THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 443/2002
Reportable

In the matter between :

ANTONIE MICHAEL DU PLESSIS
APPELLANT

and

ROAD ACCIDENT FUND
RESPONDENT

CORAM : STREICHER, FARLAM, CLOETE, LEWIS JJA,

SOUTHWOOD AJA

HEARD : 28 AUGUST 2003

DELIVERED : 19 SEPTEMBER 2003

Summary: Common law dependant's action extended to cover partner in a same-sex permanent life relationship similar in other respects to marriage where the deceased owed that partner a contractual duty of support. Heir has a right to recover funeral expenses expended by him.

JUDGMENT

CLOETE JA/

CLOETE JA :

INTRODUCTION

[1] The plaintiff (appellant in this court) and Albert Ernest Clack ('the deceased') were partners in a same-sex union when the deceased was killed in a motor vehicle accident. The primary question on appeal is whether the plaintiff should be entitled to claim damages for loss of support from the defendant (respondent in this court), the Road Accident Fund, in terms of the provisions of the Road Accident Fund Act 56 of 1996 ('the Act'). A subsidiary question is whether the plaintiff has shown his entitlement to claim funeral expenses incurred in burying the deceased.

[2] The court *a quo* dismissed both of the plaintiff's claims and refused leave to appeal. The present appeal is with the leave of this court.

THE FACTS AND ISSUES

[3] The plaintiff and the deceased had lived together continuously since March 1988. In August that year they went through a ceremony

which was as close as possible to a marriage ceremony in the presence of numerous witnesses and which was conducted by a person who was a marriage officer (who obviously did not act in that capacity; but the plaintiff said in evidence that he and the deceased would have married had the law permitted it). The union between the plaintiff and the deceased was stable. They were acknowledged by family and friends as a couple.

[4] The plaintiff was medically boarded on 1 September 1994. Before that date he earned about R800,00 per month less than the deceased. Thereafter, the plaintiff received a disability pension which was not sufficient for his needs and the deceased continued to earn a salary which was considerably in excess of the plaintiff's pension. They continued to pool their income. Accordingly, the deceased to a large extent maintained the plaintiff financially for the five years after the plaintiff was boarded and before the deceased was killed on 1 September 1999. The deceased also promised to continue to support the plaintiff after he was boarded. The plaintiff's evidence on these aspects was the following:

'Nou toe u medies geraad was het dit beteken dat jou inkomste omtrent verminder het na 'n derde van jou inkomste voor dit? --- Ja, dit het met 'n aansienlike bedrag gedaal.
Daarna het Ernest jou finansieel ondersteun? --- Ja, hy het my finansieel ondersteun. Ek het inteendeel op 'n stadium daaraan gedink om miskien vir my 'n

ligter beroep te kry waarin ek ook iets ekstra kon bring, maar hy het vir my gesê daarvoor is hy daar en hy gaan nie toelaat dat ek enige beroep met my gesondheid verder beoefen nie.
Waarvoor het hy gesê is hy daar? --- Hy het gesê hy is daar om vir my finansieel te ondersteun en in my siektetoestand sal hy vir my emosioneel en moreel bystaan en dat hy nie sal toelaat dat ek enige beroep weer beoefen nie want ek kan, ek kan 100 jaar oud word en hy sal, hy sal persoonlik toesien dat ek nie my gesondheid verder sal benadeel nie.
…
Mnr Du Plessis, het u ooit twyfel in u gemoed gehad oor of Ernest sou voortgaan om jou te onderhou? --- Daar was geen twyfel aan nie. Hy het ook altyd vir my verseker hy is daar vir my en ek het nooit, geensins getwyfel aan sy ondersteuning en sy, en sy sorg nie.'

In addition the plaintiff and the deceased agreed to make wills, each bequeathing his estate to the other; and they did so – the plaintiff on 28 July 1988 and the deceased a year later on 31 July 1989.

[5] The parties have agreed that the defendant is liable under the Act to pay to the plaintiff 75 per cent of such legally recoverable damages as the plaintiff might prove he has suffered arising out of the death of the deceased. The court *a quo* by consent made an order in terms of Rule 33(4) directing that the matter proceed to trial only on the issues of whether the plaintiff's claim against the defendant for loss of support is legally recognised and the plaintiff's right to claim for burial expenses.

[6] In terms of s 17 of the Act the defendant or an agent is, subject to the provisions of the Act, obliged to compensate any person for any loss

or damage which that person has suffered as a result of the death of any other person caused by or arising from the driving of a motor vehicle if the death is due to the negligence of the driver or owner of the vehicle. Section 19(a) of the Act exempts the defendant from liability for loss or damage for which neither the driver nor the owner of the motor vehicle which caused the deceased's death, would have been liable at common law.

[7] The defendant's case is that the plaintiff's claim for loss of support is not maintainable in law[1] and that the plaintiff has not established a right to claim any funeral costs expended in burying the deceased. It is important to emphasize that the submissions made on behalf of the plaintiff fell short of requesting this court to extend the common law definition of marriage, which requires that the union be between a man and a woman[2], to persons of the same sex.[3] The submissions on behalf of the plaintiff were rather directed towards the narrower question whether the common law action for damages for loss of support should be developed to include a person such as the plaintiff.

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[1] *Evins v Shield Insurance Company Limited* 1980 (2) SA 814 (A) at 838A: ' Only a dependant to whom the deceased was under a legal duty to provide maintenance and support may sue …' and see *Vaughan NO vs SA National Trust and Assurance Co Limited* 1954 (3) SA 667 (C) at 669F-670C and authorities there quoted.

[2] An element of the definition which has long been part of the common law - see eg Inst.1.9.1: 'Marriage, or matrimony, is a joining together of a man and woman, carrying with it a mode of life in which they are inseparable' (Sandars' translation 8th ed 29).

[3] As was done by the Ontario Court of Appeal in *Halpern v Canada (Attorney General)* (2003) 225 DLR (4th) 529.

THE DEPENDANT'S ACTION

[8] It is not necessary to embark upon a jurisprudential analysis of the origins of the common law action for loss of support, or to investigate which dependants were entitled to bring the action. It is trite that a widow who was legally married to the deceased is entitled to bring such an action for the unlawful killing of her husband. It is the plaintiff's case that the common law should be developed to place him in the same position.

[9] In *Union Government v Warneke* 1911 AD 657 the action was extended so as to give an action to a husband who had suffered patrimonial loss through the death of his wife. In *Abbott v Bergman* 1922 AD 53 the principle laid down in *Warneke* was applied to enable a husband to sue for patrimonial loss sustained by him through non-fatal injury to his wife. In *Santam Beperk v Henery* 1999 (3) SA 421 (SCA) the action was extended to cover a divorced woman entitled to maintenance from the deceased in terms of an order of court granted in terms of s 7(2) of the Divorce Act 70 of 1979. Finally, a contractual right to support arising out of a marriage in terms of Islamic law was, within defined parameters, recognised for purposes of the dependant's action in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA). *Amod* was expressly decided without reference to either the interim Constitution or the present Constitution.[4]

[4] See *Amod* at 1332G-I, para [30].

[10] In *Henery*[5] and *Amod*[6] it was held that a dependant's claim for loss of support as a result of the unlawful killing of another, being a claim for pure economic loss, will be valid if the deceased had a legally enforceable duty to support the dependant and if the right of the dependant to such support was worthy of protection by way of an action at the suit of the

dependant against the wrongdoer.

THE DUTY OF SUPPORT

[11] The first issue to be decided is, therefore, whether the plaintiff proved a legally enforceable duty of support on the part of the deceased.

[12] A marriage gives rise to a reciprocal duty of support on the part of the parties to that marriage. However, the law currently only recognises marriages that are conjugal relationships between people of the opposite sex. There is, nevertheless, in the words of Ackermann J in *National*

[5] At 427H-J, 429C-D and 430D-I.
[6] Para [12] at 1326A and para [14].

Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) para [35] 'another form of life partnership which is different from marriage as recognised by law. This form of life partnership is represented by a conjugal relationship between two people of the same sex.'[7]

[13] As regards the question whether two people of the same sex who entered into a conjugal relationship could owe a similar duty of support to one another, the Constitutional Court said in *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para [25]:

'The law attaches a duty of support to various family relationships, for example, husband and wife, and parent and child. In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same-sex life partnerships. Whether such a duty of support exists or not will depend on the circumstances of each case. In the present case the applicant and Ms Carnelley have lived together for years in a stable and permanent relationship. They have been accepted and recognised as constituting a family by their families and friends and have shared their family responsibilities. They have made financial provision for one another in the event of their death. It appears probable that they have undertaken reciprocal duties of

[7] See also *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) paras [31]-[33].

support.'

[14] In the present case the case for drawing an inference that the plaintiff and the deceased undertook reciprocal duties of support is even stronger.The plaintiff and the deceased would have married one another if they could have done so. As this course was not open to them, they went through a 'marriage' ceremony which was as close as possible to a heterosexual marriage ceremony. The fact that the plaintiff and the deceased went through such a 'marriage' ceremony and did so before numerous witnesses gives rise to the inference that they intended to do the best they could to publicise to the world that they intended their relationship to be, and to be regarded as, similar in all respects to that of a heterosexual married couple i.e. one in which the parties would have a reciprocal duty of support. That having been their intention, it must be accepted as a probability that they tacitly undertook a reciprocal duty of support to one another.

[15] Further support for this finding is the fact that the plaintiff and the deceased thereafter lived together as if they were legally married in a stable and permanent relationship until the deceased was killed some 11 years later; they were accepted by their family and friends as partners in

such a relationship; they pooled their income and shared their family responsibilities; each of them made a will in which the other partner was appointed his sole heir; and when the plaintiff was medically boarded, the deceased expressly stated that he would support the plaintiff financially and in fact did so until he died.

[16] In the light of the aforegoing I am satisfied that the plaintiff proved that the deceased undertook to support him with the intention of being legally bound by such undertaking. The deceased, therefore, owed the plaintiff a contractual duty of support.

IS THE DUTY WORTHY OF PROTECTION?

[17] The next question to be decided is whether the right of the plaintiff to such support is worthy of protection by way of an action against the defendant, or, put differently, whether the killing of the deceased should be considered to have been a wrongful act as against the plaintiff. In *Amod*[8], relying on *Henery*, it was said that the question had to be answered in the light of prevailing *boni mores*. In *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27G-I Botha JA adopted the following formulation[9] of the

[8] Para [12] at 1326B.

[9] In Fleming *The Law of Torts* 4th ed at 136.

nature of the enquiry:

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

The same approach was followed by Hefer JA in *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318D-H.

[18] In *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) the Constitutional Court said (para [43]*):*

'This is a proportionality exercise with liability depending upon the interplay of various factors. Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the "spirit, purport and objects of the Bill of Rights" and the relevant factors must be weighed in the context of a constitutional State founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.'

Nugent JA said in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [17] 'the "legal convictions of the community" must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution. The Constitution is the supreme law, and no norms or values that are inconsistent with it can have legal validity – which has the effect of making the Constitution a system of objective, normative values for legal purposes.'[10]

[10] See also *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para [12]; *Premier of the Western Cape v Fair Cape Property Developers (Pty) Ltd* [2003] 2 All SA 465 (SCA) para [33]; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para [12].

[19] The constitutional values relevant to the extension of the common law sought by the plaintiff are those contained in ss 9 and 10 of the Constitution, namely, equality and human dignity. Those sections provide:

‘9. (1) Everyone is equal before the law and has the right to equal 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 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 person may unfairly discriminate directly or indirectly 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.

10. Everyone has inherent dignity and the right to have their dignity respected and protected.’

[20] The importance of the right to equality has been repeatedly emphasized by the Constitutional Court, eg *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para [33]; *Fraser v Children’s Court, Pretoria North & Others* 1997 (2) SA 261 (CC) para [20]; *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC) para [41].

[21] The right to dignity is also important, as emphasized in *Dawood, Shalabi, Thomas & Others v Minister of Home Affairs*[11] para [35]:

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

[22] In this case, as in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC) and in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 (2) SA 1 CC, the rights of equality and dignity are closely related. The Constitutional Court said in the latter case (paras [38] and [42]):

'The respondent's submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to express that orientation in a relationship of their own choosing.

…

The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be.'

[11] Para [12] above.

[23] The provisions of ss 9(4) and (5) of the Constitution are of particular relevance in this case. They provide that no person may unfairly discriminate against anyone on the ground of sexual orientation and that discrimination on this ground is presumed to be unfair unless it is established that the discrimination is fair.

[24] In *Satchwell*[12] the Constitutional Court had occasion to consider the constitutional validity of s 9 of the Judges' Remuneration and Conditions of Employment Act 47 of 2001. The section accords certain benefits to a surviving spouse of a judge who dies. The Constitutional Court stated[13]:

'The benefits accorded to spouses of Judges by the legislation are accorded to them because of the importance of marriage in our society and because Judges owe a legal duty of support to their spouses. In terms of our common law, marriage creates a physical, moral and spiritual community of law which imposes reciprocal duties of cohabitation and support. The formation of such relationships is a matter of profound importance to the parties, and indeed to their families and is of great social value and significance.'

[25] The Constitutional Court held that the section discriminated against same-sex partners on the ground of sexual orientation which is in terms of s 9(5) presumed to be unfair. It was of the view that our law, in only

[12] Para [13] above.
[13] Para [23].

recognizing marriages between heterosexual spouses, displayed a narrowness of focus which excluded ‘many relationships which create similar obligations and have a similar social value’. It concluded[14]

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‘Inasmuch as the provisions in question afford benefits to spouses but not to same-sex partners who have established a permanent life relationship similar in other respects to marriage, including accepting the duty to support one another, such provisions constitute unfair discrimination.’

[26] If s 9 of the Judges’ Remuneration and Conditions of Employment Act unfairly discriminates against same-sex partners who have established a permanent life relationship similar in other respects to marriage, including accepting the duty to support one another, it follows logically that the common law, insofar as it affords to a spouse an action for loss of support against a wrongdoer who unlawfully killed the other spouse but not to a same-sex partner who has established such a relationship, unfairly discriminates against such same-sex partners.

[27] The common law would, nevertheless, not be in conflict with the Constitution if the discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (s 36 of the Constitution). As in *Satchwell*[15] it was not contended that this is

[14] Para [24].
[15] Para [13] above at para [26].

the case. Such a contention would have been untenable. 17

[28] Legislative developments in Europe relevant to the question under discussion have recently been summarized and discussed in the *Harvard Law Review* (vol 116, 2003) p1999, at pp2007 –2012 and by Elsa Steyn, 'On the International Recognition of Gay Love' 2003 *TSAR* p340 at pp340-1. In essence, some countries no longer require that marriage be between a man and a woman; and some countries have introduced various forms of registered partnerships which, at the one end of the spectrum, treat the partners as if they are married persons and at the other, extend benefits to them similar to the benefits enjoyed by married persons. Significant decisions by courts in other countries include the following.

[29] In England, in *Ghaidan v Godin-Mendoza* [2003] 2 WLR 478 (CA) the Court of Appeal revisited the decision of the House of Lords in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL), in which it was held that a same-sex partner could qualify as a member of a deceased tenant's 'family'[16] but not as his 'spouse' for the purposes of a

[16] Compare *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (C) , where an exclusion of liability by the insurer for bodily injuries to 'a member of the policy holders' family normally resident with him' was held to apply to a person who had been in a same-sex relationship with the policy holder

tenancy protected by Schedule 1 to the Rent Act of 1977; and because of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, read with s 3 of the Human Rights Act 1998, held that a same-sex partner could qualify as a 'spouse' of the deceased tenant. In

Bellinger v Bellinger (2003) BHRC 127 the House of Lords made a declaration that s 11(c) of the Matrimonial Causes Act is incompatible with the Convention because it does not make provision for the recognition of gender reassignment. More fundamental change in the law was left for Parliament which is in the process of reacting[17] to the decision of the European Court of Human Rights in *Goodwin v UK* (2002) 13 BHRC 120 in which it was held that United Kingdom legislation should provide for a transsexual to marry a person of the same sex.

[30] In the United States of America, three State Supreme Courts have held that limiting the right to marry to opposite-sex couples violates the Constitutions of those states: *Baehr and Others v Lewin* 852 P2d 44 (1993, Hawaii), *Brause v Bureau of Vital Statistics* 1998 WL 88743 (Alaska); and *Baker v State* 744 A2d 864 (1999, Vermont). The decisions in Hawaii and Alaska have subsequently been nullified by State legislation but in Vermont, legislation has now extended to same-sex couples virtually all of the rights and responsibilities which opposite-sex couples are granted through marriage.[18] More limited domestic

for the 10 years preceding the accident in which such person had been injured.

[17] *Bellinger* at 147b-d, para [78].

[18] These decisions and the subsequent legislative history are discussed in the volume of the *Harvard Law Review* referred to in para [28] above at p2005 and pp2015-2020.

partnership registries are also available in a few states and several municipalities.[19] The US Supreme Court, by a majority, only two months ago in *Lawrence* et al *v Texas*[20] struck down State legislation criminalizing sodomy between two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle.

[31] In New Zealand the Court of Appeal (Wellington) in *Quilter v Attorney-General* [1998] 1 NZLR 523 held that the wording and scheme of the Marriage Act 1955 could not accommodate marriages between persons of the same sex and that the subsequent enactment of the New Zealand Bill of Rights Act 1990 could not alter the position as Parliament was entitled to discriminate, if it so wished. By way of contrast, in Canada the Ontario Court of Appeal held in June this year in *Halpern v Canada (Attorney-General)*[21] that the common law definition of marriage as 'the voluntary union for life of one man and one woman to the exclusion of all others' violated the couple's equality rights on the basis of sexual orientation under s 15(1) of the Canadian Charter of Rights and Freedoms and that the violation could not be justified in a free and democratic society under s 1 of the Charter.[22] Quebec appears to be

[19] A list appears in Lambda Legal Defense and Education Fund, Partial Summary of Domestic Partner Registry Listings at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=403.

[20] Not yet reported. The decision may be found at http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=02-102.

[21] Above footnote 3.

[22] The Canadian government has apparently decided not to appeal: see the dissenting judgment of

going the same way as Ontario : *Hendricks v Quebec (Procureur général)*.[23]

[32] It is no exaggeration to say that whilst there is (not surprisingly) no uniform trend and whilst different attitudes prevail in different countries (and even in the same country), there have been increasing moves by legislatures and by courts internationally to confer greater rights on, and to recognise greater rights in favour of, parties to same-sex partnerships.

[33] In the light of the aforegoing the legal duty owed by the deceased to the plaintiff is in my view clearly worthy of protection as is required in terms of *Henery*[24] and *Amod*.[25]

DEVELOPMENT OF THE COMMON LAW

[34] The learned judge *a quo* nevertheless held, and counsel for the defendant submitted, that it was for the legislature and not the courts to decide whether and how the common law should be extended. In my view the learned judge *a quo* erred in this regard for the following reasons: First, the extension is in line with the common law principles

Scalia J in *Lawrence* et al *v Texas*, above para [30].

[23] A decision of the Superior Court of Montreal given on 6 September 2002 but not yet reported. The judgment may be found at http://www.canlii.org/qc/jug/qccs/2002/2002qccs14544.html.

[24] Para [9] above.

[25] Para [9] above.

formulated in *Henery* and *Amod*. Second, the extension is in accordance with the behests of the Constitution.

[35] Section 173 of the Constitution provides that the Constitutional Court, this court and the High Courts have the inherent power to develop the common law, taking into account the interests of justice. In terms of s 8 of the Constitution a court, in order to give effect to a right in the Bill of Rights, must develop the common law to the extent that legislation does not give effect to that right. A court should in terms of s 39(2), when developing the common law, promote the spirit, purport, and objects of the Bill of Rights.

[36] In *Carmichele*[26] the Constitutional Court stated that it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the courts are under a general obligation to develop it appropriately and should not hesitate to ensure that it is developed to reflect the spirit, purport and objects of the Bill of Rights. That court nevertheless warned that judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary. In this regard it quoted with approval a passage to the effect that the judiciary should confine itself to those incremental

[26] Para [19] above at paras [33], [34] and [39].

changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

[37] To extend the action for loss of support to partners in a same-sex permanent life relationship similar in other respects to marriage, who had a contractual duty to support one another, would be an incremental step to ensure that the common law accords with the dynamic and evolving fabric of our society as reflected in the Constitution, recent legislation and judicial pronouncements. In this regard I have already referred to *Satchwell*. In addition I refer to the following.

[38] In *National Coalition for Gay and Lesbian Rights v Minister of Home Affairs and Others*[27] Ackermann J (para [37]) pointed out that:

'A notable and significant development in our statute law in recent years has been the extent of express and implied recognition the Legislature has accorded same-sex partnerships'

and detailed in footnote 41 a number of statutory provisions which have

[27] Para [22] above.

included such unions. More examples were given in *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Projects as* amicus curiae*)* 2003 (2) SA 198 (CC) footnote 33. The examples range through statutes dealing with employment, the media, lotteries, pensions, medical schemes, housing, civil aviation, road traffic, domestic violence and estate duty.

[39] In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [28] the Constitutional Court held that s 25(5) of the Aliens Control Act 96 of 1991, by omitting to confer on persons who are partners in permanent same sex life partnerships the benefits it extends to spouses, unfairly discriminates, on the grounds of their sexual orientation and marital status, against partners in such same sex partnerships who are permanently and lawfully resident in the Republic; that such unfair discrimination limits the equality rights of such partners guaranteed to them by s 9 of the Constitution and their right to dignity under s 10; and that the limitation is not reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom and accordingly did not satisfy the requirements of s 36(1) of the Constitution.

[28] Para [22] above.

[40] In *Du Toit v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as* amicus curiae*)* 2003 (2) SA 198 (CC) the Constitutional Court held that sections of the Child Care Act 74 of 1983 and the Guardianship Act 192 of 1993 did not provide for partners in same-sex life partnerships adopting and being joint guardians of minor children, and unjustifiably infringed the rights to equality and human dignity.

[41] In *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) BCLR 463 (CC) the Constitutional Court confirmed that s 5 of the Children's Status Act 82 of 1987 was unconstitutional in that it unfairly discriminated on the basis of sexual orientation in violation of the equality provisions in the Constitution; and made an order having the effect that the section was to be read so as to provide the same status to children born from artificial insemination to same-sex permanent life partners, as it provided to children born to heterosexual married couples.

CONCLUSION : DEPENDANT'S ACTION

[42] I conclude that the plaintiff, 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 him, is entitled to claim damages from the defendant for loss of that support.

[43] It is not necessary for purposes of this judgment to consider whether the dependant's action should be extended to unmarried persons in a heterosexual relationship or to any other relationship; and I expressly leave those questions open.

FUNERAL EXPENSES

[44] The evidence establishes that the plaintiff was the deceased's sole heir. It was held in *Young v Hutton* 1918 WLD 90 at 91, on the strength of Grotius' *Introduction,*[29] that a person improperly causing the death of another is liable to the heir of the latter for funeral expenses. In *Rondalia Assurance Corporation of SA Ltd v Britz* 1976 (3) SA 243 (T) at 245H-246E Margo J, after surveying the authorities, came to the conclusion that where the heirs have laid out funeral expenses on their own account, an action to recover such expenses lies at their suit. The correctness of this conclusion was not attacked on appeal and I see no

[29] The reference was to 3.32.2 and should have been to 3.33.2, which reads to the extent relevant (*Maasdorp's* translation 318): 'Commencing then with crimes against life, which are called homicide, which include everything whereby one person improperly causes the death of another, and for which, for reasons stated above, the person causing the death is not liable to the heirs, except for funeral expenses and any other expenses which may have been caused by the crime.'

reason to differ from it.

[45] The submission made on behalf of the defendant was that the plaintiff had not shown that he had incurred any funeral expenses himself and that the court below was accordingly correct in dismissing his claim under this head. In my view a declaratory order in appropriate terms would address the problem. The terms of the order will also be dictated by the provisions of s 18(4) of the Act which limit the liability of the defendant in respect of funeral expenses to 'the necessary actual costs to cremate the deceased or to inter him or her in a grave.'[30]

COSTS

[46] The plaintiff asked for the costs of two counsel. This was opposed by the defendant. In my view it was a wise and reasonable precaution for the plaintiff to retain two counsel albeit that this was done at a late stage.

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(1) The appeal is upheld, with costs, which shall include the costs of two

[30] The legislative history of claims for funeral expenses in third party matters is set out in Klopper, *Law of Third Party Compensation* 68.

counsel.

(2) The order of the court below is set aside and the following order substituted:

'(a) It is declared that the defendant is liable to compensate the plaintiff for 75 per cent:

(i) of such damages for loss of support as the plaintiff proves he has suffered in consequence of the death of Albert Ernest Clack ('the deceased') in the motor vehicle collision which took place on 1 September 1999; and

(ii) of such necessary actual costs to cremate the deceased or to inter him in a grave as were incurred by the plaintiff.

(b) The defendant is ordered to pay the costs of the hearing before this court.

(c) The further costs of the action are reserved.'

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T D CLOETE
JUDGE OF APPEAL

Concur: Streicher JA
Farlam JA
Lewis JA
Southwood AJA