

SOUTH AFRICA / JUDGMENT

Nkhwashu v Nkhwashu N.O. (A1228/06)

[2008] ZAGPHC 382 (16 October 2008)

[2008] ZAGPHC 382**COURT**

High Courts - Gauteng

BEFORE

MSIMEKI, G. WEBSTER

CASE / FILE NUMBER

A1228/06

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THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. A1228/06

In the matter between

MONICCA NKHWASHU APPELLANT

And

SELOANE SELINA ROSSY NKHWASHU RESPONDENT

(In her capacity as the Executrix in the Estate of the late Malusela Albert Nkhwashu)

JUDGMENT

MSIMEKI, J

- [1] This appeal is directed against the whole of the judgement of Mr. Ngoasheng, the Magistrate of Lenyenye, of 13 October 2006. The Magistrate had ordered that the motor vehicles enumerated in the court order be "attached and removed (wherever they may be found by the sheriff of the above Honourable Court and same be handed over to the Applicant for safe keeping until the liquidation and distribution of her late husband's estate has been finalised."
- [2] The magistrate granted a rule nisi on 28 September 2006 which was ultimately confirmed on 13 October 2006. This appeal concerns the confirmation of the rule nisi.
- [3] The Appellant based the appeal on four grounds, viz:

That the magistrate had erred in holding that the whole of Section 23 of the Black Administration Act 38 of 1927 had been declared

unconstitutional and that therefore, it was no longer applicable even though the heirs in the current estate had entered into "a redistribution agreement and transfer of properties amended commenced (sic)."

that the magistrate had erred in confirming the rule nisi while failing to apply his mind to the surrounding circumstances of the case enumerated under this ground which Mr. Coertzen, on behalf of the Respondent, correctly submitted in his Heads, are baseless "objections" which are also not substantiated by evidence.

that the magistrate had erred when he confirmed the rule nisi, while ownership of the motor vehicles had not been proved. Sight here, was clearly lost of the fact that the appellant had in her opposing affidavit conceded that her husband had in fact owned the motor vehicles (the taxis). (See in this regard paragraph 3 of her affidavit on page 10 of the court record).

that the magistrate had erred when he held that the court had jurisdiction to deal with the matter while the value of the motor

vehicles exceeded the amount determined by the Minister from time to time by notice in the government gazette namely, currently R100 000.00. This ground was correctly not pursued when Mr. Bredenkamp, on behalf of the appellant, ultimately made his submissions in court. The ground as Mr. Coertzen correctly submitted in his heads has no merit.

[4] This appeal was set down for hearing earlier this year. The appeal was postponed because the respondent had not been given due notice of the date of set down. The appellant had also failed to serve her Heads of Argument on the respondent. Only the respondent filed her Heads of Argument in time. The appellant's Heads, according to the Registrar's stamp, were filed on 6 October 2008 when the appeal had been set down for 10 October 2008 at 10:00. A copy thereof was handed up to the court shortly before the appeal was argued by the parties. The Heads were, obviously, filed out of the prescribed time. This then necessitated an application for condonation by the appellant for the late filing of the appellant's Heads. Mr. Coertzen who had wanted the matter brought to finality, did not oppose the application which was accordingly granted.

[5] It is clearly common cause that:

the respondent was appointed executrix by the Master of the High Court on 22 August 2006.

Section 26(1) of the Administration of Estates Act 66 of 1965 (the Act), provides that:

"an executor shall take into his custody or under his

control all the property in the estate " (the

underlining denotes my emphasis).

the intention of the respondent has all along been to take the motor vehicles into her or under her control for the purpose prescribed by section 26 (1) of the Act.

the executrix has to wind up the estate and accordingly distribute it according to law.

the appellant refuses to hand the motor vehicles listed in the order to the respondent. Had the contrary been the position the matter would not have progressed up to appeal stage, which is this stage.

[6] Mr. Bredenkamp submitted that for the purpose of winding up the estate it was not necessary for the respondent to have physical

possession of the estate assets that the motor vehicles could be parked at the appellant's address. In that event, it was further

submitted, the appellant would then account to the respondent on a daily basis on the operation of the business. Once more, sight was lost of the fact that this would defeat the purpose of Section 26 (1) of the Act which is peremptory.

[7] Mr. Bredenkamp further submitted that until legislation was passed to determine when indigenous law applied, the parties had a choice as to the appropriate law that should apply. Any dispute relating thereto, according to him, had to be resolved by the magistrate having jurisdiction. It was Mr. Bredenkamp's contention that the properties in dispute had to devolve in accordance with black law and custom and not in terms of the Act. The rule nisi, in his view, was not supposed to have been confirmed when the magistrate had clearly not had regard to what was "fair and equitable".

Asked when the deceased had passed away, when the estate had been reported to the Master and when the executrix was appointed he then conceded that Section 26 (1) of the Act applied to the estate of the deceased. Mr. Bredenkamp appeared to place much reliance on the dissenting judgement of Ngcobo J in *SA Human Rights Commission v President, RSA* [2004] ZACC 17; 2005 (1) SA 580 (CC). He again lost sight of the fact that the majority judgement of the court of Langa DCJ (as he then was) reveals that:

"All estates that fall to be wound up after the date of this judgement shall be dealt with in terms of the provisions of the Administration of Estates Act."

"I have held that s23 is inconsistent with the Constitution and invalid. As a result regulation 2 (e) falls away."

The effect of the judgement is that the estates that are currently being wound up under Section 23 of Act 38 of 1927 continue to be so administered to avoid dislocation.

[8] The magistrate, in my view, appears to have applied the law correctly. There is, indeed, as Mr. Coertzen correctly pointed out no reason for this court to interfere with the decision of the magistrate, which in my view, was correctly arrived at. The appeal in my view falls to be dismissed with costs.

In the result the order I make is as follows: The appeal is dismissed with costs.

M.W. MSIMEKI

JUDGE OF THE HIGH COURT

I agree.

G. WEBSTER

JUDGE OF THE HIGH COURT

It is so ordered.

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