THE LAW OF PERSONS

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LEGISLATION

BIRTHS AND DEATHS REGISTRATION AMENDMENT ACT 18 OF 2010

One of the objects of the Births and Deaths Registration Amendment Act 18 of 2010 ('the Amendment Act') is to align the Births and Deaths Registration Act 51 of 1992 ('the Act') with the Children's Act 38 of 2005 (para 1.3 of the Explanatory Summary of the Births and Deaths Registration Amendment Bill in Gen N 680 *GG* 33356 of 5 July 2010). Sections 1, 5*(d)* and 6 of the Amendment Act update sections 11 and 12 of the Act by replacing references to the Child Care Act 74 of 1983 with references to the Children's Act.

Section 1 of the Amendment Act further inserts a new definition of 'marriage' in section 1(1) of the Act and deletes section 1(2) of the Act. In terms of section 1(2), a customary marriage and a religious marriage which the Minister of Home Affairs is satisfied has actually been concluded are encompassed in the term 'marriage' for purposes of the Act. The new definition provides that 'marriage' refers to a civil marriage, customary marriage, civil union, and foreign marriage. Religious marriages have been omitted from the new definition. This change is in keeping with the rule that religious marriages are not fully recognized by South African law. (The courts and Parliament have extended limited recognition to Muslim and Hindu marriages for specific purposes: see, for example, section 10A of the Civil Proceedings Evidence Act 25 of 1965; section 1(1) of the Children's Act 38 of 2005; *Amod (Born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); *Khan v Khan* 2005 (2) SA 272 (T); *Hassam v Jacobs NO* 2009 (5) SA 572 (CC); *AM v RM* 2010 (2) SA 223 (ECP); *Hoosein v*

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Dangor 2010 (4) BCLR 362 (WCC).) Coupled with the deletion of section 1(2), the omission has the unfortunate consequence that a child born of a religious marriage cannot be registered as having been born of married parents. This consequence was probably unintended, for it seems illogical — if not downright absurd — for Parliament to confer joint parental responsibilities and rights on the parents of a child born of a religious marriage on the basis that the child is born of married parents (ss 19 and 20 read with the definition of 'marriage' in section 1(1) of the Children's Act) but to deny these parents the right to have the birth of their child registered as the birth of a child born of married parents.

The Amendment Act also seeks to reduce false registrations of birth which may occur because late registrations and registrations by agents are permitted. Allowing an agent to register a person's birth complicates verification of the details regarding the person and his or her date of birth and affords scope for fraud (slide 8 of 'Department of Home Affairs on the South African Citizenship Amendment Bill, Births & Deaths Registration Amendment Bill presentation', available at <http://www.pmg.org.za/report/20100803-department-home-affairs-south-african-citizenship-amendment-bill-b17->, accessed on 15 February 2011). Section 4*(a)* of the Amendment Act amends section 9(1) of the Act to restrict the persons who may give notice of a child's birth to either of the child's parents. If both parents are deceased, a person who falls within the list of persons prescribed by the regulations under the Act may give notice. Section 4*(b)* of the Amendment Act further inserts section 9(1A) into the Act. The new section provides that the Director-General of Home Affairs may require that biometrics of the person whose notice of birth is being given and of the person's parents be taken in the manner prescribed by the regulations. In terms of a new definition to be inserted in section 1 of the Act by section 1 of the Amendment Act, 'biometrics' means 'photographs, fingerprints (including palmprints), hand measurements, signature verification or retinal patterns that may be used to verify the identity of individuals'. The Amendment Act further drastically shortens the period before which the provisions regarding late registration of a birth take effect. At present, these provisions apply only if the notice of birth is given after one year from the person's date of birth. Sections 4*(c)* and *(d)* of the Amendment Act reduces this period to 31 days after the person's birth by deleting section 9(3) and substituting section 9(3A) of the Act.

Section 5*(a)* of the Amendment Act amends section 11(1) of the Act to provide that the only persons who may apply to have the registration of birth of a child born of unmarried parents amended to reflect the child's birth as if his or her parents were married to each other at the time of his or her birth are one of the child's parents or the child once he or she has attained majority.

In terms of section 11(4) of the Act, the father of a child born of unmarried parents who wants to acknowledge paternity and enter his particulars after the child's birth has been registered may do so with the consent of the child's mother (see also section 26(1) of the Children's Act). Section 5*(c)* of the Amendment Act inserts section 11(4A) into the Act. The new section stipulates that if the father has acknowledged paternity in terms of the Act, his particulars will be amended only if the amendment is supported by the prescribed conclusive proof that he is the father. This provision is aimed mainly at parents who register their child under one man's surname and subsequently want to have another man registered as the child's father ('South Africa: Govt targets fraudulent birth, deaths registrations', available at <http://allafrica.com/stories/201009170892.html>, accessed on 15 February 2011). Apparently such changes of the father's identity and particulars are frequently sought to enable the 'new' father to obtain an immigration permit. This practice has become known as 'rent-a-child' (slide 18 of Department of Home Affairs presentation).

Section 6 of the Amendment Act provides for notice of the birth of an orphaned child — a matter on which the Act is currently silent. The new provision is section 12(2) of the Act.

Section 14 of the Amendment Act also inserts a new section into the Act — section 27B. This section deals with recording an adoption or a change of an adopted child's surname. According to the Department of Home Affairs, these two provisions are required to bring the legislation in line with the Children's Act and to enable child-headed households to get assistance with registration of births of the children in the household ('Minutes of Department of Home Affairs briefing of the Parliamentary Committee on the Births and Deaths Registration Amendment Bill and the South African Citizenship Amendment Bill', available at <http://www. pmg. org.za/report/20100803-department-home-affairs-south-african-citizenship-amendment-bill-b17->, accessed on 15 February 2011; slide 19 of Department of Home Affairs presentation).

The Amendment Act also for the first time provides for empowering registered funeral undertakers to deal with matters

relating to the registration of deaths. Its section 8 inserts section 22A into the Act. The new section empowers any person who conducts a funeral parlour to apply to the Director-General of Home Affairs to be designated as a funeral undertaker for the purposes of engaging in activities relating to the registration of deaths in terms of the Act. If the application is approved, a designation number is allocated to the person (s 22A(1)). The designated persons have the power to act as agents regarding death registrations and to issue death certificates (slide 21 of Department of Home Affairs presentation; Minutes of Department of Home Affairs briefing). The object of the new provision is to ensure that only properly designated persons handle death registration forms, thus minimizing 'corruption in the process' (ibid).

Finally, section 18 of the Amendment Act amends section 31 of the Act by increasing the maximum duration of imprisonment which can be imposed upon conviction of any of the offences created by the Act from five years to fifteen years.

The Amendment Act will come into operation on a date to be proclaimed by the President (s 21).

Child Justice Act 75 of 2008

The Child Justice Act 75 of 2008 came into operation on 1 April 2010 (s 100). The provisions of the Act which are relevant for purposes of the topic of the present chapter were briefly mentioned in last year's survey on the Law of Persons as the Act was only published in 2009 (see *GG* 32225 of 11 May 2009).

Children's Act 38 of 2005 and Children's Amendment Act 41 of 2007

Sections 1–11, 13–21, 27, 30, 31, 35–40, 130–4, 305(1)*(b)* and *(c)*, 305(3)–(7), 307–11 and 313–15, and the second, third, fifth, seventh, and ninth items of Schedule 4 of the Children's Act ('the Act') came into operation on 1 July 2007 (Proc 13 *GG* 30030 of 29 June 2007). The remaining sections had to be inserted into the Act by the Children's Amendment Act 41 of 2007 ('the Amendment Act') and/or required regulations to be issued before they could be implemented. The Amendment Act came into operation on 1 April 2010, while the regulations under the Act were published on 31 March and 1 April 2010 (Proc R13 *GG* 33076 of 1 April 2010; GN R250 *GG* 33067 of 31 March 2010; GN R261

GG 33076 of 1 April 2010). The remaining sections of the Act could accordingly be brought into operation on 1 April (Proc R12 *GG* 33076 of 1 April 2010). The Act and Amendment Act were discussed in the 2006 *Annual Survey* 141–55, and 2007 *Annual Survey* 885–901.

South African Postbank Limited Act 9 of 2010

The South African Postbank Limited Act 9 of 2010 provides for and regulates the incorporation, governance, and functions of the Postbank Division of the South African Post Office as a bank. The Act also repeals certain provisions of the Postal Services Act 124 of 1998 (s 31 read with sch 1). Among the repealed provisions is section 52, which provides that deposits in the Postbank and national savings certificates in the name of a minor of any age may be repaid to the minor without the assistance or consent of his or her parent or guardian. The South African Postbank Limited Act does not contain a similar provision. Thus, when the latter Act comes into operation, minors who are below the age of seven years (infantes) will be incapable of receiving their deposits or investments; their guardian will have to do so for them as they have no capacity to act and thus cannot conclude any juristic act (see, for example, Voet *Commentarius ad Pandectas* 4.4.52, 26.8.4, 26.8.9; Van Leeuwen *Censura Forensis* 1.4.3.2; Van Leeuwen *Het Rooms-Hollands-Regt* 4.2.2). Minors between the ages of seven and eighteen will require the assistance of their parent or guardian to receive their deposits or investments as they have limited capacity to act (see, for example, Voet *Commentarius ad Pandectas* 26.8.2–4; Van Leeuwen *Censura Forensis* 1.1.17.10 and 1.4.3.2; Van Leeuwen *Rooms-Hollands-Regt* 1.16.8 and 4.2.3; Grotius *Inleidinge* 1.8.5, 3.1.26, 3.6.9 and 3.48.10; *Dhanabakium v Subramanian* 1943 AD 160; *Edelstein v Edelstein NO* 1952 (3) SA 1 (A)).

SUBORDINATE LEGISLATION

The fees for the issuing of a birth or death certificate, reproduction of an entry in the register of births or deaths, reproduction of supporting documentation relating to an entry in the register of births or deaths, verification of information in the birth or death register, amendment of an entry in the birth register, a change of forename or surname, and a duplicate confirmation of a change of forename or surname were amended as from 1 July 2010

(GN 697 *GG* 33444 of 13 August 2010). Some of those fees were increased, while others remained the same. However, the Government Notice in which the amended fees were published was subsequently withdrawn (GN 782 *GG* 33523 of 3 September 2010).

Regulation 15 of the regulations under the Identification Act 68 of 1997 was amended on 13 August 2010 (GN 696 *GG* 33444 of 13 August 2010). This regulation deals with certain fees. Like the Government Notice relating to the fees payable in terms of the Births and Deaths Registration Act, this Government Notice was subsequently withdrawn (GN 781 *GG* 33523 of 3 September 2010).

The regulations regarding the sections of the Children's Act which are administered by the Department of Justice and Constitutional Development were published on 31 March 2010 (GN R250 *GG* 33067). These regulations inter alia relate to children's courts. The remaining regulations relate to the sections of the Act which are administered by the Department of Social Development. The latter regulations were published on 1 April 2010 (GN R261 *GG* 33076). They deal with, inter alia, social, cultural, and religious practices; virginity testing; male circumcision; parental responsibilities and rights agreements; parenting plans; adoption; and consent to medical treatment of, or an operation on, a minor.

The regulations and certain directives in terms of the Child Justice Act 75 of 2008 were issued on 31 March 2010, a day before the Act came into operation (GN R251 and R252 *GG* 33067 of 31 March 2010). The Act, regulations, and directives mainly relate to Criminal Law and Criminal Procedure. However, for purposes of the law of persons, it should be noted that the Act increases the minimum age of criminal accountability from seven to ten years (ss 7(1) and (3)). A child between ten and fourteen years of age is presumed to be criminally unaccountable (ss 7(2) and (3)). Such a child has criminal capacity only if the state proves beyond reasonable doubt that when the alleged crime was committed, the child had the capacity to understand the difference between right and wrong and to act in accordance with that understanding (s 11(1)). To determine whether the child had such capacity, an inquiry magistrate or child justice court may, of own accord or at the request of the prosecutor or the child's legal representative, order an evaluation of the child's criminal capacity by a suitably qualified person (s 11(3)). Directives D1, D2, L1 and L2 and chapter 2 of the regulations reiterate

these rules and contain specific instructions on dealing with children and proof of their criminal capacity. Further, the Minister of Justice and Constitutional Development issued a determination on 1 April 2010 that registered medical practitioners with a registered speciality in psychiatry and clinical psychologists may conduct an evaluation of a minor's criminal capacity (Determination 1 GN R273 *GG* 33092 of 1 April 2010).

CASE LAW

Blood Tests in Paternity Suits

LB v YD 2009 (5) SA 463 (T) and *YB v LB (A)* 2009 (5) SA 479 (GNP) were discussed in the 2009 *Annual Survey* at 883–94. In *LB v YD*, the applicant (B) successfully sought an order compelling the mother of a child who was born of unmarried parents to submit herself (M) and the child (Y) to DNA tests for purposes of determining whether he was the child's father, and in *YB v LB (A)* M unsuccessfully sought leave to appeal against that order. The Supreme Court of Appeal subsequently granted M leave to appeal. In *YM v LB* 2010 (6) SA 338 (SCA), the Supreme Court of Appeal unanimously upheld the appeal against the order in *LB v YD*. Lewis JA delivered the judgment; Harms DP, Ponnan JA, Ebrahim AJA, and Pillay AJA concurred.

The Supreme Court of Appeal held that in civil cases the role and duty of the court is to determine disputes on a balance of probabilities (para [16]). Thus, if there is a dispute about paternity, the dispute has to be determined on a balance of probabilities (paras [13] and [16]). In the absence of a dispute, it is not the court's function to make orders to obtain scientific proof of undisputed paternity (para [16]). In the present case there was no real dispute about paternity for, with the exception of a letter B's attorneys had sent to M, B at all times acknowledged paternity of Y (paras [5], [6], [11] and [12]). M also acknowledged and treated B as Y's father (paras [5] and [7]–[9]). As B's paternity was not in dispute, it was not the court's function to enable B to obtain scientific proof of what was not in dispute (paras [13] and [16]). Lewis JA approved the view that in its capacity as upper guardian of all minors the court has the inherent power to order scientific tests if such tests are in the best interests of the child, but she held that the present case was not one where such an order should have been made, since there was no dispute about paternity (para [13]).

In an obiter dictum she stated, correctly, that the rights to privacy and bodily integrity may permissibly be infringed by ordering scientific tests on a minor if this is in the best interests of the child because the constitutional rights to privacy and bodily integrity may be limited if the limitation is justifiable in terms of section 36 of the Constitution of the Republic of South Africa, 1996 (para [15]). However, she criticized Murphy J's view in the court below that the discovery of the truth should generally prevail over privacy and bodily integrity. She stated that whether the discovery of the truth should prevail is a matter that should not be generalized as it is not always in an individual's interests to know the truth (para [16]). In each case the court must consider whether it is in the interests of the particular child to know the truth (ibid).

The decision by the Supreme Court of Appeal that the upper guardian of minors has an inherent power to order scientific tests if such an order is in the child's best interests at long last brings about certainty regarding the court's power to order scientific tests on minors in paternity disputes, and is most welcome. (On the previously uncertain legal position, see Trynie Boezaart *Law of Persons* 5 ed (2010) 101–6; Jacqueline Heaton *The South African Law of Persons* 3 ed (2008) 60–3; Waheeda Banoobhai & Shannon Hoctor 'The court's power to compel DNA testing in paternity disputes — *LB v YD* 2009 5 SA 463 (T)' (2009) 30 *Obiter* 791.) However, whether the court has the power to order an adult to submit to scientific tests in a paternity dispute remains uncertain because the Supreme Court of Appeal did not have to decide this issue as it upheld the appeal on the ground that the court should not have exercised its power to order a DNA test on the child (on the unclear position in this regard, see Boezaart op cit at 101–6; Heaton op cit at 62–3; Banoobhai & Hoctor op cit at 791).

Curator

Shea v Legator McKenna Inc [2008] 1 All SA 491 (D) is discussed in 2008 *Annual Survey* at 935. In this case, the court set aside the sale of immovable property belonging to an incapacitated woman by her curator bonis. In the document relating to the sale, the curator had added the words 'subject to approval of Master of High Court' below his signature. The sale occurred after the High Court had made an order declaring the incapacitated woman incapable of managing her affairs and

appointing the curator bonis but before the curator received letters of curatorship. The court order specifically stipulated that the curator had to exercise the powers conferred upon him subject to the approval of the Master of the High Court. After recovering from her brain injuries, the incapacitated woman successfully attacked the validity of the sale. The court below held that acts a curator bonis performs prior to receiving letters of curatorship are invalid. It set the contract of sale and the transfer of the immovable property into the name of the purchasers aside. The decision was overturned on appeal: *Legator McKenna Inc v Shea* 2010 (1) SA 35 (SCA). Analysing the facts of the case, the Supreme Court of Appeal found that by writing the words 'subject to approval of Master of High Court' below his signature on the purchasers' offer to purchase, the curator had made a counter-offer to the purchasers. The purchasers had either never accepted this counter-offer, or they had not indicated their acceptance in writing as is required by the Alienation of Land Act 68 of 1981. Thus, either no contract came into existence, or the contract did not meet the statutory requirements for validity (paras [17]–[18] and [30]–[31]). Consequently, the issue of the validity of the curator's entering into a contract before receiving his letters of curatorship did not have to be decided. The Supreme Court of Appeal then considered whether the transfer of the incapacitated woman's immovable property was valid despite the absence of a valid contract of sale. It discussed the relevant rules of the Law of Property, which are not of importance for purposes of the present chapter, and held that because South African law subscribes to the abstract theory of transfer of ownership, the transfer could not be set aside (paras [21]–[31]).

Parental Responsibilities and Rights of Unmarried Father

In *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA), the Supreme Court of Appeal overturned the decision in *Fish Hoek Primary School v Welcome* 2009 (3) SA 36 (C). The case concerns payment of school fees by the father of a child born of unmarried parents. The decision is discussed in the chapter on Family Law.

Universitas

South African law recognizes two categories of legal subjects — natural persons, and juristic or artificial persons. One of the

entities recognized as a juristic person is the common-law universitas or universitas personarum. In *Ex-TRTC United Workers Front v Premier, Eastern Cape Province* 2010 (2) SA 114 (ECB), the court had to decide whether the first plaintiff had locus standi in judicio. In doing so, the issue of whether the first plaintiff qualified as an universitas had to be decided. This is the only aspect of the decision that is relevant to the Law of Persons.

Van Zyl J pointed out that an universitas is a separate legal entity from its members and has rights and duties which are independent from the rights and duties of its members. These rights and duties include the capacity to own property and to sue and be sued in its own name (para [12]). In deciding whether the plaintiff qualified as an universitas Van Zyl J firstly rejected the contention that since the first plaintiff did not have a written constitution it did not meet the requirements for an universitas (para [18]). This contention was based on *Ex parte Doornfontein-Judiths Paarl Ratepayers Association* 1947 (1) SA 476 (W) in which it had been held that an association must enjoy perpetual succession and have a constitution in order to be an universitas. Van Zyl J rejected this decision because he found that the authority the court had relied on (*Leschin v Kovno Sick Benefit and Benevolent Society* 1936 WLD 9) did not lend support to the view that an association without a (written) constitution can never be a universitas. He found that in *Leschin* the court had merely held that in order to determine whether an association has the characteristics of an universitas, its nature, objects and constitution must be considered (para [18]). Furthermore, despite the absence of a written constitution or rules for the association, the Appellate Division (now the Supreme Court of Appeal) had held in *Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs* 1960 (3) SA 291 (A) that the Witwatersrand Association of Racing Clubs was an universitas (para [19]).

Van Zyl J held that the issue of whether the first plaintiff qualified as an universitas must be decided by having regard to its nature, object and activities. As the first plaintiff was established for the very limited objective of representing its members with regard to the rights and interests arising from their previous employment with the Transkei Road Transport Corporation and jointly instituting legal proceedings in this regard, Van Zyl J found that the association would terminate as soon as its limited objective had been achieved. Therefore the association did not meet the requirement of having perpetual succession and hold-

ing property separate from its members. Accordingly, the first plaintiff did not meet the requirements for being an universitas (para [20]).

Wrongful Birth

Sonny and Another v Premier, KwaZulu-Natal and Another 2010 (1) SA 427 (KZP) deals with the action for wrongful birth. The case is discussed in the chapter on Law of Delict.