

SOUTH AFRICA / JUDGMENT

Botha v Dreyer (now Moller) (4421/08) [2008] ZAGPHC 395 (19 November 2008)

[2008] ZAGPHC 395**COURT**

High Courts - Gauteng

BEFORE

Murphy

CASE / FILE NUMBER

4421/08

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(TRANSVAAL****PROVINCIAL DIVISION)****CASE NO: 4421/08****19/11/2008****UNREPORTABLE****In****the matter between:**

LOURENS

MARTHINUS BOTHA Applicant

and

YOLINDE

DREYER (NOW MÖLLER) Respondent

JUDGMENT**MURPHY J**

1. The applicant seeks an order directing the respondent and her minor daughter ("Y") to subject themselves to DNA tests for the purpose of determining whether the applicant is the biological father of the minor daughter born on 8 November 2007. In the event that the DNA tests establish that the applicant is indeed the biological father then in terms of prayer 2 of the notice of motion he seeks a declaration that he is entitled to full parental rights and responsibilities. Similarly, in the event of a positive result, he asks for an order directing the parties to proceed to prepare a parenting plan as provided for in section 34 of the Children's

Act 38 of 2005. At the commencement of the hearing, counsel for the applicant asked for postponement sine die of the relief sought in prayer 2 and 3 pending the outcome of any test done in terms of prayer 1, should such indeed be ordered. The respondent opposes the application in its entirety including the application to separate the order for testing from any consequential

relief.

2. The applicant and the respondent were involved in an intimate relationship from February 2006 until April 2007. Y was born on 8 November 2007, that is about 7 months after the relationship between the parties terminated. 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* [1984] ZASCA 51; 1984
- (3) SA 623 (A) at 634H-I, 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 uncreditworthy to the extent that such may be disregarded and the applicant's contrary averments be accepted.
3. The parties commenced their intimate relationship in February 2006 and became engaged in November 2006 shortly after they began living together in October 2006. During December 2006 the applicant informed the respondent that he needed to spend two to three months on business in Sierra Leone but prior to that time he would be away on business in Johannesburg and Cape Town. The parties were living together in Pretoria. It appears that the respondent became disillusioned with the relationship around about this time. She was unhappy at the frequency with which the respondent arrived home late in the evenings under the influence of alcohol. This gave her pause for thought. The applicant denies that he came home frequently under the influence.
4. Although the planned trip to Sierra Leone ultimately never materialised, the respondent, in anticipation of it, moved on 20 March 2007 to the home of one of her parents in Musina. She discovered that she was pregnant with Y on 23 March
2007. In her mind there was no question whatsoever at that time that the applicant was the father. One evening in early April 2007 the respondent received a telephone call from the applicant, apparently under the influence of alcohol, during which he denied that he was the father of the expected child. He phoned again the following day and apologised, saying he had no recall of what he had said. Once again the applicant denies this. There is no basis for rejecting the respondent's account and hence the applicant's denials

must be ignored.

5. Labouring under some measure of disillusionment, the respondent re-established contact with an old boyfriend. She also found employment in Musina. Some time in April 2007 her relationship with her old boyfriend became intimate and she has subsequently married him.

There is some dispute about whether the engagement between the applicant and the respondent was finally broken off before she commenced her relationship with her husband, but such, in my view, is in any event immaterial. The applicant though is of the opinion (based on hearsay) that the respondent became intimate with her husband in early April 2007 at around the time she fell pregnant. The difference in their versions about the time the respondent became intimate with her husband amounts to a

matter of weeks. The respondent married her husband on 28 July 2007.

6. There is some dispute between the parties about the nature and frequency of their contact between April and November 2007. The respondent avers that in August/September 2007 she phoned the applicant and informed him of Y's expected date of birth, which the doctors put at 19 November 2007. The applicant denies this but admits the respondent's averment that she contacted him in late October 2007 and that the purpose of the call was to make arrangements about future maintenance and contact rights. They differ also about what they agreed, the respondent saying she asked the applicant to set out his proposals in writing; the applicant saying they intended to meet to discuss the matter but the respondent avoided meeting him and failed to keep him posted. Not much turns on this.
7. Y was born on 8 November 2007. The respondent informed the applicant of the birth three days later on 11 November 2007. The applicant immediately wanted to know when he could see the baby. The respondent, who had just been discharged from hospital, informed him that she would contact him later to make arrangements.
8. Because the applicant felt he was being excluded and also, so he says, because he entertained doubts about paternity, he instructed his attorney to write a letter to the respondent. The letter is dated 2 November 2007 (before the birth of Y) but only reached her on 13 November 2007 after Y was born. The relevant part of the letter reads:

“Ons kantore wens op record te plaas dat u aanspraak daarop maak dat mnr L Botha (applikant) die biologiese vader van u ongebore kind is, welke ons kliënt ten sterkste ontken.

Ons bevestig dat mnr Botha bereidwillig is om die bevalling welke geskeduleer is vir 08 November 2007 te betaal indien die DNA toetse bewys dat hy die biologiese vader van die ongebore kind is.

Ons kliënt is ook bereidwillig om te betaal vir die bloed en DNA toetse ten einde vaderskap te bepaal.”

9. The respondent was shocked and aggrieved by the letter because, so she maintains, she had always been willing to make the applicant a part of the child's life. She was thus taken aback by the applicant's denial of paternity.

10. Stung in this way by the letter, the respondent, after taking legal advice, decided that she would accept the applicant's denial of paternity and exclude him from the child's life. She was fortified in this by the willingness of her husband to assume paternity. Accordingly, her attorneys addressed a letter to the applicant on 4 December 2007 in the following terms:

“U skrywe gedateer 2 November 2007, gerig aan ons kliënt, mev Möller (respondent), waarin u kliënt ten sterkste ontken dat hy die vader van my kliënt se baba dogtertjie is, verwys.

Dit is ons instruksies dat u kliënt inderdaad nie die vader van ons kliënt se baba dogtertjie is nie en dat u kliënt gevolglik geen regte of verpligtinge ten aansien van ons kliënt se baba dogtertjie het nie.”

11. The applicant, seemingly hoist by his own petard, decided to change his tune. On 9 January 2008 his attorneys wrote as follows:

“Ons bevestig verder dat ons instruksies ontvang het om u kliënt te versoek om vrywilliglik toe te stem tot die neem van bloedtoetse aangesien ons kliënt 100% oortuig is dat hy die vader van die minderjarige kind is.

Ons kliënt verder ‘n aanbod maak om verantwoordelikheid te aanvaar vir die koste van die betrokke bloedtoetse by versuim waarvan ons voort gaan met die uitryking van ‘n aansoek om u kliënt te verplig.”

12. The respondent replied to this through her attorneys on 15 January 2008 and informed the applicant that she was not prepared to subject herself to a DNA test and stated further that it was not in the best interests of the child to do so either. Thereafter the applicant launched this application.
13. It seems there were some discussions between the parties prior to the birth of Y regarding maintenance. The applicant made three payments between April and July 2007 in the amounts of R2000, R1000 and R1500. According to the respondent the applicant originally agreed to pay R2000 per month and to obtain a medical scheme benefit. This has not transpired. The applicant says he stopped making payments into the respondent's bank account when she informed him she had closed her account. I accept that his that his failure to further regularise matters at this stage is probably due to the dispute that has arisen.
14. In setting out his reasons for bringing the application the applicant states that should it be determined that he is indeed the father he wishes to exercise his parental rights and duties towards the child. He wants to become an involved parent and to meet his financial and maintenance obligations as a father. He states that he has been advised that it will be in the best interests of the child for the child to know with certainty who her biological father is and for him to be a part of her life. Because of the dispute between them, the fact that he was often away from the respondent during the relevant stage of the relationship and

her subsequent intimacy with her husband, the applicant contends it will be appropriate for the court to order the applicant to subject herself to a DNA test.

15. The respondent denies that a DNA test is necessary. With the exception of the denial of paternity made by her attorney in the letter of 4 December 2007, she has always maintained the applicant was the father of the child. She points to his own belief stated in subsequent correspondence that he is 100% certain that he is the father of the child and his admission that he and the respondent were sexually intimate at the time of conception. These admissions and averments, she says, render a DNA test an unnecessary invasion of her rights to privacy and dignity and that such would not be in the best interests of the child.
16. In matters such as these it is customary for a curator ad litem to be appointed to protect the interests of the minor child. In her answering affidavit the respondent raised the point in limine that the appointment of a curator is essential and the failure of the applicant to bring an appropriate application was fatal and should result in the matter being struck from the roll. Given the age of the child, and her inability to contribute anything meaningful to the proceedings herself, I am not persuaded that a curator could add much other than to state the obvious fact that the child's physical integrity will be impacted upon by a compulsory test and further could confirm the child's and the parties' present circumstances, which are in any event not disputed. In my judgment the child's interests are adequately protected at this stage of the proceedings and for the limited purposes of the present litigation by the respondent, who set this matter down and did not persist with the point in argument.
17. The applicant argues that he has a right to know whether or not he is the father of Y. The respondent has both conceded and denied that he is the father, and despite her concession has denied him access to the child. He submitted further that it will be less prejudicial for Y to be tested at this early stage of her life rather than for her later in life to discover that the applicant is not her father, which would be considerably more traumatic than the minor invasion occasioned by a DNA test. The applicant's right to know whether he is the father with certainty before assuming the rights and responsibilities of parenthood, he argues, outweighs any inconvenience that might be suffered by Y and the respondent.
18. The law on the topic of compulsory blood or DNA testing in parental disputes is not satisfactory. There is no legislation which specifically regulates the position in civil cases. Judicial pronouncements on the topic have not been unanimous in their approach to the issues and have differed on the proper legal basis for ordering tests. In relation to the child the courts have relied on their inherent jurisdiction as upper guardian, while in relation to the non-consenting adult some judges have invoked the inherent jurisdiction of a court to regulate its own procedures while others have refused to do so. In all cases the courts have been mindful of the need on the one hand to protect the privacy and bodily integrity of those to be subjected to tests, but on the other hand

have asserted the court's role to discover the truth whenever possible and to make use of scientific methods for that purpose.

19. The most significant cases dealing with this thorny topic date to before our adoption of a fundamental constitution in 1994 and the enactment of the Children's Act 38 of 2005. The preponderance of authority favours the proposition that a court, in the exercise of its power as an upper guardian of all minors, is entitled to authorize a blood test on a minor, despite objections by a custodian parent. In deciding whether it should do so the court must act in what it considers to be the best interests of the child - see *Seetal v Pravitha and Another* NO 1983
- (3) SA 827 (D) at 862 - 4; *M v R* 1989 (1) SA 416 (O) at 420 D - E; and *O v O* 1992
- (4) SA 137 (C) at 139 H - I.
20. A different conclusion was reached in *S v L* 1992
- (3) SA 713 (E) where it was held by a Full Bench of the Eastern Cape Division that the court does not, as the upper guardian of minors, have the power to interfere with a decision of a guardian that a child should not undergo blood tests. It held that the power of upper guardianship related only to questions of custody, and not interference with the day to day parental power and control. It referred to *Coetzee v Meintjies* 1976 (1) SA 257 (T) where a Full Bench of this court concluded that the court acts as upper guardian of minors (a) where the minor has no guardian, or (b) where the guardian neglects his duty, or (c) where the parents are unable to agree as to what is best in the interests of the child (e.g. disputed custody cases). The court in *S v L* was of the opinion that the refusal of a guardian to subject a child to a blood test where paternity was disputed in a maintenance claim was not subject to the overriding power of the court as upper guardian as it did not fall into any one of the relevant categories. The court also gave consideration to whether it was a failure of duty on the part of the guardian to refuse to subject herself to tests to determine the true identity of the father and whether the child's best interests would be served thereby. In finding it did not, it concluded (at 722 F):
- "There are many situations where the Courts, applying principles such as estoppel or waiver, close their eyes to the truth, and grant relief because parties to litigation themselves place a different complexion on the facts to what they truly are."*
21. Mullins J was accordingly not convinced that blood tests should be ordered simply on the basis that they will provide certainty or a degree of certainty as to paternity. Nor was he persuaded that the prime objective of the court should always be the ascertainment of the truth. With respect, I have reservations about the wisdom of judicial policy of such an order. Truth is a primary value in the administration of justice and should be pursued, if not for its own sake, then at least because it invariably is the best means of doing justice in most controversies. While estoppel and waiver might find equitable justification in commercial causes, they, or principles like them, have less value in cases requiring a determination of status or identity. Where we come from and who we are, for most people, are questions within the realm of the sacred. Nor am I persuaded that the exclusion of improperly

obtained truthful confessions and admissions in criminal trials is a helpful analogy either. There the policy of the law rightly excludes improperly obtained evidence by elevating propriety in the administration of justice above truth. The principle of exclusion is aimed at bolstering the system of truthful investigation by securing the legitimacy of the administration of justice. No similar constraints operate here. Indeed the contrary is true: to exclude reliable scientific evidence because it involves a relatively minor infringement of privacy more often than not will harm the legitimacy of the administration of justice. Accordingly, I disagree with Mullins J and I align myself rather with the sentiment expressed by Campbell J of the Supreme Court of South Dakota in *State of South Dakota v Damm* (1936) 266 NW 667 at 670 - 71, (cited by Didcott J in Seetal) when he said:

“The primary function of the judiciary is the administration of justice, and justice can never be rightly administered unless the truth be first ascertained, as nearly as may be The citizen holds his 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 Courts 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 a pending matter.”

22. Just as courts deploy methods of compulsion to arrive at the truth in a variety of causes, there should be no overriding reason in principle or policy impeding the exercise of their inherent power and authority, as upper guardian or otherwise, to order scientific tests in the interests of discovering the truth and doing complete justice to all parties involved in a suit. The point was forcefully made by Conn J in *State of Ohio ex Van Camp v Welling* (1936) 22 Ohio L Abs 448 at 450 (cited in Seetal) as follows:

“If this be unsound, then the Courts in the application of the remedial law may fail to keep abreast of the march of progress, and thereby fail to command uniform confidence and respect. It is no answer to say that there is a lack of express authority, unless we conceive that the law is static and lacks the merit of an expansive flexibility, both in respect to the recognition of rights and their invasions, and in respect to the power of the Court to discover and apply methods of ascertaining the truth whereby the remedy may be appropriate and coincide with justice.”

23. 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 - see Kemp: *Proof of Paternity: Consent or Compulsion* (1986) 49 THRHR 271 at 279 - 81. I also take the position, and I will return to this more fully later, that it will most often be in the best interests of a child to have any doubts about true paternity resolved and put beyond doubt by the best available evidence.

24. The decision in *S v L* that the court's inherent jurisdiction as upper guardian is constrained as is claimed is therefore in my view unduly restrictive. That is not to say that the rights of an adult or a child to privacy and dignity should invariably be sacrificed to the needs of the administration of justice. Rather it reiterates the by now well-established principle that such rights must yield to the needs of the proper administration of justice when it is reasonable and justifiable for them to do so, taking into account the importance of the purpose and necessity of getting to the truth. In *Seetal v Pravitha and Another* N.O. Didcott J captured the dilemma well when he said (at 861 F - H):

"In the end the debate about compulsory blood tests amounts, as I see it, to a showdown between the two ideas, these two ideas which cannot satisfactorily be reconciled, the idea that the truth should be discovered whenever possible and the idea that 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 to 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."

25. As I read the body of decisions handed down by our courts before 1994, there has been greater judicial readiness to assume the power to order blood tests in respect of minors on the basis of the court's authority to act as the upper guardian of minors. The rationale was explained by Didcott J in *Seetal* at 862 C - F in the following terms:

"I turn next to blood tests on children, a different matter altogether, I believe."

What makes the difference is the nature of the problem, which concerns not compulsion so much as consent. No longer is one dealing with an adult who might have consented to a blood test on himself but has not, and considering as a result whether the Court should compel him to be tested. The enquiry has now to do with a child incapable in the first place of either giving or withholding consent, with a consent which can be given or withheld only by another acting on his behalf. No issue of compulsion really arises in such a case. Should the person whose consent is required decline to furnish it, a Court determined to overrule him has no occasion to compel him to give it or the child to be tested without it. The Court simply exercises the power of an upper guardian, as we call it here, by supplying its own consent."

26. The difference between overruling a dissenting guardian, with the forced removal of parental authority such entails, and the compulsion of an adult to submit to a blood test strikes me as a fine, if not artificial, moral distinction. Nevertheless, our courts have balked at ordering the latter, but in most cases were prepared with greater ease to assume authority to order the former. In *O v O Friedman* JP summarised the position as follows (at 139H - 140B):

"Different principles apply accordingly to whether it is in respect of a minor child or an adult that the Court is called upon to consider whether to order blood tests to be undertaken. The Court, in the exercise of its power as an upper guardian, is entitled to authorise a blood test on a minor, despite objections by a custodian parent Whether the Court has the power to order a non-consenting adult

to undergo a blood test in order to establish paternity is by no means as clear cut as the Court's power in the case of a minor. There is no statutory nor common-law power enabling the Court to order an adult to allow a blood sample to be taken for the purpose of establishing paternity. The question whether the power to make such an order falls within the Supreme Court's inherent jurisdiction is a disputed one."

27. In *M v R* 1989 (1) SA 416 (O) Kotze J had little difficulty in concluding that the inherent jurisdiction of the court enabled it to compel a non-consenting adult to submit to blood tests. He referred in support to Taitz *The Inherent Jurisdiction of the Supreme Court* 1988 who described the inherent powers thus (at 9):

"Those (unwritten) powers, ancillary to its common law and statutory powers, without which the Court would be unable to act in accordance with justice and good reason. The inherent powers of the Court are quite separate and distinct from its common law and its statutory powers."

The learned judge was also in agreement with the opinion of Didcott J in *Seetal* at 832B that the inherent power of the court is not confined to procedure in the strict sense. Both judges cited with approval *Ex parte Millsite Investment Co (Pty) 1965*

- (2) SA 582 (T) where Vieyra J declared (at 585H):

"The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation."

Agreeing with this proposition Didcott J went on to say:

"The outer reaches of the power do not have to be explored now. All that matters at present is this. The power is wide enough, it seems, to encompass directions concerning the search for and collection of evidence that is needed in litigation."

28. So clothed with authority, Kotze J in *M v R* concluded it was in his power to order an adult to have blood tests because in that case it was in the child's best interests that reliable information was urgently obtained to gain clarity on the question of paternity, that blood tests had become a reliable aid to discern the truth which were admissible as evidence and the guardian was compelled to act in the best interests of the minor child even if doing so would be contrary to her own interests. The court gave primacy to the judiciary's keen pursuit of truth in all legal disputes. In ordering both the guardian and the minor to submit to tests the court accepted that in litigation of this kind the child's interests are the most important but not the sole factor to be taken into account. The child's interests must be balanced against other objective considerations such as the pursuit of truth, the demands of reality and the appropriate interdependence and interaction between a child and his family and blood relations. The court's own sense of priority required the discovery of truth in that case to outweigh or trump the idea of privacy.

29. In *Nell v Nell* 1990 (3) SA 899 (T) Le Roux AJ came to the conclusion, contrary to the decision of Kotze J in *M v R*, that ordering of blood tests was not purely a procedural matter which entitled the court in terms of its inherent powers to make such an order. Again, in my view, this decision takes too restrictive an approach to the inherent jurisdiction of the court. Like Didcott J and Kotze J, I prefer the pronouncement of Vieyra J in *Ex Parte Millsite Investment Co (Pty)* that the power extends to holding the scales of justice where no specific law provides directly for a given situation.
30. The differences of opinion across the range of relevant issues thus leave the law in a state of uncertainty. As Mullins J thought in *S v L* at 718G, the absence of any clear and definitive precedent normally would leave a court at large to follow any of the above views. None of the decisions handed down in the other divisions operates as a binding precedent in this division, especially if I consider such to be incorrectly decided. It is apt then to state my preferences unequivocally. On the question of ordering a blood test on a minor despite objections by a custodian parent, I find myself in agreement with the view that the court may make such an order in the exercise of its power as an upper guardian but also in the interests of effectiveness in its procedures. Likewise, I share the conviction of Kotze J 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. Moreover, while the best interests of the child are paramount they are not the only factors to be kept in consideration.
31. The general statements of principle I have just made can be applied subject to two qualifications. The first requires me to consider the relevant decisions handed down in this division in order to determine whether or not I am bound by higher authority contrary to the views I hold on the various issues. The second qualification relates to the effect of the Constitution of 1996 and the fundamental rights contained therein, as well as the Childrens Act of 2005 which has concretised certain of those rights in relation to disputes involving minor children. The two qualifications, as will become clearer presently, are interrelated.
32. In *E v E* 1940 TPD 333 a full court of the TPD held that it had no power to order that a child whose paternity was in issue be submitted to a blood test. The matter involved an action by a husband for annulment of his marriage on the ground that at the time of the marriage his wife was pregnant as a result of intercourse with another man. At this time blood tests were developed only to the extent that they might prove conclusively that the plaintiff was not the father. The technology was not sufficiently developed to establish that he was in fact the father. The court held that it knew of no power that entitled it to make such an order. While somewhat cryptic in its reasoning, it seems the court felt it would be *contra boni mores* to compel the bodily invasion involved for the purpose sought. In *Nell v Nell* 1990 (3) SA 899 (T) Le Roux AJ, as I have mentioned, refused to accept that the inherent jurisdiction of the court to determine its own procedure extended to a power to order a blood test, and, importantly for present purposes, considered himself bound by the decision in *E v E* which he did not believe was incorrectly decided.

33. Before dealing with the binding weight of this authority, I should mention in passing that paternity tests have been accepted by our courts in recent times as having a very high degree of accuracy able to positively identify the natural father with a statistical probability of as much as 99,9 per cent - see *M v R* at 425J; and Böhm and Taitz: *The DNA-Fingerprint: A Revolutionary Identification Test* (1986) 103 SALJ 662. That being the case, a court may generally take judicial notice of the existence of such tests, with the result that it is unnecessary

for medical evidence to be adduced regarding their nature and accuracy before an order might be granted subjecting parties to them.

Such, however, it must be cautioned, and perhaps to state the obvious, would not exclude any challenge to the reliability of any

particular test in litigation once the test had been performed.

34. Subsequent to the decisions of *E v E* and *Nell v Nell*, the Constitution of 1996 has enacted fundamental children's rights in section 28 and equally fundamental rights of privacy and dignity in sections 14 and 10 respectively. Section 28(2) stipulates that a child's best interests are of paramount importance in every matter concerning the child. This, to my mind, is a strong indication where the competing interests of a parent's privacy/dignity and the child's interests are at stake that the latter should trump the former unless there are compelling reasons to the contrary. Moreover, in terms of section 8(1) of the Constitution, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. It follows that there is a duty on all courts to ensure that the common law conforms to the Bill of Rights in the rights and duties that it confers. Hence the enquiry in a case such as the present can be formulated as being whether or not the common law jurisdiction of the High Court might be deployed to override parental privacy in the best interests of the child and/or the administration of justice. In any event, section 39(2) of the Constitution mandates all courts and tribunals to indirectly apply the Bill of Rights by promoting the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law. In *S v Thebus* [2003] ZACC 12; 2003 (6) SA 505 (CC) at para 31, Moseneke J stated:

"The superior courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society. That power is now constitutionally authorised and must be exercised within the prescripts and ethos of the Constitution."

35. Accordingly, to the extent that *E v E* and *Nell v Nell* have advanced a public policy evincing a judicial reluctance to reach the question by refusing to extend the inherent jurisdiction of the courts to order blood tests in paternity suits, the rationes decidendi of both might not be consistent with the current values of our Constitution which oblige the courts to embark upon a balancing of the competing interests involved (including the rights of unmarried fathers to equal treatment) and in which, by virtue of section 28, the child's best interests will be the paramount (but not only) consideration. The approach of Kotze J in *M v R*, in

which he did exactly that, would therefore, in my opinion, be more in line with that expected by the Constitution.

36. Where the High Court is of the opinion that a pre-constitutional decision of a higher court based on public policy considerations no longer reflects the *boni mores*, it may depart from that decision. In *Afrox Healthcare Bpk v Strydom* 2002

- (6) SA 21 (SCA) (at 39D-E) Brand JA enunciated the principle thus:

“Die tweede moontlike situasie is waar die pre-konstitusionele beslissing van hierdie Hof gebaseer was op oorwegings soos boni mores of openbare belang. Indien die Hooggeregshof van oordeel is dat hierdie beslissing met inagneming van Konstitusionele waardes, nie meer die boni mores of die oorwegings van openbare belang juis reflekteer nie, is die Hooggereshof verplig om daarvan af te wyk. So ‘n afwyking is nie in stryd met die beginsels van stare decisis nie aangesien in elk geval aanvaar word dat die boni moris en oorwegings van openbare belang nie staties bly nie.”

Consequently, I do not consider myself bound by the decision in *E v E* and am at liberty to adhere to the approach of Kotze J in *M v R* which, as I have indicated, I regard as the correct and preferable approach.

37. I turn now to consider the relevant provisions of the Childrens Act 2005. The Act was enacted to effect changes to existing laws relating to children in order to bring them into line with the constitutional rights and values. Chapter 3 of the Act deals with parental responsibilities and rights. Section 18 provides generally that a person may have either full or specific parental responsibilities and rights in respect of a child which may include the responsibility and the right to care for the child, to maintain contact with the child, to act as guardian of the child and to contribute to the maintenance of the child. These elements correspond broadly with the key components of parental authority, namely: custody, access and guardianship. However, the Act envisages greater flexibility in that it is now possible to award different aspects of care and contact to different parents. This is accomplished either by agreement, court orders or parenting plans (sections 22, 23 and 33). Section 30 provides that more than one person may hold parental responsibilities and rights in respect of the same child. Section 31(2) further provides that before a person holding parental responsibilities and rights in respect of a child takes any decision significantly affecting the co-holder of parental rights and responsibilities that person must give due consideration to any views and wishes expressed by the co-holder.
38. Section 19 of the Act gives the biological mother of a child full parental responsibilities and rights in respect of the child; while section 20 confers similar full rights and responsibilities on the biological father but only if he is married to the child's mother, or if he was married to the child's mother at the time of conception, the time of birth or any time between conception and birth. Section 21 deals with the parental responsibilities and rights of unmarried fathers, and has obvious relevance to the present application on account of it being common cause that the parties have never been married at any time. In terms of this provision the unmarried biological father acquires the same parental responsibilities and

rights as the child's mother provided he meets certain requirements, namely if at the time of birth he is living with the mother in a permanent life-partnership, or, regardless of whether or not he is living with the mother, he consents to being identified as the father, or applies under section 26 of the Act for an order confirming his paternity, and contributes or attempts to contribute to the child's upbringing and maintenance for a reasonable period. This provision is a significant advance upon the common law and the provisions of the Natural Fathers of Children Born out of Wedlock Act 86 of 1987 (which the Act repeals), neither of which afforded an unmarried father any automatic rights in respect of the child. Under the previous dispensation an unmarried father could obtain parental

responsibilities and rights only if a court determined that it was in the best interests of the child. That has now changed. The unmarried father has automatic rights provided he meets the requirements of section 21(1)(a) or (b). If there is a dispute

regarding the fulfillment of the requirements the matter must be referred to mediation in terms of section 21(3) and the outcome of such mediation may be reviewed by a court.

39. This significant change in policy towards the rights and responsibilities of unmarried biological fathers brings added importance to the need for scientific determinations of paternity. In the past a court in its discretion would grant aspects of parental authority to an unmarried biological father only if it considered it to be in the child's best interests. It could accordingly rule that the father had no rights or responsibilities beyond a duty to pay maintenance. Now, once paternity is established, the rights and responsibilities are automatic with the precise nature and content being subject to mediation, review and ultimately a parenting plan. Once paternity is established the parties become co-holders of parental responsibilities and rights on an equal footing.
40. Section 36 of the Act enacts a presumption of paternity in respect of a child born out of wedlock. It reads:

"If in any legal proceedings in which it is necessary to prove that any particular person is the father of a person born out wedlock it is proved that that person had sexual intercourse with the mother of the child at any time when that child could have been conceived, that person is in the absence of evidence to the contrary which raises a reasonable doubt presumed to be the biological father of the child."
41. Section 37 provides that where paternity is placed in issue in legal proceedings and one of the parties refuses 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 such refusal might have on the credibility of that party, in other words that an adverse inference might be drawn.
42. These latter provisions do not add or detract much, in my judgement, from the legal framework sketched above that the court is possessed inherently and constitutionally of a jurisdiction to order parties to have blood tests where it concludes that the competing rights and interests at play require the truthful verification of paternity by scientific means.

Counsel for the respondent has suggested that section 37 is a clear indication that the legislature intended the less intrusive means of the presumption and an adverse inference to be sufficient and hence the only proportional means of limiting the rights of privacy and dignity involved. I am unable to agree. The adverse inference will not provide positive confirmation to the extent required in this case. The applicant seeks verification of whether or not he is the father. Reliance by the court on an adverse inference will produce a finding that he is the father, as the respondent says he is, when in fact he wants to eliminate the possibility that he is not the father. If he is not the father then he will not be a co-holder of parental responsibilities. Given the extended rights and obligations of unmarried fathers it seems only right that the truth be established, as it can be, in the interests of justice, before burdening a party with responsibilities that might not be his to bear.

43. Counsel has submitted further that the applicant has not made out a case that it will be in the best interests of the child for him to be granted parental rights and responsibilities. In terms of section 21 there is no need for the applicant to establish such. He is entitled to parental rights and responsibilities if he proves he is the biological father and complies with the additional requirements of the section, none of which extends to it being in the child's best interests that they be bestowed. The tenets of the fundamental principle of equality are such that unmarried parents are accorded the same, or at least substantially the same, rights as married parents. The fact that certain sections of the Act (section 26 and 34) giving practical effect to the implications of unmarried parents being co-holders of parental responsibilities and rights have not been promulgated as yet

is neither here nor there. The fact remains: unmarried fathers are entitled to be co-holders of those responsibilities and rights and no case needs to be made out that it will be in the best interests of the child to bestow them. The eventual precise determination of the extent of a co-holder's responsibilities and rights by the various methods envisaged in the statute, of course, will take account of the best interests of the child at that stage.

44. Accordingly, I do not accept the submission by counsel that it is insufficient for the applicant to allege that he is entitled to certainty and that before being granted relief he must make out a proper case why it is in the best interests of the child that he obtain parental rights and responsibilities with reference to his background and potential capacities as a parent. Those matters are best left to the processes contemplated in section 22 and 23 which deal with their assignment by agreement or court order, or to the process of determining whether the requirements of section 21 have been met.
45. This leads me to the final narrower question of whether or not it will be in the best interests of the minor child, Y, to determine paternity with certainty. Accepting that the applicant has a compelling interest under section 21 to have certainty, the question is whether that certainty would or would not advance the best interests of Y. In *Seetal v Pravitha* and *Another NO Didcott J* disagreed with the proposition that it will nearly always be in a child's best interests for the truth about her

paternity to emerge. He said (at 864H - 865A):

"I beg to differ. I think the statement facile. One is talking of personal matters, not of contracts uberrimae fidei. To be told of certain things does some of us no good. Not every patient is better off for learning that he has terminal cancer. Not every husband is better off for learning that his wife was once unfaithful. Nor does every child benefit from the discovery that his true father is not the one he has always supposed he had. The problem does not lend itself to generalisation. Its solution depends on the particular child, on his particular circumstances, on the particular facts of the litigation concerning his paternity."

46. While some might look askance at the learned judge's categorisation of the marriage contract as undeserving of the utmost good faith expected of contracting parties in the venal business of insurance, however morally expedient that may be, the point that each case should be looked at individually is a good one. Nevertheless, I am not inclined to place much store in the expedient that concealing the truth from a child might have the supposed advantage of not "bastardising" the child or cutting it off from an established source of maintenance. With regard to the latter there is in my view an inherent and inescapable injustice in compelling a person to assume obligations not rightfully his or hers. As for the former, I agree with the position of Asche

SJ in the Australian case *Lamb v Lamb* (1977) FLC 90 - 225 (cited in Seetal) when he said:

"Although ... it might not always be conducive to the welfare of a child for such tests to be carried out, there must be many cases where the determination of paternity (or, more correctly, non-paternity) by blood tests would set at rest nagging doubts and festering resentments by one party which must be detrimental to a child's welfare. Even when doubts proved justified, many children would be at least in no worse position than before, and a clearing of the air might be for their ultimate welfare. The stigma of illegitimacy, though still with us, is fading Knowledge of biological parentage is becoming an increasingly important factor in the treatment or amelioration of genetic weaknesses."

47. The present case is one in which a clearing of the air is called for. Both parties have at various times admitted and denied that the applicant is the biological father. The respondent was intimate with a second party, her husband, within the period of possible conception. The child is barely one year old and thus there is no established relationship that might be unduly disturbed or harmed by a determination of non-paternity. If the applicant is established to be the father, the child will benefit in time from knowing the truth and from the applicant's commitment to her financial well-being. The possible stigma of a disputed paternity will also be removed. And furthermore legislative safeguards exist for the assignment and monitoring of appropriate parental rights and responsibilities to the applicant should that prove permissible. I accordingly consider that it will be in the best interests of the child that paternity be scientifically determined and resolved at this early stage.
40. I agree that the order sought by the applicant is the one that should be granted. It is ordered as follows:

1. The respondent is ordered to submit herself and her minor child Y to DNA tests for the purpose of determining whether the applicant is the biological father of the child Y within 30 days of this order.
2. Prayers 2 and 3 of the notice of motion are postponed sine die.
3. The applicant is ordered to pay the costs of the tests referred to in paragraph 1 of this order.
4. The costs of this application are reserved.

JR MURPHY

JUDGE OF THE HIGH COURT

Date Heard: 29 October 2008

For the Applicant: Adv Z Schoeman, Pretoria

Instructed By: ML Schoeman Attorneys, Pretoria

For the Respondent: Adv RG Tolmay SC, Pretoria

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

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Prepared on 9 October 2026 · Esheria