



LESOTHO

**IN THE HIGH COURT OF LESOTHO**

**Held at Maseru**

**CIV/T/551/2018**

In the matter between:

**MAUREEN QACHA LETOOANE**

**PLAINTIFF**

And

**TEBOHO PETER QACHA**

**1<sup>ST</sup> DEFENDANT**

**ROJANA PAUL QACHA**

**2<sup>ND</sup> DEFENDANT**

**'MAMOCHEKO QACHA**

**3<sup>RD</sup> DEFENDANT**

**THE MASTER OF THE HIGH COURT**

**4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL**

**5<sup>TH</sup> DEFENDANT**

Neutral Citation: Letoane v Qacha and Others [2023] LSHC 117 Civ (1 June 2023)

**CORAM: S.P. SAKOANE CJ**

**HEARD: 12<sup>TH</sup> APRIL 2022 & 20<sup>TH</sup> MARCH 2023**

**DELIVERED: 1<sup>ST</sup> JUNE 2023**

### SUMMARY

Inheritance – disinheritance of the customary and bequeathal of the entire estate of the female child – subsequent instructions disinheriting the female child heir – whether a prospective heir can be disinherited a larger part of the estate – whether a child is entitled to inherit a half of the estate on the basis that it belongs to one of the parents – Laws of Lerotholi, section 14(1); Land Act, 1979, section 8(2) (as amended).

### **ANNOTATIONS:**

#### CASES:

#### LESOTHO

*Lepule v. Lepule* LAC (2013-2014) 21

*Masupha v. Senior Resident Magistrate for Berea and Others* LAC (2013-2014)  
227

*Semahla v. Lephole* LAC (2000-2004) 69

#### STATUTES:

*Land Act* No.17 of 1979

*Land (amendment) Act* No.6 of 1992

*Laws of Lerotholi* (1959 edition)

#### BOOKS

Poulter S. (1976) *Family Law and Litigation in Basotho Society* (Oxford: Clarendon Press)

Poulter S. (1981) *Legal Dualism in Lesotho* (Moriya)

## JUDGMENT

### I. INTRODUCTION

[1] This matter involves a claim by a female child to inherit the entire estate bequeathed to her by her parents. There is also a counter-claim by her brother (the first defendant) challenging written instructions bequeathing the entire estate to the plaintiff. The first defendant is the second born child and the second defendant is the elder brother. The first defendant entered an appearance to defend the matter while the second defendant withdrew his opposition to plaintiff's claim.

### Relief

[2] The plaintiff in the main seeks the following relief:

1. *Declaring the purported written instructions of the late Martin Qacha of the 24<sup>th</sup> August 2010 invalid, null and void and of no legal force and effect;*
2. *Setting aside of the purported written instructions of the late Martin Qacha of the 24<sup>th</sup> August 2010, as being invalid, null and void and of no legal force and effect;*
3. *Declaring the purported written instructions of the late Martin Qacha of the 24<sup>th</sup> August 2010, invalid, null and void and of no legal force and effect to the extent that it included 'Marojane and Martin Qacha;*
4. *Declaring that Plaintiff is entitled to inherit the estate in so far as 'Marojane's half share is concerned;*

5. *An order directing and compelling the Defendants to make an inventory of the whole estate of 'Marojane and Martin Qacha;*
6. *Ordering Defendants to pay costs hereof only in the event of their defending this action;*
7. *Further and / or alternative relief;*

*Alternatively*

8. *Declaring that the Plaintiff is entitled to share 'Marojane and Martin Qacha's estate with the 1<sup>st</sup> and 3<sup>rd</sup> Defendant.*

[3] The 1<sup>st</sup> defendant counter-claims for the following relief:

1. *Declaring the purported written instructions executed by Martin Qacha and Marojanee Qacha on the 5<sup>th</sup> January 1998 invalid, null and void and of no legal effect.*
2. *Setting aside the purported written instructions by the late Martin Qacha and Marojane Qacha on the 5<sup>th</sup> January 1998 as being null and void and of no legal force by reason and fact that it deprived the natural heir of his part of the estate.*
3. *Declaring that the purported written instructions by Martin Qacha on the 24<sup>th</sup> August 2010 as the lawfully executed written instructions to be given effect to.*
4. *Ordering and compelling the 1<sup>st</sup> Defendant [plaintiff in the main] to return every household property she unlawfully and without authority took from the parties' parental home.*
5. *Cost of suit in the event of opposition on attorney and own client scale.*
6. *Further and / or alternative relief.*

## II. MERITS

### Facts

[4] At the pre-trial conference, the following were agreed to be common cause:

4.1 Plaintiff is the fourth born child.

4.2 2<sup>nd</sup> defendant is the first born male child.

4.3 1<sup>st</sup> defendant is the second born child.

4.4 3<sup>rd</sup> defendant is the ex-wife of the second defendant.

4.5 During the life-time of the father and mother, they bequeathed their entire estate by way of joint written instructions to the plaintiff in 1998.

4.6 After the death of their mother, their father made other instructions in 2010 changing the 1998 instructions. Their effect was to reverse the bequest made in favour of the plaintiff.

[5] The first 1998 joint instructions read as follows:

#### FAIR TRANSLATION

“Chief of Souru Date

Stamp 05 Jan 1998

To the Chief Souru

Souru

To whom it may concern

Myself Martin Qacha, in agreement with my wife Marojane Qacha, do hereby make will and give my whole estate to my daughter Mpolai Qacha who is now Maseeng Letoane, from today the **05<sup>th</sup> January 1998**. She is then my heir to my estate. There should be no one to disturb her.

1. Two shops and property therein
  - a. Linokong Ha Roijane
  - b. Khorong Ha Mpiti
2. Home premises and properties in there
  - a. Linokong Ha Roijane
  - b. Ha Mamosa Qacha's Nek
  - c. Site at Selakhapane Qacha's Nek
  - d. Maseru Ha Hoohlo
3. Animals
  - a. Cattle
  - b. Sheep and goats
  - c. Fields
4. Cars
  - a. Truck 4 ton Dyna
  - b. Van Mazda B1800

Principal Chief of Qacha date stamp  
05 Jan 1988

Signed By:- *Martin Qacha*

Signed By:- *Marojane Qacha.*"

[6] The subsequent 2010 instructions read as follows:

#### FAIR TRANSLATION

**“ 2010**

**Faint Date Stamp**

**Qacha**

Chief of Thaba Chitja

Thaba Chitja

Greetings Chief.

With this letter I change the decision I had made my businesses at Roijane and Ha Mpiti I give to my daughter Mpolai Qacha who is now Maseeng Leetoane. Again, I am making a decision to change the bequest I had made of properties at Linokong, Ha Mamosa and Ha Hoohlo Maseru – I change again the bequeathal of the fields and animals.

My property at Maseru Ha Hoohlo is bequeathed to my son Teboho Qacha. The businesses, the cars and properties at Ha Mamosa, animals and fields will be responsible to my son Roijane and his wife Mamocheko Qacha.

The family members who were present are as follows:

Mampanatso Qacha

Maletsabisa Qacha

Masalang Mohetsane

**Date Stamp of Chief of Souru**

**24 Aug 2010”**

- [7] The second and third defendants have not entered any appearance to defend. The effect thereof is that the fight over the property is between the plaintiff and the first defendant. The plaintiff defends the bequest of the property to her in terms of the 1998 instructions and seeks the invalidation of the 2010 instructions revoking that bequest. The first defendant defends his bequest in terms of the 2010 instructions and counter-claims for the invalidation of the 1998 instructions on the ground they deprived the heir of the greater part of the estate contrary to customary law.
- [8] The plaintiff wants more than the protection of her bequest. She also seeks declaratory orders that:
- 8.1 She “is entitled to inherit the estate in so far as *Marojane’s* [her late mother] half share is concerned.”
  - 8.2 Alternatively, that she “is entitled to share their parents” estate with first and third defendants.

## **The Law**

[9] The above is a precis of the admitted facts in this case on the basis of which a determination should be made. The legal questions to be considered arise because of section 14(1) of the **Laws of Lerotholi** and section 8(2) of the **Land Act No.17 of 1979** [as amended per **Land (Amendment) Act No.6 of 1992**].

[10] Section 14(1) of the **Laws of Lerotholi** reads as follows:

“If a man during his lifetime allocates his property among 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.”

[11] Section 8(2) of the **Land Act, 1979** (the operative statute at the time) provided that:

- “(2) Notwithstanding subsection (1), where an allottee of land dies, the interest of that allottee passes to,
- (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 shall pass to the person referred to in paragraph (c);
  - (b) where there is no widow, a person designated by the deceased allottee;
  - (c) where paragraphs (a) and (b) do not apply, a person nominated as the heir of the deceased allottee by the surviving members of the deceased allottee’s family; 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.”



[12] The customary heir is the first born male child. This encapsulates the male primogeniture rule which bars a female child from heirship and, therefore, does not have the right, even if bequeathed part of the estate, to inherit a larger part thereof. This remains to be so because the male primogeniture rule is immunized from the attack of being discriminatory<sup>1</sup> by section 18 of the Constitution which reads, in relevant parts, thus:

“(1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect;

.....

(4) Subsection (1) shall not apply to any law to the extent that the law makes provision –

(a) -----

(b) -----

(c) for the application of the customary law of Lesotho with respect to any matter in the case of persons who under that law, are subject to that law.”

[13] All household property, inclusive of landed property forms part of the customary heir’s inheritance. There is no formal handing over of the estate.

---

<sup>1</sup> Masupha v. Senior Resident Magistrate for Berea and Others LAC (2013-2014)227

The heir simply steps into the shoes of the father and assumes all the rights and obligations<sup>2</sup>.

[14] Be that as it may, the strictures of the male primogeniture rule in the inheritance of landed property were relaxed by section 8(2) of the **Land Act, 1979** (*supra*). This section gives an allottee the right to designate an heir unencumbered by the male primogeniture rule and its reservation of 50% of the estate for the customary heir. It was, in my respectful view, legally permissible to nominate a female child as the heir to all landed property provided it is situated in a rural area<sup>3</sup>.

[15] Under custom, the father has the power to disinherit his prospective heir on grounds of misconduct, thereby preventing the heir from succeeding to the estate on his intestacy. But the decision to disinherit is subject to approval by the family in the presence of the prospective heir. The chief must also be notified of the decision<sup>4</sup>.

---

<sup>2</sup> Lepule v. Lepule LAC (2013-2014) 21 at 29H-I; Poulter S. (1976) Family Law and Litigation in Basotho Society (Oxford: Clarendon Press) pp. 242, 247

<sup>3</sup> Semahla v. Lephole LAC (2000-2004) 69 @ 75A-C

<sup>4</sup> Footnote 2 pp. 239-240

## Discussion

- [16] As the law stood in 1998 and 2010 when the written instructions were made, the legal competence to disinherit the customary heir of landed property lay in section 8(2) of the **Land Act, 1979** (as amended). It was legally permissible for the father to designate a prospective heir among any of his children irrespective of their birth and gender. There was even no limit on the percentage of the landed property bequeathable to the designated heir.
- [17] Thus, the proposition advanced by the first defendant that the 1998 instructions fell foul of section 14(1) of the **Laws of Lerotholi** overlooks the application and reach of section 8(2) of the **Land Act, 1979**. The soundness of the proposition lies in respect of movable property only.
- [18] In similar vein, the proposition advanced by the plaintiff that the 2010 instructions are null and void and of no legal force for bequeathing to the defendants the entire estate inclusive of her mother's share is too broadly stated. As said earlier, it was not legally permissible for the parents of the parties to bequeath the entire estate to the plaintiff. This is forbidden by section 14(1) of the **Laws of Lerotholi**. The 1998 instructions are *pro non*

*scripto*. So, when the father purported to revoke them, the purported revocation had no prejudicial legal effect.

[19] The 2010 instructions distribute the properties of the estate among the plaintiff and the defendants. However, the plaintiff attacks the distribution on the basis that:

19.1 the father was afflicted by “diabetic hypertension” and, therefore, not in his sound mind when he wrote them;

19.2 she is entitled to inherit the mother’s half of the estate;

19.3 she is entitled to share the estate with the first and third defendants.

[20] The suggestion that the father lacked full mental capacity when he penned the instructions was not supported by any medical evidence. It is based on speculation and not fact. It is rejected.

[21] As pointed out earlier, parents are entitled to bequeath their property in any manner they wish provided the customary heir is not deprived of the greater part of the estate. Under customary law, it is the man and not the wife, who is in control of the estate. His daughters have no right to be bequeathed any

part of the estate<sup>5</sup>. Any bequeathal in favour of daughters is a matter of choice. It would have been something else if the father had designated the plaintiff as the heir in respect of the entire immovables pursuant to section 8(12) of the **Land Act, 1979** something he did not do.

[22] It follows that the plaintiff does not have a right to share the estate with the defendants. She should be content with the choice of her father captured in the 2010 instructions.

### **Counter-claim**

[23] The first defendant (plaintiff-in-reconvention) seeks the following:

- 23.1 the nullification of the 1998 instructions on the basis that they deprive the customary heir of his greater part of the estate;
- 23.2 the return of household property the plaintiff (defendant-in-reconvention) took from their parental home.

[24] The first defendant does not say in what capacity he attacks the 1998 instructions. He is not the heir and does not even claim to be one. The heir

---

<sup>5</sup> Poulter S. (1981) *Legal Dualism In Lesotho (Moriija)* p.110

has not been joined as a claimant. He is sued together with the defendant in-reconvention. The defendant has no *locus-standi* to challenge the 1998 instructions.

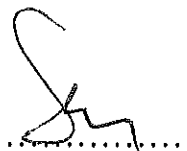
[25] The declaration does not state the place of the parental home the household property was taken from. The household property is neither listed nor particularised. The defendant denies taking it.

[26] Given these deficiencies in the counter-claim, no evidence was adduced to justify the claim for the return of the household property.

### III CONCLUSION

[27] The following orders are made:

1. The main claim is dismissed with costs.
2. The counter-claim is dismissed with costs.



.....  
**S. P. SAKOANE**  
**CHIEF JUSTICE**

For Plaintiff: *L. Masoeru*

For Defendants: *T.D. Thejane*