IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) No.44/2017
CIV/APN/153/14

In the matter between:-

MAMAHLOLI 'MATHAABE MAKHETHA **1ST APPELLANT**

MOHLOMI THAPELO MAKETHA
(Duly Assisted) **2ND APPELLANT**

And

ESTATE LATE ELIZABETH
'MABOLASE SEKONYELA **1ST RESPONDENT**

EXECUTOR: ESTATE LATE
EZEKIEL LIKILIKILI MAKHETHA **2ND RESPONDENT**

MASTER OF THE HIGH COURT **3RD RESPONDENT**

ATTORNEY GENERAL **4TH RESPONDENT**

CORAM: CHINHENGO AJA
MTSHIYA AJA
PEETE AJA

HEARD: 21 November 2018

DELIVERED: 7 December 2018

SUMMARY

Claim by deceased's ex-wife against surviving spouse that while order for division of joint estate was made at divorce some fourteen years before deceased's death, that order had not been carried into effect and court should order division before distributing deceased's property in terms of his Will;

Proceedings commenced on motion - parties agreeing to convert proceedings to action proceedings with concurrence of presiding judge after founding affidavit filed – would-be respondents filing plea pursuant to agreement and first party filing a replication - no pre-trial conference held, no discovery despite notice thereof by one of the parties - proceedings somewhat mutating back to motion proceedings - parties filing written submissions and judge deciding matter on the papers and written submissions before him - Judge finding burden of proof fell on respondent/ defendant to disprove applicant/ plaintiff's assertion that division not done;

Appeal against decision of judge on incidence of burden of proof and impliedly against consequential order;

Held failure to adopt one or other of the known procedures of motion or action proceedings rendering proceedings a mistrial;

It being unclear what procedure between motion and action proceedings difficult to see how acceptable evidence could have been placed before court and therefore difficult to see how evidential burden shifted to respondent/ defendant - in any event applicant/ plaintiff failed to make prima facie case requiring rebuttal;

Appeal upheld and matter remitted to High Court for hearing before a different judge

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] The factual background to this appeal is this. The 1st appellant 'Mamahloli 'Mathaabe Makhetha was married to Ezekiel Likilikili Makheta (Ezekiel). Initially they were married under customary law in 2002 and then they contracted a civil marriage in 2006. In 2013 Ezekiel died and left a Will in terms of which he bequeathed his property to the 2nd appellant, Thapelo, his son with the 1st appellant. In the event of the 2nd appellant predeceasing his mother, the property would pass to her.

The 2nd respondent is the executor of the estate of the late Ezekiel.

[2] Before the late Ezekiel married the 1st appellant he was married to Elizabeth 'Mabolase Sekonyela, the 1st respondent in this appeal. They divorced in 1999. After the divorce it is then that Ezekiel married the 1st appellant.

[3] Soon after Ezekiel's demise the 1st respondent commenced motion proceedings in the High Court. In her founding affidavit filed in terms of Rule 8(1) of the High Court Rules 1980, she claimed that no effect was given to an order for the division of the joint estate that was made at the time that the divorce order was granted. That an order for the division of the joint estate was made is true because at at p.12 of the handwritten judgment dated 2 December 1999, the judge said:

> "… in her evidence she asked for the division of the joint estate because she alleges that they worked together to build their business. This appears to be a reasonable demand or request.
>
> In the result the Court makes the following order:
>
> (a) Restoration of conjugal rights, failing which a decree of divorce on the basis of the plaintiff's desertion;
>
> (b) Custody of the minor child is awarded to the defendant, Elizabeth 'Mabolase Makhetha;

(c) Maintenance of the said child at the rate of M500.00 per month;

(c) Division of the joint estate;

(e) Costs of suit."

[4] There is no conclusive evidence on record that a decree of divorce was finally granted or that any order actually dividing the joint estate was later made. At paragraph 7 of the replication there is, however, some indication that the final decree of divorce was made on 7 November 2004. The parties proceeded on the understanding that a final divorce order was indeed granted. They however are in dispute over whether or not the division of the joint estate was done. That is the reason that the 1st respondent came to court after Ezekiel's death claiming that the joint estate has, to date, not been divided pursuant of the court order. After the 1st respondent lodged her application for division of the joint estate, an application was successfully made from the bar to join Mathaabe, the duly appointed heir of the late Ezekiel, as the 5th respondent. She has taken up the cudgels for herself and her minor son, Thapelo.

[5] In her application the 1st respondent sought other orders also, to wit, that rentals from three commercial sites in the joint estate be collected by a neutral court-appointed person pending the finalisation of her application, that a

notice issued by the appellants in terms of s 46 of the Administration of Estates Proclamation 1935 (No. 35 of 1935) be stayed pending the finalisation of her application; that the order for the division of the joint estate be executed; that the registration of certain property from the joint estate in the name of Thapelo be declared null and void *ab initio*, and finally, that the court condones the late filing of her application. As interim relief she prayed for the orders relating to the collection of the rent from commercial sites and the stay of the notice in terms of s 46.

[6] The appellants opposed all the relief sought by the 1st respondent.

[7] Before coming to his decision the judge identified the issue for determination at paragraph 15:

> "Notwithstanding the absence of consensus between the applicant and the concerned respondent on the inventory of their properties prior to the divorce, the main and determinative dispute is whether the order for division of the properties between the late and the applicant was actually executed. The question as to when was the 5th respondent (Mathaabe) married is more dimensional. This is because it specifically relates to the reliability and credibility of her testimony that she knows that the order that the properties which were accumulated by the late and the applicant during

the subsistence of their marriage was executed. The same applies to her consequent position that the properties which the late held at the time she got married to him, was his share of the division."

[8] He then recorded his decision as follows:

"**Decision**

21. Against the backdrop of the identified determinative issue, the decision in this case, *should turn on whether there is evidence demonstrating that the order for the division of the estate was executed.* The 5th respondent is the one who relies upon the assertion that this was done while the applicant disputes that and presents a challenge for that to be proven. It is trite law that he who alleges carries a burden of proof to evidentially demonstrate the assertion. Thus the 5th respondent carries that burden.…

[The Judge quotes from *Lebesa v Motjoka and Others* LSHC 71 para 19 and continues]

22. The enunciated legal principles cannot be reconstructed to mean that a litigant who denies the statement advanced by the other should prove that the denial has a foundation. So it was obligatory for the 5th respondent to evidentially show that the division was done. A mere fact that the applicant denies that the division ever took place cannot reverse the onus of proof.

23. It sounds unbelievable that though the 5th respondent says that she initially married customarily in 2002 which was

subsequently converted into a civil marriage in 2006; she does not know about the developments that happened with the properties in question. All she tells the Court is that all those that are a subject matter in this case, represent a share of the said division. Her basis is that the clearance, which the late received from the Master of the High Court after the divorce that he was free to marry another woman, evidences that he did not owe property to anyone. The interpretation which this court assigns to the clearance is that it certifies one to marry and has nothing to do with one's property obligations.

24. In the premises, the applicant is found to have proven her case on a balance of probabilities and the application is granted as prayed." [Emphasis is mine]

[9] Granting the application as prayed meant that the 1st respondent obtained all the relief she asked for in her notice of motion, namely, (a) that the rent from commercial sites 14273-70 and the unnumbered one at Sekamaneng be collected by a court appointed person; (b) the notice issued by the Executor in terms of s 46 of the Administration of Estates Proclamation was permanently stayed; (c) the order for the division of the joint estate made in 1999 was to be given effect to; (d) the registration of property in the name of the 2nd appellant became null and void *ab intio*; and (e) that the appellants were to pay the costs of suit. This was the relief sought by the 1st respondent in the notice of motion.

Pleadings

[10] The 1st respondent commenced proceedings in the High Court by way of notice of motion as we have seen. Before the appellants filed their opposition, the parties, apparently with the consent of the judge, agreed to proceed by way of action rather than by way of motion. This is recorded in a letter from the 1st respondent's legal practitioners dated 10 April 2014, the relevant part of which reads-

> "This is just to record the telephone conversation between your Mrs K Thabane and our Mr Potsane to the effect that the above matter be turned into a trial so as to speed up its finalisation."

[11] The judge did not issue a formal direction to convert the proceedings from motion to action proceedings. However from the submissions of counsel for both parties at the hearing of this appeal, it seems that the judge agreed to that procedure or, at the very least, acquiesced in it. Thereafter the appellants, now turned defendants, filed their plea followed by the 1st respondent's replication on or about 12 May 2014.

[12] A notice to discover in terms of Rule 34 of the High Court Rules was filed and served on behalf of the appellants on 22 May 2014. Next in the record of proceedings is a

notice in terms of Rule 8(13) filed and served by the appellants' legal practitioners on 24 September 2014. The same legal practitioners served another notice in terms of Rule 39(2) on 2 October 2014. Then followed several notices of set down by the 1st respondent's legal practitioners for the matter to be heard on 24 September 2015, 4 February 2016, 15 February 2016, 22 March 2016, 16 March 2016. The appellants' legal practitioners also applied for a set down for 1 June 2016. The matter was not heard on any of these dates.

[13] On 22 August 2016, the presiding judge, after hearing counsel, made an order requiring the Director-General of the Land Administration Authority (LAA) to appear before the court in person or through a representative on 12 September 2016 and produce "land titles belonging to the late Ezekiel".

[14] On or about 6 September 2016, 1st respondent's legal practitioners filed their final submissions. On or about 30 September 2016 they filed and served a notice of set down for 3 October 2016. On 26 November 2016 they filed and served supplementary heads of argument.

[15] The appellants' legal practitioners filed and served their written submissions on 21 November 2016.

[16] What appears next in the record is a judgment by his Lordship Makara J. It shows that the matter was heard on 6 December 2016 and judgment delivered on 26 May 2017. This appeal is against "the whole of that judgment". The notice of appeal was filed on 13 July 2017.

Death of 1st respondent

[17] After the present appeal was noted on 13 July 2017 the 1st respondent died. This was on 22 July 2017. A death certificate, with her surname spelt as Makgetha, is part of the papers before the Court. Her estate has not yet been registered nor has her customary heir been appointed. This prompted her legal practitioners to apply to this Court for a substitute to take her place in this litigation. In the last paragraph of the founding affidavit, the deponent thereto, Victor Makhetha, her second born son states-

> "I wish to state that it is only befitting that the first respondent be substituted with her estate in this appeal which she has here in Lesotho. It is also prayed that in the alternative she be substituted by her customary heir."

[18] It is implicit from the above quoted paragraph that neither has an executor of the late Sekonyela's estate been appointed nor her heir at customary law. This was confirmed at the hearing in this Court. One of the effects

of a summons once issued and served is that it transmits the action to the heirs of the party concerned should such party die before the conclusion of the case. That, however, is subject to the qualification that personal actions will not be transmitted to the heirs unless the stage of *litis contestatio* had been reached. See *Jankowiak & Anor v Parity Insurance Co. (Pty) Ltd*[1], (particularly at 289A-D). The claim in *Jankowiak* was for damages for personal injury. The court held that where *litis contestatio* had taken place before the death of the deceased the claim for general damages was transmissible to the estate of the deceased. Whichever way one looks at it, the application to substitute the 1st respondent with her estate or heir, presents no problem in this case. The appellants readily agreed to the substitution. The order that we make herein will give 1st respondent's side an opportunity to appoint the executor of the estate and the heir.

Flip-flopping between motion and action procedures

[19] After the 1st respondent delivered her replication and the pleadings closed, the appellants issued a notice to discover in terms of Rule 34. This is a procedure in action proceedings. The party required to make discovery has 21 days from receipt of the notice to do so. There is nothing on record to show that the 1st respondent made any

[1] 1963 (2) SA 286 (W)

discovery. One would have thought that up to this stage the parties were on the right path in action proceedings. It is therefore surprising that the appellants next delivered a notice in terms of Rule 8(13). This is a notice that the respondent delivers in motion proceedings when the applicant has not applied for a date of hearing under that rule. The notice was filed on 25 September 2014 and constituted a reversion to motion proceedings.

[20] The appellants' legal practitioners, in yet another about turn, filed a notice in terms of Rule 39(2) on 2 October 2014. This rule applies to defended trial actions and it is under it that a party applies for a date of set down for a defended action.

[21] A perusal of the record of proceedings does not indicate that the judge at any stage made any formal directions authorising this flip-flopping between motion proceedings and action proceedings. In the end the matter was disposed of without clarity as to whether it was motion or action proceedings, thereby creating a nightmare so far as the handling of evidence is concerned. The record only shows that the parties filed final written submissions and not how or why or in consequence of what procedure they did that. The judge then considered those submissions and finally decided the matter.

Law on motion versus action proceedings

[22] A litigant who institutes proceedings in a court of law has to decide whether to proceed by way of motion or by way of action or trial proceedings. That decision is critical to his case. There are consequences for adopting one or other of these procedures, some of which may be seriously prejudicial to a litigant in more ways than one.

[23] It is trite that motion proceedings are not permissible in proceedings in which genuine or material disputes of fact exist. The law is that where a genuine dispute of fact exists and the case cannot be resolved on affidavit, the judge will have to consider the probabilities and assess the credibility of witnesses after hearing *viva voce* evidence. That cannot be done on affidavits. On the other hand, where facts are not really in dispute and the rights of parties depend upon a question of law, motion proceedings are appropriate. The existence or non-existence of a *bona fide* dispute of fact on a material question of fact is the determinant whether one proceeds by way of motion or by way of action. The question whether a real and genuine dispute of fact exists is a question of fact for court to decide - *Ismail & Another v Durban City Council*[2]. In that case the court stated the position succinctly at 374A thus:

[2] 1973 (2) SA 362 (N) at 374

> "The decision as to whether or not a dispute of fact exists is not, however, discretionary; it is a question of fact and a jurisdictional pre-requisite for the exercise of the discretion. Thus, in considering whether such a dispute exists, a Court of appeal is not considering whether or not to set aside a discretionary decision of the Court *a quo* (which can only be done if the Court of appeal is satisfied that such has not been exercised judicially i.e. given not for substantial reasons but capriciously or upon a wrong principle – *James Brown & Hamer (Pty) Ltd v Simmons, N.O.* 1963 (4) 656 (AD) at p. 660) but whether or not a dispute of fact of the above nature exists on the papers."

[24] A real dispute of fact arises when the respondent denies material allegations made by deponents for the applicant and produces positive evidence to the contrary -*R Bakers (Pty) Ltd v Ruto Bakeries* (Pty) Ltd[3]. See also *Room Hire Co. (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd*[4] where the Full Bench stated that in all cases where a genuine dispute of fact has been shown to exists-

> "Enough must be stated by the respondent to enable the court… to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious and intended merely to delay the hearing. The respondent's affidavit must at least disclose that there are material issues

[3] 1948 (2) SA 626 (T)
[4] 1949 (3) SA 1155 (T)

in which there is a *bona fide* dispute of fact capable of being decided only after *viva voce* evidence has been heard."

[25] Ultimately, it is the proper method of determining the facts upon which a claim is based that is decisive in the choice between motion and action proceedings. The judge in the case before us does not seem to have applied his mind, not only to the question whether disputes of fact existed as a matter of fact as foreshadowed by the parties' agreement to proceed by way of action, but also to the proper method of determining the facts in the case before him. That in my view explains the absence on record of any direction regarding the appropriate procedure. The court was obliged to adopt one of the two procedures. If it can be said that the procedure finally adopted was motion procedure, the judge again does not appear to have given serious thought to R 8(14), which permits him to direct that oral evidence be heard on specified issues. The sub-rule, as a whole, provides that-

"If in the opinion of the court the application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems appropriate with a view to ensuring a just and expeditious decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person

> to be subpoenaed to appear to be examined and cross-examined as a witness, or it may order that the matter be converted into a trial with appropriate directions as to pleadings or definition of issues, or otherwise as the court may deem fit."

[26] The principles of law and the rules that I have set out above show that there is no scope for proceedings to be carried out haphazardly, or along an undefined course, and pointedly, that there is no scope for litigants to avoid taking the action route where there is a genuine dispute of facts unless evidence can be called on specific issues. The Rules of Court are there to provide guidance depending on the route to be taken. In the present case when the 1st respondent took the motion route, she must have been of the view that there were no disputes of fact incapable of resolution on affidavit. However when the parties agreed to go the action route they must have realised that motion proceedings were inappropriate for resolving disputes of fact that were likely to emerge.

[27] An examination of the pleadings will assist in determining whether the parties were correct to take the action route after the 1st respondent filed her founding affidavit, and whether, when the judge allowed the matter to move indeterminately from motion to action and back, apparently, to motion proceedings without giving

appropriate directions, it can be said the matter was properly handled by him.

[28] I set out below some of the material facts that are in dispute as disclosed by the pleadings. In doing this I bear in mind that the appellants were not on the scene for at least 3 years between 1999 and 2002, (if it is accepted that the 1st respondent contracted a customary marriage with the deceased in 2002) or for at least 7 years (it is accepted, as it must, that she married the deceased by civil rites in 2006), and would have had no knowledge of what happened during those years in respect of the properties in the joint estate of the deceased and the 1st respondent. I may itemise the facts in dispute as follows:

(a) The appellants state that the 1st respondent was a resident of Germiston in South Africa at the time of her divorce and thus dispute her very first averment that she was a resident of Ha-Abia in Maseru.

(b) At paragraph 5 of the founding affidavit, the 1st respondent avers that after the court ordered a division of her joint estate with Ezekiel upon granting the divorce, that order was not carried into effect. The division was, according to her, delayed because she lost contact with her lawyers and suffered from bad health

and financial constraints. These averments are either not admitted or out-rightly denied by the appellants. The appellants dispute the implication that the 1st respondent lived together with Ezekiel until the time of the divorce and assert that whilst the joint amassing of the estate may have ceased in 1995 when the the divorce action was instituted, the 1st respondent had been living alone and had started a life of her own as from 1993.

(c) In the same paragraph 5, the 1st respondent says that by the time she lost contact with her lawyer, the lawyer had written a letter (annexure EMM1 to the founding affidavit), which contains a list of property the subject of division, including a commercial site at Naledi/Sekamaneng and a residential site at Ha-Mabote. The appellants do not admit that annexure EMM1 "depicts the original version of what was contained in that letter if ever it was written at all" and they put the 1st respondent to the proof of her assertion. They also raise several issues the basis upon which they contend that the letter is not reflective of the true state of affairs.

(d) At paragraph 5.6 and 5.7 of the plea the respondent deny that the division was delayed by the factors

advanced by the 1st respondent and assert positively that "the sharing did take place and what (she) now alleges to have been sold without her knowledge by (Ezekiel) was in fact sold by agreement and the proceeds shared…" And that, in the absence of further evidence, it must be accepted that the division took place in 1999 when the order of division was made.

(e) At paragraph 6 of the plea, the appellants detail the circumstances and times when certain of the property listed in annexure EMM1 was acquired after the divorce and thus deny that it forms part of the joint estate for division.

(f) The appellants deny the contents of paragraphs 10 and 12 of the 1st respondent's affidavit, the latter "vehemently".

(g) Generally, it can be said that the appellants deny or do not admit all or most of the significant allegations of fact made by the 1st respondent. This constrained the 1st respondent to file a detailed replication, which could not resolve the disputed facts unless a trial was held.

1. From the foregoing, it is incontestable that the pleadings in this case were replete with contested material facts such

that evidence had to be led to establish the truth. And motion proceedings were clearly inappropriate for that purpose. The appellants were correct in making the following averment in the plea at paragraph 13-

> "Failure to disclose all material facts, such as evidence about the correct date of divorce; correct reasons why the property that formed the joint estate between Likilikili Makhetha and Applicant/Plaintiff was never divided, and remained undivided until after the death of the deceased Likilikili Makhetha; as well as the true reasons why the claim had to wait until after the death of Likilikili Makhetha all make the claim by Applicant/Plaintiff untenable."

[30] The 1st respondent's response to this paragraph also serves to show that there were wide and significant areas of disagreement between the parties. Although the replication closed the pleadings the other necessary steps for readying the matter for trial were not taken and the matters, on which the parties were to join issue, were not identified or spelt out. The written submissions by the parties also show that the disputed facts remained unresolved and lingered on as at the time those submissions were made. In his judgment the presiding judge makes it quite clear that the parties were in disagreement over a number of issues. In apparent acknowledgement of this he begins his judgment thus:

> "This is one typical straight forward case involving a determinative issue which ought to have been long resolved after the pre-trial conference. *Unfortunately, the counsel involved could not agree on basic matters which did not warrant controversy but to be simply ascertained with reference to the official records.* It was a challenge for them to even cooperate when they were ordered to consult those records and agree on what is written there without any prejudice to each other's case. Moreover, it was another challenge to consistently have both of them in attendance. At times no reason would be given in advance for a counsel's absence irrespective of its validity or otherwise. *They almost disputed every material fact such that unlike in many cases, the PTC had served no meaningful purpose.* A substantial number of complex matters which were heard after this matter have long been completed." (**The emphasis is mine**)

[31] I have highlighted two sentences in the above passage in order to illustrate the point that the parties were in disagreement over many material facts and that the presiding judge acknowledged of that fact. I have also highlighted the issue of a pre-trial conference because both counsel informed us that no pre-trial conference was held despite what the judge says at paragraph 6 of the judgment:

> "On the 8th of April 2014, the (appellants) filed their opposition and the application was accordingly moved in the presence of the counsel for the (appellants). At the end prayers 1 and 3 were by consent made an order of court. Then the court in line

> with discoveries at the PTC, directed that evidence be led to specifically elucidate the date of the marriage of the 5th respondent (Mathaabe) to determine the properties which became jointly owned by her and her late husband."

[32] The record of proceedings contains no evidence that a pre-trial conference was held. That supports the submissions of counsel before us on that point. Now, if no pre-trial conference was held and no discovery was done, how then were the action proceedings carried on or conducted? In the judgment reference is made to the appellants "having filed their opposition and the application was accordingly moved" and that the judge "directed that evidence be led to specifically elucidate the date of the marriage of … Mathaabe to determine the properties which became jointly owned by her and her late husband." The parties are referred to as applicants and respondents, thereby suggesting that the matter had, at that point, again been converted to motion proceedings. There is no indication on record that evidence was led on the specific issues mentioned. There is also no evidence on record that the parties may have proceeded in terms of Rule 39(1), which applies in those cases where the parties have stated a special case for the adjudication of the court on a question of law only.

[33] The following paragraph of the judgment further exposes the existence of disputed facts that could not possibly be resolved on the papers before the judge. It reads-

> " 12. *Ex facie* the incidental order it is clear that the late Lekilikili Makhetha and the (1st respondent) had properties. This appears so despite the fact that there is no record of its inventory. Its ascertainment was complicated by both counsel who throughout the proceedings differed on that aspect. This obtained even after the court had directed them to seek for assistance from the Land Administration Authority (LAA), to identify the sites which belonged to the two before the divorce. To further complicate the matter, counsel for the (appellants) did not sign a document based upon discoveries which her counterpart submitted to the court as a matrix of the discoveries he made from the records of the LAA."

[34] At paragraph 14 of the judgment, the judge makes it quite clear that there was no agreement between the parties over whether the 1st respondent and Ezekiel "also owned two Toyota panel vans, two Hilux vans, a stallion van, a Ford van, a Mercedes Benz car and cash deposit at Standard Bank."

[35] The judge a *quo* was, no doubt, alive to the imperative of an assessment of "reliability and credibility" of not only the 1st appellant but also of the 1st respondent. Despite that recognition the judge proceeded, undaunted, to refer to

and deal with "evidence" before him. The question immediately arises as to what evidence was before him in light of the fact that on the pleadings the parties had proceeded by way of action and not on motion. At paragraphs 16 to 19 of the judgment he dealt with several issues contested by the 1st respondent. Having done so he devoted one paragraph to the appellants' case and stated:

> "20. On the other hand, a gravamen of the case for the 5th respondent is straightforwardly that the division order by the late Kheola J was executed. In support of this assertion, the 5th respondent referred the court to the fact that the Applicant was presently staying in a house which the two owned in Thokoza in South Africa and that if otherwise, she would not have taken almost 14 years before challenging the *status quo*."

[36] The decision in the court below was squarely based on the incidence of the burden of proof with minimal consideration of the evidence. It is understandable that the court did not have before it the necessary evidence to decide the issues in dispute between the parties because that evidence is ordinarily placed before the court in motion proceedings through affidavits and in trial actions through the pleadings and sworn oral evidence given at a trial. The proceedings before the court *a quo* were neither motion proceedings nor action proceedings. Counsel for the 1st respondent submitted that the case proceeded on a

combination of motion and action proceedings. That, to say the least, is strange and unprecedented.

[37] In view of the fact that neither motion or action procedures were adopted or followed in the prosecution or handling of this case, with the result that evidence was not placed before the court by way of any recognised method, a mistrial occurred. It seemed to us that this matter should be sent back to the High Court for it to be heard *de novo* before a different judge. We however considered that it would be beneficial to the parties for us nonetheless to address the grounds of appeal.

Grounds of appeal

[38] The appellants appeal on three grounds, which, in my view amount to only one ground, that the judge wrongly decided that the appellants had an *onus* that they failed to discharge. The grounds of appeal are –

> "1. The learned Judge erred in holding that the case to be proven before the court was that made by the appellant.
>
> 2. The learned Judge erred in concluding that the duty on the part of the applicant (1st respondent) was to contest the truthfulness and reliability of the key depositions of the appellant.

3. The learned Judge misdirected himself by ignoring the (1st) respondent's role in the matter, of discharging the onus of proving, on a balance of probabilities, the allegation that the joint marital property she shared with the deceased Lekilikili Makhetha during the subsistence of their marriage, which marriage was dissolved in the year 1999 or thereabout, was not shared between them from the date of the Order for such sharing in 1999, to the date of the demise of the deceased Lekilikili Makhetha in the year 2013."

[39] Before addressing the grounds of appeal I wish to comment on paragraph 11 of the judgment which, I think, may have impacted on or informed the judge's treatment of the issues before him. Thereat the judge says –

"For the purpose of this litigation paragraph 3 of the Will constitutes the foundation of the case. This is ascribable to the fact that the applicant is precisely contesting the inscription therein that the testator bequeaths all his property to (Thapelo) with a qualification that in the event that the designated heir predeceases (Mathaabe) who is his mother, the right shall pass over to the latter. The basis of the challenge was that the testator had no legal right to make that stipulation before the execution of the incidental order for the division of the properties which she and her late husband co-owned prior to their divorce. The indication being that this has not been done and, therefore, the testator was disqualified from making a Will over the properties before they could be divided between them."

[40] In my view, the above rendition is not only a misapprehension of the 1st respondent's cause of action but also a widening of its scope. The Will speaks to property that belonged to Ezekiel as at the time of his death. The 1st respondent did not imply that the Will is open to challenge. What she challenged was what constituted Ezekiel's estate with the result that as long as it could be shown what property was in his estate, Ezekiel's Will was perfectly in order. The 1st respondent's claim was merely that the estate be divided so that the Will would relate to Ezekiel's share of the joint estate only.

Law on the incidence of the burden of proof

[41] Appellants' counsel submitted that the 1st respondent and not the appellants brought the claim before the High Court. As such the onus of proof was on the 1st respondent. If she did not discharge that onus, "the decision could not, as it did, revolve around whether the 1st appellant had discharged the onus of proving that the property had been shared by the 1st respondent and the deceased…".

[42] In dealing with the incidence of the burden of proof, I have inevitably to have regard to the procedure adopted in the court *a quo*. If the matter had proceeded on motion, then I would have had to consider whether the court was in the

circumstances entitled take a robust view of the evidence in the affidavits. But even then there were many disputes of fact that could not have permitted that course. If it had proceeded as an action, then I would have had to consider the rulings that were made by the presiding judge concerning the evidential burden. The conundrum or dilemma here arises from the fact that the court below adopted neither of the two established and well-known procedures for dealing with matters before a court. The matter commenced as an application. The opposition to the founding affidavit came in the form of a plea, followed by a replication. There was no discovery. No pre-trial conference. No identification of issues for the decision of the court. No oral evidence from witnesses. Counsel for the appellants confessed several times during the hearing of the appeal that the approach or approaches taken in the court below were confused and that she became confused herself, hence she submitted that this was a mistrial and that the case should be remitted to the High Court to be dealt with anew before a different judge.

[43] Now in dealing directly with the issues raised in this appeal it is necessary to understand that the appeal is founded on alleged misapplication of the law relating to the incidence of the burden of proof and the evidential burden. Corbett JA in *South Cape Corporation (Pty) Ltd v*

Engineering Management Services (Pty) Ltd[5] had this to say in regard to the burden of proof and the circumstances in which it may shift from one party to another:

> "As was pointed out by Davis AJA in *Pillay v Krishna* 1946 AD at pp. 952-3, the word onus has often been used to denote, *inter alia*, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents *onus* in its true and original sense. In *Brand v Minister of Justice and Another*, 1959(4) SA 712(AD) at p.715 Ogilvie Thompson JA called it "the overall *onus*." In this sense the *onus* can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other."

[44] In *South Cape Corporation*, the court was dealing with an application for leave to execute pending appeal and it said the following in relation to the evidential burden at 543C-G –

> "Applying these concepts to an application for leave to execute pending appeal, the *onus* proper (or overall *onus*) rests, as I

[5] 1977 (3) SA 534 (A) at 548 A-B

> have already indicated, upon the applicant. This is so, in my view, irrespective of whether the judgment in question is one sounding in money only or is one granting other forms of relief. Where the judgment is for money only, then, in an appropriate case, the inference may be drawn, *prima facie*, that the furnishing of security *de restituendo* would protect the appellant against irreparable harm or prejudice. This would go a long way towards establishing, *prima facie*, the applicant's claim for relief, and, in the absence of any rebutting evidence from the other party (the appellant), might be conclusive. … In an appropriate case, however, the fact that the court might draw this inference would cast upon the other party a burden of adducing evidence of facts (the so-called 'special circumstances') which tended to displace the inference of no irreparable harm. It is only in this sense, in my view, that the *onus* can be said to rest on the other party. This not being an *onus* proper but a burden of adducing evidence to rebut a *prima facie* case, the other party would not be obliged to establish a case on a preponderance of probability; and, if upon a consideration of all the evidence the Court were left in doubt as to whether irreparable harm would be suffered or not, then the applicant, upon whom the true *onus* rested would fail on this issue."

[45] I have extensively quoted the judgment in order to illustrate how the court applied the principles discussed in that case to the facts therein.

[46] It is clear that in the present case, we are concerned with the second meaning of the word *onus*, i.e., the duty cast

upon a litigant, (in this case the appellants), to adduce evidence in order to combat a *prima facie* case made by his opponent, (in this case the 1st respondent): the burden of adducing evidence in rebuttal. Otherwise the onus in the true and original sense remained on the 1st respondent. I have therefore to consider whether the 1st respondent made a *prima facie* case requiring the appellants to lead evidence in rebuttal.

1st respondent's evidence

[47] The 1st respondent's affidavit supporting the notice of motion establishes only a few the facts that are not disputed by the appellants. Apart from those facts, the rest of her averments as contained in her affidavit are disputed, as I have already shown. The main averment of fact that the joint estate was not divided pursuant to the court order, which is her cause of action, is disputed. Looking at the plea and the replication filed of record and the facts that are in dispute, it can hardly be said that the 1st respondent established a *prima facie* that would have required the appellants to adduce in rebuttal. And this was the inevitable result of the failure of the court to ensure a proper procedure, conducive to the proving of contested facts, was adopted.

[48] Counsel for the appellant submitted that Ezekiel was alive from 1999 when the order of division was made until 2013 when he passed on. It was incumbent upon the 1st respondent to place evidence before the court to show that no division took place and, in my view, she failed to do so. Whilst she alleged for example that certain of the landed property was transferred to the 2nd appellant, she produced no proof therefor. The files brought to court by the LAA representative pursuant to the court's order, were not placed before the court in proper manner and consequently no submissions were made in relation to them nor did appellants' counsel examine their contents. Appellants' counsel submitted that

> "… what purported to be evidence from the records of the Land Administration Authority was made in matrix form by counsel for the 1st respondent. Records were not extracted from the files for submission to the court but simply viewed by both counsel. Counsel for the appellants was requested to verify that the matrix was an authentic representation of the 1st respondent and her deceased spouse's owned plots. Counsel for the appellants refused to sign the matrix on the ground that it was an irregular method of presenting documentary evidence before the court.".

[49] Appellants' counsel pointed out that in the founding affidavit, at paragraph 11, the 1st respondent averred that during his lifetime Ezekiel "sold a lot of our immovable

property… the late sold our residential site and a full furnished house at Lekhaloaneng, a wholesale butchery… together with equipment fitted thereon and an agricultural plot at Qoaling." This, appellants' counsel submitted, shows that the 1st respondent knew that Ezekiel was selling property but she does not say how she got to know about it and does not explain why she did not take up the matter with him only to do so after his death. In the replication at paragraph 1 thereof the 1st respondent alleged fraudulent dealings by Ezekiel and the 1st appellant in relation to the sale of the property and undertook to prove to the court that they sold the property without her knowledge. No such proof was placed before the court. The 1st respondent also failed to produce any proof, documentary or otherwise, that she lost contact with her lawyers due to her ill health and financial difficulties. Annexure EMM1 was not shown to be authentic on the basis of any acceptable evidence. It listed some properties and apparently left out others, which the 1st respondent mentions for the first time in her founding affidavit- the "commercial site now rented as a mini market at Naledi/Sekamaneng and … a residential adjacent to (our) then home at Ha Mabote".

[50] Appellants' counsel submitted that the 1st respondent failed to make a *prima facie* case requiring rebuttal

evidence from the appellants. In any event however, she submitted that if such *prima facie* case was made then the appellants successfully rebutted it. In this connection she referred to a certificate issued by the Master of the High Court to Ezekiel, and annexed to the plea as annexure 2, and submitted that it was produced to indicate that Ezekiel approached the Master's office "in a purported effort to show that he carried no burden from his previous marriage and was ready to enter into a marriage in community of property with another. The certificate as to marriage only supports the presumption that sharing had taken place" even though the Master indicated to him that that step was not necessary.

[51] The appellants' counsels submission in essence is that with so many issues in dispute between the parties and in respect of which no, or no proper, evidence was placed before the court *a quo* it hardly can be said that the 1st respondent established a *prima facie* case as would have required that the appellants should lead evidence in rebuttal or that the evidential burden shifted to them.

[52] The 1st respondent's counsel's main submission is that the evidential burden shifted to the appellants, as determined by the judge *a quo*. The 1st appellant asserted that the joint estate was divided. As such she had to establish that

assertion with evidence and she failed to do so. I have already shown how, even if the evidential burden shifted to her, which I find not to be the case, the 1st respondent was disabled from doing so by the unclear procedure adopted by the court below in dealing with this case. Had the matter proceeded smoothly on motion, it would have become evident that there were disputes of fact incapable of resolution on affidavit and the matter would have been dealt with in terms of Rule 8(14) by either dismissing it, referring it to trial, or referring only specific issues for oral evidence. If it had proceeded smoothly as a trial action, a pre-trial conference would have been held and issues clearly defined, discovery done and oral evidence heard on all the contentious issues. The appellants would, if that had become the case, been alerted to the fact that the burden to give evidence in rebuttal was on them. The opportunity to deal with the issues properly was denied to the parties by the adoption of unusual procedures.

[53] In light of our findings above we have come to the conclusion that not only was this case irregularly handled but that the judge *a quo* misdirected himself in determining the case before him solely on the basis that the onus shifted to the appellants and that they failed to discharge that onus.

[54] I have had some considerable difficulty in coming up with an appropriate order. Having found that this matter was not procedurally handled in the court below in that it is not possible to say which route was taken in prosecuting it - motion procedure or action procedure - and having determined that the judge was incorrect in deciding it on the basis of the incidence of the burden of proof only, I consider that merely upholding the appeal does not assist in resolving the matter on the merits, a thing that this Court is not in a position to do, having regard to the fact that no acceptable method of placing evidence before the court *a quo* was adopted or followed. In my view the appropriate order of this court is to uphold the appeal, set aside the decision of the court a quo, and remit the matter to the High Court for a hearing de novo before a different with a direction that the judge should determine whether the matter will proceed on motion or as an action and proceed accordingly.

[55] Regarding costs, counsel submitted that should this Court find that a mistrial occurred it should order that each party bears its own costs of the appeal and that the costs in the High Court should be in the cause. Accordingly the following order is made-

1. The appeal is upheld and the order of the court *a quo* is set aside.

2. The mater is remitted to the High Court for a hearing before a different judge, who shall determine whether the matter will proceed before him or her on motion or as an action, and give necessary directions as he or she may deem fit.

3. Each party shall bear its own costs of appeal. The costs in the High Court shall be in the cause and determined at the conclusion of the hearing referred to in paragraph 2 of this Order.

CHINHENGO AJA
ACTING JUSTICE OF APPEAL

I agree:

MTSHIYA AJA
ACTING JUSTICE OF APPEAL

I agree:

PEETE AJA
ACTING JUSTICE OF APPEAL

For Appellants: Adv. K. M. Thabane

For Respondents: Adv, E.T. Potsane