YM v LB
(465/09) [2010] ZASCA 106 (17 September 2010)

Scientific tests on a child to determine paternity should not be ordered where paternity has been shown on a balance of probabilities.

1 Introduction

In this matter, which resulted in an enquiry by the Supreme Court of Appeal and ultimately a unanimous decision, the facts were the following: the appellant, Mrs Y M (M) appealed against an order that she and her minor daughter (Y) submit to DNA testing to determine whether Mr L B (B), the respondent, was the biological father of Y. The order was sought by B, who also claimed that, if the tests proved that he was indeed the father, he should be given full parenting rights. The North Gauteng High Court (Pretoria) (Murphy J sitting as court of first instance), ordered that M submit herself and Y to DNA tests within 30 days of the date of the order, and postponed the other relief *sine die*. The Supreme Court of Appeal granted leave to appeal. On appeal, B filed no heads of argument, and nor was there any appearance on his behalf.

2 Question of law

The appellant sought an order to overturn the judgment of the court *a quo*, which compelled the appellant (M) and her daughter (Y) to submit themselves to DNA tests against their will. Relevant questions include what possible effects the provisions of the Children's Act 38 of 2005 might have on this issue, and also what effect an order of this nature would have on criminal proceedings on a charge of arrears in maintenance, should the appeal be upheld.

3 The decision of the court

Murphy J, in the High Court considered (in considerable depth) the cases (often in conflict with one another) that have dealt with orders to submit to blood tests to determine paternity. These local cases, as well as cases abroad, dealing with orders to submit to scientific testing in order to determine paternity were also discussed at length by Didcott J in *Seetal v Pravitha* (1983 (3) SA 827 (A)). The judgment of Murphy J is reported. The judgment of the High Court refusing an application for leave to appeal is also, unusually, reported in the same volume at 479 (*LB v YD* 2009 (5) SA 463 (NGP)).

With reference to the facts, which were largely undisputed, the court ultimately upheld the appeal. Mention of certain additional facts is necessary: M and B commenced a sexual relationship in February 2006. They started living together in October of that year and became engaged in November. B told M at the end of the year that he would be going to work initially elsewhere in the country and, thereafter, abroad, for a short period of time the following year. During March 2007, M went to stay for what was thought to be the period of B's absence in the Northern Province, where her parents lived. However, B did not, in fact, go abroad. B frequently phoned M, and according to her version, he usually did so under the influence of alcohol. M became disillusioned with the relationship. Even before M moved to the Northern Province, B allegedly consumed alcohol in excess, and on many occasions returned home late at night and in an inebriated state.

At the end of March 2007, M discovered that she was pregnant. She was certain that B was the father, and alleged that B never disputed paternity, with the exception of one occasion when B denied paternity on the telephone, apparently under the influence of alcohol. M alleged that B retracted this denial the following morning and could not even remember raising the issue. In a letter sent some time later by B's attorney after the child's birth, B once again denied paternity. This was in contrast to B's conduct and his correspondence with M, which unequivocally showed the contrary. An important factor was that B paid an amount of money into M's bank account in each of April, May and July of 2007. It was submitted on behalf of the appellant that such actions were consistent with the belief on the part of B that he was the father. In the founding affidavit and in the court *a quo,* B expressly stated that he believed that he was Y's father and that he desired to develop a relationship with her.

M decided nonetheless to break off the engagement and she informed B accordingly when he visited her in April 2007. M and B agreed to remain in contact. M revived a relationship with a former boyfriend (Mr M) and the couple got engaged in June and married in July 2007. M informed B that after the birth of Y they would have to make arrangements regarding child support and access. In September 2007, M advised B telephonically that her due date was mid-November. Y was born on 8 November, and M phoned B on the day she was discharged from hospital. B said that he wanted to see Y. M indicated that she would contact B at a later stage, but, two days later, M received a letter from B's attorney in which B strongly denied paternity and tendered to pay the cost of blood and DNA tests to determine the issue.

M, although previously willing to allow B to be part of Y's life, responded via her attorney that B would not be afforded any parental rights, and he would also not be bound by any financial obligations towards Y. In a follow-up letter from B's attorney, B was now "100 per cent" certain that he was Y's father, but he nonetheless insisted that M and Y had to undergo blood tests. M bluntly refused, giving rise to B's application in the court *a quo* for an order to compel testing.

4 Legal implications

It is self-explanatory that in accordance with the so-called *Plascon Evans* principle, disputes of fact must be determined having regard to B's averments and denials unless these are untenable. According to this principle, when factual disputes arise, relief should be granted only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)).

In casu, these factual disputes were essentially immaterial; B never really denied paternity in his affidavits, but simply sought scientific confirmation. The Supreme Court of Appeal regarded the finding of the High Court that M might have been intimate with her husband, Mr M, at the time of Y's conception, unwarranted, given that the only evidence to support this finding was contained in hearsay. The Supreme Court of Appeal accordingly held that the High Court erred in ordering M and Y to undergo DNA testing. The issue of paternity *in casu,* according to the judgment of Lewis JA, was determinable on a balance of probabilities. B demanded scientific proof, which he was not entitled to. The Supreme Court of Appeal, however, accepted that there might be cases where there is a genuine uncertainty as to paternity, and where a DNA test should be ordered. As upper guardian of all children, the High Court has the inherent power, in its discretion, to order scientific tests if this is in the best interest of a child *(LB v YD supra* par 22). The author agrees with this approach. Section 37 of the Children's Act 38 of 2005 makes provision for the use of scientific tests to determine paternity. Where paternity is at issue in legal proceedings, and a litigant refuses to submit to testing, the court is obliged to warn her of the "effect which such refusal might have on [her] credibility". This was not such a case.

As a rule, the truth should be the primary value in the administration of justice and should always be pursued. Murphy J, correctly to the author's mind, stated that this is so because, if not for its own sake, then at least because "[i]t invariably is the best means of doing justice in most controversies". Where we come from and who we really are as human beings are questions that fall within the realm of the sacred for most individuals. By excluding reliable scientific evidence on a question of paternity, especially where same may be obtained expeditiously and where the costs thereof are tendered by an individual (B *in casu)*, this principle (pursuit of the truth) has been abandoned. It is of course also true that an order to compel paternity tests constitutes an infringement of an individual's privacy (s 14 of the Constitution of the Republic of South Africa, 1996). However, in the author's opinion this would be a relatively minor infringement in service of the truth. The author is not persuaded that such an order would harm the legitimacy of the administration of justice. In fact, to argue to the contrary, will do exactly that. Moreover, where it is alleged that an accused is in arrears of maintenance, the issue of paternity is a crucial element of the crime of contempt of court. The correct approach must be that, as a general matter, the discovery of the truth should prevail against the primacy of the rights to privacy and bodily integrity, especially if the truth can

be established through only minor infringement of such rights. Murphy J in the High Court came to the same conclusion (*LB v YD supra* par 23).

It will most often be in the best interests of a child to have any possible doubts about a child's paternity resolved beyond doubt by the best available evidence, which would obviously include blood or DNA tests. It is beyond cavil that, if it is in the best interests of the child, an individual's rights to privacy and bodily integrity might be infringed upon by the order of a court in the exercise of its inherent jurisdiction. From an analysis of the decision of the Supreme Court of Appeal (par 15 *in casu*), the inference is that such an order is exclusively within the purview of the High Court as upper guardian of all minors. The author does not agree with this inference, because it is trite that a maintenance court is also entitled to order a paternity test in an endeavour to determine maintenance obligations. This should also be the approach adopted, if not already the practice, in any criminal trial for contempt of court as a result of arrears in maintenance. Any other interpretation might create a stalemate whenever the defence is raised that paternity is disputed, and that the accused is therefore not liable to pay any amount of maintenance. Such a defence must be investigated by the presiding officer in a criminal trial ultimately to pronounce a verdict beyond reasonable doubt. An accused will receive the benefit of the doubt if the State is not able to prove the contrary. To argue that the discovery of the truth should as a general rule not prevail over such rights as privacy and bodily integrity – as the Supreme Court of Appeal *in casu* apparently did (par 16) – cannot stand in criminal proceedings. These rights, similar to other rights enshrined in the Constitution, may be limited where such limitation is reasonable and justifiable by applying the criteria in section 36(1) of the Constitution. It is submitted that criminal proceedings necessitate this approach.

Regarding paternity, two presumptions, which assisted the court tremendously, were embodied in the previous Children's Act 82 of 1987. This is not the situation anymore (*S v Ward* 1992 1 SA 271 (BGD) 275; *Park v De Necker* 1987 1 SA 1069 (N)). It has been argued that modern scientific tests are able to prove the identity of a person beyond a reasonable doubt, without the necessity of any corroborative evidence (Taitz and Bohm 1986 *SALJ* 662; Taitz and Singh 1995 *THRHR* 91). This argument was not, however, accepted by the court in *S v L* (1992 3 SA 713 (E)). In practice, prosecutors in criminal proceedings and maintenance enquiries are required to follow policy directives that enable them to request an order for paternity tests only if the dispute cannot be resolved by other means (*Policy Directives* Part 26 Maintenance Matters B4 (d); see also s 21(1)(*a*)–(*c*), (2)(*a*)–(*b*), and (3)(*a*)–(*b*) read with section 16 of the previous Maintenance Act 99 of 1998).

5 Conclusion

A principle that holds that the discovery of truth should always prevail over such constitutional rights can never be categorical. As Didcott J held in *Seetal v Pravitha* (*supra* 864G–865C), it is not always in an individual's interest to know the truth. Lewis JA *in casu* goes even further and finds that,

in each case in which a court faces a request for an order for a blood test or a DNA test, the court must consider the particular position of the child and make the determination for that child only. The duty of a court is to determine disputes in civil matters on a balance of probabilities. It is not a court's function to ascertain scientific proof of the truth. This, however, must always be restricted to civil matters, and even then exceptions to the rule must be tolerated for instance, as indicated in maintenance enquiries (*Salooje v Tsukudu* 1985 2 SA 889 (O)). (On the duty to maintain under the common law, see the discussion in Lesbury van Zyl *Handbook of South African Law of Maintenance* (2000) 89; *Moodly v Gramani* 1976 (1) SA 118 (N); *S v Sephiri* 1981 (2) SA 837 (B); *S v Bedi* 1971 (4) SA 501 (N); *Perumal v Naidoo* 1975 (3) SA 901 (N); *Mayer v Williams* 1981 (3) SA 348 (A)).

The author is mindful of the application of the rebuttable presumption (on a balance of probabilities) of the principle *pater est quem nuptiae demonstrant* (the father is indicated by the marriage). If the mother of the child was married at the time of conception or birth or during the intervening period, the presumption operates. This is exactly the situation *in casu*, and any further discussion in this regard confuses the issue even further.

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