IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 1032/2013**

In the matter between:

ELLEN MAGAGULA **Appellant**

and

THEMBA MAGAGULA N.O. **1st Respondent**

ESTATE LATE JOHN MAHHELANE MAGAGULA (ESTATE No. EM 232/2011 **2nd Respondent**

THE MASTER OF THE HIGH COURT **3rd Respondent**

In re:

ELLEN MAGAGULA (nee NENE) **Applicant**

and

THEMBA MAGAGULA N.O. **1st Respondent**

NGCEBASE MAGAGULA (nee DLAMINI) **2nd Respondent**

ZODWA MAGAGULA (nee HLETA) **3rd Respondent**

NOMTHANDAZO MAGAGULA **4th Respondent**

NOMAGUGU MAGAGULA **5th Respondent**

NOMALUNGELO MAGAGULA **6th Respondent**

KHONTAPHI MANZINI (nee MAGAGULA) **7th Respondent**

DAISY ATLEE (nee MAGAGULA) **8th Respondent**

THE MASTER OF THE HIGH COURT N.O. **9th Respondent**

THE REGISTRAR OF DEEDS **10th Respondent**

THE COMMISSIONER OF POLICE N.O. **11th Respondent**

THE ANIMAL HEALTH INSPECTOR N.O. **13th Respondent**

Neutral citation : Ellen Magagula v Themba Magagula and Others (1032/2013) SZHC187[2019] (07 October 2019)

Coram : **MAPHANGA J**
Date Heard : 28 May 2019
Date delivered : 07 October 2019

Summary; *Civil Law- Succession- Validity of a Testamentary Will contested – Applicant seeking a declarator declaring the deceaseds Last Will and Testament to be null and void on account of an inherent defect by reason of the deceaseds purported bequest of the entire assets in the marital joint estate;*

Dispute as to whether assets devolving to the maritial joint estate; Applicant married by civil rites to the deceased in community of property in terms of section 22 (6) of the now repealed Black Administration Act of 1927 of the then Union of South Africa- parties never divorced but separated and estranged for several years until the death of the deceased; in effect marriage substing until deceaseds death;

Deceased entering into a putative customary union with another woman (the 2nd Respondent) during the subsistence of the marriage with applicant; cohabitation with the 2nd Respondent; 2nd Respondent opposing application asserting a claim based on the existence of a universal partnership in respect of certain assets in the estate and thus asserting a claim to a share in the said property;

Held*- that on account of the subsistence of the marriage in community of property with applicant the joint estate in community enduring until the deceaseds death;*

Held*- the deceaseds last will and and testament void ab initio and of no legal effect and consequently a declarator to effect that the deceased died intestate; In effect applicant entitled to a half share in the joint estate and the deceased share falling to devolve ab intestatio in terms of the succession laws in the Kingdom;*

Held*-on the facts that deceased entered into a universal partnership in regard to certain assets in the estate to which the 2nd respondent and that such universal partnership having been proven only the deceaseds share in the said universal partnership with the 2nd respondent devolving into the joint estate;*

Introduction

[1] This is a long-drawn matter involving a challenge instituted by the applicant (a widow) and the ensuing dispute over the validity and consequentially the legal effect of the contents of her husband's will as regards the distribution as per specific bequests made by the deceased in the said will. The common cause facts are that during his lifetime around 1987 the deceased unilaterally drew and executed a will in which he inter alia made various bequests devolving certain assets of the estate, movable and fixed properties or interests therein, to various in the estate to various nominated beneficiaries including the applicant and several of the listed respondents. In it he also purported to appoint the 1st Respondent, the first-born son of both the deceased and the applicant, as the executor of the estate.

[2] It is again common ground that the deceased had been married to the applicant by civil rites; which marriage still subsisted at the time of his demise although they had been estranged and lived apart for several decades. I shall return to the material aspects of their marital circumstances and status in the course of this judgment. Suffice to say that the dispute and the litigation giving rise to this matter commenced with an application launched by the applicant Ellen Magagula (nee Nene) in August 2013. For convenience I shall refer to Ms Ellen Magagula as the Applicant throughout herein. The matter then got bogged down by various interlocutory proceedings. The protracted course of these proceedings culminated in an appeal following an order on the 16th September 2016 by His Lordship Nkosi J dismissing the application and a subsequent dismissal of a further application by the Applicant to rescind the dismissal issued by His Lordship Fakudze J on the 16th September 2016. The facts and circumstances pertaining to the developments leading to the dismissal of the main and rescission applications have been comprehensively chronicled and outlined in the Supreme Court judgment of the 28th May 2019 in the outcome of the appeal. I do not intend to burden this court with these aspects save the salient material legal events germane to this application. In the final event the Supreme court effectively reinstated the application and in exercise of its discretion in terms of Rule 33(3) of the Supreme Court Rules remitted the matter to this Court.

[3] In the judgment the Supreme Court made specific orders directing the conduct of the matter on the substantive issues and the hearing of *viva voce* evidence for determination before this court as follows:

> ***"ORDER***
>
> 1. ***The Appeal succeeds and the Judgment of the High Court relating to the rescission of the Judgment of the High Court of 16th September, 2016 is hereby set aside.***

2. ***The Order of the High Court of 16th September 2016 is hereby set aside in its entirety.***

3. ***The matter is referred back to the High Court for the hearing of oral evidence (or on commission if circumstances demand) relating to the following specific issues:***

    a. ***The subsistence of the marriage in community of property between the Appellant and the Deceased up to the date of his death;***
    b. ***The validity of the purported last Will and Testament of the Deceased made on the 17th September 1987;***
    c. ***The entitlement of the Appellant to assets in the Joint Estate in terms of the law;***
    d. ***Any matter which the High Court deems to be necessary"***

[4] In the said judgment the Supreme court further ordered the reinstatement of certain interim orders previously issued by the High Court as *pedente lite* interdicts restraining the 1st Respondent and or any other person acting on his behalf from passing transfer or any of the immovable properties in the joint estate. In effect the court held over any distribution of the fixed properties in the estate pending the finalisation of the main application.

[5] By way of slight digression, it is common cause that during the course of the motion at the High Court their Lordships Justices Dlamini T and Mamba on separate occasions made a directive that certain issues or disputes of fact pertaining to the estate merited the leading of oral evidence and directed accordingly. That was not to be and as such the record as to what specific issues were to be so dealt with remains obscure. The order of the Supreme court has clarified this aspect of the matter for the conduct of the application.

[6] When the matter came before pursuant to the Supreme Court judgment, at the commencement the parties' attorneys, namely in the person of learned attorneys Messrs Mntshali and Maseko for the applicant and respondents respectively, came into a consensual arrangement in the interest of curtailing the field of the disputed facts. In effect the parties agreed that first issue concerning the marital status and relative proprietary regime as regards the marriage between the applicant and the deceased at this time of death was moot in so far as it was settled on the basis of the following facts which are now common cause. The common cause facts are:

6.1. The deceased and applicant were married in community of property in 1960 in Johannesburg of the then Union (now Republic) of South Africa under (the now repealed Black Administration Act) by civil rites as evidenced by a copy of the marriage certificate which forms part of the bundle of documents in the

application and as has been also adverted to and in open court during the hearing of oral evidence before me.

6.2 In 1965 the couple subsequently relocated and settled in Swaziland (as it was then known) and lived as husband and wife until 1969. Owing to certain intractable marital differences they fell out and thence lived separately as estranged spouses until the deceased's demise. They never divorced and as such their marriage was in subsistence at the time of the deceased's death.

6.3 Significantly in September 1987 the deceased executed a last will and testament. This was his own separate (as distinct from a joint) will in terms of which he purported (I use the term advisedly to signify the contentious status of the will) to unilaterally bequeath various movable and immovable property to various beneficiaries including the applicant. In the said will he also nominated the 1st Respondent as the sole executor of the deceased's estate. I have already mentioned that the 1st Respondent is the first child born of the marriage between the deceased and the applicant. The status of that will is the central to the dispute in so far as the applicant seeks to challenge its validity in so far as it purports the disposition ***inter alia*** of assets held by the deceased which she regards as forming part and parcel of the joint matrimonial estate.

[7] I must accept these factual matters as having been established and as to that end obviating the determination by this court of the status issue regarding the marriage between the deceased and the applicant (in other words that until the time of the deceased's death the marriage between him and the applicant was in subsistence; thus leaving as the key remaining issues the crisp questions as to the validity of the will and whether the applicant is entitled to her claim to half of the joint estate in terms of the law.

[8] It is trite that in application proceedings the court in terms of Rule 6(18) the court has discretion to refer any specified issues in regard to which disputes of fact arise. As shall be seen from the wording of the rule the operative phrase is 'disputes of fact'. It was conceded by both counsel at the inception of the matter, and this is apparent from the formulation of the issues as articulated by the Supreme Court that both turn on matters of law rather than factual matters. However the complexity of the matter arises from the nuanced emergence of certain issues as pertains a certain immovable property claimed by the applicant to be a part of the joint estate ; which claim is disputed by the 1st and 2nd Respondents.

That property has been described in the papers as Lot 707, Extension 4, Mbabane Township situate in the Hhohho district. It is common cause that this property which comprises of a residential area even in the Mbabane urban area was the home in which the deceased and the 2nd Respondent lived for a considerable period of over 3 decades. The dispute to the property in question arises on account of a countervailing claim by the 2nd Respondent that she seeks to assert on the basis of an alleged tacit

universal partnership with the deceased and on the basis of which the 2nd Respondent seeks to defeat the applicant's claim to it. In the alternative the 2nd Respondent seeks to assert her share to the aforesaid property on the premise that she jointly contributed with the deceased to its acquisition and development in a common enterprise. Thus it became necessary to hear evidence as to the foundation of the 2nd respondents claim and the surrounding circumstances pertaining to that aspect in relation to the second issue concerning the applicant's claim to half of the value of the property in question on the basis of community of property. That in my view is, with respect, is precisely the sort of issue that the Supreme Court anticipated in its ultimate directive that this court hears oral evidence on:

"Any other matter which the High Court deems to be necessary".

[9] As stated above, the rule that governs the referral of issues to the leading of oral evidence in motion proceedings is to be found in rule 6(18) which provides as follows:

> ***"(18) Without prejudice to the generality of sub-rule (17), 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 and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."***

In the context of this matter it appears to me that the question of as to the validity of the will turns largely if not purely on legal contentions and questions of law. Admittedly the final issue as to the applicants claim to a share of the assets of the estate in question and the 2nd respondent's countervailing claim specifically to some of the assets including the immovable property described as Plot 707 does call for evidence as pertains to the background facts pertaining to the alleged universal partnership. It is on this basis that their Lordship deemed that the matter proceed to the hearing of viva voce evidence on these aspects.

The Evidence

[10] The Applicant was led in person in her testimony. She also called her daughter Nomagugu Magagula who is cited as the 4th Respondent in the proceedings. The First and 2nd Respondents also gave oral evidence to advance their case.

[11] Much of the evidence elicited from the applicant's testimony was common cause facts. In summary her evidence confirmed that she was married to the deceased in Jabavu, Johannesburg in the Republic of South Africa in 1960. She and the deceased lived in South Africa for the first four years until 1965 when they moved to Swaziland and they

lived together until 1965. Four children were born out of her marriage with the deceased being the First, Third, Fourth and Fifth respondents. After the breakdown of the marriage she moved to live in a low cost housing at Msunduza Township in Mbabane on her own. The deceased stayed with the minor children. Despite the estrangement, she did and her deceased never divorced and remained married although she became aware that the deceased had entered into other relationship and in due course entered into a customary union with the 2nd Respondent. She was aware that her husband was in cohabitation with the 2nd Respondent with her children under their joint care residing initially at Kent Rock one of the suburban areas of Mbabane and ultimately at Lot 707 (sometimes described as the St Marks home). After the death of the deceased she would eventually move in with her daughter Nomagugu at the St Marks residence. This was in 2015. She was in cordial relations with the deceased and considered herself as his lawfully wedded wife despite their estrangement and the fact that he was openly cohabiting with the 2nd Respondent after their customary ties. She told the court that the deceased was courteous to her and recognised her status in that he involved and advised her in key family developments and events of importance. Under cross examination she conceded that she during their estrangement she maintained a separate lifestyle and household and was not involved nor made any contribution towards the acquisition of the property known as Plot 707 although she asserted that she believed that the house was acquired and built by her husband and therefore in law she regarded herself entitled to a half share of the property.

[12] Her evidence was largely corroborated by the 3rd Respondent, Nomagugu Magagula. The latter is her daughter born of the marriage between her and the deceased; the first, fourth and fifth respondent also being children of the marriage. She reiterated the circumstances of her parents' (the applicant and deceased) estrangement although she was still young when it happened and her recollection of the subsequent events and circumstances of her family in the aftermath. She told the court that after her mother had left the joint household she and her siblings remained under the custody and care of the deceased who effectively raised them. In the course of events due to the circumstances they had to adapt to living with the deceased's female partners after the applicant had left the joint household. Of significance was her testimony that in due course around the 1970's they came to live with the 2nd Respondent at Kent Rock suburb of Mbabane and eventually around 1978-1979, the St Marks property once the house had been built there. She has remained in that house to date and in later years she resided only with the deceased and her minor child after his siblings had moved away from home and the 2nd Respondent had moved to live at Mbangweni Township; also in Mbabane; in 1988.

[13] During her cross examination when pressed about her assertion that the St Marks property had been developed by the deceased after the 2nd Respondent had come to live with them, it became clear that she had no first hand knowledge of the circumstances pertaining to the acquisition and development of the Plot 707 other than being told by the deceased that it was their new home.

[14] At some point before the deceased took ill and eventually passed away she told the court that the deceased had established a home in a Swazi Nation Land area at a place called Mahebedla which was to become the traditional home and also stocked the land with livestock. According to Nomagugu the 1st Respondent also built a house adjacent to the traditional homestead and was assigned by the deceased to manage the entire homestead and livestock. The 1st Respondent eventually moved house to live there.

[15] After the deceased passing the applicant moved in to live with her on the said property. According to Nomagugu the first Respondent was responsible for the maintenance and payment of the municipal taxes and levies (rates) after the death of the deceased.

[16] For the Respondents the 2nd Respondent also gave oral testimony. It merits mention that in the papers she did not initially contest the application of file any affidavits in that regard. It is the 1st Respondent that did and to that end raised certain issues regarding the source and status of the assets in the estate insisting that the applicant had no role and made no contribution whatsoever whilst attributing it to the joint efforts of the 2nd Respondent and the deceased. It was only in the replying affidavits that she filed affidavit to make certain assertions regarding the assets in the estate.

[17] The essence of the 2nd Respondent was that she was instrumental in the acquisition of Lot 707. According to her evidence both on affidavit and during her oral testimony she is the one who initiated the application for the grant of the land though the auspices of the then Minister for Local Administration, HRH Prince Masitsela under Grant No.51/1977. The allotment of the land came to be registered in the name of the deceased as that was the law of the time which did not permit for the registration of her interest. The development of the property was funded by finance sourced by the then Swaziland Development and Savings Bank (or Swazi Bank). She also testified that some of capital was sourced from the sale of a fixed property described as Lot 153. Incidentally that property is listed among some of the bequests in terms of the contested deceased's will.

[18] According to her testimony she and the deceased were co-contributors to the mortgage bond repayment obligations to the financial institution. No evidence as to the extent or proportion of their relative contributions to the investment on the said property was or as to the status of the mortgage loan account was by the time of the deceased's death. That is a matter that would arise only in the collation of the assets and liabilities in the winding up of the estate and is of no moment to the issues at hand. It emerged that the 2nd Respondent had contributed financially and materially towards the building of the homestead at Mahebedla and the acquisition of the livestock at a time that the deceased was retired. Again although no detailed evidence as to the extent of her contribution was availed her evidence in this regard was not controverted. The essence of her evidence revolved around her assertion that she was a substantial contributor to the acquisition of certain specified assets.

[19] In her testimony she also mentioned that she was also able to acquire and built another residential property situated at Mbangweni through a housing scheme which was offered as a benefit by her erstwhile employers, Swaziland Royal Insurance Corporation. She further testified that it was a condition of the scheme that any housing acquired through the facility had to be occupied by the beneficiary employees. This was the reason in 1988 she moved into the Mbangweni house where she would intermittently reside but she maintained that she continued to visit the St Marks home and to contribute to its upkeep from time to time despite these developments. She continued to see the deceased from time to time especially during the time when he was poorly and in need of palliative care. She was there by his bedside when the deceased passed away.

The Issues

[20] The issue of the status of the deceased's last will and testament pivots on two sub-textual but integral questions-

(a) the rights of a surviving spouse married in community of property vis-à-vis the property in a joint estate; and

(b) the status of property (whether movable or immovable) acquired by an estranged spouse during the subsistence of the marriage.

[21] On the facts of this case my understanding is that the fundamental issue arising pertaining to the validity of the will arising in this matter is not so much that the deceased concluded a separate or unilateral will (as contrasted with a joint will) as there is nothing in law precluding the execution of a separate will by a spouse married in community of property) but the applicant's primary contention is it is defective on account of disregarding the applicants interest in the community of property stemming from the purported request in the will of specific assets or property held in or forming part and parcel of the joint estate. In this sense the applicant laments that the will unlawfully and prejudicially affects her half-share in the joint estate – such will affecting as it does the entire asset in the joint estate regardless of her interests or half share. It is therefore argued on this premise that the will is fatally flawed hence susceptible to be set aside as invalid and a nullity for that reason.

Whether the Immovable Property Forms Part of the Joint Estate

[22] The pith of the 2nd Respondent's contentions is that the applicant has no legal claim or interest to the property (Plot 707 of Extension 4) merely on account of her marriage in community to the deceased as the said property was in fact as asset acquired by her in a tacit universal partnership with the deceased and therefore does not form part of the joint estate of the marriage between the deceased and the applicant. This in turn begs two related issues-

a) whether on the evidence a universal partnership existed between the 2nd Respondent and the deceased: and if so

b) whether the assets acquired after the applicant left the marital home (say post 1973) accrue exclusively to the universal partnership and therefore falls outside the joint estate.

[23] Pared down to its basic premis the 1st and 2nd Respondents' common position appears to me to be the proposition that in light of the fact that the applicant and the deceased ceased to have or run a joint household after their estrangement (between 1969 and 2011) there was no joint estate to speak of – in a word that the joint estate was virtually non-existent.

LEGAL FRAMEWORK

[24] The position as regards the proprietary consequences upon the death of one of spouses married in community of property is so well established in our common law as to be trite. It is this- the assets acquired by either spouse, purchased or earned during the subsistence of the marriage accrue to and form part of the joint estate of the parties. The joint estate is co-owned by the spouses in undivided and indivisible half-shares. When one spouse dies the surviving spouse becomes entitled to take her undivided share in the residue common estate upon winding up of the estate with the remaining half devolving for distribution to the deceased's rightful heirs.

Validity of the Will

[25] It is common cause that in executing the will the deceased made various bequests of the joint estate property without due regard of the existence of the joint estate and consequently the applicant's legitimate claim ex lege to her half of share of the estate. The validity of the deceased's will therefore turns on the legal efficacy of the bequest and on that account should fail and be treated as null and void and of no force and effect. It suffers from an inherent defect rendering it legally unenforceable.

There is no doubt as to the legal position that a spouse is only entitled to dispose by will or any other act *mortis causa* no more than his share of the joint estate.[1] It therefore goes without saying that a testamentary disposition that purports to dispose of specific assets and or the entire undivided community estate is an unlawful and unenforceable disposition thus on that account renders the will legally ineffectual.

Tacit universal partnership

[1] H.R Hahlo, *The South African Law of Husband and Wife,* 2nd Ed. at pate 201 and the old Roman Dutch authorities therein cited; Pothier, *Traite' de la Communaute,* para. 475. See also the learned author's restatement of the legal position regarding the testamentary power of the husband in community of property at p 142: ***"The marital power does not cover disposition* mortis causa.** ***The husband can dispose by will or his own share in the community assets, but he cannot make a will of his wife's property, whether in the form of a share in the community or community assets, or assets separately owned by her"***

[26] Mr Maseko conceded that the 2nd Respondent customary union with the deceased was bigamous or at very least a putative marriage. He argued however that the applicant by her inaction condoned the union. I think this argument is untenable and has no bearing on the issues at hand. It is beside the point. In the evolution of the issues the key point of contention has to be whether, as Mr Maseko contended on behalf of the 2nd Respondent, that there existed a universal partnership between her and the deceased in regard to the contested assets. In this regard she led evidence both on affidavit which was confirmed and elaborated *viva voce* regarding the fact that she and the deceased during the years together acquired the property in question together with other movable assets. The nub of the argument is that on the established facts the 2nd Respondent and the deceased made these acquisitions in a lifelong partnership and lived as husband and wife; and their association even if it may have been illicit, qualified as a tacit universal partnership. It is on that basis that she contests the applicant's claim that the said property fell into the joint estate but contends for the recognition of her share in the universal partnership. It was further contended on her behalf that it is this claim that should prevail and trump the applicant's claim to the joint estate.

[27] Whether there existed a universal partnership is a question that should pass a two-fold test;

a) whether there exists sufficient evidence to prove such circumstances from which such a partnership could be inferred vis-à-vis the assets in question; and the moral argument whether

b) considering the bigamous or illicit nature of the putative customary union, the court can in the circumstances countenance and recognise such a partnership.

[28] On the second question a similar issue arose for consideration *in* ***Malaza v Malaza (9/1993)*** **[1994] SZSC 1** (10 January 1994) where the court considered the import of an earlier decision of the appeal court on the moral question in *Khoza v Sedibe*[2]. In that case the facts are somewhat similar to the circumstances of the instant matter in that the deceased had previously married the appellant by civil rites but while that marriage subsisted he subsequently contracted a Swazi law and custom marriage with another woman (the respondent) with whom he cohabited for a considerable period. During the cohabitation he and the respondent acquired certain immovable property in respect to which the respondent sought to claim a share on the basis of an alleged tacit universal partnership. The reasoning of the court should be instructive herein. In reference to that case the court in the Malaza case made the following observation:

> ***"(I)n Khoza v Sedibe 1963-1969 SLR 413 it was decided, on similar facts, that ex turpi causa non oritur actio. In Khoza's case the Plaintiff's cause of***

[2] 1963-1969 SLR 413

action that the alleged partnership arose because of a putative marriage (see p. 416) and that the parties knew their union was a bigamous one, the Plaintiff could not rely on it to give rise to the cause of action, namely the alleged partnership.

In the High Court Elyon J in dismissing the appeal said that since the alleged partnership was founded on an immoral agreement (namely the illicit union) no redress could be granted (pp. 421-422)"

[29] Can the 2nd respondent's claim be entertained if it is founded upon or arises from an illicit union? But I think this case is distinguishable from the circumstances of the parties in the ***Khoza v Sedibe*** case in that in the former both parties were aware at all material times that their customary union was bigamous and an illicit one. During her oral testimony the 2nd Respondent, when she was questioned pointedly about what she knew about the marital status of the deceased at the time of their customary marriage, told the court that at all times she was led to believe by the deceased that his marriage to the applicant had been dissolved; that this was an issue that was raised also by her family concerned about the deceased's marital status. Her evidence was neither challenged nor controverted. I am prepared to accept on a balance that at the material time she was an innocent party and that as she said, in due course she came to learn that the deceased and the applicant had not divorced. In any event this is not an issue or point that was taken or arose during the parties submissions so in respecting the principles girding adversarial litigation, it shall have no bearing on the matter.

Quite apart from the fact that the point is moot herein, I should say with respect that the ***Khoza v Sedibe*** judgment is a pre-constitution decision made at a time when the prevailing social mores would have supported such adverse moral judgment on bigamous unions as to unsuit persons involved in these relationships and the application of the *ex turpi causa* principle on their causes. I do not see how any more censure should be visited on such persons any more than would say against unmarried persons in co-habitation with a married spouse who invoke the universal partnership regime as basis for a claim.

[30] As to whether the 2nd Respondent has established her contending claim that a universal partnership existed between her and the deceased, the test to be applied is that of a balance of probabilities; i.e., whether it is likely than not on the facts that such a partnership came to pass (see ***Muhlmann v Muhlmann* [1984] (3) SA 102 (A) at 124C and *Charles Velkes Mail Order [1973] (Pty) Ltd v Commissioner for Inland Revenue* [1987] (3) SA 345 (A) at 357H**). In the *Charles Velkes* case the court applying the test said the following:

"It would be apparent that the main thrust of the argument was that a tacit agreement (in respect of each catalogue) was concluded. This, on one of the recognized tests, is established where, by a process of inference, it is found

that the most plausible conclusion from all the relevant proved facts and circumstances is that a contract came into existence ... ".

[31] On the facts deriving from the available evidence it is clear that the 2nd respondent and the deceased, during the course of their relationship, went about acquiring the land and later developing the St Marks property. It is also beyond dispute that they did so in a joint undertaking for their shared benefit on a settled basis of their relationship; however that was conceived. There is judicial consensus on the essential prerequisites that must be met for recognition of such partnerships. The age-old approach formulated by the Roman Dutch authorities has been applied by our courts. It is derived from an essential propounded by Pothier in which he posited three criteria. The first is that each of the parties must bring or bind themselves to bring something be it financial means, skill or labour; in an undertaking for the joint benefit of both parties; with a view to making a profit. Profit can be understood to mean a wider concept than mere commercial gain for as long as the undertaking constitutes a communal enterprise even for non-profit making purposes **(See R J Pothier *A Treatise on the Law of Partnership* (Tudor's Translation 1.3.8)) as a correct statement of our law (see eg *Bester v Van Niekerk* [1960] (2) SA 779 (A) at 783H-784A; *Mühlmann v Mühlmann* [1981] (4) SA 632 (W) at 634C-F; *Pezzutto v Dreyer* [1992] (3) SA 379 (A).**

[32] The nub of the 2nd Respondent's case is that she claims she is entitled to an undivided share of the property Lot 707 on the basis of her alleged equity in the universal partnership concerning its acquisition and development and that as such it ought to be excluded and not form part of the assets in the joint estate. That claim does not preclude the applicant's claim to the deceased's share in the partnership. Reasoned from this perspective, it is can only be the deceased's share in the partnership concerning the property that devolves to the joint estate. In my judgment the applicant became entitled to a share in her husband's equity and as such that share bears inclusion in the joint estate and is susceptible to partition in the dissolution mortis causa.

[33] In conclusion on the basis of the facts I am prepared to accept and recognise the 2nd Respondent's interest and share in the property in question on the basis of her partnership with the deceased in that endeavour. For this reason the contending claims between the applicant and the 2nd respondent coalesce and resolve in this proposition - that the applicant is by law entitled to claim half of the deceased's share in the property Lot 707, Extension 4 by virtue of her interest in the joint estate together with her due inheritance *ab intestatio* in her husband's deceased estate. Further that the 2nd Respondent is entitled to the other half share in the property in question deriving from the universal partnership which I find to have come into effect and exist between them vis a viz the property. In practical terms the applicant's claim in the joint estate in community as pertains the property amounts to a quarter of the value thereof and the deceased's quarter should fall to be dealt with as part of the disposable estate *ab intestatio*.

[34] I am also prepared to recognise that the 1st Respondent has in good faith acted on the basis of the letters issued by the Master in the belief that he was validly appointed in terms of the will as an executor. As it turns out on account of the nullity of the will that assumption was mistaken. I do find however that the 1st Respondent should be entitled to be indemnified for the actions he has undertaken in fulfilment of his ostensibly responsibility in the process of the winding up of the estate. It follows however that the appointment as an executor as per the will is hereby set aside. In the result the estate is referred to the Master to proceed with the intestate distribution of the deceased's half share in terms of the law- with the caveat that the residue of the estate is to exclude the 2nd respondent's half share in the proceeds of the property; Lot 707 Mbabane Estate.

The Estate's Status

[35] There are critical facts pertaining the proceedings in the administration of the deceased's estate thus far that bear reiterating for remedial purposes. For this reason it is necessary to set out in summary the key milestones and current status in the affairs to do with the administration of the estate leading up to the litigation. These again are largely common cause.

1. Pursuant to the contested last will and testament of the deceased the estate of the late Samson Mahhelane Magagula was reported and registered with the office of the Master of the High Court on the 7th October 2011 and subsequently the 1st Respondent was appointed as and issued with letters of administration as an executor dative of the estate in terms of the contested will.

2. Shortly thereafter an inventory of the collated assets of the deceased's estate was compiled and filed by the first respondent. The inventory listed, inter alia certain movable properties and effects including certain motor vehicles, livestock comprising of a herd of cattle but also including certain immovable properties to which I have alluded earlier including the said Lots 707 and 153 all of Mbabane Township. As mentioned earlier according to the 2nd Respondent the latter property had long been disposed off by the time of the passing of the deceased and its proceeds used by herself and the deceased in the development of Lot 707 and construction of the residential structures comprising of the family home.

3. There is another property described in the proceedings and referred to during the oral evidence as Lot 1943, Mbabane Township. It is not included in the specific bequests of immovable assets set out in the will. It has been adverted to on a number on instances in the evidence and during submissions by the Respondents. It is common cause that the said property was acquired by the applicant through her means during the deceased's lifetime and nominally

registered in his name. This property although not mentioned in the will, was included in the inventory of assets in the estate.

4. It is common cause that the winding up of the estate had advanced to the penultimate stage where the 1st Respondent had prepared and submitted his Final and Distribution Account with the Master and the latter had upon approval of that account sanctioned and issued a Power of Attorney to enable the 1st Respondent to take transfer of the only remaining immovable property in the estate; the said Lot 707, Ext. 4 Mbabane Township and was poised to receive the said property as part of the testamentary bequest

5. It is important to point out that the other property listed as 1943 in the inventory was not included in the liquidation and distribution account possibly because that property was not specifically dealt with in the will. It was Mr Maseko's submission, reiterating a stance taken by the respondents in their evidence that the deceased had deliberately left this property out because, it is surmised, he was mindful that the said property was owned and thus constituted her share of the estate. I must say I have difficulty in following the legal basis for this argument in that the said property as is the Lot 707 property are both registered in the deceased's name and it is included in the inventory of the deceased's estate. For these reasons there is no rational and legal basis for its exclusion from the joint estate. Indeed the position taken and maintained by the applicant is that she sees no reason why this property should excluded from being treated as part of the joint estate she assets in respect of all the properties registered in the deceased's name. Thus far the applicant's position is unequivocal and consistent. To this end she makes no direct claim to it save that she considers herself entitled to an indivisible half share thereof as in the other property.

6. It was established that prior to the judgment of the Supreme Court and the reinstatement of the interdict holding over the distribution of the residue of the estate in the terms as directed by the Master, the 1st Respondent had already liquidated the movable assets. The sold items included the deceased's motor vehicles and livestock found in the estate. For purposes presently the assets of the estate remain intact and no prejudice has been occasioned by the actions of the 1st Respondent as the ostensible testamentary executor.

[36] In the result, I make the following orders:

The application succeeds in part and it is accordingly especially ordered as follows:

1. The Last Will and Testament of the late Samson John Mahhelane Magagula dated 17th September, 1987 is hereby declared null and void and thus of no force and effect;

2. The said late Samson John Mahhelane Magagula is deemed to have died intestate and his estate is susceptible to distribution *ab intestatio* in terms of the laws of intestate succession subject to the following directives:

2.1 The Applicant is entitled to her half share of the joint estate which half share it is ordered be excluded and deducted from the collated inventory of assets in the joint estate;

2.2 For purposes giving effect to 2 above it is declared that the net residue of the deceased estate shall be distributed to the deceased's heirs and to this end the Master is hereby directed to carry out the distribution and report on the outcome within 2 months of this order;

3. It is declared a partnership existed between the 2nd Respondent and the deceased in equal shares over the properties listed in the draft final distribution and liquidation account filed by the 1st Respondent and in particular in respect to the property Lot 707, Extension 4, Mbabane Township situate in the Hhohho district measuring 1225 square metres (Held under Crown Grant No.51/1977)

4. To give effect to Orders 2 and 3 above it is further ordered that the Final Distribution and Liquidation account tendered by the 1st Respondent is declared null and void save as to the following respects:

4.1 It is hereby declared that the assets listed in the said Liquidation and Distribution account are deemed to form the patrimony of the universal partnership between the 2nd respondent and the deceased and the Master of the High Court is directed to partition the said assets as follows;

4.1.1 To give the 2nd respondent her half share of the value of said partnership assets;

4..1.2. The residual half share to devolve to the matrimonial joint estate;

5. It is especially declared that the property listed as Lot 1943, Extension No. 16, Mbabane Township (Held under Crown Grant No.109/1995) measuring 470 square metres, in the Inventory of assets filed by the 1st Respondent, together with the residual value of the assets referred to in 4.1.1, forms part and parcel of the community

of property of the deceased and the applicant as per their registered marital proprietary regime;

6. The 1st Respondent is hereby indemnified in respect of any liability arising out of any acts and or transactions carried out during his tenure in his ostensible authority as executor in the deceased's estate;

7. Costs of this application shall be borne by the Estate.

MAPHANGA J
JUDGE OF THE HIGH COURT

Appearances:
For the Applicant: Mr. M. Mntshali
For the Respondents: Mr. S. Maseko