

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

**CASE NO: 4421/08
14/05/2009**

REPORTABLE

In the matter between:

YOLINDE DREYER (MOLLER)

Applicant

and

LOURENS MARTHINUS BOTHA

Respondent

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

MURPHY J

1. On 19 November 2008 I handed down judgment ordering the respondent to submit herself and her minor child to DNA tests for the purpose of determining whether the applicant is the biological father of the child. The respondent now applies for leave to appeal against that order.

2. In the judgment I made the observation that the law on the topic of compulsory blood or DNA testing in parental disputes is not satisfactory and that judicial pronouncements on the topic have not been unanimous in

their approach to the issues. While the preponderance of authority accepts that the courts have jurisdiction as upper guardians of minors to order tests on children, there has in the past been a division of opinion about whether it is permissible under the court's inherent jurisdiction to do so in respect of non-consenting adults. In reaching the conclusion I did, I chose to align myself with the view that depending on the circumstances of the case, and within reasonable limits, the privacy rights of a non-consenting adult may be expected to yield to the demands of discovering the truth in the best interests of the administration of justice, and while the best interests of the child are paramount they are not the only factors to be kept in consideration.

3. I held further that support for such a conclusion can be found in the increased recognition of the rights of unmarried fathers afforded by the Childrens Act 2005, and the constitutional imperative to balance the competing interests of privacy, the equality rights of unmarried fathers and the best interests of the child. Moreover, I held that the presumption and the adverse inference provided for in section 36 and 37 of the Act respectively would be an insufficient means for determining paternity to the satisfaction of the applicant and for that matter fulfillment of the requirements of the Act.

4. The respondent (the applicant in the application for leave to appeal) has raised 16 grounds of appeal in the notice of application for leave to appeal. The first four relate to the question of whether the interests of certainty and the rights of an unmarried alleged biological father to know the truth should override the privacy rights of the non-consenting mother, and whether or not it will most often be in the best interests of the child to have any doubts about paternity resolved and put beyond doubt. It is contended that I erred in the approach I took but also that I erred in finding in the circumstances of this particular case that truthful verification should trump the interests of the child. The last ground is unsustainable because I in fact found that it would be in the best interests of the child for paternity to be scientifically verified. In addition, I see no merit in the contention that an incorrect approach was followed. The judgment reflects a conscious balancing of the competing interest involved drawing upon the approach of Kotze J in *M v R* 1989 (1) SA 416(O) as vindicated by contemporary predicates of constitutional adjudication. There is accordingly, in my view, no merit in the first four grounds of appeal and little or no prospect that a higher court would reach a different conclusion in that regard.
5. The fifth ground of appeal is broken into four sub-grounds. The first sub-ground is that I erred in finding that the applicant's entitlement to parental rights and responsibilities is conditional upon him proving that he is the biological father. Section 26 specifically provides that a person claiming to

be a biological father who does not have the agreement of the mother must apply to court for an order confirming his paternity. The purpose of that provision, *inter alia*, is to have legal certainty about the status of the man seeking parental rights and responsibilities where such man is not married to the mother. Once biological status is established the rights and responsibilities follow, with their exact content being determined in terms of section 21(3). Accordingly, the third sub-ground that I erred in overlooking the provisions of section 21(3) is wrong seeing that I did so in paragraph 38 of the judgment. The second sub-ground that I erred in failing to assess the applicant's eligibility in terms of the conditions imposed by section 21(1)(b) of the Act is equally misplaced. As indicated in paragraphs 38, 39, 43 and 44 of the judgment the issues of eligibility and the assignment of rights are matters for determination only once biological paternity has been established. And, furthermore, the fourth sub-ground that I erred in not giving any weight to the fact that the applicant did not have any contact with the child or pay any significant maintenance is also unfounded. The issues are dealt with fully in paragraphs 6-13 of the judgment where I essentially concluded that little or no significance should be attached to the applicant's conduct on account of the impact of the dispute and the respondent's behaviour on his conduct. I am not persuaded that a higher court would decide the issue differently. In the result then I do not consider there to be any reasonable prospect of a higher court upholding the fifth ground of appeal.

6. The sixth ground of appeal is that I erred in failing to apply the provisions of section 9 of the Childrens Act and section 28(2) of the Constitution in terms of which the child's interests are of paramount importance in every matter concerning the child. There is no basis for this ground either. Throughout the judgment there are references to the child's interests being the paramount (but not only) consideration. In paragraph 47 I conclude that it will be in the best interests of the child that paternity be scientifically determined and resolved at this early stage. The sixth ground of appeal is thus devoid of merit and has no prospect of success on appeal.
7. The seventh ground of appeal is that I erred in finding that the applicant has a compelling interest in having certainty, and that it would be in the child's best interest for her to have certainty too. In the light of the recent statutory recognition of the rights and responsibilities of unmarried fathers I consider it unlikely that a higher court would conclude that doubts about paternity in a contested situation should be allowed to continue when they are otherwise capable of easy resolution; or that the stigma of ongoing uncertainty would be in the best interests of the child in the present circumstances. The seventh ground includes a further sub-ground that I erred in making the assumption that the absence of scientific proof will automatically mean concealing the truth from the child about her paternity. I did not, nor do I make any such assumption. As matters presently stand

the child's paternity is contested. Without scientific verification it is likely to remain contested for some time. That truth (the contested nature of her paternity) may or may not be revealed to or concealed from the child, but the ongoing contested nature of the paternity will result in the possibility of stigma and the inability of any court to decide on the nature and extent of any financial or other responsibilities owing by the applicant to the child. The ongoing uncertainty will be in neither the applicant nor the child's best interests. Accordingly, the prospect of this ground being upheld on appeal is also remote.

8. The eighth ground of appeal is that I erred in finding that the respondent was intimate with a second party, her husband, within the period of possible conception. The evidence on the point is indeed contradictory. But the exact date of conception has not been medically established and remains a matter for speculation. Although it seems the child was born 7 months after the applicant and the respondent ceased intimacy, such evidence has to be weighed and evaluated against the fact that the respondent on one occasion denied the applicant's paternity and refused him access to the child. That denial, by implication, points to the pregnancy possibly being the result of another intimacy. In the light of the denial of paternity by the respondent I consider that a higher court will not likely uphold an appeal on this ground either.

9. The ninth ground of appeal is that I erred in not relying on the presumption in section 36 and rejecting counsel's submission that this was a clear indication that the legislature envisaged this method of determining paternity as a more proportional means (see paragraph 42 of the judgment). I held that the presumption and the adverse inference permitted in section 37 would not be sufficient for an applicant seeking to determine whether he is not the father. Mr N Maritz SC, who appeared in the application for leave to appeal but not the application itself, made the more cogent submission that the presumption in section 36 does not in any event apply to the present case. The statutory presumption arises in legal proceedings where it is necessary to prove that a particular person is the father of a person born out of wedlock. In such circumstances a person proved to have had sexual intercourse with the mother will be rebuttably presumed to be the father. In the present case the child was not born out of wedlock. She was born during the subsistence of the marriage between the respondent and her husband with the consequence that the common law presumption *pater est quem nuptiae demonstrant* applies. Accordingly, the presumption in section 36 does not operate sufficiently to establish the paternity of the applicant and the adverse inference permitted by section 37 is equally insufficient on its own.
10. As things currently stand, the respondent's husband is rebuttably presumed to be the child's father and such presumption (effectively

denying the applicant's claim of paternity) will remain in place until it is rebutted and altered by an actual order or declaration by a competent court - *Park v De Necker* 1978 (1) SA 1060 (N) at 1061H-1062B. This point was not argued before me during the course of the application and therefore has not been explicitly considered in the judgment. It however adds compelling force to the justice of the applicant's cause that he be permitted to attempt to rebut the common law presumption by adducing scientific evidence of his paternity. Before the presumption can be rebutted the applicant will have to establish on a balance of probabilities that he and not the presumptive father is the biological father. He will need to do likewise in any application he brings in terms of section 26 of the Children's Act. Even were the respondent to admit that the applicant is the father, that may not be sufficient to rebut the common law presumption. There is no evidence on record regarding the attitude of the presumptive father. The only conceivable reliable evidence available to the applicant to rebut the common law presumption in these circumstances would be a blood or DNA test. For present purposes the point simply is that the ground of appeal that I did not rely on the section 36 presumption to determine paternity is without merit for the simple reason that the presumption finds no application in the present circumstances.

11. The tenth ground of appeal is essentially a repetition of the grounds in the first to fourth grounds and hence requires no further consideration. The same can be said of the thirteenth, fourteenth and fifteenth grounds.
12. The eleventh, twelfth and sixteenth grounds allege variously and somewhat inconsistently that I did not take account of the applicant's initial denial of paternity (which is not correct - I did so but accepted that he was acting emotionally) and the respondent's admission of his paternity. The latter, as I have said, is inadequate on its own to rebut the common law presumption but is also contradicted by her denial of his paternity. Accordingly, the allegation that I erred in finding that there was not sufficient evidence to establish paternity is also unsustainable. The parties have made contradictory statements and the common law presumption will remain in place until rebutted. Moreover, the sixteenth ground of appeal that I erred in not giving weight to the fact that the child was indeed born in wedlock does not help the respondent for the reasons already stated, and by virtue of the common law presumption arising as a consequence of that fact, is in fact contradictory of her claim that there is sufficient evidence establishing the applicant's paternity.
13. In argument before me, Ms Tolmay SC did not press the grounds of appeal set out on the notice of application for leave to appeal. Given the above analysis, her approach was the most prudent to follow. Instead she

dwelt exclusively on the statements I made in the judgment that the law on the topic is not satisfactory and judicial approaches to the question have been lacking in unanimity. That alone, she submitted, was ground enough for appeal. I think not. The only issue that may remain contentious is whether or not the inherent jurisdiction of the court to regulate its own procedures extends to an authority to order non-consenting adults to submit to blood tests. The decisions holding that no such jurisdiction exists have been overtaken by constitutional and statutory developments bestowing equal rights on unmarried biological fathers. The justice of the court assuming such jurisdiction is made plain by the facts of the present case which disclose an evident need for the effective adjudication of the dispute, whether ultimately under section 26 or the common law, in order to determine the rights and responsibilities of the applicant in relation to the child.

14. In the premises, and for the foregoing reasons, the application for leave to appeal falls to be dismissed. Neither counsel made submissions on the question of costs. I assume this may have been an oversight. Normally the costs should follow the result and considering the issues here at stake, an award of costs for two counsel is justified. However, without the benefit of counsels' submissions I pause before making a final order. The order that follows takes account of my hesitation.

15. The following orders are issued:

1. The application for leave to appeal is dismissed.
2. Either party may on notice to the other party approach the court in chambers to make additional submissions on the question of the costs of this application.
3. In the event of no additional submissions on costs as contemplated in paragraph 3 of this order being made within 5 days of this order, the respondent (applicant in the application for leave to appeal) shall pay the costs of the application, such costs to include the costs of two counsel.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 23 April 2009

For the Applicant: Adv RG Tolmay SC, Pretoria

Instructed By: Davel De Klerk Kgatla Attorneys c/o Jacques Roets Attorneys

For the Respondent: Adv N Maritz SC and Adv Z Schoeman, Pretoria

Instructed By: ML Schoeman Attorneys, Pretoria