SACHS J ABRIDGED JUDGMENT

Moseneke and Others v Master of the High Court

[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".

[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 (section 23(7)) provides:

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

(b) [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. 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.

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." Subordinate legislation made under it has been referred to as part of a demeaning and racist system, as obnoxious, and as not befitting a democratic society based on human dignity, equality and freedom. 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. 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 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'" (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.

[22] There can be no doubt that the section and the regulation both impose differentiation on the grounds of race, ethnic origin and colour, and as such constitute discrimination which is presumptively unfair in terms of section 9(5) of the Bill of Rights. 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. 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 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.

[23] I cannot accept that the provisions are reasonable and justifiable in an open and democratic society based on equality, freedom and dignity. 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.

[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. 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" 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 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", 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.

[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. 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 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. 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.

[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, 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*.