IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 50880/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

DATE: 11 AUGUST 2021

In the matter between:

M[…] S[…] N[…]	**APPLICANT**
And	
C[…] Z[…] M[…]	**FIRST RESPONDENT**
THWANE ATTORNEYS	**SECOND RESPONDENT**
DEPARTMENT OF DEFENCE	**THIRD RESPONDENT**
GOVERNMENT EMPLOYEES FUND	**FOURTH RESPONDENT**
MASTER OF THE HIGH COURT	**FIFTH RESPONDENT**

JUDGMENT

TLHAPI J

[1] This is an application in which the applicant, mother of the Late M.J.S. who died on 30 July 2011 disputes that her son is the father of two minor children, N.M. born on […] 2003 and J.M. born on […] 2006. The application was launched on July 2014 seeking the following relief:

1.1 that an order be made compelling the first respondent to make the minor children available for paternity tests;

1.2 that the court order dated 24 May 2013 under case number 22029/13 be rendered unenforceable / stayed until the paternity tests become available;

1.3 that the body of her late son be exhumed for the purpose of conducting the paternity tests;

1.4 that the respondents be interdicted to enforce the court order under case number 22029/2013 and or to not enforce or comply with the court order granted on 24 May 2013 by this Honourable Court until such time that the paternity of the above minor children has been established;

1.5 Alternatively if the pension benefit amount has already been paid out Into the first respondent's account or her Attorneys account the first respondent to ensure that such amount is not used until such time the paternity tests are done;

1.6 that the applicant make all arrangements for the exhumation of the

deceased for conducting paternity tests and the first respondent ensure that the minor children are availed for such tests. Should the tests not establish paternity the children be prohibited from inheriting from the deceased estate and pension funds of the deceased;

1.7 that should the first respondent fail to avail the minor children for such tests on a date to be determined by the attorneys of the applicant the first respondent and said minor children be excluded by the third to the fifth respondents from deriving any benefit from the deceased's estate.

1.8 The first respondent to pay the costs of the application;

[2] The application was opposed by the first and second respondent. The first respondent abandoned the point *in limine* raised relating to the *locus standi* of the applicant. The first and second respondents notice of exception and notice to strike out certain averments in the founding affidavit were not pursued and were removed.

BACKGROUND

[3] The applicant brings this application to contest the entitlement to a pension benefit and deceased estate of her son who died while in the employment of the third respondent. She alleges that the deceased left a Will appointing her as the only beneficiary to his estate. At the time of his death he conducted a relationship with the first respondent and the applicant contended that no children were born of this relationship. She contended that the deceased had never maintained the minor children and had no obligation to do so because he was not their biological father.

[4] The applicant contacted the third respondent to lay claim to the deceased's pension benefits of her deceased son and she was informed of the existence of a court order directing the pension benefits to be paid out to the first respondent. She

was not aware of the application because she was awaiting the minor children to be subjected to a paternity test.

[5] The reason for demanding a paternity test was because the deceased had many girlfriends before he met the first respondent and no children were born of these previous relationships. Further, she contended that the deceased had informed her a long time ago that he could not bear any children, as a result of the damage the physical torture he was subjected to by the apartheid government caused to his ability to procreate.

[6] The applicant denied any knowledge of the minor children; she had never seen them in her life; they had never accompanied the deceased to visit her home; he was always alone when he visited her and she had never found them at his flat when she went to visit him in Pretoria.

[7] The first respondent stated that she owned her own property in Garankuwa which she acquired before she met the deceased. She moved to the deceased's flat in Sunnyside during 2004 where she lived with the deceased and the minor children up to the time of his death. According to the first respondent each of the children were introduced to the applicant and she visited the applicant's home with the deceased and the children every December and the applicant had also paid them visits and, on one such occasion the applicant was a guest at the flat for five days.

[8] The deceased was their biological father and she annexed their birth certificates which reflected her surname and also the baptismal certificates which recorded the deceased as their father. The deceased had never disputed paternity during his lifetime and even the applicant had never questioned their paternity during the lifetime of the deceased. She contended that the applicant had failed to make out a case why she was entitled to benefit from the deceased's pension benefits. She further contended that she was not married to the deceased and had no interest in

benefiting in her personal capacity from his estate, except that the minors as his children were entitled to inherit from his estate and to receive his pension. The first respondent also annexed documents to show that during his lifetime, the deceased had made applicant and the minors beneficiaries to some of his insurance policies. The first respondent contended that the applicant had not attached the Will of the deceased to her founding papers and if indeed there was a Will appointing her as sole beneficiary then, there would be would be no need for the applicant to insist on subjecting the minors to a paternity test.

ISSUES TO BE DETERMINED

[9] The issue relates to the paternity of the two minor children and whether the applicant has made out a case for an order to exhume the body of the deceased and to subject the minor children to a paternity test after exhumation. Further, whether this court can stay or render an existing order of this court unenforceable.

THE LAW

[10] This is a novel case where the mother of a deceased person wishes to establish paternity, not by means of DNA extracted from blood samples, as provided by the Children's Act 38 of 2005, and as dealt with in a plethora of cases. The applicant expects DNA to be extracted from the skeletal remains of her deceased son to be compared with DNA extracted from the blood samples of the minors, an no blood samples are required of the first respondent. For this to happen, the court is expected to order the exhumation of the remains of the applicant's deceased son.

[11] Despite knowing of the relationship between the first respondent and her son, the applicant based her case on a suspicion, mainly hearsay, that the children born during the relationship were not the children of the deceased. It is my view that had the son been alive, the rebuttable presumption in Section 36 of the Children's Act

would be applicable, in that the man would be presumed to be the father of the child if it can be proved that he had sexual intercourse with the mother around the time that the child was conceived. Section 36 provides:

> *"If in any legal proceedings in which it is necessary to prove that any particular person is the father of* a *child born out of wedlock it is proved that that person had sexual intercourse with the mother of the child at any time the child when the child could have been conceived, that person is, in the absence of evidence to the contrary which raises reasonable doubt presumed to be the biological father of the child."*

[12] This did not prevent a party from demanding that scientific tests be conducted to prove paternity. Section 37 of the Children's Act deals with a situation where a party refuses to subject himself or herself or the child to taking blood samples. This in my view relates to DNA from blood samples taken from the parents and the child or children and it could maybe entail other relatives, to carry out scientific tests to establish paternity. In *YM v LB* 2010 (6) SA 338 (SCA) (referring to the matter of Pravitha and Another NO (1983 (3) SA 827(0)) confirmed the inherent power of the court as upper guardian of children to order scientific tests only if it was in the best interests of the child and at paragraph [13] Lewis JA stated:

> *"[16] However , whether the discovery of truth should prevail over such rights is* a *matter that should not be generalised. As Didcott J said in Seetal it is not necessarily always in an individual's interest to know the truth. In each case the court, faced with* a *request for an order for* a *blood test or* a *DNA test, must consider the particular position of the child and make the determination for that child only. The role of* a *court, and its duty, is to determine disputes in civil matters on* a *balance of probabilities. It is not* a *court's function to ascertain scientific proof of the truth."*

[13] In this matter the court is not dealing with a paternity dispute between a parent and child but with the suspicions of the applicant, "a putative grandmother" if I may refer to her as such. The question is why would the court be approached to subject the minors to a blood test, is it to satisfy the suspicion of the applicant? Factual disputes are apparent from the papers where the applicant, while not denying that there was a relationship between the deceased and the first respondent, entirely denies knowledge of the existence of the children. On the other hand the first respondent contends otherwise. The matter has therefore to be decided upon the trite principles in Plascon Evan Paints Ltd v Van Riebeeck Paints Ltd 1984(3) SA 623 (A) 634E-635C.

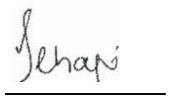
[14] The applicant has availed no objective facts upon which she bases her belief that the minors are not the children of the deceased, except her reliance upon hearsay. Counsel for the applicant has addressed issues, which were not canvassed in the founding affidavit about the status of the deceased estate with the Master of the High Court, I shall deal with what is on the papers before me. As I see it, what is the determining factor is that the deceased did not dispute paternity at any time during his lifetime and while he lived with the first respondent and the minors, neither did the applicant question their paternity. The first respondent is not claiming any interest in the deceased's estate because, as she states, they were not married to each other. It is recorded on the children's baptismal certificates that he is the father and these certificates were issued on 12 October 2003 and 25 March 2007, which was many years before his death and at a time when the said minors on both occasions were barely six months old. The deceased also ensured that he provided for them by providing a home (the flat) cared for them and made them beneficiaries to a policy in the event of his death.

[15] If there is a Will appointing the applicant as sole heir and the Master has accepted and registered same as the deceased's Will, then it means the deceased

disinherited the minors and they would not benefit from the deceased estate. The first respondent would be entitled, if she so desired to lodge a claim for maintenance on behalf of the minors from the estate. The deceased's pension benefits do not form part of a deceased estate except under certain exceptions as provided in section 37C of the Pension Benefits Act 24 of 1956. In as far as there is a court order pertaining to such benefits, whether rightly or wrongly obtained, it is trite that this court shall observe such order until lawfully set aside. Having taken into account the evidence before me, it is not in the best interest of the children to have the remains of their father exhumed and to subject them to blood tests to determine paternity. Consequently, this application is to be dismissed.

[16] In the result the following order is granted:

1. The application is dismissed with costs.



TLHAPI VV
(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	06 OCTOBER 2020
JUDGMENT RESERVED ON	06 OCTOBER 2020
ATTORNEYS FOR THE APPLICANTS	LM DIKOTOPE ATT.
ATTORNEYS FOR THE RESPONDENTS	THWANEATT