LB v YD 2009 5 SA 463 (T) / *YD v LB (A)* 2009 5 SA 479 (NGP)

Disputed paternity, blood tests; court as upper guardian, compel blood tests for DNA testing; best interests of the child

1 Introduction

When *LB v YD* (2009 5 SA 463 (T)) was heard by the High Court, an opportunity presented itself for the Court to adjudicate once and for all on the thorny issue of compelling for DNA testing. In ruling on the matter, Murphy J gave an insightful and eloquent judgment, (Heaton J "October to December Persons" 2009 (4) *JQR* par 2.1 disagrees with this assessment) however, his failure in *YD v LB (A)* (2009 5 SA 479 (NGP)) to grant leave to appeal, no matter how well founded his decision, deprived South Africans of increased legal certainty on the matter. (Heaton agrees with this statement.) In this note an attempt will be made to highlight a number of important aspects of the case and to explain why leave to appeal should have been granted in *YD v LB (A)* (*supra*).

2 The facts

The applicant in *LB v YD* (*supra*) applied to the High Court for an order compelling the respondent to submit herself and her minor daughter for DNA testing in order to establish the paternity of her minor child. The respondent resisted the application on the basis that the court order sought would constitute an invasion of her right to privacy and dignity, and furthermore, that it would not be in the best interest of the child. It thus fell to the Court to balance the rights of privacy and dignity against the role of the court in discovering the truth (par [18]).

It appeared that the applicant and respondent had been involved in an intimate relationship for more than a year. The minor child was born some 7 months after the relationship had ended (par [2]). Despite some factual disputes (which the court dealt with in terms of *Plascon-Evans Paint Ltd v Van Riebeeck Paint (Pty) Ltd* 1984 3 SA 623 (A) 634H–L) it appeared that after the relationship ended the respondent moved, took up employment, and started a relationship with a former boyfriend, with whom she became intimate (par [5]). The respondent discovered her pregnancy and married her new partner before the birth. (*ibid*) At the time the respondent discovered her pregnancy there was no doubt in her mind that the applicant was the father of the unborn child (par [4]). She advised the applicant of her pregnancy and her belief that he was the father. The applicant later phoned the respondent and denied his paternity, an assertion that he claimed he later withdrew (*ibid*).

Shortly before the birth of the child, the respondent contacted the applicant to discuss maintenance and contact right issues (par [6]). Despite these discussions the applicant felt excluded and, having some doubts regarding the child's paternity given the respondent's relationship with her new husband, instructed his attorney to send the respondent a letter in which he denied his paternity. He undertook to pay the costs of the confinement in the event that a DNA test showed him to be the biological father of the child and offered to bear the costs of the DNA tests. (par [8]) This letter reached the respondent after the birth (par [8]).

After the birth the respondent notified the applicant of the birth and, when the applicant indicated a desire to see the child, the respondent undertook to contact him later to make arrangements (par [7]). The applicant's letter subsequently reached the respondent who found its contents upsetting. She resolved to accept the denial of paternity and to exclude the applicant from the child's life, (pars [9]–[10]) and instructed her attorney accordingly.

At this point the applicant's attorney sent a letter to the respondent requesting that she voluntarily submit both herself and her child for DNA testing at the applicant's cost as he was convinced of his paternity (par [11]). The respondent declined on the basis that she was not prepared to subject herself to the test and that it was not in the child's best interests to be tested (par [12]).

The applicant sought a court order as he wished to assume the parental rights and obligations incumbent upon him in the event that he was indeed the biological parent of the minor child. His desire to assume his responsibilities was evidenced by the fact that he had made several maintenance payments but ceased to make further payments when the respondent changed her banking details (par [13]). The applicant asserted that it would be in the child's best interests to know "with certainty who her biological father is and for him to be a part of her life" (par [14]). Furthermore, given the respondent's intimate relationship with her husband immediately after the breakdown of her relationship with the applicant, and given the applicant's lengthy absences from home during their relationship, that it would be appropriate for the court to order the applicant to subject herself to DNA testing (par [14]). The respondent argued that DNA testing was superfluous as: (a) She had consistently maintained the applicant's paternity; and (b) given their intimacy at the time of the child's conception (par [15]). In light thereof, she argued that such a test would constitute an unnecessary invasion of her privacy and dignity and would not be in the child's best interests (par [15]). The respondent also averred that the failure to appoint a *curator ad litem* to represent the child's interests in this matter should result in the matter being struck off the roll. Murphy J rejected this last assertion, finding that the child could add little to the proceedings and that the *curator* would merely state the obvious fact that the physical integrity of the child would be impacted by a compulsory test. He thus found the interests of the child to be adequately protected for the limited purposes of the proceedings by the respondent (par [16]).

The applicant argued that he was entitled to know with certainty whether or not he was the father of the child, a fact that the respondent had both asserted and denied (par [17]). She had, despite her concession of his paternity, denied him access to the child (*ibid*). He argued further, that it would be less prejudicial for the child to establish paternity at this stage rather than for her to discover later in life that the applicant was not her father (*ibid*). Thus the applicant argued that his right to definitively establish paternity before assuming parental rights and responsibilities far outweighed any inconvenience to the respondent or the minor child (*ibid*).

3 The law, the critique and the discussion

The law on the topic of compulsory DNA testing is uncertain (par [18]). There is no legislation regulating the matter and judicial decisions are inconsistent either in their findings or the basis upon which tests may be ordered (*ibid*). In relation to the child the courts have relied on their inherent jurisdiction as upper guardian to order such testing, and in relation to the non-consenting adult, some have relied on their inherent jurisdiction to their own procedures while others have refused to do so (*ibid*). All courts have however recognised the need to balance the need to protect the right to privacy and bodily integrity of those to be tested and the court's role to discover the truth where possible, and to exploit scientific means to that end (*ibid*). It would appear that prior to the enactment of the Constitution in 1994 and the Children's Act in 2005, the bulk of the judicial authority supported the view that the court could exercise its rights as upper guardian of all minors to order a blood test on a minor child despite the objections of the custodian parent (par [19]). In this, the court must act in the best interests of the child. (*Seetal v Pravtha* 1983 3 SA 827 (D) 862–864; *M v R* 1989 1 SA 416 (O) 420D–E; *O v O* 1992 4 SA 137 (C) 139H–I). However, in *S v L* (1992 3 SA 713 (E)) the full bench of the Eastern Cape Division (referring to *Coetzee v Meintjies* 1976 1 SA 257 (T)) per Mullins J, found that the court, as upper guardian, cannot interfere with the guardian's decision in matters of the day-to-day control of the child but only in matters of custody (par [20]). Mullins J remained unconvinced that blood tests should be ordered simply because they would provide a degree of certainty regarding paternity. He was equally unconvinced of the ascertainment of truth being the primary objective of the court in all cases. He favoured the propriety of the administration of justice above the truth in certain circumstances (par [21]). However, Murphy J in *LB v YD* (*supra*) rejected Mullins J's argument and expressed the view that the legitimacy of the administration of justice would be harmed if reliable scientific evidence were to be excluded simply because it involved a relatively minor infringement of privacy (*ibid*). He aligned himself with Campbell J in *Dakota v Damm* ((1936) 266 NW 667 670–671, a US Supreme Court judgment, cited by Didcott J in *Seetal supra* 841C–E) where ascertainment of the truth was seen to be essential to the correct administration of justice. He upheld the court's right to order a person within their jurisdiction to furnish a few drops of blood to materially assist in the administration of justice.

Murphy J thus asserted (par [22]) that there:

> should be no overriding reason in principle or policy impeding the exercise of their inherent power and authority as upper guardian or otherwise, to order scientific tests in the interests of discovering the truth and doing complete justice to all parties involved in a suit.

Murphy J thus favoured the discovery of truth before respect for the rights of privacy and bodily integrity (par [23]) on the basis that it will generally be in the best interests of the child to have any doubts about paternity resolved by the best available evidence (*ibid*). He found (par [24]) the view in *S v L* (*supra*) to be too restrictive. However, he also stated that rights of privacy and bodily integrity may only be infringed upon where it is reasonable and justifiable to do so "when considering the importance, purpose and necessity of getting to the truth" and that they will not always be sacrificed on the alter of administration of justice (See *Seetal supra* 861F–H).

Murphy J expressed the view that the body of decisions before 1994 indicated a willingness to assume that the court had jurisdiction to order blood tests in respect of minors on the basis of the court's authority as upper guardian of minors on the basis that such authorisation amounted to granting consent to the tests rather than compelling the test. In *Seetal* (862C–F) the Court stressed the child's incapacity to either consent or withhold consent and his or her need for another to act on his or her behalf. Thus, in the event that the parent or guardian withholds such consent the court as upper guardian simply supplies its own consent. Murphy J remained unconvinced by the distinction between the consent granted in such circumstances and the compulsion of an adult to submit to a blood test but recognised that the courts would assume authority more easily in cases where it acted as upper guardian than in instances of compulsion of an adult to submit to blood tests (par [26], relying on *O v O* 139H–140A; *M v R* 1989 (1) SA 416 (O) as support. See too *Ex Parte Millsite Investment Co (PTY) LTD* 1965 2 SA 582 (T) 585H).

Certainly *M v R* (*supra*) is authority for the view that the court has the power to compel an adult to submit to blood tests where it is in the child's best interests that clarity is obtained on paternity, and that blood tests are a reliable aid to discerning the truth. The adult in that case was thus required to act in the child's best interests even if it would be contrary to her own interests (*LB v YD* par [28]). The Court stated that the child's best interests are the paramount consideration but not the sole consideration and gave effect to the judiciary's pursuit of the truth as the court's primary objective. *Nell v Nell* (1990 3 SA 889 (T)) arrived at a different conclusion to *M v R* (*supra*) and stated that, as ordering blood tests is more than a procedural matter, it does not fall within the court's inherent powers to order such testing. Murphy J rejected this view as too restrictive and preferred the *Millsite* approach (*supra*).

Murphy J thus concluded that the law was uncertain (par [30]). There was no binding precedent that he felt obliged to follow and he thus unequivocally stated his preference for the view that the court, as upper guardian and in the interests of effectiveness in its procedures could order that the child be submitted to blood tests (par[29]).

E v E (1940 TPD 333) was a case, of this same division, in which the court found itself unable to order that a minor be subjected to a blood test. Murphy J found himself unconstrained by this finding as, at the time that matter was determined, blood tests could not prove paternity and were simply used to exclude a party as a parent. It seemed that the court in *E v E* (*supra*) considered the compulsion of the invasion of bodily integrity to be *contra bonos mores*. This decision was followed in *Nell v Nell* (*supra* see *LB v YD* (par [32]). Today, however, modern technologies have advanced the value of paternity testing to the point where DNA testing can identify the natural father with a statistical probability of up to 99.9% (par [33]; *M v R supra* 425J; and Bohm & Taitz "The DNA fingerprint: A revolutionary identification test" (1986) 103 *SALJ* 662). Furthermore, subsequent to *E v E* (*supra*) and *Nell v Nell* (*supra*), the 1996 Constitution (Act 108 of 1996) embodying the fundamental rights of children (s 28) and privacy and dignity (ss 10 and 14) was enacted. S 28(2) makes the child's best interests of paramount importance in every matter concerning the child. Murphy J argued that this means that in instances where there are competing interests of children's rights on one hand and privacy and dignity on the other, the child's interests must trump the others unless there are compelling reasons to the contrary (par [35]). S 8(1) requires all three branches of government and all organs of state to ensure the common law conforms to the Bill of Rights and S 39(2) mandates courts to "indirectly apply the Bill of Rights by promoting the spirit, purport and objects of the Bill of Rights when interpreting any legislation and developing the common law" (par [34]). Murphy J stated (par 36]) that where pre-constitutional decisions no longer reflect the current *boni mores* of the community such decisions could be departed from. In making this determination he relied upon *Afrox Healthcare Bpk v Strydom* (*supra* 39D–E). Thus, in *S v Thebus* (2003 6 SA 505 (CC); 2003 2 SACR 319; 2003 10 BCLR 1100 per Moseneke J) Moseneke J stressed the inherent power of the courts to "refashion and develop the common-law to reflect the changing social, moral and economic make-up of society (526F discussed in *LB v YD* par [34]). Thus, Murphy J found both *Nell* (*supra*) and *E* (*supra*) to be inconsistent with current constitutional values which oblige the courts to balance the competing interests involved and, in so doing, to treat the best interests of the child as the paramount, although not sole, consideration.

Heaton (2009 (4) *JQR* par 2.1) is critical of this assessment as she indicates that Murphy J omitted any discussion of the Natal Provincial Division of the High Court decision in *D v K* (1997 2 BCLR 209 (N)). A decision which she asserts is directly applicable to the discussion in that it contains an important *obiter dictum* of Moodley AJ in which there is a clear reminder of the need for the court to engage in a full-scale investigation of the competing interests in terms of the s 36 limitation clause of the Constitution (*supra*).

An examination of *D v K* (*supra*) reveals that, that case is easily distinguishable from the present case. The finding is however not the source of Heaton's criticism of Murphy J's decision. Her focus is rather on the failure of Murphy J to follow Moodley's *obiter* and engage in a detailed

proportionality test as required by s 36 of the Constitution (*supra*). She is of the opinion that Murphy J's:

> random references to the rights to privacy, bodily integrity and dignity. Sometimes he mentions only privacy. Other times he mentions privacy and dignity in one breath. Occasionally he refers to bodily integrity, once on its own and twice coupled with privacy. Strangely, whenever he mentions the right to bodily integrity, he omits the right to dignity. In *YD v LB (A)* he does not refer to dignity or bodily integrity at all. These inconsistencies create the impression that he might be of the view that compelling a person to submit to a blood test primarily violates the person's privacy. They also create the impression that he either views the right to dignity and the right to bodily integrity as interchangeable . . . Or that he is not quite certain which fundamental rights are at issue.

Heaton stated further, that Murphy J could not simply adopt the approach in *M v R* (*supra*) without a thorough "constitutional limitation investigation".

While there is no doubt that Murphy J's judgment could have included a more explicit analysis of both the competing fundamental rights and the balancing of these rights for purposes of the section 36 proportionality test, a reading of the judgment leaves the reader with no doubt that the Judge did indeed weigh the interests. It was my reading that the Judge was cogniscant of all the fundamental rights that were at play in the case and that he weighed the competing rights of the adult against the paramount consideration of the best interest of the child and the purpose of the administration of justice to ascertain the truth. Murphy's failure to enumerate all the rights at play in each reference to the competing rights is regrettable, however, the reader is left in no doubt that in his opinion the adult rights in this case must give way to the rights of the child and the need to ascertain the truth.

Murphy states clearly that privacy and dignity will yield to the proper administration of justice in circumstances where it is just and reasonable. He states clearly that this will not always be the case. A determination on this will depend upon "the importance of the purpose and necessity of getting at the truth".

Heaton criticises Murphy J's failure to deal with "bodily integrity" in his final analysis. A reading of the *LB v YD* case indicates, however, that the respondent resisted the blood tests on herself only on the basis that her rights to privacy and dignity would be infringed. At no time did the respondent herself rely on her right to bodily integrity. Thus Murphy J was not obliged to consider this right in relation to the respondent.

Having dealt with the competing rights of the parties, Murphy J proceeded to examine the Children's Act (Act 38 0f 2005). It was his opinion that this Act was enacted to amend the existing child law to bring it into line with Constitutional values and rights (par [37]). To this end Chapter 3 of the Act deals with parental responsibilities and rights. In terms of section 30 more than one person may have parental rights and responsibilities in respect of a child at the same time. Section 21 provides for the

parental rights and responsibilities of unmarried fathers. Such a parent will automatically acquire the same parental rights and responsibilities as the mother if he meets certain requirements (set out in s 21(1)(a) or (b); par [38]). These automatic rights reflect a significant policy change regarding the rights and duties of unmarried fathers and add impetus to the need to determine paternity scientifically (par [39]). Furthermore, section 36 of the Act creates a presumption of paternity in instances where, *inter alia*, the person had intercourse with the mother at any time when the child might have been conceived (par [40]). Section 37 then states that an adverse inference may be drawn if, in instances where paternity is in issue, one party refuses to submit him or herself and or the child to blood tests in order to scientifically prove paternity (par [41]). Murphy J did not see these provisions as in any way altering the inherent jurisdiction of the Court to order the parties to submit to blood tests in circumstances where competing interests demand scientific verification of paternity and rejected the respondent's argument that the legislature intended parties to make use of the presumption as the less intrusive means of establishing paternity. He thus stated (par 42]):

> Given the extended rights and obligations of unmarried fathers, it seems only right that the truth be established, as it can be, in the interests of justice, before burdening a party with responsibilities that might not be his to bear.

Reliance on the presumptions in this case would have had the effect of recognising the respondent's husband as the father of the child (*pater est quem nuptiae demonstrant*). Thus burdening a person who was not regarded as either party to the proceedings as the father of the child.

4 The finding

Murphy J determined that discovering the truth is the primary value associated with administration of justice and should be pursued as the best means of doing justice in most cases (par [21]). Furthermore, the exclusion of reliable scientific evidence in circumstances where a minor infringement of privacy was involved would undermine the legitimacy of the administration of justice and could therefore not be supported (par [21]). For this reason, the privacy rights of the adult and minor child in this case must yield to the administration of justice as, in the present instance, the importance of getting to the truth made such an invasion both reasonable and justifiable in the circumstances. The court could thus order blood tests on the minor child, despite the objections of the parent, both as upper guardian of the child and in the "interests of the effectiveness of its procedures". Also, in the circumstances, and within reasonable limits, the non-consenting adult too, could be compelled to submit to blood tests in order to discover the truth and thus serve the best interests of the administration of justice. The court determined that the best interests of the child are indeed the paramount consideration in matters affecting children, however Murphy J stressed that the best interests are not the only factors to be considered (par [30]).

The above accords with the provisions of the Constitution (*supra*) and the Children's Act (*supra*) and there was no binding authority to the contrary. Thus Murphy J ordered that the respondent submit both herself and the minor child to DNA testing within 30 days of the order.

The respondent sought leave to appeal the decision in *YB v LB (A)* (*supra*). This leave was denied by Murphy J, however, in denying leave to appeal the Judge also missed an opportunity to establish legal certainty in this area of the law.

5 Discussion and conclusion

In *Bernstein v Bester NNO* ((1996) 2 SA 751 (CC): par [77]), with respect to the right to privacy and the restrictive working of section 36 of the Constitution it was stated that:

> A very high level of protection is given to an individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof may take place. But this most intimate core is narrowly construed. This inviolable is left behind once the individual enters into relationships with persons outside the closest intimate sphere; the individual's activities then acquire a social dimension and the right to privacy in this context becomes subject to limitations.

This statement has been applied in instances of the right of an individual not to know versus the need to protect the public and third parties (Joubert "Genetic testing and the insured's right not to know" 2009 *THRHR* 1724–24). It is the writers' opinion that this statement is equally relevant in relation to compelling blood tests to establish paternity as, in order to establish the paternity of the child by DNA testing, the mother's blood was also needed. In this context her right to privacy and dignity (possibly also bodily integrity) could be limited in the interests of her child. There can be no question that DNA technology has advanced beyond a simple mechanism to exclude paternity, into a valuable tool that can be used to ascertain paternity with a 99.85% accuracy. (Bhom & Taitz *supra* at 665.) DNA testing is a reliable and accurate tool of identification rather than a means to prove "negative associations" (*idem* at 667). As such, the risks formerly inherent in relying on DNA testing, and which prompted a resistance to compelling such evidence, are no longer valid and the child's best interests were indeed served by compelling the DNA testing in this instance.

Although the value of DNA testing in paternity matters has been recognised in such cases as *Ranjith v Sheela* (1965 3 SA 103 (D)) and *Van der Harst v Viljoen* (1977 1 SA 795 (C)) the reliance on such tests has depended upon the parties to the dispute voluntarily consenting to such tests. Consent in such cases is rare. (Kemp "Proof of paternity: consent or compulsion" 1986 *THRHR* 273 (273–4) on the distinction between compulsion and consent see 274–ff . See too, *Seetal supra* which investigated compulsion of blood tests in the absence of consent and was well

received: Kemp 272.) The *Seetal* decision (*supra*) set the backdrop for Murphy J's decision in the instant case and there can be little doubt that the decision in *LB v YD* (*supra*) was substantially correct. Whether the consent of the court to the blood tests is regarded as consent or compulsion, the outcome of the decision is clearly correct. The court made the correct determination when weighing the minor discomfort and minimum danger inherent in the tests against the truth that was to be achieved. Furthermore, the determination was in the best interests of the minor child. To rely upon the available presumptions would have led to the court finding the respondent's current husband, a man whom the parties believed not to be the biological father of the child, to be the father and so burdening him with all the parental rights and duties that rightfully fall to another.

That said, the leave to appeal should have been granted. Murphy was, in the writer's opinion, correct in stating that the decision was the correct one and would not be overturned in appeal, however, given that no legal certainty existed in the judicial precedent at the time the decision was handed down, the possibility existed that a different court might have decided differently and thus the opportunity to have a higher court adjudicate on the matter should have been welcomed.

In addition, a reading of Heaton's criticism of the judgment clearly reveals that there was scope for an appeal court to more fully address the section 36 investigation. Sadly the opportunity was lost, casting the matter back into the murky waters of legal uncertainty.

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