DETERMINATION OF PATERNITY
LB v YD 2009 5 SA 463 (T) and *YD v LB* (A) 2009 5 SA 479 (GNP)

1 Introduction

When a child is born, it is unlikely that maternity will be in dispute. In contrast, paternity is often in question. In *LB v YD* 2009 5 SA 463 (T) the applicant (the alleged father) approached the Transvaal Provincial Division (now the North Gauteng High Court, Pretoria) seeking an order directing the respondent (the mother) to submit herself and her child, Y, to DNA (blood) tests for the purpose of determining whether the applicant is the biological father of the minor child. When Murphy J granted the order sought, the respondent unsuccessfully applied for leave to appeal in *YD v LB (A)* 2009 5 SA 479 (GNP).

LB v YD is the first case in which an order was sought compelling an adult and a child to submit to blood tests since the implementation of the Constitution of the Republic of South Africa, 1996 (the Constitution). The case is therefore very significant. The law and Murphy J's argument with regard to compulsory blood or DNA testing, as well as the relevant constitutional rights, are considered.

2 *LB v YD*: Background, facts and judgment

The applicant and the respondent, who were never married to each other, were involved in an intimate relationship between February 2006 and April 2007 (she moved out of the home they shared in March 2007). The respondent discovered that she was pregnant on 23 March 2007. In April 2007 she became intimately involved with another man, whom she married in July 2007. The respondent's daughter, Y, was born on 8 November 2007.

Although there was no question in the respondent's mind that the applicant was the child's father, the applicant had some doubts about his paternity. In a letter by his attorney, he denied paternity and offered to pay for blood and DNA tests to determine whether he was the child's father. After taking legal advice and encouraged by her husband's willingness to assume paternity, the respondent, through a letter by her attorneys, decided to accept the applicant's denial of paternity and to exclude him from Y's life. After a change of heart by the applicant, his attorneys wrote the respondent a further letter stating that he was 100% convinced that he was Y's father, and requesting the respondent voluntarily to submit to blood tests. The respondent, through her attorneys, informed the applicant that she was not prepared to subject herself to a DNA test and that it was not in the best interests of Y to do so either.

The applicant then launched the application for an order directing the respondent to submit herself and Y to DNA tests. In setting out his reasons for the application, the applicant *inter alia* stated that he had been advised that it would be in the best interests of Y for her to know with certainty who her biological father is. Due to the dispute between him and the respondent, the fact that he was

often away from the respondent during the relevant stage of their relationship, and her subsequent intimacy with her (future) husband, the applicant alleged that it would be appropriate for the court to order the respondent to subject herself and the child to a DNA test. The respondent denied that a DNA test was necessary. She stated that, with the exception of the denial in her first letter, she had always maintained that the applicant was Y's father, that the applicant himself believed that he was the father and that he also admitted that they were sexually intimate at the time of conception. She therefore argued that a DNA test was an unnecessary invasion of her rights to privacy and dignity, and would not be in the best interests of the child. The applicant, however, argued that it would be less prejudicial for Y to be tested at this early stage of her life than to discover later that he was not her father, and that his right to know with certainty whether he was the child's father before assuming the rights and responsibilities of parenthood outweighed any inconvenience that may be suffered by the respondent and Y.

Murphy J considered the law with regard to compulsory blood or DNA testing in paternity disputes and remarked that the most significant cases dealing with this topic date back to before the Constitution of the Republic of South Africa 200 of 1993, (Interim Constitution) and (obviously) also the Children's Act 38 of 2005. He distinguished between the position in respect of ordering a blood test on a child, where the courts have relied on their inherent jurisdiction as upper guardian, and ordering a blood test on a non-consenting adult, where the courts have delivered inconsistent judgments (469B–C). After considering the facts in *Seetal v Pravitha* 1983 3 SA 827 (D) (*Seetal*), *M v R* 1989 1 SA 416 (O) and *O v O* 1992 4 SA 137 (C), Murphy J came to the conclusion that the preponderance of authority favoured the proposition that the high court, as the upper guardian of all minors, was entitled to authorise a blood test on a minor despite objections by a custodian parent. He unequivocally supported this view. He also considered, but disagreed with, the decision in *S v L* 1992 3 SA 713 (E), where it was held that the court does not have the power to interfere with a decision of a guardian that a child should not undergo blood tests. Murphy J was of the view that, as a general rule, the more correct approach is that the discovery of the truth should prevail over the idea that the rights of privacy and bodily integrity should be respected, and that it would most often be in the best interests of the child to have any doubts about true paternity resolved and put beyond any doubt by the best available evidence (471A–B). He agreed with the statement by Didcott J in *Seetal* that the debate about compulsory blood tests amounts to a showdown between two ideas, namely, the idea that the truth should be discovered whenever possible and the idea that personal privacy should be respected, and that neither is sacrosanct (471D–F).

With regard to the difference between overruling an uncooperative adult when ordering blood tests to be performed on the adult's minor child, and compelling the adult personally to submit to blood tests, Murphy J court found this to be a fine, maybe even an artificial, distinction. He pointed out that our courts have balked at ordering the latter, but have usually been prepared with greater ease to assume authority to order the former (471J–472A). He considered the decision in

M v R where it was concluded that it was in the best interests of the child that reliable information be urgently obtained to gain clarity on the question of paternity and it was held that a non-consenting adult may be compelled to submit to blood tests. Murphy J was in agreement with the decision in *M v R* that the privacy 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. He added that while the best interests of the child are paramount they are not the only factors to be considered (473F–G).

He then explained that the general statements above are subject to two qualifications. These are the rule of legal precedent or *stare decisis*, as well as the effect of the Constitution, the fundamental rights therein and the Children's Act. He believed that these two qualifications are interrelated. He considered the Transvaal Provincial Division cases of *E v E* 1940 TPD 333, where a full court held that the court has no power to order that a child whose paternity is in issue be submitted to blood tests (473 I–J), and *Nell v Nell* 1990 3 SA 889 (T), where Le Roux AJ considered himself bound by the decision in *E v E* (474B–C). To determine whether he was bound to follow *E v E*, Murphy J considered various fundamental rights enacted in the Constitution, which came into effect after *E v E* and *Nell v Nell* had been reported. He *inter alia* referred to sections 8(1), 10, 14, 28(2) and 39(2) of the Constitution. He held that the current values of our Constitution oblige the courts to embark on balancing the competing interests involved in an application to order blood tests in a paternity dispute, and concluded that all courts are obliged to ensure that the common law conforms to the Bill of Rights. He relied on the decision in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) 39D–E (*Afrox*) that 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. Although Murphy J used the words "may depart", the correct translation of the word "verplig" in *Afrox* is actually much stronger, namely *must*. As a result, Murphy J did not consider himself bound by the decision in *E v E*, but at liberty to adhere to the approach in *M v R* (474F–475F). He did not give any reasons for his conclusion, and I believe that he should at least have explained the conclusion to which he came properly by referring to the relevant public-policy considerations which no longer reflect the *boni mores* (presumably the balancing of the competing rights involved).

With regard to the relevant provisions of the Children's Act, he considered various sections in chapter 3, which deals with parental responsibilities and rights. He specifically mentioned the following sections which came into effect on 1 July 2007:

- Section 20, which confers full parental responsibilities and rights on a biological father if he is married to the child's mother, or if he was married to the child's mother at the time of the child's conception, birth or any time between conception and birth.
- Section 21, which grants full parental responsibilities and rights to certain unmarried fathers, which "has obvious relevance to the present application on

account of it being common cause that the parties have never been married at any time" (476B–C – more will be said about this under "4 1 Presumptions of paternity, and the marital status of the child's mother").

- Section 26, in terms of which an unmarried father can apply for an order confirming his paternity.
- Section 36, which provides that, in the absence of evidence to the contrary which raises a reasonable doubt, a person is presumed to be the biological father of a child born out of wedlock if it is proved that that person had sexual intercourse with the mother of the child at the time when the child could have been conceived.
- Section 37, in terms of which the refusal of a party to a paternity dispute to submit to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child may lead to an adverse inference being drawn.

Counsel for the respondent submitted that the applicant had not made out a case that it would be in the best interests of the child for him to be granted parental responsibilities and rights. Murphy J rejected this submission. He found, quite correctly, that section 21 does not require the applicant to make out such a case. In terms of the section, certain unmarried fathers are entitled to be co-holders of parental responsibilities and rights without it being shown that bestowing parental responsibilities and rights upon them would be in the best interests of the child (477F–I).

Finally, Murphy J considered the question whether it would be in the best interests of the minor child, Y, to determine paternity with certainty. He stated that a clearing of the air was called for, as the respondent had been intimate with a second party, namely her husband, within the period of possible conception, that there was no established relationship that might be unduly disturbed and that the child would benefit in time from knowing the truth (478I–479B). He accordingly held that it would be in the best interests of Y that paternity be scientifically determined and resolved, and ordered the respondent to submit herself and her minor child Y, within 30 days, to DNA tests for the purpose of determining whether the applicant is the biological father of the child Y (479C–D).

3 Application for leave to appeal: *YD v LB (A)*

In *YD v LB (A)* 2009 5 SA 479 (GNP) the respondent applied for leave to appeal against the order of the court in *LB v YD*. The respondent (the applicant in the application for leave to appeal, but to avoid confusion, I refer to her as the respondent) raised 16 grounds of appeal. All of them were dismissed without receiving much attention from Murphy J. As a result, and because many of these grounds do not add to the matters under discussion here, I do not discuss all of them in detail.

On the question of whether the interests of certainty and the rights of an unmarried alleged biological father to know the truth should override the privacy rights of the non-consenting mother, and whether or not it will more often than not be in the best interests of the child to have any doubts about paternity

resolved, Murphy J found that it would indeed be in the best interests of the child for paternity to be scientifically verified. He further stated that his earlier judgement reflected a conscious balancing of the competing interests involved (481C–E).

The respondent also alleged that Murphy J had erred in not relying on the presumption in section 36 of the Children's Act (the presumption of paternity in respect of a child born out of wedlock). On behalf of the applicant (the respondent in the application for leave to appeal) the submission was made that the presumption in section 36 was inapplicable as, in terms of the common-law presumption *pater est quem nuptiae demonstrant*, the child was not born out of wedlock. Thus, the respondent's husband was rebuttably presumed to be the child's father. Murphy J confirmed that the respondent's husband was indeed rebuttably presumed to be Y's father and that such presumption would remain in place until it was rebutted. He explained that this point was not argued in the original trial and therefore was not considered in the judgement. He added (quite correctly) that even if the respondent admitted that the applicant was the father, it might not be sufficient to rebut the common law presumption. He held that the only conceivable reliable evidence available to the respondent to rebut the common law presumption would be a blood or DNA test, and (again, correctly) that section 36 found no application in the present circumstances.

The application for leave to appeal was dismissed.

4 Discussion

4 1 Presumptions of paternity and the marital status of the child's mother

Under our law there are two presumptions with regard to paternity. One applies in respect of the child of a woman who is a party to a marriage or a civil union and the other applies in respect of the child of a woman who is not a party to a marriage or a civil union. A child who is born of a married woman or a woman who is a party to a civil union is presumed to have been born to the spouses or civil union partners. In other words, the husband or male partner is presumed to be the father. This common law presumption is expressed as *pater est quem nuptiae demonstrant* (Boberg *Law of persons and the family* (1999) 353–354; Spiro *Law of parent and child* (1985) 20). This applies to children conceived before a marriage or civil union but born during its existence, as well as children conceived during the marriage or civil union but born after its dissolution. If, however, the child is born of a woman who is not a party to a marriage or a civil union, there is a statutory rebuttable presumption that a man is the father of the child only if it is proved that he had sex with the child's mother at a time when the child could have been conceived (Children's Act, s 36).

There are various ways in which a presumption of paternity may be proved or rebutted in South African law. One of these is through the use of blood/DNA tests. Until a few decades ago, blood tests were seldom used in South Africa in paternity disputes because they were not reliable (Heaton *The South African law of persons* (2008) 60). Although medical science has advanced dramatically since then, and the value and accuracy of blood tests are widely recognised

nowadays (Heaton *Law of persons* 64), the legal position with regard to the court's power to compel a person to undergo blood tests to establish paternity is, unfortunately, still uncertain.

At first, courts held that they could not compel a person to submit to blood tests (*E v E*), but they were prepared to accept the results of blood tests as evidence where the parties voluntarily submitted themselves to these tests (*Ranjith v Sheela* 1965 3 SA 103 (D); *Van der Harst v Viljoen* 1977 1 SA 795 (C)).

In more recent cases, however, the courts have not been unanimous on this issue. They have at times been prepared to order blood tests. In *Seetal* the court held that it had the power to authorise a blood test on a minor despite objections by the guardian, but held that in the particular case a blood test would not be in the child's best interests. This conclusion by the court made it unnecessary for the court to decide the issue of whether an adult could be compelled to undergo a blood test. In *O v O* the court similarly held that it may authorise blood tests on a minor despite objections by the child's mother, but that blood tests would, in the particular case, not be in the child's best interests. It was therefore unnecessary to consider whether an order should be made with regard to the mother (143H–I). The court also held that it had no power to compel an adult to submit to a blood test for the purpose of establishing paternity.

In *F v L* 1987 4 SA 525 (W) (which Murphy J did not refer to) the facts were very similar to those of the present case. A man applied for an order declaring him to be a child's father where the mother was married to another man. The court found that it would not be in the child's best interests to be declared illegitimate, held that the husband was presumed to be the father, *inter alia* by virtue of the *pater est quem nuptiae demonstrant* presumption, and rejected the application (528B–529B).

In *M v R* the court held that as the upper guardian of all minors it had the power to consent to a blood test on a minor where it was in the best interests of the child, even if the guardian opposed it (425F–G). The court ordered that a blood sample be taken from the child and be tested (429B–C). This was also the first case where the court held that it had an inherent power to compel an adult to submit to blood tests. Kotze J said that the pursuit of the truth conflicts with the right of privacy of the mother, but that, as the child's guardian, the mother should act in the child's best interests, even where those interests clashed with her own wishes (427A–B).

In *Nell v Nell*, however, the court refused to order blood tests on the mother of a child (897C – no order was sought with regard to the minor child), and in *S v L* the court held that it did not have the power to interfere with the decision of a child's parents not to submit the child to blood tests and also could not order an adult to submit to blood tests (721I–722A).

In *D v K* 1997 2 BCLR 209 (N), the most recent case to deal with the issue of blood tests to determine paternity, and which was also not referred to by Murphy J, the applicant was married when she fell pregnant, but she maintained that at the time she fell pregnant she did not have a sexual relationship with her husband. It was only when the child wished to pursue tertiary education that the applicant

sought an order compelling the respondent to submit to blood tests in order to establish whether or not he was excluded as the possible father of the child. This case was heard after the Interim Constitution came into effect, and Moodley J came to the conclusion that the court's jurisdiction does not extend so far as to cover the compulsory ordering of an individual to submit to a blood test against his will (221). The application was dismissed. What is important about this case is, firstly, that it is the only post-constitutional case to deal with blood tests with regard to paternity (prior to *LB v YD*) and that the constitutional right to privacy was raised for the first time in respect of blood tests in paternity disputes. Furthermore, the court held that one has to adopt the least intrusive method of achieving the desired result. Further, although the court concluded that it did not have to decide on its power to order an adult to submit to blood tests as provision had been made for this by way of the presumptions with regard to paternity (221), Moodley J believed that the presumption with regard to a party who fails to submit to a blood test wanting to hide the truth (s 2 of the Children's Status Act 82 of 1987, which preceded and was repealed by the Children's Act), indicated that the legislature did not approve of compelling an adult to submit to blood tests (218G–I –see also "4 2 Constitution" below, where the relevant constitutional rights are discussed).

From the above overview of the case law it can be deduced that some courts have been influenced by whether the child was born of married parents or of unmarried parents. In *Seetal* the court held that it had the power to authorise a blood test on a child despite objections by the child's guardian, but emphasised that the blood test must be in the best interests of the child, and that if the test were to disprove the paternity of the mother's husband, the child would be born of unmarried parents and lose his right to claim maintenance from his mother's husband. The court held that this would not be in the child's best interests and, as a result, declined to order blood tests (865H–866A). In *F v L* the application was similarly rejected because the court held that the answer to the question whether a natural father has the right to bastardise his child who is deemed to be the child of another (the mother was married to another man), has to be 'no' (528C–H). In *M v R* an unmarried man applied for an order compelling the child's mother to submit herself and her child to blood tests. The mother of the child was married (not to the child's father), and the child accepted and loved the mother's husband as his father. Kotze J did not have much sympathy with the applicant or his personal interests (422A–B; 422I–J) and only made the order to compel the mother to submit herself and the child to blood tests because the mother and her husband were planning to tell the child that the applicant was actually his father, and before the child was informed of a father other than the mother's husband, certainty had to be obtained to avoid possible later psychological problems (423A–B).

The respondent in the present matter was married. When Y was born, she was thus born to married parents. This fact is important, as a court's approach to the consideration of blood tests in a paternity dispute undoubtedly has to be influenced by the marital status of the mother. I say this because the marital status of the mother determines which presumption of paternity prevails. Even though the

respondent believed that the applicant was Y's father, Y was born to married parents and thus the presumption *pater est quem nuptiae demonstrant* stands until rebutted. In Murphy J's original judgment he mentioned that the respondent was married (466D 467D 478J) but he failed to take this fact into account during his deliberations. In the application for leave to appeal he held that the argument by counsel for the applicant that the respondent's husband was, in terms of the common law presumption *pater est quem nuptiae demonstrant*, rebuttably presumed to be Y's father, correct. However, he stated that this point had not been argued before him in the original case and had consequently not been considered (483F–G). This approach by Murphy J is incorrect. The common law presumption existed when the case originally came before him and should not have been ignored simply because it had not been argued. Y was at all times the child of married parents, not of unmarried parents.

If Murphy J had taken the fact that the child was born of married parents into account, he might have approached the decision with regard to blood tests differently. In the first place, the respondent's husband has parental responsibilities and right with regard to the child. These responsibilities and rights cannot simply be ignored. Furthermore, the statement that section 21, which deals with the parental responsibilities and rights of unmarried fathers, "has obvious relevance to the present application on account of it being common cause that the parties have never been married at any time" (476B–D), creates the impression that Y was regarded as a child of unmarried parents even without this having been established by means of a DNA test. It had not at that time been proven that the applicant was the father. Thus, the common law presumption with regard to paternity in the case of a child born to a married woman applied. The respondent's argument that she had always maintained that the applicant was the father, as well as the argument with regard to the presumption in section 36 would, in my view, have been of little consequence, as the common-law presumption would have operated, and should at least have been considered by Murphy J. It was however totally ignored or overlooked. My view should not be seen as a criticism of the decision that blood tests were necessary as I believe that it was necessary to compel the respondent to submit herself and her daughter to blood tests, but I am also of the opinion that such a decision should have been taken bearing all the facts in mind (see "5 Conclusion", where I discuss this issue).

4 2 Constitution

The Constitution is our supreme law, and constitutional values form the basis of the South African state (Kroeze "Doing things with values: The role of constitutional values in constitutional interpretation" 2001 *Stell LR* 265–276). It affords fundamental rights to every person in our country (s 7(1)). These rights include the right to privacy (s 14), the right to bodily and psychological integrity (s 12(2)), the right to human dignity (s 10) and, for children, that their best interests are of paramount importance in every matter concerning them (s 28(2)).

Most of the cases that relate to blood tests with regard to paternity disputes pre-date the introduction of a Bill of Rights into our law. Before the present case, it was only *D v K* that was heard after the coming into operation of the Bill of Rights in the Interim Constitution. In *D v K* the court considered section 11 (the

right to freedom and security of the person – s 12(1) of the Constitution) and section 13 (the right to privacy – s 14 of the Constitution) of the Interim Constitution, but neglected to consider section 30(3) (s 28(2) of the Constitution), which makes the child's best interests the paramount issue in all matters that concern them. This was an important oversight by the court in *D v K*, which should have considered the adult's rights on the one hand but also the child's rights on the other, and then used the limitation clause (s 33 – s 36 of the Constitution) to determine which right(s) should prevail.

In the present matter, Murphy J did consider the Bill of Rights in the Constitution, but only in so far as it impacted on the rule of *stare decisis*. He was in agreement with the views expressed in *State of South Dakota v Damm* (1936) 266 NW 667 and *State of Ohio ex Van Camp v Welling* (1936) 22 Ohio L Abs 448 (both cited in *Seetal*) and the view in *Seetal* that neither the discovery of the truth nor personal privacy is sacrosanct (86F–H). He came to the conclusion that the discovery of the truth should prevail over the idea that the rights to privacy and bodily integrity should be respected (471A–B). The approach he followed with regard to privacy and bodily integrity is, however, pre-constitutional and confusing and, I believe, identical to what he found with regard to legal precedent: it no longer necessarily reflects the *boni mores.*

Murphy J did not explain why he did not take the constitutional rights to, for instance, human dignity, freedom and security of the person, and privacy, into consideration (for a more detailed discussion of this aspect and the random use by Murphy J of the terms "privacy", "bodily integrity" and "dignity", see Heaton "The court's power to order blood tests in paternity suits" in *Law of persons* 2009 (4) *JQR*, available at http://products.jutalaw.co.za/nxt/gateway.dll?f=templates&fn=default.htm (accessed 3 May 2010)). He did not consider any constitutional rights other than the best interests of the child (except, as I have stated, with regard to legal precedent – more about this in the next paragraph). The problem with this approach is that both the applicant and the respondent have constitutional rights which have to at least be considered before a decision affecting them is made. The way to do this would be to consider all the relevant rights and then to use the limitation clause to determine which rights justify limitation under the circumstances. If Murphy J took cognisance of *D v K*, he would have, I believe, taken a different view of the conflicting rights of the adults and the child before deciding the matter. I say this because the court in *D v K* specifically considered whether the limitation of the right to privacy of an adult unwilling to submit to blood tests was justifiable in terms of the limitation clause of the Interim Constitution (220G–221C).

As a result of Moodley J's conclusion in *D v K* – that the limitation of the right to privacy that would result if a court ordered an adult to submit to blood tests would not be constitutionally tenable – Heaton argues that courts might in future be even more hesitant to order blood tests in paternity suits, on the ground that such orders violate the constitutional right to privacy as well as the right to bodily integrity (Heaton *Law of persons* 64). Unfortunately the court in *D v K* failed to consider the best interests of the child, thus making the decision questionable.

In the present case, Murphy J did rely on the best interests of the child to reach his decision. The best interests of the child are, as we know, paramount, but are not the only consideration (*Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) 428E–429A; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) 432A–C; *M v S* 2007 12 BCLR 1312 (CC) 1325G–H; Bonthuys "The best interests of children in the South African Constitution" 2006 *Int J of Law, Policy and the Family* 23). Although Murphy J was not bound by the decision in *D v K*, taking cognisance of that decision would have, or at least should have, influenced him to the extent that all the relevant and competing constitutional rights might have been considered and balanced, taking the limitation clause into account. Although the violation of a person's right to privacy is not regarded as unimportant, it has to be borne in mind that the constitutional right of a child that his/her best interest are paramount is equally important, and until a court actually considers these rights together in one single matter (as should have been done here), it will remain uncertain which right has to prevail.

5 Conclusion

As I have mentioned (see "4 1 Presumptions of paternity, and the marital status of the child's mother"), the use of DNA or blood tests to determine paternity in South Africa is fraught with uncertainty. The judicial inconsistency makes this a very unsatisfactory part of our law. In fact, it has been suggested that legislation should settle the controversy that currently exists as to whether South African courts have the power to order blood tests to establish paternity (South African Law Commission *Project 38 Investigation into the legal position of children born out of wedlock* (1985) 70–72; Boberg 382). The matter was not addressed in the Children's Status Act. The Children's Act would have been the ideal vehicle to provide legal certainty with regard to this matter, but the legislature has failed to grasp the opportunity. Reliance on recent, post-constitutional cases is thus the only way to determine the courts' attitude with regard to ordering blood tests in a paternity dispute. Apart from *D v K*, which was heard after the coming into operation of the Interim Constitution, but before the Constitution came into effect, the present case is the only case that deals with blood tests to determine paternity in a constitutional framework. It is also the first case that deals with blood tests in paternity disputes to be reported in 13 years, and the first case of this nature since the implementation of the Children's Act. As a result, the decision is an important one.

Unfortunately Murphy J did not consider all the relevant constitutional rights that could influence a decision about the ordering of blood tests (it was explained under "4 2 Constitution" that he considered constitutional rights only as far as they impacted on the rule of legal precedent, not with regard to the power to order blood tests). As a result, the conclusion reached by him might be viewed with scepticism. Furthermore, because he did not properly take cognisance of the marital status of the mother, his argument was based on incorrect assumptions and as a result does not contribute to resolving this very thorny issue.

Murphy J might not necessarily have come to a different conclusion, but the reality is that he failed to consider all the relevant facts and constitutional rights. The mother was married, and evidence on a balance of probabilities was needed to rebut the presumption that her husband is her child's father (*Van Luttersveld v Engels* 1959 2 SA 699 (A)). It is true that stigma is no longer attached to a child being born of unmarried parents (in *Seetal* the court declined to order blood tests because if the tests were to disprove the mother's husband's paternity, the child would have been born of unmarried parents) and that Y deserves to know who her biological father is. Even though an order compelling the respondent to submit to blood tests would undoubtedly infringe (at least) her right to privacy, I believe that in the circumstances of the present case an order to compel the respondent and Y to submit to blood tests was necessary. However, because Murphy J did not consider all the constitutional rights, all the facts or the appropriate existing presumption with regard to paternity, the decision's relevance is jeopardised. This is a great pity, as this decision could have provided some certainty in an area of the law where there currently is none.

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EFFECT OF THE DESTRUCTION OF A DWELLING ON THE PERSONAL SERVITUDE OF *HABITATIO*

Kidson v Jimspeed Enterprises CC
2009 5 SA 246 (GNP)

1 Introduction

It would appear that modern South African legal literature on the right of habitation (*habitatio*) as one of the conventional forms of personal servitudes is extremely sparse. In the normal property law curriculum applicable to personal servitudes, it is customary to allocate the lion's share of available time to usufruct (*ususfructus*), thereafter to gloss over the rights of use (*usus*) and, finally, merely to refer to *habitatio* in rather cursory fashion. This trend is reflected in the most recent leading property law textbooks, which normally contain the bare, concise definition of *habitatio* as the right of the servitude holder (and his or her family) to live in a building, usually mentioning in addition that the servitude holder is obliged to exercise his right *salva rei substantia*, as well as pointing out the advantage of this type of servitude over the personal servitude of use, in that the former entitles the servitude holder with the entitlement to let or sublet the premises in question to a third party, whereas the latter precludes such an arrangement (see Van der Merwe and De Waal "Servitudes" 24 *LAWSA* (1st reissue 2000) 352; see further Badenhorst *et al Silberberg and Schoeman's The law of property* (2006) 341; Du Bois *et al Wille's Principles of South African law* 610–611; *Mostert et al The principles of the law of property in South Africa* (2010) 248; Van der Walt and Pienaar *Introduction to the law of property* (2006)