THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**: 465/09**

In the matter between:

Y D (NOW M)
Appellant

and

L B
Respondent

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

Coram: Harms DP, Lewis, Ponnan JJA and Ebrahim and K Pillay AJJA

Heard: **8 September 2010**

Delivered **17 September 2010**

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

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Murphy J sitting as court of first instance).
1 The appeal is upheld with costs including those of two counsel.
2 The order of the high court is replaced with:
'The application is dismissed with costs.'

JUDGMENT

LEWIS J (HARMS DP, PONNAN JA AND EBRAHIM AND PILLAY JJA concurring)

[1] The appellant, Mrs Y M (M), appeals against an order that she and her daughter, Y, submit to DNA testing to determine whether Mr L B (B), the respondent, is the biological father of Y. The order was sought by B who claimed, if the tests proved that he was indeed the father, in addition that he be given full parenting rights. The high court ordered that M submit herself and Y to DNA tests within 30 days of the order and postponed the other relief sought sine die. The appeal against the order is with the leave of this court. On appeal B did not file heads of argument; nor was there any appearance for him.

[2] 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, and cases in other countries dealing with orders to submit to scientific testing to determine paternity, were also discussed at length by Didcott J in *Seetal v Pravitha.*[1] The high court also considered the possible changes wrought by the provisions of the Children's Act 38 of 2005. The judgment of Murphy J is reported.[2] I do not propose to

1 1983 (3) SA 827 (A).
2 *LB v YD* 2009 (5) SA 463 (NGP). The judgment of the high court refusing an application

traverse the same material because it is not warranted on the facts. I shall revert to the principles on which the order was made, but shall first set out the facts which were largely not in dispute.

[3] 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 first elsewhere in the country, and then abroad, for a short period the following year. Accordingly in March 2007 she went to stay for what was thought to be the period of his absence in Musina, where her parents lived.

[4] In fact B did not go abroad. He frequently phoned her – on her version under the influence of alcohol – and she became disillusioned with the relationship. She alleged that before she had moved to Musina he also drank heavily and returned home inebriated late at night.

[5] Late in March 2007 M discovered that she was pregnant. She was certain that B was the father and alleged that it was not actually ever in issue save for one occasion when he denied paternity when speaking to her over the phone one night – apparently under the influence of alcohol. But he retracted the denial – which he could not even remember – the following morning.

[6] Although B also denied his paternity in a letter sent by his attorney to M later, after the child's birth, his conduct and other correspondence with her show unequivocally that he believed that he was the father. A telling factor is that he paid R1 000 into M's bank account in each of April, May and July 2007, which is consistent with his belief that he was the father of the unborn child. Most importantly, in his founding affidavit B stated that he believed that he was Y's father and wished to develop a relationship with her.

[7] Despite her certainty that B was the father of the child M decided to

for leave to appeal is also, unusually, reported in the same volume at 479.

break the engagement. She told him this when he visited Musina in April 2007. They agreed to remain in contact. She revived a relationship with a former boyfriend (Mr M) and they became engaged in June and married in July that year. She told B that they would have to make arrangements (presumably about support and access) after the child's birth.

[8] In September 2007 M phoned B and advised him of the expected date of birth (mid-November). In October he sent a message to her asking her to keep in touch and saying that he had had difficulty contacting her by telephone. She responded and asked him to send a letter with his proposals (again one assumes as to support and access).

[9] Y was born on 8 November. M phoned B the day she was discharged from hospital. He wanted to see Y. She said she would contact him in this regard at a later stage. But then two days later his attorney sent the letter referred to stating that he strongly denied paternity but was willing to pay for blood and DNA tests to determine the issue.

[10] M, who had previously been willing to allow B to be part of Y's life, responded through an attorney saying that he would not be afforded any parental rights and would not be bound by any obligations to Y. B did an about turn. The next letter from his attorney stated that B was '100 per cent' certain that he was Y's father but that he wanted M and Y to undergo blood tests. She refused to comply – hence his application for an order to compel testing.

[11] As Murphy J himself pointed out the minor disputes of fact must be determined having regard to M's averments and denials unless these are untenable.[3] These disputes were essentially as to dates and exchanges between the parties. In fact, B did not ever deny paternity in his affidavits: he simply sought scientific certainty. And the high court's finding that M may have

3 The so-called *Plascon Evans* principle: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

been intimate with her husband, M, at the time of Y's conception is unwarranted given that the only evidence for this was B's statement in his replying affidavit that he had heard from a friend that M had commenced a relationship with M at the time when conception had occurred.

[12] Paternity was thus not actually in dispute. And accordingly the high court should not have ordered M and her daughter to undergo DNA testing. Indeed there was no reason to order M herself to be tested: her maternity could not have been in doubt!

[13] That brings me to the principles on which the high court made its order. First, as I have already said, the issue of paternity in this case was determinable on a balance of probabilities. What B asked for was scientific proof – something to which he was not entitled. No doubt there are cases where there is genuine uncertainty as to paternity and a DNA test should be ordered for the child in question. It is within the inherent power of a court, as the upper guardian of children, to order scientific tests if this is in the best interests of a child, as Murphy J found.[4] And indeed s 37 of the Children's Act anticipates the use of scientific tests to determine paternity. It provides that where paternity is in issue in legal proceedings and a party refuses to submit to 'scientific tests' the court must warn him or her of the 'effect which such refusal might have on the credibility of that party'. But this is not a case in which that inherent power need have been invoked given that paternity was not disputed.

[14] Second, the high court concluded that 'truth is a primary value in the administration of justice and should be pursued, if not for its own sake, then at least because it invariably is the best means of doing justice in most controversies'. And: 'Where we come from and who we are, for most people, are questions within the realm of the sacred.' The judge continued: 'to exclude reliable scientific evidence because it involves a relatively minor infringement of privacy more often than not will harm the legitimacy of the administration of

4 Para 22.

justice'.[5] He concluded:[6]

'In short, I agree with those judges and commentators who contend that as a general rule the more correct approach is that the discovery of truth should prevail over the idea that the rights of privacy and bodily integrity should be respected . . . . I also take the position . . . that it will most often be in the best interests of a child to have any doubts about true paternity resolved and put beyond doubt by the best available evidence.'

[15] It is clear, in my view, that the rights to privacy and bodily integrity may be infringed (by a procedure ordered by a court in the exercise of its inherent jurisdiction) if it is in the best interests of a child to do so. These rights, like others enshrined in the Constitution, may be limited where it is reasonable and justifiable, applying the criteria in s 36(1) of the Constitution. As I have said in this case it is not, but in others it might well be justifiable to order blood or DNA tests.

[16] However, whether the discovery of truth should prevail over such rights is a matter that should not be generalized. As Didcott J said in *Seetal*[7] it is not necessarily always in an individual's interest to know the truth. In each case the court faced with a request for an order for a blood test or a DNA test must consider the particular position of the child and make the determination for that child only. The role of a court, and its duty, 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.

[17] The appeal is upheld with costs including those of two counsel.
The order of the high court is replaced with:
'The application is dismissed with costs.'

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C H Lewis

Judge of Appeal

APPEARANCE

APPELLANT: Ms K I Foulkes-Jones SC
(with her S Mentz)

5 Para 21.
6 Para 23.
7 Above 864G-865C.

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