AANTEKENINGE

EXTENSION OF THE DEPENDANT'S ACTION TO HETEROSEXUAL LIFE PARTNERS AFTER *VOLKS NO V ROBINSON* AND THE COMING INTO OPERATION OF THE CIVIL UNION ACT – THUS FAR AND NO FURTHER?

1 Introduction

Two judgments in the same division of the High Court have resurrected the issue as to the extension of certain rights and benefits of marriage to unmarried heterosexual domestic or life partners – an issue thought to have been settled by the Constitutional Court's majority judgment in *Volks NO v Robinson* 2005 5 BCLR 446 (CC). Both cases involved the question whether the common-law dependant's action for loss of support in consequence of the wrongful and culpable killing of a breadwinner ("the dependant's action") was capable of being developed to permit the surviving partner to such a partnership to be compensated for the death of her partner that had been caused by the negligence of an insured driver.

In *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP) the court held that the survivor to a heterosexual life partnership could, in apposite circumstances, institute the action, while the same division of the court arrived at the opposite conclusion in *Meyer v Road Accident Fund* (case no 29950/2004 (T) delivered on 2006-03-28). Since the judge in *Verheem* to a large extent based his judgment on the earlier decision in *Meyer*, it is prudent to consider the facts of the latter case first. However, before doing so, a number of developments pertinent to this action must briefly be considered.

2 The development of the dependant's action

Originally providing the means by which a deceased's widow, parents and children could be compensated for the death of their breadwinner, the dependant's action was subsequently extended to provide for a widower to institute the claim and later for a husband to claim for loss of support due to non-fatal injuries sustained by his wife (see the authority cited in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) paras 7–9). Of particular relevance for this note are the instances in which the courts have extended the scope of the action beyond the realm of an existing civil marriage (ie a marriage concluded in terms of the common law and the Marriage Act 25 of 1961), namely (i) *Santam Bpk v Henery* 1999 3 SA 421 (SCA), in which the right to institute the action was granted to a divorcée whose deceased ex-husband had been under an obligation to maintain her in accordance with an order granted in terms of section 7(2) of the Divorce Act 70 of 1979; (ii) *Amod*, in which the action was extended to the surviving spouse in a monogamous Muslim marriage that had not been solemnised in terms the Marriage Act

despite there being no legal impediment to such a marriage; and (iii) *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA), in which the action was held to be available to the survivor of a permanent same-sex life partnership "similar in other respects to marriage" in which a contractual duty of support had bound the deceased to support his surviving life partner. (It is important to note that *Du Plessis* was decided prior to the legalisation of same-sex marriage by the Civil Union Act 17 of 2006. The couple in question had however participated in a ceremony before witnesses that was described by the court as being "as close as possible to a heterosexual marriage ceremony" (*Du Plessis* para 14). The significance of this will become apparent later.)

In the process of extending the dependant's action in the manner described above, the Supreme Court of Appeal has developed a test for determining whether a claim for loss of support should succeed. This test, distilled from the *Henery* judgment by Mahomed CJ in *Amod*, and later confirmed in *Du Plessis*, is the following (*Amod* para 12; *Du Plessis* para 10):

> "(a) The claimant . . . must establish that the deceased had a duty to support the dependant.
> (b) It had to be a legally enforceable duty.
> (c) The right of the dependant to such support had to be worthy of protection by the law.
> (d) The preceding element [has] to be determined by the criterion of *boni mores*."

Meyer and *Verheem* can now be considered against this backdrop.

3 Facts of and judgments in *Meyer* and *Verheem*

3 1 Meyer v Road Accident Fund

The plaintiff (M) met the deceased (PJ) in February 1994. In September of that year she relocated and, along with all her furniture and personal effects, moved into PJ's house. She opened an estate agency soon thereafter – a business with which PJ assisted her. However, just over a year later she severely injured her back, which prompted PJ to suggest that she should stop working and stay at home. As PJ had undertaken to "look after her financially for the rest of her life", the plaintiff, secure in the knowledge that her financial needs were cared for, took him up on his offer. PJ became the sole breadwinner, while M managed the joint household. The couple was in the process of relocating to another town during 2001 when PJ was killed in a motor vehicle accident. According to PJ's will, M was both the executrix as well as the "main beneficiary" of his estate (para 3.10). M instituted the dependant's action, alleging that she was "a third party" for the purposes of section 17 of the Road Accident Fund Act 56 of 1996 "who should be placed [in] the same position as a widow who was legally married to the deceased" (para 5). The defendant's response was that, as M and PJ were never legally married to one another, M had no *locus standi* to institute this claim.

After holding that section 17 referred "to persons who are legally dependant [sic] on the deceased for maintenance" (para 4), Ledwaba J summarised the relevant case law in which the scope of the dependant's action had been extended (paras 9–18; see also 2 above). He emphasised that the court in *Du Plessis* had specifically restricted its finding to same-sex partners (para 17 read with para 22), and that the facts of that case differed from those of the matter before him (paras 18 and 23ff).

Ledwaba J proceeded to deal with the first requirement of the "test" described above and held that the (undisputed) facts placed before him showed that there was "no doubt" that PJ had undertaken to support M (para 24). The next question to be decided was whether the duty was legally enforceable and "the undertaking made by the deceased . . . worthy of legal protection, also having regard to the Constitution, by way of an action against the defendant . . . [which] is a statutory body which can only be held liable if the provisions of the [A]ct allows [sic] the same" (para 25). In this regard it was held that, while there was "nothing morally wrong" with the agreement between M and PJ and the resulting enforceability thereof *inter partes*, the question whether such an agreement could "be protected against . . . third parties, particularly the defendant, should be scrutinised thoroughly" (para 28). Ledwaba J held that, on the agreed facts, there was no indication that M and PJ (i) had been involved in a conjugal relationship; (ii) "owed each other a duty of support (according to the fact that the deceased undertook to support the plaintiff)"; (iii) had "entered into a ceremonial 'marriage' or that their relationship was regarded as a marriage in the presence of witnesses"; or (iv) that they had intended to marry one another in the future (see para 29(i)–(iv)). Ledwaba J seems to have regarded the latter aspect as being crucial to the plaintiff's case for, while he made no further comment as to factors (i) to (iii), he remarked as follows regarding factor (iv):

> "There are no grounds to justify an inference that the parties *intended to marry in the future*. On the contrary, the plaintiff consciously chose to live with the deceased *without entering into a marriage although nothing stopped them to* [sic] *from marrying*" (para 29, emphasis added).

Although he did not refer to the judgment of the Constitutional Court in *Volks* in this regard, this statement clearly ties in with the "choice argument" which was decisive in *Volks* and to which he referred later in his judgment (see below). Further, after holding that marriage was "an important social institution" that was constitutionally recognised and deserving of judicial protection and respect, Ledwaba J made the telling statement that "[t]o regard any relationship which has a feature of a marriage, as a marriage, would have a negative effect on the administration of justice, morality, the norms and values of our society" (para 30).

Ledwaba J proceeded to determine whether withholding the dependant's claim from persons in the position of M discriminated against such persons on the basis of marital status (para 33). In this context, he referred to *Volks*. He started off by making the confusing statement that the Constitutional Court in *Volks* had "declined to confront" the decision of the trial court (para 35) (while the Constitutional Court had in fact rejected the decision of that court). He proceeded to quote sections of the majority judgment of the Constitutional Court in *Volks*, and declared himself in agreement with the judgment to the effect that in cases involving life partners who were capable of marrying one another but nevertheless chose not to do so, the moral, social and legal differences between marriage and such partnerships justified the legal distinction between the former and the latter (para 36). This finding, coupled with the stipulations of the Road Accident Fund Act, led Ledwaba J to hold that M could not institute the dependant's action against the Road Accident Fund (hereafter "RAF") (para 37). He concluded his judgment with the findings that (i) permitting a person in the position of M to institute the dependant's action could cause "serious problems" for the law of succession, the "managing" of claims for loss of support, and "the institution of marriage itself"; (ii) PJ had no legal duty to maintain M; and (iii) in view of the couple's choice not to marry, the survivor did not enjoy the same right to

maintenance and loss of support as a surviving spouse (paras 38–40). Accordingly, M had no *locus standi* and her claim was dismissed with costs (para 42).

3 2 Verheem v Road Accident Fund

In this case, the deceased (D) and his female life partner (the plaintiff, V) had been living together since 1990. Two daughters were born of this relationship, while V also had a daughter (J) from a previous relationship that had come to an end before J's birth. The family of five lived together and D raised J as if she were his own child. V and D intended to marry one another, but felt that they could not afford a "decent wedding" and, as time passed, "there were ever increasing expenses – especially the costs as to the upbringing of the three daughters who were more or less the same age" (paras 2 and 12). The couple were nevertheless regarded by their family and friends as being "man and wife" (*ibid*). V was never employed. According to her (undisputed) testimony, she and D "had a contract" in terms of which she looked after the household while he was the sole breadwinner, as a result of which she was totally dependent on him for support (para 2). D was killed due to the negligent driving of a motor vehicle on 23 July 2003. V alleged that she was a third party "who should be placed in the same position as a widow who was legally married to the deceased" (*ibid*) and requested an order declaring her to have *locus standi* for the purposes of instituting her claim against the RAF.

Goodey AJ's judgment followed a similar structure to that of Ledwaba J in *Meyer*. As in the latter case, the presiding officer commenced his analysis of the law by quoting section 17 of the Road Accident Fund Act and considering the case law he deemed relevant to the issue. As these cases include those discussed in 2 above, the discussion below focuses on the additional case law upon which Goodey AJ based his judgment. These cases are:

- *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZS): In extending the dependant's action to the widow in an unregistered customary marriage, the Zimbabwe High Court held that, when presented with an opportunity to develop the common law, judges should note that if they

  > "hold to their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand. In a famous passage Lord Atkin, referring to judicial precedents, said: 'When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the Judge to pass through them undeterred'".

The extent to which this *dictum* may be relevant to *Verheem* will become apparent later.

- *Khan v Khan* 2005 2 SA 272 (T): In this judgment (also delivered by Goodey AJ), a man was found to be under a legal duty to maintain his ex-wife in a *de facto* polygynous Islamic marriage. Goodey AJ quoted a number of passages from the headnote of this case, the material aspects of which were that (i) the duty of support imposed by the common law "was a flexible concept developed and extended over time by the Courts to cover a wide range of relationships" (para 9); (ii) according to *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC), the existence of a reciprocal duty of support could be inferred from the facts of a case; and (iii) the Constitutional Court had confirmed the principle that statutes were to be interpreted in line with the Constitution of the Republic of South Africa, 1996 and its fundamental values (*ibid*).

- *Meyer v Road Accident Fund*: Goodey AJ emphasised a number of aspects of this judgment, namely that (i) the plaintiff (M) and the deceased (PJ) had been found not to have evinced any intention to marry in future; (ii) while PJ had undertaken to maintain M, the *boni mores* did not necessarily require outsiders to be bound by this agreement; (iii) the fact that there was "no obstacle" which prevented M and PJ from marrying one another had constituted a pivotal aspect of Ledwaba J's judgment (para 10); and (iv) Ledwaba J had relied on the *Volks* judgments (ie *Robinson v Volks NO* 2004 6 SA 288 (C) and *Volks NO v Robinson* 2005 5 BCLR 446 (CC)) in order to decide the legal question (*ibid*. (The latter aspect of Goodey AJ's judgment is of cardinal importance and is returned to below).
- *MB v NB* 2010 3 SA 220 (GSJ): In this case, Brassey AJ held that a binding contract was not generated by an undertaking that was given without *animus contrahendi*.

In view of the above, the material conclusions reached by Goodey AJ were the following: (i) V and D had been involved in a permanent life partnership; (ii) a contract had existed between them in terms of which D was the sole breadwinner, while V had depended entirely on him for support; (iii) D had a duty to support V which "was not merely an undertaking but was in fact a binding contract" as D had intended this result and had acted accordingly (para 12); (iv) the parties had desired to marry one another, but their financial circumstances had prevented them from doing so; (v) in view of these conclusions, the case before him was "clearly distinguishable" from *Meyer* (*ibid*) and (vi) V consequently had complied with the "test" for instituting the dependant's action and therefore had *locus standi* to do so (*ibid*). While the outcome of this case is to be supported, it will become apparent that the route taken to achieve it was not satisfactory.

4 Analysis of the judgments

4 1 Existence of a contractual duty of support and its legal enforceability

By way of introduction, it should be mentioned that the pleadings of the plaintiffs in both *Meyer* and *Verheem* create some confusion as to their precise scope. The contention that the plaintiffs wished to be placed "in the same position as a widow who was legally married to the deceased" (*Meyer* para 5; *Verheem* para 2) might create the impression that what was being sought was the recognition of an *ex lege* duty of support in the context of heterosexual life partners. Such a claim would have been precluded by the decision of the Constitutional Court in *Volks* in which it was held that no such duty exists in the context of a heterosexual life partnership (para 56) Recently, the Supreme Court of Appeal held that "[t]his was an unequivocal statement of the law by the Constitutional Court" (*McDonald v Young* 2012 3 SA 1 (SCA) para 19). In view of the Constitutional Court's "unequivocal statement of the law", it is probably safer to proceed from the premise that the plaintiffs in both cases were contending, not for the extension of the common-law *ex lege* duty of support as recognised in the context of marriage, but for the extension of the common-law dependant's action for loss of support to heterosexual life partners.

As indicated above, the starting point for doing so would be to prove that the deceased was under a legally enforceable duty to support the plaintiff. In *Meyer*, Ledwaba J found that while the deceased had undertaken to support the plaintiff, the parties did not "[owe] *each other*" such a duty (para 24 read with para 29(ii),

emphasis added). This approach overlooks a number of important principles. First, both case law and legislation confirm that a legally enforceable duty of support can arise *ex lege* or *ex contractu* (see eg s 2(1) of the Maintenance Act 99 of 1998; *Amod* para 14ff; *Du Plessis* paras 11–16), and in both *Amod* and *Du Plessis* the existence of a contractual duty of support was held to be sufficient to satisfy the requirement of a duty of support that is legally enforceable (*Amod* paras 14–15; *Du Plessis* paras 11–16). Secondly, even a tacit contract is sufficient to constitute a legally enforceable duty (*Satchwell* para 25; *Du Plessis* paras 14 and 15). Finally, the judge failed to appreciate that the mere fact that there is a sole breadwinner does not imply that there is no *reciprocal* duty of support: If there is only one economically active party, the reciprocal duty of support rests on that person as sole breadwinner (Sinclair and Heaton *The law of marriage Vol 1* (1996) 442 fn 90). Moreover, case law dealing with the dependant's action confirms that all that is required is for *the deceased* to have undertaken to support *the plaintiff* with the intention of being legally bound by the undertaking (*Du Plessis* paras 16, 42). In view of these considerations it is submitted that Ledwaba J erred both on his findings of fact (regarding the existence of a contractual reciprocal duty of support) and on his interpretation of the relevance and potency of such a duty.

In contrast, while Goodey AJ in *Verheem* can be commended for adopting the correct approach in this regard (para 2 read with para 12), the acknowledgement of the undisputed existence of the contractual undertaking of support makes it difficult to understand why he found it necessary either (i) to explain the circumstances in which the existence of such a duty could be *inferred* (see paras 8 and 9) or (ii) to incorporate Brassey AJ's argument in *MB v NB* regarding the distinction between a mere undertaking and a contract (para 11), as these issues did not arise in *Verheem*. Nevertheless, it is submitted that, in contrast with Ledwaba J, Goodey AJ reached the correct conclusion regarding the existence and value of a contractual reciprocal duty of support.

4 2 Is the duty of support worthy of legal protection according to the boni mores*?*

(a) General

As is clear from *Amod* and *Du Plessis*, the mere presence of a legally enforceable contractual duty of support does not mean that the duty is worthy of protection by means of the dependant's action. The killing of the deceased must be actionable as a wrongful act against the particular plaintiff. As seen above, case law has confirmed that the *boni mores* (legal convictions of the community) test is used for determining whether the killing of the deceased is actionable as a wrongful act against the plaintiff; in other words, the *boni mores* is the test that must be applied to determine whether the duty of support that existed between the deceased and the plaintiff is worthy of protection as against third parties by means of the action for damages for loss of support (*Henery* 430E–F; *Amod* para 12; *Du Plessis* para 17). Thus, it does not follow that each and every contractual duty of support will found the dependant's action. (For example, a contractual duty of support between a person and an unrelated benefactor who has undertaken to support the person simply because he or she feels sorry for the person might not be considered worthy of protection by means of the dependant's action. As Neethling, Potgieter and Visser *Neethling-Potgieter-Visser law of delict* (2010) 282 point out "[t]he *nature* of the contractual relationship founding the duty/right to support fulfils an important role in determining this".)

The *boni mores* are now informed by constitutional norms and values (*Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 17, referred to with approval in *Du Plessis* para 18). Further, because the common law must be developed in a manner that promotes the spirit, purport and objects of the Bill of Rights (Constitution s 39(2)), the constitutional values of equality and dignity must be considered when the potential development of the common-law dependant's action to include unmarried persons is at issue (*Du Plessis* para 19).

(b) The *boni mores* and the "choice argument"

As pointed out in 4 1 above, in both *Meyer* and *Verheem* the plaintiffs asked to be placed "in the same position as a widow who was legally married to the deceased". The manner in which the pleadings were framed in both cases had – quite understandably – a significant bearing on the outcome (and the correctness of the outcome) of each case.

In order to explain, the most authoritative case dealing with the legal position of heterosexual life partners – the Constitutional Court's judgment in *Volks NO v Robinson* 2005 5 BCLR 446 (CC) – and its underlying message regarding the *boni mores*, must be considered. In this case, the majority of the judges held that, in limiting the statutory right to claim maintenance from a deceased estate to the deceased's "spouse", the Maintenance of Surviving Spouses Act 27 of 1990 neither unfairly discriminated against the deceased's surviving life partner, nor violated her right to dignity (paras 60 and 62). The "philosophical premise" underlying this judgment was that persons who choose to be unmarried life partners despite being legally permitted to marry opt out of the responsibilities and rights that are attached to marriage by operation of law and therefore cannot lay claim to the benefits of marriage once their relationship has been terminated (para 154). For the purposes of this note, this premise – which relies solely on the presence or absence of a legal impediment to marry and does not consider individual circumstances (see eg Cooke "Choice, heterosexual life partnerships, death and poverty" 2005 *SALJ* 542 553; Schäfer "Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships" 2006 *SALJ* 626 632; Albertyn "Substantive equality and transformation in South Africa" 2007 *SAJHR* 253 266–268; De Ru "A critical analysis of the retention of spousal benefits for permanent same-sex life partners after the coming into operation of the Civil Union Act 17 of 2006" 2009 (2) *Speculum Juris* 111 119) – is referred to as the "choice argument".

By requesting the court to place them in the position of "a widow" who had been "legally married" to the deceased, the plaintiffs in *Meyer* and *Verheem* would appear to have provided Ledwaba J and Goodey AJ with no option other than to turn to *Volks* for guidance. In formulating its decision regarding the inapplicability of the Maintenance of Surviving Spouses Act to surviving heterosexual life partners in terms of the "choice argument", the majority of the Constitutional Court sent the message that a surviving heterosexual life partner's rights to equality and dignity are not violated by distinguishing between him or her and a surviving spouse. Equality and dignity are both constitutional rights and values (*Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35; *Daniels v Campbell NO* 2004 5 SA 331 (CC) para 21) and, moreover, are precisely the values that inform the *boni mores* when the extension of the dependant's action is at issue (*Du Plessis* para 19). Thus, on the basis of *Volks* it would, in a case

like *Meyer* or *Verheem*, at first glance seem to follow that the *boni mores* would not regard the killing of the deceased to be a wrongful act against a surviving heterosexual life partner, as no legal obstacle prevented the partners from marrying one another while the relationship subsisted. The "choice argument" would therefore crisply and clinically put an end to the plaintiff's case, as, indeed, happened in *Meyer* (see paras 36–37 40).

Closer inspection reveals, however, that at least two considerations militate against this conclusion:

First, despite the fact that the pleadings in *Meyer* and *Verheem* would have tempted Ledwaba J and Goodey AJ to decide the issue on the basis of *Volks*, the factual context in which the dependant's action is instituted differentiates a claim for loss of support from a claim such as the one in *Volks*: In the case of the dependant's action an outsider unlawfully causes the termination of a legally enforceable contractual duty of support. The plaintiffs in *Meyer* and *Verheem* would have continued to receive support in terms of the contract between them and their deceased life partners, had the outsider not unlawfully killed the deceased. In contrast, in *Volks* the termination of a contractual duty of support was not attributable to unlawful conduct of an outsider, for the partner died of natural causes.

Secondly, and more importantly, the dependant's action is a *sui generis* remedy (*Jameson's Minors v CSAR* 1908 TS 575 585; *Henery* 429E), in respect of which the courts have already disposed of the "choice argument" (see *Amod* para 25). Thus, the "choice argument" is irrelevant in respect of this action. Unfortunately, the judge in *Meyer* failed to appreciate this point. He should have held that even if a couple were legally free to conclude a civil marriage, the "decisive issue" for purposes of institution of the dependant's action "is not whether the dependant concerned was or was not lawfully married to the deceased, but whether or not the deceased was under a legal duty to support the dependant in a relationship which deserved recognition and protection at common law" (*Amod* para 25).

In *Verheem*, too, Goodey AJ should have pointed out that the *sui generis* nature of the dependant's action, coupled with the fact that the ability to marry is not the decisive issue, render the "choice argument" irrelevant. Like Ledwaba J, he seems to have failed to grasp this point and, even more surprisingly, he seems to have been oblivious to the decision of the majority of the Constitutional Court in *Volks* which contains the "choice argument". He introduced his treatment of *Volks* with the statement that the court had found "that permanent life partners *had to be included* in section 1 of the Maintenance of Surviving Spouses Act" (para 10, emphasis added). This statement clearly relates to the decision of the trial court. He then quoted an extract from Ledwaba J's judgment in *Meyer*, which included the confusing (and incorrect) statement (see 3.1 above) that the Constitutional Court in *Volks* had "declined to confront" the trial court's judgment. Strangely, Goodey AJ proceeded no further than to quote Ledwaba J's summary of the finding of the trial court in *Volks*. He made no reference whatsoever to the fact that the judgment of the trial court had not found favour with the Constitutional Court. This failure creates the impression that Goodey AJ was unaware that, by virtue of the Constitutional Court's "choice argument", surviving partners to permanent life partnerships were (and are still) not entitled to claim maintenance from their deceased life partner's estate. *Verheem* can therefore be doubly criticised for not conveying the true legal position as reflected in

the majority judgment in *Volks*, and, as a direct result, not engaging on the issue as to whether or not *Volks* was binding precedent that precluded the plaintiff's claim. (Had Goodey AJ grasped the point regarding the *sui generis* nature of the dependant's action, coupled with the fact that the ability to marry is not the decisive issue, he would also have been able to sidestep the rather weak argument of the plaintiff, which he supported (para 12; see also para 10) that *Verheem* could be differentiated from *Meyer* on the basis that V and D had lacked the financial means to enable them to exercise the option of getting married.) Thus, the decisions in both *Meyer* and *Verheem* can be criticised for misunderstanding the effect of the Constitutional Court's judgment in *Volks*.

These considerations show that, to use the phraseology in *Zimnat Insurance* quoted by Goodey AJ in *Verheem*, instead of seeing *Volks* for the "ghost" it really was, Ledwaba J mistakenly viewed it as a real and tangible obstacle to the plaintiff's claim. As a result, he incorrectly allowed his conclusions that the plaintiff had chosen a life partnership over marriage (para 40) and that the parties had neither "entered into a ceremonial 'marriage'" nor "intended to marry in the future" (para 29) to be decisive. (In this regard it must be pointed out that although the parties in *Du Plessis* had entered into a ceremonial "marriage", this fact was not crucial to the outcome of the case – see Steynberg and Mokotong "The common-law duty of support: Developed and extended to include the surviving homosexual partner *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA)" 2005 *THRHR* 330 332). Goodey AJ, in contrast, seems to have viewed *Volks* as a "*friendly* ghost", instead of seeing it simply as a "ghost"! In the end result, both judges failed to see *Volks* in its true perspective – as a "ghost" that could (and should) have been "[passed] through . . . undeterred".

(c) The *boni mores* and the presence or absence of a legal impediment to marriage

The above discussion shows that, having recognised that the majority judgment in *Volks* presented no more than an ostensible impediment to the plaintiff's claim, Ledwaba J should have proceeded to determine whether the *boni mores* required M to be entitled to institute the dependant's action. He would have had to take cognisance of the fact that the *Du Plessis* judgment permitted same-sex partners to institute the dependant's action, and he would have had to assess the relevance of the fact that this judgment had been delivered at a time when there was a legal impediment to same-sex marriage.

Although the presence or absence of a legal impediment to marriage is not the decisive issue for purposes of institution of the dependant's action (*Amod* para 25), it is a relevant factor in assessing the *boni mores* (as informed by the values of equality and dignity). Thus, the Supreme Court of Appeal concluded in *Du Plessis* that, in view of the exclusion of same-sex couples from marriage and the limited judicial and legislative recognition granted to same-sex life partnerships, the *boni mores* required the plaintiff's right as a dependant to be deemed worthy of legal protection. This *dictum* might have led Ledwaba J to conclude that the assessment of the *boni mores* in *Du Plessis* was done with reference to the presence of a legal impediment that was not applicable in *Meyer* because the life partners in the latter case were heterosexual, thereby possibly justifying a departure from the conclusion in *Du Plessis* that the common-law dependant's action could be extended to life partners.

However, it is important to bear in mind that the legal landscape has been fundamentally altered by the Civil Union Act since the judgment in *Du Plessis* was delivered. Now, the legal impediment to same-sex marriage no longer exists. This development requires the assessment of the *boni mores* to take place in a different light, and is of cardinal importance for an assessment of the *Verheem* judgment. It is discussed under the next heading.

4 3 The implications of the changes brought about by the Civil Union Act 17 of 2006

Same-sex marriage became a reality in South Africa on 30 November 2006 when the Civil Union Act came into operation. This Act permits both same-sex and heterosexual couples to formalise their unions by entering into a civil union which may take the form of either a marriage or a civil partnership, both of which enjoy the same legal status and occasion the same legal consequences as a civil marriage concluded under the Marriage Act (definition of "civil union" in s 1 read with s 13 of the Civil Union Act). This development implies that the "choice argument" that informed the majority judgment in *Volks* should *strictu sensu* also apply to same-sex couples who choose not to marry despite there being no legal impediment to such a marriage (see eg Carnelley and Mamashela 'Cohabitation and the same-sex marriage. A complex jigsaw puzzle' 2006 *Obiter* 379 388; Robson 'Sexual democracy' 2007 *SAJHR* 409 426; Bilchitz and Judge "For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa" 2007 *SAJHR* 466 496). However, as the Civil Union Act neither expressly nor by implication removed any of the recognition granted by the courts to same-sex couples prior to that date, the position is that same-sex couples remain entitled to that protection (*Gory v Kolver NO* 2007 4 SA 97 (CC) para 29). Thus, there is a disparity between the recognition accorded to same-sex and heterosexual couples as the former are entitled to rights and benefits to which the latter are not (see eg De Vos and Barnard "Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an on-going saga" 2007 *SALJ* 795 823; Bilchitz and Judge 2007 *SAJHR* 496; Picarra "Notes and comments: *Gory v Kolver NO* 2007 (4) SA 97 (CC)" 2007 *SAJHR* 563 565; Wood-Bodley "Establishing the existence of a same-sex life partnership for the purposes of intestate succession" 2008 *SALJ* 259 260). Indeed, prior to the judgment in *Verheem*, the capacity to institute the dependant's action constituted an example of such disparity.

Diverging opinions have been expressed in answer to the question whether the preferential treatment of same-sex life partners despite the enactment of the Civil Union Act is tenable (for opinions that this is untenable see eg *Gory* para 29; Bilchitz and Judge 2007 *SAJHR* 496; Kruuse "'Here's to you, Mrs Robinson': Peculiarities and paragraph 29 in determining the treatment of domestic partnerships" 2009 *SAJHR* 380 385 386; and for arguments to the contrary see Wood-Bodley "Intestate succession and gay and lesbian couples" 2008 *SALJ* 46 54; De Ru 2009 (2) *Speculum Juris* 120–122). The opinion which we support is that, pending the enactment of life partnerships legislation, an approach which extends similar protection to heterosexual couples is preferable to one which abolishes the recognition currently enjoyed by same-sex partners (see Heaton "The right to same-sex marriage in South Africa" in Gerber and Sifris (eds) *Current trends in the regulation of same-sex relationships* (2010) 108 118; Heaton *South African family law* (2010) 254; Meyerson "Who's in and who's

out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa" 2010 *CCR* 307).

Regardless of the view one favours, the new legal landscape has implications for a case such as *Verheem*, which was decided after the coming into operation of the Civil Union Act. (*Meyer* was decided before the coming into operation of the Civil Union Act.) Unfortunately, however, counsel for the plaintiff and Goodey AJ failed to take note of the changed landscape.

It is submitted that the plaintiff in *Verheem* should, instead of pleading to be placed in the position of a surviving spouse to a valid marriage, have pleaded to be placed in the same position as "a same-sex partner of the deceased in a permanent life relationship similar in other respects to marriage, in which the deceased had undertaken a contractual duty of support to [her]" (see *Du Plessis* para 42). From this platform she should have argued that she complied with the first two requirements of the test used to determine whether a claim for loss of support should succeed (see 2 above). As far as the third and fourth requirements are concerned, the plaintiff should have argued that, given the removal of the impediment to same-sex marriage by the Civil Union Act and the fact that same-sex life partners who do not enter into a civil union continue to enjoy the pre-Civil Union Act protection, the *boni mores* require the killing of her breadwinner to be regarded as a wrongful act committed against her, hence mandating the development of the common law and the recognition of her claim. As equality and dignity are the values relevant to such an extension, the plaintiff should have averred – as mentioned above – that the continued recognition of the dependant's action only in the context of same-sex life partnerships violated her constitutional right to equality before the law and equal protection and benefit of the law, and her right dignity.

For purposes of determining whether inequality before the law and unequal protection and benefit of the law are present, it would, in line with the test set out in *Harksen v Lane* 1998 1 SA 300 (CC) para 53, have had to be established whether the provision differentiated between same-sex and heterosexual couples and, if so, whether it bore a rational connection to a legitimate government purpose. That the existing common-law position differentiates between permanent same-sex and heterosexual couples as far as the ability to institute the dependant's action is patent. Could there be a legitimate government purpose behind not recognising the dependants' action in the context of life partnerships? It is submitted that the only such purpose could be "that the recognition of a dependant's claim which is premised on a contractual duty might unacceptably widen the scope of the dependant's action in the common law" (*Amod* para 26). However, given that (i) in *Du Plessis* this issue was not even mentioned as a factor to be considered when deciding whether or not to extend the action to same-sex unmarried couples; (ii) a heterosexual couple could easily comply with the criteria required in *Du Plessis*; and (iii) the claim is based on need and dependency, it is submitted that the purpose could not be rationally connected to the differentiation between same-sex and heterosexual couples. The differentiation would therefore fail the test set out in section 9(1) and would violate the right of the plaintiff in *Verheem* to equality before the law and equal protection and benefit of the law. By the same token, it would (to use the words of Skweyiya J in *Volks* para 62) convey the message to the plaintiff that her dignity was "worth less" than that of a survivor in a same-sex life partnership.

As far as any possible justification of the discrimination is concerned, section 36 of the Constitution requires such limitation to be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." In view of the new legal landscape created by the Civil Union Act, it is difficult to conceive of any compelling reason for withholding a need-based claim from heterosexual life partners while retaining it for similarly situated same-sex life partners. Further, in view of the contemporary approach by the courts to interpret wrongfulness "more widely to give better protection to the values underpinning the Bill of Rights" (Neethling, Potgieter and Visser *Neethling-Potgieter-Visser law of delict* (2010) 39), the killing of the breadwinner should be viewed as a wrongful act against the plaintiff, thus warranting the development of the common-law action to include life partners in her position. (As an aside, it should be mentioned that, at present, the courts regard the dependant's action as being based on a delict committed against the deceased breadwinner even though the dependant institutes the action in his or her own name based on his or her loss of support (see eg *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A); *Brooks v Minister of Safety and Security* 2009 2 SA 94 (SCA). This view has been justly criticised as being theoretically unjustified and as leading to undesirable practical consequences (Neethling, Potgieter and Visser *Neethling-Potgieter-Visser law of delict* (2010) 278–279).)

4 4 Further comments on the Verheem judgment

It must be remarked that the *Verheem* judgment is not the epitome of a carefully considered and well-structured judgment. To begin with, Goodey AJ quoted extensively from the *headnotes* of cases (see eg paras 4, 8 and 9). In addition, he also at times relied on authority not directly related to the dependant's action to draw conclusions which were in fact supported by other, more relevant and more authoritative cases (see para 9 where the headnote of *Khan* is relied on to draw conclusions that would just as easily have been substantiated by *Amod* and *Du Plessis*). The judge also – perplexingly – quoted passages from case law dealing with the interpretation of statutes (see para 9), while the matter before him involved the extension of the common law. (The constitutionality of the Road Accident Fund Act was never placed in issue.)

Finally, while it must be conceded that Goodey AJ was constrained by the pleadings placed before him, it appears that too much reliance was placed on the *Meyer* judgment. In so doing, sight was lost of the law, and too much focus was placed on differentiating the *Meyer* judgment on the basis of the factual differences between the two cases. While the factual differences were relevant to the enquiry as to the existence of a legally enforceable duty of support, the question "whether the killing of the deceased should be considered to have been a wrongful act against the plaintiff" (see *Du Plessis* para 17), that is, whether the duty was worthy of protection, required a deeper engagement with the *Volks* judgment.

5 Conclusion

While the *Verheem* judgment has evened out the distinction between same-sex and heterosexual couples as far as the dependant's action is concerned, the judgment was delivered by a single judge and is, at best, binding in the jurisdiction in question. Moreover, the preceding discussion shows that while the judgment presents the correct outcome, the ratio followed to reach it cannot be supported.

The *Verheem* judgment also highlights an issue of broader concern. This is that, while the approach advocated in this note may result in a more convincing and principled extension of the dependant's action to heterosexual permanent life partners in the future, this may be where the road ends for such couples. This is because the *Volks* judgment will prevent further judicial erosion into the privileged position currently enjoyed by unmarried same-sex couples as far as those rights that form part of "the larger context of the rights and obligations uniquely attached to marriage [by operation of law]" (*Volks* para 56) are concerned. This fact, coupled with the unsatisfactory and inconsistent legal position pertaining to South African life partnerships, highlights the need for appropriate legislative intervention. (While a draft Domestic Partnerships Bill has been published for comment (see *GG* 30663, 14 January 2008) no further developments in terms of its promulgation have taken place. This Bill distinguishes between registered and unregistered domestic partnerships. As it stands, the Bill makes provision for the extension of the dependant's action only to the former category. For suggestions regarding an amendment of this aspect of the Bill, see Smith "The development of South African matrimonial law with specific reference to the need for and application of a domestic partnership rubric" (LLD thesis UFS 2009) 696 697.)

BRADLEY SMITH
University of the Free State
JACQUELINE HEATON
University of South Africa

THOUGHTS ON INTENTION, CONSCIOUSNESS OF WRONGFULNESS AND NEGLIGENCE IN DELICT

1 Introduction

For a long time consciousness, awareness or knowledge of wrongfulness was understood, certainly by authors of delict textbooks, but also by judges and other practitioners of the law, to constitute an element of intention (cf Neethling and Potgieter *Neethling-Potgieter-Visser Law of delict* (2010) 128–129; Van der Walt and Midgley *Principles of delict* (2005) 157; Loubser and Midgley (eds) *The law of delict* (2010) 106 108 and case law cited). However, in *Le Roux v Dey* 2010 4 SA 210 (SCA) 224E–F the Supreme Court of Appeal recently stated that consciousness of wrongfulness does not, in general, form part of *animus iniuriandi* in South African law. This statement was, on face value, quite a dramatic departure from what was perceived by many to be the generally accepted position, and has already drawn reaction from academics and the bench. In this contribution, a few thoughts are offered on this topic. The aim is not to repeat what has already been stated elsewhere, but rather to supplement what others have said with a few additional thoughts. Furthermore, the focus falls squarely on the element of fault, leaving aside other aspects of the judgment that have similarly attracted interest. Thoughts offered in this contribution are arranged thematically under the headings of precedent, common law authorities, and policy.