IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 40/09**

In the matter between:-

MOSEBO MABETHA **APPELLANT**

and

MAKERENKANE MABETHA **1ST RESPONDENT**
THE COMMISSIONER OF LANDS **2ND RESPONDENT**
THE REGISTRAR GENERAL **3RD RESPONDENT**
THE MINISTER OF LOCAL GOVERNMENT **4TH RESPONDENT**
THE ATTORNEY GENERAL **5TH RESPONDENT**

CORAM: SMALBERGER, JA
FARLAM, JA
TEELE, AJA

HEARD: 8 April 2011
DELIVERED: 20 April 2011

SUMMARY

Land – Land Act No. 17 of 1979 – declaration of plot under s 44 as selected development area – setting aside of – absence of necessary jurisdictional fact.

JUDGMENT

FARLAM, JA

[1] The appellant in this matter instituted an action in the High Court against the respondents in which he claimed, inter alia, an order setting aside the declaration as a selected development area (in terms of section 44 of the Land Act No. 17 of 1979) by the fourth respondent, the Minister of Local Government, of plot 17684-184, which is situated at Lower Moyeni in the Quthing urban area, and the cancellation of the registration in favour of the first respondent of a lease over the plot granted by the Minister.

[2] The action was defended by the first respondent only. The Minister and the second respondent, the Commissioner of Lands, the third respondent, the Registrar-General, and the fifth respondent, the Attorney General, did not oppose

the relief sought and took no part in the proceedings, with the result that no evidential material was placed before the court by the Minister to justify or explain his action in declaring the plot a selected development area and thereafter granting a lease over the plot in favour of first respondent.

[3] It was common cause on the pleadings that the appellant was the only son of his father, the late Ntema Mabetha, who held title to the plot which had been allocated to him prior to 1966.

[4] The appellant alleged that he was his father's heir and that his father's interest in the plot passed to him after his father's death in 1980. He alleged further that after his father's death the first respondent unlawfully occupied the plot.

[5] The appellant also averred that the Minister's action in declaring the plot a selected development area, and the subsequent issuance of the lease document over the plot in favour of the first respondent, was unlawful and irregular in that they were not done in accordance with the provisions of the Land Act 1979 and because he, as an interested party, had not been given a hearing before the declaration was made and the lease document issued.

[6] In addition to seeking the setting aside of the declaration and the subsequent grant of the lease in favour of the first respondent, together with the consequential cancellation from the records kept by the second and third respondents of the name of the first respondent as the holder of the lease, the appellant sought, in prayer 5 of his declaration, an order substituting his name in the records kept by the second and third respondents for that of the first respondent as the lawful holder of the lease granted

by the Minister in respect of the plot.

[7] In his plea the first respondent raised a number of defences.

[8] The first was that the appellant's father transferred his interest in and right to occupy the plot to him during his lifetime and that he lawfully occupied the plot before the death of the appellant's father.

[9] The second was that the declaration of the plot as a selected development area and the subsequent grant of a lease over it in his favour had been done, as it was put, 'within the law and the spirit of the Land Act'.

[10] The third was a denial that the appellant was an interested party in view of the transfer by the appellant's father of his rights in respect of the plot.

[11] The fourth was the contention that if the appellant did have a right to the plot he lost such right under the Deeds Registry Act No 12 of 1967 because he had failed to register any certificate authorizing him to occupy or use it and because he had failed to cause to be registered the passing to him of his father's rights in respect of the land in terms of the Land Act 1979 after his father's death.

[12] The first respondent admitted in his plea that the appellant was his father's only son but pleaded that he had no knowledge as to whether he was his father's heir and put him to the proof thereof.

[13] The Judge in the court below, Peete J, found that the first respondent's defence that the appellant's father had transferred his interest in and right to occupy the plot to him could not succeed as it had been rejected by the

Magistrate's Court in an action which the first respondent had instituted against the appellant for his ejectment from the plot. The learned Judge based his finding on this point on the doctrine of res judicata, stating that this aspect of the case had been fully enquired into by the Magistrate.

[14] The Judge also found that the appellant's claim to be his father's heir was supported by the undisputed fact that he is the only son of Ntema Mabetha and in accordance with Sesotho law and custom he ought to have been designated thus by his family council. In this regard he cited Part 1, section 11 (1) of the Laws of Lerotholi and Poulter Family Law and Litigation in Basotho Society (1976) at 231. He stated further that the appellant was indeed confirmed as heir by the family in a letter in which it was noted that the plot, which had no Form C, had never been given away.

[15] The Judge, however, upheld the first respondent's defence that he had been validly granted a lease over the property by the Minister after the declaration thereof under section 44 of the Land Act 1979, which declaration the Judge held had extinguished such rights as the appellant had. The Judge, relying on the principle of regularity expressed in the maxim omnia praesumuntur rite esse acta (all things are presumed to have been done regularly), held that there was no good ground for declaring the lease issued to the first respondent invalid or declaring Legal Notice 165 of 1995, in which the Minister's declaration was published, ultra vires or as having been corruptly or irregularly issued. As a result of this finding the Judge dismissed the appellant's claim but he ordered that each party was to bear his own costs.

[16] Mr. Hlaoli, who appeared for the first respondent, did not challenge either in his written heads or in oral argument

before us the correctness of the trial court's finding that the appellant was his father's heir nor did he contend that the trial court should have found that the appellant's father had transferred his rights to the plot before his death to the first respondent. He submitted, however, that as long as section 44 of the Land Act 1979 exists all declarations that flow from it will remain valid and lawful. In support of this contention he relied on the decision of this Court in Sehlabi v. Khōeɬē and Others LAC (2005 – 2006) 400 and 404 I – 405 A. He contended that in that case this Court overruled its earlier decision in Pages Stores (Lesotho) (Pty) Ltd v. Lesotho Agricultural Development Bank and Others LAC (1990 – 1994) 51 in which a declaration made under section 44 was set aside.

[17] Mr. Hlaoli argued further that the appellant's father had lost his rights in respect of the plot nine months after the Deeds Registry Act 12 of 1967 came into operation in view

of his failure to apply to the Registrar of Deeds for a registered certificate of title to occupy or use the plot; for this submission he relied on section 15 (3) and (4) of the Deeds Registry Act.

[18] Mr. Hlaoli also submitted in the alternative that, if the appellant's father had not lost his rights to the plot, the appellant had done so because he failed, after succeeding to his father's rights, to comply with section 16 of the Act.

[19] The final point taken by Mr. Hlaoli was that even if the declaration under section 44 of the Land Act 1979 and the lease granted in favour of the first respondent were held to be invalid, the first respondent was not entitled to the relief sought in prayer 5 of his declaration because if the section 44 declaration were set aside and the prior rights of the appellant were accordingly not extinguished, the lease granted by the Minister would be invalid and it

would accordingly not be possible to grant an order substituting appellant as the lessee under an invalid lease.

[20] In my opinion there is no basis for holding that the appellant's father lost his rights in respect of the plot because of a failure to comply with section 15 (3) of the Deeds Registry Act, 1967.

Subsections (2), (3) and (4) of section 15 are relevant: they read as follows:-

> *"(2) Every person or body holding a certificate issued by the proper authority authorising 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.*
>
> *(3) Every person or body who prior to the commencement of this Act was issued with a certificate by the proper authority authorising the occupation or use of land shall likewise apply to the registrar within a period of nine months from the date of commencement of this Act for a registered*

certificate of title to occupy or use.

(4) Failure to lodge with the registrar the said certificate of occupation or use for registration in terms of sub-sections (2) and (3) within the prescribed period or within such extended period as the Registrar may allow (and the Registrar is hereby empowered so to allow extensions of that period) or within such period as the court may allow, shall render the certificate null and void and of no force and effect and the rights of occupation and use shall revert back to the owner of the land, being the Basuto

[21] The appellant's father acquired rights respect of the plot before 1966. It is common cause that no Form C existed. It is clear that no certificate was ever issued to him in respect thereof. It follows on its plain wording that section 15 cannot apply.

[22] There is also no basis, in my view, for holding that the appellant himself lost any rights he acquired from his father by virtue of the provisions of section 16 of the Act.

[23] As far as is relevant section 16 reads as follows:-

> '*(1) Every deed or agreement transferring rights in or to immovable property shall be registered in the deeds registry.*
>
> *(2) Such registration shall only be effected after the proper authority has consented in writing to the allocation to the transferee of the right to occupy and use the land on which that immovable property is situated, which consent shall not be unreasonably withheld.*
>
> *(3) Every deed or agreement transferring rights in or to immovable property shall be lodged for registration in the deeds registry within three months of the granting of the consent referred to in the preceding sub-section.*
>
> *(4) ..*
>
> *(5) Failure to lodge the said deed or agreement for registration within the prescribed period or within such extended period as the registrar may allow (and the registrar is hereby empowered so to*

allow extensions of that period) shall render the deed or agreement null and void and of no force and effect, unless otherwise ordered by the court'.

[24] The appellant acquired his father's rights not by virtue of a deed or agreement but by operation of law, by succeeding to his father's rights as his heir.

[25] Once again on the plain wording of the section it does not apply in this case.

[26] I do not agree with Mr. Hlaoli's submission that the Pages Stores case (supra) was overruled in Sehlabi, (supra). As appears in para 15 of the judgment in Sehlabi (at 404 H-I) there was no challenge in that case to either the validity of section 44 or the legal notice issued thereunder which was considered in the judgment. Moreover Ramodibedi JA (as he then was), having said that Court had in previous cases consistently

left the section intact and had stressed the importance of compensation in terms of section 46, went on to say (at 405 A-C);

> '*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 SDA was declared in respect of his plot'.*

[27] It is accordingly necessary to consider the contention raised or behalf of the appellant that the declaration in this case was invalid. It is important to stress that the attack on the declaration was based on the contention that the Minister had used the powers conferred upon him under section 44, read with the definition of selected development area in section 2, for a purpose other than that authorized by the Act and in circumstances where facts necessary for the exercise of his discretion did not exist.

[28] The definition of 'selected development' in section 2 of the Act reads as follows:-

> ' "*Selected development area" means an area set aside under section 44 for:*
>
> *a) development or reconstruction of existing built-up areas;*
>
> *b) construction or development of new residential, commercial or industrial areas;*
>
> *c) readjustment of boundaries for the purposes of town planning'.*

Section 44 is in the following terms:-

> *'44 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'.*

[29] The area of the plot in question is 656 square metres. After the declaration was issued a lease over it was granted to the first respondent, who, according to the evidence, had initiated the process that led to the issuing of the lease and had produced a document purporting to be written to the Town Clerk on behalf of the local chief which included the following:-

> *"I hereby testify that the site next to Discount Super Market belongs to [the first respondent] and it is of time long ago which does not have Form C. I will be very thankful for your co-operation in this matter".*

The Town Clerk was the secretary of the local Urban Local Committee, which considered the matter and recommended that a lease be granted to the first respondent.

[30] The first witness for the appellant, Ms Lucy 'Mathetso Mosoang, who is a Chief Land Officer in the Land Survey and Physical Planning department in the Ministry of Local Government, gave evidence as to the procedure followed. She explained that as the site was a business site and the

applicant for a lease, the first respondent, did not, as she put it, have title, by which she meant, as she said later, a Form C or a title deed, the department applied to the Minister to declare the site a selected development area under section 44. The effect of this, of course, would have been to extinguish any prior rights which might have existed in respect of the site and would then have enabled the Minister to grant a lease under section 49 of the Act. This is what was done in this case.

[31] Section 44 was considered by this Court in the Pages Stores case (supra) at 56 H – 57 I, where the following was said:-

> '*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 <u>*SA Defence and Aid Fund and Another v. Minister of Justice*</u> *1967 (1) SA 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; 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*** *[1982] 1 WLR 1155 at 1173: "Judicial review is concerned not with the decision, but with the decision-making process."*

When we come to apply the above principle to an analysis of section 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 s 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 purpose of town planning.*

[32] In my view it is clear that there was no basis on which the Minister could have formed the opinion required on what was called 'the first matter' in this case. The area of the plot is 656 square metres. No development or reconstruction of an existing built-up area was contemplated nor the construction or development of a new residential, commercial or industrial area nor the readjustment of any boundary for the purposes of town planning. As Ms Mosoang candidly conceded, the purpose of the exercise was simply to enable a lease to be granted to an applicant who did not have a Form C or a title deed.

[33] It follows that the jurisdictional fact necessary for the exercise of the power under section 44 to declare a selected development area did not exist and the declaration and the legal notice by means of which it was made are invalid.

[34] It follows further that the rights which the appellant inherited from his father in respect of the plot were not extinguished and the lease granted in favour of the first respondent is also invalid.

[35] Mr. Mohau KC, who appeared on behalf of the appellant, conceded that Mr. Hlaoli was correct in submitting that the appellant was not entitled to an order in terms of prayer 5 of his declaration. He is entitled however under prayer 7, the prayer for alternative relief, to an order setting aside the lease granted in favour of the first

respondent.

[36] The following order is made:

The appeal succeeds with costs to be paid by the first respondent.

1. The order made in the court a quo is set aside and substituted therefor is an order in the following terms:

Judgment is granted in favour of the plaintiff as follows:

1. The declaration of plot 17684 – 184 situated at Lower Moyeni as a selected development area is set aside.

2. The lease granted in favour of the 1st defendant over the said plot is set aside.

3. The 2nd and 3rd defendants are directed to delete all

mention of the said lease from the records kept by them.

4. The 1st defendant is to pay the plaintiff's costs of suit.

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I.G. FARLAM
JUSTICE OF APPEAL

I agree: _____

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree: _____

M.E. TEELE
ACTING JUSTICE OF APPEAL

For Appellant: Advocate K. Mohau KC

For Respondents: Mr. T. Hlaoli