CIV/APN/88/89

IN THE HIGH COURT OF LESOTHO

In the matter between:

PAGES STORES (LESOTHO) (PROPRIETARY) LIMITED Applicant

and

THE LESOTHO AGRICULTURAL DEVELOPMENT BANK	1st Respondent
THE MINISTER OF THE INTERIOR	2nd Respondent
KINGSWAY CONSTRUCTION (PROPRIETARY) LIMITED	3rd Respondent
BEREA CONSTRUCTION	4th Respondent
C.R. HOUSEHAM	5th Respondent
G.C. McPHERSON	6th Respondent
J.P. MULLAN	7th Respondent
J DE V BRINK	8th Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 9th day of June, 1989

This is an application for an order reviewing and setting aside the declaration by the second respondent, in terms of section 44 of the Land Act No.17 of 1979, of plots numbers 12284-024, 12284-034 and 12284-358 Maseru Central, Maseru Urban Area, as a selected development area as published in Government Gazette vol. XXXIV No.12 dated the 7th February, 1989 (Legal Notice No.17 of 1989).

The applicant seeks an order interdicting the respondents from acting on the said declaration or taking any steps whatsoever to effect it and costs of suit, including the costs of the interdict

/2.....

proceedings, to be paid by first and second respondents jointly and severally, the one paying the other to be absolved; and further and/or alternative relief.

The applicant has set out its grounds of challenging the aforesaid declaration in paragraph 30 of its founding affidavit. It alleges that the second respondent exceeded the powers granted to him in terms of section 44 of the Land Act, 1979 (the Act) in making a declaration relating to a particular building complex which amounted to no more than a single development that was proceeding in any event without the need for second respondent to have considered it necessary to declare such an area a selected development area. The development in question was not part of a scheme to which the second respondent:s power is limited, and in the circumstances the declaration by the second respondent is ultra vires his powers.

It alleges further that the real purpose and objective of the exercise by the second respondent of his powers was prompted by the perceived desirability of freeing first respondent from its obligations towards applicant under the lease agreement, which first respondent felt to be unfavourable and an unwarrantable burden on it. As much this constitutes a use of his power by the second respondent for an improper or ulterior purpose, and not in fact for the purpose of the public interest as required by the Act.

The second respondent's decision was, in the circumstances, unreasonable, arbitrary and vitiated by bad faith.

/3.....

The applicant further deposes that the second respondent's decision involves a significant loss of valuable property rights for applicant, which was vitally affected by such decision. In the circumstances applicant was entitled to a proper hearing before the decision was made. Moreover applicant entertained a legitimate expectation that if any steps were to be taken which would prejudice its rights, it would be given a fair opportunity to make any relevant statement in regard thereto, prior to any decision being taken in the matter. Furthermore it is submitted that applicant was entitled to receive a copy of the motivation for the application, to entitle it to effectively object.

The applicant alleges that should the premises be demolished, it will suffer irreparable harm to its rights to enjoy accruing to it by virtue of the lease agreement. It will obviously be compelled to cease trading for an undertermined period, and it will be in a position where it has no alternative premises readily available to it to enable a prompt recommencement of trading. The loss incurred through ceasing to trade will in addition not be amenable to proper quantification.

The second respondent has set out his reasons for decision to declare the area in question a selected development area in paragraphs 15-26 of his answering affidavit. He alleges that the proposed development is by common consent a massive re-construction and development exercise ever to be carried out in the city of Maseru. Especially in view of the fact that this project is being undertaken by a parastatal organisation, as the Minister of the Interior it is his clear duty and obligation to ensure that the

project becomes a reality. The needs of future developments of Maseru and indeed the public interest of the entire Kingdom made it imperative that the Government as a whole should lend its weight behind this project. In so doing, he and the Government of Lesotho was only actuated to ensuring the development of Maseru and the interests of the Basotho community in general.

The second respondent has stated that the proposed huge building will have eight first class shops on the ground floor, there will be huge parking space on the ground floor and on the first floor. The first respondent will occupy only the first three floors. The rest of the ten floors are proposed to be leased out to several business enterprises. This in turn will generate additional resources to the first respondent which it will plough out in the course of agricultural development in this country. In the perception of the Government of Lesotho this is a capital development whose spin-offs will regenerate the economy of this country, .

He states that to make the first respondent's project a reality, the first respondent needed extra space and plot no. 59 Maseru Central which housed the Old Police Headquarters and is currently housing the Traffic Branch . had to be included in the proposed development.

On the 21st September, 1988 he received a representation from the first respondent setting out their plans for re-construction and developments of plot numbers 12284-034, 12284-024 and the Lesotho Government site No.59 Maseru Central. The letter reads as follows:

"Honourable Minister of Interior,
C/O Commissioner of Lands,
Ministry of Interior,
MASERU

Ntate,

REQUEST FOR DECLARATION OF PLOTS 12284-024, 12284-034 AND PLOT 59 MASERU CENTRAL AS SELECTED DEVELOPMENT AREA.

The Lesotho Agricultural Development Bank requests you, with the support of the Police Department, that you declare plots 12284-024, 12284-034 and site 59 Maseru Central to be selected development area in terms of Section 44 of the Land Act 1979.

The reasons for this request arise from the desire of the Lesotho Agricultural Development Bank (Lease holders of Plots 12284-024 and Plot 12284-034 and the Lesotho Government lease holders of Site 59 Maseru Central, to redevelop these three plots soonest to provide new headquarters for the Lesotho Agricultural Development Bank and effect improvement on Site 59 Maseru Central.

We are advised by our architects and other professional advisers that traffic congestion on Kingsway has become a serious problem and is likely to exacerbate in the near future. It became necessary in our redevelopment plans to bear this factor in mind. The planned redevelopment has taken into account the need to keep Kingsway as clear of client traffic as possible and to accommodate such traffic as much as possible on the project itself. This involves adjustments to boundaries on Site 59 Maseru Central and to Kingsway and Parliament road.

The redevelopment of these three plots is estimated to cost Twenty Four Million Maloti. We enclose building plans prepared for us for the proposed redevelopment. We draw your attention to the ground plans and architects model of the redevelopment and what the building and its environs will look like when complete. The new building will comprise Thirteen (13) Floors and its construction will be tackled in two phases. The following features of the redelopment are significant for your assessment of the economic and physical merits of the proposed project:-

(a) total redevelopment costs estimates are Twenty Four Million Maloti.

(b) phase one of the project is ready to begin immediately and funding for this phase (M9,000,000-00) has already been procured. Phase one will consist of the first four (4) floors of the new building;

/6.....

(c) phase two will consist of a further Nine (9) floors and is geared to start immediately upon completion of the first phase;

(d) on 5th September 1987 the Lesotho Agricultural Development Bank building which housed our banking hall burned down. Since that time the Lesotho Agricultural Bank is without a proper bank building and the security position of the Lesotho Agricultural Development Bank is extremely weak. The redelopment of entire sites must be done together and with the long term needs of Lesotho Agricultural Development Bank in mind;

(e) the redevelopment will encompass Kingsway and Parliament road and will clearly enhance the physical appearance of Kingsway/Parliament road and Constitution road;

(f) the economic impact and value of plots 12284-024 and 12284-034 and Site 59 Maseru Central will be increased far beyond present values;

(g) the security of movement of cash in and out of the Lesotho Agricultural Development Bank is going to be vastly improved by the planned redevelopment;

(h) part of the Police Department is going to enjoy the use of improved facilities on Site 59 Maseru Central as provision has been made for this to happen in terms of the building plans.

Sir, in view of the urgent need to house the Lesotho Agricultural Development Bank properly and the cost escalation factors involved we shall be grateful for your early decision. We indemnify the Lesoth Government from any claims that may arise from any source as a result favourable decision.

C.S. MOLELLE
MANANGING DIRECTOR."

The second respondent deposes that after a careful appraisal of all the information available to him, he came to the conclusion that the three plots in question should be declared a selected development area in terms of section 44 of the Act. The development

has a much large objective because at the moment Maseru is suffering from totally inadequate office accommodation. The Lesotho Highlands Development Project which is already in steam requires very considerable office space which is not available in Maseru at the moment. The building of the thirteen-floor building complex will hopefully alleviate the situation.

I propose to deal first of all with the question of whether the second respondent was bound to afford the applicant a hearing before he declared the area in question as a selected development area in terms of section 44 of the Act. Section 44 reads as follows:-

> "Where it appears to the Minister in the public interest so to do for purposes of selected development, the Minister may, by notice in the Gazette declare any area of land to be a selected development area and thereupon, all titles to land within the area shall be extinguished but substitute rights may be granted as provided under this Part."

Mr. Dison, counsel for the applicant, has submitted that the second respondent was not entitled to make the said declaration without first giving applicant a hearing as to the propriety of the said declaration. He submitted that it is firmly established in law that when a statute gives powers to an officer of State to make an order prejudicially affecting the rights of persons or property, in the absence of an express provision or a clear intention to the contrary, there is a presumption that the power so given is to be exercised in accordance with fundamental principles of justice. He referred to the much quoted dictum of centlivres, C.J. in R. v. Ngwevela, 1954 (1) S.A. 123 (A.D.) at p. 131:

> "The maxim (audi alteram partem) should be enforced unless it is clear that parliament has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify the court's not giving effect to it."

The same principle was stated in a recent South African case, Attorney General, Eastern v. Blom and others, 1988 (4) S.A. 645 at p. 662 where Corbett, J.A. said:

> "I prefer the approach which holds that in the circumstances postulated, viz a state empowering a public official to give a decision which may prejudicially affect the property or liberty of an individual, there is a right to be heard, unless the statute shows, either expressly or by implication, a clear intention on the part of the legislature to exclude that right." (Att

Mr. Geldenhuys and Mr. Tampi, counsel for first and second respondents respectively, have submitted that by necessary implication Parliament has excluded the principle of audi alteram partem in acting under section 44 of the Act. They referred to various sections in the Act which expressly required notice to be given or tobe deemed to have been given.

It is common cause that in enacting section 44 Parliament did not expressly exclude the application of the principle audi alteram partem and that the issue to be decided by the Court is whether it has done so by necessary implication. It is also common cause that as a sub-lessee the applicant has a right of occupation. I agree with the submission that in deciding this difficult question I must look at some other provisions of the Act. Section 42 deals with the termination of leases where the lessee is in breach of certain conditions of the lease. Subsection (2)

provides that notice of termination of the lease shall be served by the Commissioner upon the lessee, the sub-lessee (where the whole of the lessee's interest has been sublet to one sub-lessee) and to the mortgagee. In the present case the applicant is a sub-lessee of only part of the plot. The other parts of the plot were sublet to other people and the first respondent held another part of the plot for its own use.

It is clear that under section 42 (2) of the Act the rights of a sub-lessee who is holding only part of the plot are ignored and no notice of termination is given to him. The purpose and effect of section 44 is to terminate a lease because it provides that upon publication of an area as a selected development area all titles to land within the area shall be extinguished.

Section 55 of the Act deals with land acquired for public purposes. It provides that prior to the publication in the Gazette of the declaration notice the Minister shall cause a copy of the notice to be served upon any person known to be in occupation of, or to have an interest in, the land, in the manner indicated in section 86. Under section 44 of the Act there is no provision for a notice to be given to the lessee or occupier of the land declared as a selected development area. If the Legislature had intended that such a notice had to be given it would have said so in no uncertain terms as it has done in section 42 and section 55 as well as in section 13 and section 14.

The first respondent is the lessee of the plot occupied by the applicant. The contract of a sub-lease is between the applicant

and the first respondent. All what the second respondent did was to give consent that the parties could enter into such a contract which does not bind the second respondent in any way. On the 21st September, 1988 the first respondent wrote the letter shown above requesting the second respondent to declare plots 12284-024, 12284-034 and site 59 Maseru Central to be selected development area. This application/request was made by the holder of the lease pertaining to the first two plots. I find it absurd to suggest that at that stage the second respondent ought to have invited the applicant and asked him to make representations. I am of the opinion that the second respondent was under no obligation to ask the applicant to make representations because the declaration was being made at the request of the lessee. The contractual obligations of the first respondent towards the applicant are no concern of the second respondent. If the first respondent is in breach of certain conditions of the lease contract between itself and the applicant that is an entirely different matter which cannot affect the second respondent's decision in any way.

The applicant was not entitled to be heard before the declaration was made on the ground that taking into account the other provisions of the Act which provide that notice must be given publication is made in the Gazette or before a revocation of allocation is made, or that upon publication notice shall be deemed to have been made, it is clear that by necessary implication the Legislature excluded the principle audi alteram partem when acting under section 44 of the Act. Secondly, the application that the second respondent must declare the area in question a selected development area was made by the holder of the lease. The

applicant has locus standi to bring interdict proceedings against the first respondent to stop it from demolishing the building which it is now occupying but it has no locus standi or right to challenge the decision of the second respondent to declare the area in question a selected development area on the ground that it has no contract with the second respondent and that the motivation came from the lessee.

The decision of the second respondent is challenged on the ground that it was ultra vires the powers afforded him under section 44 of the Act, by virtue of the fact that the development in question is no more than a conventional commercial project with no direct public interest component, and as such it is not part of scheme to which the second respondent's powers under section 44 are limited.

In section 2 of the Act "selected development area" is defined as an area set aside under section 44 for --

> "(a) development or reconstruction of existing built-up areas;
>
> (b) construction or development of new residential, commercial or industrial areas;
>
> (c) re-adjustment of boundaries for the purposes of town planning."

It was submitted that the word "areas" suggests that the power in paragraph (a) is limited to a scheme involving several areas. That the power must be construed as relating to reservation, for town planning purposes, of an area consisting of built-up areas that require urban renewal or an analogous form of urban

development. That the notion of developing an existing built-up area raises the question of what is meant by development of an area that is already built-up. A reasonably possible interpretation is that it is limited to urban renewal of such areas, an idea which fits in well with the use of the word "reconstruction". That accordingly the power is limited in relation to already built-up areas to -

(a) a town planning scheme of development involving several areas;

and

(b) urban renewal.

I do not agree with this interpretation of section 2 read with section 44 of the Act. A proper interpretation of the above two sections is that the second respondent is empowered to declare "any area" of land a selected development. I have underlined the words "any area" to show that there is nothing in the Act which requires that the declaration must always involve more than one area. Even the plural used in section 2 (a) under the definition of "selected development area" does not exclude the idea that one built-up area may be declared as a development area. Take the area from the first respondent's plots to the Lesotho Bank's Development House near the charge office; covering close to about three hundred yards and several plots. Is that to be regarded as a single built-up area or several built-up areas? If we take the construction of the sections suggested by the defence it means that the second respondent cannot declare the whole of that area because it involves one built-up area.

The area in question involves two plots which belonged to the first respondent and one plot which belonged to the Government of Lesotho. There is nothing in the Act to suggest that the second respondent could not declare such an area a selected development area and that he must wait until there is another area or other areas which must be declared simultaneously with it. I am of the opinion that development or reconstruction of the existing built-up areas can be done to a single built-up area and that even to that single built-up area development and reconstruction can be done to a single block of buildings.

It is further submitted that the second respondent exercised his powers under section 44 of the Act for an improper and ulterior motive. He merely wanted to free the first respondent of his obligations under the lease agreement. It seems to me that this serious allegation against the second respondent is not supported by any evidence. The second respondent has denied the allegation (See paragraph 28 the third paragraph of the second respond's opposing affidavit.) In the letter of the 21st September, 1988 the first respondent did not inform the second respondent that it had problems with the applicant and that it wanted to get rid of it. The applicant ought to have supported its allegations with evidence that the second respondent was aware of the dispute between the first respondent and itself.

The next question is whether the declaration by the second respondent was in the public interest. In Clininal Centre (PTY) LTD. v. Holdgates Motors Co. (PTY) LTD., 1948 (4) S.A. 480 (W.L.D.) it was held that the scheme is "in public interest" if it is to the general interest of the community that it should be carried out, even if it

directly benefits only a section or class or portion of the community. In that case the reconstruction by a company for the benefit of providing more office accommodation and parking space for the general public but in particular for ex-servicemen. The Court held that the scheme was in public interest. In the present case the scheme is undertaken by a parastatal organisation and the proposed scheme is going to provide office accommodation and parking space for the general community. In the long run the rentals from the tenants will enable the first respondent to lend money to more farmers than it is able to do at the moment. I think the scheme is without any doubt in public interest.

It is quite correct that the applicant is going to face some financial hardship if it loses the present premises but that is the matter between the first respondent and the applicant . It has nothing to do with the decision of the second respondent to declare the area in question a selected development area which is undoubtedly in the public interest.

It was further submitted that by virtue of the fact that second respondent considered himself bound to ensure that the project became a reality since it was undertaken by a parastatal organisation, and secondly by virtue of the fact that he considered himself entitled to afford the first respondent preferential treatment, second respondent misdirected himself by fettering his discretion, taking into account extraneous matter and failing to apply his mind thereto.

I am of the opinion that despite the use of the words "my clear duty and obligation to ensure that the project is a reality" the second respondent still applied his mind property to the matter before him because he starts by saying that "the proposed development is by common consent a massive re-construction and development ever to be carried out in city of Maseru". He condudes by saying that "the future developments of Maseru and indeed the public interest of the entire Kingdom made imperative that the Government as a whole should lend its entire weight behind the project. In so doing, I and the Government of Lesotho was only actuated to ensuring the development of Maseru and the interests of the Basotho Community in general". These words clearly show that the second respondent properly exercised his discretion in terms of section 44 of the Act.

In the result the application (as amended) is dismissed with costs.

J.L. KHEOLA
JUDGE

9th June, 1989.

For the Applicant - Mr. Dison
For the 1st Respondent - Mr. Geldenhuys
For the 2nd Respondent - Mr. Tampi.