C. of A. (CIV) No.14 of 1989

IN THE LESOTHO COURT OF APPEAL

In the Appeal of:-

PAGES STORES (LESOTHO) (PTY) LTD Appellant

and

1. The LESOTHO AGRICULTURAL DEVELOPMENT BANK
2. THE MINISTER OF THE INTERIOR
3. KINGSWAY CONSTRUCTION (PTY) LTD
4. BEREA CONSTRUCTION
5. C.P. HOUSEHAM
6. G.C. HENDERSON
7. J.P. MULLAN
8. J DE V. BRINK

Respondents

HELD AT MASERU

Coram:

AARON, J.A.
PLEWMAN, J.A.
ACKERMANN, J.A.

J U D G M E N T

AARON, J.A.

At all material times prior to 7 February, 1989 the First Respondent, the Lesotho Agricultural Development Bank (LADB) had title in terms of the Land Act, 1979, to a site in Kingsway, Maseru

known as site 58 (plot no. 12284 - 034), where it conducted its business as a development bank. The LADB is a parastatal organization wholly funded by the Government of Lesotho.

In September, 1987, the building on this site was destroyed by fire, and the LADB then decided not merely to replace the building on site 58, but to embark upon a much larger development, namely a high rise building comprising shops, premises for the bank, offices and parking spaces, to be erected on both site 58 and the adjoining site 58A (plot No. 12284-024) which also fronts on to Kingsway. The lease of site 58A had originally been in the name of one C.K. Garrach but had been ceded to the LADB in June, 1985. The LADB accordingly had title to both sites on which the proposed building was to be erected.

There was however a snag concerning the building which stood on site 58A and which would have to be demolished to allow the proposed development to proceed. Prior to the cession of the lease of the site to the LADB, Garrach had granted a sub-lease of portion of the building to Foschini (Lesotho) (Pty) Ltd, which was later ceded to the present appellant, which is also a company in the Foschini group. In 1982, the person who was then Minister of the Interior had consented to such grant in terms of sec. 35 (2) of the Land Act. So when the LADB acquired the lease of the site, it also acquired the appellant as a sub-lessee.

The sub-lease was for a period of four years and eleven months,

commencing on 16 May, 1980, but the appellant had options to renew the lease agreement for five successive renewal periods of 5 years each after the expiry of the intial lease period. As long as the Appellant remained in occupation, the LADB could not demolish the building on site 58A.

By letter dated 11 May, 1988, the LADB purported to give the appellant three months notice to vacate the premises, effective from 1 June, 1988, but the appellant contested the validity of the notice, asserting quite correctly that there was no provisions in the sub-lease entitling the lessor to terminate it by notice. There were subsequently two meetings between representatives of the appellant and of the LADB, with a view to trying to reach a commercial settlement. The first of these meetings was on 14 June, and the second on 17 August, 1988. Minutes of these two meetings are before the Court, and it appears that at the June meeting the representatives of the LADB indicated to the appellant's representatives that if no agreement could be reached, there were other ways in which the LADB could secure the land. Two possible procedures that were metnioned were expropriation of the land and cancellation of the lease. In the event, no agreement had been reached by the conclusion of the August meeting, and the matter was left on the basis that the parties would again consider their positions.

In the meanwhile the building plans had been submitted to the Department of Lands and Surveys for its approval, and that approval had been given subject to a number of conditions, one of which was that

the office component of the building had to be shifted back to bring it into line with the existing old government building in Kingsway. Another condition was that one parking bay had to be provided for each hundred square metres of lettable area in the new building complex. Moving the buildings back would have the result that they now encroached on the site behind sites 58 and 58A. This was site 59, which fronted on to Parliament Street, and was used for police purposes. Title to site 59 vested in the State, and the solution adopted to meet the two conditions referred to above was to incorporate site 59 in the proposed development and to use those portions of it which were not going to be built upon to provide the extra parking that was required.

On 21 September, 1988, a letter was written to the Second Respondent, the Minister of the Interior, by the LADB "with the support of the Police Department", asking that he declare sites 58, 58A and 59 to be a selected development area in terms of section 44 of the Land Act 1979. The letter provided a motivation for the request. It referred to advice received by the LADB from its architects and other professional advisers that traffic congestion on Kingsway had become a serious problem and was likely to exacerbate in the near future. The letter went on to state that-

> "the planned development 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."

It may be noted that adjustments to boundaries is listed in the definition of "selected agricultural area" in sec. 2 of the Land Act as one of the purposes for which an area may be set aside as a selected development area.

The letter then went on to indicate the size of the development and the benefits that would accrue to Maseru once it was completed. There was no mention of any difficulties with the Appellant's sub-lease, and no reference to the fact that progress with the scheme might be hampered if no agree. ment was reached with the Appellant. It may also be noted that the Appellant was not informed of the application.

To revert to the negotiations between the appellant and the LADB. After the meeting in August, 1988, there was correspondence between them in which the Appellant spelt out the cost implications to it of moving its retail operation to new premises. Then in February, 1989, information appeared in the public media to the effect that the LADB was about to demolish the building complex. On 6 February, the appellant's attorneys sought on undertaking from first respondent that appellant's rights under the sub-lease would not be breached in any way. This elicited a reply dated 10 February, 1989, from the LADB's attorneys, advising that an application had been made for the entire building complex to be declared a selected development area in terms of section 44 of the Land Act.

In point of fact, unknown to the LADB's attorneys, that application had already been granted, and a declaration of sites 58, 58A and 59 as a selected development area had been published as Legal Notice No.17 of 1989 in the Government Gazette of 7 February, 1989.

The effect of that declaration, assuming it to be valid, was that the leases held by the LADB in respect of sites 58 and 58A lapsed automatically, in terms of section 44 of the Land Act. That in turn would have the effect of terminating the Appellant's sub-lease of portion of the building on site 58A. On 29 March, 1989, a fresh lease was granted to the LADB of all three sites, as a consolidated site, enabling it to proceed with its proposed development.

Against that background, the Appellant applied to the High Court for a temporary interdict interdicting the LADB and the Third and Fourth Respondents from taking any steps to demolish the building on site 58A, and from directly or indirectly interfering with its use and enjoyment of the said building, pending proceedings which it intended instituting to set aside the declaration by the Second Respondent of the said property as a selected development area. By consent between the parties, the First Respondent gave an undertaking which was embodied in a court order, not to take any of the actions which the Appellant sought to interdict if from taking, and the proceedings were converted into substantive motion proceedings to set aside the Second Respondent's declaration.

The Fifth to Eighth Respondents were joined as parties by virtue of their interest in the matter, but no relief was sought against them.

The attack which the Appellant made in the Court below on the Second Respondent's determination was based on a number of grounds, but all were rejected by the learned Judge. On appeal, the same grounds are repeated, but in view of the decision which we have come to, it is not necessary to deal with all of them, I shall deal only with those points which are necessary to enable us to decide this appeal.

The determination under sec. 44 of the Land Act.

This appeal is concerned with the manner in which the Second Respondent, as the Minister responsible for the administration of the Land Act, exercised the powers granted to him by sec. 44. The section reads:

> "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 (of the Act)".

The section takes a form which is frequently found in empowering provisions. It consists of two parts, the first of which is introduced by words such as "where it appears to the Minister", or "where the Minister is satisfied that ...", and the second of which goes on to provide that "the Minister may" do certain things.

As was pointed out by Corbett, J (as he then was) in S.A. Defence & Aid Fund & Another v Minister of Justice, 1967 (1) S.A. 31 (C), a case which has been frequently applied, a section drafted in this form requires two separate decisions to be made. The first part of the section introduces a jurisdiction requirement, which involves consideration by the Minister of certain matters. Depending upon the wording of the introductory phrase, this decision may be either objective or subjective.

If the jurisdictional requirement is not fulfilled, then the Minister may not proceed to exercise his powers. Fulfilment of the requirement, on the other hand, does not oblige him to exercise his powers; the section says he may then exercise his powers, not that he shall do so. He is vested with a discretion, and now he is called upon to make a subjective decision; should he or should he not exercise these powers?

Provided the Minister has appreciated that there is a second matter which he must consider, provided he has formulated the question correctly and applied his mind thereto, and provided he does not

misdirect himself in any way, the correctness of his decision on the second question cannot be challenged in a court of law. As Lord Brightman said in Chief Constable of North Wales Police v. Evans, (10821)1 WLR 1155 at 1173: "Judicial review is concerned nto with the decision, but with the decision-making process."

When we come to apply the above principle to an analysis of sec. 44, we can define the two matters which the Minister must consider as follows:

(i) is it in the public interest for the purposes of selected development that this particular area should be declared a selected development area?;

and (ii) if so, should he in the circumstances of the particular case with which he is dealing make the declaration?

It may seem at first blush that the considerations which are relevant to the determination of the first matter are the same as for the second, but this is clearly not so. The "purposes of selected development", which is a matter to be considered as part of the first question, are listed in the definition of "selected development area" in sec. 2. They are

(a) the development or reconstruction of existing built-up areas;

(b) the construction or development of new residential, commercial or industrial areas;

and (c) the re-adjustment of boundaries for the purposes of town planning.

A particular project for the development of a new industrial area, to take an example from paragraph (b) above, may require the consolidation of a number of existing plots. The new industrial area may be urgently needed for the development of industry in the Kingdom. It may be possible to achieve the necessary consolidation of plots by declaring the area a selected development area. In such circumstances, it can be said that it is in the public interest to declare the area a development area for the purpose of enabling the new industrial area to be developed. The jurisdictional requirement would accordingly be fulfilled, and the Minister would have power to make the declaration.

But there may be other ways to achieve consolidation of the existing plots. For example, title to all the plots may be vested in one person, who could simply apply for consolidation. Or, if title is held by a number of different persons, all of whom are willing to cooperate in achieving consolidation, they can simply apply therefor. In such a case the Minister should consider whether it is necessary to use his discretionary powers under sec. 44 to make a declaration.

What may well be a relevant matter to consider in any particular case is the number of plots which require to be consolidated, the number of different title-holders concerned, and the number of persons who may have to be given financial compsensation instead of being given substitute sites. This may identify a situation of such complexity that the declaration of the area under sec.44 may be found to be a speedier, more effective and more convenient way of clearing the way for the proposed development than negotiations. Where, on the other hand, there are only two title-holders involved, negotiation may be relatively quick and easy. Another matter which may be considered a relevant factor is whether, in addition to lessees who would be entitled to either substituted sites or compensation, there are sub-lessees who would not be so entitled, and who would be irremediably prejudiced by declaration. In such circumstances it would be relevant to consider whether such prejudice could not perhaps be avoided by the adoption of another reasonable course. These are only some of the matters which may need to be considered which would not have been considered in relation to the first question which the Minister has to ask himself. Similar considerations could arise where the readjustment of boundaries is required for purposes of town planning.

There is one situation where sec. 44 may be found particularly useful, and that is where the furtherance of a development scheme is obstructed by a person holding title to a plot in the area, who refuses to allow his plot to be consolidated or his boundaries to be adjusted. Declaration of the area as a special development area will extinguish his title, and this may be the only method availab

or the most efective method available, to facilitate the furtherance of the development. Mr. Dison, who appeared for the appellant before the Court, submitted that to declare an area one for selective development in such circumstances would amount to using the power conferred by sec. 44 for an improper purposes. I do not agree; a reading of the section suggests to me that the section may have been enacted specifically for this purpose.

But, as was very frankly conceded by Mr. Tampi who appeared for the Second Respondent, the section is a draconian one; persons who may have had title to a plot for years, with expectation of many more years of occupancy, and who may have invested large sums in developing it, may summarily be deprived of title thereto, with limited rights of compensation. Therefore the Minister, in the proper exercise of his discretion, should always consider whether it is really necessary to put an end to a person's title by making a declaration under sec. 44. That might involve consideration of being unreasonably obstructive, or whether his cooperation could not perhaps be obtained by means of a reasonable arrangement.

The decision-making process in this case

In the present case, the declaration under sec.44 was initiated by the request made in the letter written by the LADB on 21 September, 1988, to which reference has already been made. In view of the threats made by the LADB representatives at the meeting in June, 1988, and because the letter followed so soon after the inconclusive meeting of 17 August, Mr. Dison submitted that the

request for a declaration under sec. 44 was made for the express purpose of terminating appellant's rights as a sub-lessee. He contended that this was an improper purpose for two reasons: firstly, that the power conferred by the section could never be used merely to terminate the rights of a lessee or sub-lessee, and secondly, that in any event the LADB wanted to terminate appellant's rights, not because it had been found impossible to secure appellant's cooperation in arriving at a reasonable commercial solution, but because the LADB considered the terms of the sublease unfavourable to it.

This contention, which had also been advanced, albeit not as two separate points, in the appellant's papers, was strenously denied by the LADB. In an affidavit deposed to by Mr. Molelle, the Managing Director of the LADB, the following was stated:

> "Any allegation or inference that the existence of applicant's sub-lease had played any role in first respondent's request for the properties in question to be declared a selected development area, is strongly denied. The real and only motivation for the first respondent's request to the second respondent is, firstly, as set out in first respondent's letter to second respondent dated 21 September 1988, ... and secondly, the inclusion of the police site, namely plot No. 12284 - 358 into the whole ambit of the project."

The motivation set out in the letter dated 21 September, 1988 has already been referred to. Briefly, it related to the needs to accommodate traffic, the need to incorporate the police site in the project, and the consequential need to adjust boundaries.

In a supporting affidavit, Mr. C.R. Houseman, the senior partner in the firm of architects for the project, referred to the need to set back the building and to provide additional parking and concluded:

> "I am therefore respectfully of the opinion that the final solution to the problem, namely the declaration as selected development area of the combined properties of first respondent and the police and the relocation of the police facilities to a new site, was the most practical solution in the circumstances. It will now be possible to align the building, provide the required parking space and comply with the minimum distances between the site boundary and the building line, as required by the Department of Lands and Surveys."

In view of the conflict of fact in the affidavits as to what motivated the LADB in writing the letter of 21 September, 1988, it is not possible to find in motion proceedings that the appellant's suspicions as to the LADB's true motives were correct. The matter must be approached in the basis that the explanation given by the LADB is true.

If that is so, and if the Second Respondent considered the matter purely on this basis, then he would have had to ask himself, in relation to the second question raised by sec. 44, whether it was necessary to use the mechanism of a declaration under sec. 44 to secure a consolidation of three sites, and an adjustment of boundaries, when title to the sites vested in the very persons who were asking for the declaration. Why could they not achieve the described result by simple agreement between thmselves? It may be noted that the existence of a sub-lease would not prevent a consolidation of the three sites, or an adjustment of boundaries. The significance of the sub-lease was that, even after consolidation, the building on plot no. 58A could not be demolished while the sub-lease subsisted.

But it does not necessarily follow that the Second Respondent reached his decision to make the declaration for the same reasons as had motivated the LADB to write its letter. He had his own separate sources of information. As a Government Minister, he knew of the project and had discussed it with his ministerial colleagues. He says quite candidly in the affidavit which he filed that he had even discussed the project with the Minister of Finance, who is also the Chairman of the Board of Directors of the LADB. It is therefore possible that he was aware of the inconclusive negotiations between the LADB and the appellant, and that even if consolidation of the sites had been effected, the building on plot no. 58A could not be demolished until the appellant's sub-lease was terminated.

In paragraph 30 of his affidavit, the Second Respondent denied that in making the declaration under sec. 44, his "real purpose was to free the First Respondent from some unfavourable and unwarranted burden". That amounts to a denial of improper purpose in the second of the two senses in which the phrase was used by Mr. Dison in the course of argument. It does not however amount to a denial that he made the declaration in order to put an end to the sub-lease of the appellant, whom he considered to be unreasonably frustrating the progress of the development. That may or may not have been one of his reasons; the papers do not deal expressly with the point.

The second respondent had been invited in a letter written by the Appellant's attorneys before the commencement of proceedings to set out the reasons which had motivated him in exercising his powers, but he did not respond to this request. However in his affidavit he lists, at various places, the matters which he took into consideration; these were that the proposed development was to be on a massive scale, that it entailed the use not only of the existing bank premises (that is, plot n. 58), but also the adjacent plot (plot no. 58A); that the development was to be carried out by a parastatal organization; that it would generate additional resources to the LADB which it would plough back into agricultural development in the Kingdom; that it was his clear duty and obligation to ensure that the project became a reality; that the LADB needed extra space, and that therefore plot No.59 had to be included in the proposed development. In para. 20 of his affidavit he summed up in the following words:

"The philosophy behind Section 44 is, in my perception to enable the government to set aside an area for development or reconstruction of existing built up areas. I had no doubt that what LADB was attempting to do, constituted a complete redevelopment and reconstruction of the three plots in question. I was absolutely satisfied that the plans of LADB were very important for the development of Maseru in particular and the country in general. I had no hesitation in exercising the statutory powers vested in me by Section 44 in the interests of the country. It is also a fact that in terms of the Land Act 1979, parastatal organisations are entitled to preferential treatment to facilitate economic development."

Having read the whole affidavit, and having taken into account the letter of 21 September, 1988, which the Second Respondent had before him, I have come to the conclusion that the Second Respondent did not appreciate that in considering whether or not to make a declaration under sec. 44, he was called upon to decide the two separate questions which I have identified above, and did not properly identify the matters which needed to be considered in relation to either of the two questions he was called upon to consider.

The first question involved a consideration of whether one of the three specific purposes set out in the definition of "selected development area" would be furthered by the declaration of the area. The only specific purpose mentioned in the LADB's letter of 21 September 1988 was the readjustment of boundaries on site No.59. The second respondent appears to have considered this purpose, as also the need to consolidate the three sites. It would seem therefore that he did apply his mind to the first question.

But it is in relation to the second question that his explanation falls short of what I would have expected him to say had he properly appreciated what decision he was called upon to make. The explanation given by him is fairly full; there is no reason to suspect that it was not exhaustive. Nowhere does he state that he considered whether these purposes could be achieved only by a declaration under sec. 44. If the Minister, unlike the LADB, had in mind the fact that the appellant's sub-lease needed to be terminated before building could proceed on the site, then one of the matters which the Second Respondent should have considered was why the LADB had not been able to secure the cooperation of the appellant, and whether a declaration under sec. 44 was necessary to secure a termination of its sub-lease or whether prejudice to the appellant could not perhaps be avoided by the employment of other reasonable means. He does not say that he did so, and a consideration of the reasons which he does give for his decision indicates that he did not in fact give due consideration this question.

The failure to afford the appellant the right of being heard

Quite apart from the question whether the Second Respondent asked himself the correct questions and properly applied his mind to the consideration thereof, his decision is also attacked on the ground that he should have afforded the appellant the right to be heard on the question whether a determination should be made, but failed to do so. It is not in issue that the appellant was not afforded this right; the only issue before the court is whether it was entitled thereto.

The right to be heard is generally referred to by means of the maxim audi alteram partem; and the law regarding this right has recently been reviewed by Corbett, CJ in the case of Administrator Transvaal & Others, vs Traub and Others 1989 (4) SA 731 (A). At p. 748 he stated:

> "The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle states that, when a statute empowers a public official or body to give a decision prejudicing an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some cases, thereafter ...) unless the statute expressly or by implication indicates the contrary."

The principle of justice referred to is as much part of the law of Lesotho as of South Africa, and the formulation referred to above has frequently been applied here.

In considering whether the appellant had a right to be heard by the Second Respondent before he decided to make the declaration under sec. 44, the first question to be investigated is whether the appellant had a right which would be prejudiced by his decision. The respondents have contended that there was no such right because in Lesotho, all land is vested absolutely and irrevocably in the Basotho Nation and accordingly the concept of individual ownership of land is absolutely unknown in Lesotho. That contention does not in my judgment mean that the appellant can have no right which is prejudicially affected; the appellant is not required to show that it had a right of ownership in part of plot No.59 A; a lesser right would also entitle it to be heard, if this would be prejudiced by a ministerial declaration.

The Land Act, 1979, recognizes, in addition to "title" to land, which is constituted in the case of agricultural land by allocation, and in the case of urban land, by a lease or licence, a subsidiary right of occupation which may be enjoyed by a sub-lessee. Subsec. 6(1) declares that no person shall be capable of holding title to land, unless he falls within one of the seven categories mentioned therein, and subsec. 6(2) goes on to provide that:

> "Subsection (1) shall not be construed as prohibiting any person disqualified under it from holding any right subsidiary to a lease, including a sub-lease or mortgage ....." (Emphsis supplied)

Thus the Land Act itself recognizes that a sub-lease constitutes a right to the occupation and enjoyment of land.

Subsection 35(b) provides that a lessee shall be entitled, subject to obtaining the consent of the Minister, to sub-let the land leased to him. Not only does this give further statutory recognition to sub-leases, but it provides that the right only comes into being by utilizing the administrative procedures of the Land Act. Finally reference may be made to sec.42, which provides that when a lease has been terminated by the Minister, the sub-lessee is entitled, in certain circumstances, to succeed to the lease. This indicates that the right may well have an appreciable value.

The respondents contended that because the sub-lessee's rights derive from and are exercisable only against the lessee, and because he has no privity of contract with the State, he has no right which entitles him to be heard. This is not correct; no matter where a right derives from, if a determination under sec.46 will prejudice it, the holder of the right is entitled to be heard by the Minister - unless the right to a hearing is expressly or by clear implication excluded by the Act.

In argument before the Court, counsel for both respondents referred to a decision in the Appellate Division of South Africa, Pretoria City Council v Modimola, 1966 (3) SA 250 (AD), in which it was held that an owner of a property about to be expropriated under a section of the Group Areas Development Act has no right to be heard prior to the service upon him of the notice of expropriation. It was contended that considerations similar to those adopted in that case should guide this Court in holding that there was no right to be heard in relation to a declaration under sec. 44.

There are however two points to be noted in relation to Modimola's case. The decision in that was strongly influenced by the consideration that "in the absence of a provision

> prescribing a quasi-judicial enquiry as a pre-requisite to the exercise of a power of expropriation, the act of expropriation is a purely administrative act."

(see the judgment of Botha, JA at 263F - G). The classification of acts as being eighter administrative or quasi-judicial was for many years used as a guide as to whether a person affected by the decision had a right to be heard before it was made. But it is now recognized that this traditional classification

> "is no longer adequate and has become more and more unhelpful in deciding whether the rules of natural justice are to be applied, and more particularly that relating to the right to be heard."

(per Goldstone, J in Langeni & Others v Minister of Health & Welfare 1988(4) SA [illegible] (T) at 96 A). The recognition of the inadequacy of this test started with the English case of Ridge v Baldwin (1963)2 All ER 66 (H.L.), and although the South African courts lagged behind for some years, the inadequacy has now been recognized by the Appellate Division (Administrator, Transvaal v Traub 1989 (4) SA 731 at 762 F - 763 J). The approach now is to enquire whether the administrative act affects rights, or involves consequences to persons.

The second comment on Modimola's case is that there the court considered that

> "the circumstances or conduct of the person prejudicially affected by the decision taken were irrelevant or unrelated to that decision."

(per Botha, JA at 762 B - C). Leaving aside the question whether that would still today be considered as a valid consideration, it is nevertheless a factor which distinguishes Modimola's case from this one. Here, as I have already pointed out, it may well be relevant in considering why the LADB has not been able to secure cancellation of the appellant's sub-lease, to hear appellant on that issue. As Baxter says on p. 573 of his work on Administrative Law,

> "a decision-maker can never be sure that he is properly acquainted with all the considerations relevant to his decision unless he had heard the

It may also be noted that Modimola's case has been heavily criticized as not being in accordance with modern concepts of judicial review of administrative decisions (see Baxter, Administrative Law, 576, n.256). I am therefore of the view that the decision in that case should not be applied in this case.

Another argument advanced by counsel for the respondents was based on the use in section 44 of the words "appears" ("Where it appears to the Minister --), and "any" ("any area of land"). These were said to be words of such wide connotation as to give the Minister an unfettered discretion. A few comments are called for. Firstly, the word "appears" refers only to the existence or otherwise of the jurisdictional fact; that is to say, it relates only to the first and not the second question which the Minister must consider. Secondly, the word "any" relates only to the area of land, and indicates that the Minister is not restricted as to what land he may declare a selected development area. Thirdly, his discretion derives from the use of the word "may". Admittedly it is his discretion alone, but there is nothing in the language of the section to suggest that he may exercise his discretion in a manner which is contrary to the principles of natural justice.

I am therefore of the view that unless there are indications elsewhere in the Land Act which by implication exclude the audi alteram partem principle in relation to a declaration under sec.44, that principle would apply.

Mr. Tampi contended in the first place that it was excluded because it was not expressly conferred by the Section. But this is not the correct approach. The common law rule is that the right exists unless it is excluded. Natural justice is a prima facie presumption of the common law; there is no need to seek a positive implication from the words of the statute that the principles of natural justice are to be implied in interpreting it. (see the discussion in Attorney-General Eastern Cape v Blom & others 1983(4) SA 645 (AD) at 660 F - 662 J).

Respondents had also contended in the court below that the provisions of ss.13, 14,42(2) and 55 of the Act impliedly excluded the right of hearing in relation to a declaration under sec. 44, and this argument was accepted by the learned Judge. Sec. 13 deals with the revocation by the Land Committee of an allocation of agricultural land, and provides that before exercising its power, the Committee shall give at least 30 days written notice to the person affected of its intention to do so, setting out clearly the grounds upon which the allocation is to be revoked. The argument is that where the Act requires notice to be given in any situation, it says so expressly; accordingly, the absence of a provision indicates an intention that notice is not required. A similar argument was raised in the case of R v Ngwevela, 1954(1) SA 123 (AD). At p. 130, Centlivres CJ said,

> "The Crown in invoking the maxim expressio unius est exclusio alterius contended that as other section of the Act gave the person affected the right of hearing and as sec. 9 did not, it follows

> that such a person has no such right under sec. 9. It has frequently laid down in this Court that the maxim must be applied with caution.-----In this connection it must also be borne in mind that saving clauses are often inserted by the Legislature in order to quiet fears. -------"

On the strength of this statement, Mr. Dison contends that even without the provision for notice in sec 13(2), the grant of an allotment could not have been revoked without providing a hearing, and that the lawmaker inserted the notice provision purely as a matter of caution.

Section 13(2) does not in any event provide for a hearing: it merely provides for a notice, and indicates when it must be given and what it must contain. The right to a hearing appears to have been taken for granted, and only the ancillary right of prior notice is dealt with. In my view, therefore, this provision cannot be said to exclude by implication the right to a hearing in relation to sec. 44.

Section 14 deals with the setting aside by the Minister of allocated lands for public purposes. It does not stipulate for any hearing or for any notice prior to the hearing. It requires the Minister to consult with the Principal Chief having jurisdiction in the area concerned, and to obtain the King's assent. It also provides that <u>after</u> the revocation has been cancelled, a notice must be served on the allottee, but this is a notice to vacate, not notice

of an intention to take a decision. There is in my view nothing in this section which, by expressly stipulating for something, impliedly excludes the same thing in relation to sec. 44. On the contrary, there are some provisions in this section which could be used to support an argument that in relation to a revocation under sec. 14, the right to a hearing is by implication excluded. Those features do not appear in sec. 44, and if anything is to be implied in relation to sec, 44 by reason of the differences between the two procedures, it is that the right to a hearing is excluded in sec. 14, but not in sec. 44.

Section 54 is the equivalent section for setting aside for public pruposes land held under a lease, that is, an area of urban land; and contains the same provisions as sec. 14. But in this case there is an additional requirement, which is set out in section 55: prior to the publication in the Gazette of the "declaration notice", the Minister is required also to cause a notice to be served on any person known to be in occupation of the land, or to have an interest therein. It should however be appreciated that a declaration notice is published only after the declaration under section 54 has been made. Its purpose is to advise the person in occupation of the date on which the land is to be surrendered by him, and it also contains details of the amount of compensation offered and how it is assessed.

Section 42(2) deals with the case where a lease is terminated and provides that the notice of termination must be served not only upon the lessee, but also upon any sub-lessee or mortgagee. This notice of termination clearly has nothing to do with a right to a hearing; its purpose is to notify the sub-lessee and mortgagee of

the fact of termination, because this gives them certain rights in relation to taking over the lease. In my view it affords no basis for the implication that a person who is prejudicially affected by a determination made under sec. 44 has no right to be heard before the determination is made.

It follows that in the absence of any express or implied provision to that effect in the statute, there is such a right to be heard. As this right was not accorded to the appellant, a person whose rights as a sub-lessee were prejudicially affected thereby, the determination was not made in accordance with the principles of natural justice, and would on that ground also be liable to be set aside.

Locus standi

I have refrained until now from dealing with an argument raised in limine by the respondents, namely, that the appellant has no locus standi to bring this application. In his opposing affidavit Mr. Molelle supports the objections by the following passage:

> "I have been advised that a review of administrative proceedings lies at the instance only of a person who has sufficient interest in the proceedings. The policy of the law is to exclude from litigation persons whose interest is academic or indirect, and who are not themselves touched by a direct and real grievance which needs to be remedied."

As a statement of law this is sound, but to suggest that the appellant in this case is not "touched by a direct and real grievance" is to lose sight of the facts and matters set out above. Thee is in my view no substance in the point.

Conclusion

The conclusion I have reached is accordingly

(i) that the Second Respondent misdirected himself in exercising his discretion whether or not to make a declaration under section 44 of the Land Act, in that he did not appreciate that he needed to consider, as a matter distinct from public interest, whether, bearing in mind the irremediable prejudice that the declaration would cause to the appellants, the declaration was the manner in which the public interest could best and most reasonably be served; and did not apply his mind to this question;

and (ii) that the appellant as a person who would be prejudicially affected by the declaration, had a right to be heard before it was made, and as it was not afforded this right, the manner in which the declaration was made was contrary to the principles of natural justice.

On both these grounds, the appellant is entitled to an order setting aside the declaration. In view of this conclusion, it is not necessary to deal with any of the other grounds relied upon by the appellant.

It is accordingly ordered:

(1) That the appeal is allowed with costs, which are to be paid by the First and Second Respondents jointly and severally;

(2) That the order of the court a quo is set aside, and the following order is substituted therefor:

(a) that the declaration by the Minister of the Interior of a selected development area consisting of Plot No's 12284-024, 034 and 358, Maseru Central, is published by Legal Notice No.17 of 1989, is set aside;

(b) that the Applicant's costs are to be paid by the First and Second Respondents jointly and severally.

Signed: .....
S. AARON
JUDGE OF APPEAL

I agree: Signed: .....
C. PLEWMAN
JUDGE OF APPEAL

I agree: Signed: .....
L.W.H. ACKERMANN
JUDGE OF APPEAL

Delivered at MASERU this 26th day of January, 1990.

For the Appellant : Mr. Dison
For the Respondents : Mr. Tampi