IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 467/2000

In the matter between:

SICEBI JUSTICE ZULU	**FIRST APPELLANT**
PATIENCE HLONGWANE	**SECOND APPELLANT**
THOKOZILE SARAH NYANGIWE	**THIRD APPELLANT**

and

DUDUZILE MAJOLA	**RESPONDENT**

CORAM: **SMALBERGER ADP, STREICHER, MPATI, MTHIYANE and BRAND JJA**

HEARD: **7 MAY 2002**
DELIVERED: **29 MAY 2002**

Summary: Whether it is competent for a magistrate to substitute a representative of a deceased estate appointed in terms of regulation 4(1) of the Regulations promulgated under s23(10) of the Black Administration Act 38 of 1927.

JUDGMENT

MTHIYANE JA:

[1] This appeal concerns the estate of one Aaron Ngqongqoza Mchunu (the deceased), a taxi owner and operator, who died intestate on 11 April 1997. The first appellant claims that he is at present the duly appointed representative of the estate. At the time of his death the deceased was married to the respondent by customary union. The second and third appellants contend that they too were married to him by customary union. The deceased left an estate of just over R1.3 million, comprising 13 minibus taxis, immovable property valued at R130 000,00 and a cash investment of R550 711,69 (the estate).

[2] On 6 June 1997 the magistrate of Johannesburg appointed Mr Frans Mashele, an attorney, as the representative of the estate in terms of regulation 4(1)[1] of the Regulations promulgated in terms of section 23(10) of the Black

[1] Regulation 4(1) provides: 'For the administration and distribution of any property in the estate of a deceased Black referred to in regulation 2 the appointment of an executor shall not be necessary: Provided that whenever the magistrate in whose area of jurisdiction the deceased Black ordinarily resided considers it desirable, he may issue a certificate to any person whom he may deem suitable, appointing him to represent the estate and to assume responsibility for the payment of debts, the collection of assets and the general administration and distribution of property. Such certificate shall be issued in any case where it is necessary to pass transfer to any person of immovable property, not being land in a location held under quitrent conditions, registered in the name of the deceased.' [Emphasis added]

Administration Act 23 of 1927 (the regulations).[2] In terms thereof Mashele was authorised to collect the estate assets and to 'pay all claims to the value of the assets in the estate and to award the balance of the estate, including the immovable property (if any), to the rightful heir/s'.

[3] Although Mashele was not required by the regulations to do so, he prepared a liquidation and distribution account (the account) for the estate. In terms of the account the estate beneficiaries were the respondent and the second and third appellants. The respondent became entitled to receive R223 162,09 in cash and 7 minibus taxis (R557 374,66 in total value), the second appellant, R223 162,09 in cash and 4 minibus taxis (R407 374,66 in total value) and the third appellant, 2 minibus taxis, R11 000,00 in cash and the immovable property valued at R130 000,00 (R225 212,47 in total value). The respondent and the second appellant renounced all claims to the assets due to the third appellant.

[2] Regulations for the Administration and Distribution of the Estates of Deceased Blacks, published under Government Notice R200 on 6 February 1987.

[4] On 29 August 1997 the account was approved by the magistrate, including the payment of R46 574,90 to Mashele in his capacity as the representative of the estate for his fees. Despite the approval of the account the respondent refused to hand over to the second and third appellants the minibus taxis in her possession which they were entitled to receive in terms of the account. Her reason for refusing to do so was that the second and third appellants were never married to the deceased as they had only been his lovers.

[5] On 10 March 1998 the second and third appellants, represented by Mashele, launched an application in the magistrate's court for an order compelling the respondent to comply with the account, in particular to deliver the minibus taxis due to them in terms of the distribution account. The application was, however, not proceeded with as the second and third appellants and Mashele inexplicably failed to appear at the hearing, and the respondent consequently obtained an order dismissing the application with costs.

[6] On 17 December 1998 Mashele advised the respondent's attorneys of record that his mandate had been terminated in favour of the first appellant. On 11 January 1999 the first appellant, who is also the attorney of record for the second and third appellants, was appointed as the representative of the estate in terms of regulation 4(1), in substitution of Mashele. The certificate of appointment issued to him by the magistrate recorded that the first appellant was to assume responsibility for the administration and distribution of exactly the same assets listed in the certificate previously issued to Mashele.

[7] An attempt by the first appellant to assume control of the estate assets in terms of his appointment met with resistance from the respondent who refused to co-operate with him and to release the undistributed assets which were in her possession. The respondent adopted the attitude that the estate fell to devolve in accordance with customary law – in terms of which the entire estate would be inherited by her eldest son as the general heir. The appellants disputed her claims.

[8] On 16 September 1999 the first, second and third appellants launched an application in the Witwatersrand Local Division for an order authorizing the first appellant, as representative of the estate, to collect all the assets belonging to the estate and to take all incidental steps necessary to discharge the duties of an appointed estate representative and certain ancillary orders. The matter came before Maseremule AJ who dismissed the application on the basis that the estate had already been finalized. The learned judge found that the appointment of the first appellant as representative of the estate was not competent and ordered the appellants to pay the respondent's costs jointly and severally. But as against the first appellant, the learned judge ordered that the costs were to be borne by him personally and not the deceased estate. Leave to appeal was refused. The appellants now appeal to this Court against all those orders, with leave granted by this Court on application to it.

[9] The appellants' heads of argument were filed late. They applied for the condonation of such late filing. Apart from the late filing of the heads, the

appellants were confronted with a further difficulty when the appeal came before us: the record lodged in the appeal was defective in many respects. First, the appeal record was not properly indexed nor was it paginated so as to ensure that every 10th line on each page was numbered. Secondly, some pages contained illegible parts. Thirdly, certain pages including at least one important annexure, were missing from the record. Fourthly, the record was burdened with irrelevant material. Of the four volumes filed of record, only two were relevant to the matters in issue in this appeal. With the exception of only fourteen pages (containing the judgment and order of the court *a quo*) in volume 3, the rest of the material in volumes 3 and 4 was irrelevant. On 9 October 2001 the first appellant's attention was drawn to the above defects by senior counsel for the appellants in his practice note. He instructed the first appellant (who is also the appellants' attorney of record) to correct the record accordingly. Nothing was done. At the hearing of the appeal the first appellant was directed to file an affidavit by not later than 17 May 2002, explaining why the record had not been

rectified. On 16 May 2002 the first appellant submitted an affidavit in which he stated that he was under the impression that the record had been corrected by his articled clerk, Ms Mabuchi Dama Maria Chipasula – now a qualified attorney. Chipasula has left the first appellant's employ and is now employed by the Road Accident Fund. She also filed an affidavit confirming the correctness of the allegations made by the first appellant but says nothing about why the record was not corrected. Apart from exculpating the first appellant she without protest accepts all blame for the non-observance of the relevant rule[3]. This is an unacceptable state of affairs. While the first appellant has tendered some explanation for the late filing of the heads, none has been forthcoming for the failure to correct the appeal record. It is all very well for the first appellant to put all blame for such failure to comply with the rules on his erstwhile articled clerk. But it is the first appellant who is the litigant and the attorney of record in the appeal. And it was he who should have supervised the work of his articled clerk.

[3] Rule 8 of the Supreme Court of Appeal Rules.

The rules require that a proper record be lodged in the appeal. It has been said many times in this Court that an attorney is in duty bound to acquaint himself with the rules of the Court in which the appeal is to be presented.[4] This Court has warned that non-observance of the rules of the kind displayed by the appellants in this case is viewed in a serious light and offending parties and their attorneys may be subjected to punitive costs orders.[5]

[10] Despite the unsatisfactory manner in which the matter has been dealt with by the first appellant, I am unable to say that the explanation given for the late filing of the heads and the failure to correct the record is so unworthy of consideration, that the condonation application falls to be dismissed irrespective of the prospects of success. It is therefore essential to consider whether prospects of success exist. If they do, condonation should be granted, with an appropriate order as to costs; if not, it should be refused.[6]

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[4] See *Ferreira v Ntshingila* 1990 (4) SA 271 AD at 281G.
[5] See *W.G. Davey (Pty) Ltd v National Union of Metalworkers of South Africa* 1999 (3) SA 697 (SCA) at 707B-D.
[6] *cf South African Allied Workers' Union (in liquidation) and Others v De Klerk NO and Another* 1992 (3) SA 1 at 4F-G, for the approach adopted.

[11] In dismissing the application while upholding the point in *limine* that the estate had already been finalized , the judge *a quo* said:

> '…it is not competent to deal with disputes arising out of the distribution of assets in a deceased estate where a liquidation and distribution account has been drawn up and approved, by securing the appointment of another person as the representative of an estate to collect and distribute afresh the same estate assets which have already been dealt with in terms of the liquidation and distribution account.' [Emphasis added]

[12] Consequently this appeal turns on the competence of the magistrate to substitute an estate representative duly appointed in terms of regulation 4(1). There can be no question that if the estate was not finalized, it was competent for the magistrate to appoint the first appellant as the representative of the estate, in substitution of Mashele. The difficulty with the reasoning of the judge *a quo* is that while he accepted that Mashele had collected only 'some of the assets', and distributed only 'some of the assets', and found that the respondent had refused to hand over to the second and third appellants the minibus taxis which 'they were entitled to receive in terms of the liquidation and distribution account', he

nevertheless concluded that the estate had been finalized. The fact that only 'some of the assets' had been distributed, warranted a finding to the contrary. Yet, the learned judge held that the first appellant 'could not validly be appointed as representative of the estate in respect of which a liquidation and distribution account had been finalized in the estate and approved by the magistrate'. The learned judge further found that the magistrate's approval of the account signified the finalization of the account and went on to equate the procedure in the regulations with that provided for in section 35(12)[7] of the Administration of Estate Act 66 of 1965.

[13] The analogy drawn by the judge *a quo* is misconceived. While the procedure provided for in the Administration of Estates Act is more elaborate and

[7] Section 35(12) provides: 'When an account has lain open for inspection as hereinbefore provided and-

(a) no objection has been lodged; or
(b) an objection has been lodged and the account has been amended in accordance with the Master's direction and has again lain open for inspection, if necessary, as provided in sub-section (11), and no application has been made to the Court within the period referred to in sub-section (10) to set aside the Master's decision; or
(c) an objection has been lodged but withdrawn, or has not been sustained and no such application has been made to the Court within the said period,

the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account, lodge with the Master the receipts and acquittances of such creditors and heirs and produce to the Master the deeds of registration relating to such distribution, or lodge with the Master a certificate by the registration officer or a conveyancer specifying the registrations which have been effected by the executor.'

section 35(12) provides for the estate account to lie open for inspection for a certain period to enable interested parties to object to it and to have the account amended at the Master's direction, regulation 4 provides for a more simplified procedure in which the magistrate exercises supervisory power over the administration and distribution of the deceased estate. In terms of regulation 4(3)[8] the representative may be required to render a ' just, true and exact account' of his administration but a liquidation and distribution account is not called for. No provision is made for the account to lie for inspection to enable aggrieved parties to object to it. The matter is left solely in the hands of the magistrate. This does not of course mean that errors may not be corrected if they occur. It would be within the magistrate's power to do so.

[14] Turning to the merits, it is clear that on the available evidence not all the estate assets were distributed in terms of the account. As pointed out, the judge *a*

[8] Regulation 4(3) provides: 'The magistrate may require any person to whom a certificate has been issued under subregulation (1) to provide such security for the due and proper administration of such property as the magistrate may deem necessary and to render a just, true and exact account of his administration within such period and at such intervals as the magistrate may prescribe.'

quo himself found that 'only some of the assets' were distributed by Mashele and that the respondent had refused to hand over the minibus taxis that had been allocated to the second and third appellants. It is no answer to suggest that an application should have been launched 'to review the decision of the magistrate to approve the account drawn by Mashele,' nor to suggest that an order should have been sought 'to set aside the liquidation and distribution account …as well as the part distribution which took place in accordance therewith'. In terms of the regulations (4(1)and(2)) the representative is entitled to take 'control of the assets' and to administer and distribute them. The problem did not lie with the approval of the account but with the failure to distribute the assets in terms thereof. It was not necessary for the appellants to incur the expense of a review application when a more simplified procedure was available to them, to deal with the actual problem.

[15] Because the minibus taxis have not yet been distributed, it cannot be said that the estate has been finalized. The distribution of these assets is a matter

which the estate representative still needs to attend to. On the papers it is not clear whether the immovable property (the dwelling house) allocated to the third appellant has already been transferred. In terms of regulation 4(2)[9] it is the first appellant who is vested with such power in his capacity as an estate respresentative. Argument to the contrary advanced by counsel for the respondent, namely that the transfer could be effected by the magistrate ignores the clear wording of the sub-regulation (4(2)).

[16] The argument that at the stage at which the first appellant was appointed, the magistrate was *functus officio* is not sound. The *functus officio* rule only applies '…when an administrative official has made a decision which bears directly upon an individual's interests, [and] it is said that the decision-maker has discharged his office'.[10] It was said that a person to whom statutory power has been entrusted is *functus officio* once he has exercised it and he cannot himself call

9 Regulation 4(2) provides: 'A person to whom a certificate has been issued under subregulation (1) shall have full power and authority to represent the estate in relation to such property, including power on behalf of the estate and subject to the approval of the magistrate to pass and to receive transfer of immovable property'

10 See *Baxter – Administrative Law* 372.

his own decision in question.[11] This was not the case in the present matter where some of the estate assets had not yet been distributed at the time of the appointment of the first appellant as a representative of the estate. The *functus officio* rule cannot apply where, as here, the estate has not been finalized and the magistrate is still expected, in the exercise of his supervisory functions, to give further directions concerning the undistributed assets. It therefore follows that the substitution of the first appellant fell within the magistrate's powers. In terms of regulation 4(5)[12] the magistrate is at any time entitled to revoke the certificate issued by him to a representative under sub-regulation (1). On a proper reading of regulation 4(5), the power to revoke would, in my view, include in appropriate cases the power to substitute, where the estate has not been finalized. It follows that the power of substitution is implicit in the power conferred on the magistrate to appoint a representative and to revoke such appointment because, in a case like the present, without such substitution there will be no one to finalize

[11] See *De Freitas v Somerset West Municipality* 1997 (3) SA 1080 (C) at 1082 I-J.
[12] Regulation 4(5) provides: 'The magistrate may at any time revoke a certificate issued by him to any person under subregulation (1).'

the administration and distribution of the estate, where the previously appointed representative has failed to do so. The substitution of the first appellant was reasonably incidental to the finalization of the administration and distribution of the undistributed assets in the estate and therefore competent.[13]

[17] It follows from the above that the appeal must succeed and that the first appellant is entitled to an order in terms of prayers 1 and 2 of the original notice of motion. The further relief that was sought is not being persisted with in view of the decision of this Court in *Mthembu v Letsela and Another*.[14]

[18] Three further matters require comment. The first relates to the first appellant's dual role as representative of the estate and attorney of record for the second and third appellants. That situation gives rise to a potential conflict of interest, as the interest of the estate, on the one hand, and the second and third appellants, on the other, may not necessarily correspond in all respects. It is further undesirable that the estate's appointed representative should act as the

[13] *cf Johannesburg Municipality v Davies and Another* 1925 AD 395 at 403.
[14] 2000 (3) SA 867 (SCA).

attorney for certain interested parties against another interested party arising out of the administration of the estate. The first appellant should therefore cease to act on behalf of the second and third appellants, in his own interests and theirs, and should be precluded from recovering any costs from them in relation to the present litigation, not recoverable from the respondent, which he might otherwise have been entitled to in his capacity as their attorney.

[19] The second matter is that the first appellant's functions must be limited to the recovery of all assets of the estate that have not yet been distributed in terms of the account. It is of some concern that the estate having disbursed R46 574,90 towards Mashele's fees/commission now faces the prospect of further disbursements to meet the first appellant's expenses in finalizing the estate. As this matter is destined to find its way back to the magistrate he, in the exercise of his supervisory powers, must ensure as far as possible that any further disbursements to be incurred by the estate are limited to services rendered in

respect of the undistributed assets, to avoid any duplication of fees to the detriment of the estate.

[20] The third matter relates to costs. The conduct of the first appellant (or members of his firm) in relation to the inept preparation and presentation of the record of appeal, the failure to remedy the numerous defects when they were pointed out to him and he was requested to do so by his counsel and his delay in applying for condonation, requires a punitive costs order depriving the first appellant of part of his costs on appeal. Such an order would appropriately mark this Court's displeasure of his or his firms continued and persistent disregard of the rules, conduct which borders on the contemptuous.

[21] In the result the following order is made

1. Condonation is granted in respect of the appellants' failure timeously to file their heads of argument. The appellants are to pay the costs of the application including the respondent's costs of opposition thereto.

2. The appeal succeeds and the order of the Court below is altered to read:

   'The application is granted and an order is made:

(a) Authorizing the first applicant, as the representative of the estate of the late **Mr Aaron Ngqongqoza Mchunu No. 1467/97,** to collect all the undistributed assets belonging to the said estate and to take all incidental steps necessary to discharge the duties attendant on his representation of the said estate.

(b) Directing the respondent to co-operate with the first applicant to give effect to the order specified in prayer (a) hereinabove.

(c) Ordering the respondent to pay the costs of this application.'

3. Subject to 4 below, the respondent is to pay two-thirds of the appellants' costs of the appeal.

4. The appellants are not entitled to recover from the respondent any costs in respect of volumes 3 and 4 of the appeal record, save in respect of the fourteen pages relating to the judgment and order of the court *a quo*;

5. The first appellant is not entitled to recover any costs from the second and third appellants, in his capacity as their attorney of record arising from the litigation in this matter.

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KK MTHIYANE
JUDGE OF APPEAL

Concur:
Smalberger ADP)
Streicher JA)
Mpati JA)
Brand JA)