CIV/A /1/95

IN THE HIGH COURT OF LESOTHO

In the matter between

KHALAKI SELLO **APPELLANT**

and

PITSO PITSO **1ST RESPONDENT**
GEORGINA 'MATIISETSO MPOBOLE **2ND RESPONDENT**

J U D G M E N T

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge, on 18th day of October, 1996.

This is an appeal against the judgment of Maseru Magistrate's Court in a matter in which the Appellant issued summons against the 1st Respondent on 25th October, 1993 for ejectment from the Appellant's business site number B 21 situated at Cathedral Area in Maseru Urban Area. It is common cause that the said site was registered in the name of the Appellant in the office of the REgistrar of Deeds in June 1969.

It appears that the 1st Respondent entered appearance to defend on the same date the summons was lodged and on 1st November 1993 the Appellant lodged an application for summary judgment.

Then on the 2nd November 1993 the Second Respondent lodged an application for joinder alleging that she was the lawful

owner of the site in dispute and annexing thereto a photostatic copy of her lease dated 3rd May, 1989. Second Respondent also alleged in the said application for joinder that the First Respondent was in occupation of the disputed site with her own permission.

The said application for joinder was not opposed and the application for summary judgment against First Respondent was abandoned thus giving the Respondents the opportunity to file their plea; which they did jointly on the 23rd November, 1993.

In their plea the First Respondent merely contended himself with denying that he was in wrongful and unlawful occupation of the disputed site. I observe that even at the trial he did not even give evidence at all.

The Second Respondent hereself pleaded that she was allocated the disputed site "around December 1968" and that she was further granted a lease of the said site on the 3rd day of May, 1989. She repeated her earlier assertion that the first Respondent was occupying the said site with her own permission.

At the trial of the matter the parties agreed that the duty to begin was on the Respondents. As earlier stated the First Respondent did not give evidence or call any witnesses. The Second Respondent also did not give evidence but called two witnesses namely Pheello Masoabi and her husband Moses Mpobole. She then closed her case.

The Appellant on his part also did not give evidence but called five witnesses namely PW1 Moramang Seeiso, PW2 **Sekake**

Meshack Khabo, PW3 Dr. Charles Thabo Maitin, PW4 'Malipolelo Petlane and PW5 Dr. Cohen Ntlenyane 'Makose.

In his judgment the learned trial Magistrate declined jurisdiction for reasons which appear to me not only strange but unsound in law. It proves useful to reproduce in whole what the learned trial Magistrate stated in his very brief judgment in the matter. He states:-

> "The plaintiff claims the right to occupy the site by virtue of a Registrered Certificate of Title No. 34612 and the second defendant also claims right to occupy by virtue of a Lease under the Land Act 1979 No. 13283-519. The plaintiff's document of title pre-dates that of the defendant. The former not having been cancelled, clearly the latter, being in respect of the same site, was improperly issued. If I were to eject the defendant on that basis I would be saying to the defendant that his document of tile is a worthless piece of paper that does not entitle her to occupy. In my view the effect of that would be to cancel her lease.
>
> Now Sec. 7 (1) provides: "Save as is other wise provided in this Act or in any other law no registered Deed of Grant, Deed of Transfer, Certificate of Title or other Deed conferring or conveying a title to immovable property or any right in immovable property ... shall be cancelled by the Registrar except upon an order of Court." Sec. 2(1) defines court as the High Court of Lesotho.
>
> On this view the jurisdiction of this court is outsed. I would therefore dismiss this application for want of jurisdiction. Each party is to bear his own cost."

4/...

There is no doubt in my mind that the learned trial Magistrate shockingly misconceived the issues in the matter. The real issue was not whether the court should cancel the Second Respondent's lease but whether her alleged allocation of the disputed site as evidenced by the said lease was lawful or not.

In dealing with exactly a similar situation as the one before me the Honourable Mr. Justice J.L. Kheola, as he then was, had this to say in Jonathan Thejane Bokako v Paki Zakaria Khabanyane CIV/A/19/91:

> **"The Land Tribunal seems to have misdirected itself by coming to the conclusion that it had no power to cancel a Title Deed. It was not called upon to do that but to decide whether the allocation to the respondent was lawful or not. The application for cancellation of the Title Deed would be made in the High Court at a later stage on the ground that the Land Tribunal had found that the allocation was unlawful and there having been no appeal against that finding."**

With respect I agree entirely and I accordingly discern the need to adopt a similar approach in the matter before me.

I observe that even the highest court in this country namely the Court of Appeal has also had occasion to express a similar view in Thabo Charles Maitin v Mary E. Barigye and Another C of A (Civ) No. 29 of 1994 and I would with respect like to adopt theremarks of Tebbutt AJA therein to the following effect:-

"The learned judge a quo was therefore quite correct in holding that the subordinate courts have jurisdiction to hear ejectment cases regardless of the value of the property."

I now consider the matter to be settled law. In the circumstances I find that the learned trial Magistrate in this case misdirected himself grossly in holding that the jurisdiction of the Magistrate's court was ousted in the matter.

I can only express the hope that this court shall never have to decide the point again. In the same vein the Magistrates in Lesotho would do a great service to the proper administration of justice if they familiarise themselves with judgments of this court and those of the Court of Appeal.

Indeed at the hearing of the appeal before me Mr. Matooane for the Respondents conceded, and properly so in my view, the learned trial Magistrate's aforesaid misdirection. Consequently Mr. Matooane informed the court that he did not support the judgment of the learned trial Magistrate. He submitted however that the appeal must be dismissed on other grounds gathered from the record of proceedings even if they were not relied upon by the court a quo.

Both Mr. Sello for the Appellant and Mr. Matooane for the Respondents mutually agreed that this court must go into the question of the merits of the case despite the fact that the learned trial Magistrate had clearly run away from the issue choosing to hide behind the question of jurisdiction as aforesaid.

The court accepted this proposition in the interests of finality of the matter.

I turn then to deal with the facts of the case in the matter. As earlier stated, it is common cause that the Appellant registered his title to the disputed land in the office of the Registrar of Deeds in June 1969.

In **Mats'eliso Mbagamthi v Buta Phalatsi C of A (Civ) No. 7 of 1982** Goldin JA dealing with a similar situation had this to say:-

> **"The Respondent being the registered owner of the land an onus rests upon the Appellant to rebut the presumption of respondent's rights of ownership."**

With respect I agree and it was obviously for this reason that the parties herein agreed that the duty to begin was on the respondents.

As earlier stated the Second Respondent called one Pheello Masoabi as her first witness. It was his evidence that he works at Lands Survey as a Lands & Estates Officer. He prepares leases as part of his duties. He has records of the leases but he does not necessarily have personal knowledge. According to this witness the disputed site was on the 6th December 1968 allocated to the Second Respondent as a business site. This he gleans from "the records." On 25/11/87 the Second Respondent applied for a lease. The manuscript records this witness as having stated in his own words "it traspired

that she (2nd Respondent) had not registered it in terms of the Deeds Registry Act 1967. According to law her rights lapsed."

I pause here to observe that this witness Pheello Masoabi gave very damaging evidence to Second Defendant's case in chief. I attach due weight to the fact that he did so notwithstanding the fact that he was Second Respondent's own witness. As I see it, it is clear that this witness had no personal knowledge of the disputed site. He could not therefore testify to the truthfulness of whether the Second Respondent had lawfully been allocated the site or not. Even if Second Respondent's allocation had been proved it is Pheello Masoabi's evidence that the Second Respondent's rights lapsed according to law because she had not registered the site in terms of the Deeds Registry Act 1967. This witness adds that "to rectify this the site was declared an S.D.A. (Selected Development Area) and that it was so declared on 11/11/88 by Legal Notice 198 of 1988. This resulted in a lease being granted to Second Respondent as aforesaid.

Yet the same witness Pheello Masoabi testified in his evidence in chief "we have an entry here that says that the same plot was allocated to K. Sello (the Appellant) on 6/6/69." I am satisfied that at the time of the alleged declaration of the S.D.A. (Selected Development Area) the Appellant was the registered owner of the site as aforesaid and as will emerge more fully hereunder. Hence Mr. Sello for the Appellant justifiably attacks as invalid not only Second Respondent's allocation but also the said S.D.A. (Selected Development Area) as

well as the latter's lease resulting therefrom. The attack is based principally on the following grounds:-

(a) that there is no evidence that the Second Respondent was lawfully allocated the disputed site;

(b) that on the contrary there is overwhelming evidence that the disputed site was allocated to the Appellant;

(c) that not only is the Appellant the registered owner but there is also evidence that he actually used the site in question while Second Respondent did not;

(d) that the Appellant's right of use of the site in question was never lawfully revoked;

(e) that the Second Respondent never approached or sued the Appellant for ejectment from the disputed site;

(f) that the Second Respondent's lease was erroneously issued in as much as she misled both the Commissioner of Lands and the Minister concerned that the site was unoccupied;

(g) that the real motive to declare the disputed site a Selected Development Area in favour of a private individual and thus giving undue advantage to the Second Respondent was contrary to Section 44 of the Land Act 1979 as amended;

(h) that the said SDA (Selected Development Area) was wrongful, invalid and of no force and effect in as much as the Appellant was never given notice or a hearing before such declaration could be effected.

9/...

I proceed then to examine the Appellant's aforesaid grounds of attack on Second Respondent's case in the sequence tabulated above.

(a) Whether Second Respondent was allocated the disputed site.

I observe straight away that the Second Respondent failed to call even a single member of the land allocating committee or authority in support of her allegation that she was allocated the disputed site. As earlier stated she led the evidence of Pheello Masoabi who however had no personal knlowledge of the matter but merely relied on "records" that the disputed site was allocated to the Second Respondent as a business site on the 6th December, 1968. It was the evidence of this witness that he had only been working at the Department of Lands since January 1990. Quite obviously he did not even execute the said "records" himself. In the circumstances I find that he cannot testify to the truthfulness of the contents of the said records which must therefore remain inadmissible to that extent.

The Second Respondent then called her husband Moses Mpobole as the Second and last witness in the matter. It was his evidence that he applied for the disputed site in the name of his wife in 1968 "around the 6th December." He continues "it was allocated to me by the land allocating authority." There is no explanation however of this apparent contradiction why the site was allocated to this witness personally yet according to him he had applied for it in the name of his wife. Be that as it may it is this witness's evidence that he was allocated the site by Chief Moramang Seeiso.

According to him those who were present when he was so allocated the site were one Dr. Maitin and one Dr. Mokose. He handed in the allocation certificate which was part of EX "A" and which turned out in his cross examination to be a carbon copy. I observe that even EX "B" is a carbon copy. This is supposed to be a receipt evidencing Second Respondent's application for registration of the disputed site on 27th February 1969. The cross examination on this point appears on page 34 of the record of proceedings as follows:

"Q: Did your wife fetch the certificate of allocation from the Law Office.

A: There are several copies

Q: So you used a carbon copy

A: Yes.

Q: Why not the original

A: My papers were not there at the Law Office anymore."

Pressed further about the alleged lost papers this witness made a serious allegation in the following terms:-

"They were not lost but deliberatly misplaced."

I find that these allegations are completely unsubstantiated.

Second Respondent or her husband made no attempt to call evidence from the Law Office to substantiate these bare allegations. Nor did he cross examine the Assistant Registrar General (PW4) on the issue. As will be seen later the latter gave evidence in support of Appellant's case.

I find therefore that the probative value of EX "B" is highly suspect in the circumstances of the case particularly as Second Respondent failed to confront PW4 with it to establish its genuineness.

It proves convenient at this stage to examine the evidence of the said Chief Moramang Seeiso (PW1), Dr. Charles Thabo Maitin (PW3) and Dr. Cohen Ntlenyane Mokose (PW5) on the question whether the Second Respondent or her husband were allocated the disputed site as alleged.

It was the evidence of PW1 Chief Moramang Seeiso that between 1968 and 1969 he was the acting Principal Chief of Matsieng. Among other things he used to allocate sites in Maseru. He did so with a committee of four people. There was also a Secretary who at that particular time was one Chief Khabo.

On page 36 of the record of proceedings PW1 Chief Moramang Seeiso is recorded as having categorically denied the Second Respondent's claim in the following terms:-

"I never allocated the site to Mpobole or his wife."

I find that this witness completed the damage to Second Respondent's case by actually disclosing to the court that his alleged signature on Second Respondent's allocation certificate EX "A" was nothing but a forgery. The witness states as follows on page 36 of the record of proceedings:-

> **"The signature of the same certificate in respect of Georgina Mpobole indicates my name. But the signature is not mine. I don't know who forged my signature and when."**

I observe that he was not even challenged on this serious allegation. Indeed PW1's evidence on this issue is corroborated by that of the Secretary of the Land Allocating Committee himself, PW2 on page 40 of the record of proceedings wherein he states:-

> **"I do not know PW1's signature to be like the one that appears on defendant's certificate of allocation."**

In dealing with a similar situation of a forged certificate of allocation (Form C) Aaron JA in Seetsa Tsotako v Matsaisa Matabola C of A (Civ) No. 10 of 1986 (unreported) had this to say at page 9:-

> "The defendant's plea that even if the fact of such allocation was proved, it was nevertheless improper or unlawful, is based only on the assertion that there had been a prior allocation of the same site to him in 1973. The main difficulty faced by the defendant in seeking to establish this fact is that the Form C produced by him at the trial is clearly and indisputably a forgery."

The Learned Judge of Appeal concluded on page 10 of the judgment:-

> **"Defendant was therefore clearly dishonest in testifying that this form had been issued to him in 1973, and once he is found to have been dishonest in this respect, doubt is thrown on his entire testimony."**

With respect I agree and I find that those remarks are apposite to the case before me.

I am therefore satisfied from the circumstances of this case that any reasonable court could have drawn an adverse inference against the Second Respondent and could have come to the conclusion that her Form C had been forged and that she failed to prove that the disputed site had been allocated to her. In my judgment the learned trial Magistrate should have made such findings. Moreover as earlier stated Second Respondent has not even testified that she was in fact allocated the disputed site as alleged.

It is further significant that both Dr. Charles Thabo Maitin (PW3) and Dr. Cohen Ntlenyane Mokose (PW5) deny that neither Second Respondent nor her husband were allocated a site there as they claim or at all.

(b) <u>that on the contrary there is overwhelming evidence that the disputed site was allocated to the Appellant.</u>

As earlier stated it is significant that Second Respondent's own witness himself Pheello Masoabi states on page 30 of the record:-

"We have an entry here that says that the same plot was allocated to K. Sello (the Appellant) on 6/6/69."

PW1 Chief Moramang Seeiso who was undeniably the allocating Chief clearly gave evidence favourable to the Appellant. He states as follows on page 36 of the record of proceedings:-

" I have signed for the registration of allocation of land. I allocated the site to Sello (the Appellant)."

As I read the evidence of this witness I am satisfied that there cannot be any question of double allocation in respect of the disputed site because according to him these were new sites and a survey was carried out before allocation. He was asked in cross examination on page 37 of the record of proceedings:-

"Q: Before you allocate sites did you have a record of previous allocations:

A: I believe it would be found at the Township Office.

Q: Before you gave allocated (sic) the site to Khalaki Sello did you check the record.

A: These were new sites and I allocated them."

Regarding surveys he was asked on page 38 of the record of proceedings:-

"Q: How did you know that there had not been any previous allocation

A: I chose the site to be surveyed."

PW1 was taken to task in cross examination on whether he had allocated to Appellant site No. B21 or B22 but I find that the cross examination therein was not only ineffective but also inconclusive and it clearly lost its sting when the following question was put to the witness after all:-

"Q: I take it you don't know if you had allocated Sello B21 or B22 because it was a long time ago and you did not get the records.

A: That is so."

Then there was the evidence of PW2 Sekake Meshak Khabo who testified that he used to work for the Ministry of Interior in the Township Section. He was the Secretary of the land allocating committee from 1966 to 1971. The committee was composed of the Principal Chief, the District Commissioner, the Chief of the reserve (Phiri Motemekoane) and the Secretary.

It is significant that according to the unchallenged evidence of this witness "sites were first surveyed" before allocation by the committee. It is his evidence that "the office of the district Commissioner would then be responsible for the actual placement of allottees. The Chief signed afterwards." However this witness testified that "the procedure for allocation has changed so many times." He knew the Second Respondent well.

According to PW2 the Committee used to have minutes. "There were also the register of sites containing all information. Each Applicant had a file." He was emphatic that in all

the years he had worked he did not know of a double allocation, adding "it could not happen during my time."

PW2 recalls "very well" that the Appellant was allocated a site at Cathedral Area. He identifies Appellant's Form C as being in respect of that site. Significantly he corroborates PW1 on page 39 of the record of proceedings that "those were new sites just recently surveyed." He is unchallenged in this respect nor is he challenged in his confirmation that the Appellant was allocated with other people namely PW3 Dr. Maitin and PW5 Dr. 'Mokose.

According to PW2 the site B21 had been given someone else who however exchanged sites with the Appellant as the latter stated at the site that he preferred B21 to B22. The procedure was that the committee would sit to take minutes. The papers were not signed then. They were signed after the people had been shown the sites. He confirms that the initial on B22 is his adding "I did this every time because after taking the person to the site people used to exchange sites after they had inspected them."

PW2 confirms that Appellant's Form C has been signed by PW1 Chief Moramang Seeiso. He is unchallenged on this issue as well as on the fact that he knows PW1's signature well. He testifies that he has no knowledge of Second Respondent having been granted the site in his presence, noting that according to the time quoted he was then Secretary.

In cross examination he confirms that the chief signed after the sites had been shown to the allottees. Asked why

Chief Moramang did not sign for the alteration his reply was that they did not work like that adding that he was unable to answer the question personally.

PW2 was further asked in cross examination to compare the Principal Chief's signature on the certificate of allocation of the Appellant, Dr. Mokose and the Second Respondent. It is significant that according to the witness the chief's signature on the Appellant's allocation certificate is similar to that of Dr. Mokose's allocation certificate while that of the Second Respondent is different. It seems to me that this is further proof that the chief's signature on Second Respondent's certificate of allocation is forged.

PW2 further significantly explained that the certificates of allocation bear different dates because the allottees collected them on different dates.

There was then the evidence of PW3 Dr. Charles Thabo Maitin who testified that he owns site 22 which "may be preceded by a "B". He exchanged it with the late Nkemele.

Significantly he testifies on page 43 of the record of proceedings "I was never allocated a site there at the same time as Mpobole." He further testifies that "some time last year" he told Second Respondent that he thought the disputed site belonged to the Appellant. This witness was not cross-examined altogether.

The evidence of PW4 'Malipolelo Petlane isbriefly to the effect that she works at the office of the Registrar of Deeds

as Assistant Registrar General. The documents of the office are under her control. According to this witness on page 44 of the record of proceedings, site B21 appears in the name of Khalaki Sello under deed No.6522. It was never transferred. No other person has been allocated that site." I observe that this witness was unchallenged on this issue. She was merely asked about some alterations in Appellant's deed to the extent that there is a hand-written letter "B" inserted therein and that it is not signed for. This witness explained in re-examination however that if the title deed is acceptable to the Registrar it is the latter's office which is responsible for anything wrong therein.

I accept that the Registrar of Deeds is vested with a discretion in terms of the Deeds Registry Act 1967 to accept or reject registration of a certificate of title.

Section 5 of the Deeds Registry Act 1967 provides in part:-

> **"5. The Registrar shall subject to the provisions of this Act -**
>
> **: :**
>
> **(b) examine all deeds or other documents submitted to him for execution or registration, and after examination reject any such deed or other document the execution or registration of which is not permitted by this Act or by any other law, or to the execution or registration of which any other valid objection exists."**

Section 13 (3) reaffirms the discretion of the Registrar of Deeds in the following words:

> **"The registrar shall within his <u>discretion</u> have the right to attest, execute and register original certificates of title authorising the occupation or use of land, provided such original certificate of title is presented to him in duplicate in a form prescribed by him."**

Section 13 (4) also provides as follows:-

> **"The registrar shall have the right to refuse to attest, execute or register any deed of transfer, mortage bond or certificate of title or registration of any kind mentioned in this Act if such deed or document is incorrectly prepared and he shall further have the right, if in his opinion such deed or document is of so complicated a nature that it can only be prepared by a qualified conveyancer, to refuse to attest, execute or register such deed or document unless it has been prepared by a conveyancer practising or registered to practise in Lesotho."**

In the circumstances of this case as aforesaid I am satisfied therefore that there is overwhelming evidence that the Appellant was allocated the disputed site in question. I hold therefore that the alleged alterations on which Mr. Matooane relies for attacking Appellant's title are inconsequential technicalities which do not affect the validity of Appellant's title to the disputed site.

20/...

(c) <u>That not only is the Appellant the registered owner but there is also evidence that he actually used the site in question while Second Respondent did not.</u>

I have already held that the disputed site was allocated to the Appellant. Moreover as earlier stated it is common cause that the said site was registered in the name of the Appellant in the office of the Registrar of Deeds in June 1969. I am satisfied therefore that the Appellant is the registered owner of the disputed site. Such is the effect of registration. The learned authors R.W. Lee and A.M. Honore: <u>The South African Law of Property, Family Relations and Succession</u> state the law very succintly as follows on page 21 at paragraph 18:-

"Registration as owner is proof of ownership."

See also <u>Mats'eliso Mbagamthi v Buta Phalatsi</u> (supra).

It is correct to say that registration is not conclusive proof of ownership and that there may be cases where such registration has been obtained through fraud or by mistake. In such cases registration does not confer ownership. In the case before me however there is overwhelming evidence that the Appellant was lawfully allocated the disputed site which was lawfully registered in his name in terms of the Deed Registry Act 1967. In the circumstances I am satisfied therefore that registration in the case before me is conclusive proof of the Appellant's ownership of the disputed site.

On the question of the actual use of the disputed site the Second Respondent's husband admitted under cross examination that after he had been allocated the site he realised that

someone was using it. According to him though "there were just shacks." He further significantly admitted that there was also a toilet there and a fence made of split poles which were removed one by one.

He was then asked:-

"Q: Did you know when it (the site) was used by your fellow church goer Sello Sello of Funeral Services.

A:: No - but I knew when it was being used."

Although the Appellant did not give evidence in the matter I am nevertheless satisfied that as the registered owner of the site probabilities are that he is the one who was using the site without any objection or hinderance by Second Respondent. On the other hand I am satisfied that the latter has never used the disputed site at all and that this is inconsistent with her allegation that she was allocated this site in 1969 which was about 24 years prior to the court proceedings in the matter. It is significant that she did not even initiate the court proceedings hereself.

(d) <u>That the Appellant's right of use of the site in question was never lawfully revoked.</u>

There is absolutely no evidence that the Appellant's right of use in respect of the disputed site was ever lawfully revoked.

See <u>Qhoqha v Fokothi 1971-73 LLR 274</u>

(e) <u>That the Respondent never approached or sued the Appellant for ejectment from the disputed site.</u>

It is the evidence of Second Respondent's husband that he first knew of Appellant's claim to the site as far back as in the 1970s. He was asked by the Appellant in cross examination:-

"Q: When did you know that I also claimed the site.

A: I got to know - it was in the 1970s.

Q: Early or late 70s.

A: Early 70s."

Pressed on why he did not take steps to sue the Appellant the Second Respondent's husband became very evasive. He was asked:-

"Q: What steps did you take

A: *I did not go to you. I went to the* site.

Q: You know me - why didn't you come to me

A: I went to various offices and no one came to my assistance.

Q: If someone takes away something from you, you sue them. Why didn't you do that.

A: I went to the offices and was told the site was mine." And later he says:

"I kept being promised that the site was mine."

I observe that Second Respondent or her husband did not call any witness to substantiate the claim that there were any promises that the site was theirs. For my part I find it extremely hard to imagine that if the Second Respondent had a genuine claim to the said site at all she could have slept on her rights so to speak and failed to sue the Appellant for such an inordinate length of time spanning for about 24 years.

(f) <u>That the Second Respondent's lease was erroneously issued in as much as she misled the Commissioner of Lands and the Minister concerned that the site in question was un-occupied.</u>

Despite the fact that Second Respondent's husband knew of the Appellant's claim to the site as far back as 1970 evidence shows that this important information was not revealed to the registering authorities when a lease was being sought by Second Respondent. This appears in the cross examination of Second Respondent's husband Moses Mpobole as follows:-

"Q: When your wife went to apply for a lease did she reveal that there was someone else on the site.

A: I do not know.

Q: But she was your agent. Did she say it or not.

A: No - but she went and the lease was processed."

Second Respondent's own witness Pheello Masoabi conceded under cross examination on page 30 of the record of proceedings that the person who processed the lease and thus "restored the rights that Mrs. Mpobole had lost" was aware of the allocation to someone else.

Once more this witness made a fatal concession against Second Respondent's claim under cross examination in the following terms:-

> **"Q: In the process the person who approached the Lands Commissioner must have concealed the fact that there was a previous allottee**
>
> **A: Yes."**

He was later asked :-

> **"Q: You must agree that where the Commissioner has been misled that the site is unoccupied and so consequently has the Minister - where is the validity of that allocation.**
>
> **A: There is no validity."**

In the circumstances I accept that the Second Respondent's lease was erroneously issued after the Commissioner of Lands and the Minister concerned had been deliberately misled that the disputed site was unoccupied.

(g) That the real motive to declare the disputed site a Selected Development Area in favour of a private individual and thus giving undue advantage to the Second Respondent was contrary to Section 44 of the Land Act 1979 as amended.

It proves convenient to consider this submission together with Mr. Sello's submission (h) above which is to the following effect:-

> (h) That the said Selected Development Area was wrongful, invalid and of no force or effect in as much as the Appellant was never given notice or a hearing before such declaration could be effected.

Section 44 of the Land Act 1979 provides 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 areea and, thereupon, all titles to land within the area shall be extinguished but substitute rights may be granted as provided under this Part."**

In my view this section can only be resorted to in the public interest and not for protection of individual or private interests. I find therefore that it was wrong in law to declare the disputed site a selected development area merely to revive the Second Respondent's rights which had been extinguished by her failure to register the site. The declaration was therefore not made in the public interest and is therefore invalid as being contrary to section 44 of the Land Act 1979.

Besides, there is absolutely no evidence that the Appellant who clearly had a legitimate expectation to be heard was ever given notice and hearing before such declaration of a Selected Development Area could be effected. I have come to the con-

clusion therefore that the said declaration of a selected development area was invalid and of no force and effect.

see **Pages Stores (Pty) Ltd. v Lesotho Agricultural Bank and others C of A (Civ) No. 14 of 1988.**

In the circumstances I am not surprised that Second Respondent's own witness Pheello Masoabi conceded under cross examination :-

"The lease was erroneously issued."

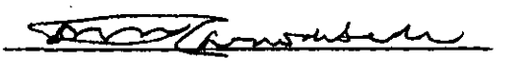
It was therefore inevitable for the learned trial Magistrate to make the finding in his judgment that the Second Respondent's aforesaid lease "was improperly issued." In my view he should then have entered judgment for the plaintiff in the circumstances.

The case for First Respondent was worse. He did not even bother to testify in the matter choosing instead to cast his fate to that of the Second Respondent. As I see it, he simply had no defence at all.

In all the circumstances of the case I am satisfied that there was overwhelming evidence against the respondents and that any reasonable court could have found for the Appellant in the matter. Indeed I find that it was a traversity of justice for the learned trial Magistrate not to have entered judgment for the Appellant.

In the result therefore the appeal is allowed with costs. The judgment of the court a quo is altered to read:

"An order ejecting Defendants from the aforesaid site together with any other persons who may be occupying it with their authority is hereby granted to the Plaintiff with costs."



M.M. RAMODIBEDI
ACTING JUDGE

For Appellant : Mr. Sello
For Respondents: Mr. Matooane