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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA**

CASE NO: 4637/2022

Reportable	Yes/No
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In the matter between:

Z[...] M[...]

1ST APPLICANT

N[...] E[...] M[...]

2ND APPLICANT

And

A[...] F[...]

1ST RESPONDENT

E[...] F[...]

2ND RESPONDENT

L[...] F[...]

3RD RESPONDENT

S[...] F[...]

4TH RESPONDENT

JUDGMENT

MHAMBI AJ

[1] This is a novel application in which the applicants seek to have an order directing the respondents to submit themselves to the DNA test to determine whether the respondents are the biological children of the late M[...] R[...] M[...],” **the deceased**”. The respondents oppose the application only on the basis that they, (respondents), seek for the DNA test to be conducted on the remains of the deceased, something which the applicants disagree on.

[2] The salient facts of this application are that the deceased who is applicant’s father had an intimate relationship with one N[...] B[...] F[...], mother of the respondents. It is an admitted fact that out of that relationship one U[...] F[...], who now has predeceased all the parties to this application, was born. The respondents allege that they too are the biological children of the deceased. It appears *ex facie* the papers filed of record that the respondents had lodged a claim against the estate of the deceased, alleging to be the biological children of the deceased and therefore had inherent right to inherit the deceased estate.

[3] The applicants allude to having no knowledge of the respondents as the deceased biological children, this paternal dispute, if I may say so, is the cause of this application.

[4] This court has to determine, firstly, whether it has powers to order an adult person to submit himself/herself to DNA test for the purposes of proving paternity. Secondly, this court has to determine whether it is in the interest of justice, regard had to be to circumstances of this case, that the body of the deceased be exhumed to conduct DNA test for the purpose of proving paternity.

[5] In their opposition the respondents have raised three points *in limine*, first is the non-joinder of the respondents' mother, B[...] N[...] F[...], the second one, is the non-joinder of the Master of the High Court. The last one is the late filing of the applicants' replying affidavit without sufficient explanation. I will deal with all the points of *in limine* raised by the respondents later in this judgment.

[6] The necessity of DNA test is a common cause issue between the parties; the parties disagree on the manner in which the DNA test should be conducted. The applicants suggest and seek that DNA test be done on them as the deceased's children or descendants, and the deceased siblings, where necessary. The respondents stand firm to say the only manner of DNA test that will provide conclusive positive paternity evidence is the test conducted on the body or the remains of the deceased. The applicants regard that as an unreasonable condition and further view it as an obstruction to the intended DNA test they seek.

[7] This application is based on a very thorny topic relating to compulsory DNA testing in parental dispute involving adults where the alleged father is the deceased.

[8] The parental disputes are frequent in cases involving the minor children, the courts have mostly relied on inherent jurisdiction as upper guardian of minors to resolve the dispute or issue for determination. In its determination, the courts are guided by the children's Act¹, and there is a legal certainty in that topic, dispute of paternity involving minors.

[9] It is my view that whatever the facts of the case might be, what is important is the administration of justice, to both parties, equally. I share the same view with Didcott J as he held in *Seetal V Previtha and Another NO*². In *Seetal*, Didcott J cited what the

¹ Children's Act 3 of 2005, specifically Section 36 read with Section 37. A party denying paternity may Invoke Section 37 to demand DNA test be conducted to prove paternity.

² 1983 (3) SA 827 (D) at 862- M

Supreme Court of South Dakota said in *The State of South Dakota V Damm*,³ in which he said he court said: -

‘The function of the Judiciary is the administration of justice, and Justice can never be rightful administered unless that truth be first ascertained, as nearly as may be..... The citizen holds citizenship subject to the duty to furnish to the courts, from time to time and within reasonable limits (which are for the courts to determine), such assistance as the court may demand of him in their efforts to ascertain the truth in controversies before them..... We perceive no valid reason why courts of record may not require of any person within their jurisdiction the furnishing of a few drops of blood for test purposes when, in the opinion of the court so to do will or may materially assist in administering justice in pending matter’.

[10] In Seetal, Didcott J said:⁴-

‘In the end the debate about compulsory blood tests amounts, as I see it, to a shut down between the ideas, these two ideas which cannot be satisfactory reconciled, the idea that the truth be discovered whenever possible and the idea that the personal privacy should be respected. Both are important. Neither, however, is sacrosanct. Each, as it happens, gets sacrificed, the first on some occasions, the second on others. The clash between the two does not really lend itself argument. How the conflict is resolved in this country when the law on the point is eventually settled will depend largely on the store the courts then sets by each idea, on its own sense of priority in that regard’.

[11] In cases involving the minor children, the courts are at ease to order for blood tests or DNA test, considering the interests and position of the child regardless of any

³ (1936) 266 NW 667 at 670 -71

⁴ Supra, at (861 F-H)

right an adult might allege to have been infringed. This has been the position even prior constitutional supremacy error. In *Pravitha and Another NO*⁵ Lewis JA stated:-

“[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, 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 DNA test, must consider the particular position of the child and make a determination for that child only. The role of a court, and it’s duty, is to determine disputes in civil proceedings on a balance of probabilities. It is not a court’s function to ascertain a scientific proof of the truth”.

[12] **Murphy J.** in *Botha V Dreyer*⁶, has analysed different authorities, before and after 1996, conclusively it is clear on those authorities that the court does have powers to compel any person to subject to DNA test for the purposes of establishing paternity or of providing the truth, and administration of justice.

[13] It is certain that this court is clothed with non-statutory powers to compel an adult person to subject to DNA test for the purposes of proving paternity. Be that as it may, the facts of this case do not require a ruling on that aspect, from this case, the dispute is the manner on which the DNA test should and not only must be done or conducted.

[14] The applicants are suggestive that the DNA test conducted without the deceased remains is sufficient to prove paternity that is an issue between the parties, a point the opposing respondents disagree with, and suggestive that the DNA test conducted on the remains of the deceased will be reliable and provide the truth.

[15] Even though this court is concerned with the administration of justice, and that the truth and only it gives an end to the legal controversies, this court need not give an

⁵ 1983 (3) SA 827 (D) at para 16

⁶ An unreported North Gauteng judgment, (4421/08) [2008] ZAGPHC 395 (19 November 2008).

order compelling drastic relief in circumstances when less drastic measures or remedies are available.

[16] An order a court should make must be in the interests of justice and not against public morals or *contra bonas mores*. An order that compels the doing of a drastic action is similarly to the one that is *contra bonas mores* and against public morals.

[17] In *King N.O. and Others V De Jager and Others*⁷, the Court refers to what Ngcobo J, held in *Barkhuizen* that the proper approach to constitutional challenge to contractual terms is “whether the term challenged is contrary to public policy as envisaged by constitutional values, in particular those found in the Bill of Rights. Since time immemorial, courts have considered the common law rule that clauses that are contrary to public policy are unlawful and unenforceable.

[18] Even though the court referred in that case to clauses in a contract, but I find it applicable to reliefs sought by parties in judicial controversies. A relief that is drastic in nature, when less drastic relief ought to have been sought and subsequently granted is unlawful and unenforceable.

[19] In this case, the respondents maintain DNA test is only appropriate, if the deceased remains will be exhumed to have DNA test conducted for the purposes of proving paternity.

[20] It is in the public morals and policy that after death, the deceased remains or bodies should not only be decently and reverently interred, but should also remain in the grave undisturbed. This public morale should indeed be respected by social institutions including courts of law. A good cause has to be shown when unenforceable circumstances make it desirable or imperative that a body should be disinterred for good reasons. In such a case, the court will not hesitate to grant an order

⁷ [2021] ZACC 4, 2021 (5) BCLR 449 (CC) 2021 (4) SA 1 (CC) 19 February 2021 para 38 and 41

of exhumation, if no case is made, granting an exhumation order will be against public policy and public morals.

[21] In my view, the proposition by the respondents is drastic, I disagree with it. The DNA test is possible, considering the facts of this case, to be conducted between the applicants and the respondents and or between the siblings of the deceased and the respondents, applicants, if need arises. The facts of this case do not desire the DNA test to be conducted on the remains of the deceased as the respondents proposed.

[22] I now turn to deal with the points *in limine* as raised by the respondents. Firstly, the point of non-joinder, either of the Master of the High Court or the respondents' mother.

[23] The test for joinder is well known, and it is whether the party to be joined has a direct and substantial interest in the outcome of the pending court proceedings. In *Absa Bank Limited v Naude N.O.*⁸, the court held that: -

'[10] The test is whether a party has a direct and substantial interest in the subject matter of the action, that is legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.

A mere financial interest is an indirect interest and may not require joinder of a person having such an interest.

The rule is that any person is a necessary party and should be joined if such a person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing, that party, unless the court is satisfied that he/she has waived his or her right to be joined.'

[24] After I have considered the nature of the reliefs the applicants seek, and the test on joinder as per the authority I have cited, I find that the Master of the High Court, and

⁸ 20264/14 [2015] ZASCA 97 (01 June 2015)

the mother of the respondents, will not be prejudiced by the outcome of this case. The interest they have or might have is not direct and substantial to the order this court might in the end make. I disagree with the respondents that they ought to have been joined in these proceedings.

25. The last point *in limine* relates to the late filing of the applicants' replying affidavit. The applicants have provided a very minimum or limited explanation for the cause of the delay in filing their replying affidavit. The filing has been delayed for almost twelve months. I intend to grant condonation for the late filing of the applicants' replying affidavit only in the interests of justice and the

I follow what the Constitutional court said in *Brummer v Gorfil Brothers Investments (Pty) LTD*⁹. In *Grootboom* the Constitutional court tabulated what the court needs to take into account in considering whether an application for condonation is in the interests of justice¹⁰. This was reaffirmed by the Constitutional Court in *Steenkamp and Others v Edcon Limited*¹¹. I am mindful that the applicants did not make a substantive application for condonation, but instead the so-called reasons for the delay are incorporated in the replying affidavit itself. However, the conduct of the applicants will have an effect on the question of costs for determination. I will deal with this issue later in the judgment.

26. In this case, I am satisfied that the applicants have, on a balance of probabilities, made out a proper case for the reliefs they now seek. The proposition for the manner of conducting DNA test for the purposes of proving paternity by the applicants is less stringent and less drastic than the one by the respondents. The circumstances of this case do not desire the grant of the exhumation order for the purpose of proving paternity as proposed by the respondents. The application therefore succeeds.

⁹2000 ZACC 3, 2000 (5) BCLR 465 at para 3

¹⁰ *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) paras 22-3 and 51

¹¹ [2019] ZACC 17; 2019 11 BCLR 1189 (CC)

27. The last issue I have to deal with is that of costs. The purpose of costs awarded is to indemnify the successful party. The general principle on costs was well summarized in *Ferreira v Powell N.O. and Others*¹², the Constitutional Court held that: -

‘The Supreme Court has over the years, developed a flexible approach to costs which proceeds with two basic principles, the first being that the award of costs, values expressly otherwise enacted, is in the discretion of the presiding officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle to a number of exceptions where the successful party is deprived of this or her costs. Without attempting either comprehensive or complete analytic accuracy, depriving successful parties of their costs can depend on circumstances such as for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of proceedings. I mention these examples to indicate that the principle which have been developed in relation to the award of costs are by nature sufficiently flexible and adaptable to meet new needs which may arise in constitutional litigation.’

28. As I have already stated, the applicants replying affidavit has been filed in an unpleasing manner. It is delayed by a period of twelve months, the explanation given is scanty or very limited, there is no substantive application for condonation filed. The applicants conduct makes a reason to depart from principle that the successful party is awarded with costs. I refuse to grant the applicants’ costs order or award, despite their success in the application.

29. In the result, the following order issues: -

ORDER:

¹² [1996] ZASCA 27, 1996 (2) SA 621 (CC) para 3

1. The respondents are directed to submit themselves to the DNA test, within thirty (30) days, from the date of grant of this order, on a date to be arranged by the applicants' attorneys of record, for the purposes of determining whether the late M[...] R[...] M[...] is their biological father.
2. The applicants are directed to arrange the nearest suitable and qualified health official within the employment of the National Health Laboratory Services for the purposes of conducting the DNA test in order to give effect to paragraph 1 above.
3. The first applicant is directed to furnish copies of the DNA test results to the respondents or their attorneys, within five (5) days of such results becoming available.
4. The first applicant is directed to pay costs of the DNA test, including the travelling costs of the respondents, where so incurred.
5. Each party is directed to pay it's own costs.

M. MHAMBI
Judge of the High Court (Acting)

Date heard : 12 December 2024
Date delivered : 5 June 2025

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