C of A (CIV) No. 20/05

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

KHOTSO SEHLABI	**APPELLANT**
and	
LEETO KHOELE	**FIRST RESPONDENT**
COMMISSIONER OF LANDS	**SECOND RESPONDENT**
MINISTER OF LOCAL GOVERNMENT	**THIRD RESPONDENT**
REGISTRAR OF DEEDS	**FOURTH RESPONDET**
ATTORNEY GENERAL	**FIFTH RESPONDENT**

CORAM : RAMODIBEDI, JA
GROSSKOPF, JA
TEELE AJ

HEARD : 4 APRIL 2006

DELIVERED : 11 APRIL 2006

SUMMARY

Declaration of rights – Land Act 1979 – Sections 44 and 46 thereof – Interpretation – Declaration of Selected Development Area – Effect thereof.

JUDGMENT

RAMODIBEDI, JA

[1] The bone of contention between the parties in this appeal is a certain residential site situated at Sekamaneng. It is the case for the First Respondent that he was allocated this site on 4 March 1980. He holds a form C, annexure "LK1", as proof thereof.

[2] The case for the Appellant, on the other hand, is that he was allocated the site in question after it had been declared a Selected Development Area ("SDA") by virtue of Legal Notice No. 60 of 1984 dated the 18th day of May of the same year. Hence the Appellant contends that whatever rights the First Respondent might have had to the site in question, these were automatically extinguished by section 44 of the Land Act 1979. I shall return in due course to this aspect. It shall suffice at this stage merely to add that the Appellant duly holds a lease, annexure "LK2", registered on 13 May, 1998.

[3] The case started as an application on notice of motion in the High Court. The First Respondent sought relief couched in the following terms:-

"1. Declaring Lease Number 13274-1299 **SEKAMANENG, BEREA** as having been wrongfully and irregularly applied for by First Respondent and wrongfully, unlawfully and irregularly issued to First Respondent by Third Respondent;

2. Cancelling Lease Number 13274-1299 **SEKAMANENG, BEREA** issued by Third Respondent in favour of First Respondent;

3. Declaring Applicant as the lawful holder of all rights to and interest in plot Number 13274-1299 **SEKAMANENG, BEREA**;

4. Directing Respondents to pay the costs hereof;

5. Granting Applicant further and/or alternative relief."

[4] The court *a quo* granted prayers 2, 3 and 4 of the notice of motion.

Hence the present appeal.

[5] It requires to be stated at this juncture that only the Appellant has noted an appeal in this matter. The Second to Firth Respondents neither filed notices of intention to oppose the application in the High Court nor did they note any appeal to this Court. It seems fair to assume that they are prepared to abide the decision of the Court.

[6] In upholding the First Respondent's application, the court *a quo* made the following remarks:-

> "From the facts of this case it is clear that the applicant has held a valid title over the plot 13274-1299 at Sekamaneng, Berea since 4th March 1980. The SDA declaration of the 18th May 1984 purportedly made under section 44 of the 1979 Land Act did not have effect of extinguishing the applicant's title mainly because the formalities under section 46 of the said Land Act were not fulfilled. Once the Minister of Interior had elected to declare the residential area to be a selected development area, he was under a duty under section 46 to offer substitute rights. Failure to do so, affected adversely the rights of the applicant who as a result had a right to be heard before his rights can be said to have been extinguished and indeed nothing was offered by the Minister as he was duty bound to do; section 46 vests a right on the lessee to be consulted and some offer to be made."

[7] The Appellant challenges the judgment of the court *a quo* on two grounds only, namely, that:-

"1

> The learned Judge erred in law in holding as he did that the SDA declaration of the 18th day of May 1984 did not have the effect of extinguishing the 1st respondent's title.

"2

> The Learned Judge erred in holding as he did and finding as a fact that the formalities under section of the Land Act 1979 were not fulfilled. There was no evidence on record to justify the reaching of such a conclusion."

[8] As is apparent from the foregoing prelude, this appeal concerns issues of law concerning the land tenure system in this country and more particularly the relevant provisions of the Land Act 1979 ("the Act"). It is to these provisions that I now turn.

[9] Section 44 of the Act reads as follows:-

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

[10] More importantly, the purposes for selected development are contained in the definition of "selected development area" in section 2 of the Act. These are:-

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

(b) construction or development of new

residential, commercial or industrial areas;

(c) readjustment of boundaries for the purposes of town

planning.

[11] Section 46 in turn provides for compensation in these terms:-

> 46. (1) Subject to subsection (2) and to section 47, where the selected development area consists wholly or partly of land used for purposes other than agriculture, lesssees and allottees of such land shall be entitled to be offered in exchange by the Minister leases within the selected development area, for the same purposes as those for which they previously held the land, of the same plot with or without amendment of the original boundaries thereof, if this is consistent with the development scheme, or of any other plot.
>
> (2) Where the development scheme is such as not to permit the grant of a lease for the purpose for which the lessee or allottee formerly held the land, the lessee or allottee shall have the option ment (sic) scheme or of claiming compensation for being deprived of his lease or allocation."

[12] In Pages Stores (Lesotho) (Pty) Ltd v Lesotho Agricultural Development Bank and Others 1990 – 1994 LAC 51 at 55 this Court interpreted section 44, assuming its validity, as providing for an automatic lapse of any prior rights to the affected plot. The Court went further to fully elaborate on what may comprise relevant considerations in declaring an SDA. It is not necessary to repeat the exercise in this judgment. But the salutary remarks of the Court on page 58 thereof bear repetition:-

> "There is one situation where s 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 available, or the most effective 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 selected development in such circumstances would amount to using the power conferred by s 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 s 44. That might involve consideration of being unreasonably obstructive, or whether his cooperation could not perhaps be obtained by means of a reasonable arrangement."

[13] On 18 May 1984, as pointed out earlier, and acting in terms of section 44 of the Act, the Minister of the Interior declared the "New Mabote" area, which admittedly covers the disputed plot, an SDA per Legal Notice No. 60 of 1984, annexure "ML2". The Legal Notice reads as follows:-

"LEGAL NOTICE NO 60 OF 1984

Declaration of a Selected Development Area (New Mabote) Notice

In exercise of the power conferred by section 44 of the Land Act 1979, I,

Nehemia Sekhonyana Maseribane

Minister of the Interior, declare that the land described in the Schedule hereto in extent 845 hectares more or less shall comprise a selected development area pursuant to Part V of the Land Act 1979 at the date of this notice.

N.S. 'Maseribane
Minister of Interior

SCHEDULE

An unnumbered plot situated near HA MABOTE URBAN AREA as delineated on Miscellaneous plan No. 03/84 held in the office of the Chief Surveyor, Maseru."

[14] As to the effect of section 44 of the Act on an SDA and with reference to what is stated at paragraph [12] above, it is strictly

unnecessary to go beyond what this Court said in Pages Stores case (supra) at page 55, namely:-

> "The effect of that declaration, assuming it to be valid, was that the leases held by the LADB in respect of sites 58 lapsed automatically, in terms of s 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."

[15] But more importantly in so far as this appeal is concerned, it is necessary to bear in mind that there is no challenge to the validity of section 44 of the Act itself. Nor is there any challenge to the validity of Legal Notice No. 60 of 1984 based on the section. I consider therefore that until this section has been lawfully struck down or repealed, it shall continue to be the law in this country. Indeed it is perhaps not inappropriate to observe that in all the cases in which section 44 (or an SDA based on the section) has been raised, this Court, no doubt due to the singular importance of this section in the public interest, has consistently left it intact. Instead, the Court has stressed the importance of compensation in terms of section 46 of the Act. That is not to say, however, that an individual litigant may not challenge the application of the section on a case by case basis and on grounds such as whether the minister properly applied his mind to the provisions of the section or whether a particular litigant was afforded the opportunity to be heard before an SDA was declared in respect of his plot.

[16] With respect to the court *a quo,* there cannot co-exist, in my view, a lawful SDA in the public interest and an individual tenure on the same piece of land or plot. That would no doubt create chaos which is in turn a recipe for lawlessness. It is the fundamental duty of judicial officers to prevent all of these and thus preserve the rule of law.

[17] In the light of the foregoing, the conclusion is inevitable in my view, that the First Respondent's title to the disputed plot was extinguished by Legal Notice No. 60 of 1984. The First Respondent's remedy lies in a claim for compensation.

[18] For the aforegoing reasons, the appeal is upheld with costs. The order of the court *a quo* is set aside and replaced with the following:-

"The application is dismissed with costs."

_____
MM RAMODIBEDI
JUSTICE OF APPEAL

_____
I agree : FH GROSSKOPF
JUSTICE OF APPEAL

_____
I agree : ME TEELE
EX OFFICIO JUDGE OF APPEAL

For Appellant : Mr R Thoahlane
For First Respondent : Mr T. Matooane
No Appearance for Second to Fifth Respondents