IN THE LAND COURT OF LESOTHO

Held at Maseru

LC/APN/39/2014

In the matter between:

LAWRANCE LEBAKAE NCHAPHA **1ST APPLICANT**

And

VINCENT MOKETE LETUTLA **1ST RESPONDENT**

NTAI PHEKO **2ND RESPONDENT**

THE LAND ADMINISTRATION AUTHORITY **3RD RESPONDENT**

LAND REGISTRAR **4TH RESPONDENT**

MINISTER OF LOCAL GOVERNMENT **5TH RESPONDENT**

ATTORNEY GENERAL **6TH RESPONDENT**

CORAM: **S.P. SAKOANE AJ**

DATE OF HEARING: **25 NOVEMBER, 2015**

DATE OF DELIVERY: **3 FEBRUARY, 2016**

SUMMARY

Review of Minister's declaration of a Selected Development Area and resultant termination of title to land – declaration made without affording applicant a hearing – failure to afford hearing resulting in setting aside the declaration – Land Act, 1979 sections 44 and 45 (1).

ANNOTATIONS

CITED CASES:
Ministry of Home Affairs And Local Government And Others v. Sakoane LAC (2000-2004) 332

Pages Stores (Lesotho) (Pty) Ltd v. Lesotho Agricultural Development Bank And Others LAC (1990-94) 51

STATUTES:
Land Act No.17 of 1979

Land Court Rules, 2012

Legal Notice No.60 of 1984

JUDGMENT

I. INTRODUCTION

[**1**] This matter was argued before me on the 25th of November, 2015 and at the close of argument, I granted the following prayers and reserved reasons:

"1. The declaration by the Minister of the Interior, of a Selected Development Area consisting of plot with numbers: 47 (later plot No: 14273-1150), 48 (later plot No: 14273-1028) and plot No: 49 near Ha Mabote Urban Area, as published by ***Legal Notice No: 60 of 1984****, is hereby set aside.*

2. The registration of leases in respect of plot number 14273-1028 and 14273-1150 in the names of the First Respondent, are declared unlawful and null and void.

3. The Third, Fourth and Fifth Respondents jointly and severally are directed to pay the Applicant's costs.

4. The Applicant is directed to pay the Second Respondent's costs."

I now render my reasons in the matter.

II. FACTS

[**2**] It is common cause that the applicant is in possession of certificates of allocation/grant of plots of land dated 1st May 1979, 30th June 1979 and 20th December 1979. These plots are situated at **Thoteng ea Sekamaneng**. The applicant has used the plots for agricultural purposes.

[**3**] On 18th May, 1984 the Minister of the Interior published a **Gazette** in the following terms:

> *"LEGAL NOTICE NO.60 OF 1984*
> ***Declaration of a Selected Development Area***
> ***(New Mabote) Notice***
> *In the exercise of the powers 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 345 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 the Interior

SCHEDULE

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

[**4**] Following the publication of this **Gazette**, the plots falling under the development area were re-numbered and re-allocated as follows:

1. Plot No:48 re-numbered 14273-1028 and allocated to the 1st respondent.

2. Plot No:47 re-numbered 14273-1150 and allocated to the 1st respondent.

Leases were accordingly granted in respect of the plots in favour of the 1st respondent.

[**5**] In 2010 the 1st respondent transferred his rights and interest in the two plots (i.e. plots Nos. 14273-1028 and 14273-1150) to the 2nd respondent in whose names they are currently registered.

[**6**] In 2012 the applicant became aware that the 2nd respondent was building a house on the two plots.

[**7**] The only respondent who has filed an answer in these proceedings is the 2nd respondent. The others were duly served pursuant to rules 36, 37, 38, 41 and 45 of the **Land Court Rules, 2012** but have not entered any notices to defend or submitted any answers in terms of Rule 19 (2). The result is that the application was heard in their absence and without their opposition in terms of Rule 51 (a). Hence the only issues that arose for determination were those raised by the applicant and contested by the 2nd respondent.

[**8**] The applicant's case is that **Legal Notice No.60 of 1984** which declared the plots he was allocated as being part of a Selected Development Area and the resultant loss of his titles to those plots is unlawful, null and void. The suggested reason here being that the Minister was bound in law to give the applicant a hearing before so declaring the area in which the plots fell as a Selected Development Area. He did not. Therefore, "the manner in which the declaration was made was contrary to the principles of natural justice".

[**9**] Accepting the fact alleged that the applicant's rights were terminated per **Legal Notice No.60 of 1984**, the answer of the 2nd respondent is that:

> 9.1 Legal Notice No.60 of 1984 is valid and lawful in that it constitutes a termination and revocation of applicant's titles by due process of law in that section 45 (1) three months' notice is deemed to have been issued and it constitutes compliance with the *audi* principle within that period. And in 1984 that the applicant ought to have challenged the declaration of the area as a Selected Development Area.

[**10**] In the light of the fact that neither the Minister, the Attorney-General nor the Land Administration Authority are contesting the application, Counsel were agreed, and I accepted, that the question of the invalidity of the declaration on the grounds of non-compliance with the *audi* principle is one of law premised on facts within the peculiar knowledge of the applicant and the Crown. Since the Crown did not enter any appearance or file any answer, the uncontested facts as alleged constituted the only sufficient basis on which to test the legal validity of the applicant's complaint.

[**11**] Counsel were not at issue on the relevant question of law, namely whether section 44 or 45 (1) of the **Land Act No.17 of 1979** was controlling in the matter. However, they were at issue as to the fate of the rights of their clients in the event of the interpretation of the sections as propounded by the Court of Appeal in **Pages Stores (Lesotho) (Pty) Ltd. V. Lesotho Agricultural Development Bank and Others** LAC (1990-94) 51.

[**12**] I then framed the issues for determination as in paras [8] and [9] above and proceeded in terms of rule 69 (2) to be addressed on them so that I could pronounce judgment.

[**13**] Miss **Tohlang**, for the applicant, submitted that the Minister's power to declare a Selected Development Area under section 44 of the **Land Act, 1979** is constrained by a legal duty to hear persons whose rights and interests would be affected thereby. This, she submitted, is the interpretation that the **Pages Stores** case gave.

[**14**] Mr. **Molapo**, for the 2nd respondent, counters by submitting that the issuance of a section 45 (1) notice in regards to the exercise of the powers to declare is deemed to have been sufficient compliance with the duty to afford the affected persons a hearing. Such person must respond within the three months period or failure to do so cannot be visited on the Minister.

[**15**] The sections in issue read thus:

> *"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.*
>
> *45(1) Where the selected development area consists wholly or partly of agricultural land other than land within a selected development area, licensees or allottees of such agricultural land shall be deemed to have received, three months' notice of termination of their licences or of revocation of their allocations, as the case may be, beginning from the date of publication in the Gazette of the notice referred to in section 44."*

[**16**] In interpreting section 44, the Court of Appeal in the **Pages Stores** judgment said, *inter alia*,:

> *"In considering whether the appellant had a right to be heard by the second respondent (the Minister) before he decided to make the declaration under section 44, the first question to be investigated is whether the appellant has a*

right which would be prejudiced by his decision. The respondents have contended that there was no such right because in Lesotho, all land is vested absolutely and irrevocably in the Basotho Nation and accordingly the concept of individual ownership of land is absolutely unknown in Lesotho. That contention does not in my judgment mean that the appellant can have no right which is prejudicially affected; the appellant is not required to show that it had a right of ownership in part of plot No.59A; a lesser right would also entitle it to be heard, if this would be prejudiced by a ministerial declaration."
(@ p.63 E-G)

……..

"Another argument advanced by counsel for the respondents was based on the use in section 44 of the words 'appears' ('where it appears to the Minister--), and 'any' ('any area of land'). These were said to be words of such wide connotation as to give the Minister an unfettered discretion. A few comments are called for. Firstly, the word 'appears' refers only to the existence or otherwise of the jurisdictional fact; that is to say, it relates only to the first and not the second question which the Minister must consider. Secondly, the word 'any' relates only to the area of land, and indicates that the Minister is not restricted as to what land he may declare a selected development area. Thirdly, his discretion derives from the use of the word 'may'. Admittedly it is his discretion alone, but there is nothing in the language of the section to suggest that he may exercise his discretion in a manner which is contrary to the principles of natural justice.

I am therefore of the view that, unless there are indications elsewhere in the Land Act which by implication exclude the audi alteram partem principle in relation to a declaration under section 44, that principle would apply." (@ p 65 H-66B)

……..

"It follows that in the absence of any express or implied provision to that effect in the statue, there is such a right to

> *be heard. As this right was not accorded to the appellant, a person whose rights as a sub-lessee were prejudicially affected thereby, the determination was not made in accordance with the principles of natural justice, and would on that ground also be liable to be set aside."*
> *(@ p.68B)*

[**17**] As I understand the position of the 2nd respondent, a section 45 (1) notice of termination of rights of the applicant constitutes compliance with the *audi* principle by the Minister in that as from the date of publication of **Legal Notice No.60 of 1984** on 18th May, 1984, the applicant was invited to make representations within a period of three months but decided, on his volition, not to do so.

[**18**] The validity or otherwise of this position is predicated on the true meaning of a section 45 (1) notice. In my opinion, the deemed receipt of the three months' notice of termination by way of publication in the **Gazette** does not in any way detract from the Minister's duty to comply with the *audi* principle. Such notice serves the purpose of public information that all affected persons whose interests and rights in land declared a selected agricultural area have been terminated or revoked and are deemed to have received notices to that effect. The purpose of gazettement is to give public notice for general information: see

Ministry of Home Affairs And Local Government And Others v. Sakoane LAC (2000-2004) 332 @ 338 J-339A

[**19**] I am fortified in this view by the following *dicta* in the **Pages Stores** judgment on the question as to whether sections 13 (2) and 42 (2) notices on revocation of allocation and termination of lease respectively constitute compliance with the *audi* principle:

> *"Section 13 (2) does not in any event provide for a hearing; it merely provides for a notice, and indicates when it must be given and what it must contain. The right to a hearing appears to have been taken for granted, and only the ancillary right of prior notice is dealt with. In my view, therefore, this provision cannot be said to exclude by implication the right to a hearing in relation to section 44." (at p.67 A-B)*
>
> ……..
>
> *Section 42 (2) deals with the case where a lease is terminated and provides that the notice of termination must be served, not only upon the lessee, but also upon any sub-lessee or mortgagee. This notice of termination clearly has nothing to do with a right to a hearing; its purpose is to notify the sub-lessee and mortgagee of the fact of termination, because this gives them certain rights in relation to the taking over the lease. In my view it affords no basis for the implication that a person who is prejudicially affected by a termination made, under section 44 has no right to be heard before the termination is made." (pp 67 H-68 A)*

[**20**] The question that remains is whether such notice of termination or revocation of rights and interests of an affected person can be made

without affording them a hearing. I think not. Once it is accepted, as it must, that the notice is but gazetted official information that rights and interests have already been terminated or revoked, such termination or revocation must have been made without first hearing the affected person. I there, cannot discern any difference in principle between the legal duty to conform with *audi* under either section 44 or section 45 (1). There is no express or implied exclusion of the *audi* principle in both. Having so found, I consider that the termination or revocation of the applicant's rights under either section without a hearing is reviewable and liable to be set aside.

[21] What remains is the consideration of the rights of the 2nd respondent. He acquired such rights from the 1st respondent. There is no suggestion or evidence that the 2nd respondent was aware of any defects in 1st respondent's title to the plots in issue flowing from the Minister's unlawful termination of the applicant's title to the same.

[22] I then do not see how the transfer of the plots and their registration in the names of the 2nd respondent falls to be declared unlawful and null and void. He transacted with the 1st respondent in good faith and acquired titles from a person whom the Minister had granted the original title in terms of section 49. However, the Minister's revocation of applicant's

titles and their subsequent grant to the 1st respondent and issuance of leases falls to be reviewed and set aside. The Minister's power to have so acted under section 49 was tainted by the illegality of depriving the applicant of his title contrary to the rules of natural justice.

III. DISPOSITION

[23] The conclusion I have reached is accordingly that:

(a) by the Minister issuing **Legal Notice No.60 of 1984** without considering its prejudicial effect on the applicant and failing to afford him a hearing in the matter, the declaration was contrary to the principles of natural justice; and

(b) the subsequent re-allocation of the plots to the 1st respondent and the issuance of leases to him has no effect according to section 85 (2) as it was done contrary to the provisions of the Act.

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S.P. SAKOANE
ACTING JUDGE

For the Applicant:	M.P. Tohlang instructed by Webber Newdigate Attorneys
For the 2nd Respondent:	L. Molapo