CIV/APN/423/92

IN THE HIGH COURT OF LESOTHO

In the matter of :

JAMES MOLEFI LEMENA	Applicant
vs	
JOHN MAKHAOLA MAHOMED	1st Respondent
COMMISSIONER OF LANDS	2nd Respondent
REGISTRAR OF DEEDS	3rd Respondent
ATTORNEY GENERAL	4th Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 2nd day of December 1994

This country has always had a land tenure system. The system for allocation, derogation and registration of titles to land have progressed to what could be called a "progressive" system as recently as from the year 1965. The modern land systems as we find in South African, and European countries are by all appearances complex systems. This is evidenced by the operation of the various land related institutions. These are, land committees, surveyors, conveyancers and estate agencies. There is currently a trend of which banks are fighting to have

a slice of the business of conveyancing of land. It is a lucrative business.

The relevant legislation in Lesotho is to be found in Land (Advisory Boards) Procedure Regulation 15 of 1965, Land Procedure Act, No 24/1967, Land Husbandry Act No.22 of 1969 Land Paballo Rights Act No. 36 of 1969, Land Administration Act Number 16/1973. Land Act No. 17 of 1979 (including its various amendments), Deeds Registry Act No. 12 of 1967, Land Survey Act Number 14 of 1980 and valuation and Rating Act No. 10 of 1980. In this development which spreading over twenty five years, I would catalogue the following developments which are reflected in this various laws:

(a) Filing of Land Allocation applications, recording of minutes of proceedings. This goes with (b) and (c) above.

(b) Issue of letters of registration being form C or form D. ("The origin of the form is debatable.")

(c) Allocation or derogation of titles to land by the operation of Committees as against chiefs (acting alone) in the past.

(d) Registration certificates to title (Title Deeds).

(e) Systematic survey of lands.

(f) Application for and registration of land leases.

(g) Advertisement of land applications and plots.

(h) Procedure for Adverse Claims and the setting up of the Land Tribunal.

(i) Selected Development areas as established by powers of the Minister.

It is this system which has been brought about by this process an attempt to bring about an almost foolproof network of checks and balances is made. This is not always successful. This Court is daily being bought face to face with clever evasions of procedures and repression of facts by litigants. Indeed certain provisions in the laws have weakness, grey areas and fuzziness which can but only be exploited by citizens. One of the problems is the absence of discovering procedures for documents of

transactions by parties who decide not to oppose but to abide by judgement of Corut.

The Applicant has filed an application in this Court, in which he asks for an Order that the First Respondent be ordered to cease building operations on and to vacate the Applicant's business site situate at Khubetsoana, in the district of Berea. Furthermore, that the First Respondent be restrained from entering upon, occupying or using Applicant's aforesaid site in any manner whatsoever. Thirdly, that the First Respondent be restrained from holding himself out to be the owner of the said site. Fourthly, that the First Respondent be made to pay the costs of this Application. Fifthly that the Second Respondent be restrained from further processing the grant of any lease in terms of the Land Act in favour of the First Respondent and lastly, that the Second and Third Respondents pay the costs in the event of opposing this application. The application ceased being an *ex parte* application on an urgent basis for reasons which I suspect have to do with problems of overcrowding of cases and load of Court business. Only the First Respondent opposed the application. I presume others will abide by judgment.

The record in this proceedings is not a bulky one. It ran up to forty five pages until Mr. Molete for Applicant filed a supplementary affidavit sworn to on the 3rd May 1994, and the

Applicant himself having filed his Replying Affidavit only on the 3rd May, 1994. These two last mentioned affidavits were filed about fourteen months after the First Respondent's answering affidavit. It was served on the Applicant's Attorneys on the 1st March 1993. I was able to discourage both Counsels (Advocate Volker for Applicant and Mr. Mahlakeng for the First Respondent) from getting into a protracted argument about the admissibility of the two affidavits. In my discretion I allowed the affidavits and I gave permission to Mr. Mahlakeng to file additional affidavit in response to the two mentioned affidavits. But all the same I thought it was interesting that Mr. Volker made a statement to the effect that the affidavits were intended to fill "certain gaps" in the founding affidavit. I thought it was most untactical. In as much as I thought that the Applicant had indicated quite sufficiently his cause of action and the Respondent had shown quite sufficiently what his defence would be, I thought this addition by Applicant of bits and pieces of evidence did not give anyone an unfair advantage. That was not the end of the story. Applicant sought to have admitted a notice headed AMENDED ORDER PRAYED. This I came to understand to mean an application for amendment of prayers or what the amended prayers would look like after this Court has granted an order for amended prayers. The document contained the following (as again amended).

(a) The Second and Third Respondents are ordered to cancel and expunge from their records lease No. 13274-144 registered in the name of the first Respondent.

(b) The Second Respondent is ordered to do all things lawfully necessary to reconstitute plot number 13274-1220 in the records of the Second Respondent.

(c) The Second Respondent is ordered to do all lawful things necessary to issue a lease to the applicant in respect of plot number 13276-1220 once same has been reconstituted in terms of (b) above.

(d) After the Second Respondent has complied with (a) (b) and (c) above the Third Respondent is ordered to register the lease granted in favour of the Applicant in respect of plot number 132740-1220.

With or without this attempt by Applicant's Counsel the Court would still be entitled to enter any order which is consistent with the Applicant's claim which is proved under

further and\or alternative relief.

In order to begin to comment about the Applicant's title I refer to the paragraph six of the founding affidavit which reads:

"6

On the 27th May 1987 I was allocated a plot of land at Khubetsoana, in the Berea district which is a business site. I attach hereto a copy of my Form C in respect of this site marked Annexure A".

This Annexure A is to be found at page 9 of the record. It is this Annexure A which the Applicant applied to be substituted for another Form C (filed) dated the 23rd June 1980 which suggested that the allocation was made on the 22nd May 1987 as against the 27th May 1987. It was claimed that the 1980 Form C was filed by mistake. What a mistake. I thought I heard it quite clearly that the Applicant was saying : "My intention in attaching Annexure "A" was to support this allocation which I speak about in the paragraph `6' of my Founding Affidavit. It now happens that instead of attaching annexure A bearing dates of allocation 22nd May 1977, I had wrongly attached Annexure A bearing the dates of allocation the 23rd June 1980. This was a mistake. I have even gone into the Court file to withdraw the wrong Annexure

A. I ask that the Court Annexure "A" be attached to my affidavit." Having explained the reason why he attached a wrong Annexure A, the only thing that remains is to explain the difference between what he has in the paragraph 6 and why it does not tally with the allegedly correct Annexure "A". I would still quarrel with an attempt to substitute the date of allocation contained in the said paragraph 6. Only the Applicant knows why he has the two Form Cs seemingly for one site. There is this attempt to explain things which I would regard as inelegant and also inclined to be unreliable. This is to be found in paragraph two of the Applicant's Replying Affidavit. It says:

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"AD Para 3

I repeat that the averments in paragraph 6 of my founding affidavit. It is plain form annexure A to my founding affidavit that I was allocated the land referred to therein on 25th May 1977 under the provision of the 1973 Land Act. In as much as para 6 of my founding affidavit alleges that the land in question was allocated to me on 27 May 1987 this is an error. The true position is as alleged above and as is apparent from annexure A to my founding affidavit."

I am sure that the parties' Counsels would be able to see what the significance of this confustion. Its significance cannot be lost to this Court when regard is had to the provisions of Section 15 of the Land Act No.20 of 1973 which reads:

"15 (1) A Chief who makes an allocation of land or grand of an interest or right in or over land to any person or persons shall issue or cause to be issued a certificate which shall -

(a) in the case of land in a rural area be substantially in accordance with Form `C' of the Schedule; and

(b) in the case of land in an urban area be substantially in accordance with Form `D' of the Schedule.

(2) A person to whom an allocation or grant of an interest or right in or over land has been made in respect of land -

(a) situated in an urban area; or

(b) situated in a rural area for commercial or

industrial purposes,

shall cause such allocation or grant to be registerd in accordance with the provisions of the Deeds Registry Act 1967.

(3) Every Chief shall keep or cause to be kept a register of all allocations of land or grants of any right or interest in or over land made by him. Such register shll be substantially in accordance with Form `F' of the Schedule. (my underlining)

There is no doubt that the scheme of procedures in the above provision is such that there ought to be no confusion as to dates of allocation. For the very reason that the registration in terms of the Deeds Registry Act 1967 was debated in arguments of the Counsels, it is useful to quote the Section 15(2) the said Act which reads"

" Every person or body holding a certificate issued by the proper authority the occupation or use of land shall within three months of the date of issue of the certificate apply to the registrar for a registered certificate of title to occupy or use." (My underlining) This was not done. The Court was not told of the reason why this was not done.

My mind is settled that the applicant's title is highly debatable, to say the least. But it is the same thing as to say that the Applicant did not have any rights to the site at all. Let us see what probabilities the next two paragraphs will show.

The Applicant and the First Respondent have known each other for a considerable time. There has also been a dispute relating to the disputed site under High Court Case Number CIV/T/351/87 concerning an alleged agreement for sub-division of the site which was claimed by the First Respondent as Plaintiff against the Applicant. The action is still pending. The Applicant's response to the claim is that the First Respondent was merely contracted to put a fence around the site thus acknowledging the site to be the Applicant's. The paragraph seven of the Applicant's founding affidavit acknowledges that claims for M22,000.00 and cancellation of contract are still pending. It is interesting to note that this First Respondent in the paragraph 4 of his opposing affidavit refers to a written contract between the parties dated the 22nd March 1993. The said contract records firstly, that the site should be surveyed and divided into equal parts in the names of both parties. Secondly, the Applicant was to repay a sum of M1,750.00 to the First Respondent on the date of the 22nd March 1983. The agreement also endorsed that the title was in the names of the present Applicant.

Again there is pending a case number CIV/APN/264/92 in this Court in which the present Applicant sought to interdict the First Respondent because of the alleged interference with the site. It is this application which revealed that the First Respondent had been issued with a land lease to plot no. 13274-1220 of Khubetsoana, Maseru Urban area. It is this circumstances of the parties' agreement which I have just referred to and the issue of the lease which indicate quite clearly that there is what more than meets the eye in this matter. But as all lawyers know, it is only a public right cannot be abrogated by private agreements, for it axiomatic that anything done contrary to statutory or customary law is void. The law does however not countenance the conduct of people who dabble in illegalities. Even then there would be no doubt that the Applicant was in occupation of the site.

It is true that on or about December 1987 Applicant applied for a lease, whereupon he was advised to get services of a private surveyor. I have no reason to disbelieve the Applicant that he duly got the services of a private surveyor. I would again have no doubt in believing that the First Respondent objected to the issuing of a lease to the Applicant on the ground that "because he is taking my site as well. I would humbly welcome an investigation to come and show how I am entitled to this site", as annexure C1 does show. (My underlining) The

Second Respondent never bothered to mount even a cursory inquiry even despite what I would regard as a clear cue shown in the annexure C1. The Second Respondent should have inquired as to what right the Applicant had. In the circumstances Applicant says that he waited and assumed that his application would be processed in the usual manner. I believe that the Applicant made several inquiries from the offices of the Second Respondent as to the progress made his application for registration of a lease. He also instructed his lawyers to make inquiries on his behalf.

Maseru urban area is an amalgamation of what used to be the Khubetsoana rural area the original Maseru City under the Principal Chief of Matsieng, part of Qoaling and Thamae are under the Principal Chief of Thaba-Bosiu, part of Qoaling and Thamae area under the Principal Chief of Thaba-Bosiu, the whole of Sebaboleng, Khubetsoana and Mabote under the Chiefs of Majara and Thaba-Bosiu (see legal notice No.14 of 1980). The Mabote selected Development Area declaration (within which is the Mabote Development Project) is within the Maseru Urban Area (under a Selected Development Area (SDA)) which was created by the Minister for the plot no. 13274-1220 Khubetsoana, Maseru Urban Area on the 12th April 1991. It appears from the map annexed to the affidavit of M. Molete there are six sub-plots in a block. These sub plots are 1414, 1415, 1416, 1417, 1418 and 1419. It appears that this First Respondent has been given a land lease

in respect of the sub-plot 1414. His lease number is 13274-1414. It could be the Selected Development Area belong to the whole block area: There is no doubt that although there is confusion in the office of the Surveyor General about the plot no. 1374-1220, what is considered (by the Applicant) to be his site has been affected the S.D.A. Some accurately suggestive words would be that it has been eaten up or swallowed up.

There is no background information as to why the Minister arrived at his decision to declare an SDA on the Applicant's site. What was the Minister's motivation? This should assume importance when regard is had to the following factors. Firstly, the admission by the First Respondent that he has a sub-division agreement with the Applicant concerning the same site. Secondly, that he objected to the Applicant being granted a land lease to the same site and thirdly that this plot belongs to him in terms of a land lease number 132774-1414 issued to him by the Commissioner of Lands and duly registered in the Deeds Registry. If ever there is anything which appears to be the reason why the site came to be registered in a lease in favour of the First Respondent it is the bolstering of his claim, in competition with the Applicant. What other reasonable view can one hold? So that at the end of the day the inquiry is not only whether the Applicant had title to the land, it is also what are the lawful reasons for this grant of title to the First Respondent by the

Minister.

The other question or main consideration will have to be whether or not the Minister in declaring a selected development area was enjoined to give the Applicant a hearing in the well known sense of the principle of natural justice otherwise commonly called *audi alteram partem*. Guided more by precedent (if not by principle) I intend to rely on the two cases of the Court of Appeal of Ntai Mphofe vs Joseph Ranthimo and Attorney-General C of A (CIV) No.22/1988 per Schutz P 28th August 1989 (Mphofe's case), the case of Pages Stores (Lesotho) (Pty) Ltd vs Lesotho Agricultural Development Bank and Seven Others, C of A (CIV) No.14 of 1989 (per Aaron JA) 26th January 1990 (Pages cases) and Seboka Tleletlele and Another vs Ntsokoane Samuel Matebane and Five Others per W.C.M. Maqutu J 1st August, 1994 (Tleletlele's case). From this Ntai Mphofe's case I am able to distil the following important principles:

(a) When allegations are sparse and insufficient a claim based on allocation cannot succeed and if the party is a Plaintiff a proper order is that for absolution.

(b) Where an allottee or a person has a certificate of allocation issued in terms of

wither Land Procedure Act 1967 or Land Administration Act 1973, in respect of land in urban area or land situated in rural area for commercial or industrial purposes such person shall within three months apply for a registered certificate failure of which shall render the certificate null and void and of no force and effect with the consequence that "the rights of occupation and use shall revert to the owner of that land, being the Basotho Nation."

(c) Where a title has lapsed or "fizzled" or has been extinguished by operation of section 15(4) of the Deeds Registry Act (as replaced by section 3(b) of Act 34 of 1967, there is no question of its being converted into a lease." There was no right which could be converted.

(d) Where the title has been extinguished as referred to in (b) and (c) above, the question of operation of section 82 of the Land Act (dual allocations) on the fact of occupation or improvements made becomes

empty and non effectual and does not feature.

(e) Where there are no titles or rights to land there are no extant (existing) rights to be extinguished in terms of section 46 of the Land Act.

(f) Section 46(1) provides for entitlement to exchange (of rights) for a lease, if the rights are consistent with the scheme (substitute rights).

From the Pages' Case I would distil the following principles:

(a) The Section 44 of the Land Act introduces a jurisdictional requirements, which involves consideration by the Minister of certain matters, "which may be either objective or subjective."

(b) Depending on the fulfilment of the first requirement, the Minister may then exercise his discretion which enables him to exercise

his powers, which amounts to a subjective decision.

(c) The correctness of the Minister's decision cannot be challenged in a Court of law provided he has formulated his question correctly and applied his mind thereto provided he does not misdirect himself in anyway.

The matter which the Minister must consider are well illustrated in the Pages cases (see pages nine to twelve). What is very clear in the present case is that the Minister was motivated by none of the salutary principles enunciated in Pages' case. Here there was no question of consolidation of titles or boundaries, development of an industrial area, adjustment of boundaries due to complexity of the terrain, no obstruction, no matter of expediency (speed) or any considerations of convenience. (a) The power in section 44(a) can never be used merely to terminate the rights of a lessee or sub-lessee. (b) It was not demonstrated that it was difficult to get the co-operation of the Applicant. (c) There was no demonstration of any motivation behind the Minister's action whatsoever. It is not faciful to conclude that the real purpose of the Minister was to give the First Respondent a right in the site, in the face of a

dispute and also bearing in mind the contentious nature of the matter.

If I were to conclude this judgment now I would say that the nonchalant and the cavalier way in which the Minister has gone above the matter is unparalleled. I say this, speaking about instances of matters that have been brought to the attention of our Courts flowing from the Minister's declaration of the SDA under cloudy circumstances. This is more so assuming that he must have been aware of the relationship between the Applicant and the First Respondent in connection with this site. It means that the Minister took sides and used his powers to support one side as against the other. It is most unwholesome. I have no hesitation in deciding that the Section 44 was used for an improper purpose for the benefit of the First Respondent and not for a public purpose. There has never been any doubt that the section is draconian. This is more so when used for improper purposes.

On the facts there is no denying that the Second Respondent consistently neglected attending to correspondence and inquiries from the Applicant. The receipt of the letter annexure DDD from the Second Respondent is denied by the Applicant. The letter is dated the 19th February 1992 and it reads:

" Please refer to your letter dated 10th September 1991.

We have found that your client's interest in Land Act lies or is situated within Mabote Urban Project. Mabote was declared a Selected Developments with the area in 1981. All Land Act document within this area are processed by the Director of Mabote Project.

May you kindly forward your inquiries to the said Director. Find hereto attached a copy of a memo from Mabote Project. One would feel that this reaction by the Second Respondent clearly amounts a form of passing the buck if not a form of damage repair. One would say, for the reason that at no time was the Applicant called at the critical time, the critical time being when his title was removed from him and a lease given to the First Respondent he was not given a hearing. Furthermore, nothing gives any impression at all that the Minister considered the Applicant at all in his exercise of his powers. Indeed there was a requirement and a need that the Applicant should have been consulted with a view to discovering the nature of the problem and finding a solution amongst the others afforded by the relevant part of the Land Act. I do recognize that at the time of the granting of lease to the First Respondent the Minister had already granted the Mabote Project SDA. Still this had been to

the detriment and prejudice of the Applicant's title, without reference to him. How can it be condoned?

The circumstances of the publication of a declaration of Selected Development Area are normally such that not sufficient information is given of the land described and the description given was never certain or full. The inescapable result is that no information is given at all. Even in instances such as the present such publication when made would only be evidence of the decision that the Minister has already declared the area under section 44.

I would have no hesitation in arriving at a conclusion that the Applicant was entitled to be heard by the Minister. I have pointed out the following ineescapable incidents. Firstly the Applicant applied for a lease and he was ignored and secondly the First Respondent even took steps to seek to prevent the Second Respondent from issuing out the lease. As to the principles involved in the entitlement of an allottee to be heard I would borrow the whole reasoning in Pages Case. As to this dimension of the nature and requirement of the notices in the Land Act, I would associate myself with the reasoning in Tleletlele's case which I found most instructive. I have indicated that I have found the Applicant's title most debatable. [But then the Second Respondent clearly acknowledges that the Applicant has rights

(see Annexture DDD)] Indeed this could have been reason why the Second Respondent ignored his application and proceeded with issuing the lease to the First Respondent. But then this should have been the reason why the Applicant should have been heard. As Baxter says on page 573 of his work Administrative Law (Quoted with approval in Pages case),

> " A decision maker can never be sure that he is properly acquainted with all considerations relevant to his decision unless he has heard the view of everyone involved."

I am concerned now with the objection that Mr. Mahlakeng made, namely that the Minister of Interior should have been joined. This objection was made for the following reasons:

Firstly it is the Minister who administer the section 44 of the Land Act and all the powers connected with the revocation of titles and granting of substitute titles. Secondly the prayers invoke the powers that only the Minister has without his having been cited. To the extend that Respondents do not have such powers it amounts to non-joinder of the Minister. I do not agree. It is only sufficient if the Attorney General is served in terms of the Government Proceedings and Contracts Act No. 4 of 1965, the relevant Minister is deemed to have been sued.

I am of the view that it has been established that the Applicant's site was within the area of the Mabote Project which was declared a selected development area. Again a selected development area was declared later as under Legal Notice No. 43 of 1991 presumably to benefit the First Respondent. Then the First Respondent was enabled to procure a lease document after the Minister had wrongly excercesed his discretion. I do so find. The are (to the First Respondent) was not declared for a public interest. The declaration of Mabote SDA did not take up account to Applicant's interest. I agree with the Applicant's submission that the said allocation by Second Respondent was improper and unlawful for the reasons outlined above.

Had there not been a Selected Development Area (which was for a public purpose) the Order that I make would have been substantially as prayed for in the amendment prayers. But then the Applicant should still have been consulted. The First Respondent seems to have contributed somewhat to great extent to the complication that resulted after the Selected Development Area (Mabote) by asking to be awarded a portion of Applicant's site. That he did so I find on all probabilities. It was for his own personal benefit. By all appearances he did not have a prior right other than the promises that he may have had for a sub-division from the Applicant. I do not make a definate decision on this one. As I have alluded the justice of the

matter does not call for the substantial grant of the prayer but for further and for alternative relief and with costs for the Applicant against the 1st Respondent.

I make the Order that consistent with Section 46 (1) the Land Act 1979 the Minister and the Second Respondent shall cause to be granted and allocated a site and all lawful rights of substantially similar dimensions as all factors shall allow plus damages (to be proved) equal to what the Applicant shall have expended on his original site.

T. MONAPATHI
J U D G E

2nd December, 1994

For the Applicant : Mr. Pheko (Webber Newdigate & Co.)
For the Respondents : Mr. Molapo (Mr. T. Mahlakeng)