

**C Müller-Van der Westhuizen & Z Nhlapo**

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# Practical challenges relating to the supervision of small estates

## Abstract

Previously, the supervision of the administration of deceased estates was divided along racial lines. Law reform has, however, seen the establishment of a single system that is fair to all South Africans – or is it? Following a brief contextualisation of the legal position on the supervision of deceased estates prior to, and following the definitive *Moseneke* judgement of 6 December 2000, this article sets out to examine whether the equality envisaged by that judgement and recent legislation pertaining to the supervision of small estates is actually being achieved.

The research reveals some practical challenges, including poor service delivery at service points; banks renouncing their nomination as executor of small estates for a lack of sufficient financial benefit; the non-registration of customary marriages; the poor protection currently afforded to vulnerable minor beneficiaries of deceased estates, and the lack of a more affordable, accessible way than lengthy and costly court procedures to challenge a decision of the Master of the High Court.

To address these challenges, it is recommended that service point infrastructure be strengthened; that banks be required to communicate more openly with their clients; that extensive awareness campaigns be launched on the urgent need for all customary marriages to be registered; that the agreement between government and Legal Aid South Africa, which is supposed to serve minor beneficiaries of deceased estates, be revisited, and that the possibility of an estate ombudsman be explored.

## Praktiese uitdagings in verband met toesig oor klein boedels

Toesig oor die administrasie van bestorwe boedels is voorheen volgens rasselyne verdeel. Tog het regshervorming sedertdien 'n enkele stelsel tot stand gebring wat billik is teenoor alle Suid-Afrikane – of is dit? Na 'n kort uiteensetting van die regstandpunt oor toesig oor bestorwe boedels voor en na die rigtinggewende *Moseneke*-uitspraak van 6 Desember 2000, ondersoek hierdie artikel of die gelykheid wat daardie uitspraak en onlangse wetgewing met betrekking tot toesig oor klein boedels beoog, werklik bereik word.

Die navorsing bring sekere praktiese uitdagings aan die lig. Dit sluit in swak dienslewering by dienspunte; banke wat hul benoeming as eksekuteur van klein boedels laat vaar by gebrek aan voldoende finansiële voordeel; die nie-registrasie van gewoonteregtelike huwelike; die huidige swak beskerming van kwesbare minderjarige begunstigdes van bestorwe boedels, en die gebrek aan 'n meer bekostigbare, toeganklike metode as uitgerekte en duur hofverrigtinge om 'n besluit deur die Meester van die Hooggeregshof te betwis.

*C Müller-van der Westhuizen, Lecturer, Department of Private Law, University of the Free State.*

*Z Nhlapo, Deputy Master, Free State High Court.*

Om hierdie uitdagings te hanteer, word daar aanbeveel dat die infrastruktuur van dienspunte versterk word; dat banke verplig word om meer openlik met hul kliënte te kommunikeer; dat uitgebreide bewusmakingsveldtogte van stapel gestuur word oor die dringende behoefte om alle gewoonteregtelike huwelike te registreer; dat die ooreenkoms tussen die regering en die Regshulpraad van Suid-Afrika, wat veronderstel is om minderjarige begunstigdes van bestorwe boedels te dien, hersien word, en dat die moontlikheid van 'n ombudsman vir boedels verken word.

## 1. Introduction

Where the gross value of an estate is R250,000 or less (hereinafter referred to as a “small estate”), section 18(3) of the *Administration of Estates Act*<sup>1</sup> authorises the Master of the High Court to direct a person or persons to finalise the estate in a fast and simple manner.<sup>2</sup> The Master may, therefore, dispense with the appointment of an executor<sup>3</sup> to administer the estate, which is a lengthier, more complicated process.

Previously, the supervision of the administration of deceased estates was divided along racial lines. Law reform in this regard has seen the responsibility of supervising the administration of deceased estates shift to the Master of the High Court alone,<sup>4</sup> the implementation of a single operating process for such supervision, and the application of the *Intestate Succession Act*<sup>5</sup> to determine beneficiaries in the case of all intestate estates. This implies that one system now applies to all South Africans – a system that is fair, or at least seems fair in theory. It requires the same quality of service to be rendered to all South Africans, without any distinction based on race, gender, age, or birth. However, when it comes to implementation, what is the current South African reality?

The main purpose of this article is to examine whether the equality envisaged by recent legislation and court judgements is being realised in practice. In doing so, the research will highlight some practical challenges relating to the supervision of small estates that create large discrepancies between the law, which at face value seems fair and just, and its practical implementation. Certain recommendations will also be made as to how these discrepancies may be addressed.

To contextualise the discussion, though, a brief historical overview of the position prior to, and following 6 December 2000<sup>6</sup> will first be provided.

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1 *Administration of Estates Act* 66/1965.

2 Abrie *et al.* 2015:91.

3 *Administration of Estates Act* 66/1965:section 18(3).

4 See also Abrie *et al.* 2015:2-3.

5 *Intestate Succession Act* 81/1987.

6 Being the date on which judgement was delivered in the case of *Moseneke v The Master* 2001 2 SA 18 CC.

## 2. Historical overview

### 2.1 The position up until 6 December 2000

The winding-up and administration of estates in South Africa prior to 6 December 2000 could be broadly divided into two categories.<sup>7</sup> Magistrates had jurisdiction over the intestate estate of an African who had ordinarily resided within his/her jurisdiction, while the Master had jurisdiction over all other deceased estates, including the testate estate of an African.<sup>8</sup> The Master's powers regarding the administration of the intestate estate of an African were expressly excluded in terms of section 23(7)(a) of the *Black Administration Act* and section 4(1A) of the *Administration of Estates Act*.<sup>9</sup> The power to administer intestate Black (African) estates was confined to a magistrate in terms of regulation 3(1) of Government Notice R200 of 1987.<sup>10</sup> A Black person had the option of indicating during his/her lifetime the preference not to live under customary law. This was signalled by an application for a certificate exempting him/her from the Code of Zulu Law under section 31 of the *Black Administration Act*, and through exemption granted by the Minister of Justice if the Minister believed that it would be unfair to distribute the estate under customary law. If the deceased concluded a civil marriage in community of property, his/her estate also devolved in terms of the common law of succession.

Pre-1994, the *Black Administration Act*<sup>11</sup> and the *Law of Evidence Amendment Act*<sup>12</sup> had a considerable impact on the recognition and application of customary law in South Africa.<sup>13</sup> However, the attempt by these acts to recognise customary law was unsatisfactory, as courts still had the discretion to apply<sup>14</sup> or, later on, take judicial notice of customary law, provided that it was not opposed to the principles of public policy and natural justice.<sup>15</sup> Nevertheless, doubt regarding the position of customary law in South Africa was to a great extent removed by the interim *Constitution*, and later also the 1996 *Constitution*.<sup>16</sup>

Although the *Law of Evidence Amendment Act* has not been repealed as yet, section 1(1), which deals with taking judicial notice of indigenous

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7 Rautenbach & Bekker 2014:185.

8 Rautenbach & Bekker 2014:185.

9 Rautenbach & Bekker 2014:185.

10 Rautenbach & Bekker 2014:185.

11 *Black Administration Act* 38/1927.

12 *Law of Evidence Amendment Act* 45/1988.

13 Rautenbach *et al.* 2010:32. See also Rautenbach & Bekker 2014:38.

14 *Black Administration Act* 38/1927:section 11(1).

15 *Law of Evidence Amendment Act* 45/1988:section 1(1).

16 Section 211(3) of the *Constitution* requires the courts to apply customary law when that law is applicable, subject to the *Constitution* and any legislation that specifically deals with customary law. Therefore, in theory, customary law is now on an equal footing with common law.

law, is now redundant,<sup>17</sup> as the *Constitution* introduced a new customary-law dispensation for South Africa.<sup>18</sup>

## 2.2 Law reform since 6 December 2000

### 2.2.1 The Moseneke decision<sup>19</sup>

In the *Moseneke* matter, the court assessed the constitutionality of section 23(7)(a) of the *Black Administration Act* as well as regulation 3(1). It held that both provisions imposed differentiation based on race, ethnic origin and colour, and as such, constituted unfair discrimination as envisaged in section 9 of the *Constitution*.<sup>20</sup> The court rejected the Master and the Minister's arguments that the administration of intestate estates of Africans by magistrates was convenient and inexpensive, and held that the justification for the differentiation was rooted in racial discrimination, which severely assailed the dignity of those concerned and undermined attempts to establish a fair and equitable system of public administration. The court also pointed out that this kind of benefit should not be linked to race, but had to be at the disposal of all people of limited means or who live far from urban areas, where offices of the Master were located.

Accordingly, it was held that section 23(7)(a) and regulation 3(1) were unconstitutional and thus invalid. The declaration of invalidity in respect of regulation 3(1) was suspended for a period of two years in order to empower the Master to administer estates of Africans. It was further held that, during the period of suspension, the word "shall" in regulation 3(1) was to be interpreted as "may". This meant that African families could choose whether to have a deceased estate not governed by the principles of customary law<sup>21</sup> administered by the Master or a magistrate. However, for practical reasons, it was held that the *status quo* with regard to transactions already completed in terms of section 23(7) and regulation 3(1) had to be upheld.

The *Administration of Estates Amendment Act*<sup>22</sup> and the *Amendment of the Regulations for the Administration and Distribution of Estates*<sup>23</sup> were promulgated to give effect to the order in *Moseneke*. The *Amendment*

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17 Rautenbach *et al.* 2010:35.

18 Rautenbach *et al.* 2010:39. See also Rautenbach & Bekker 2014:38-39.

19 *Moseneke v The Master*, judgement delivered on 6 December 2000.

20 *Moseneke v The Master*:22.

21 The order did not refer to section 23(7)(b) of the *Black Administration Act*, which prohibited the Master from dealing with certain kinds of property accruing in terms of "Black law and custom", as described in section 23(1) and (2) of the *Act*. Neither did the order affect the other regulations issued under the *Black Administration Act*, which dealt with magistrates' powers and duties to supervise such property. See *Moseneke v The Master*:fn. 33.

22 *Administration of Estates Amendment Act* 47/2002.

23 GN R1501 of 2002.

Act<sup>24</sup> provided for service points where officials could act on behalf of, and under direction of the Master, with limited jurisdiction, excluding estates that devolved in terms of customary law. Where an African died intestate, the magistrate in the area of jurisdiction where the deceased had last resided still had the power to administer the estate of any person who was a partner to a customary marriage.

### 2.2.2 Position post-Moseneke, pre-Bhe

A matter that remained unresolved after the *Moseneke* decision was the issue of succession in terms of customary law.

In *Mthembu v Letsela*,<sup>25</sup> for example, a mother unsuccessfully approached the courts thrice to contest the rule of male primogeniture in order to save her family's home from her late husband's father. The courts were reluctant to declare the rule of male primogeniture unconstitutional because of the male heir's concomitant maintenance duty. The three *Mthembu* cases were, however, criticised for having neglected to ascertain whether there was a living customary rule regulating intestate succession in social practice.<sup>26</sup>

In *Zondi v The President of the Republic of South Africa*,<sup>27</sup> the court held that regulation 2 of Government Notice R200 of 1987 offended the equality provisions of the *Constitution*: The children, both legitimate and illegitimate, of a deceased African person married by antenuptial contract or in community of property qualified to inherit the estate, while "Black law and custom", which applied otherwise, meant that in such instances, illegitimate children did not qualify as heirs. The court found this to be grossly discriminatory and struck it down, thereby conferring on all illegitimate children the same succession rights.

### 2.2.3 The Bhe decision

The *Mthembu* and *Zondi* cases were followed by the 2004 decision in *Bhe v Magistrate, Khayelitsha, Shibi v Sithole, SA Human Rights Commission of the Republic of South Africa*,<sup>28</sup> in which section 23 of the *Black Administration Act*, the regulations in terms thereof as well as the customary rule of male primogeniture were found to be unconstitutional. In fact, the decision gave rise to the implementation of a new system, which implied that all estates were to be administered and supervised in terms of the *Administration of Estates Act*;<sup>29</sup> that the responsibility to supervise the administration of all deceased estates rested only with the Master of the High Court, and that

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24 *Amendment Act*:section 2A.

25 *Mthembu v Letsela* 1997 2 SA 936 T; 1998 2 SA 675 T; 2000 3 SA 867 SCA.

26 See Himonga *et al.* (2014:63-64) and the authorities cited therein.

27 *Zondi v The President of the Republic of South Africa* 2000 2 SA 49 N.

28 *Bhe v Magistrate, Khayelitsha, Shibi v Sithole, SA Human Rights Commission of the Republic of South Africa* 2005 1 BCLR CC.

29 *Administration of Estates Act* 66/1965.

all estates were to be distributed in terms of the *Intestate Succession Act*, which was supplemented to accommodate cases where the deceased had been married in terms of customary law.<sup>30</sup>

## 2.2.4 Legislation

The *Black Administration Act* was eventually repealed by the *Repeal of the Black Administration Act and the Amendment of Certain Laws Act*.<sup>31</sup> As a result of the judgement in *Bhe* and the recommendations of the South African Law Reform Commission, the legislature enacted the *Reform of Customary Law of Succession and Regulation of Related Matters Act*.<sup>32</sup> This Act now provides that the *Intestate Succession Act* is applicable to all intestate estates.<sup>33</sup>

## 3. Some practical challenges and recommendations

A large number of South Africans die intestate, and many of those served by the Master's offices are poor, live in rural areas, and form part of the so-called vulnerable groups, being women, children and people with disabilities. The important part to be played by the Master of the High Court as well as other officials in protecting the rights of such vulnerable groups was emphasised in the *Bhe* decision discussed earlier. In practice, however, this poses certain challenges. The next section details some of the implementation challenges relating to section 18(3)<sup>34</sup> ("small estates") appointments. However, the list of challenges discussed is by no means exhaustive.

### 3.1 Service points

The Minister of Justice and Constitutional Development<sup>35</sup> has designated all magistrate's courts as service points,<sup>36</sup> where appointed persons must exercise the powers and perform the duties delegated to them on behalf of, or under the direction of the Master.

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30 For a discussion of the challenges pertaining to the impact of the *Bhe* decision on rural women, see Weeks (2015).

31 *Repeal of the Black Administration Act and the Amendment of Certain Laws Act* 28/2005.

32 *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11/2009.

33 *Intestate Succession Act*:section 2(1). The prevailing debates relating to the Act will not be discussed, in this instance. At least, one system applying to all intestate estates seems fair and just and in accordance with our constitutional values.

34 *Administration of Estates Act*.

35 In terms of the powers conferred on the Minister by section 2A of the *Administration of Estates Act*.

36 See also Weeks 2015:227.

Service points are authorised to administer all intestate estates up to the value of R100,000 or R250,000, depending on the circumstances and subject to certain limitations. The latest value has been set at R100,000 in terms of Circular Notice 17/2014 issued by the Director-General of Justice and Constitutional Development, and applies to new estates reported on, or after 2 December 2014.<sup>37</sup> Previously, this value was R50,000. The same circular notice increased the jurisdiction of service points, where the paperless estate administration system (PEAS) had been implemented to R250,000 in respect of new estates reported on, or after 2 December 2014. Service points must refer all cases to the Master of the High Court, where (i) the deceased left a will; (ii) the value of the estate, before any debts are paid or other deductions are made, exceeds or appears to exceed R100,000 or R250,000 (depending on the circumstances); (iii) one of the assets in the estate is cash to the value of more than R20,000, and one or more of the beneficiaries are minors, and/or (iv) the estate is or may be insolvent.<sup>38</sup>

Therefore, many estates fall under the jurisdiction of these points.<sup>39</sup> Master's offices are located in the city centres, far from rural areas,<sup>40</sup> and in an effort to bring the service closer to the people, magistrate's courts offer limited services relating to estates. The officials employed to consult with the public and prepare the letters of authority are called estate clerks. Estate clerks need to have a Grade 12 certificate with up to two years' experience. No law qualification is required for the position. In the Free State region, there are an estimated 100 estate clerks who also perform estate functions.<sup>41</sup> They undergo a five-day training course presented by the Justice College, but perform duties similar to an estate controller based in the Master's office. Estate controllers, however, are required to have a four-year law degree before they can be appointed as such,<sup>42</sup> and also receive training at the Justice College as well as at the office where they are based.<sup>43</sup>

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37 The date of said circular.

38 <http://www.justice.gov/master/deceased.html> (accessed on 22 July 2015).

39 See also Burman *et al.* (2008:136), who explain that many small estates go unregistered.

40 See also Weeks 2015:227.

41 Information obtained in a personal interaction with Ms Anita Wessels from the Human Resource Section at the Free State regional office of the Department of Justice and Correctional Services on 22 July 2015.

42 These are the requirements in terms of the Department's post advertisements, as confirmed by Mr Ben Moeketsi, Human Resources Officer in the Bloemfontein Master's office.

43 The Justice College provides annual training for all services rendered by the Master's office, including deceased estates, as is evident from the work programme issued annually by the college. <http://djini/C7/Justice%20College/default.aspx> (accessed on 22 July 2015).

Burman and colleagues correctly state:<sup>44</sup>

An individual's ability to protect his/her interests as a beneficiary of an estate requires knowledge of the system of administration, where to access the relevant institutions, how to access them and what his/her substantive legal rights are in relation to intestate inheritance.

In reality, though, very few people have knowledge of these matters. Indeed, family members sometimes fight over what, to others, may seem small or insignificant matters or assets, but have great significance for the people involved.<sup>45</sup> Still, clerks deal with these matters, which may not be in the public's best interest. After all, prior to the *Moseneke* and *Bhe* decisions, magistrates, i.e. people who were legally qualified and able to interpret legislation and relevant empowering provisions, handled estates dealt with in the magistrate's courts. Although some steps<sup>46</sup> have been taken in the meantime to improve the situation, not enough has been done. Out of the 66 magistrate's offices in the Free State, not one has an official qualified in the field of law to deal with deceased estates on a full-time basis. The two Assistant Masters appointed to deal with service points are based in the Bloemfontein Master's offices and merely visit the magistrate's offices once in a while.<sup>47</sup> The Master of the North-West High Court has 28 service points under its jurisdiction, not one of which has full-time personnel with law qualifications to deal with estates.<sup>48</sup> In the Mthatha area, two out of 27 service points are headed by Assistant Masters.<sup>49</sup> Consequently, in the current circumstances, it cannot be said that the poor and vulnerable are served in a manner as fair or adequate as that experienced by customers in the urban areas where the Master's offices are based, where various officials qualified in the field of law – ranging from estate controllers to the Master – deal with estates.

Burman and colleagues<sup>50</sup> also highlight that attorneys use the Master's offices even when their own offices are located within walking distance from the service points. Therefore, the system ends up serving people who

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44 Burman *et al.* 2008:140.

45 Burman *et al.* 2008:140-141.

46 A project known as Sesifikile (loosely translated as "we have arrived") was undertaken by the Master's branch, which was aimed at making the Master's services accessible to all (particularly to the rural and poor) through appropriately qualified professionals by 2012. The project identified crucial magisterial districts where an Assistant Master may be placed to deal with estates and to issue the letters of appointment, depending on the number of matters reported at such district per annum. Sixteen sites were identified at the time. <http://djini/C18/Lekgotla%20and%20Workshops/webpage%20Libsite> (accessed on 22 July 2015).

47 Confirmed by co-author Zimkhitha Nhlapo, Deputy Master, Free State High Court, from personal experience.

48 Information provided by Mr Modibela, head of the Master's office of the North-West High Court.

49 Information provided by Mr Jozana, head of the Master's office of the Mthatha High Court.

50 Burman *et al.* 2008:153.

can afford an attorney. It would thus seem that the Department of Justice and Constitutional Development is, in many instances, helping those who can, in fact, help themselves, providing service to a section of the community who are literate, can afford legal representation, and therefore know their rights.

Our submission in this regard is that the duty of issuing letters of appointment should be taken away from court clerks, and that estate controllers should rather be appointed at each service point. The estate controller would then assist people and forward the relevant documentation to the Master's office, where the information can be checked and, if all seems in order, the signed letters of authority can be issued. In this way, people who live in remote areas, far from their nearest Master's office, will receive the same standard of service as their fellow South Africans in urban areas. The recommendation is specifically for estate controllers and not Assistant Masters, as the current paperless estate administration system (PEAS) utilised by the Master's office in registering estates and issuing letters of authority enables the Assistant Master to approve and sign letters of authority from anywhere in the province.

Another option to consider, as suggested by Burman and colleagues,<sup>51</sup> is to provide service points with exclusive jurisdiction over small estates, although they would remain subject to the Master's authority and supervision. Although this would be dependent on the strengthening of the service point infrastructure, it would go a long way towards relieving the pressure on the Master's office.<sup>52</sup> Burman and colleagues also stated:<sup>53</sup> If the use of service points was made mandatory for all small estates, it would not only be used by those who cannot afford an attorney. Greater scrutiny of the performance of service points may in fact be promoted if professionals also use the service on a regular basis.<sup>54</sup>

### 3.2 Banks renouncing nomination on small estates

Apart from attorneys, certain financial institutions such as banks and insurance companies also offer a will-drafting service to the public. When one chooses to draft one's will at a bank, for example, the bank will usually be nominated as the executor of the estate. However, in most instances, should the testator die with an estate value of below R250,000, the bank would submit the reporting documents to the Master, but would simultaneously renounce its nomination as executor.<sup>55</sup> One particular bank

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51 Burman *et al.* 2008:153.

52 Burman *et al.* 2008:153.

53 Burman *et al.* 2008:154.

54 For a discussion of service points and so-called "property grabbing", see Burman *et al.* (2008:136-156). In their article, the authors discuss various other practical loopholes in the service point system, which fall outside the scope of this discussion.

55 Information obtained from co-author Zimkhitha Nhlapo, Deputy Master of the Free State High Court and former head of the Master's office of the Bhishe

even stipulates in its letter that, should it transpire that the estate is valued at more than R250,000, its renunciation would be of no effect. From this, it is safe to conclude that the bank's main concern is financial gain rather than safeguarding the interests of the testator/testatrix.<sup>56</sup>

With the bank renouncing, the right to nominate a Master's representative shifts to the beneficiaries. This has proven to be fertile breeding ground for family feuds as to who should be appointed as the executor/executrix. These feuds prolong the process, which may lead to the estate property ending up in the wrong hands.

To illustrate this, co-author of this article Zimkhitha Nhlapo, Deputy Master of the Free State High Court, was in the process of accepting wills in January 2014 when she came across three matters in which the same bank was nominated as executor. According to the inventories, two of these estates were small estates, whereas the third one was valued at over R250,000. The bank accepted its nomination in respect of the latter estate only.

Obviously, banks are in the business of making money. It is, however, recommended that the possibility of them renouncing due to the value of the estate be communicated to their customers in advance to enable the customer to make an informed decision as well as to recommend that the testator/testatrix make provision for an alternative Master's representative in the event of the bank renouncing its nomination. When customers are not duly informed in this regard, the value of the estate should not be accepted as a valid ground for the bank to renounce its appointment as executor. Legislation must provide for grounds on which renunciation of executorship is considered acceptable. These should then be regulated by the Master.

### 3.3 Customary marriages

Another practical challenge relating to supervision pertains to the non-registration of customary marriages. Previously, customary marriages were not recognised as valid and were referred to as "customary unions". Recognition of customary marriages was, however, formalised by the *Recognition of Customary Marriages Act*.<sup>57</sup>

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High Court. She has observed this practice in both offices. This has further been confirmed by the heads of the Master's office of the North-West and Mthatha High Courts. In the North-West Master's office, for instance, the head of office confirmed that financial institutions renounced their nomination in respect of approximately eight out of ten testate estates valued at below R250,000.

56 Except when otherwise determined in the will, which rarely happens, the prescribed tariff for the executor's remuneration is 3.5% of the gross value of the assets at the date of death, and 6% of the gross income accrued and collected after the date of death. See Abrie *et al.* 2015:121.

57 *Recognition of Customary Marriages Act* 120/1998.

The registration of customary marriages provides certainty, which is why section 4 of this *Act* provides for it.<sup>58</sup> However, section 4(9) provides that failure to register a customary marriage does not affect its validity.

Proving the existence of a customary marriage that has not been registered may pose a problem to the executor of an estate, as well as to the Master when an estate is reported. This is especially the case when the existence of such a marriage is being disputed by the interested parties. Therefore, the Master insists on proof of registration, as section 4(8) of the *Recognition of Customary Marriages Act* provides that a certificate of registration of a customary marriage constitutes *prima facie* proof of its existence.<sup>59</sup>

As Burman and colleagues stated,<sup>60</sup> women who were married under customary law and whose marriage was either never registered or, if registered, cannot furnish a copy of the certificate, are particularly at risk. If a family member registers the deceased as never having been married, and that same family member is appointed as the Master's representative, the danger exists that the deceased's assets may have been squandered by the time the spouse is able to source the marriage certificate from the Department of Home Affairs and contest the appointment.<sup>61</sup> In *Mahlala v Nkombombini*,<sup>62</sup> for instance, the deceased's marriage was not registered, which resulted in the mother of the deceased being appointed as executrix of the estate. The issue surrounding the registration of customary marriages has been scrutinised by the courts and academics alike,<sup>63</sup> but an appropriate solution still seems to evade us.

The *Reform of Customary Law of Succession and Regulation of Related Matters Act*<sup>64</sup> could have an impact on the Master's insistence on a certificate, as section 5 of the *Act* stipulates that, if any dispute or uncertainty arises in connection with the status of any person whose estate or part thereof must devolve in terms of the *Intestate Succession Act*, the Master of the High Court may make such determination as may be just and equitable in order to resolve the dispute or remove the uncertainty. Section 5 further provides that, before making such a determination, the

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58 It should be noted that, although the last date prescribed for late registrations by the Minister of Home Affairs was 31 December 2010, it appears that the Department of Home Affairs continues to process late registrations. See Van Niekerk (2014:503) and authorities cited therein. This, however, falls outside the scope of this discussion.

59 See also *Kambule v The Master* 2007 3 SA 403 E.

60 Burman *et al.* 2008:150.

61 Or, as articulated by Burman *et al.* (2008:151), "... it is likely that the deceased's assets will have been 'grabbed'".

62 *Mahlala v Nkombombini* 2006 5 SA 524 SE.

63 See Himonga *et al.* (2014:105-106) and authorities cited therein, as well as authorities cited by Van Niekerk (2014:496).

64 *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11/2009.

Master may direct that a magistrate or a traditional leader in the Master's area of jurisdiction hold an inquiry into the matter.

The challenge still remains that, even if the Master makes use of section 5, the deceased's assets may have been squandered by the time the dispute or uncertainty is settled. This is especially relevant in respect of livestock and furniture, which may also be the only assets in the estate. Obviously, this is detrimental and unfair to the rightful heir(s).

As much as the solution to this challenge seemingly is to require that all customary marriages be registered in order to be valid, the reality is that, in the absence of an alternative, sensible penalty,<sup>65</sup> too many women and their children will be prejudiced if their marriages are not recognised due to non-registration, putting these women and children further at risk.<sup>66</sup> Although, clearly, steps need to be taken to raise awareness of the *Act* to ensure that people's rights in this regard are protected,<sup>67</sup> the question is when and how this will be done, considering that it has been fifteen years since the *Act* has taken effect. Spouses (and children) who find themselves in situations such as these seem to be in a so-called "catch 22", as although they have valid marriages according to the *Act*, the lack of registration or the late registration of their marriages restricts the full enjoyment of their rights in terms of, among others, inheritance. In this regard, Van Niekerk stated:

[I]n practice the absence of a registration certificate severely affects the spouses. Registration, which ensures that 'marital status is made more certain and easier to prove' *is in fact fundamental to the protection of women in (and children from) customary marriages. Thus a registration certificate is necessary, for example, to access pension benefits, to inherit, and to divorce.*<sup>68</sup>

Despite registration being fundamental to the protection of the rights of the vulnerable, little has apparently been done to raise awareness of this issue. Possible practical ways of raising awareness include radio and television advertisements; assistance from traditional leaders, who could inform and educate people in their mother tongue; involving legal practitioners in community-based programmes, as well as displaying informative posters at key places of assembly, such as city halls.<sup>69</sup> Although it is acknowledged that we are not there yet, it may in the near future seem less outrageous and unfair for registration to be a validity requirement, once awareness strategies are implemented.

Registration will also ensure that, should a person already be married (either civil or customary) and be planning a further marriage, the wife/husband to be is made aware of the existing marriage before it is

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65 See also Himonga *et al.* 2014:106.

66 In this regard, see also Maithufi & Bekker 2009:164-174; Rautenbach & Bekker 2014:106; Himonga *et al.* 2014:106.

67 See Rautenbach & Bekker (2014:106) and the authority cited therein.

68 Van Niekerk 2014:495 (author's emphasis).

69 This list is by no means exhaustive.

too late.<sup>70</sup> On 18 November 2015, the Durban High Court declared both a subsequent customary marriage and a subsequent civil marriage invalid, as the man's first wife had not consented to the second customary marriage.<sup>71</sup> It is not permitted to conclude a civil marriage while a customary marriage to another party subsists.<sup>72</sup> The customary wife was represented by the Legal Resources Centre, which, according to a TimesLIVE report, expressed the hope "that the order encourages women in similar matrimonial situations to register their customary marriages".<sup>73</sup> This again illustrates that there is a definite need for the registration of customary marriages. Although issues surrounding the matrimonial property system applicable in polygynous customary marriages do not form part of this discussion,<sup>74</sup> a comparison – at least as far as customary marriages are concerned – with the matter of *Mayelane v Ngwenyama*<sup>75</sup> and the matrimonial consequences in respect of such wives also seems apt.

### 3.4 Estates with minor beneficiaries

Small estates, in which minors or other incapacitated persons have an interest, require special consideration. There is no question that beneficiaries with limited capacity deserve protection. The Master's branch and Legal Aid South Africa entered into an agreement relating to assistance in the administration of deceased estates with minor heirs. In terms of this agreement, Legal Aid South Africa will provide the following services:<sup>76</sup>

- i. The administration of deceased estates where minors are heirs and qualify for assistance, provided that where such an estate also has adult heirs who may not otherwise qualify for assistance, the provision of assistance to the minor(s) may dictate that assistance be provided to the adults in the same process.<sup>77</sup>
- ii. Assistance to minors in lodging maintenance claims against estates of deceased parents.

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70 There are numerous examples of court cases where the one party was unaware that the spouse was already a party in another marriage. Recent examples are *MM v MN* 2013 4 SA 415 CC; *Murabi v Murabi* (893/12) 2014 ZASCA 49 (1 April 2014), and *Nhlapo v Mahlangu* (59900/14) 2015 ZAGPPHC 142 (20 March 2015).

71 *Legalbrief*, 19 November 2015.

72 *Recognition of Customary Marriages Act*:section 3(2).

73 <http://www.timeslive.co.za/thetimes/2015/11/19/Law-steps-in-to-keep-customary-marriage> (accessed on 19 November 2015). See also Broughton 2015.

74 For a brief discussion on this matter, see Rautenbach & Bekker (2014:109-110), as well as the authorities cited therein.

75 *Mayelane v Ngwenyama* 2013 8 BCLR 918 CC.

76 According to par. 3 of the cooperation agreement between Legal Aid South Africa and the Department of Justice and Constitutional Development, Office of the Chief Master of the High Court which was signed in July 2010. See also Nhlapo 2014:70.

77 See also the article entitled "Legal Aid SA to assist municipality with deceased estates" in *Legalbrief* dated 13 June 2014, [www.legalbrief.co.za](http://www.legalbrief.co.za) (accessed on 13 June 2014).

- iii. Assistance with the appointment of legal guardians for minors whose legal guardians have passed away. This assistance shall also extend to the appointment of guardians to enable a minor to access money kept in the Guardians Fund.
- iv. Provision of legal representation to qualifying minors in estates where an executor/estate administrator other than Legal Aid South Africa has been appointed.
- v. The institution and defence of litigation in connection with any benefit that may be claimable by an applicant against an estate, as well as the appointment or removal of an executor.
- vi. Legal services incidental to, or arising from the foregoing.

Legal Aid South Africa is not expected to perform duties and comply with requirements other than those that would be expected from any other person administering an estate. Where Legal Aid South Africa has been appointed in terms of section 18(3) of the *Administration of Estates Act*, the Master will request the nominee to formally inform the Master once the estate has been finalised. Where letters of executorship have been issued, the estate must be administered in terms of the *Administration of Estates Act*, which will include the lodging of a liquidation and distribution account.<sup>78</sup>

The agreement with Legal Aid South Africa started as a pilot project in the Office of the Master of the Free State High Court in 2009, and was eventually rolled out to the rest of the country. The aim of this project was to protect the interests of minor children, especially those in child-headed households. However, thus far, the project has been unable to achieve its stated goal. On 22 November 2012, the Master of the Free State High Court appointed Legal Aid South Africa to assist with over 1,000 cases,<sup>79</sup> but very few of those have been finalised since. Legal Aid South Africa in Bloemfontein provided the following reasons for their failure to perform:<sup>80</sup>

- i. Most estates have no cash available to pay the creditors or administration costs, with the only asset being fixed property on which rates are owed to the municipality and no transfers can be done.
- ii. Legal Aid South Africa cannot exercise proper control over the assets, as they have no facilities at which to store estate assets. These assets are left in the care of the relatives, who will, in most instances, squander them.

In terms of section 26 of the *Administration of Estates Act*, immediately after the granting of letters of executorship, an executor shall take into his/

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78 Nhlapo 2014:70.

79 According to information obtained from Mr M Motloug, the Justice Centre executive at Bloemfontein Legal Aid, there is currently only one professional assistant dealing with hundreds of deceased estates in that office.

80 According to a memorandum based on the minutes of a meeting between the Office of the Master of the Free State High Court and Legal Aid South Africa (Bloemfontein) on 22 November 2012. See also Nhlapo 2014:71.

her custody or under his/her control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain such items under any contract, right of retention or attachment. The second reason raised by Legal Aid South Africa would, therefore, not have been an issue if these matters had been discussed before the agreement was signed. Leaving estate assets with relatives is obviously contrary to the provisions of section 26, and leaves the interests of the minors prejudiced by the very executor who was appointed to protect them. If Legal Aid South Africa, as appointed executors in terms of the agreement, cannot protect the interests of the minors, one is bound to ask what purpose the agreement serves.<sup>81</sup>

The relevant authorities would be well advised to revisit this entire project. The Chief Master and Legal Aid South Africa need to engage with the Department of Cooperative Governance and pave the way for dealing with the concerns raised by Legal Aid South Africa. Urgent agreement between these two stakeholders is of paramount importance, as it concerns the provision of assistance to minor beneficiaries, and thus members of a vulnerable group.<sup>82</sup>

### 3.5 The role of the courts

In terms of section 95 of the *Administration of Estates Act*, every appointment by the Master (of an executor, tutor, curator, or interim curator) as well as every decision, ruling, order, direction, or taxation by the Master under the *Act* shall be subject to appeal or review by the court upon application by any person aggrieved thereby. On any such appeal or review, the Court may confirm, set aside, or vary the appointment, decision, ruling, order, direction, or taxation, as the case may be. Needless to say, this process is cumbersome, costly and inaccessible to most. Currently, the only way to challenge the Master's decision is to approach the High Court. The majority of people with valid reasons to challenge decisions by the Master end up not doing so, because they lack the financial means. The establishment of a less cumbersome and more accessible procedure in this regard would, therefore, better serve the citizens of the country, particularly those who have suffered the loss of a loved one and are left to fight the battle for survival on their own.

In 1809, the Swedish parliament created a position known as the "Justitie-Ombudsman", which literally translates as "go-between"<sup>83</sup> and, more loosely translated, also means "citizen's defender" or "representative of the people".<sup>84</sup> In essence, "an ombudsman provides assistance to

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81 Nhlapo 2014:71.

82 Nhlapo 2014:71-72.

83 Kuta 2003:389.

84 Calitz & Boraine 2005:741.

individuals with problems or concerns in a neutral, non-biased manner”.<sup>85</sup> Put more formally, the ombudsman’s mission is:

... to generate complaints against government administration, to use its extensive powers of investigation in performing a post-decision administrative audit, to form judgments which criticize or vindicated administrators, and to report publicly its findings and recommendations but not to change administrative decisions.<sup>86</sup>

Although Calitz and Boraine focused on insolvent estates when they recommended the creation of an ombudsman for the Master of the High Court in 2005, they noted the following, which seems equally relevant to this discussion:<sup>87</sup>

The idea of regulating the industry should (therefore) not be viewed as a “watchdog” initiative, but rather an opportunity to reform the industry in order to give creditors confidence in the persons they appoint and ultimately reducing the amount of supervision provided by the state.

The authors also noted that this would provide an alternative to expensive litigation and that the ombudsman could assist in educating the public regarding the powers and duties of the Master, as well as draw attention to issues within the legal system arising from their work.<sup>88</sup>

An ombudsman would, therefore, ensure that the appointed Master’s representatives and the process, in general, inspire confidence in heirs and other interested parties. The ombudsman should have the authority to – either of his own accord or following a complaint – investigate the actions of a Master, consider the merits of the matter, take evidence, review a decision by the Master, and give any directions to a Master that the ombudsman deems fit.

The ombudsman’s office would be an alternative to lengthy and expensive litigation, and would, therefore, benefit both rich and poor, but especially the poor to whom “‘I’ll see you in court’” simply is not an option.<sup>89</sup>

#### 4. Conclusion and recommendations

Although law reform has brought an end to the blatant racial discrimination that characterised the supervision of the administration of deceased estates – including so-called “small estates” – in the past, the equality envisaged by recent legislation and court judgements does not seem to be

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85 Kuta 2003:390-391.

86 Kuta 2003:390-391. For the ombudsman’s mission as stated by The Ombudsman Association, see Kuta (2003:391). For the definition, characteristics and jurisdiction of the ombudsman as laid down by the American Bar Association, see Kuta (2003:392-393).

87 Calitz & Boraine 2005:734.

88 Calitz & Boraine 2005:742.

89 See Kuta 2003:412.

fully achieved, due to certain practical implementation challenges. These include poor service delivery at service points; banks renouncing their nomination as executor of small estates for a lack of sufficient financial benefit; the non-registration of customary marriages; the poor protection currently afforded to vulnerable minor beneficiaries of deceased estates; and the lack of a more affordable, accessible way to challenge a decision of the Master of the High Court than the lengthy and costly court procedures that seem to be the only available option at present. All of this implicates the state's obligation to realise substantive equality.

In rethinking its current approach to the supervision of the administration of small estates, the state should first afford service points the attention they deserve. As service points were established precisely to bring the estate administration system to grassroots level,<sup>90</sup> it is imperative for them to be strengthened in order to truly serve the people for whose benefit they were created. Secondly, banks who are nominated as executors of small estates should be required to properly inform their clients in advance of the possibility that they may renounce such nomination because of the low value of the estate. This would enable clients to make informed decisions, and may help prevent the unnecessary hassle of suddenly having to nominate a Master's representative themselves. It could also eliminate many a family feud, which currently simply prolongs the entire process. Thirdly, the non-registration of customary marriages creates uncertainty and conflict. It is, therefore, recommended that an extensive awareness campaign be launched to inform people of the need to register all customary marriages, highlighting the benefits this offers, including greater security for the bereaved widows and children of such marriages. It is further suggested that the possibility of establishing registration as a validity requirement be examined as soon as such an awareness campaign proves successful. In the fourth instance, the agreement between the Master of the High Court and Legal Aid South Africa aimed at providing assistance to minor beneficiaries in deceased estates – commendable as it may be – currently fails the very people whose interests it is supposed to protect. This agreement must be revisited in order to increase its effectiveness and afford minors the special protection they deserve as members of a vulnerable group in our society. A final recommendation is for the establishment of an estate ombudsman as an alternative to lengthy and expensive litigation when a person wishes to challenge the Master's decision, but lacks the financial means to go to court.

Addressing these challenges in a sustainable, practical fashion will undoubtedly go a long way towards eradicating these indirect forms of discrimination and inequality that have arisen in the course of implementing the reformed laws and rules on supervision of the administration of small estates. To many who are already struggling to come to terms with the loss of a loved one, the current South African reality is that they are failed and left unprotected by the law on estate administration. It is hoped that the recommendations contained in this article will help us create another, improved South African reality – one that protects everyone's interests.

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90 Burman *et al.* 2008:154.

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