C. OF A. (CIV) NO.5 OF 1993

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

In the matter between:

SAMSON RAPEANE	APPELLANT
AND	
BERNADETTE RAPEANE	RESPONDENT

CORAM:

LEON, JA
STEYN, JA
BROWDE,JA

JUDGMENT

LEON, J.A.

This is an appeal against the decision of the Court *a quo* which discharged a rule *nisi* in which the appellant had sought and obtained the stay of a writ of execution issued out of the office of the Registrar of the High Court on 27 May 1992 in CIV/APN/251/83 pending the finalisation of CIV/APN/56/86.

The factual background to this case is briefly as follows.

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The appellant and the respondent were formerly married to each other but their marriage was dissolved by a decree of divorce on the 8th October 1984. In terms of the order of Court custody of the minor children was granted to the respondent and it was further ordered that there be a division of the joint estate. Paragraph 4 of the order reads as follows:

> "That maintenance ordered *pendente lite* continue until the division of the joint estate of the parties."

In terms of paragraph 5 of the order Mr. S.C. Buys an Attorney of the Court was appointed liquidator of the joint estate of the parties.

Thereafter the appellant was found not to have fulfilled his obligations in terms of the maintenance orders and a writ of execution was issued against him.

On the 12th February 1986 the Respondent instituted an application for committal of the applicant to prison for contempt of the maintenance order in Civil Application 56/86 which application is still pending.

On 27th May 1992 the Respondent issued out a second writ from the office of the Registrar of the High Court. Before the

learned Judge in the Court *a quo* the appellant sought an order staying the execution of that writ pending the determination of Civil Application 56/86. The basis of the application was that the applicant's obligations to pay maintenance had ceased. The application was refused by the Court *a quo* and it is against the refusal that this appeal is brought.

In paragraph 7 of his application the appellant makes the following statement with regard to his obligation to pay maintenance:

> "It was a condition of the divorce order .... that maintenance granted *pendente lite* was to continue until the division of the joint estate. In my respectful submission the assets of the joint estate were depleted until there was nothing to divide."

The respondent did not file any opposing affidavit but her Attorney filed a notice in terms of Rule 8(10)(c) of the High Court Rules submitting that the question of the appellant's liability to pay maintenance to the respondent was *res judicata* as that question had been decided in CIV/T/286/84.

The defence of *res judicata* was upheld in the lower Court which accordingly discharged the rule *nisi*.

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The learned Judge held that the crucial question was whether or not the liquidation of the joint estate had been completed. He analyses the affidavit of Mr. Buys in the 1986 case (six years earlier) and concludes from what was said therein that the division of the joint estate had not been completed. That being so the obligation to pay maintenance continued. I should add that in Mr. Buys' affidavit, after setting out the facts, he states "I wish to inform the Honourable Court that I am not able at this stage (my underlining) to complete my appointment as Trustee ....." That affidavit was sworn in April 1986.

With regard to the defence of *res judicata* it is conceded on behalf of the respondent that the term used was a misnomer. What the Respondent was attempting to say was merely that the appellant's liability under the maintenance order had not ceased. This was not a special plea in the technical sense and played no part in the *RATIO DECIDENDI* of the Court *a quo*.

It is common cause that the liability of the appellant to pay maintenance would continue until the division of the joint estate. It was contended on behalf of the appellant that the learned Judge had erred in relying solely upon the affidavit of Mr. Buys in the 1986 case and ignoring the unchallenged allegations of the appellant in the present case.

It was further contended that on the unchallenged

allegations of the appellant in the present case the joint estate was completely depleted and that therefore there was nothing left to divide. In those circumstances, so the argument went, the obligation to pay maintenance had ceased.

The crucial question in this appeal depends upon whether the appellant's obligation to pay maintenance had ceased. If it had then he was entitled to a stay of execution. In holding that the obligation to pay maintenance had not ceased the learned Judge relied upon the affidavit of Mr. Buys referred to above. But that affidavit dealt with the position in 1986 not in 1992. Even it is assumed that the Court *a quo* was entitled to have regard to the affidavit it was no guide to the position of the joint estate in 1992.

The only evidence before the Court dealing with the joint estate at the time of the application which is the subject of this appeal, was the statement by the appellant in his affidavit to the effect that the joint estate was depleted and that there was nothing to divide. That statement was unchallenged and must be accepted as correct.

The question then is whether the fact that the joint estate is depleted with nothing to divide amounts to the same thing for the purposes of the Court order as the division of the joint estate. That is what Counsel for the appellant contended but I

do not agree with that contention.

In terms of the Court order the obligation to pay maintenance would cease on the fulfilment of a condition i.e. the division of the joint estate. In my judgment that condition has not been fulfilled. When the Court granted the order relating to maintenance it must have contemplated that on the division of the joint estate, assets would become available which could be used by the respondent to maintain herself and the minor children. The inference becomes even stronger when one bears in mind that the Court was also acting as Upper Guardian of the five minor children of the marriage. If the Court knew at the time of the making of the order that there would be no assets to divide it would not have made the order which it did with respect to maintenance.

It follows that the depletion of the joint estate does not relieve the appellant of his obligations under the Court order to pay maintenance.

In these circumstances I agree with the conclusion arrived at by the learned Judge *a quo* albeit for somewhat different reasons.

The appeal must be dismissed with costs.

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R.N. LEON
JUDGE OF APPEAL

I agree .....
J. H. STEYN
JUDGE OF APPEAL

I agree .....
J. BROWDE
JUDGE OF APPEAL

Delivered at Maseru This 22nd. day of ..... 1994.