

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO.09/2019**

**LC/APN/16/2017**

In the matter between:

**MOROMA MAOENG**

**1<sup>ST</sup> APPELLANT**

**MATHABO MAOENG**

**2<sup>ND</sup> APPELLANT**

**PHATLALLA DEVELOPMENT**

**3<sup>RD</sup> APPELLANT**

**AND**

**'MAMACHE MAOENG**

**1<sup>ST</sup> RESPONDENT**

**LAND ADMINISTRATION AUTHORITY**

**2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR**

**3<sup>RD</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS**

**4<sup>TH</sup> RESPONDENT**

**MASERU CITY COUNCIL**

**5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL**

**6<sup>TH</sup> RESPONDENT**

**EURO BRICK AND PAVE (PTY) LTD**

**7<sup>TH</sup> RESPONDENT**

**CORAM:**

P T DAMASEB AJA

M CHINHENGO AJA

N T MTSHIYA AJA

**HEARD** : 14 OCTOBER 2019  
**DELIVERED** : 01 NOVEMBER 2019

**SUMMARY**

*Appeal – Customary Law – The first appellant (a male) is the first-born son of the second house under Basotho customary law. The first respondent (a female) is the only surviving child from the first house. The deceased father of the first appellant and first respondent left behind land in both the first and second houses. The first appellant claimed that the land from the first house was left to him by the deceased under customary law and had himself and his wife assigned the lease over the disputed land by the Maseru City Council. The first respondent, challenged the transfer to the first and second appellant alleging that the transfer was procured fraudulently. She maintained the land was allocated to her by the family after the deceased father's death. Land had in the meantime been passed on to third parties by the first and second appellants. It was common cause a quo that the transfer of the disputed land to first and second appellants was procured through misrepresentation. The court a quo thus set aside for that reason and declared first respondent heir on strength of the family nominating her. On appeal, court confirming the order setting*

*aside the registration both to first and second appellants and third parties and upholding the declaration of first respondent as heir to disputed land.*

*Appeal dismissed with costs.*

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## **JUDGMENT**

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**P T DAMASEB AJA:**

### **Introduction**

[1] The first appellant and the first respondent are the children of the late Mr Mohlauli Maoeng (Mohlauli), who died in 2000.

[2] The first appellant, whom I shall hereafter refer to as 'Moroma' (a man), and first respondent (a woman) whom I shall henceforth refer to as 'Mamache', are siblings sired by the late Mohlauli with two different women to whom he was polygamously married. Moroma's mother's name is 'Matsela' and 'Mamache's mother's name is 'Maleshoboro. 'Matsela died in 2004 and 'Maleshoboro in about 1999.

[3] Under the customary law of the Basotho (also known as the 'laws of Lerotholi') gender plays a defining role when it comes to inheritance. Under the Laws of Lerotholi:

***'Heir***

*11(1) The heir in Basutoland shall be the first male child of the first married wife, and if there is no male in the first house then the first born male child of the next wife married in succession shall be the heir.*

*(2) If there is no male issue in any house the senior widow shall be the heir, but according to the custom she is expected to consult the relatives of her deceased husband who are her advisers.*

...

### **Inheritance**

*13 (1) Subject to the provisions of paragraph 14 the heir in Basutoland shall inherit all the unallocated property of the estate and he is obliged by custom to use the estate with his father's widow or widows and to share with his junior brothers according to their rank, which shall be according to the order in which their mothers were married.*

*(2) The question of what portion of the unallocated estate shall be set aside for the support of the deceased's widow or widows during her life or their lives, shall be decided by the paternal uncles of the principal heir and other persons whose right it is under Basuto Law and Custom to be consulted.*

...

### **Allocation of property during lifetime**

*14(1) If a man during his lifetime allots his property amongst his various houses but does not distribute such property, or if he dies leaving written instructions regarding the allotment on his death, his wishes must be carried out, provided the heir according to Basuto custom has not been deprived of the greater part of his father's estate.*

*14(2) A widow who has no male issue in her house shall have the use of all the property allocated to her house. On her death, the principal heir shall inherit the remaining property but he must use the property for the*

*maintenance of any dependents in such house: provided that no widow may dispose of any property without the prior consent of her guardian.'*

[4] The issue that falls for decision in this appeal is who, between Moromo and 'Mamache, is the lawful heir to a part of the estate of the late Mohlauli.

### **Common cause facts**

[5] The late Mohlauli had two 'houses': one with 'Maleshoboro ('Mamache's mother) and 'Matsela (Moromo's mother). 'Maleshoboro was the first wife and 'Matsela the second wife. In customary law parlance, 'Maleshoboro's was the 'first house' and 'Matsela's the 'second house'. There was a third wife (and therefore a 'third house') but on appeal it was accepted that for the purposes of this appeal her status and that of her issue is irrelevant or that that house was not in the picture.

[6] The first house had two fields: one at Linakotseng and the other at Ha Ts'iame. The second house had only one field at Linakotseng. The third house had no field. The land in dispute is situated at Ha' Ts'iame and formed part of the estate of the first house.

[7] The central issue that fell for resolution *a quo* (and therefore on appeal) is whether Moromo became heir to the estate of the first house ('Maleshoboro's house) to which he did not belong. Moroma's case is that he became heir to the estate of the first house by virtue of a disposition made by the late Mohlauli nominating him as heir to the first house's estate. According to Moroma, the late Mohlauli executed two letters before his death dealing with his estate relative to the first and second houses. The two letters read (freely translated from Sesotho to English) as follows:

**First letter**

*'The third family is in my hands. On all my  
things the responsible person is Moroma Maoeng  
The writer is me Mohlauli Maoeng  
I thank you Chief*

[8] This letter purports to have been executed on 9 May 2000 before the Chief of Likotsi Ha Ts'iame.

**Second letter**

*'I greet you Chief  
Chief I hereby notify you that I have got three families; on the eldest family's  
wife, I give to my son whose name is Moroma Maoeng  
I have got three fields  
I give to Moroma two fields*

*I thank you Chief*

[9] This letter purports to have been executed on 9 May 2000 before the Chief of Likotsi Ha Ts'iame.

[10] A commercial site situate at Likotsi, Maseru Urban Area, Maseru City, in the district of Maseru ('the disputed land') is registered under Plot No. 12311-278 in the joint names of Moroma and his wife, the second respondent, 'Mathabo Maoeng (hereafter 'Moroma's wife'). During the lifetime of the late Mohlauli the disputed land formed part of the first house (Mohlauli's estate with 'Maleshoboro).

[11] The case before us is about how, and whether, the disputed land should have been registered in the name of Moroma and his wife. 'Mamache maintains that Moroma and his wife took title in the land through fraud, while Moroma maintains that it devolved upon him under the laws of Lerotholi by virtue of a written instrument executed by the late Mohlauli and quoted in paragraph [7] above.

### **Transfer history of the disputed land**

[12] From the pleadings and the evidence led at the trial to which I shall refer presently, after the death of Mohlauli, a lease over the

disputed land (as Plot No. 12311-278) was registered in the joint names of Mohlauli and his wife in the records of Maseru City Council (MCC) on 6 November 2016. The lease was transferred to Phatlalla Development (Pty) Ltd (Phatlalla) on 6 March 2017.

[13] Phatlalla surrendered the lease on 14 September 2017. At some stage thereafter, Plot No. 12311-278 was consolidated with an adjacent land, being Plot 12311-279, to become a new consolidated Plot No. 12311-328.

[14] During the trial in the court below, it became apparent from the evidence of Mampolelo Leoma, an employee of the Land Administration Authority (LAA), that ‘Mamache’s originating application that initiated the present proceedings, was served on that authority on 5 May 2017 and the surrender of the consolidated leases occurred after the application had been served on LAA.

### **The pleadings**

[15] In her originating application, ‘Mamache alleged that the disputed land was initially ‘fraudulently and unlawfully’ registered in the names of Moroma and his wife. ‘Mamache alleged that the disputed land was ‘acquired’ by her parents ‘around 1970s and or before then’; that she is the lawful owner thereof ‘as the only



surviving daughter of the deceased and having been appointed by the family to inherit all immovable properties of her parents’.

[16] According to ‘Mamache, Moroma is the first male child of the second house (of late Mohlauli and ‘Matsela) and that the disputed land never formed part of the estate of the second house. For that reason, Moroma ‘cannot purport to inherit the estate of the first house during my lifetime and without my consent.’

[17] According to ‘Mamache, Moroma and his wife fraudulently and unlawfully misrepresented to MCC that the disputed land belonged to the second house. Based on that misrepresentation, MCC ‘acted upon’ the fraudulent and unlawful misrepresentation and ‘allocated and/or confirmed’ Moroma as ‘the rightful heir’ in respect of the disputed land.

[18] ‘Mamache also alleged that, based on the facts she alleged, Moroma and his wife ‘are not the owners’ of the disputed land and have ‘no interest or rights whatsoever thereto.’ As a result, the duo, and third and fourth respondents ‘have no interests or rights whatsoever’ in the disputed land.

[19] Mamache sought the following relief:

*“1. An order declaring the registration of the Applicant’s site situate at Likotsi Maseru Urban Area in the district of Maseru under Lease No. 12311-278 in the names of the 1<sup>st</sup>*

*and 2<sup>nd</sup> Respondents and the subsequent transfer thereof to the 3<sup>rd</sup> Respondent unlawful, null and void and of no legal effect;*

*2. Cancellation of Lease No. 13282-2166 in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the subsequent transfer thereof to the 3<sup>rd</sup> Respondent and directing the 5<sup>th</sup> and 6<sup>th</sup> Respondents to register a new lease in respect of the sad site in the names of the Applicant;*

*3. An order declaring the 8<sup>th</sup> Respondent's decision to confirm and allocate all the rights and interest on site No. 12311-278 situate at Likotsi Maseru Urban Area, Maseru City, in the district of Maseru as unlawful, null and void and of no legal force and effect;*

*4. An order declaring the applicant the lawful owner of all rights and interests on site No.12311-278 situate at Likotsi Maseru Urban, Maseru City, in the district of Maseru;*

*5. Interdicting and restraining the 4<sup>th</sup> Respondent from paying the purchase price and/or the rentals to any person until the matter is finalized.*

*6. Directing the 4<sup>th</sup> Respondent to pay the purchase price and all the outstanding rentals to the Applicant herein.*

*7. Leave of the Honourable Court to entertain and determine the present Application in the interest equity and fairness;*

8. *Costs of suit;*
9. *Further and/or alternative relief.”*

## **Opposition**

### *Moroma and his wife*

[20] Moroma and his wife deny that ‘Mamache is the owner of the disputed land. They allege that the disputed land ‘was sought to be transferred to her only in 2017’ while the transfer to them ‘had long been done’ over the disputed land. The duo denies acting fraudulently in respect of the disputed land. They maintain that ‘the transfer was done in accordance with the law and moreover publications pertaining to the site referred were duly done and nobody ever insisted or raised a grievance pertaining to the site’.

[21] Moroma and his wife allege that Moroma, as the eldest male issue of the second house, and ‘only male of the surviving father was rightfully appointed the heir in respect of the site and property of his father’. They allege further that ‘Mamache, allegedly a divorcee at the time Moroma was appointed heir, was only appointed ‘recently long after the first respondent had been appointed’ heir.

[22] It is averred that ‘Mamache could not have been properly appointed heir as she was a divorcee and because her mother (‘Maleshoboro) had no male child to inherit the property. Moroma and his wife maintain that the disputed land belonged to Mohlauli and

never belonged to the second house. As such, Moroma is the 'rightful heir to his father's property from the second house inasmuch as there was no male child to inherit the property, the rest of the children including [Mamache] being married elsewhere.'

[23] Phatlalla (third respondent), entered an appearance to oppose and filed an 'Answer'. Therein it avers that the disputed land was 'lawfully transferred and registered' in its name and that, for that reason, 'Mamache 'cannot be the lawful owner and title holder.' It maintains that as far as it is concerned, the allegations of fraud and unlawfulness allegedly perpetrated by Moroma and his wife is 'baseless' as it is 'in possession of a valid [lease] in the names of [Moroma and his wife] issued in September 2016'. In the circumstances, all transactions, more especially as pertains to the transfer were done in 'good faith.' It maintains that its 'transaction' with Moroma and his wife 'precede the so-called appointment' of 'Mamache as heir to the disputed land, and that, 'Mamache 'can therefore not be the owner *post facto*'.

[24] According to Phatlalla, 'Mamache failed to object when Moroma and his wife were issued a lease in respect of the disputed land and when the transfer to it occurred; and for that reason, 'Mamache cannot 'abuse court process to cancel what is otherwise a lawful transfer'. It concludes that:

*‘Contrary to what [Mamache] alleges, the facts and the record show that there was no fraud committed and the lawful procedure was followed and as such the registration of the site in question in the manner was done not erroneous at all.’*

[25] The fourth respondent, Euro Brick and Pave (Pty) Ltd (Euro Brick and Pave) filed a notice stating that it does not oppose the proceedings and that it will abide the decision of the court.

[26] The fifth respondent (Land Administration Authority), hereafter ‘LAA’ also filed an ‘Answer’ for the sole purpose of placing relevant facts before court based on the official records under its control. They make clear that they do not support the version of either side to the dispute.

[27] According to the LAA, the records show the existence of a 10<sup>th</sup> June 2016 minute of MCC confirming ‘inheritance’ of the disputed land that ‘belonged to the late Mohlauli and ‘Matsela Maoeng’. The records also show a family letter that ‘nominated 1<sup>st</sup> Respondent as an heir to the estate of late Mohlauli and ‘Matsela Maoeng.’

### **Pre-trial minute**

[28] In so far as it concerns the issues in dispute, the pre-trial minute dated 23 June 2017 records that the parties agreed on the following:

- (a) That 'Mamache was nominated by the family on 16 April 2017 as heiress to the estate of her deceased parents Mohlauli and Maleshoboro.
- (b) MCC on 6 June 2016 resolved that Moroma should inherit the disputed land which belonged to Mohlauli and 'Matsela.

[29] The pre-trial minute spelled out the following issues for decision by the court:

- i. Whether or not the site the subject matter hereof was fraudulently and unlawfully registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent under Lease No. 12311-278?*
- ii. Whether or not the aforesaid site was acquired and formed part of the estate of the Applicant's parents being the late Mohlauli and 'Maleshoboro?*
- iii. Whether or not the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had fraudulently and unlawfully misrepresented to the 8<sup>th</sup> Respondent that the site the subject matter hereof formed part of the estate of Mohlauli and 'Matsela'.*

## **Amendment**

[30] After the parties executed the pre-trial minute, 'Mamache on 24 August 2018 filed of record an amendment to the originating application in the following terms:

*‘On the records of [Land Administration Authority<sup>1</sup>] [Phatlalla Development (Pty) Ltd] maliciously and unlawfully surrendered lease No. 1328-278 being subject of the dispute and another Lease No. 12311-279 adjacent to the site in dispute on 14<sup>th</sup> September 2017 and illegally, maliciously and unlawfully applied for the two sites to be consolidated. The [Land Administration Authority, the land Registrar and the Commissioner of Lands] herein erroneously consolidated the two sites on the 7<sup>th</sup> September 2017 to produce a new Plot No. 12311-328.*

*Prayer 10*

*An order declaring the consolidation of Plot No. 12311-278 and 12311-279 to produce Plot No. 12311-328 as unlawful, null and void and of no legal force and effect.’*

## **The trial**

[31] The matter was tried by Sakoane J in the Land Court, a division of the High Court. It is unnecessary to give a blow-by-blow recital of the evidence as it became apparent during the trial that the material evidence is either common cause or is admitted. On the central issue of how the disputed land was registered and his name and that of his wife, Moroma admitted that at the time that they caused the registration to their names, he misrepresented to MCC that the land in dispute belonged to the second house, that of his mother and the

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<sup>1</sup> The fifth respondent.

late Mohlauli, when in truth and fact it belonged to the first house. He also admitted that the purported letter by his father bequeathing the disputed land to him was never presented to MCC when the transfer of the disputed land in their names occurred.

[32] The judge below found the purported written bequest suspect in regard to whether it truly represents the intention or wishes of Mohlauli. It was conceded by Moroma and a witness called on his behalf that there is an erasure on the letter which suggests that originally it referred to one field but after the erasure it refers to three fields.

[33] During the course of the trial and at the stage where Mr *Hlalele* on behalf of Moroma and his wife was cross-examining Ms Leoma from the LAA, the following exchange (duly edited) between counsel and Sakoane J took place:

*‘The Court: There is nothing like bona fide inheritance Mr Hlalele is either you inherit in accordance with the law or not, legal or illegal there is nothing bona fide. You concede do you that what you told Maseru City Council was wrong and that much is conceded by your client suggesting that ‘Matsela and not ‘Maleshoboro, so according to the Maseru Council they knew the site you inherit is the site of ‘Matsela not the site of ‘Maleshoboro, isn’t it Mr Hlalele? It is on that basis that your allocated the inheritance was approved, that is the point that has been made.*

*Mr Hlalelle for Moroma and his wife: ‘Let me concede to that effect my lord.’*



[34] It was also common cause that the purported appointment of Moroma as heir to the disputed land occurred without 'Mamache's knowledge.

[35] Moroma's suggestion that 'Mamache was married at the time Mohlauli purportedly bequeathed the disputed land to him was based on hearsay evidence and was vigorously denied by 'Mamache. It was therefore properly not relied on by the judge *a quo* in resolving the issue of the rightful heir to the disputed land.

[36] It was also common ground that the family had on 16 April 2017 resolved to appoint 'Mamache as heir to the disputed land.

[37] An employee of MCC testified that since it is now common ground that the representation made by Moroma and his wife was false at the time they applied to have the lease assigned to them, the registration of the disputed land in the duo's names is null and void and of no legal effect.

### **The judgment**

[38] Based on the above cited common cause or admitted facts, Sakoane J in his judgement reached the following conclusions. That the disputed land formed part of the estate of 'Mamache's mother with Mohlauli: In other words, the first house. To the extent that

Moroma represented otherwise to MCC when he had the latter confirm him as heir to the disputed land, he did so fraudulently and unlawfully; more so that Moroma did not present to MCC the alleged letter by Mohlauli in support of his application to be confirmed heir. The learned judge drew from that failure the inference that Moroma knew that had he presented Mohlauli's alleged written nomination of him, it would likely have induced MCC not to confirm him heir to the disputed land.

[39] Based on the uncontroverted evidence at the trial, both from the evidence of 'Mamache and her witnesses and that of the witnesses called by Moroma and his wife, the judge *a quo* made the following critical findings of fact at paras [24]-[27] of the judgment:

*'Exhibit "J<sup>2</sup>" makes reference to three fields. One field is bequeathed to the 1<sup>st</sup> Respondent. However, the number of fields is erased and substituted with two fields. The 1<sup>st</sup> respondent says he was present when Exhibit "J" was written and his father is the one who made the erasures and substitution. However, this Exhibit does not bear the signature of the writer nor a signature indicating the identity of the person who erased reference to one field and substituted it by reference to two fields. It should be recalled that that the 1<sup>st</sup> respondent professed that since he could not read and or write, he was unable to see what had been written and then erased and substituted for. He can then not vouch for the erasure and substitution. A witness called by the 1<sup>st</sup> respondent who happened to be one of the people whose names appear on Exhibit "J" (Khethisa Maoeng), testified that at the*

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<sup>2</sup> This is the purported written designation by Mohlauli in favour of Moroma in respect of the disputed land.

*time he appended his name, the erasures were not there. He was told about the cancellation afterwards and was not present when this was done. If he wrote his name when reference was done to one field only, this raises to a doubt about the genuineness of the erasures and substitution. This is the same witness whose name appears as one of the witnesses in Exhibit "B"<sup>3</sup> who testified before the Maseru City Council that the disputed site "belonged to 'Matsela Mohlauli Maoeng whose heir is the 1<sup>st</sup> respondent". It is incomprehensible why both the 1<sup>st</sup> respondent and this witness told the Maseru City Council about heirship of the 1<sup>st</sup> respondent to an 'unencumbered site situated at Likotsi which belonged to 'Matsela Mohlauli Maoeng "well knowing that no person of such name existed. Even assuming that such a person existed, Maseru City Council could not have been made to understand that it was confirming the heirship of the 1<sup>st</sup> respondent to the estate of his mother and not that of his father in the first house."*

[40] The judge also said:

*'There is no good reason for [Moroma] and his witness not to produce Exhibit "J" [the written nomination of 9 May 2000] before the Maseru City Council to back-up their story that the property referenced in it [the disputed land] and the one in issue are part of the estate of the first family bequeathed to [Moroma].*

...

*I was left with a distinct impression that this was a ruse to get hold of the disputed site under cover of it belonging to [Moroma's] mother when it wasn't. The possible explanation is that the disputed site is the one field referenced in Exhibit "J" whose reference was erased and substituted for two fields.'*

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<sup>3</sup> Being the family nomination of 16 April 2017 in favour of Mamache.

[41] The learned judge *a quo* also held that for a valid confirmation of Moroma as heir by MCC to have occurred, the Land (Amendment) Act 6 of 1992, read with Regulation 7 of 1980<sup>4</sup> required that a written notice of the deceased allottee's death, the designation of Moroma as heir, together with relevant particulars of the property to be inherited must have been presented to MCC. That did not occur and, as I understand the judge's reasoning, vitiated the registration of the disputed land in the names of Moroma and his wife.

[42] The judge also concluded that 'Mamache was unmarried at the time that the family on 16 April 2017 nominated her heir to the disputed land and was accordingly not disqualified from being nominated heir to the disputed land. The learned judge concluded:

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<sup>4</sup> Regulation 7 (1) and (2) states: '7. (1) Whenever any person dies within the jurisdiction a given Land Committee leaving any allocated land referred to in section 8 of the Act, the nearest relative or connection of the deceased or in default of any such relative or connection, the person who at or immediately after the death has the control of the land formerly held by the deceased, shall within 12 months thereafter cause a notice of death signed by him to be delivered or transmitted to the Chairman of that Land Committee.

- (2) The notice referred to in sub-section (1) shall show:-
- (a) the date of the death of the deceased, his district and village of origin, his last place of domicile and his last place of residence;
  - (b) the relationship of the informant to the deceased;
  - (c) the name and sex of the heir of the deceased;
  - (d) whether the heir is the first male issue of the deceased or was designated as heir by the deceased or was nominated as heir by the surviving members of the deceased's family in the event of there being no first male issue heir or a designated heir;
  - (e) whether the allocated land is to be occupied by the spouse of the deceased and minor children of the deceased; and
  - (f) relevant particulars to identify the locality of the allocated land.

*‘The Maseru City Council does not oppose [Mamache] being declared as the rightful heir to the disputed site. There being no contestation of her nomination as the heir by the family to the disputed site and no opposition by the [MCC], there are no factual and legal impediments to her claim being made good. Since her nomination by the family does not in law suffice to constitute an allocation and still needs to be confirmed and accepted by the allocating authority, an appropriate order is warranted: Makhutla and Another v Makhutla and Another LAC (2000-2004)<sup>5</sup>.’*

[43] As regards the purported transfer of the disputed land to Euro Brick and Pave, the learned judge *a quo* correctly concluded that such transfer to be valid had to be evidenced by a deed of transfer to Euro Brick and that there should have been ‘ministerial consent to undergird the purported sale<sup>6</sup>: **Sea Lake (Pty) Ltd v Chung Hwa Trading Enterprises Co (Pty) Ltd and Another<sup>7</sup> LAC (2000-2004) 190; Mthobi v Sebotsa LAC (2007-2008) 439.<sup>8</sup>**’

[44] The learned judge *a quo* then held that:

*‘The result is that there is no proof that the purported sale was sanctioned by the Minister as the law required. It cannot then be given effect to. The sale agreement is, however, valid as between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the 4<sup>th</sup> respondent. But it does not bind the applicant.*

...

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<sup>5</sup> LAC (2000-2004) 480 at 489E-F, para 28.

<sup>6</sup> In terms of regulation 7 (1) and (2) of the Land Regulations 1980 published in Legal Notice 15 of 1980. Vide *n* 4 above.

<sup>7</sup> At 193G-H.

<sup>8</sup> At 442A.

*Rei vindicatio* takes care of the applicant's claim of title but does not invalidate the sale agreement between the respondents. It is for the respondents to see what to do after the applicant is put in ownership and possession of the site: *Shuping v Abubakar*<sup>9</sup> LAC (1985-89) 186.'

## **The orders**

[45] Following upon his reasons, Sakoane J made the following declaratory orders:

- (a) *declared as null and void and of no legal force and effect the allocation by MCC and the subsequent registration of the disputed land in the names of Moroma and his wife; including the subsequent transfer thereof to Phatlalla Development;*
- (b) *declared as null and void and of no force and effect the consolidation of Plot No. 12311-278 with Plot No. 12311-279 into Plot No. 12311-328.*

[46] The learned judge then gave the following positive mandatory interdicts:

- (c) *directing MCC to process and confirm the allocation of the disputed land to Mamache on the strength of the family's 16 April 2017 nomination of her as heir to her parents' estate;*
- (d) *directing the Commissioner of Lands and the Registrar of Lands to cancel Lease No. 12311-328 (the consolidated plot) and in its stead to*

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<sup>9</sup> At 189C-F.

*issue a new lease in respect of Plot No. 12311-278 in the name of Mamache upon receipt from MCC of a resolution confirming the allocation of the disputed land to Mamache.*

### **Appeal grounds**

[47] The gravamen of the complaint in the appeal grounds is that the Land Court misdirected itself in finding for ‘Mamache (and not for Moroma and his wife) on the strength of the family nominating her heir on 16 April 2017.

[48] Allied to the above is the complaint that the Land Court should have held that ‘Mamache was indeed a married female with children and, presumably for that reason, disqualified to be heir to the disputed land - considering that there were male children from the second house entitled under customary law to inherit the assets of the first house.

[49] It is also stated that the court *a quo* erred in granting the declaratory orders and positive interdicts.

### **Main submissions on appeal**

*The first and second appellants: Moroma and his wife*

[50] On behalf of Moroma and his wife it was submitted by Mr *Mariti* that since ‘Mamache had a first-born sibling who predeceased her,

and there were no other male issue from the first house, according to s 14(3) of the Laws of Lerotholi, Moroma was entitled to be appointed heir to the estate of the first house as the first male child from the second house; and was indeed so nominated in writing on 9 May 2000 by Mohlauli.

[51] Mr *Mariti* also submitted that ‘Mamache bore the burden to prove that the written nomination of him as heir by Mohlauli was invalid but that she failed to do so. The argument goes that since the 9 May 2000 written nomination of him by Mohlauli came prior in time to that by the family nominating ‘Mamache, the court should have confirmed him as heir to the disputed land.

*The first respondent: ‘Mamache*

[52] In the view that I take of the outcome of the appeal it is unnecessary to regurgitate the submissions on behalf of ‘Mamache. Suffice it to state that Mr *Setlojoane* for ‘Mamache supports in every respect the judgment and order of the court below and asks that the appeal be dismissed.

## **Analysis**

[53] The Land Court was entitled to set aside the registration of the disputed land in the names of Moroma and his wife as the *causa* for the transfer was an admitted and fraudulent misrepresentation. The



appeal grounds directed at that conclusion (and the declaratory orders referred to at para [45] above) have no merit and stand to be dismissed.

[54] The Land Court also proceeded to determine the question who, in law, was the rightful heir to the disputed land? It determined that issue against the backdrop of the two competing claims: that by Moroma that under the laws of Lerotholi, read with Mohlauli's nomination letter of 9 May 2000, he was the lawful heir; the other by 'Mamache that Mohlauli that the family's disposition of the land to her on 16 April 2016 gave her better title than the one relied on by Moroma.

[55] The laws of Lerotholi's bias against females has been ameliorated by the Land (Amendment) Order 6 of 1992. In so far as it is relevant, s 8 of the 1992 Order states as follows:

*'(2) Notwithstanding subsection (1)<sup>10</sup>, where an allottee of land dies, the interest of that allottee passes to:*

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<sup>10</sup> Which states: '(1) Subject to subsection (2) and section 11, a grant of title under this Part, if made in respect of land which is not the subject of a registrable title, shall not be transferable and shall, subject to the conditions laid down in the allocation and to the power or revocation, entitle the allottee to use or to use and occupy or to allow another person to use the land for the purpose stated in the allocation for a period which -

- (a) in the case of a body corporate or unincorporate may be a limited or indefinite period;
- (b) in the case of an individual, may be a limited period or his lifetime but shall not endure beyond his lifetime.

- (a) *where there is a widow, the widow is given the same rights in relation to the land as her deceased husband, but in the case of re-marriage the land shall not form part of any community of property and, where a widow re-marries, on the widow's death, title passes to the person referred to in paragraph (c);*
- (b) *where there is no widow, a person designated by the deceased allottee<sup>11</sup>;*
- (c) *where paragraphs (a) and (b) do not apply, a person nominated as heir of the deceased estate by the surviving members of the deceased allottee's family<sup>12</sup>; or*
- (d) *in any other case, the State, and the Chairman of the relevant Allocating Authority shall record in his register the passing of that title. (Emphasis supplied).*

[56] The Land Court correctly concluded, based on the admitted and common cause facts, that the written nomination of 9 May 2000 relied on by Moroma in all probability did not reflect the true wishes and intention of Mohlauli in respect of the disputed land. Moroma could therefore not rely on paragraph (b) of s 2 cited above.

[57] That conclusion has the effect that in respect of the disputed land, upon his death, Mohlauli had not designated any person as heir to the disputed land as contemplated by paragraph (b) of s 2. 'Mamache's claim to heirship is predicated on paragraph (c) of s 2.

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<sup>11</sup> This provision would cover Moroma if Mohlauli's written designation of 9 May 2000 indeed related to the assets of the first house - which the High Court found was not the case.

<sup>12</sup> This is the provision that ameliorates the laws of Lerotholi in regard to a female child, and it is the provision under which Mamache stands to inherit if the purported designation of Moroma fails.

The Land Court correctly found that the family duly nominated her and that such nomination had not been challenged or disproved.

[58] The Land Court concluded, having heard the evidence, that the assignment of the lease over the disputed land to Euro Brick Pave did not comply with the applicable legislation. That finding by the Land Court has not been called in question, except for a general attack that the court *a quo* misdirected itself in declaring that the transfer of the lease was null and void. In any event, what is a nullity cannot be cured if the law has not been complied with. The Land Court's conclusion finds support in the provisions of the Land Act 17 of 1979.

[59] Sections 34, 35 and 36 of the Land Act provide as follows:

34. *Save as otherwise provided, this Part applies to all leases and licences.*

35. (1) *A lessee shall be entitled -*

(a) *subject to any statutory conditions or other conditions attaching to the lease, to the exclusive possession of the land leased;*

(b) *subject to obtaining the consent of the Minister -*

(i) *to dispose of his interest;*

(ii) *to encumber the land leased by mortgage;*

(iii) *to sublet the land leased.*

(2) *Notwithstanding subsection (1)(b) no consent shall be required to the lessee's disposal of his interest by valid will or surrender if the lease is in respect of land held for residential or commercial or industrial purposes only.*

(3) *In the event of a lessee dying intestate -*

(a) *where the lessee qualifies thereunder the disposition of his estate shall be governed by the written law relating to succession; or*

(b) *where the lessee does not qualify under paragraph (a), section 8 (2) and (3) shall apply as if he were an allottee and the Commissioner shall thereupon request the Registrar of Deeds to endorse any registered lease or other registered document of title accordingly.*

(4) *Nothing in this section shall be construed as affecting section 42 or the compulsory sale under any law or by a mortgagee of land held under a lease.*

36. (1) *Where the consent of the Minister is required under section 35, such consent shall not be unreasonably withheld.*

(2) *Consent may be given specifically in writing or generally.*

(3) *Where consent is given -*

(a) *specifically, it may be given subject to terms and conditions if in the Minister's opinion undue speculation in any transaction in land will occur; and*

(b) *generally, the Commissioner shall, by notice in the Gazette, publish the terms and conditions under which the general consent is given.*

(4) *No consent shall be given to any transaction by a parastatal organization upon which a notice in writing has been served by the Commissioner under section 77 in respect of the land involved in that transaction.*

*(5) Any transaction conducted by a lessee without the consent of the Minister or contrary to the terms and conditions of a general consent shall be of no effect.*

[60] Section 4 of the Land Act stipulates that if any provision of customary law conflicts with the Act, the provisions of the Act will prevail.

[61] The Minister's consent had to be applied for in the prescribed form under Part 111 of the Land Regulations 1980 made under the authority of the Land Act. Regulation 12 (1) (a) and (b) of those regulations stipulates that every application to the Minister for consent for the transfer of a lease or grant of a sublease of whatever part of land held under lease shall be made to the Minister in prescribed form. The Land Court, having heard the evidence, came to the conclusion that was not done. Therefore, the order of the court below declaring the transfer to Euro Brik Pave as null and void is unassailable.

## **Disposal**

[62] 'Mamache had, on a preponderance of probability, established that:

- (a) Moroma and his wife misrepresented to MCC that the disputed land belonged to the estate of Mohlauli and 'Matsela;

- (b) The disputed land in fact belonged to the estate of her mother and Molauli;
- (c) Mohlauli had not designated anyone as heir to the disputed land as contemplated by s 2 (b) of Order 6 of 1992;
- (d) She was duly nominated as heir to the disputed land by the family in terms of paragraph (c) of s 2 of Order 6 of 1992;
- (d) The fraudulent misrepresentation perpetrated by Moroma and his wife had the effect of vitiating (i) the confirmation by MCC of him as heir and (ii) the consequent registration of a lease in his' and his wife's names in respect of the disputed land;
- (e) The fraud perpetrated by Moroma and his wife also rendered invalid all subsequent transfers of the disputed land to third parties, in particular, Phatlalla and Euro Brick and Paving, rendering those transactions liable to be set aside as being void.

[63] The result is that the appeal has no merit and must be dismissed.

### **Costs**

[64] I see no reason why costs should not follow the result and I will accordingly make an order as such.

### **Order**

[65] The appeal is dismissed, with costs.

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**PT DAMASEB**  
**ACTING JUSTICE OF APPEAL**

I agree

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**M CHINHENGO**  
**ACTING JUSTICE OF APPEAL**

I agree

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**N T MTSHIYA**  
**ACTING JUSTICE OF APPEAL**

**For the Appellants:**

Adv. K.A Mariti

**For the 1<sup>st</sup> Respondent:**

Adv. R. Setlojoane