

**A MISSED OPPORTUNITY TO SETTLE  
THE LAW ON DNA TESTING  
IN PATERNITY DISPUTES**

**YD (now M) v LB 2010 6 SA 338 (SCA)**

## **1 Introduction**

On 17 September 2010, in (*YD (Now M) v LB* (2010 6 SA 338 (SCA))), the Supreme Court of Appeal (SCA) unanimously delivered what should have been a ground-breaking decision in the use of deoxyribonucleic acid (DNA) testing for paternity disputes. This was an appeal against the decision of Murphy J, in order to determine the child's paternity. An order for DNA tests was granted by the court *a quo* against the mother and her daughter, Y, to determine whether Mr LB (B) was the biological father of Y in the case of unmarried persons (*YD* par [1]). If the tests proved that he was the father, he would then be entitled to full parental rights (*YD* par [1]). This judgment should have been ground-breaking for two main reasons. First, *YD* was the first SCA judgment dealing with the use of scientific tests in paternity disputes. Until then, different provincial divisions had reached different conclusions on the court's power to compel either a minor or an adult to submit to the tests. Thus, *YD* was an ideal opportunity for the SCA to unify "the provincial divisions", that is, to bring certainty of law regarding DNA testing for paternity disputes. Second, the decision came at a time of the constitutional era and the era of the Children's Act (38 of 2005) with its section 37, which deals with parties not willing to submit to DNA testing in paternity disputes. In particular, section 37 is meant to be a statutory intervention seeking to achieve a compromise position where the court is faced with the evil of having to force a recalcitrant adult to submit himself or the minor child, against his or her will, for testing where paternity is disputed. Hence, this was an opportunity for the SCA to put section 37, which had not been tested before a court of law, into perspective. However, the court missed this golden opportunity. Therefore, the purpose of this note is to provide a critical analysis of the SCA's decision of *YD*. It begins with a brief overview of the legal position prior to the judgment of *YD* and concludes by reviewing the possible effects of the *YD* judgment.

## **2 The facts**

As stated from the onset, *YD* was an appeal against the decision of the North Gauteng Division, which granted an order authorizing that blood tests be done on a mother and her minor daughter, for the purposes of resolving a paternity dispute. It transpired from the facts that the parties had started

living together in an intimate relationship in October 2006 and became engaged a month later (par [3]). However, by the end of 2006, the relationship had become acrimonious and the parties separated (par [3]). The appellant, M, discovered late in March 2007 that she was pregnant with what she certainly believed to be the respondent's child (par [5]). At all material times, B, the respondent, accepted that he was the father of the child that M was carrying (par [5]). It was only once, while under the influence of alcohol, that B denied being the child's father (par [5]). He even paid three amounts of R1 000 into M's bank account in April, May and July, in anticipation of the birth of the child (par [6]). The child, Y, was subsequently born on 8 November 2007 (par [9]). M and B communicated regularly before and immediately after the birth of Y (par [7]-[9]). However, in April 2007, prior to the birth of Y, M revived a relationship with her former boyfriend, Mr M, and married him within three months (par [7]). Thus, Y was born into M and Mr M's marriage.

Nevertheless B was willing to be part of Y's life all the time (par [6], [8] and [10]). However, two days after the birth of Y, B did an about turn by, through his attorney, strongly denying paternity of Y, demanding blood and DNA tests to resolve the issue (par [9]). As a result thereof, M, who had been willing to allow B to be part of Y's life, absolved B of all responsibilities and rights through her attorney, (par [10]). B then changed his mind and, through his attorney, claimed that he was "'100 per cent' certain that he was Y's father" (par [10]). He nevertheless insisted that M and Y submit to blood tests (par [10]). Following M's refusal to undergo tests herself or subject her daughter to tests, B successfully applied to the high court for an order compelling M and her child Y to avail themselves for blood tests (par [10]). Murphy J granted the order on the basis that the court, as the upper guardian of all minor children, has inherent power to authorize such tests (*LB* par [47]). The High Court held that the best interests of the child, while paramount, are not the only consideration (*LB* par [34]). On the rights to privacy and dignity of the mother, the court endorsed the view expressed in *M v R* (1989 1 SA 416 (O)), when it held that the individual rights to privacy and dignity needed to yield to the quest for truth and proper administration of justice, when doing so is reasonable and justifiable (*LB* par [28] and [36]). However, the SCA reversed Murphy J's decision. It held that from the circumstances of the case and by B's own admission in his correspondence with M, he was certain that Y was his child (par [6] and [10]). As the court put it, "after the child's birth, [B's] conduct and other correspondence with her show unequivocally that he believed that he was the father" (par [6]). Thus, paternity was not in dispute (par [12]). Instead B was, according to the court, only seeking scientific certainty regarding the child's paternity (par [11]). According to the SCA, paternity was in the circumstances determinable on a balance of probabilities and there was therefore no need for scientific tests (par [13]). The court held that B was not entitled to the scientific tests for which he was seeking (par [13]). Moreover, the SCA was of the view that since maternity was never in doubt, the High Court should not have ordered DNA tests on Y's mother (par [12]). Before providing a critique of the court's

finding, it is necessary to highlight briefly the position that existed prior to the YD decision.

### **3 The position prior to YD**

The South African law position regarding the use of scientific tests has long been regulated by common law and section 2 of the Children's Status Act (82 of 1987) (see Taitz and Singh "Does the Supreme Court Enjoy the Inherent Power to Order Relevant Parties to Submit to Blood Tests to Establish Paternity? 1995 58 *THRHR* 91 92). Section 2 of the Children's Status Act has since been replaced by section 37 of the Children's Act. The Bill of Rights also has a significant impact on this area of law. This part of the note considers the legal position under three headings, namely, the common law, the constitutional era and the Children's Act.

#### *3 1 The common law*

The common-law position has been stated many times by authors and courts that it has become trite (see Banoobhai and Hoctor "The Court's Power to Compel DNA Testing in Paternity Disputes – *LB v YD* 2009 5 SA 463 (T)" 2009 30 *Obiter* 791 794). In terms of the common law, where the parties had volunteered for blood tests, the court would accept the results thereof without issue. For example, *Ranjith v Sheela* (1965 3 SA 103 (D)) was one of the first cases to deal with the use of blood tests in paternity disputes. In this case, the husband of the child's mother denied paternity of the child on the basis that he had no sexual intercourse with his wife during the time which the child would have been conceived. Both parties and the child voluntarily underwent blood tests, the results for which were submitted as evidence in court. The court accepted the results of the blood tests as proof that the husband was not the child's father. Since then, the understanding had been that the results of these blood tests would be accepted in instances where the parties submitted to the tests on their own volition.

However, over the years the use of blood and DNA samples to resolve paternity disputes has remained a controversial issue under South African law. Two issues have always confronted South African courts whenever parties in paternity disputes were seeking a court order compelling other persons to submit. First, the question of whether the court has any authority to compel a child to have a blood test despite objection from the guardian. Secondly, the most sticking issue has been whether the court may order an adult person to submit to having blood or DNA tests against his/her will. On both issues, there has been a divergence of views from different provincial divisions (see Banoobhai and Hoctor 2009 *Obiter* 795-798; and Taitz and Singh 1995 *THRHR* 92).

As for the child, long before the advent of the Constitution of the Republic of South Africa, 1996 (the Constitution) with its concept of the paramountcy of the best interests of the child (s 28(2)), the courts have been consistent

that they would only grant an order for a blood test when doing so is in the interests of the child. For instance, in *Seetal v Pravitha NO* (1983 3 SA 827 (D)), the Durban and Coast Local Division (now KZN HC, DBN) held that, as an upper guardian of all minor children, the court has the power to authorize that blood tests be done on the child despite objections by the child's guardian, as long as doing so was in the best interests of the child. However, the court went on to dismiss the husband's application for a court order as speculative, since he had no evidence of the marital infidelity that he had alleged. A similar view was held by then Cape Provincial Division in *O v O* (1992 4 SA 137 (C)). In this case, the court dismissed the application. Likewise, other provincial divisions have adopted a similar stance (for example the Orange Free State Division in *M v R supra* (*M v R*)).

On the issue of the court ordering blood tests for adults, there has been a divergence of opinions. The courts have either left the issue open or held that they have no authority at all. For example, in *Seetal (supra)* the court left the issue open, whereas in *O v O (supra)*, the Cape High Court expressly held that there was neither a statutory nor common-law power that empowered the court to order blood tests on a non-consenting adult. However, prior to that, the Orange Free State Division in *M v R (supra)* had held that the court did have the power to order an adult to avail himself for blood tests against his will. It is noteworthy that the court in *M v R* acknowledged, first, that this had to be in the best interests of the child, and secondly, that it was not a simple issue as the matter involved infringing on one's right to privacy (see *LB* par [30]). The court went on to order both the mother and the child to submit to blood tests. It is submitted that the approach and reasoning of the court in *M v R (supra)* are legally sound, as it balances the interests of the adult (the mother in that case) and the child, while according more weight to the best interests of the child.

### 3.2 *Constitutional era*

The advent of democracy ushered in a new era of respect for human rights and the rule of law. For instance, section 2 of the Constitution expresses the supreme law of the Republic and renders as invalid any law or conduct that is inconsistent with the Constitution. Section 7 proclaims the Bill of Rights as the cornerstone of democracy, and affirms the values which include human dignity. Hence, the court may not dispose of an application without paying due regard to constitutional values. Such values include, *inter alia*, the right to bodily integrity (s 12); the right to privacy (s 14); and the right to human dignity (s 10). While these rights apply in respect of all persons, including children, it is submitted that primarily, the child's most important rights are the child's rights to family or parental care (s 28(1)(b)) and the paramountcy of its best interests (s 28(2)). The Constitutional Court has held that section 28(2) is not unlimited, but is subject to the limitation clause, contained in section 36 of the Constitution (*De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC); 2003 12 BCLR 1333 (CC) par [54]-[55]). Therefore, the paramountcy principle should not be understood to mean that the child's best interests trump everything (*De*

*Reuck* par [54]-[55]; see also Skelton "Abusing Children's Rights" 13 September 2010 *The Mercury*, a lecture delivered at the University of KwaZulu-Natal, Pietermaritz-burg). Instead, the paramountcy of the best-interests-of-the-child principle, as a constitutional value, should be weighed against the competing constitutional rights of others, such as privacy and bodily integrity. It should also be viewed in the light of the limitation clause in the Constitution (s 36).

### 3.3 *The Children's Act 38 of 2005*

The Children's Act repealed previous legislation dealing with children's issues (Schedule 4 of the Children's Act). Some sections of the Children's Act came into effect on 1 July 2007, while the rest of the Act came into effect on 1 April 2010 (Proc R330763 in GN R12 of 2010). The purpose of the Children's Act is to give effect to children's constitutional rights. It is also an attempt to place South African law that deals with children's rights in harmony with international law and the various international conventions to which South Africa is a party (*Bosman-Sadie and Corrie Practical Approach to the Children's Act (2010) v*). Section 9 of the Act is similar to section 28(2) of the Constitution. It provides that: "in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied" (s 9 of the Children's Act). Meanwhile, section 7 (of the Children's Act) provides for best-interests-of-the-child standard, that is, a wide range of factors that need to be considered when one deals with matters affecting children, such as paternity, which falls under parental responsibilities and rights. Among others, the factors include: the attitude of any specific parent towards the child and the exercise of parental responsibilities and rights in respect of that child (s 7(1)(b)(i) and (ii) of the Children's Act). The child's physical and emotional security are paramount (s 7(1)(h) of the Children's Act). They also include the need for the child to remain in the care of his parent, family and extended family and any action or decision that would avoid or minimize further legal or administrative proceedings in relation to the child (s 7(1)(f)(i) and s 7(1)(n) of the Children's Act). Moreover, where there is no statutory or common-law duty upon the court to order blood tests on any adult person, section 37 (of the Children's Act) requires the court, in proceedings where paternity is in dispute, to warn any party refusing to undergo scientific tests of the adverse effect of such refusal on his or her credibility.

Further, unlike in the common law where fathers or unmarried fathers virtually had no rights in respect of children born outside of wedlock, the Children's Act confirms more rights and responsibilities on these persons (see, eg, *F v L* 1987 4 SA 525 (W); and *Jooste v Botha* 2000 2 SA 199 (T)). For instance, section 21 of the Act allows unmarried fathers to acquire full or certain responsibilities and rights in respect of their children. These may even be acquired through an agreement with anyone who holds responsibilities and rights in respect of a particular child (s 22 of the Act). Thus, the concept of the best-interests-of-the-child has been extended by these new developments. Virtually, this diminishes any discrimination based

on the child's birth status. Hence, the courts will be more willing to have a wider view of the "child's best interests", rather than to restrict it to a narrow view which seems to be suggesting that the notion of a child's best interests is inherent to growing up within a marriage, or that mothers are better able to care for a child compared to fathers. As a result, the courts will be more inclined now than they were in the past to authorize blood tests, even if that means that the child will lose its status as a child of marriage. However, this will only be done if doing so is in the child's best interests, after balancing all the relevant factors.

#### 4 The *YD (Now M) v LB* judgment

The SCA held that the High Court should not have ordered DNA tests on Y's mother since only paternity and not maternity was in dispute (par [12]). This now creates a new confusion in the area of DNA testing. It has long been a standard practice in South African law that all three persons – the alleged father, the child and its mother – would submit their body tissue samples for a comprehensive scientific analysis. However, now the parties in a paternity dispute will no longer be certain if the mother needs to submit to the test or not. On the other hand, according to one source, motherless tests "are just as conclusive as those performed with trios" (Anonymous "Paternity Testing without the Mother" <[http://www.ehow.com/facts\\_5896099\\_paternity-testing-mother.html](http://www.ehow.com/facts_5896099_paternity-testing-mother.html)> accessed 2011-07-04). Hence, if this information is anything to go by, the pronouncement by the SCA could signal an era of motherless paternity tests. In turn, this may help simplify the process where a genuine dispute of paternity exists, by shifting the focus away from an unwilling mother. When the alleged father demands DNA testing, then the issue will only be restricted to the best interests of the child rather than stretching to the constitutional rights of a mother.

Furthermore, the SCA seems to have created another confusion regarding section 37 of the Children's Act. First, it referred to its power to invoke section 37 as its "inherent power" (par [13]). This creates the impression that the court has discretion to invoke provisions of this section when a party refuses to submit, in the case of a *bona fide* dispute. The section is couched in the following terms:

"If a party to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court *must* warn such party of the effect which such refusal might have on the credibility of that party" (s 37 of the Children's Act). (author's own *italics* added).

Contrary to what the court seems to be suggesting, the language of the section appears to imply that the court has an obligation to warn the party of a possible adverse inference against him or her, if a dispute genuinely exists and the other party is refusing to take part in scientific tests (par [13]). The section is couched in a mandatory manner, as it says "the court must warn such party ..." (s 37 of the Children's Act). Of course, the section should be

understood in the light of its predecessor, section 2 of the Children Status Act (82 of 1987). Section 2 of the Children Status Act provided the following:

“If in any legal proceedings at which the paternity of any child has been placed in issue it is adduced in evidence or otherwise that any party to those proceedings, after he has been requested thereto by the other party to those proceedings, refuses to submit himself or, if he has parental authority over that child, to cause that child to be submitted to the taking of a blood sample in order to carry out scientific tests relating to the paternity of that child, it shall be presumed, until the contrary is proved, that any such refusal is aimed at concealing the truth concerning the paternity of that child.”

Thus, this section differs materially from its successor. From its language, the court had to draw the inference once it was proved that the other party was refusing to submit himself or the child for blood samples. In turn, that party was charged with the onus of adducing evidence to the contrary. However, section 37 of the Children’s Act has removed the obligation placed upon the court to draw such adverse conclusion against a recalcitrant party. Instead, the Legislature has created an obligation on the court to warn any party refusing to submit himself or the child to blood test that it may exercise its discretion to draw a negative inference against him or her. Hence, I submit that, unlike what the SCA alluded to, the only discretion left for the courts is to draw an adverse inference against the party refusing to submit for DNA tests. Nonetheless, this would happen if there is evidence that such refusal was *mala fide* (*S v L* 1992 3 SA 713 (E) 720E).

Secondly, while the SCA made it clear that section 37 of the Children Act would be invoked when there is a genuine dispute of paternity, it did not go far enough to place this section within its rightful place in paternity disputes. The court merely acknowledged that section 37 of the Children’s Act “anticipates the use of scientific tests to resolve paternity” (par [13]). It would have been helpful to make a ruling conclusively on the role of section 37 of the Children’s Act in paternity disputes. It is submitted that the court would, in the case of a genuinely disputed paternity, apply the provisions of section 37 of the Children’s Act as a lesser evil, to avoid subjecting the unwilling party to intrusive blood tests which otherwise violate his or her constitutional right to privacy, among others (see also s 36(1) of the Constitution). Further, I submit that the court should only draw an inference in terms of section 37 of the Children’s Act if the other evidence on a balance of probabilities points to such conclusion that party in question was concealing the truth (*S v L supra* 720E).

Finally, the judgment of the court *a quo* was mainly founded on the pursuit of truth and proper administration of justice (par [14]-[15]). Therein, Murphy J endorsed the view held by some authors that “the discovery of truth” should prevail over respect for, or protection of, rights to privacy and bodily integrity (par [14]-[15]; and Banoobhai and Hoctor 2009 30 *Obiter* 798). However, I concur with the SCA that such pursuit of truth and administration of justice should not be the deciding factor in curtailing these fundamental rights by granting an order for the scientific test for paternity disputes (par [16]). Instead, these two factors should matter when they are inherent in the best interests of child at the centre of the paternity dispute. With regard to the

court's inherent power to compel an unwilling party, against his or her will, to submit to blood test Taitz and Singh refer to the decision of the House of Lords (in *S v McC; W v W* [1972] AC 26) (Taitz and Singh 1995 *THRHR* 96 and 98-99). Therein, Lord MacDermott acknowledged that such inherent jurisdiction of the high court (Taitz and Singh 1995 *THRHR* 96):

“confers power, in the exercise of a judicial discretion to prepare the way by suitable orders or directions for a just and proper trial of the issues between the parties” (46B-F).

The authors state that the court went on to grant an order for blood tests against the parties and the children as it was of the view that that was in the best interests of children concerned. Elsewhere, the authors quote a Canadian case of *Crow v McMynn* ((1989) 49 CRR 290), wherein the court found that the interests of the parties (constitutional rights) and the government (proper administration of justice) was “tied to the welfare (or interests) of the child involved” (Taitz and Singh 1995 *THRHR* 99; and Banoobhai and Hoctor 2009 *Obiter* 798). Hence, I am in agreement with the SCA that the finding by Murphy J that elevated the interests of truth and administration of justice above the best interests of the child should be rejected (par [18]; and Banoobhai and Hoctor 2009 *Obiter* 798 and 802). Indeed, the best interests of the child concerned, as the SCA correctly held, should be accorded more weight than the former.

## 5 Conclusion

This SCA judgment has confirmed some known facts regarding the use of DNA tests in paternity disputes. It confirmed the general approach that the courts should not be hasty in ordering scientific testing against anyone in paternity disputes. Instead, they should first ascertain if paternity is indeed in dispute or not. Should there exist no such a dispute, it would be the end of the matter. However, if a genuine dispute of paternity exists, as a general rule, the court would strive to settle the dispute on a balance of probabilities. Only when the disputed paternity cannot be settled on a balance of probabilities would the court consider whether to grant an order for DNA test or not. Even then, the courts will only grant an order if doing so is in the best interests of the particular child in question (par [16]).

However, the judgment is an opportunity missed by the SCA. The SCA created some uncertainty on whether the mother should be party to the DNA testing where there is a dispute of paternity. While evidence suggests that motherless tests are as effective as the trios, our South African jurisprudence would have been more enriched had the SCA gone further in this regard to make an informed ruling based on foreign jurisprudence or scientific evidence. Instead, it merely held that maternity was not in dispute (par [13]). It also created uncertainty on the general obligation placed upon the courts by referring to such as an inherent power, despite the language of section 37 suggesting otherwise. Moreover, by its failure to put the role of section 37 of the Children's Act in paternity disputes within its perspective, the SCA missed an opportunity. This would have contributed to the

development of DNA testing within the new era of the Children's Act. The timing was perfect as the whole Children's Act came into force on 1 April 2010. Therefore, I submit that, where the court elects to settle the matter on a balance of probabilities rather than granting an order compelling parties to submit to DNA testing, it may only exercise its inherent power to draw a negative inference on the party who refused to submit to the tests. This, it is submitted, should only be done if its conclusion, that such a party is concealing the truth, is supported by other evidence before the court. Conversely, I concur with the SCA that where a *bona fide* paternity dispute cannot be resolved on a balance of probabilities, the court has discretion to order scientific tests on the child, based on the best interests of that particular child (par [13]). Lastly, the *YD* judgment has also made it clear that the courts have the power to curtail an adult's constitutional rights such as the right to privacy, provided doing so is in the best interests of that particular child (par [15]).

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