CIV/APN/386/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

SEBOKA TLELE-TLELE	1ST APPLICANT
REALEBOHA NKOKO	2ND APPLICANT

VS

NTSOKOANE SAMUEL MATEKANE	1ST RESPONDENT
MINISTER OF INTERIOR	2ND RESPONDENT
COMMISSIONER OF LANDS	3RD RESPONDENT
DEEDS REGISTRAR	4TH RESPONDENT
HIS WORSHIP MAGISTRATE (THABA TSEKA)	5TH RESPONDENT
ATTORNEY GENERAL	6TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu, on the 1st day of August, 1994.

This application was brought *ex parte* for an order in the following terms:

"1. That a RULE NISI be issued and return-

able at the time to be fixed by this Honourable Court, calling upon the respondents to show cause (if any) why:-

(a) Strict compliance with the Rules of Court shall not be dispensed with;

(b) The proceedings in CC. 36/91 pending at Thaba-Tseka Magistrate's court shall not be stayed pending the outcome of this application.

(c) 1st respondent shall not be restrained from interfering in any manner whatsoever with plot No. 39361-040 pending the outcome of this application.

(d) The declaration by the 2nd respondent of a selected development area consisting of Plot NO. 39361-040 Thaba-Tseka published by legal notice NO. 123 of 1987 shall not be set aside as invalid and of no force and effect;

(e) Lease NO. 39361-040 shall not be cancelled;

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2. Cost of this application against such respondents who shall oppose same;

3. Further and / or alternative relief;

4. That prayers 1(a), 1(b) and 1(c) operate with immediate effect as an interim order pending the outcome of this application."

A *Rule Nisi* was issued which must have been extended several times, but at one time lapsed. It was revived on the 1st November, 1993. The matter was eventually argued on the 15th June, 1994.

The application is an opposed one and opposing papers were filed.

At the time this application was brought ejectment proceedings were pending against First Applicant at the Thaba-Tseka Magistrate Court in CC. 31/91.

First Respondent is a holder of a Lease No. 39361-040 for a plot in Thaba-Tseka which First and Second Applicants are occupying. Consequently (basing himself on this lease) First Respondent issued ejectment proceedings against Second Applicant before the Magistrate's Court

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Thaba Tseka. First Applicant is asking this Court to cancel this lease.

The Second Applicant has really no title to the land in question. First Applicant has purportedly sub-divided the land which is the subject of this dispute. First Applicant claims he agreed to transfer a portion of this land to Second Applicant. There is no dispute about the fact that such an agreement is a nullity as it was made with the consent and involvement of the land allocating authority.. Second Applicant cannot have the right to use and occupy that land unless the land allocating authority allocates that portion to him.

In Lesotho there is no individual ownership of land. The land belongs to the people as a whole. The King or of late the Government holds the land in trust for the people. The Chiefs and their land committees continue to allocate land except land that has been selected as a development area that falls directly under the administration of the Commissioner of Lands and the Minister of Interior.

Considerable confusion has been caused by the grafting of Ministerial administration of land selected for development over the land administration that existed before 1979. The first attempt at systematising land

allocation was made through the *Land Procedure Act of 1967*. The customary land allocation practices in the *Land Procedure Act of 1967* had been preserved as much as possible save that records were to be kept and the chief was to be helped by a committee and revocations of rights to land could only take place after a hearing. This was followed by the *Land Act of 1973*. In June 1981 the current *Land Act of 1979* came into force. It ushered in the current land administration by consolidating and improving existing land law and introducing the Selected Development Areas for residential, business planning and agricultural purposes.

By custom every householder is entitled to have a piece of land on which to erect his dwelling and to have a piece or pieces of land to farm in order to subsist. The population is increasing rapidly and already the land available cannot meet this expectation. The legislature has not yet addressed this issue. The *Land Act of 1979* tries to improve the existing land administration and introduces *Land Tribunals* to settle disputes. In general, the existing law is left largely as it used to be save that it is consolidated. Expropriation of land for public purposes under *Part VI* of the *Land Act 1979* is nothing new. What the act does is merely to improve and clarify procedures that have been in existence for the expropriation of land. There is unfortunately the tendency to confuse *Part VI* on land required for public purposes and *Selected Development and Selected Agricultural Areas* under

Part V of the *Land Act of 1979.*

The real innovation in our land administration is the *Selected Development Areas* and the *Selected Agricultural Areas*. Reading *Part V* of the *Land Act* of 1979 as a whole (section 44 included), the inescapable conclusion is that it was intended to improve the quality of life of localities as a whole. It is not primarily intended to dispossess people of their rights and interests over land. The *Selected Development Area* need not be declared if the cooperation of individuals can be secured by persuasion. *The Selected Development Area* should be declared to overcome selfish and unreasonable obstruction of a project devised and designed for the good of all in the particular area.

The Court of Appeal in the case of *Pages (Lesotho) (Pty) Ltd v Lesotho Agricultural Development Bank and Others* C of A (CIV) No.14 of 1989 (unreported) is against the tendency to seize the lands of people through the *Selected Development Area* procedure merely because the Minister may grant substitute titles to the people whose titles have just been extinguished. The Court of Appeal has upheld and re-affirmed the rights of existing land allottees. It has put the Minister under an obligation to consult with them and thus make them willing partners in the intended development scheme unless their circumstances or behaviour makes such a step impossible.

To show that *Part V* was not intended to be a vehicle for wholesale dispossession by the Minister, we have to examine the *Land Act* itself.

The long title of *Land Act of 1979* states that the Act is intended

> "To consolidate and amend the law relating to land thus providing for:
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> (a) the grant of titles to land;
> (b) the conversion of titles to land;
> (c) the declaration of selected development areas and selected agricultural areas and titles therein;
> (d) the setting aside of land for use for public purposes;
> (e) the establishment of a Land Tribunal;
> (f) the grant of public servitudes, and for connected purposes."

My understanding of the *Act* based on the *ratio decidendi* of the Court of Appeal case of *Pages Stores (Lesotho) Pty Ltd v The Lesotho Agricultural Development Bank and Others* C of A (CIV) No.14 of 1989 (unreported) is that the existing land policy is geared towards the service of the existing occupants of land. This is obvious from the definition of "selected development area" in *Section 2* of the *Land Act of 1979*. In a selected development area, the intended development or reconstruction is in general intended for existing allottees therefore they should (as much as possible) be parties to the intended reconstruction or development. Similarly the

creation of servitudes and the readjustment of boundaries for purposes of town planning or even agriculture shows clearly that the development that is intended is for the existing allottees and others in the locality.

What Aaron JA seems to have clearly held in the *Pages Store (Lesotho) (Pty) Ltd.* case is that *Section 44* of the *Land Act* is an empowering provision. Therefore there are conditions precedent that must be fulfilled because the Minister can exercise the draconian powers under the Act. They are in fact to put in Aaron JA's words, "a jurisdictional requirement". In other words implicit in the statute is that the Ministers should use those arbitrary powers reasonably when the situation calls for such an action. If this awareness is not displayed, then,

> "the jurisdictional requirement is not fulfilled, then the Minister may not proceed to exercise the powers." Aaron JA observed.

The way I see it acting oppressively and without due consideration of the rights of existing allottees and other people who have an interest within the selected development area, is not to act in the public interest.

Not only should the Minister in this case objectively determine whether it is in the public interest to develop the particular area, he has also to determine whether or not the declaration of a selected development area is his

only option.

While the Court should not substitute its own discretion for that of the Minister in matters of administration, the Court's duty is nevertheless to see that the Minister uses the powers conferred by statute for the purposes they were intended for by the legislature. The entire *Part V* of the *Land Act of 1979* is not meant to be a means of despoiling the people who have rights over land. The aim is, as much as possible, to involve people who already had rights over the land selected for development in the intended development scheme.

In other words, the aim of *Part V* of the *Land Act of 1979* is not to take away land from one person who is an allottee (in order to give it to some one else) so that this new occupier can be the one to enjoy the fruits of that development. The understanding I have is that the Minister is obliged to make the existing land occupiers the beneficiaries of any future development scheme that he might embark upon in the public interest (unless that is unavoidable). This happens where such a person or people have rights that cannot be reconciled with the development scheme. In that event the Minister is obliged to adopt draconian measures by declaring a *Selected Development Area* and see that the existing allottees are compensated to the extent that their right over land have been affected. Among the options open to the Minister is to

grant the person affected substitute rights or both substitute rights and compensation.

Courts have repeatedly said they are not supposed to interfere with the exercise of Ministerial discretion so long as it is exercised in the manner that the legislature directed. This area is not free from complications. Where the Minister exercises his powers whether objectively or subjectively, the courts should not substitute their discretion for that of the Minister, so long as he is doing what the legislature authorised and in a manner that the legislature had in mind. The problem that always has to be overcome is that there are other rights which are protected by law which cannot just be disregarded by the Minister unless the legislature specifically said they should.

While it is not the function of the courts to explore alternatives for the Minister and to choose the best way to achieve developmental objectives, Aaron JA in interpreting *Section 44* said the Minister must always see to it that other ways of achieving objectives are sought. If the Minister can reach the desired end with the cooperation of the allottees in the area ear-marked for development:

> "In such a case the Minister should consider whether it is necessary to use his discretionary powers under *Section 44* to make a

declaration."

(Vide *Pages Stores (Lesotho) (Pty) Ltd.* (supra)

This conclusion of Aaron JA followed logically from the fact that a "selected development area" extinguishes titles which the Minister might almost immediately thereafter have to substitute. For that reason it would be an abuse of the process to declare a "selected development area" as a matter of course, even if it is not necessary. It also follows that the legislature never intended the "selected development area" as a means presenting allottees with a *fiat accompli* of revocation of titles which can then be substituted by the Minister at will and on his terms. These powers are to be used if this is the best way forward.

Aaron JA in the *Pages Store (Lesotho) (Pty) Ltd.* case emphasised the public beneficial use of Ministerial powers under *Section 44* as follows:

> "There is one situation where *Section 44* may be found particularly useful, and that is, where furtherance of a development scheme is obstructed by a person holding 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 available, to facilitate development... Therefore the Minister, in the proper exercise of his discretion, should always consider whether it

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> is really necessary to put an end to a person's title by making a declaration under *Section 44.*"

It is clear from what Aaron JA said that the Minister is obliged (in exercising his powers under *Section 44)* to consider whether prejudice to allottees and occupiers "cannot perhaps be avoided by the employment of other reasonable means."

The fact that the Minister never even knew or even considered that there were existing allottees in the area intended for development, is an indication that he never assumed the exercise of developmental powers legally and properly. To put it in the words used in *Pages Stores (Lesotho) (Pty) Ltd v Lesotho Agricultural Bank & Others* (supra), the Minister did not fulfil the jurisdictional requirements that would enable him to have the power to declare a Selected Development Area.

The main thrust of Mr. *Nathane*'s argument, Counsel for Respondents, is that this Section clearly excludes the right to hear the person who is the current legal occupier and user of the and in the Selected Development Area. In the light of what has been said above, the right to be heard is implied. I would further add this right of an existing allottee is also the right to be a partner in the intended development scheme unless this is avoidable for good reasons.

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Titles to land continue to be registrable in terms of the *Deeds Registry Act of 1967* for some sites insofar as it has not been repealed by the *Land Act of 1979*.

The greatest problem that confronts and complicates land administration is that most of the land in Lesotho is not surveyed. Land is being surveyed on an *ad hoc* basis all over Lesotho. Private surveyors are employed to survey lands under the over-all supervision of Office of the Chief Surveyor. It is not unusual to find conflicts in the survey diagrams.

There is a practice of surveying lands without the knowledge and involvement of the local chiefs and other land allocating authorities. The Chief Surveyor then gives these site numbers. The Office of the Commissioner of lands then publishes them under the numbers that the Chief Surveyor's office has given them. It is not unusual for several advertisements of a similar type to appear in newspapers.

These advertisement of surveyed sites under new numbers which only the Chief Surveyor knows are completely useless. A publication that is envisaged is of land that is clearly identifiable and described in terms which the general public can identify with reasonable certainty. A

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publication that is none of these things is not for public information.. The reason being that it does not inform at all.

The *Land Act of 1979* gives the Minister whose right hand person is the Commissioner of lands extensive and arbitrary powers. The very nature of these powers invites strict interpretation to protect existing vested rights . See Cotran CJ in *Sebueng Malebanye v Sechabaseoele Goliath* 1974 - 75 LLR 276 at page 280 C where he said:-

> "It is a well known rule of construction that express and unambiguous language is absolutely necessary in statutes passed conferring new rights or takeing away vested rights."

There is no dispute that the land in question was an arable land that was in an urban area or what was once a rural area. This land was controlled by Land Committee under the Chairmanship of a chief. In terms of *Section 13 of the Land Act of 1979* and the repealed *Land Act 1973* and *Land Procedure Act of 1967* (now repealed) the existing holder had a right to be notified and heard before the land he had the right to use or occupy was taken away.

Dealing with *Section 9* of the Land Procedure Act of 1967 which is very similar to *Section 13 of the Land Act 1979* in the case of *Seeiso Sehloho v Tumo Majara* 1971 - 73 LLR 194 De Villiers A.CJ said the purpose of giving notice

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is:

> "That his right will be taken away unless within the specified period he indicates to the person giving notice that he wishes to make submission and representations as to why the intended revocation, should not be made...
> As the giving to the respondent a notice which I have indicated is required by *Section 9(1)* was a condition precedent to any lawful revocation of his rights, and no such notice was given, his rights have never been lawfully revoked and the chieftainess accordingly has no right to allocate the field to appellant."

The right of an allottee not only to be heard but to have a dialogue with the Minister before he can determine whether he should resort to what amounts to a form of moderate expropriation is implicit (if not express) in *Section 44* of the *Land Act of 1979*. See the *Pages Stores (Lesotho) (Pty) Ltd.* case.

The land had been allocated to First Applicant for agricultural purpose. I have already shown the obligation to consult over the intended development scheme was ever present. The use of powers under *Section 44* is available to the Minister only in the last resort. It does not mean holders of agricultural land can be despoiled and dispossessed by the Minister at will.

They are to be invited to co-operate with the Minister in order that they, like other people in the locality, can be participants in the development project, with this *caveat* that they cannot be allowed to frustrate a development scheme for the area as a whole. If they do, the Minister might be obliged to use the powers under *Section 44* to revoke their titles to land. During and after negotiations, the Minister has a duty to see these allottees are not prejudiced if that can be avoided. In the final resort the Minister is obliged to compensate those allottees.

Mr. *Hlaoli* argued that the whole surreptitious declaration of the "selected development area" was done for the sole benefit of First Respondent. There is no evidence on record signifying that it was in the public interest to do so. There is not even an evident scheme of development at all except that First Applicant's land was seized under the purported "selected development area" idea. The Minister's intention and objectives are unknown. No negotiations about the scheme and possible compensation could have been embarked upon because everything was done secretly. The Chief of the area and First Applicant never knew of the Minister's intention to take First Applicant's agricultural land.

A vague and ineffectual publication of a "selected development area" was published in the Government Gazette.

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I have already said it was virtually no publication at all because it completely failed to identify the land that was the subject of the publication, save perhaps to the surveyors. The public for whom the advertisement was intended could not benefit from it. It is instructive to note that First Applicant wrote the following letter Annexure "E" on 17/10/91 to the Commissioner of Lands:

> "It has come to my attention that by error Mr. Ntsokoane Samuel Matekane has been allocated a site on my field who appears now holding Lease No. 39361-040.
>
> I have been ploughing that field all the years even this year I was harvesting maize in that field. I am surprised now how a person can be allocated my field without my being advised or notified."

The inescapable conclusion is that the Minister of the day had completely misconceived his powers under *Sections 44 and 45* of the *Land Act 1979*. Publication in a gazette was being used as a method of seizing of people's land contrary to the Act. It does not help matters to find the Chief Town Planner writing to Chief Lands Officer annexure "F" dated 21-07-87 in which he says it has been decided to create a warehouse for Mr. Matekane at Thaba Tseka:

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" Attached herewith is an extract of a map showing site No.39361-040...; recommended as SDA in favour of Mr. S. Matekane."

I find Mr. *Hlaoli*'s argument unassailable inasmuch as this "selected development area" hardly meets what could be said to be the public interest annexure "F" states,

" it was finally agreed that a ware-house be created for him."

I do not think the Ministerial powers under *Section 44* are intended to create warehouses for specific individuals. The *Land Act* has in it, a built-in machinery to avoid discrimination and unfair preference of some individuals over others.

If indeed First Applicant has no rights as Mr. *Nathane* the First Respondent's Counsel argues, then *Section 21 and 22* have to apply. In that event the Minister has to call for tenders before the site can be allocated for commercial and industrial purposes. In that event, First Respondent would have had to compete with other businessmen before he could win the right to be allocated the site. The reason being that in terms of *Section 22(1)*,

"Where land available for grant of title is to be used for commercial or industrial purposes...the Commissioner may issue invita-

tions for tender in the Gazette or a national newspaper..."

This Section is to be read with *Section 21* which makes advertisement of sites peremptory. See the case of *Ntai Mphofe v Joseph Ranthimo & Another* C of A (CIV) No.22 of 1988.

It follows therefore, if the First Respondent's submission is correct and First Applicant indeed had no existing rights, then failure to follow the provisions of *Section 21* read along with *Section 22* makes his lease null and void. Therefore First Respondent's title cannot stand which ever way you look at it.

As First Applicant has succeeded and the unsuccessful intervention of Second applicant did not increase costs of suit substantially, I am of the view that it should not affect the question of costs in these proceedings.

In the circumstances I make the following order:

(a) The *Rule Nisi* is confirmed in the following terms:

(i) The proceedings in CC 36/91 based First Respondent's registered lease dated 6th July, 1989 referrable to site number 39361-

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040 are stayed.

(ii) First Respondent is restrained from interfering with First Applicant's rights over the land now styled plot 39261-040.

(iii) The declaration by Second Respondent of a selected development area consisting of plot No. 39361-040 Thaba-Tseka published in Legal Notice No. 128 of 1987 is set aside as being invalid and of no force and effect.

(iv) Lease No. 39361-040 dated 6th July, 1989 is hereby cancelled.

(a) First and Second Respondents are directed to pay the costs of this application.

W C.M. MAQUTU
JUDGE

For Applicants : Mr. T. Hlaoli
For Respondents: Mr. H. Nathane