



**IN THE NORTH GAUTENG HIGH COURT
(PRETORIA)**

**CASE NO: 863/2004
DATE: 28 AUGUST 2009**

In the matter between:

T.Z.M.

and

MINISTER OF JUSTICE

HEKL HECTOR MTHOMBENI

EMELYNE MUMSY NXUMALO

PLAINTIFF

FIRST DEFENDANT

SECOND DEFENDANT

THIRD DEFENDANT

J U D G M E N T

MAKGOKA, AJ:

[1] This matter came before me by way of a stated case, formulated as follows:

“1. The question is whether a magistrate (second defendant) appointing an executrix (third defendant) in terms of Regulation 4(1) of the Regulations for the Administration and Distribution of Estates of Deceased, published under Government Notice R.34 of 1966, was performing a judicial, quasi judicial or administrative function;

2. In the event it is found that the second defendant was performing administrative functions then in that event a damages claim for delict is competent. ”

[2] The parties further agreed to a separation of issues in terms of Rule 33 (4) of the Uniform Rules of Court, and thus proceed on the issue of liability only. I deem it useful at this stage, to set briefly the factual background of the matter.

[3] The plaintiff was [.....] to M. W. N. (*the deceased*) who passed away intestate [.....]. The parties had three minor children born of their marriage. The marriage was dissolved on 7 February 1992 by the North Eastern Divorce Court, some 11 months before the deceased passed away.

[4] In her summons, the plaintiff in her capacity as mother and natural guardian of the minor children, sued the defendants, jointly and severally, for alleged damages suffered as a result of second defendant's declaration of subsistence of a customary union between the deceased and the third defendant, and secondly, in appointing the third defendant as "*the executrix*" of the deceased's estate. At all relevant times, the second defendant was acting within the scope of his duties with the first defendant. The plaintiff alleges that the second defendant's conduct was wrongful. It is instructive to note that no allegation of improper motive, bad faith or improper exercise of a discretion, is made against the second defendant.

[5] It appears that during the period between the divorce and his death, the deceased lived in an intimate relationship with the third defendant ("*Nxumalo*") fact it is very probable that the two were co-habiting as at the time of death of the deceased.

[6] Shortly after the deceased passed away, the plaintiff reported the death to the Mhala Magistrate Court. It is not clear what transpired thereafter, but on 23 January 1996, the second defendant ("*the magistrate*"), issued a certificate in terms of Regulation 4(1) under Government Notice *L'R34 of 1966*". (it should have been R200 of 1987). In terms of the said certificate, Nxumalo was appointed as a representative of the intestate estate of the deceased.

[7] The plaintiff was not satisfied with the appointment of Nxumalo and after some representations to the Magistrate's Office in Mhala, an enquiry was held before another magistrate, Mr C C Khoza, to determine who was entitled to represent the estate of the deceased. After hearing both the plaintiff, Nxumalo and a number of relatives of the deceased, Mr Khoza revoked the appointment of Nxumalo. Instead, the plaintiff was appointed as a representative of the estate, after Mr Khoza made a finding that, at the time Nxumalo was appointed, she was a party to an existing civil marriage

to another man.

[8] It is not clear from the bundle of discovered documents as to what procedure or criteria the magistrate had employed in the earlier appointment of Nxumalo. In his findings, Mr Khoza stated that Nxumalo had been appointed “*without an enquiry*”. I shall revert to this point later in the judgment.

[9] The final Liquidation and Distribution Account in the deceased’s estate was finalized on 23 January 2001, according to the executor’s certificate attached thereto. The said date is significant for the reason that, on 15 October 2004, the Constitutional Court in *Bhe and Others v Magistrate Khayelitsha* 2005 (1) SA 580 (CC), declared section 23 of the Black Administration Act, 38 of 1927 and Regulation Notice 10601 of 6 February 1987, to be inconsistent with the Constitution of the Republic of South Africa, 108 of 1996, and invalid. The invalidity was made with retrospective effect from 27 April 1994.

[10] However, a proviso was added, among others, that where the estate of a deceased Black person, who died after 27 April 2004 but before 15 October 2004 (the date of judgment) had already been wound up in terms of the Black Administration Act and the regulations, delivery of the assets will devolve thereunder, unless a dispute by an heir is made. Accordingly, the estate in the present matter having been wound up in 2001, the applicable law is the Black Administration Act and Regulations published under Government Notice R200 of 6 February 1987 (“*the Regulations*”).

[11] Regulation 4 of the said notice provided:

“4(1.) 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.

.....

4(5) The magistrate may at any time revoke a certificate issued by him to any person under sub-regulation (1)."

[12] It was submitted by Mr *Leopeng*, counsel for the plaintiff, that when appointing Nxumalo, the magistrate failed to conduct an enquiry, which resulted in the magistrate failing to take into account two aspects, first, that the deceased had minor children with the plaintiff, and second, that Nxumalo was, at the relevant time, a party to an existing civil marriage with another man, thus incapacitating her to conclude a valid customary union with the deceased.

[13] There are three reasons why the above contentions are not sustainable. First, Regulation 4(1) conferred considerable and wide powers to the magistrate, without prescribing the procedure to be followed to enable him to make an appointment of "a *suitable person*". The magistrate did not even need to give prior notice or afford any prior hearing to anyone likely to be affected by the appointment. There was certainly no obligation upon the magistrate to conduct an "*enquiry*" as argued by Mr *Leopeng*.

[14] Secondly, even if assuming the magistrate was under an obligation to conduct an enquiry before appointing a person as a representative of the estate, it appears that in the present case, the magistrate considered certain documentation submitted to him prior to his decision. The said documents established *prima facie*, that the deceased and Nxumalo were married according to customary rites in 1994. Those documents were: sworn affidavits of the next of kin of Nxumalo, attesting to existence of customary union, as well as a letter from the headman of Nxumalo's village, also certifying that customary union existed between the deceased and Nxumalo.

[15] As a result of all these, the magistrate issued a certificate in terms of section 31 of the Black Administration Act, declaring the deceased and Nxumalo to have been partners in a customary union. I find no wrongfulness on the part of the magistrate in this regard. He might well have been negligent in considering this aspect. However, nothing has been placed before me pointing to the direction of wrongfulness on this point.

[16] Thirdly, it should be borne in mind that in terms of Regulation 4(1) the magistrate appointed Nxumalo as a representative of the deceased's estate, "*to assume responsibility for the assets, and the general administration and distribution of the deceased's property*". Nxumalo was therefore not appointed as an heir or beneficiary of the estate. So to that extent, there can be no harm or prejudice to any interested party, flowing from the mere appointment by the magistrate. Nxumalo could well have benefited from the estate of the deceased, not on the basis of her appointment in terms of regulation 4(1), but on the strength of the section 31 certificate, which declared her to have been a partner with the deceased in a custody union. I have already dealt with the circumstances around the issue of this certificates in the preceding paragraph.

[17] In any event, it is my view that when acting in terms of Regulation 4(1), the magistrate exercised a quasi-judicial, if not a judicial function, but certainly not an administrative function. Hoexter, *Administrative Law in South Africa*, p 53, describes an administrative act as "*one that implements or gives effect to a policy, a piece of legislation or adjudicative decision*". Acting in terms of the regulation, the magistrate did not simply implement policy. He had, first, to consider whether it was "*desirable*" to issue a certificate, and if so, identify any person he "*may deem suitable*". That involves some weighing of various aspects, bringing into play his subjective views of the situation and the person to be appointed.

[18] In *Coetzer en 'n Ander v De Kock, NO en Andere* 1976 (1) SA 351 (O), portion of the head-note reads as follows:

"Where the Master makes an investigation into facts in order to decide whether there are grounds for the issue of a certificate under section 42(2) of the Administration of

Estates Act, 66 of 1965, there must be a causal relationship between his findings and his decision whether or not to issue the certificate: it is, therefore, a judicial act which he performs in that connection (my underlining)

[19] In the premises I answer the first question of the stated case in the negative: the magistrate, acting in terms of Regulation 4(1) of Government Notice 200 of 1987, did not perform an administrative but a judicial function.

[20] Even if I am wrong in the conclusion I have arrived at, and the correct position be that the magistrate performed an administrative act when issuing the certificate of appointment, there is still reason why the plaintiff's action should fail. The general principle is that, where an administrative decision is challenged, there being no allegation of *mala fides*, irregularity or improper motive the only question for the courts to determine, is whether the official has in fact exercised his discretion, not whether he has correctly exercised it. See *Shenker v The Master and Another* 1936 AD 136 at 146 and *Hartley v The Master* 1921 AD 407.

[21] The legal position expounded above, has a direct bearing on the manner in which the stated case was formulated. Both counsel appear to have been remiss in formulating the stated case, which at law, is at variance with the general principle enunciated above. However, a party is not bound by an incorrect concession on a point of law. See *Kerksay Investments (Pty) Ltd v Rand burg Town Council* 1997 (1) SA 511 (T) at 520 I - J.

[22] Even on policy considerations, liability does not arise without further ado, on mere establishment of unlawful action. In *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) the then Appellate Division held that the distinction between quasi-judicial and purely administrative decisions was of little value in resolving the issue whether negligence in making decisions pursuant to statutory functions gave rise to delictual liability. There was no justification for treating the distinction between quasi-judicial as

a touchstone or determining liability for loss caused by the negligent exercise of a statutory function. Where such negligence was present, the liability for the exercise of the statutory powers in question relied upon the question whether the public authority's conduct was wrongful, as opposed to unlawful. The nature of the public authority exercised required to be closely scrutinized rather than to pursue the classification between quasi-judicial and purely administrative decisions. The division into quasi-judicial or administrative acts could not possibly play down a hard and fast rule as to when a duty of term arise.

[23] In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), the Constitutional Court considered a claim for damages in delict as a result of a negligent but *bona fide* award of a contract pursuant to a tender. At 137 D - E, Moseneke DCJ, with customary eloquence, articulated the position thus:

“(I)n our constitutional dispensation, every failure of administrative justice amounts to a breach of a constitutional duty. But the breach is not an equivalent of unlawfulness in a delictual liability sense. Therefore, an administrative act which constitutes a breach of a statutory duty is not for that reason alone wrongful...”

[24] At 144 A- B the Deputy Chief Justice continued:

“Compelling public considerations require that adjudicators of disputes, as of competing tenders, are immune from damages claims in respect of their incorrect but honest decisions....”

[25] In my view, the above applies equally to a magistrate acting in terms of Regulation 4(1). In the absence of any allegation of bad faith, improper motive or exceeding of a discretionary power, I am unable to conclude that an action for delictual damages is available to the plaintiff as a result of the magistrate's conduct. No wrongfulness, bad faith, improper motive or *ultra vires* conduct has been alleged or established on the part of the magistrate. The plaintiff's action against the first and second defendants

should therefore fail. With regard to costs, I have decided not to make any costs order against the plaintiff. She acted in her capacity as mother and natural guardian of minor children. The first and second defendants' litigation is funded through public funds.

[26] It should be understood that this judgment relates only to the first and second defendants. It does not affect the *lis* between the plaintiff and Nxumalo, the third defendant. There is *prima facie* case that she has been unduly enriched at the expense of the then minor children, who are now ail majors. With the necessary substitution of the plaintiff, they may proceed with the action against Nxumalo.

[27] I therefore make the following order:

1. The plaintiff's action against the first and second defendants is dismissed.
2. The plaintiff's claim against the third defendant is postponed *sine die*.

T.M. MAKGOKA

ACTING JUDGE OF THE HIGH COURT