result of loss of support lies only if the duty to support exists by operation of the law.[97] The exception to the above general rule exists in the form of section 1 of the Compensation for Occupational Injuries and Diseases Act[98] which includes the cohabitants in the formulation of "dependent" thus:
"If there is no widow or widower…a woman or a man with whom the employee was in the opinion of the commissioner at the time of the accident living as husband or wife…and who was in the opinion of the commissioner at the time of the accident wholly or partly financially dependent upon the employee."

Despite the fact that the said Act includes a cohabitee as a dependent of an employee in terms of the definition in section 1, the Act still contains a discriminatory aspect since although the Act contains a presumption that a spouse was dependent on the workman, no such presumption exists as far as the cohabitee is concerned. The latter has to prove dependency unaided by any presumption (Sinclair & Heaton, 1996: 285).

5.3 Succession

5.3.1 Intestate Succession

Where the domestic partnership is terminated by the death of one of the cohabitees, no automatic right of inheritance exists and the surviving partner is not automatically regarded as an heir or dependent (Hutchings & Delport, 1992: 122). In terms of the Intestate Succession Act, 81 of 1987, if a partner dies, the estate devolves to a spouse, and if there is no spouse, to the children of the deceased.[99] Where no such spouse or children exist, the estate of the deceased will go to the parents or other blood

[97] *Union Government v Warneke* 1911 AD 657.
[98] 130 of 1993.
[99] Sections 1(1)(a), (b) and (c).

relatives, down the line of blood relations from the closest to the furthest.[100] Where the deceased has no blood relatives, the estate will devolve *bona vacantia* to the state, despite the fact that the deceased and the surviving partner were cohabiting. Therefore, no right of intestate succession exists between domestic partners.[101]

5.3.2 Testate Succession

There exists no legal obstacle to prevent one cohabitant from making specific provision by will for the other cohabitant. In fact, nothing precludes a cohabitant from leaving his or her entire estate to the other partner in the relationship even to the exclusion of his or her spouse or children. The testator will, however, need to clearly state his or her intention that he or she wants the cohabiting partner to benefit from the estate.[102]

5.4 Insurance

Cohabitants may name each other as beneficiary under a life insurance policy provided the nomination is clear since a clause in an insurance policy, which confers benefits on members of the insured's "family", is not deemed to include a cohabitant. Where a policy, for example a motorcar insurance policy, covers (or excludes) passengers who are members of the insured's family, this provision does not operate to the benefit detriment of the insured's cohabitant (Sinclair & Heaton, 1996: 290).

5.5 Insolvency

Section 1 of the Insolvency Act,[103] makes specific provision for the position of cohabitants as it provides that if the separate estate of one or two spouses who are not living apart is sequestrated, the estate of the solvent and that of the insolvent

[100] Sections (1)(1)(d), (e) and (f).

[101] *Ex parte Leeuw* 1905 SC 340 at 341; *Estate Baker v Estate Baker* 1908 SC 234 at 240.

[102] *Momeen v Bassa* 1976 4 SA 338 (D). The testator died survived by two wives: one to whom he as legally married, and one to whom he was married according to Islamic rules. In his will he left certain benefits to his "wife" without making it clear which one he meant. The court assumed that the absence of evidence to the contrary, it has to be assumed that he meant his legal wife.

[103] 24 of 1936.

spouse vest, first in the Master, and then in the trustee. The estate of the solvent spouse will only be released if it can be proved that the estate was so acquired by the solvent by a title, which cannot be assailed by the creditors of the insolvent spouse (Sinclair & Heaton, 1996: 290). Section 21 (3) of the above Act further provides that a woman who is living with a man as his wife, and a man who is living with a woman as her husband, are included in the definition of spouse.[104] Section 21 of the Insolvency Act is subject to criticism as despite the fact that cohabitees do not enjoy the benefits and privileges afforded to married couples, they are subjected to the treatment given to married couples when one partner becomes insolvent.

5.6 Pension

In terms of the rules of pension funds, pension benefits may after the death of the member of the fund, be paid either to the dependents of the deceased member, or to a nominee or to both dependants and nominees in any proportion the trustees of the fund judge to be fair. In *Rory Martin and Beka Provident Fund*[105] the Pension Funds Adjudicator was called upon to consider the validity of the Pension Fund's decision to pay spousal benefits to the same-sex life partner of one of its members. From the evidence presented, the adjudicator found that it was clear that the complainant was a factual dependent of the deceased.[106] From the above it can be deduced that even though there exists no legal obligation on one cohabitant to maintain the other, one cohabitant can qualify as a factual dependent, if the one did indeed maintain the other.

In terms of the Military Pensions Act,[107] cohabitees are afforded the same status as that of married couples with regard to claims concerning military personnel. In terms of the said Act the definition of "wife" includes a woman who is the mother of a natural child under the age of eighteen years and who is regularly maintained by the member as well as woman with whom the member lived together as man and wife

[104] *Chaplin No v Gregory* 1950 3 SA 555 (C). The insolvent lived with another woman, apart from his wife. The court held that the estate of his wife and not his cohabiting partner vested in the trustee.
[105] PFA/GA/563/99.
[106] See also section 31 of the Special Pension's Act, 60 of 1996, which extended its definition of "spouse" so as to include cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years.
[107] 84 of 1976.

for a period of at least five years immediately prior to the commencement of his military service.

In addition to the above, section 1 of the Pension Funds Act[108] defines the term "spouse" to include a person who is the permanent life partner.

5.7 Children born from domestic partnerships

Before the enactment of the Children's Act[109] children who are born from a domestic partnership were regarded as children being born of unmarried parents (Cronje & Heaton, 1999: 49). The consequence hereof was unless such children were rendered legitimate by the subsequent marriage of their natural parents, they would not be able to succeed to their natural father on intestacy (Cronje & Heaton, 1999: 76). This position has been amended by section 1(2) of the Intestate Succession Act which no longer differentiates between legitimate and illegitimate children with regard to their right to inherit from their natural parents. In terms of the Births and Deaths Registration Act,[110] the child of an unmarried mother adopts the surname of the mother and can only be registered under the surname of the father with the permission of the mother and the assent of the father of the child.[111] Section 10 of the Births and Deaths Registration Act does not provide for the child of unmarried parents to be registered under a double-barreled surname.

In terms of the common law, the unmarried mother exercised parental authority over her child to the exclusion of the father of the child. This was the position despite the fact that natural fathers were still under an obligation to maintain the child financially. The differential treatment between unmarried mothers and unmarried fathers as well as between married and unmarried fathers was regarded as being unconstitutional (Barratt, Denson, Domingo, Mahler-Coetzee & Osman, 2023: 155). The position of unmarried fathers in respect of their natural children is presently regulated by sections 21, 22, 23 and 24 of the Children's Act.[112] Section 21 makes provision for unmarried fathers to acquire parental rights and responsibilities.

[108] 24 of 1956.
[109] 38 of 2005.
[110] 51 of 1992.
[111] Section 10.
[112] 38 of 2005.

Provided the unmarried father meets the criteria as set out in terms of section 21, he will be deemed to be in the same legal position with regard to his child as if he were married to the mother of the child. The parental rights and responsibilities acquired by an unmarried father in terms of section 21 includes caring for the child, maintaining contact with the child, acting as the guardian of the child and contributing towards the maintenance of the child. Section 22 of the Children's Act provides that where the unmarried father does not automatically acquire full rights and responsibilities in terms of section 21, he can still acquire parental rights and responsibilities in respect of his child if he enters into a parental responsibilities and rights agreement with the mother of the child (Barratt, Denson, Domingo, Mahler-Coetzee & Osman, 2023: 155).

Such agreement will, however, only take effect upon registration with the family advocate or if it is made an order of the High Court or the children's court. In terms of section 23 of the Children's Act, the biological father of the child can also make an application for to court for the assignment of certain parental rights and responsibilities. Whilst section 23 appears to have unmarried fathers in mind, it is not limited to them as "any person having an interest in the care, well-being or development of a child" can approach the court for an assignment of certain rights and responsibilities. In determining whether or not to grant the application the court will take into account whether this is in the best interest of the child. In other words, any person could include the grandparents or other relatives of the child. Section 24 makes provision for the biological father to apply to the High Court for guardianship to be awarded to him. Once again, section 24 is not limited to an application by the biological father as the High Court can assign guardianship to anyone who has an interest in the care, well-being or development of a child, provided this is in the best interests of the child. Mention must be made of the fact that in terms of section 21(2) of the Children's Act, a biological father always has a duty to contribute toward the maintenance of the child even where he has no other parental rights and responsibilities in terms of sections 21, 22, 23 and 24 as discussed above.

The position before the enactment of the Children's Act was that single or divorced persons were allowed to adopt children, but at the termination of the domestic partnership, the domestic partner of the adoptive parent was deemed to have no rights of access to such child and could be held liable for the maintenance towards such child (Schwellnus, 2001). This was the position even though both parties to the

domestic partnership may have agreed to the adoption whilst in the relationship. Furthermore, on the death of the adoptive parent, the deceased's partner did not automatically become the adoptive child's guardian.[113] Section 231(1) of the Children's Act has remedied the situation described above as partners who are in a permanent domestic life-partnership are allowed to a jointly adopt a child. Furthermore, in terms of section 231(1)(c) a person in a permanent domestic partnership may also adopt the child where the other partner is the parent of the child. Once the adoption order is granted by the court, the adopted child is regarded as the child of the adoptive parents for all intents and purposes and similarly, the adoptive parents are regarded as the child's parents for all purposes. In other words, the adoptive parents acquire full parental rights and responsibilities as if they were the biological parents of the child (Barratt, Denson, Domingo, Mahler-Coetzee & Osman, 2023: 155).

6 Legal developments regarding cohabitative relationships after the enactment of the Constitution

6.1 Introduction

Since the enactment of the Constitution important legal developments have taken place in the field of family law.[114] These developments point to a recognition by the lawmakers and the courts that the notion of family is influenced by culture and changes over time. There is also a recognition that the nucleus model of a single – general, heterosexual civilly married couple with children born within the marriage – is neither the norm not the only form of family that deserves legal recognition. Since the enactment of the equality clause, strong arguments have been advanced for viewing domestic partnerships as a form of family that deserves legal protection and recognition for to single out marriage as the only protected institution would

[113] This was the position for both heterosexual and gay and lesbian couples. See Steyn, 1998: 115.

[114] The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, can be cited as an example which gives greater effect to the constitutional guarantee of equality in section of the final Constitution. In terms of section 6 the Act prohibits discrimination against any person, the prohibited grounds for discrimination include marital status and sexual orientation. Furthermore, section 34 of the said Act refers to the possible inclusion of the grounds of "family responsibility" and "family status" within the listed grounds of discrimination. The Employment Equity Act, 55 of 1998, can also be cited as an example since it contains the ground of discrimination on the basis of family responsibility.

constitute unfair discrimination.[115] Legislation[116] has been enacted which shows a greater acknowledgement and recognition of domestic partnerships. The recognition of domestic partnerships in such legislation is an important development in terms of reflecting the current *mores* of South African society. However, partners to domestic partnerships are now confronted with a plethora of statutory provisions, many with different requirements, due to *ad hoc* recognition by the legislature.[117] It is important that domestic partnerships be granted legal recognition uniformly as consistency is vital.

Furthermore, as a result of the enactment of the Constitution,[118] South Africa entered into a new era of constitutional development whereby it committed itself to an open and democratic society based on freedom and equality.[119] As a result all South Africans are guaranteed basic human rights and freedoms.[120] For the first time in the history of South Africa, there is a Constitution that contains a Bill of Rights where equality and freedom underpin its very foundation. Section 7(1) describes the Bill of Rights as the cornerstone of democracy that affirms the democratic values of human dignity, equality and freedom (Woolman & Bishop, 2014: 35). The achievement of the ideals set out in the Constitution essentially involves the eradication of all forms of inequality, whether it be based on, for example race, gender, marital status, religion or sexual orientation.[121]

---

[115] The courts have accepted this argument where it has been made by partners in a gay and lesbian relationship. See*: Langemaat v Minister of Safety and Security supra*; *V v V* supra; National Coalition for Gay and Lesbian Equality v Minister of Home Affairs supra; Satchwell v *President of the Republic of South Africa and Others supra*; and *Du Toit and Another v Minister for Welfare and Population Development and Others supra.*

[116] Examples of such legislation include, *inter alia,* Income Tax Act 58 of 1962; Estate Duty Act 45 of 1955; Insolvency Act 24 of 1936; Domestic Violence Act 116 of 1998.

[117] At present there is no general legal recognition of domestic partnerships.

[118] Constitution of the Republic of South Africa, 1996.

[119] S 1 of the Constitution. See also Sinclair & Heaton, 1996.

[120] S 7 of the Constitution. See also Albertyn & Kentridge, 1994.

[121]

S 9 of the Constitution states: *"(1) Everyone is equal before the law and has the right to protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No persons may unfairly discriminate or indirectly*

The State is therefore placed under an obligation to respect, protect and fulfil all the rights contained in the Bill of Rights. The theme of an open and democratic society, based on freedom and equality, is advocated throughout the Bill of Rights.

Given South Africa's long history of institutionalized discrimination, oppression and subjugation of certain groups in society, it is hardly surprising that equality occupies a prominent place in the South African Constitution. In reaction to this long history of prejudice, exclusion and discrimination, the Constitution contains an elaborate equality clause in section 9. In order to promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken. Apart from the equality clause in section 9, courts and tribunals are also encouraged to "promote the values that underlie an open and democratic society based on human dignity, freedom and equality" elsewhere in the Bill of Rights.[122]

The enactment of the Constitution with its Bill of Rights has impacted significantly on South African family law, since marital status is one of the grounds listed in terms of section 9(3) of the Constitution. Therefore, to treat domestic partners differently spouses married in terms of civil marriage and not to afford the domestic partners the same protection as that of spouses is tantamount to unfair discrimination which is in contravention of the Constitution. There appears to be no rational justification for Parliament not to grant legal recognition to domestic partners. It is submitted it is unconstitutional on the ground of marital status that the same protective measures and benefits are not granted to domestic partners as that granted to spouses who enter into civil marriages. In terms of section 9(3) of the Constitution, marital status is listed as one of the prohibited grounds. The discrimination against domestic partners on the basis of marital status is, therefore, presumed to be unfair. Once the discrimination is found to be unfair, it must then be established whether the discrimination is justifiable. There appears to be no cogent reasons as to justify the unfair discrimination against domestic partners. In fact, the Constitution requires

against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[122] Ss 36(1) and 39(1)(a).

family law to accommodate, respect and protect diversity and so acknowledge that there are alternate lifestyles existing in present day South Africa. In *Minister of Home Affairs v Fourie (Doctors for Life International & Others*, *Amici Curiae; Lesbian & Gay Equality Project v Minister of Home Affairs)*[123] it was stated that the Constitution affirms the right to be different and celebrates the diversity of the nation. Furthermore, whilst the Constitutional Court has identified marriage as a social institution which is of vital importance,[124] this does not mean that the institution of marriage is the end and be all and that it should be regarded as being more important than other relationships, permanent domestic partners, in particular. Despite these sentiments expressed by the Constitutional Court, the reality is that the legal protection and recognition afforded to civil marriages are not extended to domestic partners irrespective of the number of years that they are living together. The Constitutional Court has, therefore, failed in its duty to grant legal protection and recognition to domestic partnerships.

To address this, the legislature has proposed the enactment of legislation. the draft Domestic Partnership Bill of 2008 was tabled in Parliament in 2008. The SALRC also proposed the Single Marriage Statute in 2019. The proposed legislation is discussed hereunder.

6.2 The Draft Domestic Partnership Bill

6.2.1 Historical background

In 2001 the South African Law Reform Commission (SALRC) issued a Questionnaire to elicit responses to as to whether law should intervene to impose rights and obligations between domestic partners so as to regulate domestic partnerships. Such responses were to serve as a basis for the Commission's deliberations. The aim of the Commission's investigation was to harmonize the lack of legal recognition granted to cohabitees and rights of equality and dignity contained in the Bill of Rights (South African Law Reform Commission, 2001: 1).

---

[123] 2006 (1) SA (CC) at par 60.

[124] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at par 30; Minister of Home Affairs v Fourie 2006 (1) SA (CC) at para 16.

In its Questionnaire the Commission considered proposals for possible law reform to the following issues (South African Law Reform Commission, 2001: 1):

a) Whether domestic partnerships should be legally recognized and regulated;
b) Whether marital rights and obligations should be further extended to domestic partnerships;
c) Whether a scheme of registered partnerships should be introduced;
d) Which marital rights, obligations and benefits should require registration or marriage and which should depend only on the existence of a domestic relationship;[125]
e) Whether legislation should provide for same-sex marriage;
f) Whether marital rights and obligations should be further extended to people living in interdependent relationships having no sexual element.

Furthermore, the Commission questioned whether legislation should be enacted to enable domestic partners to bring maintenance claims against their partners and if so, whether the principles should be the same as those applicable to married persons (Clark, 2002: 639). An argument against intervention would be respect for individual autonomy as the domestic partners choose not to be treated as if they had married. In other words, the law should not force on the couple the status of marriage. In terms of this argument domestic partnerships should be preserved as an alternative to marriage and not become merely a different type of marriage.

An argument in favour of legal intervention is that marriage is distinguishable from domestic partnerships by virtue of the piece of paper, which testifies to the former's existence. The nature of marriage and domestic partnerships are identical in the following respects (Sinclair & Heaton, 1996: 293):

a) Children are often born of both unions;
b) Similar emotional involvement's are created;
c) Women are often left at risk when the relationship is terminated; and

[125] The Commission outlines two basic approaches which may be adopted. Firstly, to bestow some recognition on certain domestic partnerships as a distinct status. In other words, a domestic partnership can be equated with marriage as the partners would be given the same legal benefits and burdens as those bestowed on spouses. This approach would require specific statutory extension to be enforceable. The second approach is to view domestic partnerships on the aspects arising therefrom as contractual or quasi-contractual in nature. In this regard, the impetus would come from case law and would be generally limited to the resolution of property disputes. See: Clark, 2002.

d) The creation of complex issues of finance and property.

In 2003 the SALRC released a Discussion Paper on Domestic Partnerships. In terms of the Discussion Paper domestic partnerships are subdivided into two categories, namely, registered domestic partnerships and unregistered domestic partnerships. A registered domestic partnership would allow unmarried partners to register their mutually dependent domestic relationship so as to gain official state and societal recognition (South African Law Reform Commission, 2003: 259). Registration of a domestic partnership would entail that the parties to such relationship ascribe to a legally prescribed procedure by which the couple publicly commits to their relationship. Registration of such partnership would have the following consequences (South African Law Reform Commission, 2003: 11):

a) The partners to the relationship obtain certain rights and obligations which to some extent mirror marital legal consequences; and
b) A public record is created of the existence of the domestic partnership.

The registered partnership model as proposed by the SALRC affirmed the basic principles and values which ought to guide the regulation of close personal adult relationships, these being: equality and respect for diversity on the one hand, and autonomy and freedom of choice on the other.

The SALRC, however, also acknowledged that a registered domestic partnership would not be suitable for a vulnerable partner in an intimidating relationship.[126]

The SALRC therefore proposed another category of domestic partners, namely, those who are not registered in terms of the Bill. In terms of unregistered domestic partnerships, the SALRC proposed that such partnerships be granted recognition via ascription.

Ascription entails the process whereby unmarried domestic partners are awarded a civil status by legislation as if they have formally committed to the relationship, without them having taken any steps to effect such recognition. In other words, a particular status automatically attaches to the relationship after a certain period or

[126] The vulnerable partner may not be able to convince the stronger partner to register the relationship.

under certain circumstances.[127] Couples need not be aware of the existence of the legislation for it to apply to them. As such, ascription is particularly valuable for vulnerable partners who cannot convince their partners to register the relationship under a registered partnership model.

The proposals advanced by the SALRC in its Discussion Paper were by no means the final recommendations of the Commission. The proposals were put forward for evaluation and consideration by means of a series of regional workshops which were held in October 2003. The preliminary conclusions of the SALRC, as set forth in the Discussion Paper, can be summarized as follows (South African Law Reform Commission, 2003: 334):

- Same-sex relationships are to be acknowledged by the law.
- Partnerships (both same-sex and opposite sex) will come into being by way of consensus/private contract but with the option of registration.
- The availability of benefits during the existence of the partnership without registration must be limited.
- At the end of the unregistered partnership any party may approach the court for an equitable distribution of property on the bases of status subject to specific criteria.

6.2.2 The draft Domestic Partnership Bill, 2008

The publication of the draft Domestic Partnership Bill on the 14 January 2008 seemed to indicate that the legislature opted in favour of legislation to grant legal recognition to domestic partnerships. Despite the fact that after the publication of the draft Bill, only a month was given for the submission of public comments in respect thereof, the Bill's journey towards enactment and the legal recognition of domestic partnerships is proceeding at a snail's pace (Barratt, Denson, Domingo, Mahler-Coetzee & Osman, 2023: 342). As such, no legislation has to date been enacted to regulate domestic partnerships.

The proposed provisions of the draft Domestic Partnership Bill in respect of the regulation of property, maintenance, children and succession very closely resemble those provisions which apply to spouses in a civil marriage in terms of the Marriage

[127] This model is also referred to as a presumption based model.

Act[128] or civil partnership in terms of the Civil Union Act.[129] The objective of the draft Bill is to grant legal recognition to domestic partners and afford them the same spousal consequences conferred on spouses when they enter into a civil marriage or civil partnership. The draft Bill furthermore seeks to protect domestic partners should the domestic partnership be terminated by making provision for the regulation of financial matters which arise as a result of such termination.

The draft Bill distinguishes between registered and unregistered partnerships.[130] In order for the domestic partnership to be registered the following criteria must be complied with:

a) Both parties must be over the age of 18 years;[131]
b) At least one of the partners must be a South African citizen;[132]
c) A registration officer who is designated by the Minister of Home Affairs as such must register the domestic partnership;[133]
d) Both partners must sign the prescribed register in the presence of the registration officer. The latter is also to sign the register to certify that the partners have voluntarily registered their partnership and signed it in the registration officer's presence.[134]

In contrast, a domestic partnership is regarded as unregistered if it has not been registered in terms of the Bill or where not all the requirements for registration as set out in the Bill have been complied with.[135] In other words, the partners to a domestic partnership have made no effort to formalize their relationship. The position with regard to property acquired prior to and during the domestic partnership of a registered partnership in terms of the draft Bill will firstly be addressed and thereafter the position of property in an unregistered partnership.

---

128 25 of 1961.

129 17 of 2006.

130 Chapter 3 of the draft Bill deals with registered domestic partnerships and chapter 4 deals with unregistered domestic partnerships.

131 Clause 6(1) of the Draft Domestic Partnerships Bill, 2008.

132 Clause 4(6) *supra.*

133 Clause 5 *supra.*

134 Clause 6 *supra.*

135 See Definitions in Chapter 1 of the Draft Domestic Partnership Bill, 2008.

Unlike a marriage entered into in terms of civil where the spouses are deemed to be married in community of property unless they enter into an antenuptial contract, there is no general community of property between spouses in a registered domestic partnership.[136] However, provision is made for the partners of a registered domestic partnership to enter into a domestic partnership agreement whereby the parties can agree on the ownership and future distribution of their property.[137] Clause 8 as read with clause 22 provides for court division of the partnership property, in particular where the domestic partnership has been terminated. Clause 22 closely resembles section 7 of the Divorce Act[138] as it provides that a court can make an order for the division and distribution of the partnership assets in a manner that is just and equitable. In terms of clause 22(3) the court is furthermore allowed to order one partner to transfer some of his assets to the other partner.[139]

As far as unregistered domestic partnerships are concerned, if such partnership is terminated either by separation or death, one or both of the partners may apply to court for an order relating to maintenance, succession and/or property.[140] In the event of the dissolution of the unregistered domestic where the partners are able to reach agreement as to the division of partnership property, application may be made to court to make that settlement on order of court. However, where the partners cannot reach agreement as to the division of the partnership property, they may apply to court for an order in that respect.[141]

In respect of maintenance between domestic partners, the draft Bill seeks to remedy the difficulties experienced by domestic partners as at present no reciprocal duty of support exists between domestic partners, no matter how long the partnership existed.[142]

---

[136] See Property Division in Part V of the Draft Domestic Partnership Bill, 2008

[137] Clause 7(3) *supra.*

[138] 70 of 1979.

[139] Clause 22(3) is very similar to s7(3) of the Divorce Act.

[140] Clauses 26, 28, 29, 30, 31 & 32.

[141] Clause 32.

[142] See Maintenance after termination of a registered partnership in Chapter 3, Part IV of the Draft Domestic Partnership Bill, 2008. See Maintenance after termination of an unregistered partnership in Chapter 4, Part II of the Draft Domestic Partnership Bill, 2008.

In terms of clause 22(4) of the Bill a duty of support is created where the partners have registered their domestic partnership. The duty of support is dependent on the respective financial means and needs of each of the partners and extends to accommodation as both partners are entitled to occupy the family home.[143] However, the partners to a registered domestic partnership are still not allowed to bind each other in contract in respect of household necessaries and are not obligated to supply household necessities unless they included this provision in their partnership agreement (Barratt, Denson, Domingo, Mahler-Coetzee & Osman, 2023: 342).

At the termination of the registered domestic partnership, provision for ongoing maintenance can be regulated in a termination agreement.[144] Where no such agreement exists, the position is regulated by clause 18(1) which empowers the court to make an order for maintenance in favour of one of domestic partner for a specific period, or until the beneficiary's death or until the beneficiary enters into a recognized relationship, be it a civil marriage, civil partnership or a registered domestic partnership.[145] In terms of clause 18(2) several factors that the court must consider to decide whether or not ongoing maintenance are listed. These factors include, *inter alia,* the respective contributions of each partner to the domestic partnership, the age of the registered partners and the duration of the registered domestic partnership.

Should the draft Bill be enacted as legislation this will allow the surviving registered domestic partner to claim for maintenance in terms of the Maintenance of Surviving Spouses Act at the death of one of the partners.[146] Furthermore, clause 21 makes provision for a delictual claim in the event of the wrongful death of one registered partner.

The position in respect of unregistered domestic partnership in so far as maintenance is concerned is that there exists no reciprocal duty of support.[147] As such no delictual claims based on loss of support will be considered.

[143] Clause 11 of the draft Domestic Partnership Bill 2008.
[144] As in s 7(1) of the Divorce Act 70 of 1979.
[145] S 7(2) of the Divorce Act contains very similar provisions.
[146] Clause 19 of the draft Domestic Partnership Bill.
[147] Clause 27.

Notwithstanding the provisions of clause 27, the draft Bill does make allowances for the partners to make an application for maintenance where the partnership is dissolved whether due to separation or death. In terms of clause 28 where an application is made for maintenance due to the partners separating, the court may make an order which is just and equitable in respect of the payment of maintenance for a specified period. Clause 28(2) lists the factors which the court which the court must take into consideration when deciding whether or not to grant a maintenance order. An application for maintenance where the partnership is terminated by the death of one of the partners is regulated by clause 29(1) which permits the surviving partner to lodge a claim for reasonable maintenance from the deceased partner's estate until the beneficiary's death, remarriage or registration of another domestic partnership, insofar as the beneficiary is not able to provide for himself from his own earnings and means. Clause 29(1) differs markedly from clause 19 as the latter includes a registered domestic partner in the definition of "spouse" in terms of the Maintenance of Surviving Spouses Act. An unregistered partner is not deemed to be a spouse in terms of the Maintenance of Surviving Spouses Act. Clause 29 is however very similar to the provisions as contained in the Maintenance of Surviving Spouses Act. The list of factors which a court must consider in an application whether or not to grant reasonable maintenance to a surviving partner is contained in clause 30.

With regard to the right to succession, clause 20 provides that the Intestate Succession, Act 81 of 1987, apply to registered partnerships. This would mean that for the purposes of the Intestate Succession Act a partner in a registered partnership is deemed to be a "spouse" as meant in the Act. As far as unregistered domestic partnerships are concerned, clause 31 makes provision for an unregistered partner to make a court application for an order allowing him to inherit. The provisions as contained in clause 31 are very similar to the rules in the Intestate Succession Act.

Despite the SALRC embarking on roadshows throughout South Africa to promote the Domestic Partnership Bill, it did not translate into the enactment of legislation. The reasons advanced for this can be attributed to the fact that the Bill is not very well drafted, some of the provisions are unclear and often contradictory. Despite the Bill extending numerous of the legal protections which are enjoyed by spouses in a civil marriage, the time Bill is regarded as stale due to the length of time which has passed since the Bill was tabled in Parliament.

6.3.1 Single Marriage Statute

In 2019, the SALRC, embarked on an investigation as to the promulgation of legislation, namely, a single marriage statute, which would regulate all marriage and marriage-like relationships.[148] The SALRC envisaged that the proposed legislation would also regulate domestic partnerships. The Discussion Paper included two drafts of legislation, namely, the Protected Relationship Bill and the Recognition and Registration of Marriages and Life Partnership Bill. The advantages of the enactment of a Single Marriage Act which includes the regulation of domestic partnerships is that it will be a means to address the hardships, inequalities and discrimination which domestic partners experience in South Africa as a result of the lack of recognition and protection that is afforded to domestic partners.

Furthermore, by means of the enactment of general Single Marriage Statute which recognises all marriages as well as domestic partnerships, South Africa family law would be fulfilling its purpose, which include, the protection of the more economically vulnerable members of the family, the promotion of fairness within the family and the creation of legal certainty and predictability within family law. The enactment of a Single Marriage Statute will also be less time consuming and expensive as single piece of legislation will grant legal recognition to all marriages and permanent life domestic partnerships in South Africa instead of having the various family forms being granted legal recognition by separate pieces of legislation as separate pieces of legislation may also serve to further marginalize people within the South African society.

Despite the proposal by the SALRC to enact general enabling legislation in the form of a Single Marriage Statute which would also regulate domestic partnerships, this was met with resistance from various sectors of society. The Single Marriage Statute has been put on hold and to date, there has been no further movement to promulgate it into legislation.

[148] South African Law Reform Commission, 2019; and South African Law Reform Commission, 2021.

7 Conclusion

Despite the fact that the draft Domestic Partnership Bill signified a step in the right direction, it was not enacted as legislation. In the interests of justice, it is desirable that legislation be enacted that creates a jurisdiction for the fair distribution of assets on the breakdown of the domestic partnership, taking into account the realities of the economic life that the parties have shared, and the effect of the relationship on those positions. It could further be argued that legal intervention creating a set of private obligations between domestic partners would reduce the burden on the state of claims from indigent unmarried persons. Therefore, there should be a comprehensive reform of the law so as to recognize and regulate domestic partnerships. The position at present is that there is still no legal recognition of domestic partnerships, and the reality is that there is still minimal protection for domestic partners.

The absence of any legislation or otherwise regulating domestic partnerships, is wholly unsatisfactory where a dispute arises with regard to maintenance issues and the division of assets when the relationship is terminated. For example, a dispute arises between domestic partners at the termination of the relationship concerning the division of the partners' assets, the parties can choose to approach the secular courts if they cannot reach an agreement. This would necessarily involve a High Court application that is costly and time-consuming. The same would apply to a dispute regarding spousal maintenance or a dispute relating to the care and contact of a child born to the partners of the domestic partnership.

Whilst the courts have made inroads towards the assisting partners in domestic partnerships, it should be acknowledged that access to the court system is available only to those who possess the financial resources. The enactment of legislation that recognizes and regulates domestic partnerships will go a long way to regulating and protecting domestic partners in a more structured way. This, will in turn, lead to a fair and non-discriminatory dispensation and will not be limited to those instances where the spouses have the financial means to embark on litigation.

Legal intervention is therefore vital for to deny domestic partners the protection afforded to married couples or to compel couples to get married in order to qualify

for the same benefits as spouses, amounts to an unacceptable violation of their rights to equality and freedom from unfair discrimination on the ground of marital status.

References

Albertyn, C., & Kentridge, J. (1994). Introducing the right to equality in the Interim Constitution. *South African Journal on Human Rights (SAJHR)*, 10(2), 149-178.

Barratt, A., Denson, S., Domingo, W., Mahler-Coetzee, N., & Osman, F. (2023). *Law of persons and the family*. Maskew Miller Learning.

Bradley, D. (1989). The development of a legal status for unmarried cohabitation in Sweden. *Anglo-American Law Review*, *18*, 322-334.

Clark, B. (2002). Families and domestic partnerships. *South African Law Journal*, *119*, 634-648.

Clark, B. (1999). Duty of support between cohabitees. In B. van Heerden, A. Cockrell, & R. Keightley (Eds.), *Boberg's law of persons and the family* (2nd ed.). Juta.

Cronje, D. S. P., & Heaton, J. (2000). *South African family law*. Butterworths.

Hahlo, H. R. (1972). The law of concubinage. *South African Law Journal*, *89*, 321-332.

Hutchings, A., & Delport, E. (1992). Cohabitation: A responsible approach. *De Rebus*, 121-125.

Kruuse, H. (2009). "Here's to you, Mrs Robinson": Peculiarities and paragraph 29 in determining the treatment of domestic partnerships. *South African Journal on Human Rights*, *25*, 380-391.

Madzika, H. (2020). Dawn of a new era for permanent life partners: From *Volks v Robinson* to *Bwanya v Master of the High Court*. *De Jure Law Journal*, *53*, 393-406.

Meyerson, D. (2010). Who's in and who's out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa. *Constitutional Court Review*, *3*, 295-316.

Midgley, R. (1984). The effect of the cohabitative relationship on divorce proceedings. *Speculum Juris*, 52-64.

Pothier, R.-J. (1853). *A treatise on the law of partnership* (O. D. Tudor, Trans.; 1.3.8).

Schwellnus, T. (2001). Cohabitation. In B. Clark (Ed.), *Family Law Service*. LexisNexis.

Schwellnus, T. (1995). The legal position of cohabitees in South African law. *Obiter*, *16*, 133.

Sinclair, J., & Heaton, J. (1996). *The law of marriage*. Juta.

South African Law Reform Commission. (2001). *Issue Paper 17 (Questionnaire), Project 118: Domestic Partnerships.* https://www.justice.gov.za/salrc/ipapers/ip17_prj18_quest.pdf (accessed 26. 6. 2025).

South African Law Reform Commission. (2003). *Discussion Paper 104, Project 118: Domestic Partnerships.* https://www.justice.gov.za/salrc/dpapers/dp104.pdf (accessed 26. 6. 2025).

South African Law Reform Commission. (2019). *Issue Paper 35 (Single Marriage Statute), Project 144*). https://www.justice.gov.za/salrc/ipapers/ip35_prj144_SingleMarriageStatute.pdf (accessed 26. 6. 2025).

South African Law Reform Commission. (2021). *Discussion Paper 152: Single Marriage Statute, Project 144*. https://www.justice.gov.za/salrc/dpapers/dp152-prj144-SingleMarriageStatute.pdf (accessed 26. 6. 2025).
Statistics South Africa. (2024). *Marriages and divorces, 2022* (Statistical release P0307). https://www.statssa.gov.za/publications/P0307/P03072022.pdf (accessed 26. 6. 2025).
Steyn, M. (1998). From closet to constitution: The gay family rights odyssey. *Tydskrif vir die Suid-Afrikaanse Reg 97*.
Thomas, P. (1984). Konkubinaat. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, *47*, 455.
Woolman, S., & Bishop, M. (2014). *Constitutional law of South Africa* (loose-leaf ed.). Juta.

Legislation

Civil Union Act 17 of 2006 (South Africa).
Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (South Africa).
Constitution of the Republic of South Africa, 1996 (South Africa).
Domestic Violence Act 116 of 1998 (South Africa).
Maintenance of Surviving Spouses Act 27 of 1990 (South Africa).
Marriage Act 25 of 1961 (South Africa).
Recognition of Customary Marriages Act 120 of 1998 (South Africa).
Rental Housing Act 50 of 1999 (South Africa).

Bills

Domestic Partnership Bill 2008 (South Africa).

Cases

Ally v Dinath 1984 (2) SA 451 (T).
Botha NO v Deetlefs and Another 2008 (3) SA 419 (N).
Bronn v Frits Bronn's Executors (1860) 3 Seale 313.
*Butters v Mncor*a 2012 (4) SA 1 SCA.
Bwanya v Master of the High Court 2022 (3) SA 250 B (CC).
Drummond v Drummond 1979 1 SA 161 (A).
Ex parte Dessels 1976 1 SA 851 (D).
Ex parte Soobiah: In re Estate Pillay 1948 1 SA 873 (N).
Fink v Fink and Another 1945 WLD 226.
Francis v Dhanai [2006] JOL 18401 (N).
Gory v Kolver 2007 (4) SA 97 (CC).
Hyde v Hyde and Woodmansee (1866) LR 1 P and D 130.
Isaacs v Isaacs 1949 (1) SA 952 (C).
Laubscher v Duplan 2017 (2) SA 264 (CC).
McDonald v Young 2012 (1) SA 1 SCA 11.
Mühlmann v Mühlmann 1984 (3) SA 102 (A).
National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs [1999] ZACC.
Paixao v Road Accident Fund 2012 (6) SA 377 (SCA).
Ponelat v Schrepfer 2012 (1) SA 206 (SCA) 207.
Robinson v Volks NO 2004 (6) SA 288 (C).
Santam Bpk v Henery 1999 (3) SA 421 (SCA).
Satchwell v President of Republic of South Africa 2002 (6) SA 1.

Seedat Executors v The Master (Natal) 1917 AD 302.
Thompson v Nodel Steam Laundry Ltd 1926 TPD 674.
Union Government (Minister of Railways and Harbours v Warneke 1911 AD 657.
V (also known as L) v De Wet NO 1953 (1) SA 612.
Volks NO v Robinson 2005 (5) BCLR 446 (CC).
Wiham v Minister of Home Affairs 1989 1 SA 116 (ZH).

Povzetek članka v slovenskem jeziku (abstract in Slovene language):

Zakonska zveza je bila tradicionalno opredeljena kot zakonsko priznana prostovoljna zveza za skupno življenje enega moškega in ene ženske, ki izključuje vse druge, dokler traja. Ali ta opredelitev še vedno velja za Južno Afriko, je vprašljivo, saj velike spremembe v družbenih odnosih in vedenju odražajo vse večje število različnih ali alternativnih načinov življenja. Trenutno je vse več parov, ki se odločijo za skupno življenje, ne da bi svojo zvezo formalizirali v očeh zakona. Ti odnosi, v katerih pari živijo skupaj in ustvarijo skupno gospodinjstvo, se imenujejo partnerske skupnosti. Južnoafriško družinsko pravo zagotavlja pravno zaščito in priznanje le civilnim zakonskim zvezam, sklenjenim v skladu z zakonskimi določbami. Zaščita, ki jo zagotavlja civilna zakonska zveza, se ne razteza na partnerske skupnosti. Vprašanje, ki se poraja, je, ali se lahko zavrnitev zakonskega priznanja in zaščite partnerskih skupnosti (na ravni zakona) šteje za neustavno.