

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A117/2008

DATE:

8 AUGUST 2008

5 In the matter between:

SARAH SASS

APPELLANT

and

THE MAGISTRATE MALMESBURY

RESPONDENT

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JUDGMENT

VELDHUIZEN, J

15 The appellant appeals to this Court against the magistrate's
judgment of 6 December 2007 refusing to grant the appellant's
unopposed application for an administration order in terms of
section 74(1) of the Magistrate's Court Act 32 of 1944 (the
Act).

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The applicant applied for the appointment of a non-practising
attorney to be appointed as administrator. The magistrate
took the view that because a non-practising attorney is not
required to give security, his appointment "defeats the purpose
25 of section 74 of the Act". Relying on African Bank Limited v

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Melwyn Weiner, 2005(4) SA 363 (SCA), the magistrate held:-

“However, regard must be had to the fact that such an attorney, when appointed as an administrator, must act in such a capacity (as an attorney) throughout: he or she does not dispense with professional functions or duties at any point in the administration.”

10 I do not agree with the magistrate's reasoning. In my view his reliance on the Africa Bank Limited v Melwyn Weiner judgment of the Supreme Court of Appeal is misplaced. The judgment did not decide the question of the posting of security in terms of section 74E of the Act by a non-practising attorney in
15 administration orders. Section 74E(3) of the Act reads:-

“An administrator who is not an officer of the court or a practitioner shall, before a copy of the administration order is handed or sent to him by
20 registered post, give security to the satisfaction of the Court and thereafter, as required by the Court, for the due and prompt payment by him to the parties entitled thereto of all monies which come into his possession by virtue of his appointment as
25 an administrator.”

This sub-section was analysed in Weiner NO v Broekhuysen, 2001(2) SA 716 (C), Van Reenen J (Revelas A J concurring) decided on pages 725H to 726B:-

5 "Section 74E (3) provides that any administrator
who is not an "officer of the court" or a
"practitioner" shall give security to the satisfaction
of the Court as required by the Court for the due
and prompt payment by him or her to the parties
10 entitled thereto of all monies which come into his or
her possession by virtue of his or her appointment
as administrator." Unlike the concept "officer of
the court", the concept "practitioner" is defined in
section 1 of the Act as meaning an advocate, an
15 attorney, an articulated clerk and an agent such as
referred to therein. This definition appears to have
amplified the ordinary meaning of practitioner which
is "one engaged in the practice of any art,
profession or occupation, especially in medicine,
20 surgery or law (The Shorter Oxford English
Dictionary), so as to encompass practising as well
as non-practising attorneys. We say so because
when the legislature employs that concept in the
narrower sense, for example practising attorney, it
25 specifically states so (see section 74J(7)). In our

view the concept attorney in the definition of practitioner means an attorney admitted to practise as such (see section 1 of the Attorneys Act 53 of 1979). The magistrate in his judgment accepted that it was common cause that the appellant is an admitted attorney. On the basis of that finding, in our view, he could not have held that the appellant was obliged to provide security."

10 We are obliged to follow this decision unless we are convinced that it is wrong. I am not so convinced. In fact I agree with the reasoning of Van Reenen J and more particularly his finding that an attorney admitted to practise as such, but at the time of his appointment as an administrator is not practising, is not obliged to provide security in applications like the present.

15 That being the position, I fail to see how the appointment of a non-practising attorney who is not required to give security will lead to the circumvention of the provisions of section 74 of the Act. It follows that the magistrate's judgment falls to be set
20 aside.

The appeal is according UPHELD, HIS JUDGMENT SET ASIDE
and replaced with the following order:-

25 1. The applicant's estate is placed under administration in

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terms of the provisions of section 74 of Act 32 of 1944.

2. Normal Woolf Sharkey of ADMS Building Solutions (Pty) Limited is appointed as administrator of the applicant's estate.

3. The said Norman Woolf Sharkey is absolved from giving security for the administration of the applicant's estate.

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VELDHUIZEN, J

EJS STEYN, AJ