CASES / VONNISSE

MISATTRIBUTED PATERNITY

Nel v Jonker (WCHC) unreported case number A653/2009 dated 2001-02-17

1 *Nel v Jonker* (WCHC) unreported case number A653/2009 dated 2011-02-17

Nel v Jonker is the first reported judgment dealing specifically with misattributed paternity (also known as paternity fraud, child-identity fraud, false paternity or non-paternity) in the South African context. The now ex-husband had regarded the child, born four months into his marriage with the mother, as his biological child and had maintained her as such. Only 16 years after the birth, and 10 years after the divorce, did he discover through DNA testing that the child had actually been fathered by another man (par 1-4; 54). The maintenance court varied the divorce order by deleting his (future) maintenance obligations towards the child since he was not the biological father of the child (par 5). The court *a quo* subsequently awarded damages to the cuckolded ex-husband for the R50 000 that he paid towards the child's maintenance since the divorce (par 3-6). It is this order that was taken on appeal.

The ex-husband argued that he supported the child in the *bona fide* and reasonable belief that the support was due and payable (par 10). The claim in the court *a quo* was based on the *condictio indebiti,* although no allegation was made that the ex-wife had been enriched by the payments or that the payments were made wrongfully or without just cause (par 12). The court based its finding on a "mutual error" between the parties (par 14).

The High Court, on appeal, disagreed. Although the pleadings lacked the necessary allegations (par 18), the court noted that there was no prejudice resulting from the poor formulation (par 39). For the reasons which follow below, the court found that the ex-husband did not meet all the requirements of the unjustified enrichment *condictio indebiti* claim and did not discharge the onus the law placed upon him (par 15, 43).

First, the court found that the ex-husband could not show on the facts that his error in paying maintenance was reasonable (par 55, 63). Put differently, there were not sufficient facts to justify his mistake (in maintaining the child) as an excusable error on his part (par 43, 57). Although the court understood

his reluctance to confront the issue in the light of the possible consequences of a paternity test which could potentially destroy his relationship with the child, the court held that it weighed heavily and that he only wanted certainty when his ex-wife (again) applied for an increase of the maintenance amount. This made him resentful (par 50) especially in the light of the fact that his family had been telling him for years that there was doubt about the child's paternity (par 60). The court noted that he took years to initiate the paternity test notwithstanding the family pressure to do so, and that he was only spurred into action by a request for an increase. This led the court to find that he was indifferent as to whether the maintenance was due or not (par 50, 61). In the light of these factors the court found that the ex-husband did not establish that his mistake (in paying the maintenance) was justified and was thus not entitled to "judicial exculpation" (par 63).

As an aside it should be mentioned that the court noted *obiter* that had prescription been raised at the trial, the amount would have been "significantly curtained" (par 62).

The second reason for the failure of the action was that the court concluded that there was no proof that the mother of the child was actually enriched by the maintenance payments, since the person that benefited was the child (par 64, 69). The court noted: "I have some difficulty in understanding … how it can be said that the Defendant was enriched by these payments" (par 64), as the mother was merely a conduit for the child (par 68). There was no evidence regarding the financial details of the mother and the costs of the child (par 65). It was held that the ex-husband did not establish a *prima facie* case of enrichment. In order to do so, he bore the onus to show that the mother's estate had been enriched to the extent that there had been an increase of her assets as a result of the payments (par 69). The court held that he had not done so (par 72). In addition the court, noting that enrichment is an equitable remedy, held that it would not be "fair … to now order her [the mother] to restore either the entire amount or part thereof" (par 74). The court endorsed *Trahair v Webb & Co* 1924 WLD 227 at 235, in that a "court must be careful that, in a desire to do justice to the plaintiff, an injustice is not done to the defendant" (par 73).

The third reason for the refusal of the action related to considerations of public policy. The court noted *obiter* that the *condictio indebiti* is an equitable remedy aimed at "corrective justice" and that there had to be a correlation between the gain on the one hand and some form of injustice that need not be economic loss on the other hand (par 75, 79). This correlation was based on value-laden considerations (par 76) and it was noted that in this regard the courts generally look at any "slackness or unreasonable delay" (par 77). Moreover, the considerations had to be viewed through the prism of the Constitution, as the courts are obliged to develop the common law in terms of the spirit, purport and objects of the Bill of Rights (par 78). In addition hereto the court opined that in the future courts would be wary to recognise similar claims, as the inquiry into paternity could destroy an otherwise loving parental relationship with the child whose rights were protected in section 28(2) of the Constitution (par 79).

The appeal was upheld and the claim of the ex-husband was dismissed (par 80).

2 Purpose of note

The purpose of this note is to set out the problem of misattributed paternity and to determine the rights of the parties to such a dispute in South Africa, in the light of the current legal view of paternity. Although the case touched on these questions, the court was unable to consider all the issues and make specific findings as a result of the poorly drafted pleadings and the lack of evidence before it. This note therefore seeks to provide an introductory overview of the concept of misattributed paternity, in particular focusing on the financial aspects of this problem and, specifically, the possibility of reclaiming any maintenance amounts already paid towards the upkeep of the child. The question will further be addressed: If there is a claim, from whom can be claimed and what would the basis of such a claim be?

Although this note does not engage in a detailed survey of relevant comparative authority, references to selected arguments used in foreign cases are included to assess the possible applicability of these arguments in similar disputes in South Africa.

3 Misattributed paternity

Misattributed paternity refers to the situation where a putative (legal) father of a child is not the same person as the biological father of the child. The evidence of the genetic reality is often discovered years after the putative father had accepted, or was legally found to be, the biological father of the child and has supported and bonded with the child. The knowledge that paternity had been misattributed has far-reaching consequences.

> "Marriages, relationships and families end. Children are abandoned by the only fathers they ever knew. Fathers are bitter and fight to disown the non-biological child. Children lose their sense of identity. And the damage cannot be undone" (Kording "Little White Lies that Destroy Children's Lives – Recreating Paternity Fraud Laws to Protect Children" 2004 *Journal of Law and Family Studies* 237).

The scenario of a man who accepts paternity knowing that he is not the child's biological father – the so-called poor man's adoption – is excluded from this discussion, as are instances where the husband/putative father permitted his wife/partner to participate in extra-relationship intercourse and thus should have foreseen the possibility that he may not be the biological father of the child.

Misattributed paternity first came to the fore as a medico-ethical dilemma: should the true genetic relationships be disclosed when tests for a medical procedure (for example in potential organ transplants) reveal such information? The answer to this question remains controversial, but is not relevant for present purposes (see in general Lucast "Informed Consent and

the Misattributed Paternity Problem in Genetic Counseling" 2007 1 *Bioethics* 41; Brown "Genetic Counseling. Legal Issues Surrounding Nondisclosure of Paternity" 2008 *Journal of Legal Medicine* 345; Suter "All in the Family: Privacy and DNS Familial Searching" 2010 *Harvard Journal of Law and Technology* 362; and Sokol "Truth-telling in the Doctor-patient Relationship: A Case Analysis" 2006 *Clinical Ethics* 130).

Misattributed paternity is seemingly neither uncommon nor a new phenomenon. There are, however, no reliable statistics – either for South Africa or other countries. Some studies suggest the incidences of misattributed paternity in the West comprise between 10% and 30% of all pregnancies; others disagree and place the figure between 1%-4% (Gilding "Rampant Misattributed Paternity: The Creation of an Urban Myth" 2005 2 *People and Place* 1; Turney "Paternity Secrets: Why Women Don't Tell" 2005 *Journal of Family Studies* 227 228; and Seliber "Taxation Without Duplication: Misattributed Paternity and the Putative Father's Claim for Restitution of Child Support" 2007 14 *Washington and Lee Journal of Civil Rights and Social Justice* 97 102). The heightened profile of misattributed paternity is *inter alia* as a result of medico-technological developments, making genetic certainty possible through relatively cheap DNA testing. In South Africa the costs are less than R2000 with numerous online services available (see http://www.easydna.co.za, http://www.dnatest. co.za and http://www.paternitytestsouthafrica.co.za accessed 2012-04-10).

Why would mothers lie by keeping the true facts secret? There is a perception that misattributed paternity occurs as a result of financial greed or because female sexuality is out of control and that "women are predatory, deceptive and instrumental". However, research shows that it is less planned by the woman concerned (Turney 2005 *Journal of Family Studies* 229). Turney found that misattributed paternity occurred mainly when women have "one-off" sexual encounters on the margins of a monogamous relationship or during a move from one relationship to another within a short period of time (Turney 2005 *Journal of Family Studies* 235-236). If during this time of transition conception takes place, either of the men could potentially be the biological father of the child. Women in this position are typically uncertain about who the father of the child is (and may not want to reveal the father's identity even if this is known), and they often decide not to disclose their doubt (or knowledge), mainly because the current relationship is stable and/or because a social bond already exists between the child and the current partner (Turney 2005 *Journal of Family Studies* 236). The mother thus opts for the pragmatic-default position (Turney 2005 *Journal of Family Studies* 236). This omission is rationalized as being in the best interests of the child and to protect the existing relationship (Turney 2005 *Journal of Family Studies* 235). Turney notes further that as time goes by the mothers may find it more difficult to express the truth, seeing no benefit for themselves, their current family or for the biological father and his family – even though they acknowledge that this may not be fair to the child (Turney 2005 *Journal of Family Studies* 235). Moreover, Turney notes that doctors often advise against termination of the pregnancy when woman are uncertain whether the child is that that of their current partner, as it

potentially could be his (Turney 2005 *Journal of Family Studies* 238). In addition, research shows that women are still afraid of moral judgments by the families involved and the child itself (Turney 2005 *Journal of Family Studies* 239-240).

> "it is clear that paternity secrets are deeply held, complex and difficult to disclose. Failing to immediately confess another, and often unimportant, distasteful or distressing event, in the context of an unexpected pregnancy and a promising or permanent relationship, set these women on a trajectory from which it became increasingly difficult to exit. Their own interests became subsumed by the interests of those whose lives were being built around a particular understanding of who the father was. The imperative was weighed against the harsh moral judgments that attend the moral panic about them as 'the enemy, the source of the threat, selfish, evil wrongdoers who are responsible for the trouble'" (Turney 2005 *Journal of Family Studies* 243).

This position is further entrenched by the putative father, as men generally, psychologically, do not tend to challenge paternity when they are in a stable, (undeserved?) trust relationship. Where the faithfulness of their wives/partners is not in issue, they will acquiesce to paternity (Turney 2005 *Journal of Family Studies* 230).

4 Biology, fatherhood and the duty to maintain

In terms of the South African law, one of the fundamental common-law principles is that both biological parents must maintain their children *pro rata* according to their means (Van der Linden (Juta Translation) *Institutes of Holland or the Manual of Law, Practice and Mercantile Law* 3ed (1897) 1.IV.I. 29; and *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 668).

The rationale for this duty arises out of a natural affection and duty flowing from an actual or presumed blood relationship (described as *ex jure naturae et sanguinis* (Spiro *The Law of Parent and Child in South Africa* 4ed (1985) 385 with reference to D 25.3.5(2)); out of a sense of dutifulness (Spiro *The Law of Parent and Child in South Africa* 385 with reference to *In re Knoop* (1893) 10 SC 198 200); *ex ratione pietatis* (Spiro *The Law of Parent and Child in South Africa* 385 with reference to *Ford v Allen* 1925 TRD 5 7 and Voet *Commentary on the Pandects* (Paris Edition of 1829, including the supplement to that work by Van der Linden and translated with explanatory notes and noted of all South African reported cases by Gane) Vol I (1955) *Ad Pandectas* 25.3.5(16)), *ex officio pietatis* (Spiro *The Law of Parent and Child in South Africa* 385 with reference to Voet *Ad Pandectas* 25.3.4; and *Waterson v Mayberry* 1934 TPD 210 214); or *ex natura necessitates* (Spiro *The Law of Parent and Child in South Africa* 385 with reference to *Mootan v Joosub* 19230 AD 60; D 25.3.5(16)). Where there is no blood relationship between the parties, no legal duty to support arises. The exceptions in instances of adoption, artificial fertilization and surrogacy will not be dealt with for the purposes of this note.

The importance of biological considerations in the common law is also evident from the legal principles relating to adultery and *stuprum*.

The possibility that a wife may have conceived a child by a man other than her husband without his knowledge had serious legal consequences. Originally, under the *Lex Julia de adulteriis coercendis*, the infidelity of a wife was a criminal offence based on the notion of the "scandalous mixing of seed" and the "substitution of children and the implanting of bastard offspring in another's family" (C 9.9.1; Nathan *The Common Law of South Africa Vol 3* (1906) 1624; Voet *Ad Pandectas* 48.5.6.1 note 8; Van Leeuwen *Part I Book V of Censura Forensis* (1741) 4ed (revised and annotated by De Haas and edited and translated by Hewett) (1991) 1.5.24.1; *Simon van Leeuwen's Commentaries on the Roman-Dutch Law* (1921) (translated by Dekker) 1.4.14.1; Nathan *The Common Law of South Africa* 1624 fn 7; and Thomas "Prenuptial *stuprum*" 2001 64 *THRHR* 423 426).

Stuprum, where a bride was, unbeknown to her husband, pregnant with a child of another man at the time of the marriage, renders the marriage voidable at the choice of the innocent husband (Voet 25.2.15; Groenewegen *Censura Forensis* I 1 15 10; and Sinclair (assisted by Heaton) *The Law of Marriage* (1996) 394). The rationale for this rule was (and is) that the lack of chastity by a married woman is more reprehensible, as her actions can cause major trauma to a family by the introduction of another's offspring into a marriage (Van Leeuwen *CF* 1.4.14.1). Thomas argues that this rule has become obsolete and may even be unconstitutional (2001 *THRHR* 423*ff*), but this issue will not be dealt with in this note.

The determining factor in the applicable legal principles pertaining to paternity today remains that of biology (Children's Act 38 of 2005 s 18-21; and Van Schalkwyk "Maintenance for Children" in Boezaart (ed) *Child Law in South Africa* (2009) 38).

As the determination of motherhood is legally and practically seldom at issue (bar for the exceptions mentioned above), this issue is not pursued below.

Paternity has, however, given rise to numerous legal disputes. From a historical perspective, for centuries the exact determination of genetics was uncertain. To assist with the uncertainty, the rebuttable presumption was created to determine legal paternity. In terms of the common-law presumption, *pater est quem nuptiae demonstrant,* the husband was (and is) presumed to be father of the children conceived or born during the marriage with the accompanying rights and duties (*Van Lutterveld v Engels* 1959 (2) SA 699 (A) 702). This presumption also preserved the sanctity of marriage and promoted the best interests of the child in the light of the negative consequences attached to illegitimacy at the time. (Spiro *The Law of Parent and Child in South Africa* 39. See also Hoover "Establishing the Best Answer to Paternity Disestablishment" 2011 37 *Ohio Northern University LR* 145 147). The question whether this presumption has not become obsolete in the era of DNA testing is not relevant for purposes of this note (see in general Moses "Recurring Dilemmas: The Law's Race to Keep Up with

Technological Change" 2007 *University of New South Wales Faculty of Law Research Series* 21 http://www.austlii.edu.au/au/journals /UNSWLRS /2007/21.html who argues that the similar rule in the California Code of Civil Procedure is arbitrary in the modern era as technological developments undermine the justification for the legal rule). This issue will not be dealt with for the purposes of this note.

Although the presumption is not taken up in the Children's Act, it remains part of the South African common law. Section 20(b) of the Children's Act only grants automatic parental responsibilities and rights to a married *biological* father if he was married to the mother at the time of conception or birth of any time in between. In terms of the presumption, the husband will be presumed to be the father of non-biological children born during the marriage, although such presumption may be rebutted. Notwithstanding the focus on biology, the courts still insist on determining fatherhood on the basis of probabilities in the light of what they perceive the best interests of the child to be, rather than on the factual situation (*YM v LB* 2010 (6) SA 338 (SCA); and *F v L* 1987 4 SA 525 (W)). The result is that, unless the truth in the form of an actual biological link is the yardstick, the retention of the presumption and the use of probabilities to determine paternity leave room for error and genetic testing will continue to expose instances where legal fatherhood and biological paternity do not overlap (see *inter alia Johncom v Media Inv Ltd v M* 2009 4 SA 7 (CC) and the case under discussion, *Nel v Jonker*).

Biology is important. Each child is entitled to an identity that is inborn, natural and inalienable. It has been argued that biology should be prioritized over established personal, legal, moral and financial bonds, as the shared genetic bond is stronger than any other connection (Turney "Paternity Testing and the Biological Determination of Fatherhood" 2006 *Journal of Family Studies* 85).

However, fatherhood (as opposed to biological paternity) entails more than a mere biological bond. It encompasses a social and often intense personal relationship with a child (Turney 2006 *Journal of Family Studies* 90). Once this relationship with the child has been established, the best interests of the child may complicate the legal landscape as it is no longer necessarily in line with the biological reality.

It should be noted that the use of a biological link as a yardstick is generally an all-or-nothing determination – a man is either the biological father, or not (Turney 2006 *Journal of Family Studies* 89). In South African law, parental responsibilities and rights, including the duty to maintain, fall on the biological father (Children's Act s 18-21). As this principle (subject to limited exceptions) excludes the putative father, his position in a misattributed-paternity scenario can be ameliorated by sections 22 and 23 of the Children's Act. A parental-responsibilities and -rights agreement may be entered into with another person having an interest in the well-being of the child (which the putative father may have) or a court may make an order to that effect. This would, theoretically at least, give rights *vis-à-vis* the child to

the non-biological putative father where there already is an existing parent-child bond – should he wish for the relationship to continue. A legal relationship between a non-biological father and a child is after all not uncommon in South Africa in the light of the variety of types of families that exist today. (*Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 31. See also Kording "Nature v Nurture: Children left Fatherless and Family-less When Nature Prevails in Paternity Matters" 2004 *University of Pittsburgh LR* 811 862; and Jacobs "When Daddy Doesn't Want to be Daddy Anymore: An Argument Against Paternity Fraud Claims" 2004 *Yale Journal of Law and Feminism* 193).

Research has shown, however, that a putative father may not always wish to continue to have a relationship with the child (Kording 2004 *Journal of Law and Family Studies* 237) and in these instances the courts would not compel him to continue with the relationship. In *Jooste v Botha* (2000 (2) SA 199 (T)) it was determined that the courts were not prepared to enforce a relationship between a child and his biological father. It is unlikely that the court would enforce a relationship between a putative father and his non-biological child.

Because of the upheaval caused by misattributed paternity, it has been argued that there should there be a limit on the time frame in which a putative father may challenge paternity, especially in instances where there is an existing relationship between him and the child exists. Allowing such testing at a later date would inevitably be problematic (Kording 2004 *Journal of Law and Family Studies* 240; and Anderlik and Rothstein "DNA-based Identity Testing and the Future of the Family: A Research Agenda" 2002 *American Journal of Law and Medicine* 215 226). Draper and Ives go further and argue that once a man accepts paternity (or if it is so ordered by the court), there can be no moral justification for a paternity challenge until the child becomes an adult. Thus fathers should challenge paternity at the beginning of the child's life, or not at all (Draper and Ives "Paternity Testing: A Poor Test of Fatherhood" 2009 31(4) *Journal of Social Welfare and Family Law* 407 416). This issue has yet to be debated in South Africa.

5 Personal consequences

It should be clear that misattributed paternity is problematic because it has the potential to cause the destruction of the family, including the functional parent-child relationship (Jacobs 2004 *Yale Journal of Law and Feminism* 196). Some of these consequences have been mentioned above. The bottom line is that the mother's falsehood sets the family up for an emotional bombshell (Seliber 2007 *Washington and Lee Journal of Civil Rights and Social Justice* 103). Once the true facts come to the surface, the consequences affect a number of persons: the child, the putative father, the mother and the real biological father and his family.

The child is the real victim as research shows that he loses his sense of identity, the only father he has ever known, as well as certainty and trust in his parents (Kording 2004 *Journal of Law and Family Studies* 237; and

Seliber 2007 *Washington and Lee Journal of Civil Rights and Social Justice* 103). The law does not assist the child when the truth is revealed. As mentioned above, parental responsibilities and rights are based on biology and the legal basis for the relationship between the child and the putative father is severed (subject to the two possibilities mentioned above) and the maintenance obligation halted. Either an additional agreement or a court order is required to make provision for the continuation of the legal relationship between the child and the putative father and only if it can be shown to be in the best interests of the child. It is submitted that the best interests of the child should have to be determined within the factual context of each individual matter.

The question may also be asked whether the child would be able to approach the court for an order compelling the mother to reveal the true identity of the biological father, as the child does have an emotional, psychological and medical interest in the truth (Young "Removing the Veil, Uncovering the Truth: A Child's Right to Compel Disclosure of his Biological Father's Identity" 2009 *Howard LJ* 217 218, 225 with reference to *Sutton v Diane* J No 273519, 2007 WL 840900 (Mich App, Mar 20, 2007)). This question has yet to be answered in South Africa and will be disregarded for the purposes of this note.

The consequences for the putative father are obvious and he is generally devastated by the revelation resulting in his sense of family being destroyed and potentially being deprived of a parent-child relationship with a child that he regarded as his own for many years (Turney 2006 *Journal of Family Studies* 80-82; and Kording 2004 *Journal of Law and Family Studies* 238). In addition, he, and possibly his real family and children, may have suffered financially as a result of the mistaken payments (Kording 2004 *Journal of Law and Family Studies* 262).

The biological father's rights are also affected as he has been denied the knowledge of his paternity and thus the opportunity to have a relationship with his child – albeit with the accompanying duties and responsibilities. This is especially relevant under the Children's Act that grants automatic parental responsibilities and rights to unmarried fathers in certain instances (s 21). If the biological father is unaware of the birth, he is prevented from potentially exercising these rights on the presumption that he wishes to do so. For the biological father, the consequences of the discovery would depend on the circumstances. Research conducted by Turney in 2006 confirmed that genetics alone does not ensure that the biological father would claim his role and, notwithstanding a sense of guilt, absent a relationship with the mother, any sense of connection with the child was tenuous at best (Turney 2006 *Journal of Family Studies* 79-80). In addition, if the child is the result of an adulterous affair, the knowledge may result in the biological father's family unravelling or he may not want the child resulting in neglect or abandonment (Kording 2004 *Journal of Law and Family Studies* 249).

The parental responsibilities and rights of the mother, who is generally vilified as the perpetrator of the fraud leading to misattributed paternity, are

not directly affected although it could have some financial consequences (as is argued below). In the context of South African law it would be possible to prosecute the mother for fraud, which is defined as "unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another" (Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 702; and Burchell *Principles of Criminal Law* 3ed (2005) 833). The crime is characterized by the breadth of its ambit, encompassing the use of any form of misrepresentation (see Snyman *Criminal Law* 5ed (2008) 532-535) to establish prejudice which may be either patrimonial or non-patrimonial in nature (Burchell *Principles of Criminal Law* 840) and may either constitute actual prejudice or even potential prejudice (Snyman *Criminal Law* 535-537). Whilst some may baulk at the use of criminal proceedings in this context on policy grounds, there is no question that the conduct of the mother falls squarely within the definition of the crime of fraud. This is all the more clear if one considers that the fault requirement for the crime encompasses not only direct intention to defraud, but also intention in the form of *dolus eventualis*, where the accused foresees the possibility of the harm occurring, but continues in her course of action. Thus, where the mother suspects that the wrong man is being targeted for parental obligations, but continues to burden him with these duties and their accompanying emotional and financial consequences regardless of such suspicions, the crime of fraud would be committed. Similar considerations apply to the crime of perjury (the "unlawful and intentional making, upon oath, affirmation or admonition and in the course of judicial proceedings before a competent tribunal, of a statement which the maker knows to be or foresees may be false" – Burchell *Principles of Criminal Law* 959), where the mother leads false evidence regarding paternity in a court hearing to establish paternity or maintenance. It is worth noting that just as there are policy arguments against targeting the mother in this situation with criminal prosecution, there are also policy arguments in favour of such prosecution.

> "Punishing mothers that lie sounds severe but the one thing that is undisputed in any paternity determination or dispute is that a woman knows who she has been intimate with. Arguments that a woman miscounted the months, forgot she had an affair, was drunk, or just did not want to believe anyone other than her husband or the man she identified in her paternity affidavit could be the child's father are excuses. They are excuses that destroy women's credibility and perpetual stereotypes about women as looking for the deepest pocket and trapping men. They are excuses that, when endorsed or justified by the courts, cause society to distrust the courts and paternity system as protecting the mother's interests over the father's and the child's" (Kording 2004 *Journal of Law and Family Studies* 277).

6 Financial consequences

6 1 Introduction

Misattributed paternity has the effect that the mother is allowed to "choose" the father of the child. This choice places the maintenance duty on the wrong man, whilst the biological father, who owes the duty to support, is

allowed to ignore his financial obligations. Before the discovery of the misattributed paternity, the putative father would have been required to maintain the child in accordance with his (and the mother's) means. Once the reality is revealed, the putative father is no longer regarded as the father of the child and his duty to maintain in principle falls away, although a court order may be required if there is an existing maintenance order in place. The courts would generally order that the duty relating to maintenance for future payments would cease once the truth is exposed, as biology in essence still determines the maintenance duty. (*Nel v Jonker* par 5. See also Kording 2004 *Journal of Law and Family Studies* 249). The only exception hereto would be where the court refuses to open/re-open the issue of paternity because it regards it not to be in the best interests of the child (*F v L* 1987 (4) SA 525 (W)). This issue will not be dealt with for the purposes of this note.

Once the putative father is out of the maintenance-payment "picture", the child (or mother on behalf of the child) will still have recourse against the biological father of the child – should there still be a need for maintenance and presuming that the biological father is identified and able to provide maintenance. His duty to maintain will be calculated as it is both he and the mother that are liable for the maintenance of the child according to their means. Both parents are liable for the maintenance of their child *in solidum* (Sonnekus *Unjustified Enrichment in South African Law* (2008) 238, 295).

6 2 Reclaiming maintenance amounts already paid

What about the amount already paid? It has been stated that, where a third party fulfils the maintenance obligations on behalf of a parent *vis-à-vis* a child, he would have a claim to recover the contributions from the parent based on unjustified enrichment or managing another's affairs (*negotiorum gestio*) (Van Zyl *Die Saakwaarnemingsaksie as Verrykingsaksie in die Suid-Afrikaanse Reg. 'n Regshistoriese en Regsvergelykende Ondersoek* LLD Thesis (1970) 7; Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* (1999) 243 fn 52; Spiro *The Law of Parent and Child in South Africa* 394; *Pretorius v Van Zyl* 1927 OPD 226 and the discussions by De Vos *Verrykingsaanspreeklikheid* 3ed (1987) 299; and Du Plessis *The South African Law of Unjustified Enrichment* (2012) 327-328).

However, Du Plessis correctly points out that where a person pays maintenance in the belief that he is the parent (as in the case of misattributed paternity), he does not intend to perform another's obligation making a claim in terms of *negotiorum gestio* unavailable to the claimant.

The available basis for an unjustified-enrichment claim would be the *condictio indebiti* (Du Plessis *The South African Law of Unjustified Enrichment* 328; *Nel v Jonker* par 15-39). Du Plessis argues that the *condictio ob causam finitam* could also be applicable (Du Plessis *The South African Law of Unjustified Enrichment* 228 fn 72), but the discussion below is limited to the *condictio indebiti.*

Notwithstanding murmurings to the contrary, there is currently no general enrichment action in the South African law, making it necessary to use an existing *condictio* to be successful with a claim. The elements of an unjustified enrichment action are the following (*McCarthy Retail Ltd v Short Distance Carriers CC* 2001 (3) SA 482 (SCA) par 15-25; Du Plessis *The South African Law of Unjustified Enrichment* 2; and Visser *Unjustified Enrichment* (2008) 47-48): one, the defendant must be enriched; two, the plaintiff must be impoverished; three, the defendant's enrichment must be at the expense of the plaintiff and four, that there is no legal ground or justification for the retention of the enrichment. These elements have been refined for the *condictio indebiti.*

The object of the *condictio indebiti* is to recover money transferred in intended payment or performance of a non-existent debt (Lotz and Horak "Enrichment" in WA Joubert (ed) *LAWSA* Vol 9 First Reissue (1996) par 78). There are four requirements for this *condictio*: one, transfer of ownership of property or payment of money; two, an undue transfer, *id est* there must have been no legal obligation to transfer; three, the undue transfer must have been made under circumstances that warrant restitution (*id est* it must have been made due to an excusable mistake as to the liability or due to "duress and protest"); and four, the undue transfer was made between parties legally designated as transferor and recipient (Du Plessis *The South African Law of Unjustified Enrichment* 97-98; and see also Lotz and Horak in *LAWSA* par 79). Du Plessis notes that the undue transfer "must be claimed from the person 'who must be considered, in all the circumstances of the case, truly to have received the payment'." (157)

The question is thus whether the putative father would have an enrichment claim based on the *condictio indebiti* for the maintenance he paid towards a child which turned out not to be his. With regard to the requirements for such a claim, two are obviously applicable to a misattributed paternity scenario: one, there was a transfer of money (the child was maintained) and two, the transfer was undue (there is no legal obligation on a putative father to maintain the child of another). The remaining two requirements require some discussion. Can it be said that the transfer was made due to an excusable mistake? And who can be regarded to have "truly" received the payment: the child, the mother or the biological father? Each of these requirements will be discussed below.

In terms of the requirements, the erroneous transfer of the funds must be made as a consequence of an excusable mistake that it was due (Du Plessis *The South African Law of Unjustified Enrichment* 130). What will be regarded as an "excusable mistake" is somewhat unclear, yet *bona fides* seems to be required (Du Plessis *The South African Law of Unjustified Enrichment* 134). If the putative father is under the *bona fide* belief that he is the biological father and there are no indications to the contrary, his payment may be excusable. In *Nel v Jonker* the court seems of the opinion that he either knew the truth or should have challenged the truth earlier. It indicated that a degree of indifference would suffice to render the payment non-excusable (par 44-63). This argument is closely connected to a type of

estoppel (Du Plessis *The South African Law of Unjustified Enrichment* 164). Underlying the argument by the court in *Nel v Jonker* is the fact that, as he did not challenge paternity earlier in light of what his family said about the paternity of the child, he represented himself as the father of the child (to keep his relationship with the child intact) and could thus not at a later stage challenge paternity. (For a discussion of estoppel in instances of misattributed paternity in the United States see Henry "The Innocent Third Party: Victims of Paternity Fraud" in 2006 40(1) *Family Law Quarterly* 51 72; and Hoover 2011 37 *Ohio Northern University LR* 152-153 with reference to *Clevenger v Clevenger* 11 Cal Rptr 707 (Cal Ct App 1961).)

The next question relates to who truly received the money and thus from whom can be claimed? Schrage refers to the French decision of *L v V* (Civ 1.2.1984, D 1984.388; D 1984 IR 315. Mestre, Rev.trim.dr.civ 1984, 712 ("Unjustified enrichment. A historical and comparative overview" in Schrage (ed) *Unjustified Enrichment and the Law of Contract* (2001) 14):

> "After a divorce the wife married another man and some time later obtained a declaration that her second husband was the father of a child born to her when she was still married to the first husband. Since the first husband had until then been paying maintenance for this child, he brought action against the wife for the restitution of those payments as money paid when it was not due. This action was ineffective because the wife was insolvent, but the plaintiff successfully brought an enrichment action against the second husband as the legitimated father. The first husband was impoverished by his payments and the second husband was enriched by the discharge of his legal duty to support his legitimated child. The action against the mother, though it was available, and had indeed been brought, was ineffective because of her insolvency."

With reference hereto, Sonnekus argues that this example would give rise to an enrichment claim by the putative father in South Africa, analogous to a *condictio indebiti,* against the second husband for the expenses he incurred. He argues that the enrichment is to be found in the saved expenses that they would have incurred and the impoverishment is the expenses paid by the first husband (Sonnekus *Unjustified Enrichment in South African Law* 296). Sonnekus further submits that the putative father will also have a claim against the mother had she contributed to the maintenance of the child, as both parents are liable for the maintenance of their child *in solidum* (Sonnekus *Unjustified Enrichment in South African Law* 238, 295). Moreover, he states that the claim against the biological father should succeed *in toto,* leaving it to him to re-claim from the mother for her share of the maintenance duty (Sonnekus *Unjustified Enrichment in South African Law* 296 fn 344).

It was unfortunate that the court in *Nel v Jonker* was seemingly unaware of the arguments of Sonnekus in this regard. The comment by the court, that the mother was not enriched but merely a conduit of the payments (par 65-66) is clearly wrong and does not take into consideration the individual and joint-support duties of the mother as a parent. If she did not have the putative father to contribute and she chose not to burden the biological father, she would have been solely liable for the maintenance of the child *in*

toto. It is submitted that Sonnekus is correct and that the claim can be instituted either against the biological father (if he is known), or the mother if she contributed to the maintenance of the child, or both.

The court noted *obiter* that had prescription been raised at the trial, the amount would have been "significantly curtained" (par 62). This would only be the case in instances where the mistake was inexcusable. In other instances, it is submitted that Sonnekus is correct in that the claim by the first husband (in the *L v V* scenario) would not be defeated or limited by prescription, as the prescription period will only commence once the putative father becomes aware of his "*indebiti* payments" (Sonnekus *Unjustified Enrichment in South African Law* 296 fn 344).

The judgment in *Nel v Jonker* raised an additional issue, namely the possible defence of public policy within a constitutional paradigm and its underlying values such as dignity that could influence restitution (par 75-79; and Du Plessis *The South African Law of Unjustified Enrichment* 174-175). As the *condictio indebiti* is an equitable remedy, the decision will be influenced by value-laden considerations including public policy, and in this light the judge referred to the undesirable and disruptive consequences of a restitution claim on the constitutionally protected parent-child relationship (par 79; and Du Plessis *The South African Law of Unjustified Enrichment* 175). The court seems to intimate that, where there is already a parent-child relationship, the courts may, in light of the "best interests of the child" principle, refuse to make an order that the maintenance money should be returned. However, in instances of misattributed paternity the facts have been revealed and the relationship may already be destroyed. This argument by the court does not take cognisance of the legal provisions linking biology and the duty to maintain. The alternative is for the legislature to address the issue and move the basis for the duty to maintain from biology to recognition as is the case in some other jurisdictions. This issue is disregarded for the purposes of this note.

The court also did not specifically weigh the "best-interests" principle up against principles of fairness and the right to dignity of all the parties, including the putative father and the mother who received a windfall through her deception (Epstein "The Parent Trap: Should a Man be Allowed to Recoup Child Support Payments if he Discovers he is Not the Biological Father of the Child?" 2003-2004 *Brandeis LJ* 655 665).

In various states in the USA, the application of the "best interests of the child" principle often results in a ruling against the pecuniary interest of the putative father – especially if the child is an innocent victim and the mother struggling financially (Hoover 2011 *Ohio Northern University LR* 159; and Epstein 2003-2004 *Brandeis LJ* 664). This application is controversial, as the application of this principle is unduly harsh in failing to provide an equitable remedy to the putative father, who is after all a victim of fraud (Epstein 2003-2004 *Brandeis LJ* 667-8; and Seliber 2007 *Washington and Lee Journal of Civil Rights and Social Justice* 115). Epstein argues for a more flexible approach that would consider the best interests of the child, the fraud by the mother, lack of diligence by the father, and the error by the court along with

the effect on public policy (Epstein 2003-2004 *Brandeis LJ* 669-670). Seliber argues that the putative father should have a claim from the mother but only if she can afford to pay him back (Seliber 2007 *Washington and Lee Journal of Civil Rights and Social Justice* 123). It has been argued that to force a man to maintain a child that he is not related to alienates men from the legal system and makes them "financial prisoners, condemned men or victims of involuntary servitude" or "duped dads" (Kording 2004 *Journal of Law and Family Studies* 262-3).

It is interesting that in German law a restitution claim may be denied if the undue transfer is supported by a moral obligation towards the recipient (Du Plessis *The South African Law of Unjustified Enrichment* 175). The example Du Plessis gives is "when maintenance is mistakenly paid to a relative when no legal obligation exists to do so, it may be regarded as desirable from a policy perspective to allow the beneficiary to retain the enrichment" (Du Plessis *The South African Law of Unjustified Enrichment* 175). In German law family relations are defining: if the transferor was related to the recipient and mistakenly regarded himself liable for the maintenance, there will be no restitution claim. However, if they were not related such as in the case of misattribute paternity, the unjustified enrichment claim would be possible (Du Plessis *The South African Law of Unjustified Enrichment* 175 fn 533 with reference to *Staudingers Kommentar zum BGB (*Lorenz) § 814 BGB par 20). Applying the German principles to misattributed paternity, the putative father would be able to claim his maintenance money back as he is not related to the child.

7 Conclusion

Reading the case of *Nel v Jonker* leaves one with a feeling of dissatisfaction: partly because the set of facts was not ideal to deal with this complex issue, and partly because of deficient pleadings and evidence, making a precedential judgment on misattributed paternity impossible.

Looking at the common law, if the parties are still married, there is the possibility that the putative father could apply (if the requirements for *stuprum* are met), that the marriage be dissolved. Although this may have financial consequences for the mother, it may also impact on the child and the courts may not want to declare the child to be a child born of unmarried parents. It also does not solve the maintenance issue.

Although the courts would end any future maintenance obligation, it is submitted that there should in principle be a claim by the putative father for restitution against either the biological father and/or the mother if all the other requirements for unjustified enrichment are met. Not granting such a restitution claim seems unjust and not consistent with the common-law principles strictly based on biology as a basis for paternity. Additional issues such as the public-policy defence in the light of constitutional principles of the best interests of the child and the right to dignity, along with the question

of fairness, still require due consideration by the courts. The comments in *Nel* in this regard were superficial at best.

In addition, it is submitted that there should be consequences for the mother to deter women from creating these situations of misattributed paternity fraudulently.

Misattributed paternity can only be avoided through DNA testing at the time of birth of all children (Kording 2004 *Journal of Law and Family Studies* 264). In South Africa this would be financially unfeasible.

Other solutions should be sought. Although legislative intervention is a possibility, the courts could create a flexible approach on an *ad hoc* basis in the light of the common law and the constitutional principles premised upon the facts of each matter, in which the best interests of the child in the light of existing relationships, the fraud by the mother, the lack of diligence by the father as well as the effect on public policy are taken into account.

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