

## THE LAW OF PERSONS

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### LEGISLATION

The Child Justice Act 75 of 2008 was published in GG 32225 of 11 May 2009. The Act is discussed in the chapter on Criminal Law. For purposes of the Law of Persons it should be noted that the Act raises the minimum age of criminal accountability from seven to ten years (s 7(1) and (3)). A child between ten and fourteen years of age is presumed to be criminally unaccountable (s 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)).

### SUBORDINATE LEGISLATION

The fees that are payable in terms of section 8 of the Births and Deaths Registration Act 51 of 1992 in respect of making various applications, obtaining a birth or death certificate, reproduction of an entry in the birth or death register, reproduction of supporting documents, verification of information from the birth or death register, and the issuing of a duplicate confirmation of the changing of a person's forename or surname have been revised. The revised fees came into operation on 1 April 2009 (GN R347 GG 32043 of 27 March 2009).

### DRAFT LEGISLATION

Draft regulations relating to the Child Justice Act were published for comment during the year under review (Gen N 1159 GG 32507 of 18 August 2009).

### 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) concern a dispute regarding the ordering of DNA tests on

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a child and her mother. In *LB v YD*, the applicant successfully sought an order compelling the mother to submit herself and the child to DNA tests for purposes of determining whether he was the child's father. In *YB v LB (A)*, the mother sought leave to appeal against that order. The court dismissed the application for leave to appeal. It held that some of the grounds for seeking leave to appeal were unfounded (paras [4]–[7], [10], [12], and [13]). In respect of other grounds the court was convinced that it had adopted the correct approach in *LB v YD* and that it was unlikely that a higher court would arrive at a different conclusion (paras [4], [5], [7], and [8]). As the two cases essentially relate to the same issues — the court's power to order DNA tests on an adult in civil cases dealing with disputed paternity, and its power to order such tests on a child in such proceedings — the two judgments are discussed together. The main point of reference is the decision in *LB v YD*. Where the court in the application for leave to appeal expanded on or reiterated the reasons it gave in *LB v YD*, references to *YB v LB (A)* are also included.

The applicant and the respondent in *LB v YD* lived together until seven months before the birth of the child whose paternity was in dispute. The respondent discovered her pregnancy a few days after the parties' relationship had ended. Shortly afterwards she became involved with another man and became intimate with him. She married this man four months after the termination of her relationship with the applicant. Around the time of the child's birth, the applicant's attorneys informed the respondent that the applicant denied paternity but was willing to pay the expenses relating to the child's birth if DNA tests showed that he was the child's biological father. The respondent was shocked by the applicant's denial of paternity but, after taking legal advice, decided to accept his denial because her husband was willing to assume paternity of the child. Her attorneys then wrote the applicant a letter informing him that their instructions were that he was indeed not the child's father and that he had no responsibilities and rights in respect of the child. The applicant then changed his tune. He requested the respondent to consent to blood tests as he was '100% oortuig' (para [11]) that he was the child's father. When the respondent refused to do so, the applicant launched the application to compel her to subject herself and the child to DNA tests. He explained his decision to bring the application by stating that if the tests were to show that he was indeed the child's father, he wanted to become an involved parent and exercise his

parental responsibilities and rights, including his financial responsibilities. He further stated that it would be in the child's best interests to know with certainty who her father was and for him to be a part of her life if he was her father. He submitted that he had a right to know whether he was the child's father and argued that this right as well as the child's best interests outweighed the minor invasion that would be occasioned by the blood test. The respondent opposed the application. She argued that the test was unnecessary because, with the exception of the letter written by her attorneys, she had always maintained that the applicant was the child's father and the applicant had admitted that he had sexual intercourse with her at the time when conception could have taken place. He had also stated that he was convinced that he was the child's father. She argued that these admissions and statements rendered the test an unnecessary invasion of her rights to privacy and dignity and also rendered the test contrary to the best interests of the child.

In dealing with the contentious issue of whether the court has the power to order an unwilling parent to submit himself or herself and his or her child to a blood test, Murphy J started off by pointing out that there is no legislation that specifically regulates the issue and that there are conflicting judgments in this regard (para [18]). He further stated that the conflicting judgments were delivered before the coming into operation of a Bill of Rights and the Children's Act 38 of 2005 (para [19]). This statement is partly inaccurate as one decision, *D v K* 1997 (2) BCLR 209 (N), was delivered after the coming into operation of the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution). Murphy J does not mention this case in either *LB v YD* or *YB v LB (A)*. Had he taken note of this case, he might not have dismissed the application for leave to appeal so lightly and he might have adopted a different approach in respect of the limitation of fundamental rights, as is explained below.

Be that as it may, with regard to the first main issue which had to be decided in *LB v YD*, namely, the court's power to order a blood test on a minor, Murphy J stated that most of the conflicting judgments favour the view that the High Court, acting in its capacity as upper guardian of all minors, has the power to authorise a blood test on a minor despite parental objections, and that the criterion for deciding whether or not to authorise the test is the child's best interests (para [19]). He made it very clear that he preferred this view, which had earlier been adopted in *Seetal v*

*Pravitha* 1983 (3) SA 827 (D), *M v R* 1989 (1) SA 416 (O), and *O v O* 1992 (4) SA 137 (C) (paras [22]–[24], and [30]). This view of Murphy J's is indeed correct.

The conflicting cases in which it had earlier been held that the court does not have the power to impose a blood test on a minor are *E v E* 1940 TPD 333 and *S v L* 1992 (3) SA 713 (E). In *S v L* the court held, inter alia, that its power as upper guardian does not extend to interfering with a parent's decision not to submit his or her child to a blood test even if the court thought that the test ought to be performed. It also held that the mere fact that a blood test might provide certainty with regard to paternity did not justify compelling a person to submit to the test. Nor did the primary objective of the court always have to be the ascertainment of the truth. Murphy J differed strongly from the latter view. He held that the truth 'is a primary value in the administration of justice and should be pursued, if not for its own sake, then at least because it invariably is the best means of doing justice in most controversies' (para [21]). Excluding reliable evidence because it involves a relatively minor infringement of privacy (s 14 of the Constitution of the Republic of South Africa, 1996) would usually harm the administration of justice (para [21]). He then held that, as a general rule, the discovery of the truth should trump the rights of privacy and bodily integrity but that this does not mean that the rights to privacy and dignity must 'invariably be sacrificed to the needs of the administration of justice' (paras [23] and [24]; s 12(2) of the Constitution protects the right to bodily integrity, and s 10 the right to dignity). Without giving authority for his view, Murphy J held that there is a well-established principle that *privacy and dignity* 'must yield to the needs of the proper administration of justice when it is reasonable and justifiable for them to do so, taking into account the importance of the purpose and necessity of getting to the truth' (para [24]). Presumably the 'well-established principle' Murphy J had in mind is to be found in section 36(1) of the Constitution, which permits a limitation of a fundamental right if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account inter alia the importance of the purpose of the limitation (in this case, getting to the truth in the interest of the administration of justice).

It is necessary to digress slightly at this point to deal with Murphy J's statements regarding the constitutional rights which are at issue in a case such as this, because one of the puzzling

aspects of his judgments in both *LB v YD* and *YB v LB (A)* is his random references to the rights to privacy, bodily integrity, and dignity. Sometimes he mentions only privacy (*LB v YD* paras [21], [28], [30], and [34]; *YD v LB (A)* paras [2], [3], and [4]). Other times he mentions privacy and dignity in one breath (*LB v YD* paras [24], [34], and [42]). Occasionally he refers to bodily integrity; once on its own (*LB v YD* para [16]) and twice coupled with privacy (*LB v YD* paras [18] and [23]). Strangely, whenever he mentions the right to bodily integrity, he omits the right to dignity. In *YD v LB (A)* he does not refer to dignity or bodily integrity at all. These inconsistencies create the impression that he might be of the view that compelling a person to submit to a blood test primarily violates the person's privacy. They also create the impression that he either views the right to dignity and the right to bodily integrity as interchangeable (which is a highly controversial view to adopt), or that he is not quite certain which fundamental rights are at issue. Of course, both dignity and bodily integrity are at issue, as are the right to privacy, the right of the child in terms of section 28(2) of the Constitution to have paramountcy afforded to his or her best interests in all matters concerning him or her, and the right to equality, which is contained in section 9 of the Constitution. (Murphy J refers to the right to equality in *LB v YD* para [43] and *YD v LB (A)* para [3].) The child's right to parental care, which is contained in section 28(1)(b) of the Constitution, may also be at issue.

To return to the main discussion: With regard to the second issue in *LB v YD* — the court's power to order an adult to submit to a blood test against his or her will — Murphy J pointed out that the courts have been more reluctant to order a blood test on an adult than a minor (para [26]). In *M v R* (supra), the court held that the High Court's inherent power to determine its procedure empowers it to compel an unwilling adult to submit to a blood test (see also *Seetal v Pravitha* 1983 (3) SA 827 (D)). In *Nell v Nell* 1990 (3) SA 889 (T), by contrast, the court held that ordering someone to submit to a blood test is not merely a procedural matter, because the order also affects principles of substantive law in that the test involves a violation of the person's bodily integrity. (Murphy J did not mention this, but the view that ordering someone to submit to a blood test is not merely a procedural matter was also adopted in *S v L* (supra) and *D v K* (supra).) Sitting as a single judge, Le Roux AJ in *Nell* considered himself bound by the precedent of the full court in *E v E* (supra),

where it was held that the court does not have the power to order a blood test against a person's wishes, as doing so would be *contra bonos mores*. Murphy J disapproved of the view in *Nell* and found that that holding that the ordering of a blood test goes beyond the scope of the court's inherent procedural power is too restrictive an interpretation (para [29]). He preferred the view of Vieyra J in *Ex parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) that this inherent power is not merely derived from the need to make the court's order effective and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation (para [29] read with para [27]).

Before being able to make a firm finding that the court is empowered to order a blood test on a child and an unwilling parent, Murphy J had to contend with the precedent system, which, *inter alia*, requires that a single judge must follow an earlier ruling of a full bench of the same division unless the decision was delivered before the coming into operation of the Bill of Rights and was based on considerations of public policy which no longer reflect society's *boni mores* (*Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 39D–E). As the full bench in *E v E* (supra) had held the opposite of what Murphy J wanted to hold, he had to use changed public policy to justify deviating from *E v E*. Based on his view of what the Bill of Rights provides for, Murphy J concluded that he was not bound by the judgment (para [36]). He held that *E v E* advanced a public policy which does not conform to the Bill of Rights, as it does not balance competing rights (paras [34]–[35]; see also *YD v LB (A)* para [13]). (Murphy J's statement also related to *Nell v Nell* (supra), although the latter case was decided by a single judge in the same division and was thus not binding on him.) He pointed out that the Bill of Rights protects the paramountcy of the child's best interests, the right to privacy, and the right to dignity. He further stated that in the case of competing fundamental rights, the court must balance the rights while bearing in mind that the child's best interests must be the paramount, but not the only, consideration (para [35]; see also *YD v LB (A)* paras [2] and [6]). He held that section 28(2) of the Constitution, which provides that the child's best interests are paramount in every matter concerning the child, 'is a strong indication, where the competing interests of a parent's privacy/dignity and the child's interests are at stake, that the latter should trump the former unless there are compelling reasons to the

contrary' (para [34]). These pronouncements by Murphy J are broadly in line with the view of the Constitutional Court that rendering the child's best interests paramount does not mean that all other constitutional rights may simply be ignored, or that limitations of the child's best interests are impermissible (*Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) para [20]; *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) para [29]; *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC) paras [25], [26], and [42]; see also the obiter statement in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) para [55]). Instead, the correct approach is to apply the 'paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally-protected interests' (*S v M* supra para [25]). As Murphy J concluded that the approach in *M v R* was more in keeping with the balancing of competing interests which is required by the Constitution (para [35]; see also *YD v LB (A)* para [4]), he opted to follow that approach rather than the decision in *E v E*.

Although I do not question Murphy J's conclusion that he was justified in deviating from *E v E* (supra), I am troubled by the manner in which he used the approach in *M v R* (supra). In *M v R* it was held that the child's interests must be considered with due regard to considerations such as the pursuit of truth, the demands of reality, the appropriate interdependence and interaction between a child and his or her family and blood relations, the risk which the blood test might hold for a person's health, and the right to privacy. Murphy J seems to have lost sight of the fact that, although the approach in *M v R* might be more in keeping with the balancing exercise which is required by the Bill of Rights, the enactment of the Bill of Rights after *M v R* meant that he could not simply adopt that approach and omit a constitutional limitation investigation. As there was no need to do so, the court in *M v R* did not engage in any attempt to establish whether, and how, privacy could constitutionally be balanced with the child's best interests, or whether the infringement of the right to privacy which would be caused by a court-ordered blood test could be constitutionally justified, but Murphy J most certainly should have engaged in this sort of investigation. However, nowhere in either of his judgments did he give proper consideration to the issue of whether the limitation of the various fundamental rights by a court-imposed blood test can be justified in terms of section 36 of

the Constitution. Perhaps he would not have committed this error if he had taken account of the post-Bill of Rights decision in *D v K* (supra), for Moodley AJ's obiter dictum might have reminded him of the limitation analysis that had to be undertaken.

In *D v K*, Moodley AJ, in an obiter dictum, considered whether the limitation of the right to privacy which would be occasioned by a court order compelling an unwilling adult to submit to a blood test to determine paternity was justifiable in terms of the limitation clause in the interim Constitution. *D v K* dealt solely with the court's power to compel an unwilling adult to submit to a blood test. The court dismissed the application on the ground that its inherent procedural power did not extend to the making of the order sought. As a result of this finding, Moodley AJ did not have to consider the constitutional dimensions of an order compelling an unwilling adult to submit to a blood test but he nevertheless briefly did so. At the time of the decision the interim Constitution was in operation. Its section 13 protected the right to privacy and its section 33 contained the limitation clause. Section 33(1) permitted a limitation of the right to privacy by law of general application, provided that the limitation would be permissible only to the extent that it was reasonable and justifiable in an open and democratic society based on freedom and equality and provided further that the limitation did not negate the essential content of the right. Moodley AJ held that the fact that Parliament had enacted a presumption that a party who fails to submit to a blood test wants to hide the truth (s 2 of the Children's Status Act 82 of 1987, which was the predecessor to s 37 of the Children's Act) indicated that Parliament did not approve of compelling an adult to submit to a blood test (at 218G-I). This view reflected what was considered reasonable (at 221B-C). Moodley AJ accordingly concluded that the limitation of the right to privacy by the court's ordering an unwilling adult to submit to a blood test in a paternity dispute would not be constitutionally tenable. (As an aside, I should mention that Moodley AJ's obiter dictum is also not above reproach. One of the grounds on which it can be criticised is that Moodley AJ did not take any other fundamental right, such as the child's right to have paramountcy afforded to his or her best interests, into account. Another is that he equated the legislature's view with what is constitutionally permissible in terms of the limitation clause.)

Another troubling aspect of Murphy J's judgment in *LB v YD* is his view regarding the relationship between the common law and

a fundamental right in the context of the court's power to order a blood test. He stated that because section 8(1) of the Constitution provides that the Bill of Rights applies to all law and binds the judiciary, all courts must ensure that the common law conforms to the Bill of Rights. This much is correct. Crucially, however, he failed to mention that section 8(3) of the Constitution instructs the court when applying a provision of the Bill of Rights to apply or, if necessary, develop the common law to the extent that legislation does not give effect to the particular fundamental right. Murphy J continued: 'Hence, the enquiry in a case such as the present can be formulated as being whether or not the common-law jurisdiction of the High Court might be deployed to override parental privacy in the best interests of the child and/or the administration of justice' (para [34]).

Murphy J's formulation of the enquiry and his omission of section 8(3) convey an incorrect understanding of what it is that the Bill of Rights permits the judiciary to do with regard to the common law. In the present case, the enquiry should not have been whether the common-law jurisdiction of the High Court can override the fundamental right of privacy. As the Constitution is the supreme law, a provision of the common law cannot be used to override a fundamental right. The enquiry should instead have been formulated as whether giving effect to the child's fundamental right to have paramountcy afforded to his or her best interests required development of the common law (more specifically the rules regarding the court's common-law powers to regulate its own procedure and/or its inherent powers as upper guardian of all minors). In this enquiry due regard should have been given to balancing the child's best interests as against the other fundamental rights which are at issue, such as the right to privacy, and the right to bodily integrity.

After dealing with the Bill of Rights, Murphy J considered the provisions of the Children's Act regarding the parental responsibilities and rights of unmarried fathers. In terms of section 21(1), an unmarried father acquires the same parental responsibilities and rights as the child's mother if he lives with the mother in a permanent life partnership when the child is born (s 21(1)(a)). Regardless of whether he has ever lived with the child's mother, he also acquires the same parental responsibilities and rights as the mother if he consents or successfully applies to be identified as the child's father in terms of the Act, or pays damages in terms of customary law, and contributes or attempts in good faith to

contribute to the child's upbringing and maintenance for a reasonable period of time (s 21(1)(b)). Murphy J correctly found that the first requirement for a man's acquisition of paternal responsibilities and rights in terms of section 21(1) is that he must be the child's father (para [39]; see also *YD v LB (A)* para [5]). Murphy J further stated, equally correctly, that the conferment of automatic parental responsibilities and rights on certain unmarried fathers by section 21 is a significant change from the former position at common law and in terms of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, in terms of which the court could confer guardianship, custody, or access on the father if this was in the child's best interests (paras [38]–[39]). Now section 21 does not require proof that the conferment of parental responsibilities and rights is in the child's best interests (para [43]; see also *YD v LB (A)* para [5]). Murphy J held that the changed position and extended responsibilities and rights of unmarried fathers required that the truth be established by scientific means before a man is burdened with responsibilities which he may not legally need to bear (paras [39] and [42]).

Murphy J also referred to sections 36 and 37 of the Children's Act. Section 36 sets out a presumption of paternity in respect of a child of unmarried parents. It provides that a man is presumed to be the father of a child born of unmarried parents if it is proved that the man had sexual intercourse with the child's mother at any time when the child could have been conceived. The presumption operates in the absence of evidence to the contrary which raises a reasonable doubt. Section 37 provides that if a party to a paternity dispute refuses to submit himself or herself or a child to a blood test for the purposes of scientific paternity tests, the court must warn the party of the effect the refusal might have on his or her credibility. In the present case only section 37 applied, as the child was born during the subsistence of the marriage between her mother and the man who became her mother's husband after the break-up of the relationship between her mother and the applicant. The *pater est quem nuptiae demonstrant* presumption of the common law accordingly applied in this case and rendered the mother's husband the child's presumed father (*YD v LB (A)* paras [9]–[10]). Murphy J held that section 37 does not contribute much in respect of the issue of whether the court has the power to order a person to submit to a blood test. He rejected the view of the respondent's counsel that section 37 was a clear indication that the legislature wanted the courts rather to draw the adverse

inference mentioned in the section than to compel a person to submit to a blood test (*LB v YD* para [42]). (Counsel's argument was in keeping with the view Moodley AJ adopted in *D v K* in respect of the predecessor of section 37 of the Children's Act.) Murphy J further pointed out that resorting to drawing an adverse inference of a person's credibility does not provide an answer as to whether or not the applicant is really the child's father (para [42]; see also *YD v LB (A)* para [3]). Nor would the mere application of section 37 enable the applicant to rebut the *pater est quem nuptiae demonstrant* presumption, for the presumption operates until it is rebutted and altered by a court order (*YD v LB (A)* paras [10] and [12]).

Based on his findings that he was not bound by *E v E*, that the court's power as upper guardian of all minors includes the power to order a blood test on a minor, and that the court's inherent power to regulate its procedure includes the power to compel a person to submit himself or herself to a blood test, Murphy J concluded that he was legally empowered to order a blood test on an unwilling adult and a minor. This led him to consider whether ordering a blood test in the present case would be in the child's best interests. He held that each case should be evaluated on its own facts (para [46]). He specifically indicated that he did not attach much weight to the 'expedient that concealing the truth from a child might have the supposed advantage of not "bastardising" the child or cutting it off from an established source of maintenance' (para [46]; in *Seetal v Pravitha* (supra), Didcott J relied on these factors to found his decision that ordering a blood test would not be in the child's interests). Murphy J held that compelling a man who was not really the father of a child to bear responsibilities for that child would inherently and inescapably result in injustice (para [46]). This dictum is welcome and in keeping with the approach in *M v R* (supra) that money which is wrongly taken from a man who is not really the child's father is not a 'benefit' that should be taken into account and protected by the court (see also Jacqueline Heaton *The South African Law of Persons* 3 ed (2008) 63). As regards the child's losing the status of having been born of married persons, Murphy J supported the view of the Australian court in *Lamb v Lamb* (1977) FLC 90–225 that there are many cases where the determination of paternity would 'set at rest nagging doubts and festering resentments' which have a detrimental effect on the

child's welfare (para [46], quoting *Lamb v Lamb* as cited in *Seetal v Pravitha* supra at 838H). Thus a 'clearing of the air' might ultimately be in the child's interests (ibid). Further, the stigma of having been born of unmarried parents is fading and knowledge of one's biological parentage is becoming increasingly important in the treatment or amelioration of genetic weaknesses (ibid). Murphy J considered the present case to be one where a clearing of the air was needed. He further took the fact that the child was only eleven months old into account and held that there was no established relationship which might be unduly disturbed or harmed if a particular man were scientifically proved not to be her father (para [47]). Determining whether the applicant was her father would remove the stigma of her disputed paternity and, if the applicant was indeed her biological father, the child would benefit from knowing the truth and from the applicant's commitment to her financial wellbeing. The applicant could then also obtain other parental responsibilities and rights over her. Murphy J concluded that it would be in the child's best interests that paternity be scientifically determined (para [47]; see also *YD v LB (A)* para [7]). He accordingly ordered the respondent to submit herself and her child to DNA tests for the purpose of determining whether the applicant is the child's biological father. The applicant was ordered to pay the costs of the tests (para [48]).

In an obiter dictum Murphy J also dealt with judicial notice of the results of blood tests. He stated that in view of our courts' acceptance of the high degree of accuracy of these tests in establishing probable paternity, a court may take judicial notice of the existence of these tests. Medical evidence about the nature and accuracy of the tests need not be led in court. The reliability of a particular test may, however, be challenged after the test has been performed (para [33]). Although only obiter, this view is welcome, as the value and accuracy of blood tests is widely recognised nowadays (see also Heaton op cit at 64). In terms of section 21 of the Maintenance Act 99 of 1998, a court may even order the State to pay the costs, or part of the costs, of scientific paternity tests if both parties agree to submit to the tests but cannot afford to pay for them. Surely the courts should be prepared to take judicial notice of the technique and reliability of blood tests if Parliament considers these tests accurate enough to warrant the State bearing the costs of the tests in maintenance court cases.

## CHILDREN BORN OF UNMARRIED PARENTS

### *Acquisition of parental responsibilities and rights by an unmarried father*

*Fish Hoek Primary School v Welcome* 2009 (3) SA 36 (C) concerns the liability of the non-care-giving parent of a child born of unmarried parents for the child's school fees. The decision was overturned on appeal in *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA). However, it should be noted that the Supreme Court of Appeal did not reject the part of the decision of the trial court in which it was held that section 21 of the Children's Act does not retroactively confer parental responsibilities and rights on the father of a child born of unmarried parents (at 45–6).

### *Consent to the adoption of a child born of unmarried parents*

*AS v Vorster NO & others* 2009 (4) SA 108 (SEC) deals with a mother's consent to the adoption of her child, who was born of unmarried parents. The case is discussed in the chapter on Family Law.

## CURATOR

In *Shea v Legator McKenna Inc & others* [2008] 1 All SA 491 (D), a curator bonis sold immovable property belonging to an incapacitated woman whose affairs he managed. In the document relating to the sale, the curator wrote 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 own affairs and appointing the curator bonis but before the curator received letters of curatorship. The court order specifically stipulated that the curator was required 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 held that acts a curator bonis performs after being appointed by the court but prior to receiving letters of curatorship are invalid (at 497I–J). 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 & another v Shea & others* [2009] 2 All SA 45 (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 bonis 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. The court discussed the relevant rules of the Law of Property, which are not important for present purposes, 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]).