

In the matter between:

**MARTHA PHAMOTSE**

**PLAINTIFF**

**And**

**PHILLIP PHAMOTSE  
TSOTELLO PHAMOTSE  
MOTSELO PHAMOTSE  
PATLO PHAMOTSE  
‘MAPATLO PHAMOTSE  
LESEKO KENA PHAMOTSE  
MASTER OF THE HIGH COURT  
THE ATTORNEY GENERAL**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT  
3<sup>RD</sup> DEFENDANT  
4<sup>TH</sup> DEFENDANT  
5<sup>TH</sup> DEFENDANT  
6<sup>TH</sup> DEFENDANT  
7<sup>TH</sup> DEFENDANT  
8<sup>TH</sup> DEFENDANT**

## **JUDGMENT**

**Coram** : Honourable Acting Justice E.F.M. Makara  
**Dates of Hearing** : 19 February, 21 February, 18-19 March,  
15-16 May, 2013  
**Date of Judgment** : 17 December, 2013

### **Summary**

*The Plaintiff originally suing her sons, daughter in law and her son in law seeking for declaratory that the Will executed by her late husband with whom they became divorced as being null and void – The basis being that the document purported to give the defendants property rights over the properties which she and the late had owned in community of property – The parties while engaged in the Pre-Trial Conference (PTC) resolving that it was obvious that the properties which belonged to the plaintiff and the deceased prior to the divorce should be regarded to be hers – Site No12284-253 being identified as the property for contestation as to whether it was acquired before the*

*storm or afterwards – Strong evidence indicating that the site in question though its allocation was endorsed by the Minister in 2003, has its root in Sit No. 12284-266 allocated to the deceased in 1985 and, subsequently, declared an SDA – The site ultimately substituted by the allocation of Site No.12284 – 253 as a compensatory site in terms of Sec. 46 (1) (2) of the Land Act 1979 – The declaration made that the site formed part of the plaintiff and the deceased's community of property – The plaintiff found to be the successor to its rights – The parties encouraged to go for a Restorative Justice Forum for a relational therapy.*

#### CITED CASES

**Sehlabi v Khoele and Others LAC 2005 – 2006 Pages Stores (PTY) Ltd v Lesotho Agricultural Bank and Others LAC 1990 – 1994 Mosebo Mabetha v Makerenkane Mabetha and Others C of A No. 40 / 09**

#### STATUTES & SUB-LEGISLATION

**Land Administration Authority Act 2011.**

**Land Act No 17 of 1979**

[1] The plaintiff instituted the present action against the defendants on the 11<sup>th</sup> November 2011. She sought for a declaratory order in the following terms:

1. Declaring the purported “Last Will and Testament” of the Late **Simon Majakathata Phamotse**, registered on **10<sup>th</sup> December 2010** under Seventh Defendant’s Registration Number **272/2010**, invalid, null and void and of no legal force and effect.
2. Setting aside the purported “Last Will and Testament” of the Late **Simon Majakathata Phamotse**, registered on **10<sup>th</sup> December 2010** under Seventh Defendant’s Registration Number **272/2010**, as being invalid, null and void of no legal force and effect.
3. Directing Seventh Defendant to remove from his register the purported “Last Will and Testament” of the late **Simon Majakathata Phamotse** registered on the **10<sup>th</sup> December 2010** under Registration Number **272/2010**.
4. Ordering the Defendants to pay costs hereof only in the event of their Defending this action:
5. Further and/or alternative relief.

[2] The proceedings were preceded by a holding of the extended Pre-Trial conference in terms of Rule 36 of the Rules of this Court. This was a follow-up to the initial one conducted before my sister Mahase J who was originally seized with the matter. It transpired from the conference that it was ultimately the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants who were contesting the action. The trio who are the husband the wife and their son had accordingly entered the appearance to defend the action and filed their pleadings. It should be further highlighted that the 1<sup>st</sup> Respondent is the eldest son of the deceased and the Plaintiff.

[3] In a nutshell, a foundation of the Plaintiff's summons against the defendants is a challenge over the validity of a Will in terms of which the late Simon Majakathata Phamotse (the deceased) had directed the devolvment of his estate. The Plaintiff took the measure in an endeavour to assert her right over the part of the estate in relation to which she claimed her right of succession. On the other hand, the 1<sup>st</sup> Respondent enjoying the support of the 4<sup>th</sup> and the 5<sup>th</sup> Respondent vigorously sought to rely upon the content and the form of a Will in claiming their rights of inheritance to the estate.

## **The Common Cause Background**

[4] The parties share a consensus of minds on almost all the historical and material developments which have culminated into these proceedings. Their synopsis reveals that the plaintiff and the deceased were at all material times hereto married to each other by civil rites and in community of property. This marriage was dissolved by a decree of the Honourable Court on the **18<sup>th</sup> June 2003**. The decree did not deal with ancillary prayers which included properties. All ancillary prayers were deferred to a later date. The deceased died before those ancillary prayers were disposed off.

[5] On or about the 10<sup>th</sup> December 2010 and whilst the estate of the Plaintiff and the deceased remained joined, there was registered with the Master of the High Court, a document which was presented as the Last Will and Testament of Simon Majakathata Phamotse. In the said Will, the properties had been bequeathed to certain person as follows:

- A **Toyota Hilux** and the certain **Nissan Sentra** to **Tsotelo Phamotse** (2<sup>nd</sup> Defendant).
- A site situate at **Ha Simone** near the residence of **Chieftainness 'Mahlalefang Phamotse** to **Motšelo Robinson Phamotse** (3<sup>rd</sup> Defendant)
- A residential site and a house thereon at **Ha simone** to **Patlo Gabriel Phamotse** (4<sup>th</sup> Defendant)  
A site at **Hlotse (Amerika)** to **Phillip Phamotse Phamotse** (1<sup>st</sup> Defendant)
- A site at **Maseru** (Central Pela Central Prison to **Phillip Phamotse Phamotse**.

- A site at **Ha Simone motseng** next to the residence of **'Mahlalefang Phamotse** to **Motšelo Robinson Phamotse** (3<sup>rd</sup> Defendant).
- A fire arm **Star SA Cal 635-25**, serial number **1334792** to **Mapatlo Phamotse** (5<sup>th</sup> Defendant).

[6] It should be projected that in consequence of the Pre Trial Conference, the parties developed a different perception of the determinative issues in this case. The Plaintiff's Counsel after consulting with the Counsel for the Defendants informed the Court that he would dispense with the evidence of the Forensic Hand Writing Expert which he had indicated that he would feature to testify against the authenticity and the validity of the impugned Will upon which the 1<sup>st</sup>, 4<sup>th</sup> and the 5<sup>th</sup> Defendants relied upon for their claim of succession over the deceased's estate. This resulted from the Counsel's realisation that the focus should be on the issues which would be premised upon the decisive facts to be proven by the parties respectively. In that thinking, they resolved that:

The evidence of a Forensic Handwriting Examiner then in attendance and ready to testify on behalf of the Plaintiff to the effect that the Will aforesaid had not been signed by the deceased was no longer necessary in view of the fact that the parties agreed and recorded that **all property which was part of the joint Estate between the Plaintiff and the deceased before the divorce was granted be awarded to the Plaintiff and that the Defendants had no claim thereto. That on the other hand the property which was not part of the said joint Estate at the time would not be claimed by the Plaintiff and could be awarded to whomsoever would be entitled thereto.**

[7] In the subsequent development, on the 16<sup>th</sup> May 2013, the parties through their Counsel elucidated their first agreement by

agreeing that all the property listed in the will save for the site situated at Maseru Central, be awarded to the Plaintiff. It was on this point, acknowledged by them that the rest of the properties qualified to be awarded to her since it was obvious that it formed part of the joint estate and that as such, the deceased could not dispose it through a Will. The plaintiff subscribed to the view without admitting that the late had executed the document. The inventory of the estate according to the parties stands thus:

- A certain **Toyota Hilux** and the certain **Nissan Sentra**
- A certain site situate at **Ha Simone** near the residence of **Chieftainness 'Mahlalefang Phamotse**
- A certain residential site and a house thereon at **Ha simone**
- A certain site at **Hlotse (Amerika)**
- A certain site at **Maseru** (Central Pela Central Prison)
- A certain site at **Ha Simone motseng** next to the residence of **'Mahlalefang Phamotse** and
- A certain fire arm **Star SA Cal 635-25**, serial number **1334792**

[8] The history behind the site in question is that it is traceable from a residential site number situated at Katlehong in the district of Maseru which was allocated to the late Simon Majakathata Phamotse in Katlehong in Maseru sometime during 1985. He was already married in community of property with the applicant at the time. It has to be highlighted that this is not in dispute.

### **The Issues for Determination**

[9] The developments have projected two basic decisive issues. The first is whether the Plaintiff has proven that the said site has any relationship with the one over which she is claiming successory rights by virtue of her marriage in community of property to her late husband with whom they later got divorced. The second is whether the deceased had acquired the site during the subsistence of her marriage with the deceased or after their divorce and, therefore, the demise of the community of property.

### **The Evidence Presented by the Parties before the Court.**

[10] These were presented against the backdrop of the road map agreed between the Counsel and the Court on the expedient and the reliable manner in which the issues would be evidentially approached. This basically resulted from the Pre - Trial Conference where matters of convergences and divergences were mutually identified. In that scheme, the Counsel and the Court had further agreed on the strategic manner in which the evidential challenges would be approached in such a manner that only the materially relevant and decisive evidence would be brought. It should, therefore, suffice to state in synopsis terms that in essence the Counsel for the Plaintiff sought to advance the evidence that would project a picture that the site in dispute had been acquired by late husband during the subsistence of their marriage and appreciably constituted part of their joint estate at the material time. The

Counsel for the Defendant had reacted thereto by vigorously testing the authenticity and the accuracy of the evidence tendered since it throughout appeared to support the Plaintiff's version. His endeavour was to make the Court develop a perception that the land had been allocated to the deceased after the storm which had culminated into the dissolution of the marriage. The end result was according to him that it was never part of the joint estate and should in accordance with the mutually designed plan in this case, be awarded to the Defendants particularly the 1<sup>st</sup> Defendant.

[11] Thus, in accordance with the evidential plan, Dr. Pontso Sekatle who is a former Minister of Local Government and Chieftainship Affairs which is *inter alia* in charge of land allocation, featured before the Court as Court Witness 1. The material part of her evidence was that she had in her said official capacity, formalised the granting of lease title in favour of the late Simon Majakathata Phamotse. This ministerial transaction was, according to her, done on the 2<sup>nd</sup> April 2003. She, however, made it clear that the allocation itself had already been done by the Land Allocation Committee and her role was simply to approve it.

[12] The second witness who testified before the Court on the subject matter was Ntsebo Relebohile Putsoa who is Customers'



Service Manager of the Lesotho Land Administration Authority (LAA)<sup>1</sup> and who is in that capacity a custodian of the files containing the land allocation applications and copies of the land titles. The Court acting in concert with the Counsel had thought that she could present a reliable historical revelation on the site under consideration. She featured before the Court as Court Witness 2 and commenced with her testimony by alerting the Court that she was armed with File Number *12284 – 266 and 12284 – 523* respectively which are both pertinent to the present site.

[13] The crux of her evidence is that the former file had to do with a site which had originally been allocated to Simon Majakathata Phamotse. She revealed that it was, subsequently, appropriated by the State through its declaration as a Selected Development Area. (SDA)<sup>2</sup> This statutory based power was exercised by the late Sekhonyana Maseribane who was then a Minister who was also in charge of the land allocation affairs. The witness hastily complemented her evidence by explaining with reference to the two documents before her that the appropriated land was replaced with *Site No 12284 – 523* and elaborated the obvious point that this site became a compensatory site to the appropriated *Site No 12284 – 266*. She pointed out that the original allocation and the appropriation were respectively done in 1985.

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<sup>1</sup> The Authority has been created under the Land Administration Authority Act 2011.

<sup>2</sup> The declaration was made by the Minister in the exercise of the powers vested upon him under S 44 of the Land Act 1979. The power was invoked where the land was required for the public interest.

[14] The last Court Witness was Adv. Ts'eliso Daniel Makhaphela testified as a Director of the Legal Affairs in the Authority. His evidence was in all material respects similar to that tendered by the Customer Care Manager of the Authority especially on the historical relationship between *Site No 12284 -266* and *Site No 12284 – 253*. He, likewise, explained with the assistance of the documents before him that the latter land assumed the status of a compensatory site to the former which had been declared as part of the S D A.

#### **The Arguments Advanced by the Parties**

[15] There must from the onset be clarity that the arguments and the submissions made here were basically calculated at convincing the Court to adopt either of the conflicting views on the question of the time when the late was allocated *Site No.12284 – 253*. The answer thereof would resolve the determinative question as to whether or not the marriage between the Plaintiff and her deceased husband was still subsisting at the time and consequently, provide guidance regarding whether it formed part of their community of property.

[16] Advocate S Phafane KC for the Plaintiff argued that *ex facie* the testimonies by the witnesses before the Court, it transpires clearly that *Site No. 12284 -253* has a direct historical correlation with *Site*

*No. 12284 -266*. On that note, he maintained with reference to the evidence by the three witnesses especially that of the 2<sup>nd</sup> and the 3<sup>rd</sup> that the former which is the existing site registered in the names of the late Simon Majakathata Phamotse, is a compensatory site which was allocated to him following the declaration of the latter as part of the S D A.

[17] He cautioned that the authorisation of the allocation of *site No 1884-253* by the Minister on the 16<sup>th</sup> September 2003, following the grant made on the 2<sup>nd</sup> April 2003, shouldn't be mistaken for being its date of allocation. There was emphasis laid on its being a compensatory site and that it represents the original allocation which indisputably fell within the period of the subsistence of the marriage and, therefore, that it is traceable from the property rights which the plaintiff and her husband had acquired at the time *Site No. 12284 -266* was allocated to the deceased. He submitted that the Minister's authorisation was merely a formalisation of the compensatory site allocation made as far back as in 1985. In support of this proposition, he relied upon S 46 (1) and (2) of the Land Act which in part reads:

Where the Selected Development Area consists wholly or partly of land used for purposes other than agriculture, lessees and allottees of such land shall be entitled to be offered in exchange.... Leases within the Selected Development Area ..... or compensation for being deprived of their leases or allocation....

[18] His interpretation of the Section referred to immediately above was that the admittedly extinguished rights of the allottee to *Site No. 12284 -266*, was conditional to compensation in monetary terms or by way of a substitute land allocation. He in conclusion, referred the Court to the case of **Sehlabi v Khoele and Others** LAC 2005 – 2006 p 400 C- E and **Pages Stores (PTY) Ltd v Lesotho Agricultural Bank and Others** LAC 1990 – 1994 p 51. In the instant case, he explained that the rights to the latest site had transited from the original land allocations.

[19] On the contrary, Adv. Mohapi counter argued on behalf of the respondents that the Court should realise that the *Site No. 12284 – 253*, which had substituted *Site No. 12284 -266*, had its allocation authorised by the Minister only recently on the 16<sup>th</sup> September 2003 following its grant made on the 3<sup>rd</sup> May 2003. He then contrasted the date of the ministerial transaction with the 18<sup>th</sup> June 2003 which was the day on which the Plaintiff and the Deceased were legally divorced.

[20] The Counsel skilfully laid emphasis on these dates to highlight the fact that the Minister had endorsed the allocation of the site and paved a way for its registration in the deceased names few months after the storm had already swept away the marriage and its community of property regime. According to him, the official allocation of the site took place at the time the Minister blessed the preceding processes. The picture which he sought to present before

the Court was that the existing site never formed part of the community of property and that it should, consequently, devolve upon the 1<sup>st</sup> Respondent. He effectively suggested that this should be so, in accordance with the controversial Will presumably executed by the deceased.

[21] It is of great significance to indicate that it was vehemently contended for the Respondents that the rights to *Site No. 12284 – 266* which is a predecessor of *Site No. 12284 – 253* became extinguished by operation of its declaration as a Selected Developmental Area and that the rights to the latter were only acquired by the Deceased after the divorce. This is consistent with the submission already made that the Plaintiff has no claim over the site. The Counsel for the Respondents has in support of his view that the rights to the original site had extinguished, by drawing the attention of the Court to the decided case of **Mosebo Mabetha v Makerenkane Mabetha and Others C of A No. 40 / 09**. There according to him, it was determined that the rights of an allottee became extinguished upon the ministerial declaration of the Selected Developmental Area.

### **The Court Findings and Decision**

[22] The historical revelations behind the central issue in the matter, is that the land in question which is *Site No. 12284 -253*,

has its genesis in *Site No. 12284 – 266* which had been declared as the S D A. This is evidenced by the background fact that the Minister had made an undertaking to the Deceased that the affected *Site No. 1884-266* would be substituted with the allocation of a compensatory Site. The latter being *Site No. 1884-253*. This is understandably indicative that the **rights** which had accrued to the deceased from the original allocation of the site transcended into the compensatory one. The end result is that the rights pertaining to the substitute land are rooted in the allocation of its predecessor.

[23] The Court decides that the **rights** to the existing site in question fall within the community of property rights which had historically and subsequently at all material times obtained between the late Simon Majakathata Phamotse and the Plaintiff. The *status quo* has not been disrupted by the divorce order which dissolved their marriage. A paramount factor for recognition here is that the historical rights have by operation of law permeated through the pre divorce era to the post one in a form of a heritage.

[24] It has been the determination of the Court that the defendants' Counsel has, despite his tactful endeavours when cross examining the Plaintiff's witnesses, failed to shake the foundations of the their evidence. The trio have in their testimonies consistently corroborated each other on all the considerations of significance.

[25] The final word in the judgement is premised upon the earlier resolution by both Counsel that the rest of the properties be recognized to form the joint estate of the Plaintiff and the Deceased. This was in realization of the fact that they had all belonged to the two before the storm. Thus, the focus is on the question of the ownership rights to *Site No.12284 - 253* which is situated at Katlehong in Maseru. On that note, the Court decides that the Plaintiff has on the balance of probabilities proven that she has the historically traceable rights over the site. It is accordingly, declared that she is entitled to a judgment pertaining to her rights to the same land.

[26] The rights to the rest of the estate are logically held to belong to the Plaintiff by virtue of the settlement concluded between the Counsel.

[27] The Court notwithstanding its decision, finds it befitting given the common cause facts in this case, to express a view that it would appear that the rights of the 1<sup>st</sup> defendant as the Customary Law natural heir of the deceased and the Plaintiff, would have to be recognised accordingly to avoid unnecessary failure litigation and complicate the already adversely affected relations between the parties. Once again, there is emphasis on the on the imperative

need for the mother and her eldest son to submit themselves to a Restorative Justice Forum at the Mokhorong oa Khotla in the Magistrate Court for relational healing sessions.

**E.F.M. MAKARA  
ACTING JUDGE**

For the Plaintiff	:	Adv. S.J. Phafane K.C. instructed by Mei & Mei Attorneys Inc.
For the Defendant	:	Adv. P.L. Mohapi