88/1459

88/1959

G.P.-S.134917-1955-6-1,000.

U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE ~~Provincial~~ Division.)
(~~Provinsiale~~ Afdeling).

CASE STATED ~~Appeal in Civil Case.~~
BY: ~~Appèl in Siviele Saak.~~

MINISTER OF BANTU ADMINISTRATION & DEVELOPMENT Appellant,

~~versus~~

IN RE: MBIYOSE JILI -v- BEKIZIZWE DUMA & ANO. Respondent.

Appellant's Attorney / Prokureur vir Appellant: Naude & N.

Respondent's Attorney / Prokureur vir Respondent:

Appellant's Advocate / Advokaat vir Appellant: Mr. E. Theron Q.C. Steyn ~~against~~ In favour a quo

Respondent's Advocate / Advokaat vir Respondent: D. P. de Villiers Q.C. C. S. Steyl against a quo

(NAC)

Set down for hearing on / Op die rol geplaas vir verhoor op: Tuesday, 22nd Sept., 1959.

9.45 - 4.40

~~1. 2. 5. 6. 8~~ (A)

C.A.V.

N. d. au Plessis
Acc. Reg.

Pretoria: Tuesday 20th October 1959.

Stated case answered against the decision of the Court a quo i.e. held that G.N. No. 1664, sec 7, of 1929 is not ultra vires.

N. d. au Plessis
Registrar.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter of :-

EX PARTE MINISTER OF BANTU ADMINISTRATION AND DEVELOPMENT, in re MBIYOSE JILI v. BEKIZIZWE DUMA and JOSEPH KUMALO

Coram:Schreiner,Beyers,Malan,Ogilvie Thompson JJA.et BOTHA A.J.A

Heard: 22nd September, 1959. Delivered: 20/10/1959

J U D G M E N T

SCHREINER J.A. :- Acting under section 14 of the Native Administration Act (No. 38 of 1927), which I shall refer to as "the Act", as substituted by section 7 of Act 21 of 1943, the Minister of Bantu Administration and Development submits a decision of the North Eastern Native Appeal Court on a question of law to this Court, in order that it may determine that question.

Though the question to be determined relates generally to the rules governing the devolution of the intestate estates of deceased natives, the facts forming the background should be briefly stated. One Charka Duma, a native, died during 1951 and on the 18th February 1952 a native commissioner issued to his brother Bekizizwe Duma a certi-

ficate/.....

-ficate purporting to be in terms of Regulation 4 (1) of the Regulations framed under section 23 (10) of the Act and published under Government Notice No. 1664 of the 20th September 1929. I shall call these Regulations "the 1929 Regulations". The certificate empowered the appointee "to represent the intestate estate.....and as general heir" of the deceased with full powers to transfer to himself as general heir and sole heir ab intestate of the deceased a certain piece of land. On the same day that the certificate was issued to him, Bekizizwe Duma, instead of transferring the land into his own name, sold 25 acres thereof to Mbiyosi Jili for £200. The price was paid and occupation taken but transfer was not registered. On the 4th March 1953 a will of the deceased was submitted to the same native commissioner, who thereupon revoked the certificate issued by him. In terms of the will of the deceased left his property to his five daughters and appointed John Kumalo his executor. John Kumalo completed a death notice on the 7th March 1953 and Letters of Administration were issued in his favour by the Master of the Supreme Court, Natal, on the 18th April 1955. The delay was not explained to this Court. In August 1956 Mbiyosi Jili instituted action in the native commissioner's court against Bekizizwe Duma and John Kumalo for a declaration that he had bought and paid for the 25 acres and for an order directing/.....

-ing John Kumalo as executor testamentary of Charka Duma, to transfer the property to him or alternatively to refund him the £200. Bekizizwe Duma consented to judgment but John Kumalo contested the action on the ground that Bekizizwe Duma had sold the land in his personal capacity and not as representing the deceased estate. Judgment was given in favour of the defendants by the native commissioner. Mbiyose Jili appealed to the North Eastern Native Appeal Court but the majority of that court dismissed his appeal. In giving the majority judgment the President of the court held that Regulation 2 of the 1929 Regulations as amended, in so far as it purports to lay down substantive rules of devolution, is ultra vires and invalid and that consequently the designation of Nokizizwe Duma as general heir to the deceased was void ab initio.

Doubting the correctness of this decision the Minister desires the determination of the questions . -

"(1) Whether the said Regulation No.2 of Government Notice 1664 of 1929 (as amended) is ultra vires the empowering provision, namely section 25 (10) of Act No. 38 of 1927 in-so-far as it

(a) purports to lay down substantive rules of devolution; and

(b) purports in paragraph (d) of the said Regulation 2 to delegate powers to the Minister to direct the manner in which property is to devolve.

(2)/.....

(2) If the said Regulations are ~~said~~ held to be ultra vires, what rules of law govern the devolution of intestate native estates.'

In order to elucidate the real problem raised by the majority judgment in the Native Appeal Court it is necessary to set out substantial portions of section 23 of the Act and the amendments introduced by section 7 of Act 9 of 1929, which I shall call "the 1929 Act". The material parts of section 23 of the Act read :-

"23(1) All movable property belonging to a native and allotted by him or accruing under native law or custom to any woman with whom he lived in a customary union,or to any house, shall upon his death devolve and be administered under native law and custom.

(2) All land in a location held in individual tenure upon quitrent conditions by a native shall devolve upon his death upon one male person,to be determined in accordance with tables of succession to be prescribed under subsection (10).

(3) All other property of whatsoever kind belonging to a native shall be capable of being devised by will.Any such property not so devised shall devolve and be administered according to native law and custom.

(4) Any dispute or question which may arise out of the administration or distribution of any estate in accordance with native law shall be determined by the native commissioner.....subject to an appeal to the native appeal court.

(5) Any claim or dispute in regard to the administration or distribution of any estate of a deceased native shall, unless all the parties concerned are natives be decided in an ordinary court of competent jurisdiction.

(6) In connection with any such claim or dispute,the heir...

or/.....

or the executor testamentary shall be regarded as the executor in the estate as if he had been duly appointed as such according to the law governing the appointment of executors.

(7) Letters of administration from the Master of the Supreme Court shall not be necessary in, nor shall the Master have any powers in connection with, the administration and distribution of the intestate estate of any deceased native.

.....

(9) In regard to property validly bequeathed by the will of a deceased native, native law shall not apply, in which case a certificate by the native commissioner.....designating the heir.....or executor testamentary as the case may be, as executor in terms of subsection (6) shall be regarded for all purposes as equivalent to letters of administration.

(10) The Governor-General may make regulations not inconsistent with this Act -

(a) prescribing the manner in which the estates of deceased natives shall be administered and distributed;

(b) defining the rights of widows or surviving partners in regard to the use and occupation of the quitrent land of deceased natives;

(c) dealing with the disherison of natives;

(d) prescribing the powers and duties of native commissioners.....in carrying out the functions assigned to them by this section;

(e) prescribing tables of succession in regard to natives; and

(f) generally for the better carrying out of the provisions of this section;

..... "

The material parts of section 7 of the 1929 Act read :-

"7/.....

"7. Section twenty-three of the principal Act" i.e.the Act, "is hereby amended by -

(a) the deletion from subsection (3) of the last sentence thereof;

.....

(d) the insertion in sub-section (7) after the word'Master' where it occurs for the second time of the words 'or any executor appointed by the Master', and the deletion from that subsection of the words 'the intestate estate of any deceased native' and the substitution therefor of the following -

(a) the estate of any native who has died leaving no valid will; or

(b) any portion of the estate of a deceased native which falls under subsection(1) or (2); and

(e) the deletion of subsection (9) and the substitution therefor of the following subsection -

(9) whenever a native has died leaving a valid will which disposes of any portion of his estate,native law and custom shall not apply to the administration and distribution of so much of his estate as does not fall under subsection (1) or (2) and such administration and distribution shall in all respects be in accordance with the Administration of Estates Act,1913(Act 24 of 1913)."

It will be observed that under section 23 (1), (2) and (3) of the Act,before the 1929 amendments, provision was made for the devolution of all property left by a deceased native. Sub-sections (1) and (2) dealt with special kinds of property - they could not be willed but in the case of property falling under (1) went to persons ascer-

-tained by native law and custom and in the case of property falling under (2) went to the successor named in the table of succession to be provided by regulations made under section 23(10)(e). Then under subsection (3) all other property could be willed and if not willed was to devolve according to native law and custom. There was no property belonging to a deceased native, which after the coming into force of section 23 of the Act could have fallen outside the limits of subsections (1),(2) and (3).

But on the 3rd April 1929 when the 1929 Act came into force the second sentence of subsection (3) disappeared, and property not falling under subsections (1) and (2), if not willed, was not covered by any provision of the Act or the 1929 Act.

This brings me to the Regulations made under section 23 (10). Before 1929 there had been Regulations issued under Government Notice No. 2257 of the 21st December 1928. Part II of these Regulations dealt with succession to land, in the Cape Province outside the Transkei, falling under subsection (2) of section 23 of the Act. Part I was of general application and dealt with the exercise by native commissioners and magistrates of their powers to settle disputes about estates administered under native law and custo and with the issue of certificates authorising the transfer of

land/.....

land and designating a person as executor in the estate of the deceased native.

Then came the 1929 Regulations, which were published on the 20th September, i.e. more than five months after the coming into force of the 1929 Act. They repealed Part I of the 1928 Regulations and substituted others. By Regulation 2 they dealt with the devolution of that part of the property of a deceased native which did not fall under subsection (1) ~~and~~ or (2) of section 23 of the Act and had not been willed in terms of the first sentence of subsection (3). The 1929 Regulations were amended in minor respects in 1930, by Government Notices 716 and 1171 of that year. A new Regulation was substituted for Regulation 2 by Government Notice 939 of 1947. For the most part it is the same as the original 1929 Regulation 2. It includes a provision dealing with the property of foreign natives. Then there are three classes of cases in which the property is to devolve as if the deceased had been a European. The first of these classes is that of natives exempted under certain provisions from native law. The second class is that of natives married in community of property or by ante-nuptial contract, including natives who had been so married and had not thereafter entered into a native customary union. The third class of case arises where at his

death/.....

death the deceased native was survived by his partner in a marriage under section 22 (6) of the Act or by his partner in a customary union, or by his partner as a putative spouse, or where he is survived by the issue of himself and any such partner. In this third class of case the common law of intestacy is not automatically applied, but if the Minister is of opinion that it would be inequitable or inappropriate if native law and custom were applied to the devolution of the whole or part of the property he may direct that the property (the whole or part) shall devolve as if the native had been a European lawfully married out of community of property to the partner. In all other cases the property, i.e. unwilled property not falling under subsection (1) or (2) of section 23, "shall be distributed according to native law and custom."

Now there would have been no difficulty at all if the 1929 Act had itself embodied the terms of Regulation 2, or if it had made express or clear provision for the issuing of a Regulation to cover the field left open by the repeal of the second sentence of subsection (3) of section 23. Again, as before the repeal, the provisions would have covered all possible cases. But Parliament did not fill the gap directly in the 1929 Act and it left the regulating provisions of subsection (10) unchanged. There was thus room

for/.....

for the view adopted by the majority of the Native Appeal Court, that by the repeal of the second sentence of subsection (3) the common law system of intestacy was automatically restored, and that the powers to regulate contained in subsection (10) were insufficient to support a regulation in the form of Regulation 2, which provides not merely for the machinery of administration and distribution, but for a system of devolution, and one, moreover, which includes authorising the Minister in certain cases to determine whether common law intestacy or native law and custom should be applied.'

Before examining directly the changes effected by the amendment of section 23 it will be convenient to consider on broader lines what was the apparent intention of Parliament when it enacted section 7 of the 1929 Act, and some reference to the historical background is advisable. As was pointed out in Tobata v. Tobata (5 S.C.528) until there was legislation on the subject questions of succession to natives had to be decided according to the common law. But long before Union the view had become established that, at least where natives did not make use of the European practice of testation, the common law of succession could not satisfactorily be applied to them. The first statutory modification of the position was apparently brought about by the Cape Act 18

of/.....

of 1864. At that stage the change was clearly in the direction of applying native law and custom generally to cases where natives died intestate. We were referred to pre-Union legislation in other parts of South Africa but it is not necessary to examine those laws in detail. The trend was the same. It should, however, be pointed out that for the Transkei there were successive proclamations which culminated in Proclamation 142 of 1910, section 8 of which contained provisions hardly distinguishable from subsections (1), (2) and (3) of section 23 of the Act before the 1929 amendment.

Thus native law and custom had become dominant in the field of native intestate succession before 1927 and its position was preserved in the Act. But by 1929 Parliament had reached the conclusion that the universal application of native law and custom to the intestate estates of natives, outside the forms of property dealt with in subsections (1) and (2) of section 23, would not be satisfactory, and that a change was required to meet the cases of natives who were emerging from tribalism and adopting European marriage and other customs.

If there was to be a change it could either take the form of an immediate departure from the

then established system based on native law and custom and a substitution of the common law, or it could follow more gradual lines, a measure of elasticity being introduced in order to meet the fact that natives were at different stages of detribalisation.

It seems antecedently improbable that Parliament would at one stroke have abandoned the native law and custom system of intestacy and reverted to the pre-1864 position for all natives. Questions of succession are closely connected with marriage and family law. Sections 22 and 23 of the Act together constitute Chapter V which was only brought into operation on the 1st January 1929 a few months before the passing of the 1929 Act. Section 22 dealt with the marriages and property rights of natives in provisions which apparently sought to reconcile the effects of civil and customary marriages. Section 22 (6), already referred to, provided that a civil marriage should not result in community of property unless the parties specially declared that they intended and desired that result. This was, it seems, an example of a tentative, experimental approach to the problems arising out of the changing position of the natives. Again in section 11(1) of the Act, which authorises native commissioners in their discretion to decide questions involving customs followed by

natives/.....

natives according to native law, if not opposed to the principles of public policy or natural justice, it is provided that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles. Neither section 11 nor section 22 of the Act was in any way amended by the 1929 Act, and this, I think, provides some indication that Parliament was not in 1929 making radical changes on the lines of substituting the common law for native law and custom in relation to intestate succession and allied subjects. If there had been this drastic change of policy it must have been manifest in the provisions of the 1929 Act. Instead we find the few changes introduced by section 7, most of them relating to procedural details. Subsections (1) and (2) of section 23 were retained and apart from the repeal of the second sentence of subsection (3) the changes were minor or consequential.

But, though unimportant in themselves some of the changes support fairly strongly a negative answer to the question whether Parliament intended to introduce the common law of ~~intestate succession~~ intestacy for natives. If that had been the intention it would have been natural to provide that the rules of the common law should be administered through the ordinary machinery which operates under the Administration of Estates Act, 1913. A corner stone

of/.....

of that system is control by the Masters of the Supreme Court. Now in 1927 subsection (7) of section 23 excluded the Masters from any part in the control of the intestate estates of deceased natives. That was quite natural, and indeed inevitable, for under the Act all unwilled property was covered by subsection (1) or (2) or by the second sentence of subsection (3), and so fell outside the sphere of operations of the Masters, working under Act 24 of 1913. But, if the 1929 Act was by the repeal of the second sentence of subsection (3) introducing the common law, it would have been an obvious consequential amendment to bring the whole of the estates of deceased natives, outside subsections (1) and (2), within the framework of Act 24 of 1913, whether the deceased had died testate or intestate. Instead of this change being made, we find in subsection (7) a reaffirmation in the most explicit terms of the exclusion of the Masters, and of executors appointed by them, from the administration of any unwilled property left by deceased natives. It is difficult to conceive of Parliament's having done this if the intention had been to introduce the common law.

In full accord with this argument is the change made in subsection (9). Originally it dealt with willed property, which was excluded from native law, though a certificate from the native commissioner took the

place/.....

place of letters of administration. The 1929 Act did not for administration purposes distinguish between the willed and the unwilled parts of the estate. Once there was a will the whole administration was brought under Act 24 of 1913 - even in respect of the unwilled property, other than that falling under subsection (1) or (2). But if in 1929 Parliament was applying the common law to all unwilled property left by a native (other than that falling under subsections (1) and (2)) it would have been illogical to make the control of the Masters depend on whether or not some part of the estate had been willed.

For these reasons it seems to me to be quite clear that Parliament, when it passed the 1929 Act, did not intend by the repeal of the second sentence of subsection (3) to re-apply to native intestate estates the common law rules of intestacy.

Nevertheless it seems to be equally clear that after the repeal and before the publication of the 1929 Regulations it was the common law rules that applied. For there were no other rules that could apply.

But there was nothing to prevent that position from being changed by another Act or by regulations duly made within the enabling provision. No further Act was passed but the 1929 Regulations if they were valid could

effectively/.....

effectively achieve the same result. The argument against their validity is that section 23 (10) (a) is the only provision that could conceivably support such a regulation as Regulation 2. (It was not argued that assistance could be gained from section 23 (10)(f)). But section 23 (10) (a), it was submitted, could not before the enactment of the 1929 Act have authorised a regulation providing rules of devolution, since section 23 (1)(2) and (3) of the Act already covered devolution completely. Consequently before the 1929 Act was enacted the manner of administering and distributing the estates of deceased natives, which could be regulated under section 23 (10) (a), was limited to procedural matters and did not extend to rules fixing who should be entitled to the deceased's property. And since the wording of section 23 (10)(a) was not changed by the 1929 Act the power to regulate was still as limited as it was under the unamended Act.

There appear to be two theoretically possible answers to this argument. The first is that even in the unamended Act the wording of section 23 (10)(a) was wide enough to cover regulations that provided rules of devolution. Our attention was drawn to pre-Union provisions in which the expression "administration and distribution", as

applied/.....

applied to the estates of deceased natives, was apparently used to include the laying down of rules of devolution (see e.g. Act 18 of 1864 (C) sections 2 and 5; Proclamation 28 of 1902 (Tvl.)section 70). There can be no doubt that the expression can be used in a wide sense of the sort indicated, but there is also no doubt that it can be used in a relatively narrow sense, to connote the procedural steps by which estates are reduced into possession, liquidated and paid out to the persons entitled. The correct sense must depend on the context and in favour of the view that in the context of the 1927 Act the narrower meaning obtained is, as I have indicated, the fact that subsections (1), (2) and (3) of the Act already provided a complete code of devolution. It was suggested, in argument, that even under the Act before the amendment there was room for regulations fixing who were to be deemed to be the beneficiaries by native law and custom. Parliament might of course authorise the making of regulations declaring native law and custom on the subject and thus in effect making rules of devolution, but it seems to me that ~~dxxxgxxxx~~ language more directly related to such a power would probably have been required. I ~~do not think that~~ very much doubt whether in the context of the Act before the amendment there was power under section 23 (10) (a) to make regulations relating to devolution.

Assuming/..?....

this doubt to be well-founded
Assuming ~~that it be~~, the second answer to the argument advanced in support of the majority judgment must now be considered. It is that when the 1929 Act repealed the second sentence of subsection (3) it so changed the context of section 23 (10) (a) as to give it a wider meaning. On principle that seems to be correct. The second sentence of subsection (3) completed the system of devolution provided by subsections (1), (2) and (3) and it was because of the completeness of the system that the regulating power in section 23 (10)(a) had to be interpreted narrowly. Consequently when Parliament removed the second sentence of subsection (3) it enabled section 23(10)(a) to be given the wider meaning that could support a regulation providing rules of devolution. In order to ascertain whether the 1929 Regulations (as amended) are valid one should read section 23 in its amended form.(cf. New Mines Ltd v. Commissioner for Inland Revenue, 1938 A.D. 455 at page 463, referred to in Regina v. Correia, 1958(1) S.A.533 at page 540). So reading the section, and having regard to what has been said about the apparent intention of Parliament when it enacted the 1929 Act, it seems to me that section 23 (10) (a) in its changed context is wide enough to support Regulation 2.

The other ground for holding Regulation 2 to be invalid which was stated in the judgment of the

majority/.....

majority of the Native Appeal Court is that the Regulation involves a delegation of power by the Governor-General to the Minister. This question must be considered on the assumption that section 23 (10) (a) after the 3rd April 1928 authorised regulations prescribing how the estates of deceased natives should devolve. On that assumption there could clearly be no objection to Regulation 2 on the ground that it operates a general delegation to the Minister. For the most part the regulation is explicit as to the circumstances in which the property is to devolve as if the deceased had been a European. Even beyond the cases dealt with by general rule the matter was not left generally to the discretion of the Minister. Only in certain sets of circumstances, which were similar to those in which the Regulation directly applied the common law, was the Minister given the power by stating his opinion to decide what system was to apply. And he had to follow what seemed to him to be the equitable and appropriate course. As I have indicated the problem with which Parliament and the regulating authority had to deal related to a changing situation and one in which elasticity was an important factor. This appears to be one of those exceptional cases in which the examination of the ~~exx~~position of individuals could not, in reason, be avoided and in which it was impossible to cover all the ground by

general/.....

general rules. A discretion had to be exercised in certain cases and Parliament must be taken to have authorised the importation into the Regulations of provisions which would meet such cases as well as those for which general rules could be provided. For these reasons it seems to me that Regulation 2 was not rendered invalid because it made certain cases depend on the Minister's opinion.

In reaching the above conclusion I have not found it necessary to refer to the decided cases in which Regulation 2 has been held or assumed to be valid. These cases, in the Supreme Court as well as the Native Appeal Courts, were used to support an argument that, even if it should appear to this Court that Regulation 2 was invalid, the question should be determined in such a way as not to disturb the view hitherto generally accepted. How far the principles discussed in such cases as Union Government v. Rosenberg (Pty)Ltd. 1946 A.D.120 at page 130; Mine Workers Union v. Prinsloo, 1948(3)S.A.831 at page 852; Rydawell v. Chapman, 1953(3)S.A.514 at page 521, apply to determinations given by this Court under the procedure employed in this case need not be decided.

The answer to the Minister's first question is that Regulation No. 2 of Government Notice 1364 of 1929 is not ultra vires either on the ground that it lays

down/.....

down substantive rules of devolution or on the ground of delegation. The second question accordingly falls away.

O.D. Schreiner 29.9.54

Beyers, J.A.
Malan, J.A.
Ogilvie Thompson, J.A.
Botha, A.J.A.

} Concur