IN THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU **C OF A (CIV) 57/2018**
CIV/APN/417/2014

In the matter between

MATETE PAUL MATETE	**APELLANT**
And	
MATEBELLO JEAN MATETE	**1ST RESPONDENT**
THAKANE CHIMOMBE	**2ND RESPONDENT**
MOTLATSI RAMARUMO	**3RD RESPONDENT**
MM OPERATIONS SERVICES (PTY) LTD	**4TH RESPONDENT**
MOPELI PAUL MOKHETHI	**5TH RESPONDENT**
REGISTRAR OF COMPANIES	**6TH ESPONDENT**
MASTER OF THE HIGH COURT	**7TH RESPONDENT**
ATTORNEY GENERAL	**8TH RESPONDENT**

CORAM : DR. K.E. MOSITO, P
M. CHINHENGO, AJA
N.T. MTSHIYA, AJA

HEARED : 16 MAY 2019

DELIVERED: 31 MAY 2019

Summary

Testate succession-validity of a joint Will-Competence to make a joint will under unproved customary marriage in community of property. Non-compliance with Rule 8(19) of the High Court Rules takes away the High Court's jurisdiction except when court finds there was substantial compliance.

JUDGMENT

MTSHIYA AJA

INTRODUCTION

[1] This is an appeal involving a dispute arising from the last Will and testament of the now deceased Sello Gilbert Matete. The appellant is Matete Paul Matete, the first born son of the deceased from his first marriage to 'Malebina Matete (born Monokoane) which ended in divorce on 29 April 1991. The 1st respondent is Matebello Jean Matete who was subsequently married to the deceased by Christian rights in community of property on 6 July 2012.

[2] The dispute ended in the High Court and on 28 September 2018, the High Court granted the following order in favour of the 1st respondent:

> "IT IS HEREBY ORDERED THAT:
>
> 1. That 1st Applicant is hereby declared as the universal heir of the late Sello Gilbert Matete.
>
> 2. That the transfer of the 500 shares held by the late Sello Gilbert Matete in M.M Operations Services (Pty)

Ltd. Reg. No 1993/97 to the 1st Respondent is hereby declared unlawful, null and void.

3. That the 1st Applicant is hereby declared the rightful heir of the 500 shares held by the late Sello Gilbert Matete in the 2nd Respondent.

4. That the 4th Respondent is hereby ordered to register the 1st Applicant as the holder of the 500 shares held by the late Sello Gilbert Matete in the 2nd Respondent, and to remove that name of the 1st Respondent as the Director and shareholder of the 2nd Respondent from the company file in the Registry of Companies.

5. That the 3rd Respondent is hereby ordered the cease paying, or cause to be paid, dividends in respect of the 500 shares held by the late Sello Gilbert Matete in the 2nd Respondent to the 1st Respondent.

7. That the self-appointment of the 1st Respondent to the directorship of the 2nd Respondent is hereby declared unlawful and a nullity;

8. That the 3rd respondent ceases to work with the 1st Respondent as the director and shareholder of the 2nd Respondent in the affairs and operations of the company.

9. That the 1st Respondent pays the costs of this suit."

[3] The appellant is appealing against the granting of the above order. The grounds of the appeal are listed as follows:-

"-1-

The learned judge erred and misdirected himself in deciding that both the deceased **Sello Gilbert Matete** and **Neo 'Matebello Matete** were competent to execute a joint Will in respect of the property of the joint estate on the **24th day of May 2005** whilst they were not validly married at the time but only got married on the **6th day of July 2012.**

-2-

The learned judge erred and misdirected himself in deciding that **Neo 'Matebello Matete** could execute a joint **Will** with the deceased in respect of the property that in law did not belong to her or was not hers as she was not married to him at the time of executing the **Will**.

-3-

The learned Judge erred and misdirected himself in declaring the first appellant as the sole heir to the estate of the deceased **Sello Gilbert Matete** whilst she had asked the ***Court aquo*** to declare her the ***universal heir*** of the estate of the late **Sello Gilbert Matete.**

-4-

The appellant reserves the right to file further grounds of appeal as may be permissible in law."

On 15th March 2019 the appellant filed the following additional grounds of appeal:

"-1-

The Learned Judge erred and misdirected himself in deciding that a Will made before marriage by parties purporting to be married is valid when in fact such allegations amount to fraud.

-2-

The Learned Judge erred and misdirected himself in deciding that the Will made before marriage is valid. By doing so he implied that the clauses of the Will applied retrospectively to the marriage of the 1st respondent and deceased which was only on or around the 6th July 2012 when the Will was made on or around the 24th May 2005.

-3-

The Learned Judge erred and misdirected himself in concluding that the deceased dies testate when the Will he had made was invalid due to the untrue contents especially with regard to his relationship with the 1st respondent where they claimed they were married in community of property.

-4-

The Learned Judge erred and misdirected himself deciding on issues irrelevant to the matter in that he concentrated on marital power when that was not brought before him. The Learned Judge ought to touch on the issue of testate and interstate succession as this was the core of the matter before him.

-5-

The Learned Judge erred and misdirected himself in that he based his judgment on the case that was dealing with specifically landed property but the case before him was on succession of companies and monies.

-6-

The Learned Judge erred and misdirected himself in appreciating the 1st respondent's allegation of being the

universal heir even on the property acquired from the first meeting. The 1st respondent cannot by law inherit from another house and this is supported even by the Sesotho principle of "*malapa ha a jane*".

-7-

The Learned Judge erred and misdirected himself in denying that the estate of the deceased should devolve in terms of the customary law on the basis that the 1st respondent and the deceased had made it clear how they wished their estate to devolve. This reasoning is faulty because at the time when the Will was made, the parties were not married thus had no common property to decide upon.

-8-

The Learned Judge erred and misdirected himself in that he at no point in his judgment mentioned the issue of urgency yet it was one of the points raised in limine much deserving to be addressed.

-9-

The Learned Judge erred and misdirected himself in dismissing the application for stay pending appeal when the necessity to grant such was apparent more-so when not only the directors were affected but also the innocent employees. It is not fair for the grass to suffer when elephants fight.

-10-

The appellant reserves the right to tile further grounds of appeal as may be permissible in law."

BACKGROUND AND THE FACTS

[4] Before their marriage, the deceased and 1st respondent lived together during which time they executed a Joint Will which they registered with the Master of the High Court on 24 May 2005. In that testament the couple refer to themselves as married in community of property and the 1st respondent is referred to, not by her maiden name Neo Jane Malefane, (as she was then) but as Neo Matebello Matete.

[5] In June 1993, the deceased and Mopeli Mokhethi, the 5th respondent registered a security services company called M.M Operations Services (Pty) Ltd (4th respondent) in which each of them held 500 shares. The deceased's portion of shares was transferred to the appellant subsequent to a meeting held on 3 May 2014 by the family. At that meeting the Matete family nominated the appellant as the sole lawful heir to the deceased's estate.

[6] The 1st respondent challenged the appellant's appointment as the sole heir to the estate and made an application for relief from the High Court on 1 October 2014. The 1st Respondent argued that appellant's appointment as sole heir was unlawful on the basis that such an appointment goes against the prescripts of the Joint Will executed by the 1st respondent and the deceased. The 1st respondent's position was that as she was the lawful wife of the deceased at the time of his death and as per the existing will, she was the sole heir to the deceased's estate.

[7] The appellant opposed the application on two main grounds. He challenged the validity of the Will on the basis that the 1st respondent was not lawfully married to the deceased at the time the Will was executed. Furthermore, that even if the Will was valid, in terms of section 14 (1) of the Laws of Lerotholi a father is not permitted to, by Will, deprive his heir of a greater share of the father's estate. It was appellant's position that he was lawfully appointed heir by a meeting of the Matete family

on 3 May 2014 and such appointment was endorsed by their Chief.

POINT IN LIMINE

[8] At the commencement of the hearing of this matter, the appellant raised the issue of jurisdiction. It was argued, for the first time, that when the matter was filed in the High Court, there was no compliance with Rule 8(19) of the High Court Rules (1980). The Rule provides as follows:

> "When an application is made to court, whether **ex parte** or otherwise, in connection with the estate of any person deceased, or alleged to be a prodigal or under any legal disability mental or otherwise, a copy of such application, must, before the application is filed with the Registrar, be submitted to the Master for his consideration and report. If any person is to be suggested to the court for appointment of curator to property such suggestion shall also be submitted to the master for his consideration and report. There must be an allegation in every such application that a copy has been forwarded to the Master."

It is common cause that the appeal before this Court relates to the estate of a deceased person.

In response to the issue of non-compliance with Rule 8(19), the 1st respondent said the issue was never canvassed in the *court a quo* and did not form part of the appellant's grounds of appeal. Furthermore, the Master was cited and served with the application. A report had been received from the Master.

[9] The Court, realising the importance of the issue raised, asked the parties to file supplementary heads of argument on same. This was done.

[10] In the supplementary submissions the appellant maintained that non-compliance with rule 8(19) of the High Court Rules is fatal due to the importance attaching to the Master's report in matters of this nature. In advancing argument on the issue, the appellant, among other case authorities cited, mainly relied on **Maphunye Qocha and 3 Others V. Hape Nthongoa C of A(CIV/49/16** where, under similar circumstances, this Court ruled that non-compliance with rule 8(19) was fatal.

[11] In the case relied on, Qocha (supra), Mosito P, at paragraphs 9, 10 and 11 states:-

> "[9] Dealing with a similar situation in the High Court of Botswana in ***Makgatlhe v Mattias***, Masuku J pointed out that, '[i] is clear from the wording of the above Rule that it is mandatory for every application in connection with a deceased's estate or person under any legal disability, must be submitted to the Master for consideration and report before the same can be filed with the Registrar. It is an ineluctable fact that the peremptory provisions above were not followed by the Applicant as there is no evidence of submission of the application to the Master and clearly, there is no report. Such an application, whose conduct, flies in the face of clear and unambiguous provisions of the Rules must fail for that reason.' I endorse the above comments by the learned judge.
>
> [10] In ***Mphalali v Anizmi'halali and Others***, Nomngcongo J regarded non-compliance with this Rule as mandatory. He proceeded to point out that, 'the Rule is couched in mandatory terms. I consider this an indicator of the direction. He then went on to say that,

> in the present proceedings the applicant contrary to Rule 8 (9) has filed his application with the Registrar without first submitting a copy of such application to the Master. He has also failed, per force to make an allegation that such copy has been so forwarded to the Master as required. In asking me to condone such non-compliance the applicant does not say what other relief he seeks consequent upon such condonation. Do, I for instance allow him to go back and rectify the matters in respect of which he is in default or do I proceed to hear the main application, ignoring the provisions of the rule.' The Learned Judge went on to say that:
>
> > This rule in providing specifically that even if applicants in connection with deceased estate are brought ex parte they must still be first submitted to the Master before filing with the Registrar, leaves very little discretion with the court to grant condonation for failure to comply. Not only that, the Master is further enjoined to consider the matter and then to make a report. Such a report might lend a totally different colour to the outcome of proceedings. A copy of this application must therefore have been forwarded to the Master for his consideration and report, otherwise we could be trespassing on the Master's territory ex parte, a proceeding that is specifically not allowed by the rules.
>
> [11] The learned judge proceeded to say that, '[t]he approach that I respectfully propose to adopt is that which was taken by Roux J in ***Small Business Development Corporation Ltd v Khubeka 1990 (2) SA 851 at 853 (H)*** viz "whether this irregularity may be condoned and, if so, should it be condoned." Of course if the inquiry ends in a negative answer to the question whether it may be condoned that is the end of the matter and condonation is refused. In embarking upon this inquiry, it has to be taken into account the wording of the rule noncompliance with which is sought to be condoned and whether or not condonation would defeat the very purpose of the rule.' I endorse the above comments by the learned judge. I am of the view that failure by the applicant to comply with the above rule was fatal to the application."

I have deliberately quoted extensively from Qocha because the case sets out the position of this Court on the need to

comply with, not only Rule 8(19), but generally with the Rules of court.

A court, as is the case *in casu*, faced with the determination of a point *in limine* raised in respect of non-compliance with Rule 8(19) should derive guidance from the above authorities which set out the law. However, in doing so the court must examine the factual situation attaching to each individual case.

[12] In agreeing with the above position, already taken by this Court, I note that in order to comply with Rule 8 (19), the appellant *in casu* ought to have done the following things:

(a) Serve the application on the Master *prior* to having it issued by the court.

(b) Obtain a report from the Master.

(c) State in the application that a copy of the application has been forwarded to the master.

It is the appellant's position that the above requirements of the law were not met. The requirements, it was argued, are mandatory and therefore the mere citation of the Master, as *in casu*, did not necessarily cure the irregularity.

[13] In response to the above submissions, the 1st respondent, in supplementary submissions, maintained that, the

application was served on the Master after having been issued and that a report was received from the Master on 10 October 2014. The said report reads as follows:

> "REPORT IN TERMS OF RULE 8(9)
>
> -1-
>
> We have perused our documents and have established that the late Sello Matete had a joint will with the 1st applicant registered under No. 23/2005.
>
> -2-
>
> However, his death was not reported to us with fourteen days as required by law.
>
> -3-
>
> We were approached by first applicant on the 7th May 2014, who informed us that the deceased died intestate. He was in the process of administering the deceased's estate in terms of the customary law based on a letter by the Matete family endorsed by their area chief, a letter from their principal chief as well as one from the DA. We relied on this letters and confirmed him as the customary heir.
>
> -4-
>
> A few days later we got an inquiry from the second applicant about the above appointment. We were further informed that the first respondent knew very well of the deceased's will but proceeded as he did anyway. We called him to our office and informed him that we would not have furnished him with said letters of administration had we known that the deceased left a will and further asked him to return the said letters to our office. To date he has not.
>
> -5-
>
> Immediately thereafter we wrote a letter to the fourth respondent marked "NM2" in the applicant's founding affidavit cancelling our letters of administration and requesting them to reverse the transfers and appointments already made. Unfortunately they could not as evidenced by their response marked "NM3" on the applicant's founding affidavit.
>
> -6-
>
> We support the above application as it is apparent that the first respondent acted fraudulently and pray that it be granted as prayed."

The 1st respondent further stated that although there was, in the application, no allegation that a copy had been forwarded to the master, there was *in casu* substantial compliance with

Rule 8(19) and thus making the case distinguishable from Qocha. The 1st respondent said the purpose of the rule had therefore been fulfilled and furthermore, in addition to the report, the Master, as a cited party, was always aware of the case. To that end she urged the court to dismiss the point *in limine*.

[14] Apart from maintaining that Rule 18(9) should have been strictly adhered to, the appellant did not respond to the new arguments raised by the 1st respondents.

[15] Given the circumstances of this case and without belittling the importance of complying with rules, I am inclined to agree with the 1st respondent that *in casu* there was substantial compliance with the rule 8(19). In taking that position I am guided by what this Court said in **Lesotho Nissan (Pty) Ltd v Katiso Makara C of A (CIV) 72/14**. In that case, dealing with an issue of non-compliance with rules, **Chinhengo AJA** said:

> "[10] This is a case in which it is only proper to recall, as a preface to the consideration of the issues, the wise words of Smalberger JA in **National University of Lesotho and Another v Thabane LCA (2007-2008)**. Therein the learned judge was constrained to make the following remarks-
>
> > "Before proceeding I propose to make some comments concerning the rules. They are primarily designed to regulate proceedings in this Court and to ensure as far as possible the orderly, inexpensive and expeditious disposal of appeals consequently the rules must be interpreted and applied in the spirit, which will facilitate the work of this Court. It is incumbent upon practitioners to know, understand and follow the rules, most if not all of which are cast in peremptory terms. A failure to abide by the rules

> could have serious consequences for parties and practitioners alike, and practitioners ignore them at their peril. At the same time formalism in the application of the rules should not be encouraged. Opposing parties should not seek to rely upon non-compliance with the rule injudiciously or frivolously as an expedient to cause unnecessary delay or in an attempt to thwart an opponent's legitimate rights. Thus what amounts to purely technical objections should not be permitted in the absence of prejudice to impede the hearing of appeals on the merits. The rules are not cast in stone. This Court retains a discretion to condone a breach of its rules (see Rule 15) in order to achieve a just result. The attainment of justice is the Court's ultimate aim. Thus it has been said that the rules exist for the court, not the court for the rules."

[16] Admittedly, unlike in other jurisdictions the provisions of rule 8(19) are mandatory but I am, however, inclined to be seriously guided by the points raised in the above case.

In Zimbabwe, a similar provision in the High Court Rules, 1971, Rule 248 provides, in part, as follows:-

> " In the case of any application in connection with
>
> (a) the estate of a deceased person or
>
> (b) .....
>
> A copy of the application shall be served on the master not less than ten days before the date of set down for his consideration and report by him <u>if he considers it necessary or the court requires such a report</u>" (My own underlining)

Although the above gives the Master a discretion on the issue of the report, I want to believe the purpose is the same in both jurisdictions. The purpose is to alert the Master of issues relating to a deceased estate which estate may be lying for distribution before that office. Obviously if the issues in the application impact in any

way in the distribution of the estate, the Master will say so. In this jurisdiction, I believe because of s.3(b) of Reclamation No.19 of 1935, it is mandatory for the Master to submit a report.

[17] *In casu*, I note that as at 9 September 2014, the Master was already fully aware of the estate of Sello Gilbert Matete. On that date, following a request from the 1st respondent's lawyers, the office of the Master wrote to the Registrar of companies in the following terms:

> "RE : ESTATE LATE SELLO GILBERT MATETE
>
> We are the administrators of deceased person's estates and guardians of minor children.
>
> The above named deceased person met his untimely death sometime in March 2014 having previously attested to a joint will with his spouse Ms Neo Matebello Matete. In that Will, they had appointed three people as the co-executors namely Motlatsi Ramarumo, Mahlomola Matete and a senior partner at Naledi Chambers. However, after his death, the family of Sello or the executors did not within the stipulated time of two weeks report the death of the deceased to our office. Instead we were furnished with the customary letters appointing one Mr. Matete as the heir to the deceased.
>
> Consequently we wrote him the letters of administration of which we are advised he used to transfer the deceased's shares from MM OPERATIONS (PTY) LTD into his own names and appointed himself a director forthwith. We furnished the said Mr Matete with the letters of administration unaware that there was a will and he was not an executor there let alone the deceased's beneficiary in terms of the will.
>
> Take note that we hereby cancel and annul the letters of administration issued to Mr Matete and kindly reverse the transfer of shares and appointment into directorship of MM OPERATIONS (PTY) LTD as it was obtained unlawfully.
>
> Hoping the above is in order.
>
> I remain.

CC : T. MATOOANE AND CO.
MR MATETE MATETE"

On 10 September 2014, the Registrar of Companies responded to the above letter in the following terms:-

" RE : ESTATE LATE SELLO GILBERT MATETE

We acknowledge receipt of your letter dated 9th September 2014.

The office of the Registrar of Companies would not be able to reverse the transaction as you request due to the following reasons:

1. Although Mr Matete was not properly appointed as the executor of the deceased's estate, he is the holder of those shares and he is the only one who can effect their transfer;

2. Where, on the other hand, your good office instructs the office of the Registrar of Companies to transfer shares to the heir of the deceased, and such an instruction is assumed on mistake, the transaction is still valid, and cannot be reversed by the instruction *per se.*

   Therefore, our office advises your good office to request Mr Matete to transfer those shares to the executor in terms of the will and if he does not co-operate, the matter should be taken to court for the court to make its determination.

We hope you will find this in order.

Yours faithfully

Florence Motoa-Mokhesi
Registrar of Companies a.i"

I reproduce the above correspondence merely to show that, as at 1 October 2014, when the 1st respondent filed an application in the High Court, the Master, a cited party herein, was already fully aware of the debate on the estate. To that end, I would not place emphasis on the fact that

service on her was only effected after the filing of the application and that there was no declaration in the application relating to the need to involve the Master as required by Rule 8(19). Taking into account the factual position relating to this case, I am of the opinion that there was substantial compliance with Rule 8(19). The case is easily distinguishable from Qocha, where no single step had ever been taken to involve the Master. In that case the Master was not even cited.

On the basis of substantial compliance, I am unable to uphold the preliminary issue.

ISSUES

[18] With the issue of non-compliance with the rules having been put away from the path of progress, I now move to address the merits of the appeal. The appellant prays for the reversal of the order of the court a quo which declared the 1st respondent as "the sole heir of their joint estate with the deceased." That decision was based on a Joint Will whose validity the appellant has questioned.

[19] The grounds of appeal, herein are twelve in total but the issues in all grounds, can, in my view, be disposed of by merely considering the issue of whether or not there was a valid Joint Will. All the grounds are centred on that issue. Accordingly if that issue is determined in favour of the

appellant the estate of the late Sello Gilbert Matete will fall to be administered under customary law.

ARGUMENTS

[20] In the main the appellant challenges the order of the lower court on the basis that the Joint Will that the deceased and the 1st respondent executed is invalid. The appellant submits that the invalidity is due to a number of factors. First, he contends that the couple did not meet the prescribed requirements for executing a Joint Will as a married couple before they were validly married in terms of the Marriage Act of 1974, which the joint will purports to do.

[21] The appellant placed emphasis on the Legal Capacity of Married Persons Act 2006. He points out that the Act only came into operation on 6 December 2006. The lower court could not therefore confirm the existence of a valid Joint Will as the parties lacked capacity to enter into a will as a married couple at the time of its execution. Second, the Joint Will, according to the appellant, is fraudulent as it is unlikely that the deceased would sign a will purporting to be married in community of property when there was no evidence of marriage. The Master of the High Court was therefore misled into accepting the existence of a marriage in 2005 when in fact the 1st respondent and the deceased were only later married in 2012. The 1st respondent did not reveal important information to the Master.

[22] The appellant further argues that even if the Joint Will were to be found to be valid, his appointment as sole heir is justified as the Joint Will is silent on the distribution of shares in the 4th respondent. It is the appellant's position that the silence necessitated the appointment of an heir for the deceased's estate and that the lower court gave no reasons for rejecting the family's appointment of him as the heir in favour of the 1st respondent. Furthermore, the appellant argued, the court order as it stands is contrary to the principle of "*malapa ha a jane*" that prohibits one house from inheriting from the other. There was no distribution of the estate after divorce. The appellant said the 1st respondent had therefore no legal right to execute a Joint Will that disposed of properties from the senior house.

[23] In response to the appellant's arguments the 1st respondent argued that the joint Will remained valid and had never been challenged. She said the appellant had always known about the existence of the Will. With respect to the shares in 4th respondent, it was her argument that same fell to be distributed in terms of company law and in so submitting the 1st respondent relied on Articles 25 and 28 of 4th respondent's Articles of Association which allow for transfer of shares by Will.

It was argued that the court a quo had adequately explained the law applicable to Joint Wills in paragraphs 8 to 15 of the judgment.

The 1st respondent argued that the immovable property referred to in the Will was the property acquired by the deceased and the 1st respondent after the dissolution in 1993 of the deceased's' first marriage to appellant's mother. To that end, she maintained that the deceased's wishes in the Will were to be respected.

DETERMINATION AND THE LAW ATTACHING TO THE JOINT WILL.

[24] The Will in issue, dated 9 March 2005 and filed with the Master on 24 May 2005 under No.23/2005, reads, in part as, follows:-

> **"THE JOINT WILL AND TESTAMENT OF SELLO MATETE AND NEO 'MATEBELLO MATETE**
>
> This is the last Will Testament of Sello Matete and Neo 'Matebello Matete. (Married in community of property) residing at Sekamaneng in the district of Berea, Lesotho, whose postal address is P.O. Box 86 Maseru.
>
> **DIRECTION**
>
> We have **abandoned the customary mode of life and have adopted the European mode of life** and therefore our estate falls to be administered under the Administration of Estates Proclamation No. 19 of 1935 or any other comparable legislation in force from time to time in the Kingdom of Lesotho. This **Will** will only take effect after our death.
>
> **THE SURVIVING TESTOR/TESTATRIX**
>
> We **nominate, constitute and appoint the SURVIVOR OF US** as the **sole and universal heir of all the family assets and effects, whether movable or immovable and wherever situate, subject to the following conditions**:- (My own underlining)

It will be noted that under the first paragraph of the Will, Sello Matete and Neo Matebello Matete declared that they were married in community of property. There is no evidence of that marriage in the papers, except for the later civil marriage contracted on 6 July 2012, allegedly in community of property. That was after some 7 years from the date of the Will. Whilst I do not believe the same parties are barred from converting their customary law marriage into a civil marriage, there is *in casu* no evidence of the customary law marriage. There is only a phrase in the Will which reads "married in community of property."

On the issue of converting the marriage, in **M. Ntloana & Another v M. Rafiki C of A (CIV) No.42 of 2000** (unreported), **Ramodibedi JA** said:

> "It must always be born in mind, however, that there the court was concerned with a marriage to another person – other than the spouse in question. It is in that context that I have underlined the words 'other person' used in Section 29 of the Marriage Act 1974 – to indicate my view that the impediment introduced by the section is not directed at the parties to a customary marriage – converting such marriage to a civil one if they so wish. In this regard, the law was, in my view correctly stated by Jacobs CJ in Zola v Zola 1971-73 LLR 286."

[25] The appellant has argued that at the time of the signing of the Will the parties were not married to each other until 6 July 2012. To that end, it is argued, the parties had, in terms of the Legal Capacity of Married Persons Act 2006, no capacity to enter into a Joint Will. Indeed that Act came into force on 6 December 2006. That was after the Will had been

signed. The provisions of the law in the Legal Capacity of Married Persons Act 2006, relied on, are found in sections 4 and 5 where it is provided as follows:-

> "4. The provisions of this Part shall apply to a marriage in community of property, irrespective of the date on which the marriage was entered into.
>
> Equal powers of spouses
>
> 5. Spouses married in community of property have equal capacity to do the following in consultation with one another –
>
> (a) dispose of the assets of the joint estate;
>
> (b) contract debts for which the joint estate is liable; and
>
> (c) administer the joint estate."

That Act defines the following relevant words as follows:

"Marriage" means any marriage solemnized or recognised under the Marriages Act 1974.

"Joint estate" means the estate of a husband and wife married in community of property or by customary law.

Furthermore, it was argued, Section 3(b) of the Administration of Estates Proclamation No. 19 of 1935 requires proof in change of style of life. The section reads:-

> "3. This Proclamation shall not apply –
>
> (b) to the estates of Africans which shall continue to be administered in accordance with the prevailing African law and custom of the Territory : Provided that such law and custom

> shall not apply to the estates of Africans who have been shown to the satisfaction of the Master to have abandoned tribal custom and adopted a European mode of life, and who if married, have married under European law." (My own underlining)

The appellant argued that there was no proof that at the time of executing the Will his late father and the 1st respondent had "abandoned the tribal custom and adopted the European mode of life." It was the appellant's submission that given the absence of proof of that fact, which is normally investigated by the Master, the estate of his father fell to be administered under customary law. The issue of shares in the 4th respondent would therefore be distributed under customary law.

Indeed, in addition to the absence of proof of a customary marriage, the Master's report is silent on what is required in terms of s. 3(b) of the Administration of Estates Proclamation No. 19 of 1935. This refers to proof being shown "to the satisfaction of The Master that the parties in the marriage have abandoned tribal custom and adopted a European mode of life".

[26] The 1st respondent submitted that the appellant was always aware of the Will but had never challenged it. That simple argument, in my view, does not address the law.

[27] A reading of the *court a quo's* judgment seems to show that, in reaching its decision, the *court a quo* merely relied on

section 5 of the Inheritance Act 26 which the *court a quo* quoted in its judgment and then reasoned as follows:-

> "[8] Despite popular belief, it is not true that in our law only married persons are allowed to make a joint will. A joint will is in essence a testamentary document by which two or more persons express their intentions in a single document, irrespective of whether they are married or not. It can be used by couples who live together without entering into a legally recognised marriage [i.e. in a type of relationship known by various terms, such as domestic partnership, life partnership, cohabitation, living together]. Since such a relationship does not confer the consequences a legally recognised marriage on the cohabitants, such partners can acquire some degree of protection by making use of ordinary legal rules and remedies such as contracts and wills.
>
> [9] In terms of section 5 of out of Law Inheritance Act 26 of 1873:
>
> "Every person competent to make a will shall have full power by any will executed after the taking effect of this Part to disinherit or omit to mention any child, parent, relative or descendant without assigning any reason for such disinheritance or omission, any law, usage or custom now or heretofore in force in Basutoland notwithstanding: and no such will as aforesaid shall be liable to be set aside as invalid, either wholly or in part, by reason of such disinheritance or omission as aforesaid." [my emphasis]
>
> [10] And the expression "competent to make will" has been interpreted to mean, in the case of an African, persons who "have abandoned tribal custom and adopted a European mode of life." [per proviso to section 3(b) of the Administration of Estates Proclamation 19 of 1935]. This expression has very offensive overtones and ought to have been jettisoned long ago by our lawmakers. In more acceptable parlance it means a person whose lifestyle is predominantly modern rather than predominantly customary. It must be noted that the third requirement in the aforesaid proviso only applies where the testators are married (in which case then they must have married under European law)."

[28] With respect to Legal Capacity of the Married Persons Act the *court a quo* had this to say:

> "[15] The Legislator in its wisdom found it fit to do away with the restrictions that the husband's marital power had over the property of the joint estate. The resultant consequences of marriages in community of property under this Act was that the minority status of married women was removed. In terms of section 3(1) of the act did not only apply to marriage contracted under civil rights but also to common law and customary marriages when it comes to administration of the joint estate. This was necessary because society is evolving and the law is dynamic, we now live in a society where everyone is equal before the law and has the right to equal protection and benefit of the law, and unfair discrimination on the grounds of gender, sex and marital status has been outlawed."

[29] The above passages contain noble words but fail to fully explain the applicable law. A proper conclusion could only be reached after determining whether or not there indeed was a customary marriage or European marriage complying with s.3(b) of Proclamation No. 19 of 1935. In any situation, either type of marriage has to be proved. *In casu*, it was important to establish that on the 9 March 2005 when the Joint Will was executed there was indeed a marriage in community of property and that s.3(b) of Proclamation No. 19 of 1935 was complied with. In **Sebakeng Mokete and 4 Others v Lerato Mokete and 2 Others C of A (CIV) 19/2007** the Court said:

> "[12] In holding that the common law governed the estate of the deceased the judge a quo appears to have been of the view that the proviso to section 3(b) of the Proclamation is satisfied where there has been a marriage by civil (European) law. This is clearly not the case (**Khatala vs Khatala (1963-1966) HCTLR 97** at **10 B-C**). The proviso excludes from the operation of section 3 (b) Basotho who "have abandoned tribal custom and adopted a European mode of life, and who, if married, have married under European law." It therefore postulates two requirements, both of which have to be present for the proviso to come into operation. Only the second (marriage under European law) has been established. The first (abandonment of tribal custom and adoption of a

> European mode of life) was not raised in the affidavits and has never received proper consideration in this matter.
>
> [13] The question whether a person has abandoned a customary mode of life and adopted a European way of living is obviously a question of fact to be judged on the particular facts of each case. The onus would be on the first applicant, who claims that the common law applies, to establish such abandonment and adoption – see the remarks in this regard of Ramodibedi JA in **Tsepo Mokatsanyane and Another v Motsekuoa Thekiso and Others C of A (CIV) NO.23 of 2004**, paras [14 and [15]."

[30] We have, *in casu* a situation where the parties, without proof of a customary marriage, declare themselves married in community of property. They also declare that they have abandoned the traditional way of life. That aspect of their life was never cured by the subsequent civil marriage in 2012. For the purposes of the Will, the 1st respondent should have provided proof of marriage at the time of making the Will and proof that she and the deceased had indeed abandoned the traditional way of life. That, in terms of law, required confirmation by the Master. That was never done. In the absence of that, and notwithstanding the existence or not of a Joint Will, it is difficult to understand how the estate of the deceased can fall to be administered under section 3(b) of the Administration of Estates Act Proclamation NO 19 of 1935. I am satisfied that the appellant has made a case and in the circumstances the appeal should succeed.

[31] The appellant attempted to combine an appeal on stay with this appeal. That attempted appeal was, however, not persisted with.

[32] On the question of costs, I think it would be fair to let the estate bear the costs. I take the view that both parties genuinely believed the intervention of this court was necessary in order to ascertain the applicable law in the distribution of the estate.

[33] I therefore order as follows:-

1. The appeal succeeds.
2. The order of the High Court granted on 28 September 2018 be and is hereby set aside and substituted with the following:

   "The application is dismissed with costs."
3. The costs of this appeal and the application in the lower court shall be paid by the estate.

_____

N.T. MTSHIYA, AJA

I agree: _____

DR K.E. MOSITO, P

I agree: _____

M. CHINHENGO, AJA

FOR APPELLANT : ADV. C.J. LEPHUTHING
FOR RESPONDENTS: ADV. M.V. KHESUOE (MRS)