IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/362/2019**

In the matter between:

SETENE MOKHAHLANE **APPLICANT**

AND

'MABAKUENA TEMA (NEE MOKHAHLANE)	**1st RESPONDENT**
KANANA COMMUNITY COUNCIL	**2nd RESPONDENT**
ATTORNEY GENERAL	**3rd RESPONDENT**
'MARALEKOTI MOKHAHLANE	**4th RESPONDENT**

Neutral Citation: Setene Mokhahlane v 'Mabakuena Tema (Nee Mokhahlane) & 2 Others (CIV/APN/362/2019) [2021] LSHC 22 (22 APRIL 2021)

JUDGMENT

CORAM: **MOKHESI J**

DATE OF HEARING: **23RD FEBRUARY 2021**

DATE OF JUDGMENT: **22ND APRIL 2021**

SUMMARY:

CUSTOMARY LAW OF SUCCESSION: *Formalities for issuing written instructions- The deceased issuing written instructions in the absence of the heir or a family member, and without publicising the decision to the family- Written instructions declared invalid.*

ANNOTATIONS

'LEGISLATION':

Laws of Lerotholi

BOOKS:

Patrick Duncan, ***Sotho Laws and Customs, A Handbook Based on Decided cases in Basutoland together with THE LAWS OF LEROTHOLI (Oxford University Press, Cape Town 1960***

CASES:

Mokatsanyane and Another v Thekiso and Others LAC (2005-2006) 117

Lephema v Total Lesotho C of A (CIV) 36 /2014

Shale v Shale (C of A (CIV) 35/19) [2019] LSCA 45 (01 NOVEMBER 2019

'Makatleho Masoabi and Another v Fumane Mofelehetsi (CIV/A/ 10/14) [2014] LSHC 32 (21 August 2014

National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)

Administrator, Transvaal, and others v Theletsane and Others 1991 (2) SA 192

Sekhoane v Sekhoane (C of A (CIV) No. 22 of 2005) (NULL) [225] LSHC 211 (20 October 2005

Qhamaku v Qhamaku J.C 169/47

[1] **INTRODUCTION**

This is an application in terms of which the applicant is challenging the validity of written instructions on distribution of property which was supposedly executed by their late mother bequeathing certain properties to her children, including the applicant. It is not in dispute that the applicant as the first male issue is entitled to inherit, but the question is whether the written instructions purportedly written by their mother bequeathing a certain field at Thoteng to the 1st respondent, is valid owing to the fact that the latter was the author of same upon dictation by their deceased mother, in the absence of the heir and without publicising the same to the family. As it is apparent, this case concerns not so much the substance, but the formalities for executing written instructions. The substantive aspect of customary bequeathment, for example, covers matters such as, that the heir cannot be deprived of more than half of the estate or that the widow cannot disinherit the heir (**Mokatsanyane and Another v Thekiso and Others LAC (2005-2006) 117**).

[2] **FACTUAL BACKGROUND**

The applicant and the 1st respondent are siblings, the applicant being the eldest and male. The 1st respondent is the youngest and female. There are two other siblings who were joined and served with this application but did not file any opposing papers. The parties' gender is important as this matter concerns customary law succession. It must be mentioned that the 1st respondent is a married woman. The applicant is the first male child of the deceased, 'Mamoliehi Mokhahlane, who predeceased her children in the year 2002. At the time of Mrs 'Mamoliehi's death, the applicant was serving a rather long prison term in the South Africa. He was only released years after his mother's death. It appears that at all material time, the 1st

respondent was the deceased's main caregiver as she was very ill. It during this time of the that annexure "SM1" was authored by the 1st respondent purportedly on the dictation of their deceased mother. The deceased did not write the said Instructions because she was according to the 1st respondent "too sick or weak" to write it. She disputes the applicant's contention that their mother was illiterate. The said Instructions bears the stamp of 26th October 2000. Its fair translation reads as follows:

> *"'Mamoliehi Mokhahlane as the heir of Koko Mokhahlane has allocated her inheritance as follows: The field at Phuleng to Setene Mokhahlane . Two hectors of a field at Thoteng to Abia. Stones at home to Moliehi. Three hectors at Thoteng to Seeng and my premises is for her.*
>
> *I Mamoliehi Mokhahlana*
>
> *Chief stamp dated 26 – 10 – 00" (sic)*

[3] It is common cause that a person referred to as Seeng in the Instructions above, is the 1st respondent. Upon the return of the applicant from the Republic of South Africa, he found the 1st respondent staying in her maternal home, and this naturally generated discontent from the applicant as the heir, but crucially for purposes of this case, after the 1st respondent had vacated the house upon the applicant's arrival, in 2016, the 1st respondent on the strength of annexure "SM1" applied for allocation of agricultural field at Thoteng, Marabeng. She was allocated the said field on the 20 June 2016 by the 2nd respondent. Mediation efforts to resolve the dispute between the two siblings came to nought, leading to litigation which among others, as its latest instalment, the current application.

[4] **RESPECTIVE PARTIES' CASES:**

Applicant's case:

It is the applicant's case that the Written Instructions are invalid for the following reasons:

a) Their deceased mother was illiterate and could not have authored the Instructions.
b) That the said Instruction bears no signature of the deceased as the testator nor a mark or thump print.
c) That the Instruction/letter was not "attested by even a single witness."

d) That the chief's stamp is not authentic. On this aspect, the supporting affidavit of Mrs 'Mampoi Majara was filed, however that affidavit is rejected as it is based on hearsay evidence. The deponent did not have personal knowledge of matters she sought to testify about.

[5] **RESPONDENT'S CASE:**

In her answering affidavit the respondent raised a point that this court does not have jurisdiction to entertain this matter as it is justiciable before the District Land Court. She denies that their mother was illiterate. She maintains that the impugned instructions were at the behest of their late mother and are therefore valid.

[6] **Issues for determination:**

(a) Point *in limine* raised, and
(b) The merits; whether the Written Instructions are invalid.

[7] **JURISDICTION:**

As regards the point that this court does not have jurisdiction, my considered view is that this matter, principally, concerns the validity of the impugned written Instruction. A prayer seeking cancellation of the certificate of allocation is merely an incident of the main prayer seeking a

declaration that the written instructions purporting to bequeath certain properties to the 1st respondent is null and void *ab initio*. It is true that the Land Court and District Land Court are given an exclusive jurisdiction in terms of s.73 of the Land Act No.8 of 2010 (as amended by Act No.16 of 2012) to hear and determine all disputes, actions and proceedings 'concerning land'. The phrase 'concerning land' was interpreted to mean "claims/disputes from title to land, derogations from title and rights which override title" (**Lephema v Total Lesotho C of A (CIV) 36 /2014**). These courts are thus given an unlimited jurisdiction in respect of land matters. It is true that the High Court has unlimited jurisdiction, however, that jurisdiction has been curtailed or conditioned by the legislatively-empowered land specialist courts.

[8] The question to be answered in this matter is whether in view of this reality, this court has jurisdiction to order cancelation of allocation to land where the principal prayer is about the validity of the written instructions? In my considered view the main issue being justiciable in this court, cancellation of allocation will merely be incidental to the determination of the main issue. The instant matter is distinguishable from the decisions such as **Shale v Shale (C of A (CIV) 35/19) [2019] LSCA 45 (01 NOVEMBER 2019)** where in the main the applicant had sought a declarator that he is heir and a consequential relief of cancellation of certificate of allocation which had been issued in favour of the respondent. Although in terms of prayer 2(e) the applicant in the instant matter has sought a declarator that he is the heir of the estate of the late 'Mamoliehi Mokhahlane, that prayer is superfluous because it is common cause that the applicant is the customary heir. In the instant matter, in the main, the applicant is seeking to invalidate the written Instructions of his late mother.

[9] Even though the Land Court has an exclusive jurisdiction on land disputes, that however, does not disentitle this court to pronounce itself upon those matters, which though falling within the jurisdiction of those courts, are incidental to the determination of the main issue on which this court has jurisdiction. I am inclined to follow the approach which was articulated in **'Makatleho Masoabi and Another v Fumane Mofelehetsi (CIV/A/ 10/14) [2014] LSHC 32 (21 August 2014).** In this matter the respondent had raised an objection to jurisdiction of the District Land court to grant an interdict where such would involve issuing a declarator as to the respective parties' rights to the property. The declarator could only have been issued consequent upon determining the validity of the Will on the strength of which one of the parties asserted its right to the property. In holding that the District Land Court has jurisdiction Mosito A.J (as he then was) said**:**

2.11 In my view the learned Magistrate was inclined to determine the issue of the validity of the will which was not before her. The issue before the Magistrate was not one about the validity of the will but the issue as to who of the parties was entitled to the site in question. It is difficult to understand why the court did not have jurisdiction to determine all disputes even including a determination on which of the parties is entitled to the site in question and to pronounce that it was either the one or the other who had such rights. If the issue of the validity of the will were to be determined, it seems to me that that would be a matter would be a subject of incidental jurisdiction of the court. (sic)

2.12 Of course it may occur that the District Land Court is called upon to decide a claim which falls within its jurisdiction in respect of both cause of action and parties as well as amount, but that in order to adjudicate upon such claim the court is compelled to pronounce upon matters falling beyond its jurisdiction. The question may then be whether the court will cease to have jurisdiction in a case where it would otherwise have had

jurisdiction, but virtue of the fact that this collateral matters fall outside its jurisdiction. This issue is one that has to be informed by whether the particular dispute before the court concerns an action, dispute and proceedings over land. In such cases the court would have incidental jurisdiction to pronounce upon the issue otherwise falling outside its jurisdiction if only for purposes of making a final determination on the matter in respect of which it has jurisdiction. However, for now a detailed discussion of how the court has to go about exercising such incidental jurisdiction, is a matter that should wait until the next day and it is not necessary to be determined in this case.

I therefore determine that this court has jurisdiction to hear this matter.

[10] **THE MERITS AND DISPUTE OF FACT:**

It is the applicant's contention that their late mother did not dictate the instruction to the 1st respondent, as she alleges. Given that this is motion proceedings, the version of the 1st respondent is to be preferred. This conclusion is anchored on the consideration that the applicant's counsel faced with the apparent disputes of fact that it was the 1st respondent who authored the impugned Instructions upon dictation by the deceased, applied for referral of the issue to *viva voce* evidence in terms of Rule 8 (14) of the High Court Rules 1980. However, this application for referral was not made at the earliest possibility, but rather when it became obvious that there was a dispute of fact on the material aspect of the case. This notwithstanding, this court has a discretion whether or not to order referral to oral evidence, which discretion was used to refuse the application: the decision was made mindful of the fact that motion proceedings are not designed to determine probabilities but adjudication of legal issues based on common cause facts(**National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)** at para.26). It is clear that it is the 1st

respondent who authored the instructions on dictation, as her version cannot be discarded as far-fetched, untenable, uncreditworthy or bald denial. Moreover, the person who would have given the instruction and the chief who endorsed it with the chief's stamp, are both deceased, but this notwithstanding, the referral of this issue, even if this court was minded to, to *viva voce* evidence would not have disturbed the balance of probabilities that the document was authored by the 1st respondent on the dictation of her later mother and date-stamped by the chief. I found support for this approach in the matter of **Administrator, Transvaal, and others v Theletsane and Others 1991 (2) SA 192 at 196I – 197B**

> *It is not permissible to base factual findings regarding such contentions on a mere weighing up of probabilities. I do not wish to comment on the statement that in considering the affidavits one should adopt 'a robust, common-sense approach;' there is no need for me to do so. For my purpose it is enough to say that in motion proceedings, as a general rule, decisions of fact cannot properly be founded on a consideration of probabilities, unless the court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or clearly untenable as to warrant their rejection merely on the papers, or that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits. This rule, which is trite, applies to instances of disputes of fact….*

[11] **HAS THE APPLICANT MADE OUT A CASE FOR INVALIDATION OF THE WRITTEN INSTRUCTIONS:**

Giving the context of the instructions, the 1st respondent averred that:

> *"13.2 It is denied that our mother was illiterate. I aver that our mother dictated the letter to me on the basis of the fact that at the time, she had been too sick or weak to write the letter herself. I aver that our mother personally took the letter to the late chief 'Maleshoboro Majara for it*

to be defaced with the stamp of the office of the chief when her health improved to evidence that it was indeed her intentions reflected in the letter the applicant currently wants set aside as null and void.

13.3 I submit that the letter was not a Will in the formal sense in terms of the received law therefore strict compliance with the prerequisites for the signature of witnesses would not be required. The deceased gave the land to me for my inheritance just as he did for the deponent. In this regard, I challenge the deponent to adduce proof to the effect that there had been forgery."

[12] Two things are clear from the above averments; (a) the deceased did not write the Instructions herself but instead the 1st respondent did as a beneficiary, and even the signature which appears on the document is disputed to be that of the deceased as alleged by the 1st respondent. For purposes of this case, I am going to assume that the deceased signed the document; (b) No witnesses were present when the Instruction was executed, except the 1st respondent because if they were present, she would have said so unequivocally and they would have confirmed such an assertion, and logically, they would have signed as witnesses.

[13] **THE LAW**

Our law of intestate succession is based on the principle of system of primogeniture, which means that the deceased estate devolves from the eldest son to the eldest son (**Sekhoane v Sekhoane (C of A (CIV) No. 22 of 2005) (NULL) [225] LSHC 211 (20 October 2005)**. It is trite that customary law recognises the freedom of testation, however that freedom is subject to a limitation provided by s.14 of the **Laws of Lerotholi** which provides that:

*"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."(emphasis added)

[14] As already said in the introductory remarks, this case implicates non-compliance with the formalities for bequeathment at customary law. It is not the applicant's case that he has been deprived of more than half of the deceased's estate, rather his case is that the purported written Instructions are invalid for not being witnessed or signed by the testator. The law is clear that when a testator at customary law bequeaths property through testamentary disposition, two requirements must be met:

(a) That the heir must not be deprived of the greater part of the deceased's estate.

(b) That the heir must be present, and that there must be family publicity of the bequeathment. **(**Patrick Duncan, ***Sotho Laws and Customs, A Handbook Based on Decided cases in Basutoland together with THE LAWS OF LEROTHOLI (Oxford University Press, Cape Town 1960))*** at pp 14. – 15.

[15] For written instructions to be valid the above elements must be fulfilled. Although the requirement in (a) is not implicated in this case the second one is. The written Instruction was written on the dictation of the deceased and signed by the latter. The 1st respondent was the only person present when the instructions were reduced to writing. No family members other than the 1st respondent, were present and no publication of the instruction to the family was ever made. The statement of the law in this regard was made in **Qhamaku v Qhamaku J.C 169/47** quoted in **Duncan, Sotho Laws and Custom** ibid**)** wherein the Paramount Chief in his judgment said:

"According to the Sotho custom and practices, in this country, when a father intends to make a gift to a younger child out of the property of the estate this gift must be made in the presence of the elder son as he will be responsible after the death of his father. Or in case the elder son is not present one of the members of the family should be called upon to be present, who will then inform the heir what has happened."

[16] At p.17 of the same book the learned author Patrick Duncan regards the above as the correct statement of the law and made the following remarks:

"I regard these judgments ***[****referring to* ***Qhamaku v Qhamaku ibid and Molapo v Peete J. C. 196/47]*** *as being accurate statements of the law. From them it can be seen that the heir has no veto, for both statements envisage the possibility of the allocations being made in his absence, and only seek to ensure that the heir is told authoritatively what has been done. If he is not informed at the time, then he will have the right to undo allocations when he inherits. In* ***Borotho v Borotho, J.C 360/48****, the heir was absent at the time of allocation. The details of allocation were written in a book. When the heir returned, he wrote in the book, 'I confirm all that is written here and I agree to it.' He signed this statement. Later he sought to argue that the gift was invalid because he had been absent, but it was held that his absence did not invalidate the gift."*

[17] It is common cause that the applicant was not present when the instructions were made bequeathing property in the manner now in issue in this case. I am deliberately not making any allusion to the fact of the deceased being too ill to make the instructions because no evidence has been proffered showing that her ill-health had incapacitated her to the extent that that she could not validly issue instructions bequeathing her property. But I think the fact that the 1st respondent as the beneficiary to the instructions was the

only person present in the room, presents serious difficulties. When the law requires that a family member be present it guards against a situation where a person (as in this case), in the absence of the heir, being in the position where he or she stands to benefit from the Instructions is the only person present when they are reduced to writing. The reason for is not difficult to fathom. It could be the easiest thing for anyone to flaunt what are purportedly the deceased's instructions, to the detriment of the heir, when in fact they are not. Without the act being witnessed by a family member and publicised in the family as envisaged by the law, the deceased's instructions cannot be valid in law.

[18] In the result, the following order is made:

(a) The purported Written Instructions allegedly written by the late 'Mamoliehi Mokhahlane are declared null and void *ab initio.*

(c) The certificate of allocation issued by 2nd respondent in the names of the 1st respondent is declared *null and void* and of no legal force and effect.

(d) The certificate of allocation mentioned in (b) above must be cancelled forthwith.

(e) The applicant is awarded the costs of suit.

MOKHESI J

FOR THE APPLICANT:	**ADV. T. PHATSISI instructed by K. D. MABULU & CO. ATTORNEYS**
FOR THE 1st RESPONDENT:	**ADV. MOKHATHALI instructed by M. W. MUKHAWANA ATTORNEYS**

FOR THE 2nd and 3rd RESPONDENTS: NO APPEARANCE