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Bwanya v Master: A Softening of the Doctrine of Precedent

FATIMA OSMAN

ABSTRACT: *Bwanya v Master of the High Court* [2021] ZACC 51, 2022 (4) BCLR 410 (CC), 2022 (3) SA 250 (CC) provided the Constitutional Court with the opportunity to reconsider its previous judgment of *Volks v Robinson* [2005] ZACC 2, 2005 (5) BCLR 446 (CC) and its implications for the inheritance rights of opposite-sex partners. The Court in *Bwanya*, in a much-anticipated decision, declared the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 unconstitutional to the extent that the legislation did not provide for partners in a permanent life partnership in which the partners have undertaken reciprocal duties of support. The article argues that while *Bwanya* may be distinguishable from *Volks*, it would be an artificial — rather than meaningful — distinction that seeks to avoid a confrontation with *Volks*. The *Bwanya* and *Volks* cases raise the same substantive issue, being the rights of unmarried partners, and the Court should be applauded for confronting the issue directly rather than skirting the issue through superficial distinctions. Unfortunately, the Court's approach in confronting and departing from *Volks* without declaring the previous judgment wrong is confusing and unconvincing. The judgment appears to represent a softening of the doctrine of *stare decisis* and a shift in the Court's approach regarding the rights of unmarried parties, as legislative intervention in this area is not forthcoming.

KEYWORDS: inheritance, maintenance, precedent, succession

AUTHOR: Associate Professor, Private Law, University of Cape Town, South Africa
Email: Fatima.Osman@uct.ac.za ORCiD: 0000-0002-1357-7840

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I INTRODUCTION

In 2021, the Constitutional Court in *Bwanya v Master of the High Court* ('*Bwanya* CC')[1] brought to the fore a question that had been simmering below the surface for years but had yet to come to court: what are the intestate inheritance rights of opposite-sex partners? The Court, in a much-anticipated judgment, declared the Intestate Succession Act 81 of 1987 ('ISA') and the Maintenance of Surviving Spouses Act 27 of 1990 ('MSSA') unconstitutional to the extent that the legislation did not provide for partners in a permanent life partnership in which the partners have undertaken reciprocal duties of support.[2] The judgment has unsurprisingly caught the interest of many.

In this article, I seek to make sense of the Court's reasoning and reconcile it with existing jurisprudence. First, I analyse whether *Bwanya* is distinguishable from the leading case of *Volks v Robinson*[3] and whether the issue at hand would have been better disposed of on this basis. Thereafter, I scrutinise the reasoning in *Bwanya,* considering the previously decided case of *Volks* in which the Court dismissed a similar challenge to the MSSA. I argue that *Bwanya*'s approach in departing from *Volks* without declaring the previous judgment wrong is confusing and unconvincing. The judgment is better understood in terms of a softening of the doctrine of *stare decisis* and a shift in the Court's approach regarding the rights of unmarried parties, as legislative intervention in this area is not forthcoming.

II *BWANYA V MASTER*

Briefly, the facts of the case were that the applicant and the deceased started a romantic relationship in 2014, and the applicant moved in with the deceased later that year.[4] The deceased introduced the applicant as his wife to his friends, and by October 2015, the couple were contemplating having a baby.[5] The deceased supported the applicant financially, who in turn provided him with love, care, emotional support, and companionship.[6] In November 2015, the couple got engaged and planned to travel to Zimbabwe for lobolo negotiations.[7] In April 2016, the deceased died, and his will provided that his mother, who had predeceased him in 2013, was the sole heir of his estate.

The applicant subsequently filed two claims against the estate. First, she sought maintenance in terms of the MSSA, and second, she claimed inheritance under the ISA. These claims were founded on the assertion that her permanent life partnership with the deceased was comparable to a marriage and that they had undertaken reciprocal duties of support towards each other.[8]

[1] *Bwanya v Master of the High Court, Cape Town & Others* [2021] ZACC 51, 2022 (4) BCLR 410 (CC), 2022 (3) SA 250 (CC)('*Bwanya* CC').

[2] The order regarding the MSSA is slightly different. The Court states that a survivor in terms of the MSSA includes 'the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate', *Bwanya* CC (note 1 above) at para 95.

[3] *Volks NO v Robinson & Others* [2005] ZACC 2, 2005 (5) BCLR 446 (CC)('*Volks*').

[4] *Bwanya* CC (note 1 above) at para 3.

[5] Ibid at para 4.

[6] Ibid at para 5.

[7] Ibid at para 6.

[8] Ibid at para 8. It is beyond the scope of this article but for a discussion of what it may mean to undertake reciprocal duties of support, see A Barratt '"In Which the Partners Undertook Reciprocal Duties of Support"—A

The executor of the deceased's estate rejected both claims, and the applicant challenged the constitutionality of s 2(1) of the MSSA and s 1(1) of the ISA in the High Court. She argued that the two Acts were unconstitutional to the extent that they excluded surviving partners in permanent heterosexual life partnerships, where the partners had undertaken reciprocal duties of support, from claiming maintenance and inheritance from the estates of their deceased partners.

The Western Cape High Court dismissed the challenge to the constitutionality of the MSSA on the basis that it was bound by the Constitutional Court's judgment of *Volks v Robinson,* in which the Court had dismissed a similar claim.[9] The *Volks* case dealt with a challenge to the MSSA specifically, but academics have generally accepted that its reasoning would apply to preclude opposite-sex partners from inheriting from each other under the ISA. In this regard, De Waal and Schoeman-Malan note that the Constitutional Court in *Gory v Kolver*[10] held that the term 'spouse' in the ISA includes a partner in a permanent same-sex life partnership in which the partners had undertaken reciprocal duties of support. The authors state that after the *Volks* case, 'it is generally accepted that persons of the opposite sex, who did not want to formalise their relationship in any of the recognised ways, would not enjoy the same protection'.[11] They speculated that the anomalous position that unmarried same-sex partners enjoyed greater rights than opposite-sex partners would continue until the legislature intervened.[12] The view is also found in the Constitutional Court judgment of *Gory v Kolver* in which the Court considered the rights of unmarried same-sex couples under the ISA. The Court noted that a potential legislative remedy carries 'the possibility that unmarried heterosexual couples will continue to be excluded from the ambit of section 1(1) of the Act' and referred to the *Volks* case as authority for the exclusion of opposite-sex partners from the ISA.[13] It is clear that the Constitutional Court viewed *Volks* as precluding opposite-sex partners from inheriting under the ISA.

The broad interpretation of *Volks* was presumably based on its ratio — the choice argument that parties who chose not to marry could not avail themselves of the benefits of marriage — being generally applicable to preclude an extension of exclusive spousal benefits to unmarried partners.[14] But after the Constitutional Court judgment of *Laubscher v Duplan*[15] in which the Court affirmed the inheritance rights of unmarried same-sex partners under the

Discussion of the Phrase as Used in *Bwanya v Master of the High Court, Cape Town*' (2022) 25 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1.

9 *Bwanya* CC (note 1 above) at para 11. For a discussion of the High Court judgment, see F Osman 'Splitting Hairs? *Bwanya v Master of the High Court*' (2021) 138 *South African Law Journal* 521, 521–534; K Madzika 'Dawn of a New Era for Permanent Life Partners: From *Volks v Robinson* to *Bwanya v Master of the High Court*' (2020) 53 *De Jure* 393, 402–406; Barratt (note 8 above) at 1–28.

10 *Gory v Kolver NO & Others* [2006] ZACC 20, 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC)('*Gory*').

11 MJ de Waal & MC Schoeman-Malan *Law of Succession* (5th Ed, 2016) 19.

12 Ibid. Also see J Jamneck & C Rautenbach (eds) *The Law of Succession in South Africa* (3rd Ed, 2017) 33 who speculated that the reasoning in *Volks* would apply if opposite-sex partners challenged their exclusion from the ISA.

13 *Gory* (note 10 above) at para 29.

14 B Smith 'Have We Read *Volks* Wrong All Along? — *Laubscher v Duplan*' (2018) 81 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg/Journal of Contemporary Roman-Dutch Law* 149, 152. Also see the plethora of literature he cites in support of the view that *Volks* had broader implications than merely precluding a claim under the MSSA.

15 [2016] ZACC 44, 2017 (2) SA 264 (CC), 2017 (4) BCLR 415 (CC).

ISA despite the existence of legislation permitting them to formalise their relationship, Smith argued that this interpretation was brought into question.[16] This is because the *Laubscher* judgment distinguished the issue from *Volks*. While that reasoning may be open to critique, the recognition of the inheritance rights of unmarried same-sex partners paves the way for the piecemeal extension of marital rights, including inheritance rights, to unmarried opposite-sex partners lest it gives rise to a claim of unfair discrimination based on marital status and sexual orientation.[17]

In a reflection of the flexibility introduced by *Laubscher*, the High Court in *Bwanya* found that *Volks* was not binding on the issue of the constitutionality of the ISA. It held that the ISA was inconsistent with the Constitution and invalid to the extent that it did not provide for permanent opposite-sex life partners who had undertaken reciprocal duties of support.[18] Thus, the matter came before the Constitutional Court as an appeal of the dismissal of the claim under the MSSA and the confirmation of the declaration of invalidity of the ISA.[19]

Madlanga J penned the majority judgment in which five other judges concurred. The Constitutional Court held that excluding permanent life partners who undertook reciprocal duties of support from the MSSA and ISA is unconstitutional.[20] The Court ordered

[16] Smith (note 14 above) at 149.

[17] Ibid at 160.

[18] *Bwanya* CC (note 1 above) at para 11 and *Bwanya v Master* [2020] ZAWCHC 111, 2021 (1) SA 138 (WCC). For a discussion of this, see Osman (note 9 above) at 521–534.

[19] Given the confirmation application, there was understandably no appeal to the Supreme Court of Appeal.

[20] *Bwanya* CC (note 1 above) at para 95:

'1. The omission from the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 (Maintenance of Surviving Spouses Act) of the words "and includes the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate" at the end of the existing definition is unconstitutional and invalid.

2. The definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act is to be read as if it included the following words after the words "dissolved by death" — "and includes the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate".

3. The omission from the definition in section 1 of the Maintenance of Surviving Spouses Act of the following, at the end of the existing definition, is unconstitutional and invalid — (a) "Spouse" for the purposes of this Act shall include a person in a permanent life partnership in which the partners undertook reciprocal duties of support; (b) "Marriage" for the purposes of this Act shall include a permanent life partnership in which the partners undertook reciprocal duties of support.

4. Section 1 of the Maintenance of Surviving Spouses Act is to be read as though it included the following at the end of the existing definition — (a) "Spouse" for the purposes of this Act shall include a person in a permanent life partnership in which the partners undertook reciprocal duties of support; (b) "Marriage" for the purposes of this Act shall include a permanent life partnership in which the partners undertook reciprocal duties of support.

5. The orders contained in paragraphs 1, 2, 3 and 4 are suspended for a period of 18 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.

6. Should Parliament not enact legislation as contemplated in paragraph 5, the order of invalidity that shall come into operation 18 months after the date of this order shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date upon which the order of invalidity comes into effect.

7. The omission in section 1(1) of the Intestate Succession Act 81 of 1987 after the word "spouse", wherever it appears in the section, of the words "or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support" is unconstitutional and invalid.

8. Section 1(1) of the Intestate Succession Act is to be read as though the following words appear after the word "spouse", wherever it appears in the section: "or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support".

the definition of a survivor in the MSSA be amended to include a 'surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate'.[21] The order differed slightly with respect to the ISA, where the Court ordered that the words 'or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support' be read in after the word spouse in section 1(1) of the ISA.[22] The order encompassed survivors in same-sex life partnerships (though not the issue in the case at hand) on the basis that their exclusion would be nonsensical and discriminate unfairly.[23] The broad order is a matter I return to later in the article. The order of invalidity was handed down on 31 December 2021 and was suspended for 18 months to allow Parliament the opportunity to correct the constitutional defects.[24] The Judicial Matters Amendment Act 15 of 2003 gives effect to the order with effect from 3 April 2024.

Mogoeng CJ dissented in a single judgment and held that *Volks* bound the Court as it was not shown to be clearly wrong. He proposed setting aside the High Court's declaration of unconstitutionality with respect to the ISA.[25] In addition, Jafta J (with Mhlantla J and Tshiqi J concurring) delivered a partially concurring judgment. Jafta J confirmed the High Court's order that the ISA was constitutionally invalid but held that the challenge to the MSSA should fail given the *Volks* judgment in which the Court had previously considered and dismissed a challenge to the MSSA.[26]

III IS *BWANYA* DISTINGUISABLE FROM *VOLKS*?

The first issue to consider is whether *Bwanya* is distinguishable from *Volks* and whether the distinction could justify the Court departing from *Volks* without declaring its previous judgment wrong. This is because the Court in *Bwanya* displayed an apparent reluctance to overturn its prior decision, which is unsurprising and accords with its previous jurisprudence.

The closest the Constitutional Court has come to overturning its previous judgment is the infamous *Fredericks* / *Chirwa* / *Gcaba* saga, where the Court delivered conflicting judgments. In its 2001 *Fredericks* judgment, the Court held that public sector employees may rely on the right to just administrative action in employment-related disputes and that the Labour Relations

9. The orders contained in paragraphs 7 and 8 are suspended for a period of 18 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.

10. Should Parliament not enact legislation as contemplated in paragraph 9, the order of invalidity that shall come into operation 18 months after the date of this order shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date upon which the order of invalidity comes into effect.

11. In the event that serious administrative or practical problems are experienced as a result of the coming into operation of paragraphs 1, 2, 3, 4, 7 and 8 of this order, any interested person may approach this Court for a variation of this order.

12. The Minister of Justice and Correctional Services must pay the costs of the applicant in this Court, such costs to include the costs of two counsel.'

21 *Bwanya* CC (note 1 above) at para 95.

22 Ibid.

23 Ibid at para 81.

24 Ibid at para 95.

25 Ibid at para 151.

26 Ibid at para 153.

Act 66 of 1995 does not exclude the jurisdiction of the High Court.[27] It was a unanimous judgment by O'Regan J in which Chaskalson CJ, Langa DCJ, Ackermann J, Kriegler J, Madala J, Mokgoro J, Sachs J, Yacoob J, Du Plessis AJ and Skweyiya AJ concurred.

In contrast, just six years later, in 2007, the Court in *Chirwa* — where six of the eleven judges on the bench had decided the *Fredericks* case — departed from their previous judgment in *Fredericks*.[28] The Court held that the High Court does not have concurrent jurisdiction with the Labour Court to entertain disputes about the unfair dismissal of public service employees.[29] This was the finding of both the majority judgments of Skweyiya J (in which Moseneke DCJ, Madala J, Navsa AJ, Ngcobo J, Nkabinde J, Sachs J and Van der Westhuizen J concurred) and Ngcobo J (in which Moseneke DCJ, Madala J, Navsa AJ, Nkabinde J, Sachs J and Van der Westhuizen J concurred). Notably, Skweyiya AJ, Madala J and Sachs J appeared to have reversed their position. Given the finding that the High Court does not have concurrent jurisdiction with the Labour Court, the majority judgment of Skweyiya J held it was unnecessary to decide whether the dismissal of public service employees constituted administrative action.[30] Ngcobo J held that the termination of the applicant's employment contract did not constitute administrative action.[31]

The minority judgment held that the matter was indistinguishable from the *Fredericks* matter, and following *Fredericks*, the High Court and Labour Court have concurrent jurisdiction on constitutional issues but that the dismissal at hand did not constitute administrative action. The judgment was delivered by Langa CJ, with Mokgoro J and O'Regan J concurring therein — all three judges having decided the *Fredericks* case.

Thus, *Chirwa* appeared to contradict *Fredericks*. The Court distinguished *Chirwa* from *Fredericks* on the basis that in the *Fredericks* case, there had been no reliance upon the provisions in the Labour Relations Act that deal with unfair dismissal, as had occurred in *Chirwa*.[32] But the distinction is questionable. Hoexter describes the distinction as unconvincing and the cases as contradictory and, in particular, notes that '*Fredericks* was so obviously a "labour" matter that the High Court believed it lacked jurisdiction to hear it'.[33]

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[27] *Fredericks & Others v MEC for Education and Training Eastern Cape & Others* [2001] ZACC 6, 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 (CC)('*Fredericks*'). J Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional Court Review* 79, 81. For a discussion of the substantive issues at hand, see T Ngcukaitobi & J Brickhill 'A Difficult Boundary: Public Sector Employment and Administrative Law' (2007) 28(4) *Industrial Law Journal* 769.

[28] *Chirwa v Transnet Limited & Others* [2007] ZACC 23, 2008 (4) SA 367 (CC), 2008 (3) BCLR 251 (CC) ('*Chirwa*'). For a discussion of the Supreme Court of Appeal judgment in *Chirwa* see T Ngcukaitobi 'Life After *Chirwa*: Is There Scope For Harmony Between Public Sector Labour Law and Administrative Law?' (2008) 29 *Industrial Law Journal* 841; BPS van Eck 'Labour Dispute Resolution in the Public Service: The Mystifying Complexity Continues' (2007) 28 *Industrial Law Journal* 793; H Cheadle 'Deconstructing *Chirwa v Transnet*' (2009) 30 *Industrial Law Journal* 741; Brickhill (note 27 above) at 81.

[29] Both the judgments of Skweyiya J (with seven judges concurring) and Ngcobo J (with six judges concurring) agreed on this point.

[30] *Chirwa* (note 28 above) at para 73.

[31] Ibid at para 150.

[32] Ibid at para 61.

[33] C Hoexter 'Clearing the Intersection? Administrative and Labour Law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209, 220.

The *Chirwa* judgment created uncertainty in the law by not expressly declaring *Fredericks* wrong. Instead, *Chirwa* confirmed that the dismissal of a public service employee does not constitute administrative action but, in conflict with *Fredericks*, held that the High Court does not have concurrent jurisdiction with the Labour Court to deal with dismissal disputes of public service employees. This contradictory approach unsurprisingly gave rise to an inconsistent approach to the issue and contradictory jurisprudence as some courts sought to reconcile the cases while others interpreted *Chirwa* to have overruled *Fredericks*.[34]

The matter came to a head in 2009 in *Gcaba.* In the face of its contradictory jurisprudence, the Constitutional Court was tasked with adjudicating whether a decision not to appoint the applicant constituted unfair administrative action and whether the High Court had jurisdiction to hear the matter.[35] Van der Westhuizen J delivered a unanimous judgment with Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Skweyiya J and Yacoob J concurring therein. The Court held that public sector employment issues may amount to administrative action if they have direct implications or consequences for other citizens but that the decision at hand did not amount to administrative action and that, consequently, the High Court did not have jurisdiction to hear the matter.[36] An extensive critical analysis of the judgment and its implications is beyond the scope of this contribution,[37] but it is helpful to understand the Court's approach to conflicting case law.

First, it is essential to note that in adjudicating the matter, the Court avoided declaring the *Fredericks* / *Chirwa* judgments contradictory, wrong, or having overruled the other.[38] As expected, the Court emphasised the importance of precedent in ensuring legal certainty and equality before the law.[39] The Court expressed caution regarding adherence to, or deviation from, its own previous decision.[40] While 'understanding may increase and interpretations may change … [t]his Court must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so. One exceptional instance where this principle may be invoked is when this Court's earlier decisions have given rise to controversy or

[34] For example, see *Nakin v MEC, Department of Education, Eastern Cape* [2008] ZAECHC 13, 2008 (6) SA 320 (Ck), (2008) 5 BLLR 489 (Ck); *Makambi v MEC, Department of Education, Eastern Cape* [2008] ZASCA 61, [2008] 4 All SA 57 (SCA), (2008) 8 BLLR 711 (SCA); *De Villiers v Minister of Education, Western Cape* [2008] ZAWCHC 58, 2009 (2) SA 619 (C), (2009) 30 ILJ 1022 (C); *Nonzamo Cleaning Services Cooperative v Appie* [2008] ZAECHC 111, [2008] 9 BLLR 901 (Ck), 2009 (3) SA 276 (CkH); and *Makhanya v University of Zululand* [2009] ZASCA 69, 2010 (1) SA 62 (SCA), [2009] 8 BLLR 721 (SCA). For a comprehensive discussion of the contradictory jurisprudence, see BPS van Eck '*Chirwa v Transnet* and Beyond: Urgent Need for the Constitutional Court to Provide Certainty: Aantekeninge' (2010) 1 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 119.

[35] *Gcaba v Minister for Safety and Security & Others* [2009] ZACC 26, 2010 (1) SA 238 (CC), 2010 (1) BCLR 35 (CC)('*Gcaba*'). For a discussion of the case see T Ngcukaitobi 'Precedent, Separation of Powers and the Constitutional Court' 2012 *Acta Juridica* 148.

[36] *Gcaba* (note 35 above) at paras 64, 69–75.

[37] Brickhill (note 27 above) at 79–109; P de Vos 'Constitutional Court Tries to Fix Its Own Balls-Up' *Constitutionally Speaking* (7 October 2009), available at http://constitutionallyspeaking.co.za/constitutional-court-tries-to-fix-its-own-balls-up/.

[38] *Gcaba* (note 35 above) at para 77. Brickhill (note 27 above) at 83. For a critique of the approach also see De Vos (note 37 above).

[39] *Gcaba* (note 35 above) at para 62. For a discussion of this, see Brickhill (note 27 above) at 79–109.

[40] *Gcaba* (note 35 above) at para 62.

uncertainty, leading to conflicting decisions in the lower courts'.[41] This reference to controversy and uncertainty is important because the Court appears to invoke the legal uncertainty created by the *Fredericks* / *Chirwa* saga as the justification for its intervention and pronouncement in the matter. There is no acknowledgment in the judgment that the conflicting judgments of the Court themselves have caused the confusion or that either *Fredericks* or *Chirwa* were wrongly decided. But rather, the Court states that the cases along with preceding jurisprudence have resulted in 'differences of opinion in subsequent jurisprudence on the proper interpretation and application of overlapping constitutional, administrative and labour law provisions and principles, … which gives this Court, as the highest court in all constitutional matters, an opportunity to provide some clarity and guidance'.[42] According to the Court, the judgment is about setting the record straight — rather than the Court overturning a previously incorrectly decided case. And the Court lays the blame for the confusion in the jurisprudence at the feet of 'the legislature, courts, legal representatives and academics [who] often create complexity and confusion rather than [provide] clarity and guidance'.[43] De Vos perceives this attribution of blame as a slight, and the Court as shirking responsibility for its inconsistent jurisprudence.[44] Finally, the Court states that 'to the extent that this judgment may be interpreted to differ from *Fredericks* or *Chirwa*, it is the most recent authority',[45] with the explicit intimation that *Gcaba* replaces *Fredericks* and *Chirwa* but without explicitly declaring the previous judgments wrong.

The Court's approach in *Gcaba* is important because it underscores the Court's clear reluctance to overturn a previous judgment even when it appears to be required to resolve the conflicting jurisprudence. It points to the fact that since the Constitutional Court's establishment, the Court has yet to overturn expressly a previous judgment. Notably, the Constitutional Court was established in 1994, which renders it relatively young at just 30 years

[41] Ibid.
This is important because the *Volks* case has given rise to significant controversy and criticism; see C Lind 'Domestic Partnerships and Marital Status Discrimination' 2005 *Acta Juridica* 108, 113; L Schäfer 'Marriage and Marriage-Like Relationships: Constructing a New Hierarchy of Life Partnerships' 2006 *South African Law Journal* 626, 632–633; C Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253, 266–267; H Kruuse '"Here's to You, Mrs Robinson": Peculiarities and Paragraph 29 in Determining the Treatment of Domestic Partnerships' (2009) 25 *South African Journal on Human Rights* 380; B Smith 'Rethinking *Volks v Robinson*: The Implications of Applying a "Contextualised Choice Model" to Prospective South African Domestic Partnerships Legislation' (2010) 13 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 237; B Smith & J Heaton 'Extension of the Dependant's Action to Heterosexual Life Partnerships after Volks v Robinson and the Coming into Operation of the Civil Union Act — Thus Far and No Further?' 2012 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 472; P de Vos & J Barnard 'Same-sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga' (2007) 124(4) *South African Law Journal* 795, 811–813; D Meyerson 'Who's in and Who's out? Inclusion and Exclusion in the Family Law Jurisprudence of the Constitutional Court of South Africa' 2010 Constitutional Court Review 295, 308–312; and E Bonthuys 'A Duty of Support for All South African Unmarried Intimate Partners Part 2: Developing Customary and Common Law and Circumventing the *Volks* Judgment' (2018) 21 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1.
For a discussion of some of this critique, see Part IV.

[42] *Gcaba* (note 35 above) at para 3.

[43] Ibid at para 2.

[44] De Vos (note 37 above).

[45] *Gcaba* (note 35 above) at para 77.

old, and it may not have been afforded many opportunities to overturn a previous judgment.[46] But *Gcaba* reveals that even when the South African Constitutional Court has been allowed to reconsider a judgment, it is firm in its reluctance to declare a previous judgment wrong.

Historically, this avoidance of binding precedent has been achieved 'through a minimalist approach to decision making and by distinguishing, rather than overruling, its earlier decisions where they appeared to stand in the way of an outcome'.[47] Indeed, early jurisprudence of the Court has been described as 'cautious, incremental, particularistic and theoretically modest'.[48] The approach is exemplified in the Court's jurisprudence on the ISA, where the Court has, on several occasions, pronounced on the under-inclusive nature of the beneficiaries listed in the ISA. Here the Court has provided relief to litigants through narrow orders that realise rights (such as realising the intestate inheritance rights of spouses married according to Islamic law) but do not address the broader overarching issue which permeates these cases: is the ISA, which is rooted in the Dutch principles of succession found in the Octrooi of 1661, compatible with contemporary South African society?[49]

Furthermore, the Court frequently distinguishes matters at hand from previously decided cases to find differently. For example, in *Kaunda v President of the Republic of South Africa*[50] the Court distinguished the case from its earlier decision of *Mohamed v President of the Republic of*

[46] In comparison, the United States Supreme Court was established in 1789 and is 235 years old. It is noteworthy that up until 2020, the US Supreme Court had reversed its own judgment only 145 times, which constitutes about half a per cent of its judgments; D Schultz 'The Supreme Court Has Overturned Precedent Dozens of Times in the Past 60 Years, Including When It Struck Down Legal Segregation' *The Conversation* (20 September 2021), https://theconversation.com/the-supreme-court-has-overturned-precedent-dozens-of-times-in-the-past-60-years-including-when-it-struck-down-legal-segregation-168052. It reveals perhaps a respect for previous judgments and reticence to overturn them.

[47] Brickhill (note 27 above) at 80.

[48] I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138, 147. Currie discusses several of the Court's cases in support of his view, being *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13, 1996 (1) SA 984 (CC), 1996 (1) BCLR 1; *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696; *Nel v Le Roux NO* [1996] ZACC 6, 1996 (4) BCLR 592, 1996 (3) SA 562 (CC); *De Lange v Smuts NO* [1998] ZACC 6, 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC); *Bernstein v Bester NO* [1996] ZACC 2, 1996 (4) BCLR 449 (CC), 1996 (2) SA 751 (CC); *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* [1995] ZACC 7, 1995 (10) BCLR 1382 (CC), 1995 (4) SA 631 (CC); *Case v Minister of Safety and Security, Curtis v Minister of Safety and Security* [1996] ZACC 7, 1996 (3) SA 617 (CC), 1996 (5) BCLR 608 (CC); and *JT Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23, 1996 (12) BCLR 1599 (CC), 1997 (3) SA 514 (CC). This is in contrast to the Court's more comprehensive approach in *S v Makwanyane* [1995] ZACC 3, 1995 (6) BCLR 665 (CC), 1995 (3) SA 391 (CC).
Currie describes it as 'judicious avoidance' and more recently Mia described it as 'decisional minimalism'; N Mia 'The Problems with Prince: A Critical Analysis of *Minister of Justice and Constitutional Development v Prince*' (2020) 10 *Constitutional Court Review* 401, 411. For a critique of Currie see CJ Roederer 'Judicious Engagement: Theory, Attitude and Community' (1999) 15 *South African Journal on Human Rights* 486 who argues that judicious avoidance must be preceded by judicious engagement.

[49] MJ de Waal 'Intestate Succession in South Africa' in K Reid, M de Waal & R Zimmermann (eds) *Comparative Succession Law: Vol. II: Intestate Succession* (2015) 249, 255. For a discussion of whether South Africa's current succession laws are compatible with contemporary South African society see F Osman 'The Reform of Customary Law of Succession Act in Contemporary South Africa' (2023) *Acta Juridica* 186.

[50] [2004] ZACC 5, 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC).

South Africa[51] on the basis that in the previous case the applicant's transfer to the United States of America was as a result of South Africa's wrongful conduct, and there was no such conduct in the present case.[52] In *Prince v President of the Law Society of the Cape of Good Hope & Others*,[53] the Court upheld a general statutory prohibition on the possession of cannabis but several years later decriminalised the private use, possession and cultivation of cannabis by an adult for private consumption in *Minister of Justice and Constitutional Development v Prince (Clarke & Others Intervening); National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton*.[54] In the latter case, the issue was framed as an infringement to the right to privacy as opposed to whether an exemption for religious use should be granted,[55] which allowed the Court to sidestep its previous judgment without declaring it wrong.[56]

It raises the question of whether *Bwanya* is distinguishable from *Volks* and whether the matter could have been decided by such means. First, is whether *Bwanya* is distinguishable from *Volks* based on the choice argument? An argument for this distinction is that the claimed benefits should be extended to the applicant in *Bwanya* on the basis that the parties exercised a choice to marry (the parties were engaged and preparing for lobolo negotiations), but external circumstances beyond their control, being the untimely death of the deceased, prevented the conclusion of the marriage. The argument looks beyond the formalistic marital status of the applicant to whether the parties in practice exercised a choice to marry. The difficulty with this argument is that the parties had not, in fact, married and may have at any time ended the relationship or called the engagement off. In *Volks*, the Court looked strictly at the marital status of the parties and justified the discrimination based on the choice argument. The Court did not look at the actual choice of the parties — because if it had, it would have found that Mrs Robinson never exercised a choice in the matter. Thus, I think the argument of elevating the conduct of the parties beyond their marital status to find that they exercised a choice to marry in *Bwanya* is not in keeping with *Volks*. Of course, *Volks* is open to criticism, as is discussed later on in this article. My argument is simply that the applicant in *Bwanya* would not have been successful in asserting her claims within the *Volks* paradigm. The *Volks* judgment discriminated based on marital status, and no matter how close the parties in *Bwanya* were to marriage, they were simply not married. This is arguably a formalistic approach that undermines the substantive equality rights of parties, but that critique (which has also been made in respect of *Volks*) is beyond the scope of this article.

Secondly, it is important to consider the facts of the cases and issues raised. In *Volks*, the deceased had executed a will, and the surviving partner was bequeathed a motor vehicle, the contents of their flat, and a sum of R100 000 in an estate valued at just over R400 000.[57] In, addition, the applicant claimed maintenance from the estate in terms of the MSSA. In contrast,

[51] [2001] ZACC 18, 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC).

[52] For a discussion of the case see M Coombs '*Kaunda v President of the Republic of South Africa* Case CCT 23/04 2004 (10) BCLR 1009' (2005) 99 *American Journal of International Law* 681.

[53] [2000] ZACC 28, 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC).

[54] [2018] ZACC 30, 2018 (6) SA 393 (CC).

[55] Ibid at para 63.

[56] For a discussion of the case see Mia (note 48 above).

[57] *Volks* (note 3 above) at paras 7 and 101. Lind states that her share amounted to R140 000; Lind (note 41 above) 109 fn 7. The residue of just under R250 000 was meant to devolve upon the deceased's three children; *Volks* (note 3 above) at para 8.

in *Bwanya,* the deceased died effectively intestate — the deceased had a will, but his nominated beneficiary, his mother, predeceased him, and he left no heirs. The applicant in *Bwanya* thus brought a claim under the ISA and MSSA where she had received no inheritance in terms of the will.

It is noteworthy that a claim under the ISA was not the issue adjudicated upon by the Court in *Volks*. Indeed, this was the approach — to interpret *Volks* as binding on claims brought under the MSSA and not the ISA — adopted by the High Court and the dissenting judgment of Jafta J (with Mhlantla J and Tshiqi J concurring) to grant *Bwanya's* claim under the ISA and dismiss the challenge to the MSSA. Given that the *Volks* case was not decided based on the ISA, it arguably provides the Constitutional Court with a possible basis for distinction. This, however, may not be the strongest of distinctions given that *Volks* has, as discussed above, been interpreted in literature and by the Constitutional Court itself to preclude an unmarried opposite-sex life partner from inheriting under the ISA.[58] Furthermore, the Court in *Volks* denied the applicant's maintenance claim based on the choice argument, being that having chosen not to marry, the applicant could not avail herself of the benefits of marriage. It would stand to reason that this ratio is applicable in later cases with the result that parties not married cannot claim the benefits of marriage, such as inheriting from each other as spouses, even where the claims are brought under different statutes.

Smith argues that a more robust argument is to distinguish the nature of the benefits being claimed under the ISA as different from those claimed under the MSSA.[59] Smith argues that judicial development has extended inheritance rights in the ISA beyond legally recognised marriages, resulting in the applicant not seeking to avail herself of the benefits of marriage.[60] Partners in non-recognised marriages and unmarried partners in permanent same-sex partnerships may inherit from each other, meaning that the benefit is no longer an exclusive benefit of marriage.[61] More generally, the ISA caters to the inheritance rights of a range of family members, whereas the MSSA is limited to a surviving spouse's claim for maintenance. Accordingly, *Bwanya's* claim under the ISA is not precluded by the *Volks* case because she is not seeking to claim an exclusive spousal benefit even though she is unmarried. Of course, *Bwanya's* claim for maintenance under the MSSA is directly precluded by *Volks*, and how it may be distinguished will be dealt with later on.

Smith's argument is undoubtedly more substantial than the argument that seeks to distinguish the claims based merely on the statute under which the claim is brought. It is also a more legally sound basis than that adopted by the Court to distinguish the *Bwanya* claim from *Volks* and accords with the Court's jurisprudence to distinguish cases. But it is doubtful whether the distinction is meaningful and not invoked merely as an artifice to allow the Court to sidestep the central issue of confronting the thorny question of whether *Volks* is good law. This runs the risk of a repeat of the *Fredericks* / *Chirwa* / *Gcaba* saga, where lower courts who are forced to interpret seemingly conflicting jurisprudence adopt different approaches as to whether the latter judgment overrules the former or how they should be reconciled. This

[58] *Gory* (note 10 above) at para 29.
[59] Smith (note 14 above) at 159.
[60] Ibid.
[61] Ibid.

undermines clarity and legal certainty and runs counter to the objectives of the doctrine of precedent.

Indeed, the value of these distinctions, especially when they appear so artificial, is questionable. Here, Zitzke argues persuasively against a dogmatic legal categorisation of concepts so that they may be kept in separate boxes and treated differently.[62] While the claims are brought under different statutes, he argues that maintenance and succession are concerned with the same underlying principle, being the financial implications of surviving members and that the spheres of maintenance and succession are interwoven, as discussed earlier. Perhaps more importantly, Zitzke argues that in a constitutional era, even areas of law that do not appear strikingly similar are connected because 'the transformative constitution is the golden thread that is meant to tie South African law together as a "single system of law"'.[63]

Zitzke's robust argument requires us to acknowledge that constitutional principles link all systems of law and artificial legal distinctions may obscure a holistic understanding of the law. This is because legal categories hinder our ability to see the interconnectedness of the law as legal concepts are meant to be placed in neat, separate boxes. However, Zitzke's argument is that in a constitutional era, transformative constitutional principles guide legal development and cut across legal concepts for a cohesive legal system. Accordingly, the Court should not focus on artificial legal categorisations but be able to acknowledge when the constitutional issues raised and canvassed are the same and decide matters accordingly, including overruling a previous judgment which may be capable of distinction based on a legal categorisation.

While theoretically compelling, this argument may be understandably challenging for the Constitutional Court, which, as discussed previously, employs the technique of distinction to avoid overturning previous judgments. This narrow approach to decision-making conflicts starkly with Zitzke's argument for a more holistic perspective of the legal system. Zitzke's approach raises several questions, the most basic of which is, does it undermine certainty. Surely, given the far-reaching impact of constitutional decision-making, courts should exercise greater caution and restraint rather than adopt a robust approach that undermines legal certainty and settled questions of law. If constitutional principles link all systems of law, then does this risk the Court overturning an unrelated case it considers to be clearly wrong? I would argue yes, if the case canvasses the relevant constitutional principles that justify overturning the previous judgment. Anything less means that the Court would allow an unconstitutional legal situation to persist based on a legal distinction until yet another litigant can challenge the matter in their own time and at their own cost. But importantly, it does not mean that the Court will overturn a previously decided case on a whim based on the broad notion that constitutional principles create a single system of law. It is not the vague reference to constitutional principles that justifies the overturning of a judgment, but the fact that the relevant constitutional principles have been canvassed, and these principles pertain to the previous judgment and justify it being overruled. It is an acknowledgment that the judgments bind the same constitutional issues as opposed to distinguishing the judgments based on

[62] E Zitzke '"Constitutionally Wanting" Reasoning in the Law of Intestate Succession: A Critique of Categorical Objectivism, the Achievement of Inequality, and a Jurisprudence of Pride' (2018) 1 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 182, 189.

[63] Ibid at 192.

what may be artificial legal categorisations. This may help to ensure a coherent constitutional jurisprudence that aligns with the transformative spirit of the Constitution.

Nonetheless, it is arguable that *Bwanya* is distinguishable from *Volks*. The applicant in *Volks* received an amount under the will, whereas in *Bwanya*, the applicant received nothing from the estate. This is arguably an essential distinction because where a party inherits from an estate, allowing them to claim maintenance against the estate reduces the distribution available to other beneficiaries and may arguably frustrate the testator's wishes.[64] Thus, *Bwanya* may be distinguishable from *Volks* because it involved an applicant who did not inherit from the estate, unlike in *Volks*. Arguably, the *Bwanya* judgment accounts for this distinction as the Court ordered an amendment to the definition of a survivor in the MSSA with the qualification that the surviving partner would only qualify for maintenance if they had not received an equitable share in the deceased partner's estate.[65] For unmarried partners who inherit from their partner's estate, like the applicant in the *Volks* case, this condition means that they may not have a claim under the MSSA if they are deemed to have received an equitable share. Indeed, in the *Volks* case, Mokgoro and O'Regan JJ (dissenting) found that Mrs Robinson was left an equitable share in the estate which precludes her from any further claim against the estate.[66] Accordingly, it may have been argued that *Bwanya* does not overturn the precedent set by *Volks*. Instead, it may be distinguished — arguably on the narrowest of grounds that it dealt with a partner who was not left a share in the estate unlike in *Volks* — and provides an avenue for unmarried partners who have not received an equitable share from the estate to claim maintenance under the MSSA.

In summary, it appears that there are sound grounds upon which *Bwanya* can be distinguished from *Volks*. It is incontrovertible that *Bwanya's* challenge of the ISA was not the claim in *Volks*. In respect of the challenge to the MSSA, the applicant in *Volks* received a benefit under a will, whereas the applicant in *Bwanya* received nothing. The Court's order appears cognisant of this difference as it states that the surviving partner would only qualify for maintenance if they had not received an equitable share in the deceased partner's estate — whereas such qualification does not exist in respect of married partners. Thus, even under the *Bwanya* order, the applicant in *Volks* may not have received maintenance unless she could prove that her benefit from the estate did not constitute an equitable share in the estate.

However, while I concede that these are valid grounds that a court seeking to avoid a previous precedent may invoke, this is arguably not the ideal approach. In other words, *Bwanya* can be distinguished from *Volks*, but the Court was correct in not adopting such an approach. Questions regarding the correctness of the *Volks* judgment have been raised for

[64] *Laubscher NO v Duplan & Another* [2016] ZACC 44, 2017 (2) SA 264 (CC), 2017 (4) BCLR 415 (CC) ('*Laubscher*') at paras 46–47.

[65] Mokgoro and O'Regan JJ para 142 and clause 1 of the proposed order in para 145, in which they find that Mrs Robinson had been left an equitable share of Mr Shandling's estate: R140 000 out of an estate valued at just over R400 000. It is, perhaps, for this reason that the majority of the Court was so comfortable refusing her claim. See Skweyiya J's expression of sympathy (in para 59).
This qualification does not apply to married partners. Nonetheless, this may be considered as a survivor has a claim for maintenance insofar as they cannot provide therefor from their own means, and in the determination of maintenance, the court considers, amongst others, the amount in the estate available for distribution to heirs and legatees, see s 2(1) and s 3 of the MSSA.

[66] *Volks* (note 3 above) at para 142.

years, including in the Constitutional Court case of *Laubscher v Duplan* by the Court itself.[67] Froneman J, in a minority judgment in *Laubscher,* stated that *Volks* was not inclusive enough in the current social circumstances and advocated for a departure from the decision because it was clearly wrong.[68] The Court in *Laubscher* described Froneman's reasoning as 'stimulating' and 'persuasive' and intimated that it would reconsider the ratio of *Volks* if given the opportunity.[69] Thus, the Court needed to address whether *Volks* is good law rather than attempt to distinguish the cases and perpetuate the uncertainty around the matter. This is not an overreach by the Court to overturn an unrelated case, but an acknowledgment of how *Volks* has permeated South African succession law and jurisprudence — even though it was not a succession claim. As discussed previously, academics have speculated, based on *Volks,* that unmarried partners cannot inherit intestate from each other. The reality is that law cannot be delineated into neat boxes with sharp lines. While *Bwanya* may have technically been distinguishable from *Volks*, the Court had to deal with the *Volks* judgment directly to ensure a coherent jurisprudence. Failing to do so, may have resulted in conflicting judgments in the lower courts — similar to the *Fredericks*/*Chirwa*/*Gcaba* saga — who may have felt at liberty to choose between the conflicting judgments or interpreted *Bwanya* to have impliedly overruled *Volks*. Moreover, it is undesirable for a court to perpetuate what is considered bad law because cases can be distinguished on spurious and technical grounds.

IV *BWANYA*: *VOLKS* IS NOT BINDING

The Court in *Bwanya* acknowledges the biggest hurdle to the challenge to the MSSA is the *Volks* case.[70] The Court was split six to four on this issue as both minority judgments concurred that the challenge to the MSSA should fail given the *Volks* case. The essence of the *Volks* judgment was that it is not wrong to discriminate between married and unmarried life partners because unmarried life partners have chosen not to marry and avail themselves of the protections of marriage,[71] referred to as the choice argument.[72]

In a robust critique of the *Volks* case and its reasoning, Lind notes that the MSSA discriminated based on marital status, and that the Court in *Volks* almost unquestioningly accepts that the prioritisation of marriage is legitimate in a constitutional dispensation.[73] The Court justified the discrimination based on marital status on two grounds. First, was the constitutional and international recognition of marriage and the importance of marriage and

[67] *Laubscher* (note 64 above) at para 77.

[68] Ibid at paras 84, 86.

[69] Ibid at para 50.

[70] *Bwanya* CC (note 1 above) at para 37.

[71] For a discussion of the choice argument or what Schäfer describes as 'the objective model of choice', see L Schäfer 'Marriage and Marriage-like Relationships: Constructing a New Hierarchy of Life Partnerships' (2006) 123 *South African Law Journal* 626, 627, 641–644; and B Coetzee Bester & A Louw 'Domestic Partners and "The Choice Argument": Quo Vadis?' (2015) 18 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 2950, 2953.

[72] For a discussion of the case, see L Wildenboer 'Marrying Domestic Partnerships and the Constitution: A Discussion of *Volks NO v Robinson* 2005 5 BCLR 446 (CC): Case Note' (2005) 20 *SA Publiekreg/SA Public Law* 459.

[73] Lind (note 41 above) at 113–115.

family as social institutions in society.[74] Unfortunately, the Court does not interrogate whether this recognition is too narrow and should be expanded to other relationships. In other words, the Court could have affirmed the importance of marriage and, nonetheless, examined whether recognition should be extended to other relationships that function like marriage.

The second justification for the discrimination based on marital status was the choice argument, which has subsequently been subject to compelling criticism. Commentators argue that the choice argument ignores that in some cases, the socio-economic context renders choice meaningless or limited; it does not respect the choice of individuals who choose not to marry but whose relationships are comparable to marriage; and choices are sometimes based on mistaken understandings of law — for example, parties may often mistakenly believe that their relationships entitle them to spousal benefits.[75] Bonthuys explains further that discrimination based on marital status intersects with gender, race, religion, sexual orientation, and culture to perpetuate patterns of advantage and disadvantage.[76] Thus the choice argument failed to acknowledge that it is often privileged white women who have such a choice, whereas it is impoverished African rural women who cannot negotiate for marriage and suffer the consequences of their marital status,[77] resulting in the Court in *Volks* almost ignoring the impact of the discrimination.[78] Later, when the Court in *Volks* recognised the potential vulnerability and exploitation of women in cohabitant relationships, it delinked the contextual analysis from the claim before the Court.[79] This allowed it to ignore the position of women within marriage and cohabitant relationships and find the discrimination to be fair. Smith thus describes the judgment as a theoretically sound clinical adherence to matrimonial law that ignores the social and practical context in which choice is illusory.[80] The social context of women who have no choice was viewed as a wider issue, and the Court held its solution did not lie in the MSSA but in regulating non-marital relationships, which is a task for the legislature.[81] This approach ignored that the Court was not being asked to overhaul South African family law but to address the MSSA's under-inclusiveness, as it had in its previous judgment of *Daniels v Campbell*.[82] This brings to the fore the Court's selective use of the choice argument. Bonthuys notes that the choice argument has only been used in respect of unmarried opposite partners and in one case of a Hindu marriage where the wife sued for a divorce.[83] The choice argument is glaringly absent in several Muslim marriage cases[84] where the courts have granted relief to parties even

[74] *Volks* (note 3 above) at paras 51–53.

[75] Schäfer (note 71 above) at 627, 641–642; and Coetzee Bester & Louw (note 71 above) at 2956–2957. Also see Lind (note 41 above).

[76] Bonthuys (note 41 above) at 6.

[77] Ibid at 6–7.

[78] C McConnachie 'Transformative Unfair Discrimination Jurisprudence: The Need for a Baseline Intensity of Review' (2015) 31 *South African Journal on Human Rights* 504, 511.

[79] Albertyn (note 41 above) at 267.

[80] Smith (note 41 above) at 245.

[81] *Volks* (note 3 above) at paras 59 and 64–67.

[82] *Daniels v Campbell & Others* [2004] ZACC 14, 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)*('Daniels*').

[83] *Singh v Ramparsad* [2007] ZAKZHC 1, 2007 (3) SA 445 (D); Bonthuys (note 41 above) at 22.

[84] *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA); *Daniels* (note 82 above); *Khan v Khan* 2005 (2) SA 272 (T); and *FR v FR* [2015] ZAWCHC 6, [2015] 2 All SA 352 (WCC). It was also not used in *Govender v Ragavayah* [2008] ZAKZHC 86, 2009 (3) SA 178 (D), [2009] 1 All SA 371 (D) when a Hindu wife applied to be included as a spouse for the purposes of the ISA.

though they have not concluded a civil marriage and are able to do so, as many Muslim people do.[85] Religion is privileged, and those who have non-religious reasons for the conclusion of marriage are afforded fewer rights and protection in the law.[86] In respect of the different treatment of same-sex couples, Kruuse argues that social impediments that preclude same-sex couples from marriage are unjustifiably prioritised over those experienced by women.[87]

But despite overwhelming criticism of *Volks*, the case had up until *Bwanya* not yet been overturned and the doctrine of precedent demands that *Volks* be followed and that the challenge (at least to the MSSA) in *Bwanya* be dismissed.[88] The Court in *Bwanya* considered the reasoning of the *Volks* judgment and concluded that it was 'convinced that *Volks* was wrongly decided'.[89] But, the Court notes that this is not enough and that the Court may depart from its previous decision only 'if that decision was clearly wrong'.[90] The test for 'clearly wrong' is beyond 'a matter of personal preference, mere disagreement, misgivings, doubt, let alone whim'; it is a stringent one, and the departure from a previous decision should not be undertaken lightly.[91] Unfortunately, the Court does not expand on what this rigorous test requires or what it means to go beyond mere disagreement.

The dissenting judgment of Mogoeng CJ sheds light on the matter. Mogoeng CJ states that the Appellate Division has 'set a very high reversal-of-own judgment standard' and that the Court may only set aside its own decision when it has been arrived at through some manifest oversight or misunderstanding, the nature of a palpable mistake which would justify the Court setting aside the judgment.[92] The Court cannot prefer its own reasoning to that of its predecessor, and the maxim of *stare decisis* should apply more rigidly in the highest court than in all others.[93] Mogoeng CJ quoted *Patmar Explorations,* which expounded on this test, to state that the Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous.[94] Similarly, Jafta J emphasises that it is not a matter of personal preferences by judges, but it requires the decision to be plainly wrong in law.[95] Thus, while the *Volks* and *Bwanya* judgments were handed down 16 years apart and the Court's composition adjudicating the matter was completely different, a departure from the *Volks* case must be justified on the grounds of more than the change in the Court's composition and its personal preference.

[85] Bonthuys (note 41 above) at 21–22.

[86] D Meyerson 'Who's In and Who's Out? Inclusion and Exclusion in the Family Law Jurisprudence of the Constitutional Court of South Africa' (2010) 3 *Constitutional Court Review* 295, 310.

[87] Kruuse (note 41 above) at 385–386. For an alternative view see MC Wood-Bodley 'Intestate Succession and Gay and Lesbian Couples' (2008) 125 *South African Law Journal* 46, 54–60 and Smith (note 41 above) at 263–264 for an evaluation of Wood-Bodley's argument.

[88] *Bwanya* CC (note 1 above) at para 37.

[89] Ibid at para 46.

[90] Ibid.

[91] Ibid.

[92] Ibid at para 106.

[93] Ibid.

[94] Ibid at para 107.

[95] Ibid at para 158. Also see *Camps Bay Ratepayers and Residents Association & Another v Harrison & Another* [2010] ZACC 19, (4) SA 42 (CC), 2011 (2) BCLR 121 (CC)('*Camps Bay Ratepayers*') para 28 where the Court emphasised the importance of the doctrine of precedent and that a court may only depart from a previous decision when satisfied that the decision is clearly wrong.

The Court in *Bwanya* emphasises the importance of precedent as a core component of the legal system's rule of law, certainty, predictability, and coherence. It concludes that it is unable to find that *Volks* was clearly wrong. This is an important finding as being unable to find *Volks* clearly wrong, the judgment would bind the Court.[96] But the Court finds that it does not have to reach the same conclusion as *Volks* because the two arguments on which the judgment is based, namely the choice argument and the argument that the right to maintenance arises by operation of law during the existence of the marriage, are faulty.[97] I evaluate the Court's justifications for its departure from *Volks*, and do not provide a general assessment of the correctness of the *Volks* judgment.

In respect of the choice argument, the Court in *Bwanya* states that whether parties had a choice to marry is not the appropriate question, but rather, it is whether permanent life partnerships are deserving of protection.[98] This is not a novel approach. The Court in *Daniels v Campbell* (when faced with the question of whether spouses in Muslim marriages could inherit under the ISA) stated that the question is not whether parties have the option to marry under the Marriage Act 25 of 1961 but rather whether, in terms of common sense and justice, the objectives of the legislation are best served by extending protection to Muslim spouses.[99] Nonetheless, the Court in *Bwanya* addresses the choice argument because of its centrality in the *Volks* judgment. The Court states that whether there is a choice to marry is not a legal question but a factual one. As a matter of fact, is there a choice to marry or not to marry? The Court states that it is not bound by the answer to this question of fact, especially as new evidence was presented to the Court that was not placed before the Court in *Volks*.[100]

Here, the judgment does not address the objective principle of constitutional invalidity, which was also raised by Jafta J in his partially dissenting judgment.[101] The principle entails that the invalidity of a statutory provision does not depend on the facts of the case, lest it result in a statute being valid on one day and invalid on another.[102] The law must have the same impact regardless of the facts of a case.[103] The Court in *Volks* would have presumably considered the impact of the legislation for all people in similar situations and not just Mrs Robinson. Accordingly, even if the choice argument was a factual question — which did not appear to be the case — the Court's order of constitutional invalidity in *Volks* was presumably independent of this inquiry. In any event, if this were treated as a factual inquiry, the Court in *Bwanya* would have found that on the facts at hand the applicant had a choice to marry. Based on the facts, the parties planned to marry and travel to Zimbabwe for lobolo negotiations. It was simply a stroke of bad luck that the deceased died before the parties married, leaving the applicant without marital rights — but it cannot be said that the applicant did not have

[96] I do not evaluate the correctness of the *Volks* judgment and whether the Court in *Bwanya* should have rather declared *Volks* to be an error in law justifying the Court's departure from it. Such an evaluation has been made elsewhere: see B Meyersfeld 'If You Can See, Look: Domestic Partnerships and the Law' (2010) 3 *Constitutional Court Review* 271.

[97] *Bwanya* CC (note 1 above) at para 48.

[98] Ibid at paras 68–70.

[99] *Daniels* (note 82 above) at para 25.

[100] *Bwanya* CC (note 1 above) at para 61.

[101] Ibid at para 160.

[102] Ibid at para 161.

[103] Ibid.

a choice to marry.[104] Nonetheless, the Court answered this factual question from an abstract sense based on broader societal considerations rather than the facts of the case and found that in some cases there is a choice and others there is not.[105]

Moreover, what the Court refers to as new evidence is not apparent. It is not a change in the legal landscape, as there are no further legal impediments to marriage. Instead, it relates to new evidence of the social circumstances affecting the choice to conclude a marriage. In this regard, the judgment refers to statistics on an increasing trend in cohabitation,[106] changes in family formations,[107] and the Women's Legal Centre Trust's ('WLCT') evidence regarding why choosing not to marry is illusory.[108] But it is questionable whether this is new evidence that constitutes a change in the circumstances that surrounded the *Volks* case.

In *Volks*, the Court refused to admit additional evidence tendered by the Centre for Applied Legal Studies ('CALS') aimed at demonstrating the vulnerability of women in cohabitant relationships and the lack of choice of whether to marry or not.[109] However, the Court in *Volks* was nonetheless cognisant of the vulnerability and economic dependence of women in marriage and cohabitant relationships.[110] The Court explicitly acknowledged the imbalance in power relationships may mean that women who wish to marry are unable to do so.[111] This may result in the exploitation of women who are not compensated for their contribution to the joint household in the form of labour and emotional support.[112] The Court had no difficulty recognising the vulnerability of cohabitants and that the impact of the non-recognition of their rights is aggravated by factors such as poverty and illiteracy.[113] However, the Court rejected the argument that the extension of a maintenance claim upon the death of a partner would address the vulnerability of cohabitants.[114] Thus, while the WLCT may have made more extensive submissions in *Bwanya*, it is apparent that the Court was cognisant of the issues in *Volks*.

Furthermore, the Mokgoro and O'Regan minority judgment in *Volks* reflects an awareness of the increasing rates of cohabitation in South Africa.[115] Sachs J also acknowledges that the theoretical choice to marry may not always manifest in reality.[116] The South African Law Reform Commission's ('SALRC') discussion paper on domestic partnerships was also available to the Court in *Volks*.[117] The Court in *Bwanya* further explicitly acknowledges that the judgment in *Volks* was mindful of women who may be trapped in cohabitant relationships

[104] Mogoeng CJ underscores this point in his dissenting judgment. He notes that the parties 'had chosen to be married' and 'they did not choose to be permanent life partners'. *Bwanya* CC (note 1 above) at para 100.
[105] *Bwanya* CC (note 1 above) at para 69.
[106] Ibid at para 52.
[107] Ibid.
[108] Ibid at para 62.
[109] *Volks* (note 3 above) at paras 31–35. For criticism of this part of the judgment see Lind (note 41 above) at 118–120.
[110] *Volks* (note 3 above) at paras 63–66.
[111] Ibid at para 64.
[112] Ibid.
[113] Ibid at paras 65–66.
[114] Ibid at para 66.
[115] Ibid at para 119.
[116] Ibid at paras 157–159, 164, 180 and 210–212.
[117] Ibid at para 167.

despite their desire to marry.[118] So what, then, is the new evidence? It appears that perhaps more evidence was presented to the Court in *Bwanya* on the issue of the vulnerability of partners in cohabitant relationships.[119] But, it is a misnomer to describe it as new evidence, evidence of issues of which the Court was not aware and that would change its answer to the question of whether individuals had a choice whether or not to marry. Indeed, the Court in *Volks* was well aware that many women struggle to exercise the choice to marry and states that it has 'a genuine concern for vulnerable women who cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships'.[120] Thus *Bwanya's* reasoning that it was not bound by the choice argument because of the new evidence presented is unconvincing.

This brought the Court in *Bwanya* to the second of the two grounds used to justify the departure from the *Volks* case: the argument that the MSSA extended a maintenance duty that arose by operation of law between married partners and did not create a new duty. The Court suggests that the reasoning is incorrect given developments in the common law that have extended rights to opposite-sex life partners.[121] In this regard, the Court examines *Paixão v Road Accident Fund*,[122] where the Supreme Court of Appeal recognised a legally enforceable duty of support between unmarried life partners in the context of a dependent's action. The Court argued that *Paixão* was ultimately not based on contract but rather the 'spouse-like relationship that made it necessary that the right be afforded legal protection'.[123] The Court argues that the relationship's familial nature drove the development of the law rather than the fact that a duty of support arose between the parties by agreement.[124] Accordingly, the Court finds no basis to distinguish between reciprocal duties of support arising between married partners by operation of law and those arising by agreement between unmarried partners[125] and concludes that excluding permanent life partners who had undertaken reciprocal duties of support from the MSSA is unconstitutional.[126]

The Court's reasoning here is not entirely convincing. The Supreme Court of Appeal in the *Paixão* case explicitly distinguished *Paixão* from the *Volks* case to sidestep the finding that an unmarried partner could not benefit from their partner's estate. The Court noted that the purpose of a maintenance claim under the MSSA is to provide for the reasonable maintenance needs of a party from the deceased spouse's estate.[127] A spousal benefit accrues to a dependent because of a formally recognised marriage.[128] On the other hand, the purpose of the dependent's action is to place the deceased's dependents to whom the deceased owed a legally enforceable duty to support in the same position they would have been, in respect

[118] *Bwanya* CC (note 1 above) at para 65.

[119] As stated above, the Court in *Volks* refused to admit the evidence of CALS on the issue.

[120] *Volks* (note 3 above) at para 68.

[121] *Bwanya* CC (note 1 above) at para 71.

[122] *Paixão & Another v Road Accident Fund* [2012] ZASCA 130, 2012 (6) SA 377 (SCA)('*Paixão*').

[123] *Bwanya* CC (note 1 above) at para 71. See Barratt for a discussion of the Court's use of the *Paixão* judgment. Barratt notes that this argument went to a different element of the dependent's action, namely whether the contractual right of support was worthy of protection; Barratt (note 8 above) at 7.

[124] *Bwanya* CC (note 1 above) at para 71.

[125] Ibid.

[126] Ibid at paras 74–81. For a discussion of the meaning of the phrase 'in which the partners undertook reciprocal duties of support', see Barratt (note 8 above) at 1–28.

[127] *Paixão* (note 122 above) at para 26.

[128] Ibid.

of support and maintenance, had the deceased not been unlawfully killed.[129] The remedy arises because of the unlawful termination of a legally enforceable duty of support.[130] The distinction between the two remedies is made even more apparent when it is understood that the dependent's action has been recognised in respect of the loss of support arising from the death of a nephew,[131] a biological father who voluntarily continued to support his daughter after adoption financially,[132] and an unmarried partner, even though the deceased was in a lawful marriage with another woman at the time of his death.[133] While the courts in these cases may have recognised an enforceable duty of support, they would not give rise to a claim under the MSSA because of the statute's very different purpose. There may be other reasons for the Court to extend the benefits of the MSSA to unmarried partners, but the fact that unmarried partners have a claim under a very different dependent's action does not appear to be one of them. *Paixão* is not to be viewed as 'an abandonment of the principles of the choice argument but rather as a natural development of the dependant's action'.[134]

Furthermore, Barratt notes that the Supreme Court's discussion regarding the familial relationship between the parties (and relied upon by the Constitutional Court as set out above) occurred in establishing a delictual claim.[135] The delictual claim requires that the contractual right to support be worthy of protection determined by society's *boni mores*.[136] Accordingly, the discussion of the familial relationship between the parties was used to support the argument that the right of support was worthy of protection and would give rise to a claim in delict. The familial relationship itself did not give rise to the enforceable duty of support, rather the duty of support arose because of the tacit contract for reciprocal support between the parties.[137]

Finally, it is not entirely clear that a development in the common law justifies a departure from the *Volks* judgment. In simple terms, judges have the power to develop common law but not legislation.[138] This means that judges are empowered to develop the common law to take into account changes in society, such as by developing the dependent's action discussed above to take into account changes in family formations and relationships. The development of the common law in this manner falls within the judiciary's domain. In contrast, judges do not technically develop legislation. I say technically because judges interpret legislation,[139]

[129] Ibid.

[130] Ibid.

[131] *Road Accident Fund v Mohohlo* [2017] ZASCA 155, 2018 (2) SA 65 (SCA).

[132] *JT v Road Accident Fund* [2014] ZAGPJHC 229, 2015 (1) SA 609 (GJ).

[133] *Jacobs v Road Accident Fund* [2018] ZAGPPHC 830, 2019 (2) SA 275 (GP).

[134] Coetzee Bester & Louw (note 71 above) at 2954 fn 26.

[135] Barratt (note 8 above) at 7.

[136] Ibid at 7–8.

[137] Ibid at 8.

[138] Section 173 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') refers to 'Inherent Power' and provides: 'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'
Also see S 39(2) of the Constitution, which provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[139] Constitution S 39(2).

and the Constitutional Court has the final say on the constitutionality of legislation,[140] which constitutes a development in the law in so far as it changes the way the law is applied. This is a significant power because, as discussed later on in the context of the extension of the ISA, it may result in monumental changes in the law and, in reality, constitute a significant development in the law. To foreshadow the upcoming discussion, the courts have been responsible for the most significant developments in intestate inheritance law, such as extending intestate inheritance benefits to same-sex partners and spouses married according to Islamic Law.[141] But—and this distinction is crucial—the court's powers with respect to legislation are limited. As stated previously, courts may only interpret legislation or declare it unlawful. Where the legislation is lawful, they cannot substitute the legislation with their own views or extend the ambit of the legislation because they deem it to be more progressive or better policy. This is because, while the judiciary serves as a check on the legislature, and an important check in South Africa, it does not legislate. The court's powers in respect of the common law are far more robust.

We must not lose sight of the fact that South Africa adheres to the doctrine of separation of powers.[142] While the lines are blurred and courts undeniably wield great power in the interpretation and implementation of legislation, they do not have carte blanche to develop legislation to bring it into line with what they may consider to be society's developing needs. There are limits on the court's powers and one such limitation is that the court may only exercise its powers in respect of legislation when the legislation is unlawful, a different threshold to developing the common law. This is not to minimise the significant role the courts play in the interpretation and implementation of legislation. It simply emphasises that the court has different roles in respect of legislation and common law, and a development in the common law on its own cannot be used as a justification for courts to develop legislation.

Accordingly, this means that it is entirely within the courts' power to develop common law to extend the dependent's action to unmarried partners in certain circumstances. This development, however, does not necessarily render legislation that does not extend protection to unmarried partners unconstitutional. The court will have to consider whether the same rights underpin the common law and statutory provisions and whether the vindication of the rights requires a change in the legislation as was done in the common law. But this is not automatic; it must be considered, because it is entirely possible that the court has adopted a robust and different policy approach to developing the common law, but it is not the only lawful option. Provided that the legislation reflects one of the lawful options, the court does not have the power to substitute it with the court's own approach. This is because:

[140] Constitution S 172(2)(a). For an excellent overview of the Constitutional Court's treatment of cases from 1995 to 2012 see IM Rautenbach 'Constitutional Court 1995–2012: How Did the Cases Reach the Court, Why Did the Court Refuse to Consider Some of Them, and How Often Did the Court Invalidate Laws and Actions?' (2013) 16 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 45.

[141] *Gory* (note 10 above) and *Daniels* (note 82 above).

[142] *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22, 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) para 46. Z Motala 'Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service under the New South African Order' (1995) 112 *South African Law Journal* 503; K O'Regan 'Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' (2005) 8 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1; and D Landau & D Bilchitz 'The Evolution of the Separation of Powers in the Global South and Global North' in D Landau & D Bilchitz (eds) *The Evolution of the Separation of Powers* (2018) 1, 9 and 18–22.

> It is unavoidable that judges will encounter legislative choices with which they disagree. There could be valid and cogent grounds for such disagreement. But the court, being a court of last instance, has a duty to respect the policy choices of the legislature. That requires an appreciation of the distinction — which is often nuanced and not apparent — between questions of legal interpretation and policy choices.[143]

Of course, this may create an incongruency between the common law and legislation in its treatment and regulation of the rights of unmarried partners, but it is the legislature's prerogative to correct any such incongruency — provided it is not unlawful. In this vein, Jafta J succinctly articulates the essence of the problem as Parliament's failure to regulate the affairs of permanent life partners.[144] But he notes, and arguably rightly so, that the failure does not empower a judicial intervention and that Parliament can accord them the protection it deems fit.[145]

Ultimately, the Court in *Volks* pronounced on the constitutionality of the MSSA. Given the doctrine of precedent, the only way for the Court to have departed from the binding judgment of *Volks* is to state that the decision is clearly wrong. This is an argument that has been made convincingly elsewhere.[146] The Court, however, does not make such an argument but rather reasons that the factual nature of the choice argument and the development in the common law allows it to depart from the *Volks* case without a declaration that the *Volks* case is clearly wrong. But the Court fails to address how this is reconciled with the doctrine of precedent, which dictates that *Volks* must be followed. This is the point of contention raised in the dissenting judgments. Mogoeng CJ acknowledges the majority's desire to overturn the *Volks* judgment but maintains that 'it is legally impermissible to do so without demonstrating that the Volks majority was clearly wrong'— something the Court explicitly denied. The refusal to declare the judgment clearly wrong but not abide by it creates uncertainty in our law. The Constitutional Court itself cautioned against this in *Camps Bay Ratepayers' and Residents' Association v Harrison,*[147] where it stated:

> It is tempting to avoid a decision by a higher authority when one believes it to be plainly wrong. Judges who embark upon this exercise of avoidance are invariably convinced that they are 'doing the right thing'. Yet, they must bear in mind that unwarranted evasion of a binding decision undermines the doctrine of precedent and eventually may lead to the breakdown of the rule of law itself.

While the statement appeared directed at the Supreme Court of Appeal,[148] it is no less true regarding the Constitutional Court itself. In this context, the Court's reluctance to declare *Volks* clearly wrong manifests uncertainty about the validity and reliability of other judgments that relied upon the *Volks* precedent. For example, in *Flynn v Farr*, the Cape of Good Hope Provincial division relied upon the *Volks* case to refuse to recognise that de facto adopted

[143] Ngcukaitobi (note 35 above) at 168.

[144] *Bwanya* CC (note 1 above) at para 195.

[145] Ibid at paras 195, 202.

[146] Kruuse (note 41 above) at 380; B Smith 'Intestate Succession and Surviving Heterosexual Life Partners: Using the Jurist's "Laboratory" to Resolve the Ostensible Impasse That Exists After *Volks v Robinson*' (2016) 133 *South African Law Journal* 284. For an alternative view, see Wood-Bodley (note 87 above) at 46.

[147] *Camps Bay Ratepayers* (note 95 above) at para 30.

[148] Brickhill (note 27 above) at 91.

children should be recognised for inheritance under the ISA.[149] The court noted that the Constitutional Court in *Volks* found that the MSSA did not infringe upon Mrs Robinson's dignity and used that to find that there would similarly be no infringement of dignity in refusing to grant inheritance rights to de facto adopted children.[150] Given that *Volks* has been overturned but not declared clearly wrong, how should *Flynn v Farr* be treated? It arguably presents an opportunity to revisit the finding in *Flynn v Farr,* given the *Bwanya* judgment and its treatment of the *Volks* case.

In conclusion, the Court's explanation of its assertion that it was not bound by *Volks*, without declaring it clearly wrong, is not persuasive. To cloak the choice argument as a question of fact, which is not binding given the change in context, is misleading, especially given the facts that the parties were on the precipice of concluding a marriage and clearly had a choice as to whether to marry, and had not married.

V SOFTENING OF *STARE DECISIS*

The doctrine of precedent is based on the Latin maxim *stare decisis et non quieta movere*, which means to stand by previous judgments and not to disturb settled law.[151] In practical terms, it means that a court will follow its own past decision unless it is satisfied it is wrong and will refuse to abide by it.[152] The consistent and predictable application of a previously decided rule ensures certainty in the law and equality in the treatment of litigants.[153] It allows individuals to arrange their affairs with knowledge of legal rules and confidence that disputes will be resolved in a predictable manner rendering it central to the rule of law.[154] Certainty has social and economic value as litigants are encouraged to settle disputes rather than go to court and change the law.[155] It also ensures efficiency as courts do not have to decide cases afresh every time, thus making it indispensable to the rule of law.[156]

Given that *Bwanya* did not find *Volks* to be clearly wrong and the reasons for departing from *Volks* were unpersuasive, is *Bwanya* wrong? Is *Bwanya* bad law for not adhering to the traditional notion of *stare decisis*? I think not. The Court's reasoning may be sound if it is understood as a softening or more 'moderate view' of the doctrine of *stare decisis*.[157] In a more flexible approach to the doctrine of precedent, a court may decline to follow a binding precedent in exceptional circumstances when there are sound and legitimate reasons to do so.[158] Rycroft argues that the Constitutional Court, sitting as a court of last resort, has to consider

[149] *Flynn v Farr* 2009 (1) SA 584 (C).
[150] Ibid at paras 41, 48.
[151] HR Hahlo & E Kahn *The South African Legal System and Its Background* (1968) 214.
[152] Ibid at 243.
[153] Ibid.
[154] Ngcukaitobi (note 35 above) at 155–156.
[155] BV Harris 'Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle' (2002) 118 *Law Quarterly Review* 408, 413.
[156] Ibid at 413–414; and G Devenish 'The Doctrine of Precedent in South Africa' (2007) 28 *Obiter* 1, 4–5.
[157] For a discussion of this approach, see Kruuse (note 41 above) at 387.
[158] Devenish (note 156 above) at 10.

factors beyond merely whether a previous judgment is wrong because 'its role requires it to reconsider the law in the light of changing circumstances'.[159]

The approach is consistent with the Supreme Court of Canada, which has held that while it usually adheres to its own decisions, it is not bound to do so.[160] The Canadian Supreme Court has justified overturning precedent due to inconsistency with the Canadian Charter of Rights and Freedoms, developments in the law that undermine the previous decision, the prior decision causing uncertainty, and unfairness to the accused.[161] The result is that the Supreme Court may deviate from a precedent. Parkes opines that the open and transparent manner in which it does so is preferable to the court distinguishing cases on technical grounds, changing the law without admitting it or perpetuating an unjust outcome.[162] *Stare decisis* appears to play a diminished role in the court's jurisprudence as it evinces a willingness to revisit its previous decisions,[163] even when not clearly wrong. The court's approach has not been without critique, as some commentators have questioned the court's willingness to disturb settled law that has had no adverse consequences.[164] Nonetheless, it is beyond doubt that the court adopts a robust approach to overturning precedent and (some) willingness to overturn even recently decided case law.[165] The grounds used by the Canadian Supreme Court are very similar to the questions that need to be answered in the affirmative in the moderate approach to precedent discussed below.

Kruuse, drawing on an earlier examination by Rycroft,[166] identifies three of the most pertinent questions a court should consider — and which aptly explain the *Bwanya*

[159] A Rycroft 'The Doctrine of Stare Decisis in Constitutional Court Cases' (1995) 11 *South African Journal on Human Rights* 587, 588.

[160] SD Woolman & D Brand 'Is There a Constitution in This Courtroom? Constitutional Jurisdiction After *Afrox* and *Walters*' (2003) 18 *SA Publiekreg/SA Public Law* 37, 72.

[161] *R v Bernard* 1988 CanLII 22 (SCC), [1988] 2 SCR 833. See D Parkes 'Precedent Revisited: *Carter v Canada (AG)* and the Contemporary Practice of Precedent' (2016) 10 *McGill Journal of Law & Health* 123, 132.

[162] Ibid.

[163] Ibid.

[164] WN Brooks & K Brooks 'The Supreme Court's 2012 Tax Cases: Formalism Trumps Pragmatism and Good Sense' 2013 *Supreme Court Law Review* 267, 294.

[165] In 2007, the court in *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia* [2007] SCJ 27, [2007] 2 SCR 391 (SCC) reversed a trilogy of decisions relating to collective bargaining. Four years later in *Ontario (Attorney General) v Fraser* [2011] SCJ 20, [2011] 2 SCR 3 (SCC) Rothstein J (dissenting) would have overturned the Health Services judgment.

The approach to the vertical doctrine of precedent may be considered even more robust as the court has said that a trial court may reconsider a settled ruling where a new legal issue is raised or a change in circumstances or evidence changes the parameters of debate; *Carter v Canada (AG)(Carter SCC)* 2015 SCC 5, [2015] 1 SCR 331 para 44. For a discussion of the vertical convention of precedent, which is beyond the scope of this article, see Parkes (note 161 above) at 137–143; J Arvay, S Tucker & AM Latimer 'Stare Decisis and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?' (2012) 58 *Supreme Court Law Review* 61, 70–75.

[166] Rycroft (note 159 above). Rycroft articulates six factors based on jurisprudence from the US Supreme Court a court should consider in overruling a previous judgment:

(a) Has the rule proved to be intolerable simply in defying practical workability? ...

(b) Is the rule subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation? ...

(c) Have related principles of law so far developed as to have left the old rule no more than a remnant of abandoned doctrine? …

judgment — in determining whether to depart from a previous judgment.[167] If answered in the affirmative, the questions point to changes in law and circumstances that justify a court departing from precedent to achieve important constitutional objectives. The questions are:

- Has the related law developed to such an extent to render the old ruling obsolete?
- Have the facts changed or come to be seen so differently that the old ruling is no longer justified?
- Is the ruling an obstacle to achieving other objectives found in other laws?[168]

The reference to the development in the law is arguably what the Court in *Bwanya* was alluding to in its discussion of the development of the common law dependent's action. Here, the Court could also note the extensive legal recognition of unmarried partners, such as in the Domestic Violence Act 116 of 1998, the Medical Schemes Act 131 of 1998, the Income Tax Act 58 of 1962, the Estate Duty Act 45 of 1955, the Pension Funds Act 24 of 1956, and the Immigration Act 13 of 2002. In addition, judicial development means that same-sex unmarried partners can inherit from each other and have greater rights than their opposite-sex counterparts. The result is that *Volks* is entirely out of kilter with our jurisprudence that has generally sought to extend protection to unmarried partners, and may be considered obsolete.

The second question is whether the facts have changed or come to be seen so differently that *Volks* is no longer justified. I argued in the previous section that there is no change in the factual circumstances. The difficulties surrounding the choice to marry existed at the time of the *Volks* case, as was noted in the minority judgments. However, there appears to be a change in the Court's willingness to recognise these difficulties so that the facts are seen vastly differently. In *Volks,* the Court ignored the socio-economic difficulties surrounding the choice to marry. It held that parties who choose not to marry when the law allows them to do so cannot avail themselves of the benefits of marriage. But that approach has changed, and the Court has, in *Laubscher v Duplan,* affirmed the intestate inheritance rights of unmarried same-sex partners. The change in approach to the rights of unmarried partners, means that *Volks* is no longer justified. The fact that *Laubscher v Duplan* dealt with same-sex marriage is not sufficient to justify differential treatment to *Volks*. This would create an unacceptable hierarchy in the obstacles experienced in marriage and prioritise sexual orientation over poverty and patriarchy, particularly experienced by women as obstacles to marriages.[169]

Finally, the question is whether *Volks* is an obstacle to achieving other objectives found in other laws. Kruuse argues that *Volks* failed to realise the constitutional objective of protecting all family types.[170] In contemporary South African society, the nuclear family is the least common family formation in South Africa.[171] Declining marriage rates and increasing divorce rates[172]

(d) Have facts so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification? …

(e) Is the most recent decision a collision with a prior, intrinsically sounder doctrine? …

(f) Is the decision a direct obstacle to the realization of important objectives embodied in other laws? … .

[167] Kruuse (note 41 above) at 388.

[168] Ibid.

[169] Ibid at 385–386.

[170] Ibid at 389.

[171] Department of Social Development *Revised White Paper on Families in South Africa* (2021) 6–7.

[172] Ibid at 12.

have resulted in families being formed in a myriad of ways,[173] including through cohabitation without marriage.[174] *Volks* is undeniably a stumbling block to realising the rights of unmarried partners and also the constitutional objectives of equality and non-discrimination. This is because the problem is broader than cohabitation, encompassing the gender inequality women experience.[175] Mrs Robinson may not have had a need for the maintenance claim, if men and women were rewarded equally for work performed in and outside the home and there was a similar equal sharing of burdens in respect of the home.[176] Put simply, the recognition of the rights of unmarried partners is necessary because women often carry a disproportionate burden of caregiving and household responsibility which goes unpaid and hinders their earning potential.[177] Despite changes in attitudes, 'the material benefits of life in our society are still controlled and enjoyed disproportionately by men'.[178] This means that women are left economically vulnerable at the termination of the relationship. The development in the law to allow unmarried partners claims against the estate is then necessary to address the inequality in relationships that exists even between married partners.

From the above discussion, the moderate approach or softening of *stare decisis* provides a different (but not necessarily lower or less rigorous) threshold for departing from a binding precedent. The approach provides a better-theorised explanation of the judgment and the Court's departure from *Volks*. The focus is shifted from the soundness of the previous judgment to determining what is sound in the current context, without precedent being seen as shackles that cannot be shaken. The approach may be justified if the *stare decisis* doctrine is not viewed as an end in itself, but rather as a means to achieve other important goals, such as justice and equality, which may sometimes be achieved when not every decision is followed as precedent. It acknowledges the value-laden nature of constitutional interpretation and the changing nature of values.[179] The *Bwanya* judgment and its treatment of *Volks* arguably make more sense when viewed through the flexible doctrine of precedent. The judgment would have been strengthened had the Court acknowledged head-on that it was not strictly adhering to the doctrine of *stare decisis* and justified its departure from the *Volks* case on a softer approach to the doctrine of *stare decisis*.

But the critique of the flexible approach is obvious: it undermines the doctrine of *stare decisis*, an unassailable part of our legal system that ensures certainty in our law and equality

[173] F Osman 'Family Formations in Contemporary South Africa: Does South African Marriage Law Protect Lived Realities?' (2020) *International Journal of Law, Policy and the Family* 272; and B Goldblatt 'Regulating Domestic Partnerships: A Necessary Step in the Development of South African Family Law' (2003) 120 *South African Law Journal* 610.

[174] Lind (note 41 above) at 111.

[175] Ibid at 112.

[176] Ibid.

[177] D Chopra & E Zambelli 'No Time to Rest: Women's Lived Experiences of Balancing Paid Work and Unpaid Care Work' 2017 *Institute of Development Studies* 1, 18–21; and D Casale & D Posel 'Gender and the Early Effects of the COVID-19 Crisis in the Paid and Unpaid Economies in South Africa' *Coronavirus Rapid Mobile Survey Wave* (15 July 2020) 1, available at https://cramsurvey.org/wp-content/uploads/2020/08/Casale_policy-brief.pdf.

[178] Lind (note 41 above) at 112.

[179] Kruuse (note 41 above) at 387. Also see Ngcukaitobi (note 35 above) at 167 who acknowledges that 'certainty cannot be the be-all and end-all. A final appellate court should enjoy the power to depart from its previous decisions'.

of those before it[180] — and it is perhaps the reason why the Court does not explicitly adopt the flexible approach. Here, it is undeniable that the flexible approach amounts to a softening of *stare decisis*. Still, it need not be seen as a complete jettisoning of previous judgments in which every case is decided anew without recourse to previous judgments. Precedent must be respected, but it is an approach that equally acknowledges that a shift in societal values and norms may require a break from precedent in exceptional circumstances.

Unfortunately, *Bwanya* does not explicitly endorse the approach. Rather, it declines to apply binding precedent with the shaky justification discussed previously. Had the Court expressly adopted the moderate approach, it would have undoubtedly been critiqued for undermining certainty and established legal principles. But how can the values of certainty and predictability justify perpetuating an erroneous decision that affects people's rights? My argument is that they cannot, but the justification for the departure from the decision must, nonetheless, be clear and capable of being consistently applied to ensure the integrity of the legal system. To this end, the moderate approach articulates well the principles the Court used to justify a departure from *Volks* and the judgment would have been strengthened had the Court explained its reasoning in terms of the approach.

VI A SHIFT IN THE COURT'S APPROACH

A question that remains unanswered is what may have motivated the Court to refuse to apply *Volks* even though it was not convinced it was clearly wrong. The judgment must be justified beyond a mere shift in the composition of the Court and, in this part, I examine whether the judgment perhaps represents a shift in the Court's approach to unmarried partners.

The *Bwanya* judgment was yet another critical intervention in the ISA by the Constitutional Court which in jurisprudence spanning over 20 years has delivered seven groundbreaking judgments on the ISA.[181] Despite robust jurisprudence in this sphere of law, the Court has adopted a restrained stance by issuing orders for relief to the parties involved and not over-arching relief that addressed the broader issue of the under-inclusive nature of the ISA.[182] For example, historically, a glaring lacuna in the ISA is its definition of spouse and failure to provide for spouses in religious marriages. This omission resulted in *Daniels v Campbell,* in which the Court provided that the word spouse in the ISA and the MSSA must be read to include spouses in monogamous, Muslim marriages.[183] The narrow order allowed monogamous spouses in Islamic marriages to inherit from each other under the ISA but did not generally pronounce on the rights of spouses in religious marriages.[184] Four years later, when the question

[180] Woolman & Brand (note 160 above) at 44. It is also said to promote efficiencies in the law and allow individuals to conform their behaviour to known legal rules. For a discussion of the significance of precedent, see N MacCormick 'The Significance of Precedent' (1998) *Acta Juridica* 174; Devenish (note 156 above) at 4–7.

[181] *Daniels* (note 82 above); *Bhe & Others v Khayelitsha Magistrate & Others* [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Hassam v Jacobs NO & Others* [2009] ZACC 19, 2009 (5) SA 572 (CC), 2009 (11) BCLR 1148 (CC)('*Hassam*'); *Gory* (note 10 above); *Bwanya* CC (note 1 above); *Laubscher* (note 64 above); *Moosa NO & Others v Minister of Justice and Correctional Services & Others* [2018] ZACC 19, 2018 (5) SA 13 (CC), 2018 (10) BCLR 1280 (CC).

[182] For a discussion of the under-inclusive nature of the ISA, see Osman (note 49 above).

[183] *Daniels* (note 82 above).

[184] The Court provided relief to particular litigants without a general extension of inheritance rights to parties in religious marriages — which is the nub of the problem. The result is that currently parties in Muslim and

of the inheritance rights of spouses in Hindu marriages arose, the parties had to go to court for relief.[185] Similarly, further litigation was needed to recognise the inheritance rights of spouses in polygamous Muslim marriages.[186]

It is arguable that the Court in *Volk*s (decided in 2005) exercised similar restraint and was in some part influenced to exercise judicial restraint in the matter by what appeared to be forthcoming legislative intervention.[187] The Minister of Justice and Constitutional Development ('the Minister') explicitly argued for such restraint, considering the SALRC's exploration of law reform in the area.[188] It should be noted, however, that the Court has not displayed the same restraint in matters relating to the rights of same-sex couples. Meyersfeld notes that '[i]n the same year as the *Volks* decision, the Court was less deferential to parliament in the case of *Fourie*, where the Court's direction to the legislature was clear and unequivocal: same-sex marriage had to be legalised'.[189] Similarly, the Court in *Gory v Kolver* declared the ISA unconstitutional to the extent that it precluded partners in same-sex life partnerships who have undertaken reciprocal duties of support from inheriting from their partner's estate even though the Court was aware that law reform allowing same-sex couples to conclude a civil union was imminent.[190] The Civil Union Act was passed several days later, with the strange result that same-sex life partners who chose not to conclude a civil union could inherit from each other while their heterosexual counterparts could not.[191] In *Laubscher*, the Court confirmed this position and the inequitable treatment of same-sex and opposite-sex couples. Still, it noted that it would be the legislature's prerogative to address the situation.[192] In a similar vein of extending protection to unmarried same-sex partners, the *Bwanya* order encompasses unmarried same-sex partners, though this issue was not before the Court. The broader order is consonant with the Court's historical jurisprudence to extend protection to unmarried same-sex partners. But what, then, has motivated the Court to break from its restrained approach concerning opposite-sex partners and jettison the *Volks* precedent?

In 2005, Lind opined that in leaving the matter of unmarried partners to Parliament to resolve, the Court appeared 'daunted by the scale of the problems presented by this endemic

Hindu marriages are entitled to inherit under the ISA but there has been no pronouncement on the rights of their counterparts in other religious marriages such as Christian or Jewish marriages. This may be thought to be insignificant as most Christian and Jewish marriages are simultaneously registered as civil marriages, but it may have significant effect in the customary law arena. In customary law, parties often conclude a customary law marriage and then celebrate their marriage with a 'white wedding,' being a religious ceremony in a church. While some parties may go on to register their marriage at the Department of Home Affairs, others do not. The customary law marriage is valid in law, but individuals often struggle to prove the existence of the customary marriage in the absence of registration. The result is that upon the death of a spouse, the surviving spouse may find the validity of their marriage disputed by families who seek to negate the marital rights such as inheritance rights. However, regardless of the status of the customary marriage, the surviving spouse should be able to assert inheritance rights in terms of their Christian marriage like their Muslim and Hindu counterparts.

[185] *Govender v Ragavayah NO & Others* [2008] ZAKZHC 86, 2009 (3) SA 178 (D).

[186] *Hassam* (note 181 above).

[187] *Volks* (note 3 above) at para 28; heads WLCT para 26.

[188] *Volks* (note 3 above) at para 29.

[189] Meyersfeld (note 96 above) at 290.

[190] *Laubscher* (note 64 above) at para 22.

[191] This inequality was recognised by the Court in *Laubscher* (note 64 above) at para 31.

[192] Ibid.

social phenomenon'.[193] The *Bwanya* judgment appears to be the Court's acknowledgment of the legislature's failure to provide relief to unmarried partners as hoped. The SALRC released its report on domestic partnerships in 2006,[194] and the Domestic Partnerships Bill was issued in 2008. Yet, 15 years after the *Volks* judgment was handed down, the law reform referred to by the Minister in the case has yet to come to fruition. It led to a turnaround of the argument made in *Volks* that the Court should exercise restraint given forthcoming law reform: the WLCT in *Bwanya* argued that the absence of legislative intervention after years of deliberation justified the Court's intervention to protect the rights of life partners and overturn the *Volks* judgment. Notably, in *Bwanya*, the Minister did not argue for judicial restraint, though law reform appeared imminent.[195] At the time the judgment was handed down on 31 December 2021, the SALRC, mandated by the Department of Home Affairs, had released Discussion Paper 152, Single Marriage Statute, with two proposals for a proposed single marriage statute in South Africa which, amongst others, recognised the rights of unmarried partners.

Today, the *Bwanya* judgment and the recognition of the rights of unmarried partners may direct proposed law reform. In 2023, the Department of Home Affairs released a Draft Marriage Bill and subsequently the Marriage Bill (B43–2023)('the Bill') proposing a single marriage statute to regulate marriage that does not recognise life partnerships or the rights of unmarried partners. This position conflicts starkly with *Bwanya* and the recognition of inheritance and maintenance rights of unmarried partners. The Bill's non-recognition of life partnerships may be interpreted as a contravention of the *Bwanya* judgment, which compels the recognition of unmarried partners or risks the statute being declared unconstitutional. Despite what Jafta J's earlier comments suggest, Parliament is not free to regulate the affairs of permanent life partners and accord them the protection it deems fit;[196] *Bwanya* is a constraint going forward. But Parliament is always constrained by notions of lawfulness and constitutionality and the judgment is no more than this. The judgment provides broad recognition of the rights of unmarried partners who had undertaken reciprocal duties of support, but regulation of the rights is left to the legislature. For example, imagine a scenario where a single mother of three children is in a long-term committed relationship with her partner, who is not the children's father and has assumed no financial responsibility for them. If she were to die intestate, her partner may inherit the entire estate to the exclusion of her children.[197] Such an outcome appears wholly unjust and results from a blunt extension of the ISA to unmarried partners without balancing the rights of other family members. Legislative reform will presumably consider such implications and provide therefor. Thus, *Bwanya* is a significant judicial intervention that forces the recognition of the rights of life partners but, in accordance with the notions of deference and separation of powers, this is meant to be comprehensively regulated by the legislature.

[193] Lind (note 41 above) at 108.

[194] SA Law Reform Commission Report on Domestic Partnerships (March 2006).

[195] *Bwanya* CC (note 1 above); heads WLCT para 56.

[196] *Bwanya* CC (note 1 above) paras 195, 202.

[197] ISA s 1(c). If the estate is smaller than the prescribed amount currently set at R250 000, the surviving spouse inherits the entire estate.

VII CONCLUSION

Scholars have long called for more extensive protections for the rights of unmarried partners,[198] and the *Bwanya* judgment answers that call. The judgment addresses *Volks* as a binding precedent, the biggest obstacle to recognising such a claim. The Court refrains from declaring *Volks* clearly wrong, perhaps not without good reason. This is because while the *Volks* decision has given rise to plenty of scholarly criticism and commentary, it is not clear that it reaches the threshold of 'clearly wrong', which has been described as being a manifest oversight or misunderstanding, or a palpable mistake that would justify the Court setting aside the judgment. The Court in *Volks* was aware of the non-legal constraints on marriage (and clearly discussed them in the minority judgments) and it would be disingenuous to state that the Court misunderstood or was mistaken about the constraints in order to be able to classify the judgment as clearly wrong.

Accordingly, the Court in *Bwanya* frames the choice argument central in *Volks* as a question of fact to which the Court is not bound. However, the argument is not the most convincing. *Bwanya* is best understood as a softening of *stare decisis*, which allows the Court to deviate from a previous judgment because of legal developments, changes in circumstances, and broader constitutional objectives. This theorisation of the judgment better explains the Court's deviation from *Volks*, though perhaps not the motivation for the shift in the Court's position that it is the legislature's responsibility to protect unmarried partners as it deems fit. Here, I would suggest that the judgment represents an evolution in the Court's jurisprudence to protect unmarried partners, given the lack of legislative intervention despite years of deliberation, and we would do well to take heed of it. While *Bwanya* recognises the rights of unmarried partners, it may open the door for the Court to recognise the myriad of family formations and use *Bwanya* as a basis for the extension of protection. Even in the face of *Volks*, the Court's reasoning means that we may soon see claims by others (like extended family members, siblings, or unmarried roommates) that test the Court's willingness to recognise the rights of those in atypical family formations.

[198] E Bonthuys 'A Duty of Support for All South African Unmarried Intimate Partners Part 1: The Limits of the Cohabitation and Marriage-based Models' (2018) 21 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1; BS Smith & JA Robinson 'An Embarrassment of Riches or Profusion of Confusion? An Evaluation of the Continued Existence of the Civil Union Act 17 of 2006 in the Light of Prospective Domestic Partnerships Legislation in South Africa' (2010) 13 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 30; TA Manthwa *Recognition of Domestic Partnerships in South African Law* (LLM dissertation, University of South Africa, 2015) 3.