REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

..... 24/10/2017

SIGNATURE **DATE**

CASE NO: A5020/2016

Court a quo CASE NO: 30619/2015

In the matter between:

M	**FIRST APPELLANT**
M in her capacity as mother and natural guardian of **Z**	**SECOND APPELLANT**

and

D	**FIRST RESPONDENT**
SETSHABA PENSION FUND	**SECOND RESPONDENT**

JUDGMENT

WINDELL J

INTRODUCTION

[1] The issue arising in this appeal is whether the first appellant, M, and her minor child, Z, (the minor child) should be compelled to undergo DNA testing to establish whether the deceased, SD, is the biological father of the minor child. The DNA tests are intended to create scientific certainty before the second respondent, Setshaba Pension Fund (Setshaba), pays out a R2 000 000 death benefit of the late SD to M in her capacity as mother and natural guardian of the minor child. The issue arises against the following backdrop.

[2] M was involved in a romantic relationship with SD, the first respondent's son, from about November 2005 until middle 2010. The minor child was born on 28 December 2008, approximately one and a half years before the relationship ended. SD passed away in a motorcycle accident on 22 February 2015. Shortly before his passing he was permanently employed. His employment terms included benefits, such as the death benefit administered by Setshaba.

[3] Following the death of SD, the first respondent ascertained that the death benefit became payable to SD's dependent(s), or failing any dependent or nominated beneficiary, to his estate. The first respondent also ascertained that Setshaba had determined that the minor child was a dependent in terms of its rules and would be the beneficiary of the death benefit. The first respondent launched an urgent application to interdict Setshaba from paying out the benefits to the minor child (Part

A), and for an order compelling M and the minor child to subject themselves to DNA testing to establish paternity of the minor child (Part B).

[4] The first respondent obtained an order in the urgent court interdicting and restraining Setshaba from paying out the death benefit, pending the outcome of Part B. Part B came before Canca AJ on 11 December 2015. He held in favour of the first respondent and ordered M and the minor child to submit themselves to DNA tests for the purpose of determining whether the late SD is the father of the minor child. It is this order that is the subject of this appeal.

[5] The appellants brought a substantive application for the reinstatement of the appeal. The application was not opposed and the appeal is reinstated.

THE FIRST RESPONDENT SUBMISSIONS

[6] The first respondent alleged that there had always been some uncertainty surrounding the paternity of the minor child. She gave the following background information in support of the relief claimed:

> 6.1 SD and M moved to Port Elizabeth during 2008 and sometime during 2008 M came back to Johannesburg and *"no-one seemed to know her exact whereabouts for approximately 3 months"*. M thereafter resurfaced and reconciled with SD and shortly thereafter informed him that she was pregnant with his child. They moved back to Johannesburg where they continued to live together.

6.2 After the birth of the minor child in December 2008, SD requested the first respondent to attend a ceremony where gifts were sent to M's family in acknowledgement of the birth of the minor child. The ceremony was held at the home of M's parents.

6.3 When the minor child was about a year old, several members of her family had indicated their scepticism about the paternity of the minor child as "*it was clear that he look nothing like SD*".

6.4 During the course of many conflicts between M and SD, she did not get involved and she did not think that it was her place to mention her scepticism about the minor child's paternity.

6.5 It is not clear when SD himself started doubting whether he was the minor child's father, but during 2009 he suddenly became *"dismissive"* if asked about the minor child's wellbeing. During 2010 SD confided in her that he did not believe that the minor child was his son. He also expressed his doubts to his cousin and two of his friends.

6.6 After M and SD broke up in 2010, SD stopped paying maintenance for the minor child and M threatened to take him to maintenance court. SD welcomed it as it would enable him to resolve the paternity issue. M however never referred the matter to the maintenance court.

6.7 She advised SD to go for paternity tests but at the particular time he was unemployed and was not able to afford it as he was between occasional contract jobs.

[7] After SD passing, the first respondent notified Setshaba of the suspicions surrounding the paternity of the minor child. In response thereto Setshaba gave the first respondent three months from 17 June 2015 to provide conclusive proof that the minor child is not SD's son.

[8] The first respondent contended that, as the minor child has not been dependant on SD for some years before SD's untimely death, it is of great importance that the paternity of the minor child is determined with certainty before Setshaba distributes the death benefits. It is submitted that the only manner to conclusively proof the paternity of the minor child is through DNA testing.

THE APPELLANTS SUBMISSIONS

[9] M refused to submit herself and the minor child to DNA testing. She contended that there is no legal basis for her and the minor child to be subjected to DNA tests when SD himself had accepted the minor child as his child up until his death. She further contended that the first respondent has failed to establish grounds to sustain the relief sought and that the relief sought would infringe her and the minor child's rights to privacy. It is consequently not in the best interests of the minor child to be subjected to those tests.

[10] SD registered the birth of the minor child as provided for in section 10 of the Births and Deaths Registration Act 51 of 1992 and obtained an unabridged birth

certificate. According to this certificate SD is indicated as the father of the minor child and M as the mother.

[11] M also deposed of an affidavit wherein she made submissions to Setshaba in support of the pay-out. In this affidavit, attached to her answering affidavit, she stated the following:

> 11.1 She was involved in an intimate relationship with SD from November 2005 until 2010 when the relationship ended on account of unresolved differences.
>
> 11.2 As a result of the intimate relationship the minor child was born on 28 December 2008 in the presence of SD.
>
> 11.3 SD registered the birth of his son immediately after his birth and posed for pictures with his son and declared his fatherhood on social media.
>
> 11.4 Upon her discharge from hospital they continued to live together as a family in Midrand until they parted ways in 2010.
>
> 11.5 Immediately after the birth the first respondent's and SD's cousin came to see the minor child. They brought him gifts and clothes as is custom in their culture to welcome a new addition to the family.
>
> 11.6 During 2009 M's father and SD's father initiated lobola negotiations which unfortunately did not yield any results as their relationship has become strained.
>
> 11.7 The minor child's first birthday was memorable and was celebrated in the presence of his paternal grandmother and relatives.

11.8 After parting ways in 2010, SD continued to have casual contacts with his son until his death in February 2015.

11.9 SD was contributing towards the maintenance of the minor child on a casual basis since they did not have a formal parenting plan.

[12] SD denied the allegations made by the first respondent in relation to the paternity issue and contended that the allegations are based on hearsay and are speculative.

THE COURT A QUO

[13] Canca AJ was satisfied as to the inherent credibility of the first respondent's factual averments and found that the first respondent had established the requisite grounds for the relief she sought. He was of the view that if there is a reasonable possibility that the estate might be entitled to the benefits, it is the first respondent's duty as executrix to pursue the issue.

[14] The court *a quo* held that the main reason why the order should be granted is that it will resolve the issue of whether the minor child or the estate is entitled to the death benefit. The second reason is that it is in the minor child's interest that the issue of paternity be resolved as the uncertainty of the disputed paternity will follow the minor child for the rest of his life. He remarked that the minor child was *"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 the minor child 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".

LEGAL PRINCIPLES

[15] The appellants raised two issues separate from the merits during the hearing of the application before Canca AJ, namely the *locus standi* of the first respondent and the first respondent's failure to take Setshaba's "decision" on review. Both these arguments were not persisted in during the appeal hearing. For purposes of this appeal it is accepted that the first respondent had the necessary *locus standi* to launch the initial application and that the decision of Setshaba was conditional and therefore not reviewable.

[16] The SCA has confirmed that it is within the inherent power of the court as the upper guardian of children, to order scientific tests if it is in the best interests of a child.[1] In ordering the appellant to submit themselves to DNA testing, the court *a quo* relied on the matter of LB v YD[2] where Murphy J stated the following:

> "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

[1] *YM v LB* 2010 (6) SA 338 (SCA) at [13]

[2] 2009 (5) SA 463 (NGP) at Par 23

> interests of a child to have any doubts about true paternity resolved and put beyond doubt by the best available evidence."[3]

[17] *LB v YD supra* was overturned on appeal.[4] Lewis JA remarked on Murphy J's approach to the importance of discovering the truth, with reference to the matter of *Seetal v Pravitha and Another NO* [5]:

> "[16] However, whether the discovery of truth should prevail over such rights is a matter that should not be generalised. 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 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. *(footnotes omitted)*

[18] Lewis JA concluded that as paternity was not actually in dispute (save for one occasion where the father denied paternity when speaking to the mother over the phone one night – apparently under the influence of alcohol), the applicant's conduct and other correspondence with the respondent show unequivocally that he believed that he was the father, and the High Court should not have ordered the mother and her daughter to undergo DNA testing. Lewis JA however remarked that in cases

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[3] *LB v YD* at [14]

[4] *YM v LB supra* at [13]

[5] 1983 (3) SA 827 (D) Didcott J held that the child's interests, are all that matter, they are decisive and the child alone is the court's responsibility.

where there is genuine uncertainty as to paternity, a DNA test should be ordered for the child in question.[6]

[19] The question that needs to be determined in the present matter is if a genuine uncertainty as to paternity of the minor child exists, and if so, whether it will be in the best interests of the child to order DNA tests. In determining this question, its solution depends upon the particular child, on his particular circumstances, and on the particular facts of the litigation.[7]

[20] As there are certain factual disputes on the papers, not all of which are material, this matter has to be decided in accordance with the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[8] namely on the facts averred in the applicant's affidavits which have been admitted by the respondent, unless any denials of the respondent are untenable or not creditworthy, to the extent that such may be disregarded and the applicant's contrary averments be accepted.

[21] The court *a quo* held that M's responses to the applicant's allegations have been less than satisfactory. In its view her responses consist of bald denials which he did not find to be genuine or in good faith. I cannot agree. M denied the allegations that the minor child was not SD's child and attached an affidavit to her founding affidavit wherein she clearly sets out all the necessary facts. She was under no obligation to say more or to answer to the hearsay evidence. Under the circumstances her response was sufficient. Applying *Plascon Evans* the following facts should

[6] At [13]
[7] Seegal
[8] 1984 (3) SA 623 (A) at 634H - I

therefore have been taken into account by the court a *quo*. M and SD were in an intimate relationship and had been staying together since 2005. The minor child was born in 2008 whilst M and SD were still in the relationship. SD registered the child and an unabridged birth certificate reflects him as the father. For the first two years of the minor child's life SD acknowledged him as his son and provided for him. After SD and M parted he sporadically supported the minor child as he was not always employed.

[22] The facts in *LB v YB* and *Seetal supra* are distinguishable from the present matter. In both those matters the applicants were the fathers of the minor children involved. *In casu* the father had passed away. Except for the say so of the first respondent and two others, there are no objective facts suggesting that SD was not the father of the minor child. The reasons the first respondent set out to create the doubt are weak. The fact that the minor child looked nothing like SD's family members and that M disappeared for three months and that *"no-one seemed to know her exact whereabouts"* appears to be the only reasons why SD allegedly had doubts. The minor child was seven years old when SD passed. He, himself, did not take any positive steps during the seven years to establish paternity.

[23] The position in *Seetal supra* was similar. In this matter the father of the minor child brought an application to compel the mother and the child to undergo DNA testing to establish paternity. The denial of paternity rested on mainly the child's physical features and an allegation that the minor child's mother committed adultery. No facts were placed before the court to substantiate the allegation of adultery. The respondent also refused to submit herself and the child to blood tests. Didcot J held

that the dissimilarity in appearance was a moot point and that he does not need to know the reason for the respondent's refusal to submit to DNA testing as it is "*none of my business*"

[24] The first respondent contended that it is important to establish paternity so that the minor child can develop a bond with the paternal family. She stated it is in the best interests of the child to have any doubts about true paternity resolved. If all the facts are taken into consideration, it is clearly not the reason why the first respondent approached the court. The truth of the matter is that the application is not about what is in the best interests of the child but it is about the money. Nothing prohibited the first respondent from establishing a bond with the minor child in the last seven years since the child was born. SD had seven years to rectify his legal relationship with the minor child if he truly believed that the child was not his but he did not do so. What triggered the first respondent to bring the application is the amount of the death claim involved. Had that not been an issue she would not have raised the issue of paternity.

[25] Section 37 of the Children's Act[9] which provides that:

> *If a party to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn such party of the effect which such refusal might have on the credibility of that party."*

[9] 38 Of 2005

[26] No mention is made of this section in the first respondent's founding affidavit. It was first mentioned in the replying affidavit. No specific reliance was placed on this section during the proceedings before Canca AJ and the record shows that the court did not warn M that her refusal might have an effect on her credibility. In *YM v LB supra* Lewis JA considered this section and stated as follows:

> [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. 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.

[27] The first respondent failed to demonstrate a genuine uncertainty as to the paternity of the minor child and the reasons advanced by the applicant are insufficient and should not be entertained. In conclusion, in the interest of the minor child, there is no substantial and substantiated doubt about the minor child's paternity which needs to be resolved. Moreover, to submit the minor child to paternity testing at this point in time will not serve his best interests.

[28] In the result the following order is made:

28.1 The appeal is upheld with costs.

28.2 The order of Canca AJ is set aside and replaced with the following order:

28.2.1. The application is dismissed with costs

L. WINDELL
JUDGE OF THE HIGH COURT

I agree

P.A. MEYER
JUDGE OF THE HIGH COURT

I agree

W. HUGHES-MADONDO
JUDGE OF THE HIGH COURT

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Date of hearing: 6 September 2017

Date of judgment: 24 October 2017