

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No: 30619/2015

Heard on: 20 November 2015

Judgment on: 11 December 2015

In the matter between:

D

Applicant

And

M

First Respondent

M in her capacity as mother

And guardian of **Z**

Second Respondent

SETSHABA PENSION FUND

Third Respondent

Summary:

Minor - Disputed paternity – Evidence – DNA tests – Court’s power to order such tests in circumstances where only one parent is alive and the mother refuses to subject herself and the minor to the tests – whether paternity can be proved without access to the body of the alleged father - whether executrix has *locus standi* to launch an application to compel the mother and child to undergo such tests in circumstances where there is a possibility that the estate may be a beneficiary of a death benefit – when hearsay evidence is admitted when it is in the interests of justice to do so.

JUDGMENT

CANCA AJ

INTRODUCTION

- [1] I have decided not to disclose the identities of some of the parties because a minor child is involved.
- [2] This is Part B of an application in which the applicant seeks a final order compelling the first and second respondents, who is one and the same person, being the mother and her minor son Z, to subject herself and her minor son to DNA tests for the purpose of determining whether her deceased son, SD, is the biological father of Z ("the minor child"). The applicant undertakes to pay the costs of the tests.
- [3] Following the death of SD on 22 February 2015, the applicant ascertained that a death benefit amounting to some R2 000 000.00 became payable by the third respondent to his dependent(s), or failing any dependent or nominated beneficiary, to his estate. The applicant also ascertained that the third respondent had determined that the minor child was a dependent in terms of its rules and would be the beneficiary of the death benefit. The applicant, who together with others had queried the minor child's paternity during SD's lifetime, requested the third respondent to subject the first respondent and the minor child to DNA tests in order to get certainty as to his paternity. This request was refused but the applicant was given some time to present the third respondent with irrefutable proof that the minor child was not SD's.
- [4] When the first respondent refused a request by the applicant to undergo DNA tests together with the minor child, the applicant sought and obtained, in Part A of this application, the following order:

“1.The Third Respondent is interdicted and restrained from paying out the death benefit of the late [SD] to the Second Respondent or to any other person pending the determination of the relief sought in Part B of the application.”

[5] The first respondent opposes the application in its entirety.

PARTIES

[6] In addition to being SD’s mother, the applicant is also, by virtue of Letters of Authority issued by the Assistant Master of the High Court: Johannesburg, the executrix of his estate.

[7] The first respondent is also cited as the second respondent in her representative capacity as the minor child’s mother and legal guardian.

[8] The third respondent is the pension fund responsible for the administration and distribution of SD’s death benefit.

BACKGROUND

[9] The first respondent and SD were involved in an intimate relationship from about November 2005 until the middle of 2010. Z was born on 28 December 2008, approximately one and a half years before the relationship ended. There are various factual disputes on the papers as to the nature of the relationship between SD and the first respondent and whether or not SD still considered himself Z’s father prior to his death in February 2015. Therefore, this matter has to be decided in accordance with the principle set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3)

SA 623 (A) at 634 H – I. See also *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC) at paragraph 53. This aspect of the matter is dealt with more fully in paragraph [25] below.

- [10] The applicant avers that her son's relationship with the first respondent was tumultuous and marked by drug and physical abuse by both parties, which at some point, when they were living in Port Elizabeth, resulted in SD's being hospitalized after being allegedly stabbed by the first respondent. The applicant also avers that there was a break in the relationship of approximately three months following the stabbing incident during which period the first respondent returned to live in Johannesburg. The parties reconciled and the first respondent returned to live with SD in Port Elizabeth. Shortly after their reconciliation the first respondent apparently informed SD that she was pregnant with Z, so the averment continues.
- [11] The applicant avers further that, when Z was approximately a year old, she, SD and certain members of her family started to doubt the child's paternity. Their suspicions were apparently based on the child's appearance, the contention being that everyone in SD and the first respondent's families were fair whereas the minor child was dark in complexion. SD allegedly also expressed doubts about the minor child's paternity to friends and had allegedly requested a paternity test which the first respondent apparently refused, so the applicant avers. In support of this allegation, the applicant annexed two affidavits deposed to, respectively, by SD's cousin and a long-time friend. A transcript, allegedly of a Facebook conversation between SD

and another friend, was also annexed to the founding affidavit. In these documents SD questions Z's paternity and states that his requests for DNA tests were rejected by the first respondent. The first respondent attacks the transcript of the Facebook conversation on the basis that same is hearsay and could be a fabrication produced by anyone. I agree. Accordingly, no weight is attached to the contents of the Facebook transcript as it is not accompanied by an affidavit verifying its contents. The applicant also avers that SD stopped paying maintenance for the minor child when he began to doubt that he was the father.

- [12] The first respondent denies the aforementioned averments. The difficulty is that these denials are, in the main, bald. The first respondent simply does not counter with sufficient particularity the averments regarding the alleged stabbing incident, the drug abuse and the averment that, following a hiatus of three months in the relationship, she conceived the minor child shortly after the reconciliation (the inference being that she was already pregnant with Z when she reconciled with SD). I am of the view that the latter allegation carries no weight, as there is no evidence as to when the minor child was born following the reconciliation. There is also no meaningful response to the allegation by SD's long-time friend that SD had queried the minor's child's paternity and had requested DNA tests which the first respondent allegedly refused. The first respondent's reply to this allegation is merely to quote a paragraph in a letter the third respondent addressed to the applicant stating that if SD had questioned his paternity, he had approximately seven years to rectify his legal relationship with Z but had failed to do so. The allegation of lack of maintenance by SD is simply

countered with a statement that SD maintained the minor child on a casual basis as they did not have a formal parental plan.

- [13] It is difficult to understand why the first respondent did not consider it necessary to respond with greater particularity to those allegations. To simply dismiss those serious allegations as ill-founded, speculative and hearsay is clearly not sufficient in motion proceedings.
- [14] In her opposition to the application, the first respondent, firstly, challenges the applicant's *locus standi* , contending that, being neither a dependent nor a complainant in terms of the Pension Fund Act 24 of 1956 (the "Pension Fund Act") and the third respondent's rules ("the Rules"), the applicant lacked the necessary capacity to launch this application. Secondly, the first respondent contends that, instead of launching this application, the applicant ought to have reviewed the third respondent's decision to regard Z as the beneficiary of the death benefit.
- [15] I now turn to consider whether there is merit to the respective stances adopted by the parties.

LOCUS STANDI

- [16] The crisp issue to be determined is whether a person, who is not a dependent or a complainant in terms of the Pension Fund Act or the Rules, but who has been properly appointed as an executor or executrix of a deceased member's estate, is entitled to the relief sought in this application.

- [17] It is common cause that, following her suspicions regarding the minor child's paternity, the applicant had no relationship with the first respondent and the minor child. The applicant contends, however, that, firstly, as the mother of SD, she has an interest in the matter as final resolution of the question surrounding Z's paternity would contribute to his development and strengthen the ties with the paternal side of his family. It would also ensure that Z does not unduly benefit from SD's estate, in the event of it being found that SD is not the father, so the contention continues. Secondly, Mr Mabuda, for the applicant, sought to persuade me in argument that the applicant also had an interest in the matter by virtue of her being the executrix of SD's estate.
- [18] In terms of the Rules, it is only the following who, upon the death of a member, are legally entitled to the death benefit: 1. the member's dependent; 2. a nominee designated as such in writing by the member; 3. the member's estate in the event of there not being a dependent or designated nominee; 4. the Guardian's Fund if the Master of the High Court has not received an inventory in respect of the member's estate. The applicant was not dependent on SD during his lifetime nor was she nominated as a beneficiary.
- [19] The applicant only disclosed her status as the executrix of the estate in her replying affidavit following a challenge to her right to institute this application. The general rule is that new matter cannot be introduced in reply. See *The Master v Slomowitz* 1961 (1) SA 669 T at 673H-674 A. In *Slomowitz*, Jansen J recognized that there were exceptions to that general

rule. Also, in terms section 3 of the Law of Evidence Amendment Act 45 of 1988, a Court is permitted to admit hearsay evidence if it is of the opinion that it is in the interests of justice to do so, having regard, *inter alia*, to the nature of the proceedings.

- [20] The applicant introduced herself as the executrix of SD's estate in a letter to the third respondent dated 8 April 2015 when she requested the third respondent to subject the first respondent and the minor child to DNA tests. This was months before the launch of this application. The applicant's failure to state in her founding affidavit that she was also bringing this application in her capacity as an executrix is in my opinion not fatal. The applicant was, in fact and in law, already an executrix when she brought the application, having being appointed to that position on 26 March 2015. I therefore consider it to be in the interest of justice, given the nature of the matter and the probative value of that evidence, that the hearsay evidence regarding her status as executrix be admitted.
- [21] SD did not designate a nominee to either share or to be the sole beneficiary of the death benefit. Consequently, if it is found that SD is not the minor child's father, the death benefit falls to his estate in terms of the Rules. In the light of the above, I find that the applicant has, as the executrix of SD's estate, sufficient interest in the matter and thus the requisite *locus standi* to bring this application. It is therefore not necessary for me to consider the contention that the applicant is not a complainant in terms of the Rules and consequently lacks the right to institute these proceedings. I now turn to consider the first respondent's second attack.

WAS A REVIEW APPLICATION MORE APPROPRIATE IN THIS MATTER?

[22] Given that I have found that the applicant has an interest in ascertaining who the rightful beneficiary of the death benefit is, it was well within her right to elect to bring this application instead of reviewing the third respondent's decision to regard Z as the rightful beneficiary of the death benefit. Mr Sebola, for the first and second respondents, argued that the applicant should have attacked the third respondent's decision to regard Z as the beneficiary rather than to seek an order subjecting the first respondent and the minor child to DNA tests. It is correct that the third respondent views Z as the beneficiary of SD's death benefit but that decision was based on the evidence currently before it. However, because the third respondent allowed the applicant to furnish it with irrefutable proof to the contrary, that decision is conditional upon the presentation of such proof. This is what the applicant is attempting to do with this application. The third respondent's decision is therefore clearly not final and thus not reviewable. I find no merit in the contention that the applicant should have proceeded by way of review against the third respondent.

THE MERITS

[23] The first respondent also attacks the application on the basis that the applicant has failed to establish grounds to sustain the relief sought and that there is no legal basis for the first respondent and the minor child to be subjected to the DNA tests when SD himself had accepted Z as his child up until his death. Moreover, so the contention continues, the evidence relied

on by the applicant is hearsay that should not be admitted by the Court and, in any event, irrelevant to the relief sought.

[24] The applicant disputes the contention that SD accepted the minor child as his up until his death. There is also no evidence to support this contention. The first respondent's averment that SD contributed to the minor child's maintenance, albeit sporadically, and retained contact with him until his death, has to be contrasted with the contents of the affidavit by SD's friend. It is apparent from that affidavit that SD's love for Z and presumably financial assistance ceased following the first respondent's refusal to take the requisite tests to verify paternity, when the minor child was approximately two years old.

[25] It is trite that, in assessing disputes of fact in motion proceedings, the Court will apply the *Plascon-Evans* rule which was restated and refined thus by the Constitutional Court in *In Rail Commuters Action Group* above:

"Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where however a denial by the respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the Court may adjudicate the matter on the basis of the facts asserted by an applicant."

As previously stated, the first respondent's responses to the applicant's allegations have been less than satisfactory. Her responses consist of bald denials which I do not find to be genuine or in good faith. The first respondent also failed to avail herself of the right to subject the applicant and the deponents of the affidavits lodged in support of the application to

cross-examination under Rule 6(5)(g) of the Uniform Rules of Court. I am satisfied as to the inherent credibility of the applicant's factual averments and find that the applicant has established the requisite grounds for the relief she seeks.

- [26] A further argument advanced by Mr Sebola is that there is no pending application to exhume SD's body for purposes of conducting the paternity test and as a consequence, the order prayed for would be incapable of achieving the relief sought. The contention being that, without access to the body, the DNA tests would not prove that SD was the father. A supplementary affidavit by the applicant, to which an affidavit by a Laboratory Manager at the National Health Laboratory Services was attached, was handed to me from the bar, addresses this issue.
- [27] It would appear that at the hearing of Part A of this application, the presiding Judge requested information regarding the scientific procedure and accuracy of tests determining the paternity of a minor child in instances where the father is deceased. According to the deponent of that affidavit, who describes herself as an expert in the field of Human Genetics, a child inherits half its DNA from its mother and the other half from the father. The averment continues that, in instances where the alleged father is deceased, the most ideal scenario is to test the mother, the child and both parents of the alleged deceased father. It is further averred that in the case of a male child, additional testing of the Y chromosome, which looks at relatedness through the male - line would also be possible in which event a probability in excess of 98% was possible. It is therefore clear that an

acceptable DNA test result is possible without resorting to the body of SD. Based on the evidence from the official from the National Health Laboratory Services, I find no merit in Mr Sebola's contention that paternity cannot be proved without access to SD's body.

- [28] In a final attack, Mr Sebola invoked the provisions of the Constitution contending that the relief sought would infringe the first respondent and the minor child's rights to privacy. It was consequently not in the best interests of the minor child to subject him to those tests. In reply, Mr Mabuda referred me to several authorities where the Courts dealt with a party who, where the paternity of a child had been placed in issue, refused to submit himself or herself or the child to a DNA test in order to ascertain that child's paternity. Admittedly, those authorities involved parents who were both alive and one of them had initiated the legal proceedings. The present matter is distinguishable in those respects. The legal principles though remain appropriate in this matter.
- [29] Murphy J, in *Botha v Dreyer* {2008} JOL 22809 T, after examining the law on compulsory blood or DNA testing in parental disputes, concludes at paragraph 42, that the Court is clothed inherently and constitutionally with jurisdiction to order parties to have blood tests where it finds that the competing rights and interests of the parties require the truthful verification of paternity by scientific methods. In arriving at that conclusion, Murphy J agreed with the view adopted by Kotze J in *M v R* 1989 (1) SA 416 (O) that it was in a Court's power to order an adult to have blood tests because it was in the best interests of the child that reliable information be

obtained to gain clarity on the question of paternity. A guardian was compelled to act in the best interests of the minor child even if doing so would be contrary to her own interests. Murphy J also aligned himself with Kotze J's dictum that, depending on the circumstances, and within reasonable limits, the privacy rights of a non-consenting adult must yield to the demands of discovering the truth in the best interests of the administration of justice. I agree.

- [30] In the present matter, I am of the view that the main reason why the relief prayed for should be granted is that it will resolve the issue of whether the minor child or the estate is entitled to the death benefit. If there is a reasonable possibility that the estate might be entitled to the benefits, it is the applicant's duty as executrix to pursue the issue. The second reason is that it is in the minor child's interest that the issue of his paternity be resolved as the uncertainty of his disputed paternity will follow him for the rest of his life. He is fast approaching the age where knowing and being accepted by the paternal side of his family will be important to his emotional well-being both as a pubescent and later as an adult. If it turns out that SD was indeed his father, then he will get the chance to interact with his paternal blood relatives. If the tests prove the contrary, then it is just as important that Z no longer labour under the impression that his father is deceased. He can then, hopefully with his mother's assistance, cultivate a relationship with his real father. For all of the above, I agree with Murphy J that the relatively minor infringement of the first respondents and Z's privacy should not trump the discovery of the truth. Failure to seek the

truth in circumstances such as these would not be in the best interests of the administration of justice.

[31] I am of the view that a scientific determination of the minor child's paternity will be in his best interest and that the order sought by the applicant should be granted.

[32] Both parties asked for costs in the event of either of them being successful. The applicant has achieved success. The general rule is that a party which has achieved substantial success is entitled to its costs. Nothing in the papers or in Mr Sebola's argument persuades me to deviate from the general rule.

[33] In the result, I order as follows:

1. The first respondent is ordered to submit herself and her minor son, Z, to DNA tests for the purpose of determining whether the late SD is the biological father of Z within 30 (thirty) days of today's date and which date must be arranged with the applicant's attorneys of record;
2. The DNA tests shall be conducted by a suitably qualified official in the employ of the National Health Laboratory Services, Johannesburg or at a similar facility.
3. The applicant is hereby ordered to furnish copies of the results of the DNA tests to the respondent's attorneys of record within 5 (five) days of such results becoming available.
4. The applicant is ordered to pay the costs of the DNA tests.

5. The first respondent shall pay the costs of this application.

MP CANCA

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Appearances:

For the applicant: Mr Mabuda

Instructed by: Nomaswazi Maseko Attorneys, Parktown.

For the first and second respondents: Mr Sebola

Instructed by: Mmamahlola Rabyanyana Attorneys, Pretoria.

