CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 51/00

DIKGANG ERNEST MOSENEKE	First Applicant
KARABO MABEL MOSENEKE	Second Applicant
MALATSI VINCENT MOSENEKE	Third Applicant
KABELO DUNSTAN MOSENEKE	Fourth Applicant
TIEGO MOSENEKE	Fifth Applicant
versus	
THE MASTER OF THE HIGH COURT	Respondent

Heard on : 21 November 2000

Decided on : 6 December 2000

JUDGMENT

SACHS J:

Introduction

[1] This case, which concerns the administration of deceased estates, reminds us that transition is a process. According to laws enacted during our racist past, when a white person dies without leaving a will his or her estate must be administered by the Master of the High Court. When a black person dies intestate, however, his or her estate must be administered by a

magistrate. This difference, rooted as it clearly is in racist attitudes and practices of the past, must change. Yet as this case illustrates, such change cannot be achieved with a simple stroke of a pen.

[2] In October 1999 Mr Sedise Samuel John Moseneke, a retired principal and inspector of schools, died without leaving a will. His estate included immovable property, motor vehicles, shares, unit trusts and insurance policies. He is survived by his widow, a retired schoolteacher, and four sons, all of whom are professional persons with university degrees leading what they describe as an "urban lifestyle". The widow and the sons are the applicants in this matter, and I shall refer to them as "the family".

[3] Shortly after the family's attorneys had formally lodged a death notice with the Master, they forwarded, under cover of a letter dated 25 February 2000, a host of documents to the Master. The family first learnt from a magistrate, and not the Master, that the magistrate was administering the estate.

[4] The law governing the administration of the estates of black people who die intestate is as follows. Section 23(7)(a) of the Black Administration Act[1] (section 23(7)) provides:

> "Letters of administration from the Master of the Supreme Court shall not be necessary

[1] Act 38 of 1927.

> in, nor shall the Master or any executor appointed by the Master have any powers in connection with, the administration and distribution of—
>
> (a) the estate of any Black who has died leaving no valid will".

Regulation 3(1) (regulation 3) was promulgated under the Black Administration Act[2] and deals with the administration of "the estates of deceased blacks". It reads:

> "All the [designated] property in any estate [of a black person who dies leaving no valid will] . . . shall be administered under the supervision of the magistrate in whose area of jurisdiction the deceased ordinarily resided and such magistrate shall give such directions in regard to the distribution thereof as shall seem to him fit and shall take all steps necessary to ensure that the provisions of the Act and of these regulations are complied with."

The effect of these provisions is that the Master of the High Court has no power to deal with intestate black estates, although he administers black estates where a will has been left, and all estates of white, coloured and indian people.

[5] The family's attorneys wrote to the Master expressing great concern at being subjected to

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[2] The regulations are issued in terms of section 23(10) of that Act, which states:

> "The Governor-General may make regulations not inconsistent with this Act —
>
> (a) prescribing the manner in which the estates of deceased Blacks shall be administered and distributed".

differential treatment on the grounds of race. They stated that they had been instructed to record that there was nothing in the Black Administration Act which prohibited the Master from proceeding with the administration and distribution of the estate. This latter statement was incorrect. Following on their letter to the Master, the family commenced proceedings in the Transvaal High Court (the High Court) in which they failed to identify properly the source of the discrimination. Without challenging the provisions of the Act, an order was sought that the Master be directed to register and administer the estate, and that a declaration be made that his refusal to do so was unlawful and unconstitutional. The Master lodged a report with the court stating that in terms of the Act and its regulations, his office did not have jurisdiction to register or administer black intestate estates. The report indicated that the Department of Justice was in the process of rationalising its legislation and bringing it into line with constitutional values, but that this raised complex issues which were still the subject of discussion within the department.

[6] The family then filed a supplementary affidavit in which they averred that the Act and the regulations were unconstitutional and invalid. They gave notice that they would seek to amend their notice of motion to include a prayer to that effect in the relief they claimed. They undertook in their affidavit to cause a copy of the application to be served on the Minister of Justice and Constitutional Development (the Minister), who is the Minister responsible for the administration of the Black Administration Act.

[7] Although the papers were served on the Minister, the notice of motion was not amended so as to challenge the constitutional validity of section 23(7) or the regulations. The Minister did not oppose the application, which was set down on the unopposed roll in the High Court. The

family's attorneys prepared and presented a draft order to the Court. The draft order reads as follows:

> "1. The Provisions of Clause 3(1) of the Regulations promulgated in terms of the Black Administration Act, No 38 of 1927, as amended and published in Government Gazette number 10601, Government Notice number R.200 of 6 February 1987, are declared invalid, unconstitutional and of no force an effect.
>
> 2. The Respondent is ordered to immediately register and oversee the administration and distribution of the estate of the Late Sedise Samuel John Moseneke in accordance with the Provisions of the Administration of Estate Act, no 66 of 1965, as amended."

The terms of section 23(7) of the Black Administration Act were not brought to the attention of the judge in the High Court who made an order in terms of the draft. The Registrar of the High Court referred that order to this Court for confirmation.[3]

[8] It is not clear, however, that this is an order which necessarily requires confirmation in terms of section 172(2)(a) of the Constitution, which provides as follows:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or

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[3] Section 167(5) of the Constitution provides that:
> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

Although regulation 3 was made by the State President during the apartheid era, it may constitute "conduct of the President" as contemplated by section 172(2)(a).[4] As will appear, however, it is not necessary to decide this issue in this case.

[9] The High Court's order has in fact had an unanticipated and drastic effect. The declaration that regulation 3(1) was invalid deprived magistrates of any competence to deal with what the Black Administration Act called "the estate of any Black who has died leaving no valid will". At the same time, section 23(7) of the Black Administration Act prohibits the Master from administering and distributing the estate of any black person who has died leaving no valid will. The result is that such estates cannot be administered at all. As the Master reported to this Court,

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[4] Section 3(2)(b)(i) of schedule 6 to the 1996 Constitution provides that a reference in pre-1994 legislation to the State President shall be construed as a reference to the President under the new Constitution:

> "Unless inconsistent with the context or clearly inappropriate, a reference in any remaining old order legislation—
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> . . .
>
> (b) to a State President, Chief Minister, Administrator or other chief executive, Cabinet, Minister's Council or executive council of the Republic or of a homeland, must be construed as a reference to—
>
> (i) the President under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive"

The regulation in question was promulgated by the State President in 1987.

an impasse has resulted with:

> "no official procedures in place to ensure the proper administration of the intestate estates of Blacks. No registration processes will be in place, no authorities / directions to administer these estates can be issued, financial institutions will not release monies for funerals, payments of debts, maintenance of dependents, etc. Transfer of properties will not take place . . . Chaos in the administration of intestate estates of Blacks will ensue. (In fact that [has] already happened . . . .)"

[10] Upon receipt of the referral from the High Court, the President of this Court issued directions which required the parties to consider whether an invalidation of section 23(7) by the High Court could be inferred, and whether this Court could confirm such invalidation; alternatively, whether there was some other procedure under which this Court could declare section 23(7) to be invalid; if so, whether it should do so; what order it should make; and whether or not any order should be suspended.[5]

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[5] The directions stated that:

> "
> . . .
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> 3. The issues that will be considered at the hearing are as follows:
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> (i) Is paragraph 2 of the order made by the High Court consistent with section 23(7) of the Black Administration Act, 1927? If not, and in view of the allegations made in the first applicant's supplementary affidavit dated 28 August 2000, and paragraphs 4 and 5 of the master's report, can it be inferred from the terms of paragraph 2 of the order that the High Court considered section 23(7) to be inconsistent with the Constitution?
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> (ii) Can a declaration of invalidity be inferred from the terms of an order or must there be a specific declaration of invalidity in terms of section 171(1)(a) of the Constitution?
>
> (iii) Is section 23(7) inconsistent with the Constitution?
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> 4. If a declaration of invalidity of section 23(7) cannot be inferred from the terms of the order made by the High Court, and bearing in mind the provisions of that section, what are the implications of paragraph 2 of the order for the applicants, and for any executor appointed by the master pursuant to the order made?

5. What are the implications of the order as a whole for estates that have been or are being wound up under the Black Administration Act?

6. If the order made is not subject to confirmation by this Court, are there circumstances which would permit this Court to deal with the matter under rule 17 and consider the constitutionality of section 23(7), and what an appropriate order would be if that section were to held to be inconsistent with the Constitution? If so, should that be done?

7. If this Court is entitled to consider the issue of the constitutionality of section 23(7) either under rule 15 or under rule 17, what order should be made in that regard, and in particular, if the section were to be held to be inconsistent with the Constitution, what order should be made under section 172(1)(b) of the Constitution concerning estates in the course of being wound up under the provisions of the Black Administration Act, and those which have been wound up under that Act since the Constitution came into force?"

[11] In response to these directions, the family submitted written argument contending that the High Court had indeed implicitly invalidated section 23(7). Alternatively, they asked that they be granted direct access to this Court to apply for an order declaring the section to be invalid.[6] In either event, they requested that the order of unconstitutionality should take effect from the date on which this Court made its order so as not to affect estates already distributed.

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[6] Section 167(6) provides that:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
> (a) to bring a matter directly to the Constitutional Court
> . . . ."

Rule 17(2) of the Constitutional Court states that the application must set out:

> "(a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
> (b) the nature of the relief sought and the grounds upon which such relief is based;
> . . . ."

[12] For his part, the Minister explained that having been given but few days notice of the High Court proceedings and inadequate information as to the nature of the order sought by the applicant in that Court, he had not appreciated the implications of the order as ultimately sought and obtained by the family. He contended that the High Court order was subject to confirmation by this Court and argued that it should not be confirmed. If however, the Court were to confirm the order, he argued that the declaration of invalidity should be suspended for a period of three years to enable parliament to correct the defects in the legislation in as harmonious and effective a manner as possible. In the alternative, he noted an appeal against the judgment of the High Court.

[13] During argument, it was submitted on behalf of the Minister that although the Minister had not been a party to the proceedings in the High Court, he was entitled to appeal against the order because he should have been joined in those proceedings in the light of the fact that they concerned the invalidity of a regulation administered by his department.[7] It is clear that the Minister should have been a party to the proceedings in the High Court.[8] If the order made by the High Court falls within the scope of section 172(2) of the Constitution he is entitled to appeal to this Court against the order made.[9] This Court has the power to regulate its own process

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7 See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659.

8 See *Parbhoo and Others v Getz NO and Another* 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at para 5. See rule 10A of the Uniform Rules of Court and also rule 6(2) of the Rules of this Court.

9 In terms of section 172(2)(d), which states:

> "(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

taking into account the interests of justice.[10] Because there is a need to deal with this matter expeditiously, I consider that the best solution to the problem that has arisen is to permit the Minister to join the proceedings as a party and appeal against the order made. This serves the interests of justice and avoids the need to determine whether section 172(2)(a) applies to regulations made by State Presidents prior to the coming into force of the interim Constitution. Whether or not such an order is subject to confirmation under section 172 raises difficult questions which can better be resolved at another time in litigation, where the parties have had adequate opportunity to consider the issues and present detailed argument to this Court on them and this Court has the opportunity to consider the implications of such arguments.

[14] It is convenient to summarise the practical considerations referred to in the papers. The Master says that his office is not in a position at this stage to manage the estates of black people who have died intestate, because of lack of human resources, infrastructure, training and finance. He states that magistrates attended to the administration of some 66 000 intestate black estates during 1999. Furthermore, he notes that the offices of the Masters of the High Courts are already under substantial pressure and barely manage to cope with their current workload. He considers that if all intestate estates handled by the magistrates were to be transferred to these offices, the result would most probably be chaos.

[15] The Minister urges that the administration and distribution of the estates of black people

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[10] Section 173 of the Constitution.

remain in the hands of magistrates for the moment. He states that magistrates are to be found in every small town and are therefore conveniently located close to the people; their methods of administration of deceased estates are informal and relatively swift; they have a better understanding of customary law; and Master's fees do not have to be paid.

[16] The Minister indicated that the laws regulating succession and the administration of estates were already receiving attention from parliament and the South African Law Commission.[11] He observed that a draft bill, the Amendment of Customary Law of Succession Bill,[12] was discussed in both parliamentary justice committees in September or October of 1999. This Bill proposed the repeal of section 23 of the Black Administration Act and provides that all estates are to be administered in terms of the provisions of the Administration of Estates Act.[13] In terms of section 3(2) of this Bill, it is proposed that the Master could delegate his powers to administer estates to a magistrate in cases where the estate is valued at less than an amount set by

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11 Some of the difficulties have been referred to by the South African Law Commission. It notes that:

> "The question of succession in customary law has been a burning issue for some time, reaching its climax in June with the decisions of the Supreme Court of Appeal in the case of *Mthembu v Letsela.* The contested positions involve, on the one side, the need to honour the Bill of Rights by removing laws that discriminate against women in matters of inheritance, and, on the other, the recognition of customary law in the same constitution as part of the law of the land. The difficult task of trying to reconcile these provisions is complicated in any case by the need to be alive to practical realities and to intervene in ways which do not worsen the situation of people in their daily lives.
>
> These complexities have already seen a draft Bill introduced in Parliament and then withdrawn (1998), and three court case[s] culminating in the Supreme Court decision. It is worth noting that both the High Court and the Supreme Court of Appeal endorsed the Law Commission's process of consultation as the best guarantee of the participation of all stakeholders in this sensitive legislative experiment . . . ".

Summary of the Law Commission Discussion Paper ("Customary Law" Discussion Paper 93, Project 90 August 2000).

12 B109-98.

13 Act 66 of 1965.

the Minister in regulations published in the Gazette. The Minister would also be able to make regulations to govern the reporting of such estates. In addition, the Bill seeks to amend the Intestate Succession Act[14] in order to make provision for claims of spouses married under customary law. The Minister did not say what had happened to the Bill since its introduction in parliament over a year ago.[15]

[17] A further dimension to the debate was added by the Women's Legal Centre Trust who applied for and were granted the right to make written and oral submissions as an *amicus curiae*. They contended that in the case of intestate estates of deceased Africans, race, gender and culture interacted in a way which discriminated directly and indirectly against African widows. The *amicus* supported the invalidation of both section 23(7) and regulation 3(1) on the basis that the procedures adopted under the Administration of Estates Act functioned in practice in a manner which was far more protective of the rights of African women than those employed in terms of the regulations under the Black Administration Act.[16]

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14 81 of 1987.

15 See, however, footnote 11 in which it is suggested by the South African Law Commission that the Bill has been withdrawn.

16 Section 18(1) of the Administration of Estates Act above n 13 provides that the Master may convene a meeting with:

> "the surviving spouse . . . the heirs of the deceased and all persons having claims against the estate . . . for the purpose of recommending to the Master for appointment as

The application for direct access

executor or executors, a person or specified number of persons."

[18] Counsel argued that it could be inferred from the High Court order that section 23(7) of the Act had been declared invalid even if the order did not say so expressly. It is not necessary to decide whether or not in principle this Court may ever confirm an order not actually and explicitly made but existing only by inference. It must be doubted whether this can be done. The family applied in the alternative for direct access to this Court in terms of rule 17.[17] In the light of this application, nothing further need be said on the question whether it is possible to infer an order of invalidity in circumstances where an express order has not been made. Exceptional circumstances exist which warrant the grant of direct access to the applicants.

[17] Above n 6.

[19] It is clearly in the interests of justice that the crisis affecting the administration of intestate estates be resolved as quickly as possible. This Court has frequently stated that direct access should only be granted in exceptional circumstances.[18] In my view, there are three special factors in the present matter which, in combination, provide strong support for granting the family direct access. The first is that the interests of justice require a speedy unblocking of the administrative impasse which probably affects thousands of families, many of whom may be in desperate need of access to resources presently tied up in deceased estates that cannot be administered. The second is that the section and the regulation are so manifestly discriminatory that there can be no doubt as to their unconstitutionality. It is not necessary therefore for extensive evidence to be led and evaluated in order for a decision on the constitutional issue to be reached. The third factor is that both the Minister and the Master ultimately supported the matter being dealt with on the basis of direct access.[19] Taken together, these factors constitute exceptional circumstances which dictate that direct access be granted. In the result, I proceed on the basis that the despite the flawed character of the proceedings launched in the High Court, the public interest requires that the family nevertheless be granted direct access to challenge the constitutionality of the section and the regulation. I turn now to consider the merits of that application as well as the merits of the appeal noted by the Minister.

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18 See for example, *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at para 4 and the authorities referred to therein.

19 A similar consideration led to the grant of direct access in *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

The constitutionality of section 23(7)(a) and regulation 3(1)

[20] The Black Administration Act has been described by this Court as "an egregious apartheid law which anachronistically has survived our transition to a non-racial democracy."[20] Subordinate legislation made under it has been referred to as part of a demeaning and racist system,[21] as obnoxious, and as not befitting a democratic society based on human dignity, equality and freedom.[22] The Act systematised and enforced a colonial form of relationship between a dominant white minority who were to have rights of citizenship and a subordinate black majority who were to be administered.[23] As Ngcobo J pointed out in *DVB Behuising*:

> "The Native Administration Act, 38 of 1927, appointed the Governor-General (later referred to as the State President) as 'supreme chief' of all Africans. It gave him power to govern Africans by proclamation. The powers given to him were virtually absolute. He could order the removal of an entire African community from one place to another. The Native Administration Act became the most powerful tool in the implementation of

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20 See the judgment of Ngcobo J in *Ex Parte Western Cape Provincial Government and Others; In Re: DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) at para 1. The Black Administration Act was originally called the Native Administration Act 38 of 1927. It has been amended some 41 times.

21 *DVB Behuising* above n 20 at para 2.

22 See the judgment of Madala J in *DVB Behuising* above n 20 at para 93.

23 Mamdani comments on the nature of this two-tier approach:

> "The African colonial experience came to be crystallized in the nature of the state forged through that encounter. Organized differently in rural areas from urban ones, that state was Janus-faced, bifurcated. It contained a duality: two forms of power under a single hegemonic authority. Urban power spoke the language of civil society and civil rights, rural power of community and culture. Civil power claimed to protect rights, customary power pledged to enforce tradition. The former was organized on the principle of differentiation to check the concentration of power, the latter around the principle of fusion to ensure a unitary authority. To grasp the relationship between the two, civil power and customary power, and between the language each employed — rights and customs, freedom and tradition — we need to consider them separately while keeping in mind that each signified one face of the same bifurcated state."

Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (New Jersey, Princeton University Press 1996) at 18.

> forced removals of Africans from the so-called "white areas" into the areas reserved for them. These removals resulted in untold suffering. This geographical plan of segregation was described as forming part of 'a colossal social experiment and a long term policy'"[24] (References omitted)

[21] It is painful that the Act still survives at all. The concepts on which it was based, the memories it evokes, the language it continues to employ, and the division it still enforces, are antithetical to the society envisaged by the Constitution. It is an affront to all of us that people are still treated as "blacks" rather than as ordinary persons seeking to wind up a deceased estate, and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour.

[24] *DVB Behuising* above n 20 at para 41.

[22] There can be no doubt that the section and the regulation both impose differentiation on the grounds of race, ethnic origin and colour,[25] and as such constitute discrimination which is presumptively unfair in terms of section 9(5) of the Bill of Rights.[26] The Minister and the Master suggested that the administration of deceased estates by magistrates was often convenient and inexpensive. However, even if there are practical advantages for many people in the system, it is rooted in racial discrimination which severely assails the dignity of those concerned and undermines attempts to establish a fair and equitable system of public administration.[27] Any benefits need not be linked to this form of racial discrimination but could be made equally available to all people of limited means or to all those who live far from the urban centres where the offices of the Master are located. Given our history of racial discrimination, I find that the

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25 Section 9(3) states:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

26 Section 9(5) states:

> "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

27 See the basic values and principles governing public administration set out in section 195 of the Constitution.

indignity occasioned by treating people differently as "blacks", as both section 23(7) and the regulations do, is not rendered fair by the factors identified by the Minister and the Master. I conclude therefore that both provisions create unfair discrimination within the meaning of section 9(3) of the Constitution. They also constitute a limitation of the right to dignity entrenched in section 10.[28]

[28] Section 10 states that:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

[23] I cannot accept that the provisions are reasonable and justifiable in an open and democratic society based on equality, freedom and dignity.[29] No such society would tolerate differential treatment based solely on skin colour, particularly where the legislative provisions under consideration formed part of a larger package of racially discriminatory legislation which disadvantaged black people systematically and effectively. It is not necessary to decide whether or not a temporary continuation of such unfair measures could have been justified in terms section 36 in the earliest period of transition. The fact is that six years have passed since the installation of constitutional democracy and the provisions have been challenged by persons whose dignity has been wounded. Such convenience as the provisions might achieve can be accomplished equally well by a non-discriminatory provision. There can be no justification whatsoever for their continuation on the statute book in a democratic society based on freedom, dignity and equality.

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[29] Section 36 provides that:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[24] I accordingly hold that the section and the regulation are inconsistent with the Constitution and invalid.

A just and equitable order

[25] The real problem in this case is to devise an order that is just and equitable in all the circumstances.[30] To keep a manifestly racist law on the statute books is to maintain discrimination; to abolish it with immediate effect without making practical alternative arrangements is to provoke confusion and risk injustice. Such a dilemma is inherent in transition. The Black Administration Act, as its very name indicates, both reminds us of South Africa's shameful and "disgraceful"[31] past and continues to make invidious and wounding distinctions on grounds of race. It survives, however, because it has become encrusted with processes of great practical, day-to-day importance to a large number of people.

[26] Complete rationalisation of such anachronistic laws as the Black Administration Act will take time, as it involves both practical problems of administration and difficult policy questions relating to the achievement of equality in our culturally diverse and pluralistic society. In the

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30 Section 172(1)(b) states that:

> "Powers of the courts in constitutional matters.— (1) When deciding a constitutional matter within its power, a court—
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> . . .
>
> (b) may make any order that is just and equitable, including—
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

31 See the remarks of Mohamed J in *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793(CC) at para 7.

present matter, however, the launching of inadequately focused legal proceedings converted what was an inevitable tension between the old and the new, into an avoidable crisis requiring a rapid remedy from this Court. How, then, may we cleanse our statute book of all traces of a law which was a pillar of "the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice",[32] while at the same time preventing undue dislocation and hardship? During the hearing of this matter, the Court canvassed a possible solution to the difficulty, which the parties accepted, although the *amicus* did not.

[32] See the epilogue to the interim Constitution.

[27] It was common cause that transactions already completed under the regulation and section should not be disturbed. It was also agreed that a period of two years would be appropriate to enable parliament to review the whole field of succession and administration of deceased estates in an harmonious and effective manner which would fully respect the rights entrenched in the Constitution. The difficulty was how to protect rights in the interim period. To subject the families of black people who die intestate to the continuing indignity of racist treatment would not be acceptable. The order that this Court makes as a temporary measure gives all African families a choice in circumstances where a member of the family dies intestate and the estate is not governed by the principles of customary law.[33] They can require the Master to administer the deceased estate as provided for in the Administration of Estates Act, or else opt for the cheaper and more accessible process under the control of the local magistrate, as regulated by the Black Administration Act. This choice is achieved by giving immediate effect to the invalidation of section 23(7)(a), but suspending the declaration of invalidity in respect of regulation 3(1) for two years. In short, the Master is empowered to administer black intestate estates immediately, while the special empowerment of magistrates will continue under the Black Administration Act for not longer than two years. In order to make it clear that there is a choice, the word "shall" in regulation 3 must be read for the period of the suspension to mean "may". The magistrates' jurisdiction is therefore not exclusive and obligatory, but concurrent and

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33 It should be noted that this order does not refer to section 23(7)(b) of the Black Administration Act, a provision which prohibits the Master from dealing with certain kinds of property accruing in terms of "Black law and custom", as described in sections 23(1) and (2) of the Act. The order also does not affect the other regulations issued under the Black Administration Act which deal with the powers and duties of magistrates to supervise such property.

permissive.

[28] We were informed that an order in these terms has the support of the Master, and is probably capable of effective enforcement. To the extent, however, that unexpected and serious practical problems might appear in future, provision is made in the order for its terms to be varied on application by any interested person.

[29] It should be mentioned that counsel for the *amicus* found herself unable to agree with the proposed order. She contended that because of the acute effects on widows and children of the way in which estates were administered by magistrates, there was a need for this Court to make an order which would be operative as soon as possible. She argued that regulation 3 was the gateway into a system of administration which placed women and children of customary unions in an extremely vulnerable position. On the other hand, the Administration of Estates Act expressly provides that widows should participate in the appointment of an executor, or be appointed as an executor.[34] She accordingly proposed that the operation of the declaration of invalidity in respect of the regulation be suspended until 31 March 2001, a period much shorter than the two years proposed by the parties.

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[34] Above n 16.

[30] The questions raised by the *amicus* are no doubt of major importance. If the foundational value of creating a non-sexist society is to be respected,[35] proper consideration has to be given to the way the measures concerned impact in practice both on the dignity of widows and their ability to enjoy a rightful share of the family's worldly goods. There is not enough material before us, however, to justify in this matter an investigation into what are complex questions thrown up by the intersection of race, gender, culture and class. It is clear however, that the order made in this case does not affect the right of any person to approach a competent court for other suitable constitutional relief relating to the issues raised by the *amicus*.

[31] None of the parties sought an order for costs. None is made.

The order

The following order is made:

1. The application in terms of Rule 17 for direct access to this Court by the applicants is granted.

2. Section 23(7)(a) of the Black Administration Act 38 of 1927 is declared to be

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35 Section 1 of the Constitution reads:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
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> . . .
>
> (b) Non-racialism and non-sexism."

inconsistent with the Constitution and invalid with effect from the date of this order.

3. The Minister of Justice and Constitutional Development is joined as a second respondent in the proceedings initiated in the High Court, and is granted leave to appeal in this Court against the order made by the High Court.

4. The appeal by the Minister is upheld in part. The order of the High Court is set aside and replaced with the following order:

   4.1 Regulation 3(1) of the Regulations published in Government Notice 10601 of 6 February 1987 is declared to be inconsistent with the Constitution and invalid.

   4.2 The order of invalidity in 4.1 above is suspended for a period of two years.

   4.3 During the period of suspension referred to in para 4.2, the word "shall" in regulation 3(1) is to be read as meaning "may".

5. Any interested person may approach this Court for a variation of this order in the event of serious administrative or practical problems being experienced.

6. The Master of the High Court, Pretoria, shall administer the estate of the late Sedise Samuel John Moseneke in accordance with the provisions of the Administration of Estates Act 66 of 1965.

7. The Minister of Justice and Constitutional Development is requested to ensure that this order is brought to the attention of all Masters of the High Courts and all magistrates dealing with the administration of estates under the Black Administration Act 38 of 1927 and the regulations promulgated thereunder.

Chaskalson JP, Langa DP, Ackermann J, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, O'Regan J, Yacoob J and Madlanga AJ concur in the judgment of Sachs J.

SACHS J

For the applicants: IV Maleka instructed by Hack Stupel & Ross.

For the Respondents: J L van der Merwe SC and SM Lebala instructed by the State Attorney, Pretoria.

For the *amicus curiae:* J Kentridge instructed by the Women's Legal Centre Trust.