



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Reportable/Not Reportable

Case no: 23156/24

In the matter between:

L. M. M.

APPLICANT

and

M. A. L.

FIRST RESPONDENT

THE MINISTER OF HOME AFFAIRS

SECOND RESPONDENT

**THE DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS**

THIRD RESPONDENT

Neutral citation: *L. M. M. v M. A. L. and Others* (Case no 23156/24) [2024]
 ZAWCHC (14 May 2025)

Coram: **SALLER AJ**

Heard: 22 April 2025 and 30 April 2025

Order: 30 April 2025

Reasons: 14 May 2025

Summary: Application to remove the father's name from a child's birth certificate – DNA test showing that father listed on the birth certificate is not the biological father – Children's Act 38 of 2005 – Births and Deaths Registration Act 51 of 1992

REASONS FOR THE ORDER GRANTED ON 30 APRIL 2025

Saller AJ

INTRODUCTION

- [1] This application concerns the sad question of what is to happen when a man finds out that he is not the biological father of a child he has accepted as his own.
- [2] The applicant in this matter is a South African man listed on South Africa's population register as the father of the three-year-old girl P.H.M. ("the child"). He is not married to the mother of the child, the first respondent, but acknowledged paternity at birth and consented to being listed as father of the child on the birth certificate. He did so based on the first respondent's assurances that he was the child's father.
- [3] But a recent DNA paternity test has shown that this is not true.
- [4] The applicant comes to court to ask it to sever the legal relationship between him and the child and to direct the Department of Home Affairs ("the Department") to remove him as father from the child's birth certificate.
- [5] The first respondent is a national of Lesotho, lawfully resident within the court's jurisdiction. She opposes the relief sought.
- [6] Both the applicant and the first respondent were initially unrepresented. At the hearing, the applicant was for the first time represented by counsel, while the first appeared in person.

- [7] The applicant cites the Department through the Minister of Home Affairs and the Director-General of Home Affairs as the second and third respondents, respectively. The Department abides the relief.
- [8] The Department was represented by the State Attorney's Ms Karjiker, who not only assisted the unrepresented parties (as they were until the eve of the hearing) with the practicalities of the litigation, but also prepared an explanatory affidavit at the court's request. The court is indebted to her.

LITIGATION HISTORY AND SUBMISSIONS

- [9] The applicant filed his application on 24 October 2024, asking the matter to be set down for 15 November 2024.
- [10] The first respondent opposed the application and filed an answering affidavit on 6 November 2024, albeit that it appears she was unable to serve on the applicant at the address set out in the notice of motion.
- [11] On 15 November 2024 the matter was called on the unopposed motion court roll in the third division, when it was postponed to 30 November 2024. On 30 November 2024 the matter was again called on the third division roll. Mangcu-Lockwood J sitting in third division gave directions that Ms Karjiker assist and guide the parties to properly secure a date for hearing the application as an opposed motion.
- [12] With Ms Karjiker's assistance, the matter was placed on the opposed roll for hearing on 22 April 2025. Formal communication between the parties, including the filing of a reply, has since been by email, facilitated by Ms Karjiker.
- [13] At the hearing, as mentioned, the applicant was for the first time represented by counsel, while the first respondent appeared in person and Ms Karjiker appeared for the Department.

- [14] In argument, Mr Mtambeka for the applicant submitted that the relief sought by the applicant could be achieved through a termination of parental rights and obligations as provided for in section 28 of the Children's Act 38 of 2005 ("Children's Rights Act"). While the notice of motion initially did not include such relief, it was subsequently added as a second prayer in an unopposed amendment.
- [15] Mr Mtambeka further submitted that the judicial presumption in favour of the applicant's paternity as a result of the sexual relationship between the applicant and the first respondent at the likely time of conception was rebutted by the result of the DNA paternity test.
- [16] He concluded that an order terminating the applicant's parental rights and responsibilities ought to be made on the following grounds (I paraphrase his heads of argument slightly):
- a. The applicant is not the biological father of the child;
 - b. It is in the best interests of the child to know her true identity;
 - c. The applicant no longer wishes to assume the role of father to a child he knows is not his biological child; and
 - d. The child has the right to live in a secure and nurturing environment, free from avoidable trauma.
- [17] For the State Attorney on behalf of the Department, Ms Karjiker confirmed that her clients abided by the court's decision, but urged the court to make an order that was practicable having regard to the Department's established processes.
- [18] Addressing the court in person, the first respondent for the first time asked the court to order the applicant to submit to a second DNA test at her expense before making a final order.
- [19] The court *mero motu* referred the matter to oral evidence in view of the potentially very serious repercussions of the outcome of this application on the minor child, the limited information placed before the court in the respective

affidavits, as well as the fact that the first respondent remained unrepresented. None of the parties objected to the referral.

[20] After hearing the oral evidence of the applicant and the first respondent (more on this below) and considering the parties' submissions, I stood the matter down subject to directions for Ms Karjiker to file an explanatory affidavit on behalf of the Department setting out the practical steps, and their legal bases, which the Department ordinarily requires for the removal of the name of an unmarried father from a child's birth certificate if and when it is established through a DNA paternity test that he is not the biological father.

[21] Ms Karjiker filed such an affidavit on 25 April 2025. The procedure which the Department adopts to cater for the removal of the father's name from a birth certificate is described in that affidavit as follows:

- a. Both parents are ordinarily required to apply under section 7(2) of the Births and Deaths Registration Act 51 of 1992 ("Births and Deaths Registration Act") on the prescribed form DHA 526 for the "*verification, supplementation or rectification of personal particulars*" on the population register; as well as providing two completed sets of prescribed DHA 24 forms entitled "Notice of Birth" to indicate the child's old details (i.e. providing the mother's, the father's, and the child's details) and the child's new details (i.e. providing only the mother's and the child's details).
- b. If there is a court order that permits the application to be made by only one parent, a stamped copy of such an order must accompany the application.
- c. If paternity has been excluded on the strength of a DNA test, a copy of the laboratory test result must accompany the application.
- d. There are other requirements, such as an administrative payment of R70 and the attachment of a range of documents.

THE PARTIES' EVIDENCE

- [22] The applicant and the first respondent both say they commenced a relationship “*late in 2021*”, but neither can say with certainty in which month, much less on which day, their relationship began.
- [23] It is common cause that immediately prior to their relationship, the first respondent was involved with another man. She was unable to say when her relationship with her previous boyfriend ended. This, too, she says, was “*late in 2021*”.
- [24] Soon after commencing their relationship, the first respondent told the applicant that she was pregnant, and the child was born on 30 June 2022.
- [25] The applicant says that the first respondent assured him he was the biological father of the child, and despite some misgivings, he accepted her word. He attaches a copy of the child’s birth certificate to his founding application, which identifies him as the as the child’s father and records that the applicant acknowledged paternity of the child at birth.
- [26] The applicant embraced his responsibilities as father. He supported the first respondent financially during her pregnancy, and until very recently he supported the child financially without there being a maintenance order in place. He took out medical aid and listed the child as a dependant to ensure she received proper medical care. He and the applicant did not live together, but he would see the child most weekends. When speaking about his relationship with the child, he became visibly emotional, and the court has no doubt that he cares for her.
- [27] But his emotional attachment to the child is the very thing, he explained, that pushed him to insist on a paternity test. This is because his continuing and growing doubts regarding the child’s paternity have impacted negatively on his relationship with her.

- [28] The first respondent eventually agreed that a paternity test be done. On 25 September 2024 both parties and the child went to the Lancet Laboratory facility in Rondebosch, where samples were taken for that purpose.
- [29] The pathology result of the DNA paternity test, dated 18 October 2024, is attached to the founding affidavit. It unequivocally excludes the possibility of the applicant's paternity of the child.
- [30] The first respondent complained of the fact that she, as mother, was not contacted directly by Lancet or provided with the results, despite providing her contact details when she attended the laboratory on 25 September 2024. In her oral evidence, she said that she has never seen the original result. When invited to view the original document in the court file, however, she indicated that she accepts that the laboratory test result excludes the applicant's paternity.
- [31] Faced with the first respondent's complaint, the applicant explained in his replying affidavit and in oral evidence that since he had paid for the paternity test, he was regarded as the account holder, and it is for this reason that Lancet contacted only him on 18 October 2024 to notify him of the result. When he called Lancet to obtain further details, he was told that the pathology test result could be collected at any Lancet branch, which he did shortly thereafter on the same day.
- [32] After collecting the pathology test result that excluded his paternity, the applicant confronted the first respondent on WhatsApp. An exchange of WhatsApp messages ensued over the following days. The first respondent told the applicant that she contacted Lancet telephonically to verify the result, but its employees refused to discuss the result with her without the applicant being present. The applicant then sent her an image of the pathology result on WhatsApp, at her request. He also offered to go to Lancet with her "*anytime*" to verify the test result. The applicant also told the first respondent that he wanted to have his name removed from the child's birth certificate, and that they would have to go to the Department together to do so.

- [33] The first respondent's reply was that she was only free on Saturday after 5pm, due to her work. The applicant pointed out that the Department was only open weekdays from 8am to 5pm. In his oral evidence, he reiterated that he had been willing to go to Lancet with the first respondent to satisfy her of the result, but that her insistence on going after hours made that impossible.
- [34] There is some dispute, which takes the matter no further, about what interaction took place over the next few days. The applicant says the first respondent was in Lesotho when they corresponded regarding the results, and that she refused to engage with him thereafter. The first respondent says she was in Johannesburg, and it was the applicant who would not speak with her telephonically. The applicant says they spoke again on 23 October 2024 when he repeated his request that the first respondent accompany him to the Department to change the child's birth certificate, which she refused. The applicant says such a conversation took place on 21 October 2024, and that her refusal was only due to her work commitments.
- [35] The applicant says he went to the Department alone, where he was told that he would require the first respondent's co-operation to change the details of the child's birth certificate.
- [36] On 24 October 2024 the applicant filed the present application.
- [37] From the parties' oral evidence, it appears that the applicant has subsequently ceased all payments in support of the child. The first respondent has removed the child from her school in Cape Town. At present the child is living with her grandmother, the first respondent's mother, in a village outside of Maseru, Lesotho, and is going to school there. The first respondent's younger sister lives nearby and visits occasionally. The first respondent says this is because she cannot afford to keep the child with her in Cape Town without financial support from the applicant. She is currently unemployed and receives only occasional financial support from her older sister.
- [38] It also emerged that, at some point, the first respondent asked the applicant that a second DNA paternity test be done. The applicant refused, on the grounds

that he had already paid in full for the first test, and that the first respondent was not willing to pay for the second test she requested. In her oral evidence, the first respondent indicated that her family was now prepared to pay for a second test.

- [39] In his oral reply, the applicant still resisted a second test, on the grounds that the delay in severing his legal relationship with the child was causing him ongoing deep emotional pain for which he had to seek therapy. He pointed out that there was no reason to doubt the outcome of the first paternity test result: the first respondent was present when the samples were taken, and the test is conclusive. The applicant's response appeared genuine, as did his emotional turmoil. His concern with delay is underscored by the fact that the first respondent indicated that the earliest that the child could be returned to Cape Town to conduct a second test was during the school holidays in late June or July 2025.

DETERMINATION OF THE ISSUES

- [40] Two issues present themselves for determination. The first is whether the applicant should be ordered to submit to a second DNA paternity test before a final determination is made. If the answer is in the negative, the second question that arises is whether there are grounds for granting the application for termination of the applicant's parental rights and responsibilities and his removal from the child's birth certificate as the child's father.
- [41] As to the first question, the first respondent was unable to explain on what grounds she disputed the outcome of the DNA paternity test. She accepts that, on the face of it, the test result excludes the applicant's paternity.
- [42] The first respondent's complaint about the manner in which the outcome of the paternity test was communicated, is addressed by the applicant's explanation that he is the account holder because he paid for the test. This is borne out by the fact that only the applicant's details – his email address and his cell phone number – appear on the test result. More importantly, whether or not Lancet's

employees were remiss in notifying the first respondent has no bearing on the integrity of the test result.

- [43] It is to the first respondent's credit that she frankly admitted that she was unable to put a date to when the relationship with her previous boyfriend ended and her relationship with the applicant began in "*late 2021*". This period of uncertainty fully overlaps with the likely time of conception of the child who was born on 30 July 2022. On her own version, it is therefore reasonably possible that she was engaged in a sexual relationship with someone other than the applicant at the time the child was conceived.
- [44] Taken together, these facts comfortably tilt the balance of probabilities in the applicant's favour that he is not the biological father of the child.
- [45] This court has an inherent power to order that a paternity test be conducted against the wishes of a putative parent where there is genuine uncertainty regarding paternity, and this is in the interests of the minor child. But such an order is not to be had merely for the asking. A court will be mindful of the fact that it constitutes an infringement of the putative parent's rights to privacy and bodily integrity. The role of a court, and its duty, is ultimately to determine disputes in civil matters on a balance of probabilities. In this regard, see *Y.M. v L.B.* 2010 (6) SA 338 (SCA) paras 11, 14-16.
- [46] Where, as here, that balance is comfortably established on the evidence already before the court, there are no grounds for the court to order the applicant to submit to a second paternity test before making a final order.
- [47] Turning then to the second issue, the applicant seeks relief that both is substantive and practical. While the termination of the applicant's responsibilities and rights under section 28 of the Children's Act goes to the substance of what the applicant wishes to achieve, he also asks that this be given practical effect through his removal from the child's birth certificate as father.
- [48] A birth certificate reflects the particulars which are required to be submitted to the third respondent, the Director-General, by the provisions of the Births and

Deaths Registration Act. In the present matter, upon the registration of the child's birth as required by that Act, the applicant's paternity of the child will have been included in the population register of which the third respondent is the custodian. It is that information which must be amended in order to grant the applicant the practical relief he seeks.

- [49] Section 7(2) of the Births and Deaths Registration Act empowers the third respondent to rectify the particulars of "*any person in any document submitted or preserved in terms of this Act or included in the population register*" if it comes to his attention that such particulars are incorrect. Subsection (4) provides for an application to be made to the third respondent in the prescribed form for "*the amendment or rectification of his or her particulars furnished in terms of this Act*".
- [50] As already mentioned, the Department requires that such an application to be made on the form DHA 526, accompanied by a corrected notice of birth on form DHA 24. In the case of a minor child, where the records maintained by the third respondent reflect both mother and father, the consent of both parents is required for a change of the child's particulars unless a court orders otherwise.
- [51] The Births and Deaths Registration Act does not make express provision for such an order. I am, however, satisfied that the court has the inherent power as the upper guardian of the minor child, having regard to the child's best interest as provided by section 28(2) of the Constitution, to make such an order.
- [52] Section 28(1) of the Children's Act, read with section 28(3)(a), on the other hand, makes express provision for an order by the High Court terminating a person's parental responsibilities and rights. Subsection (4) sets out the considerations which must be taken into account when making such an order. Unsurprisingly, here, too, the court is required to consider the best interests of the child, as well as the parental relationship and degree of commitment, as well as any other factor which the court considers relevant.

[53] At first blush, it might appear that in the present matter the best interests of the child are irreconcilable with those of the applicant and place an insurmountable obstacle in the way of the relief he seeks because a termination of the applicant's legal obligations towards the child will result in a deprivation of the advantages she has enjoyed through her relationship with him. But a far more nuanced enquiry is called for.

[54] In *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC), the Constitutional Court grappled with the question whether the interests of a minor child would always trump competing rights of another person. Deputy Chief Justice Langa (as he then was) answered the question in the negative and explained at para 55 (footnotes omitted): -

"[55] In the High Court judgment, the view is expressed ... that section 28(2) of the Constitution "trumps" other provisions of the Bill of Rights. I do not agree. This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with section 36."

[55] Four years later, in *S. v M. (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC) the Constitutional Court had opportunity to comprehensively consider the scope and nature of the protections afforded to minors by section 28 of the Constitution, including the requirement, in section 28(2), that in every matter concerning a child its best interests are "*of paramount importance*".

[56] Writing for the majority (with the minority not taking issue with the legal principles developed) Justice Sachs placed the constitutional injunction of section 28(2) of the Constitution in context (para 20, my emphasis, footnotes omitted):

[20] No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the

law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. Thus, even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. It follows that s 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can.

- [57] Justice Sachs went on to highlight at para 24 the contextual nature and inherent flexibility of the enquiry into the child's best interests mandated by section 28 of the Constitution. He pointed out that "[a] *truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved.*"
- [58] And, of particular relevance to the present matter, at para 25 Justice Sachs held that the emphatic and far-reaching formulation of section 28 "*cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations.*" At para 26, he affirmed that "*the best-interests injunction is capable of limitation*" and that section 28 "*cannot be said to assume dominance over other constitutional rights*".
- [59] Returning to the present matter, the evidence is that the paternal relationship between the applicant and the child has irretrievably broken down. Its severance has left the applicant with emotional scars. The applicant explained how it became impossible for him to treat the child as his own, first in doubt, and now in the secure knowledge, that she is not his biological child. For as long as the applicant is legally bound to the child, she will embody his pain and feed his resentment that he was falsely persuaded to accept her as his own.
- [60] On the other hand, the child is currently in a safe environment with her grandmother in Lesotho and has started going to pre-school there. The first respondent's younger sister lives nearby, and the first respondent visits when

she is able. The child may yet come to know her true biological father or may come to have another father figure in her life. The relief sought does not stand in the way of her future.

- [61] In those circumstances, and on balance, I concluded that the applicant should be granted the relief he sought and made a such an order on 30 April 2025.

COSTS

- [62] The applicant was required to approach the High Court as upper guardian of the child for the relief he sought. He was unrepresented for the majority of the time, but felt compelled to brief counsel at the third appearance undoubtedly motivated by his frustration at the delays in bring the matter to finality.

- [63] On the other hand, that delay cannot be placed at the door of the first respondent, who appeared in person each time the matter was set down. She is currently unemployed and without significant means. There is no indication that she acted in bad faith in opposing the relief. She, too, clearly cares about her child, and wants what is best for her.

- [64] Finally, as already mentioned, Ms Karjiker on behalf of the Department went far beyond what was required. She appeared each time, not to oppose the relief sought but to assist the court. She submitted that the Department should not be saddled with a costs order regardless of the outcome of the application, and that submission was plainly well made.

- [65] In the circumstances, no order as to costs was made.

K S SALLER
ACTING JUDGE OF THE HIGH COURT

Appearances

For applicant: Adv Xabiso Mtambeka

Instructed by: Masoka Attorneys Inc.

First respondent: in Person

For second respondent: SB Karjiker, State Attorney, Cape Town.