

A critical analysis into the land tenure system in Lesotho and its implication on foreign investment

MJ Mapeshoane



[Orcid.org/0000-0002-8968-3332](https://orcid.org/0000-0002-8968-3332)

Mini-dissertation accepted in partial fulfilment of the requirements for the degree *Master of Laws in Estate Law* at the North-West University

Supervisor: Prof W Erlank

Graduation ceremony: May 2020

Student number: 29799406

Acknowledgements

This dissertation would not have been completed without the assistance and support of the following people:

My supervisor, Prof Wian Erlank, without whose support, professional guidance and timeous feedback, this research would not have been completed.

My family and friends for their love and encouragement throughout this journey. In particular, I would like to thank my Mother, Matebelo Mapeshoane for her relentless moral support and her prayers and to Kelello Pule thank you so much for everything.

Abstract

This mini dissertation will analyse whether Lesotho has in place land laws and policies that ensure that land in the country contributes significantly towards the country's economic development. Land is an important resource for a country's economic development. This is because land is needed for the country's agricultural activities again, land ownership is key in promoting investment since land can serve as collateral in order for one to access credit. In order to ensure that land is used for the betterment of a country's economy, it is essential for a country to have laws and policies that provide assurance of land ownership and security of tenure.

The land tenure system in Lesotho has undergone numerous reforms but to this day foreign investors are restricted from owning rights to land. This restriction is despite the fact that foreign investment form an integral part of the country's economic development. The manufacturing sector which is dominated by foreigners is one of the most successful sectors in Lesotho. Its success is as a result of the involvement of Foreign Direct Investment (FDI). Based on these observations, a recommendation is made that foreigners are permitted to hold title to land in order to attract them to invest further in Lesotho.

Key Words: Land tenure, Foreign Direct Investment, Economic development

Contents

1	Introduction.....	1
1.1	Background	1
1.2	Problem statement.....	3
1.3	Objectives	4
1.4	Research question.....	5
1.5	Organisation of the study	5
2	An overview of the land tenure systems and the land laws reforms made to meet the country's economic development.....	6
2.1	Introduction.....	6
2.1.1	Overview of the land tenure system	6
2.2	Types of land tenure systems	7
2.2.1	Customary land tenure	7
2.2.2	Statutory land tenure	9
2.3	History of the land tenure system in Lesotho	10
2.3.1	Traditional tenure arrangement	10
2.3.2	Shortcomings of the traditional land tenure	12
2.4	Land tenure reforms.....	13
2.4.1	Land Act Procedure Act and Deed Registry Act	14
2.4.2	1973 land reforms.....	14
2.4.3	Land Act No 17 of 1979.....	16
2.5	Concluding statement.....	22
3	Chapter 3 Introduction	Error! Bookmark not defined.
3.1	Background	22
3.2	The Millennium challenge reforms.....	24
3.2.1	Land Act No 8 2010	24
3.3	Systematic land regularisation project	27
3.4	Land Administration Authority	29

3.5	Concluding remarks.....	30
3.5.1	Urbanisation	30
4	Introduction.....	32
4.1	Foreign Direct Investors: overview	32
4.1.1	Manufacturing Textile industry in Lesotho.....	34
4.1.2	Diversification of FDI.....	37
4.2	FDI and Land tenure System in Lesotho	38
4.3	Agriculture.....	44
4.3.1	Importance of agriculture in Lesotho’s economy	44
4.3.2	Land tenure security and agriculture	47
4.4	Concluding remarks.....	51
5	Summary, conclusion and recommendation	51
5.1	Summary and conclusion	51
5.2	Recommendations.....	56
5.3	Conclusion.....	58

List of Abbreviations

AGOA	African Growth and Opportunities Act
CBL	Central Bank of Lesotho
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
FOSA	Forestry Outlook Studies in Africa
GDP	Gross Domestic Product
GOL	Government of Lesotho
IFAD	International Fund for Agricultural development
JSA	Journal of Sustainable Agriculture
JSDA	Journal of Sustainable Development in Africa
LAA	Land Administration Authority
LNDC	Lesotho National Development Corporation
LPRC	Land Policy Review Commission
LSPP	Lands Surveys and Physical Planning
MCC	Millennium Challenge Corporation
MFA	Multi Fibre Agreement
SADC LJ	SADC Law Journal
SARPN	Southern African Regional Poverty Network
SSA	Sub Saharan Africa
UNCTAD	United Nations Conference on Trade and Development\
USA	United States of America

1 Introduction

1.1 Background

The basic principle of the land tenure system in Lesotho as enshrined by the Constitution¹ is that land belongs to the Basotho nation and is held in trust by the King. Before 1967, acquisition of land was exclusively in accordance with customary law, the *Laws of Lerotholi* which is starting point in this regards.² Under customary law, Chiefs were authorised to make and revoke land allocations. According to Thabane³ the allottee in this instance did not have rights of ownership over land allocated to them but had a right entitling them to use the land in accordance with the terms and conditions provided by the Chief. Upon the death of the holder, the land reverted to the Chief for reallocation.⁴ The said reversion in fact never happened since the actual practice has been that the land is inherited by the deceased allottee's family without going through the process of reallocation by the chief.⁵ Further discussion on the land tenure system in Lesotho will be made in the succeeding chapter.

In 1967, an attempt was made to reform the customary rules of allocation through the introduction of the *Land Procedure Act 1967* (herein referred to as *LA 1967*) and the *Deeds Registry Act 12 of 1967* (herein referred to as *the Deeds Registry Act*). However, neither the *LA 1967* nor the *Deeds Registry Act* proposed a substantial change to the land allocation process since the customary principles of usufruct and non-transferability of land were still upheld in both pieces of legislation.⁶ The *Land Procedure Act* was enacted mainly to provide for procedures relating to the application for allocation of land or for a grant of any interest or right in or over the land. Additionally, the *Deed Registry Act* introduced registration of title deeds.⁷ Both pieces of legislation, in effect, merely formalised the customary land allocation system by introducing documentation as proof of title.⁸

¹ Section 108 *Constitution of Lesotho 1993*.

² Juma 2011 *Pace International Law Review* 119.

³ Thabane *Who Owns Land in Lesotho* 7.

⁴ Thabane *Who Owns Land in Lesotho* 7.

⁵ Thabane *Who Owns Land in Lesotho* 7.

⁶ Daemane 2012 *JSDA* 166.

⁷ Leduca *Lesotho Urban Markets* 5.

⁸ Section 16 of the *Deeds Registry Act* provides that every deed or agreement transferring rights or

Subsequent to the 1967 Acts, in an attempt to reform the land laws, other laws were enacted including *inter alia* the *Land Husbandry Act* 1969,⁹ the two Land Laws of 1973¹⁰ and the *Land Act* 1979.¹¹ All these laws were ultimately repealed and replaced by the *Land Act* 2010, which is currently governing allocation of land in the rural and urban areas. As provided for by this Act, the power to allocate land is vested in the King¹² and it is exercised by the local authority in consultation with the chiefs in the rural areas.¹³ In the urban areas on the other hand, the power to allocate land is exercised by the authorised allocating authority in an urban area in consultation with the chief.¹⁴

Moreover, under this Act, the leasehold system became the predominant landholding system in the urban areas. The mandate to administer and issue leases is vested in the Land Administration Authority (herein-after referred to as the LAA). The LAA is an autonomous organisation created and governed by the *Land Administration Act* 2010. Apart from issuing leases, the LAA is also responsible for registration of deeds and cadastral surveying and mapping.

Section 4 of the *LA* 2010 reiterates the constitutional provision that land in Lesotho is vested in the Basotho nation and held in trust by the King. According to Mosaase,¹⁵

...this principle is indeed a sound one, since it is a forceful recognition that land is the most important natural resource and should be utilised for the welfare of the nation, present and future.

In line with the proposition that land is a precious resource,¹⁶ all persons eligible to hold title to land have been categorised exclusively by the *LA* 2010 under section 6. Foreign individuals have been excluded from the list of people entitled to own land in Lesotho. In the same vein, foreign businesses are also limited from holding title to land. Section 6 provides that,

to immovable property shall be registered in the deeds registry office.

⁹ Pule *et al.* 2004 *Journal of Modern African Studies* 293.

¹⁰ In 1973 the *Land Act 1973* and the *Administration of Lands Act* of 1973 were enacted.

¹¹ Pule *et al.* 2004 *Journal of Modern African Studies* 293.

¹² Section 7 *LA 2010*.

¹³ Section 24 and Section 25.

¹⁴ Chaka *et al.* "Good Land Governance" 5-18.

¹⁵ Mosaase "Lesotho's Land Policy" 63-66.

¹⁶ Gerstter *An assessment of the Effect on Land Ownership* 3.

...foreign enterprise may hold land for investment purposes, provided Basotho whose land may be valued so that it may form part of the shareholding in such a partnership, form at least 20% of the membership or shareholding of the enterprise.

1.2 Problem statement

According to the UNCTAD report,¹⁷ foreign direct investment is important in Lesotho's economy. This is because the country needs the manufacturing sector-entirely driven by FDI in the apparel industry to fuel economic growth, employment and export revenues. In essence, FDI contribute more than half of total export earnings in Lesotho.¹⁸ Since FDI, plays an invaluable role into the economic growth of Lesotho, it is therefore essential that policy makers are encouraged to improve internal regulatory frameworks to afford openness and access to investors.

As noted above, there are restrictions placed on foreign ownership to land in Lesotho. Seeing that foreign investment is an integral part of Lesotho's economic growth, this research will seek to show that it is reasonable to assume that the restriction on the ability of different categories of people to hold title to land could have negative implications on Foreign Direct Investment. That is, because of these restrictions, foreign investors are likely to be hesitant and discouraged from making permanent improvements on land that they cannot hold in perpetuity or as more than mere sub-lessees. The eventuation of this probability will have major potential implications on the economy, including a slowdown in growth caused by this likely dis-investment. According to Weigel,¹⁹ foreign investors who face difficulty in owning or leasing land in a host country are discouraged to invest in that country because no firm wants to invest without secure tenure of the land where its facilities are located.

Even though foreigners are restricted from holding title to land, they can enter into sub-lease agreements with Basotho leaseholders. As per section 24 of the *Deeds Registry Act*, the process of sub-lease registration requires the parties to get consent from the proper authority. Section 36 of the *Land Act 2010* outlines that consent shall be granted by the Commissioner of Lands whose office is based within the LAA. Once the consent has been

¹⁷ UNCTAD *Investment Policy Review* 13.

¹⁸ Lesotho Review 2018 <https://www.lesothoreview.com>.

¹⁹ Weigel *Foreign Direct Investors* 26.

granted, the sublease agreement has to be registered in the Deeds registry office thereafter then the agreement will be legally acceptable.²⁰

Since investors can only have rights as sub-lessees, their rights are not as comprehensive as the right of the leaseholder. As a result, due to the fact that the investor does not have security of tenure there is no guarantee that they will get sufficient financial assistance from financial institutions. As stated by Munro-Faure ²¹

...security of land tenure in this case can be defined as the certainty that a person's rights to land will be recognised by others and protected in cases of specific challenges.

As outlined in UNCTAD,²²

...a sub-lease title presents risks to a foreign investor willing to develop commercial or industrial property for its own use of the lease. The foreign investor is not in control of the primary relationship between lessee and government. Default by the lessee will impact the sub-lessee's security of title- there is no certainty of novation to the sub-lease under the law.

In essence, it is submitted that a sub-lease does not afford tenure as secure as ownership; on the other hand, there is insecurity of tenure brought about by the fact that the investor has a right to short term duration sub-lease agreement as opposed to the right of ownership.

According to Migot-Adholla and Bruce,²³ a farmer will not make a long-term investment in his holding unless he is secure in reaping the benefits of his investment. Essentially therefore, adequate security of tenure can strengthen investment opportunities in Lesotho. An in depth discussion on whether there is security of land tenure offered to foreign investors to encourage them to invest in the agricultural sector will be undertaken in this study

1.3 Objectives

To determine whether the land tenure system in Lesotho is open enough to attract foreign investor. Considering that the Lesotho economy to a large extent depends on foreign investment this study seeks to show that not enough of a legal framework has been put

²⁰ Section 24(2) and (3) of the Deeds Registry Act.

²¹ Munro-Faure et al. Land Tenure and Rural Development 18.

²² UNCTAD *Investment Policy Review* 13.

²³ Migot-Adholla and Bruce *Searching For Land Tenure Security* 5.

into place to ensure not only the attraction of various foreign investors, but to also ensure that the investors take on long-term investments in the country and are not merely involved in investment traditionally known as "foot-loose" investments.²⁴ Even though Basotho have rights to land, they however, do not have adequate financial power or muscle to immerse themselves in commercial agriculture and industrial property,²⁵ which is where foreign investment can come in and assist with some much-needed financial power.

1.4 Research question

The principal question in this research is whether the land tenure system in Lesotho is accommodative to foreign investors who may contribute towards the economic development of the country.

1.5 Organisation of the study

In order to answer the principal question, this study is divided into five chapters. The following will be discussed:

- a) Chapter 1 will be an introductory chapter providing a general overview of the research topic.
- b) In chapter 2, the different land tenure systems will be discussed. This chapter will also delve into the evolution of the land tenure system in Lesotho
- c) In chapter 3, Provisions of the *LA 2010* and other laws limiting foreign ownership of land will be discussed.
- d) In chapter 4, the importance of foreign investment in Lesotho will be dealt with.
- e) In chapter 5, the conclusion on the findings of the research will be made. There will be suggested recommendations as well as how those recommendations can be implemented to ensure that the land regulations are conducive to foreign investors.

²⁴ UNCTAD *Investment Policy Review* 8.

²⁵ Pule *et al.* 2004 *Journal of Modern African Studies* 293.

2 An overview of the land tenure systems and the land laws reforms made to meet the country's economic development

2.1 Introduction

The aim of this chapter is to discuss the land tenure system in Lesotho. In order to give a clear understanding of the land tenure system that is operational in Lesotho, the chapter will commence by giving a general explanation of the land tenure concept as defined by different authors. Thereafter different land tenure systems that exist within different jurisdiction will be discussed. In conclusion, the land tenure system in Lesotho and the shortcomings of the land tenure system will be analysed.

2.1.1 Overview of the land tenure system

The term tenure is derived from the Latin word *tenere* which means to hold.²⁶ Adams²⁷ supports this definition and is of the opinion that

...land tenure can be described as the terms and conditions on which land is held, used and transacted.

According to Munro-Faure,²⁸ land tenure therefore, "defines the social relations between people and land." This relationship between people and land is defined by a set of legal rules and regulations that outline how property rights are to be allocated within a society.²⁹ These rules define procedures and processes that ought to be followed in order for one to access the rights to use, control and transfer land.³⁰ They also define responsibilities of the landholder as well as impose restrictions on the use, control and transfer of land.³¹ In simple terms, land tenure systems determine not only persons eligible to hold title to land but also the conditions and duration under which one can hold title to land.³²

²⁶ Ryan and Cooper *Those Who Can Teach* 245.

²⁷ Adams *et al. Land Tenure Reform and Rural Livelihood in Southern Africa* 2.

²⁸ Munro-Faure *et al. Land Tenure and Rural Development* 7.

²⁹ Munro-Faure *et al. Land Tenure and Rural Development* 7.

³⁰ Munro-Faure *et al. Land Tenure and Rural Development* 7.

³¹ Munro-Faure *et al. Land Tenure and Rural Development* 7.

³² Munro-Faure *et al. Land Tenure and Rural Development* 7.

Various land tenure systems have developed worldwide under the influence of historical cultural and economic factors.³³ Some of these will be discussed in the following section.

2.2 Types of land tenure systems

According to Munro-Faure,³⁴ land tenure systems are a hybrid of formal statutory rules and informal customary rules. In order to distinguish between statutory regulations from informal customary rules, Payne and Durand-Lasserve³⁵ pointed out that

...the statutory formal system normally includes private freehold and leasehold rights while the customary system consists of communal tenure systems and open systems of tenure.

As will be seen in the subsequent paragraphs, with customary land tenure, the rights usually held by the natives are administered in accordance with their traditions.³⁶ In addition, under customary tenure system, the concept of the acquisition of ownership rights is foreign.³⁷ Instead, occupants are afforded the right to occupy and use land.³⁸ With a statutory system on the other hand, land tenure is more formal than customary land tenure. Whereas the rights derived under customary land tenure system may not be registered, it is a requirement under statutory land tenure system that formal registration of land ownership is done.³⁹ With statutory land tenure system formal property rights are recognised and regarded explicitly by the state.⁴⁰ Informal property rights on the other hand are those that lack official recognition and protection and are recognised under customary land tenure system.⁴¹

2.2.1 Customary land tenure

³³ Kasimba *Land Tenure rights* 7.

³⁴ Munro-Faure et al *Land Tenure and Rural Development* 7.

³⁵ Payne and Durand-Lasserve "Security of Tenure Types" 1-78.

³⁶ Freudenberger 2013 <https://www.land-links.org>.

³⁷ Freudenberger 2013 <https://www.land-links.org>.

³⁸ Mends *A study of the Institution of the Customary Land Tenure System* 9.

³⁹ Freudenberger 2013 <https://www.land-links.org>.

⁴⁰ Munro-Faure *et al Land Tenure and Rural Development*.

⁴¹ Freudenberger 2013. <http://www.land-links.org>.

2.2.1.1 Communal land tenure

According to Mends,⁴² customary tenure is regarded as the system of land relations in which ownership of the land is vested in the community. In a customary system of land tenure, the individuals have no ownership rights, instead, they normally enjoy unrestricted right of usage.⁴³ Since there are no ownership rights over land, such land is inalienable. Payne⁴⁴ has emphasised that

customary land is not subject to personal ownership, although use-rights maybe alienable within and between members of the community.

As Fisher⁴⁵ noted, "the major characteristic of customary tenure is that the land is regarded as belonging not to the individual but to the whole social group." Further, with customary land tenure, land is administered in accordance with customary rules and norms of a particular community.⁴⁶ As Wily⁴⁷ noted, in the customary tenure system the norms are derived from the community itself rather than from a statute. Since customary rules and norms are mostly unwritten and known by the particular community that follows the known customary law, they are rarely binding beyond that community.⁴⁸ That is why perhaps Van der Walt⁴⁹ is of the opinion that

...customary rights in property cannot really be described as real rights or as ownership or as limited real rights, because their nature and function are so uniquely tied in with the social structure which underlined customary relationships. They are rights in property, but unlike any other rights.

2.2.1.2 Open access system of land tenure

In an open access system of land tenure, access to land is generally open to anyone.⁵⁰ In other words, there are no specific rights assigned to anyone and no one is excluded from accessing land.⁵¹ Examples of open access system of land tenure include marine tenure where access to the high seas is free and open to all. It also includes rangelands,

⁴² Mends *A study of the Institution of the Customary Land Tenure System* 3.

⁴³ Mends *A study of the Institution of the Customary Land Tenure System* 9.

⁴⁴ Payne *Urban Land Tenure and Property Rights* 4.

⁴⁵ Mends "A Study of the Institution of the Customary Land Tenure System" 1-14.

⁴⁶ Payne *Urban Land Tenure and Property Rights* 3.

⁴⁷ Wily 2011 <https://dlc.dlib.indiana.edu>.

⁴⁸ Freudenberger 2013 <https://www.land-links.org>.

⁴⁹ Van der Walt *Introduction to the Law of Property* 226.

⁵⁰ FAO 2002 <http://www.fao.org>.

⁵¹ FAO 2002 <http://www.fao.org>.

forests and any other place where resources are accessible to everyone without any restrictions.⁵² While on the other hand, in a communal system of tenure, only members of a specific community have a right to access the common area and non-members of that community are excluded from accessing the common area. With an open access system of tenure, the common land is accessible to everybody and access is thereby not limited to a specific class of people.⁵³

2.2.2 Statutory land tenure

2.2.2.1 Freehold land tenure

In a freehold system, tenure is derived from the state and gives the beneficiary near absolute ownership of land.⁵⁴ In other words, with this type of tenure, the land holder has full rights and competencies of ownership to transfer, bequeath, mortgage and use property for an unlimited duration.⁵⁵

Thus, in a freehold system ownership is defined as a near absolute right due to the fact that the right can be restricted by the law.⁵⁶ Payne⁵⁷ emphasises that with private ownership, one has a right to absolute free enjoyment and disposal of property, provided that they are not in any way contrary to the laws or regulations.

2.2.2.2 Leasehold tenure

As defined by Bruce,⁵⁸ a leasehold system is a form of land tenure whereby there is a lease agreement between the lessor and the lessee that the former agrees to give the latter temporary use and enjoyment of the property in return for payment of rent. In other words, with the leasehold, land may mostly belong to the state, an individual or corporations and then through contractual agreement the land is leased to individuals for an agreed period.⁵⁹ The lease agreement will be registered against the title of the land

⁵² Munro-Faure *et al Land Tenure and Rural Development* 7.

⁵³ FAO 2002 <http://www.fao.org>.

⁵⁴ Payne *Urban Land Tenure and Property Rights* 20.

⁵⁵ Payne *Urban Land Tenure and Property Rights* 4.

⁵⁶ Van Der Walt and Pienaar *Introduction to the Law of Property* 27.

⁵⁷ Payne *Urban Land Tenure and Property* 4.

⁵⁸ Bruce 1998 *Country Profiles of Land Tenure* 249.

⁵⁹ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 427.

to create effective and enforceable land rights. On the expiration of the lease, the lessee has to restore the property to the landowner.⁶⁰

2.3 History of the land tenure system in Lesotho

2.3.1 Traditional tenure arrangement

In describing the customary land tenure system of Lesotho the starting point is the *Laws of Lerotholi*.⁶¹ This is because the *Laws of Lerotholi* are usually regarded as a reliable source of customs and traditions of Basotho.⁶² Prior to the publication of the *Laws*, Basotho customs were unwritten.⁶³ As such, it was only in 1903 that the Basutoland National Council was established and its first task was to compile and write down all Basotho Laws.⁶⁴ As a result, the *Laws of Lerotholi*, which is the main source of customary law, was promulgated in 1903.⁶⁵ These laws spelt out the basic tenets of the customary land tenure.⁶⁶ Not only that, but the laws also outlined the Basotho customary rules of allocation and revocation of land. In traditional Basotho society, land was not the property of any individual. Land instead belonged to the community and was held in trust by the Chiefs.⁶⁷ Casalis⁶⁸ described land ownership among the Basotho as follows,

The sale and transfer of land is unknown to these people. The country is understood to belong to the whole community and no one else has right to dispose of the soil from which he derives support. The sovereign chiefs assign to their vassals the parts they are to occupy; and these latter grants to every father of a family a portion of arable land proportionate to his wants. The land thus granted is insured to the cultivator as long as he does not change his locality. If he goes to settle elsewhere, he must restore the fields to the chief under whom he holds them, in order that the latter may dispose of them to some other person.

From the above quote, it is apparent that the principle of Lesotho's customary land tenure system as stated by the Constitution⁶⁹ is that "land in Lesotho belongs to the Basotho

⁶⁰ Badenhorst *et al Silberberg and Schoeman's The Law of Property* 427.

⁶¹ Mosito 2014/15 *SADC LJ* 72; Leduca 2003 *Informal land Delivery Processes* 9.

⁶² Leduca *Informal Land Delivery Processes* 9.

⁶³ Juma 2011 *Pace International Law Review* 116.

⁶⁴ Juma 2011 *Pace International Law Review* 117.

⁶⁵ *Laws of Lerotholi* were first promulgated in 1903. In 1922 the Laws were revised into *Laws of Lerotholi* of 1922, Law No 8. The other revisions to the *Laws* were later done in 1946 and 1959.

⁶⁶ Juma 2011 *Pace International Law Review* 116.

⁶⁷ Juma 2011 *Pace International Law Review* 102.

⁶⁸ Juma 2011 *Pace International Law Review* 102.

⁶⁹ Section 108 *Constitution of Lesotho*.

nation and is held in trust by the King. Therefore, traditionally, land could not be owned by individuals but people were allocated land for use and occupation purposes.⁷⁰ Land could not be bought, sold, transferred or exchanged. Indeed this principle has been described as a sound one, since it acknowledged that land is the most important natural resource for the welfare of the nation- present and future and it should be used solely for the benefit of the nation.⁷¹

According to Mokitimi,⁷²

the fundamental concept of the land tenure system is that land is a national and social asset to be utilised for the benefit of the nation.

This system entitled all households to have access to land for residential and agricultural purposes.⁷³ Basically, an allottee did not have rights of ownership over the residential land allocated to them but rather, they had a right of access over the land as long as they occupied the land. Apart from the right of use on the residential property, an allottee also owned all the improvements they made on the allotted piece of land. On agricultural land, the allottee owns the crops cultivated on that land during agricultural season, however, at the end of agricultural season the agricultural land becomes a communal grazing field as such the whole community had a right to graze on that piece of land.⁷⁴ To this day, the landholder's rights to arable land are still seasonal. Mokitimi⁷⁵ furthermore stated that

...when the land cultivated, the owner has exclusive rights to that land. However, after the crop is harvested the land becomes open access whereby anybody can exercise secondary rights of grazing animals.

In principle, upon the death of the allottee⁷⁶ or the change of allegiance from one Chief to another, both agricultural and residential land allocated to that individual reverted back to the administrative control of the Chief who reallocated it.⁷⁷ However, in case of the allottee's death, minor dependants left in the household would be reported by the

⁷⁰ Thabane *Who Owns and in Lesotho* 8.

⁷¹ Mosaase "Lesotho's Land Policy"63-66.

⁷² Mokitimi *Analysis of Security of Tenure* 6.

⁷³ Mokitimi *Analysis of Security of Tenure* 7.

⁷⁴ Mokitimi *Analysis of Security of Tenure* 9.

⁷⁵ Mokitimi *Analysis of Security of Tenure* 8.

⁷⁶ The allottees in this case refer to the married couple that has been allocated land.

⁷⁷ Section 7 (5) (a) *Laws of Lerotholi*; Mosito 2014/15 *SADC LJ*2.

guardians of such minors to the chief.⁷⁸ The chief would then make provisions for such minors.⁷⁹

One could however submit that the reversion of land to the allocating authority was only a theoretical concept since in practice; the rights of use were continually inherited by the deceased allottee's family.

As noted above, under customary law, allocation of land was done by the Chiefs on behalf of the King. It must be noted that under the traditional tenure, the Chiefs had an absolute power in land allocation and administration.⁸⁰ That is, a Chief could revoke an allocation for instance where they were of the opinion that the allottee had more land than was required for their family subsistence.⁸¹ For this reason, the traditional system was believed to be egalitarian in land distribution.⁸² Hence it has been specified in the *Laws of Lerotholi* that every married man was entitled to three fields for agriculture and a piece of land for residential purpose.⁸³ In this way, the traditional land tenure was seen as a way to offer security to Basotho against land hoarding and to control disproportionate aggregation of property rights.⁸⁴

2.3.2 Shortcomings of the traditional land tenure

As has been noted in the preceding chapter, the fundamental principle of land tenure in Lesotho is that all land is vested in the Basotho Nation and held in trust by the King. The land in fact, belonged to neither the Chief nor the allottee, Chiefs only had the right to administer the land. According to Mosito,⁸⁵

Lesotho's traditional land tenure system performed well and equitably while land was accessible to all and land management posed no problems.

⁷⁸ Mokitimi *Analysis of Security of Tenure* 7.

⁷⁹ Mokitimi *Analysis of Security of Tenure* 7.

⁸⁰ Thabane *Who Owns Land in Lesotho* 11.

⁸¹ Mosaase "Lesotho's Land Policy" 63-66

⁸² Daemane 2012 *JSDA* 165.

⁸³ Under the Customary law, woman were not entitled to be allocated land but widows and unmarried woman could be allocated land at the discretion of the chief. This provision was changed after the enactment of *Legal Capacity of Married Persons Act* No9 of 2006.

⁸⁴ Daemane 2012 *JSDA* 165.

⁸⁵ Mosito 2014/15 *SADC LJ* 73.

Nevertheless, as time went by, the Chiefs who had a right to allocate land seemed to exercise that right as if the land belonged to them.⁸⁶ As asserted by Thabane,⁸⁷ there was a series of grievances from individuals that included *inter alia* arbitrary refusal to allocate land or the withdrawal of land given to widows and old women. In fact, Mosaase⁸⁸ pointed out that the arbitrary allocation of land was not a recent problem but it can be traced from as far back as 1874.

Over and above the arbitrary allocation grievances, land management also posed problems.⁸⁹ The problem of mismanagement of land included the fact that the chiefs allocated land without consideration of any planning principle. According to Leduka⁹⁰ this act resulted in "urban sprawl and ribbon development along the main roads." Another problem of the communal system in Lesotho was that agricultural land was sacrificed for residential houses.⁹¹ Furthermore, the communal grazing practice led to serious overstocking with poor quality livestock.⁹² In addition, as pointed out by Thabane⁹³ there were also common reports that the land tenure in Lesotho was not conducive to economic development in general and foreign investment in particular. An in-depth discussion on the effects of the land tenure system on the economy of Lesotho will be undertaken in the following chapter.

It is because of these reasons, among others that perhaps there were several attempts made to reform land tenure by departing from the strict application of customary rules of land tenure.

2.4 Land tenure reforms

According to Leduka⁹⁴ except for the 1928 *Government Reserve Proclamation*⁹⁵ no attempts were made to change the customary land laws until 1967.

⁸⁶ Mosito 2014/15 *SADC LJ* 74.

⁸⁷ Thabane *Who Owns the Land in Lesotho* 12.

⁸⁸ Mosaase "Lesotho's Land Policy" 63-66.

⁸⁹ Selebalo *Creation of Land Records* 1.

⁹⁰ Leduka *Lesotho Urban Land Market* 5.

⁹¹ Daemane 2012 *JSDA* 166.

⁹² Daemane 2012 *JSDA* 167.

⁹³ Thabane *Who Owns the Land in Lesotho* 10.

⁹⁴ Leduka 2007 *Africa Today* 95.

⁹⁵ The Proclamation was meant to enable the appointment of colonial government reserve chiefs,

2.4.1 *Land Act Procedure Act and Deed Registry Act*

Hence, Leduca⁹⁶ opines that the first attempt to reform the customary laws of tenure were made in 1967 when two laws were passed. The Acts being the *Land Procedure Act* 24 1967(hereinafter referred to as *LPA 1967*) as well as the *Deeds Registry Act* 12 of 1967 (hereinafter referred to as the *Deeds Registry Act*). These laws however, did not make any change to the allocation, administration and the control of land.⁹⁷ The *LPA 1967* was enacted mainly to provide for procedures relating to the application for allocation of land or for a grant of any interest or right in or over the land;⁹⁸ the *Deeds Registry Act* regulated the registration of deeds.⁹⁹ In fact, these two laws still upheld the customary principle of tenure that land is non-transferable. One could, therefore, conclude that the 1967 Acts did not remedy the inadequacies of the traditional land tenure rules.¹⁰⁰

2.4.2 *1973 land reforms*

As a result, further attempts at reforming the land law were made in 1973 when two land laws were again passed. These laws are the *Administration of Lands Act* of 1973(hereinafter referred to as the *ALA 1973*) and *Land Act* of 1973(herein after referred to as *LA 1973*).

2.4.2.1 *Land Act No 1973*

The *LA 1973* which was meant to cover the rural land introduced no substantial change to the existing customary land tenure.¹⁰¹ Seeing as, the Act still upheld the notion that the land in Lesotho is vested in the Basotho nation, but land administration is vested in the King, whose powers were to be exercised by Chiefs and Headmen. Section 3 of the Act, provides that

to oversee the affairs of the native urban population and to exclude hereditary chiefs from allocating land in reserves.

⁹⁶ Leduca 2007 *Africa Today* 95.

⁹⁷ Daemane 2012 *JSDA* 166; Leduca *Lesotho Urban Land Market* 5.

⁹⁸ Leduca *Lesotho Urban Land Market* 5.

⁹⁹ Leduca *Lesotho Urban Land Market* 5.

¹⁰⁰ Leduca 2007 *Africa Today* 95.

¹⁰¹ Leduca *Informal Land Delivery Processes* 10; Mosito 2014/15 *SADC LJ* 75.

all land in Lesotho vests in the Basotho Nation and the power to allocate land is vested in the King in trust for the Basotho Nation.¹⁰²

Apart from the introduction of Land Allocation Boards which were entrusted to advise Chiefs regarding the allocation and administration of land, the *LA 1973* did not bring any significant change to the customary land tenure.¹⁰³ In effect, even though the *LA 1973* introduced the land allocation committees, the committees only had an advisory role.¹⁰⁴ Furthermore, according to Pule and Thabane,¹⁰⁵ the Chiefs mostly ignored the committee's recommendations and as a result, the presence of the committees did not bring any improvement of land allocation and land use control. The *LA 1973* remained in force until 1980 when it was repealed by the *Land Act 17* of 1979.

2.4.2.2 Administration of Lands Acts 1973

Whereas the *LA 1973* did not make any considerable change to the customary land tenure, the *ALA 1973* which was meant for the urban land attempted some changes. For starters, the most significant aspect of the *ALA 1973* is that the Act attempted to nationalise land by placing the administration of the land with the government and removing such powers from the control of the Chiefs.¹⁰⁶ The *ALA 1973* provided that

it is hereby confirmed that the ownership of land is irrevocably vested in the Nation, represented by the State of Lesotho.

The *ALA 1973* confirmed that the ownership of land is irrevocably vested in the Nation, represented by the State of Lesotho. That being the case, there was a bit of confusion between the *LA 1973* and the *ALA 1973*. This is because, while the *LA 1973* reaffirmed that the land is vested in the Basotho Nation and the land administration is vested in the King whose powers were to be exercised by Chiefs, the *ALA 1973* on the other hand provided under section 2 that

it is hereby confirmed that the ownership of land is irrevocably vested in the Nation, represented by the State of Lesotho.¹⁰⁷

¹⁰² Pule and Thabane *The Journal of Modern African Studies* 287-288.

¹⁰³ Damane 2012 *JSDA* 166; Mosito 2014/15 *SADC LJ* 75.

¹⁰⁴ Mosito 2014/15 *SADC LJ* 75.

¹⁰⁵ Pule and Thabane 2004 *Lesotho's Journal of Modern African Studies* 288.

¹⁰⁶ Thabane "Land Tenure, Housing Rights and Gender" 35.

¹⁰⁷ Mosito 2014/15 *SADCLJ* 75.

It is imperative to note that the *ALA 1973*, which tried to remove the land administration from the King by replacing them with the government, was never brought into operation.¹⁰⁸ Mosito¹⁰⁹ speculated that perhaps the *ALA 1973* was not brought into operation because "it proposed land tenure reforms that affected the power of chiefs in land allocation and management." Leduka¹¹⁰ also shares Mosito's sentiments and he is of the opinion that the Chiefs obstructed the implementation of the *ALA 1973* because the Act proposed land tenure changes that threatened the authority of traditional Chiefs over land.

In addition, even though its implementation was obstructed, the *ALA 1973* is the first piece of legislation to introduce a notion of leasehold as well as land revenue by way of ground rent.¹¹¹ Furthermore, since under the customary Basotho land tenure there was no formal documentary title as proof of land allocation, it was only through the *ALA 1973* that a proof of title allocation document known as "Formc" was introduced.¹¹² A "Formc" is a title document that was given by the Chief to an allottee as proof of title. That is, the Chief, upon granting the applicant an allocation of land, issued the "Formc" to the allottee. The area Chiefs were required to maintain a register of land that has been allocated and the "Formcs" issued. The "Formc" document was later abolished by the *Land Act 1979*. However, all "Formcs" issued prior to the enactment of the Act remain valid.¹¹³ The "Formc" was replaced by three documents of title being "Formc1" as the allocation certificate issued for agricultural land in the urban areas, "Formc2" was the allocation certificate issued for residential or agricultural properties in the rural areas and Form"c3" was the allocation certificate issued for residential property in the urban areas.¹¹⁴

2.4.3 *Land Act No 17 of 1979*

¹⁰⁸ Mosito 2014/15 *SADCLJ* 74.

¹⁰⁹ Mosito 2014/15 *SADCLJ* 75.

¹¹⁰ Leduka *Lesotho Urban Land Market* 5.

¹¹¹ Leduka *Lesotho Urban Land Market* 5.

¹¹² Thabane "Land Tenure, Housing Rights and Gender" 36.

¹¹³ Thabane "Land Tenure, Housing Rights and Gender" 36.

¹¹⁴ Thabane "Land Tenure, Housing Rights and Gender" 36.

In 1979, further land reform came into place, when two 1973 Acts were consolidated into the *Land Act 1979* (hereinafter referred to as the *LA 1979*) which was brought into operation in 1980.¹¹⁵ According to Leduka¹¹⁶ the *LA 1979*,

...was premised on a cautious approach involving an evolutionary transformation of the customary land allocation process. This evolutionary change was to begin with the establishment of land allocation committees chaired by the chiefs in ex-officio capacity, but with provision for direct elections to all committees as sometime in the future.

He continues to state that the *LA 1979* achieved this transformation by nationalising all land in Lesotho with the rights to be leased from the state.¹¹⁷ It therefore follows that, the *LA 1979* deviated from the traditional tenure rules where the land was held in trust by the King and instead the Act provided that land in Lesotho is vested absolutely and irrevocably in the Basotho Nation and is held by the State as representative of the nation.¹¹⁸ The Act then provided for the establishment of Land Allocation Committees and the Committees instead of Chiefs had the power to allocate land and revoke allocation of such land.¹¹⁹

2.4.3.1 Tenure options under LA 1979

Additionally, the *LA 1979* introduced three forms of land tenure options being allocation, leasehold and licence.¹²⁰ A brief discussion on each tenure has been outlined below.

2.4.3.1.1 Leasehold system

Under the *LA 1979*, the leasehold gave lessees exclusive possession and enjoyment of the leased land, subject to statutory conditions that could be attached. Rights in land could be sold, sub-let or mortgaged, although only with the consent of the Minister of Local Government.¹²¹ Leaseholds varied in terms of duration, with the longest being 90 years for residential purpose, commercial lease on the other hand subsisted for a maximum period of 60 years.¹²² While the shortest leasehold period was 30 years for land

¹¹⁵ Leduka *Lesotho Urban Land Market* 5.

¹¹⁶ Leduka *Informal Land Delivery Processes* 11.

¹¹⁷ Leduka *Lesotho Urban Land Market* 5.

¹¹⁸ Section 3(1) *LA 1979*.

¹¹⁹ Section 12 (1) *LA 1979*.

¹²⁰ Leduka *Lesotho Urban Land Market* 6.

¹²¹ Section 35 *LA 1979*.

¹²² Section 39(1) (a); Section 39(1) (b) of *LA 1979*.

used for the sale of petroleum products and for purposes of wholesale storage of petroleum or oil.¹²³

2.4.3.1.2 Allocation

In rural area, the Act provided, under section 7 for the allocation which carried a similar meaning to that understood under customary allocation. Hence, a right of title granted under this tenure system, was not transferable.¹²⁴ It is important to note that, allocation title applied exclusively to the land in the rural areas.¹²⁵ As per section 8 a grant of title of this nature entitles the allottee a right to use and occupy the land for his lifetime.¹²⁶ Grant of title under allocation differs from land allocated under customary law because, whereas under customary law, allocated land could not be inherited, the *LA 1979* on the other hand provided that after the death of the allottee, the use right will then pass to the designated heir to the allottee's estate.¹²⁷

Even though allocations titles were for indefinite periods, provided there were valid reasons, the allocating authority could revoke an allocation after giving the allottee thirty days' notice.¹²⁸ As noted by Leduka,¹²⁹ reasons for revocation included for instance misuse of land through failure to combat soil erosion or failure to cultivate the land for three successive seasons and when the land was required for public purposes. A land holder whose allocation was revoked was entitled to compensation for all the lawful improvement they made on the land. ¹³⁰

2.4.3.1.3 Licences¹³¹

The Act again provided for the "licence" which was introduced specifically to apply to urban land that was still predominantly under agricultural use. In this form of tenure, an

¹²³ Section 39(1) (c) *LA 1979*.

¹²⁴ Section 8 (1) *LA 1979*.

¹²⁵ Section 7 *LA 1979*.

¹²⁶ Section 8(1) provides that in the case of a body corporate or unincorporated the land may be allocated for a limited period or indefinite period whereas in case of an individual allocation may be for a limited time or his lifetime but shall not endure beyond his lifetime.

¹²⁷ Leduka *Urban Land Market* 6.

¹²⁸ Leduka *Urban Land Market* 6.

¹²⁹ Leduka *Urban Land Market* 6.

¹³⁰ Section 15 *LA 1979*.

¹³¹ Section 34 *LA 1979*

allocation for an unspecified period was made by the Chief assisted by the Land Allocation Committee. The licence entitled the licensee to use and occupy land only for agricultural purpose. The rights under an allocation remain non-transferable and could not be sold.¹³² Apart from being restricted from disposing of their rights, the licensee was prohibited from creating any lesser rights on the land.¹³³ That is, a licensee was not allowed to for instance sub-let the land. Furthermore, unless the improvement or changes made to the land related to agricultural activities, the licensee was required to seek ministerial consent before making any changes or improvements on the land.¹³⁴

2.4.3.2 LA 1979 Constraints

The *LA 1979* is regarded as the most important legislation because it greatly transformed the land laws in Lesotho.¹³⁵ Leduka¹³⁶ opines that unlike the *LA 1973*, the *LA 1979* was premised on a policy of change. In other words, this Act was enacted mainly to shift away from the traditional beliefs that the power to allocate, revoke and administer land is vested solely in the traditional Chiefs.¹³⁷ According to Mosaase,¹³⁸ the customary land tenure failed to meet the changing social and economic needs of Lesotho. Alternatively stated, the transformation from the traditional ideology was implemented because the customary land tenure arrangement was identified in general as the main institutional constraints to the country's economic development.¹³⁹ In a nutshell, Lesotho embarked on a land reform programme, by enacting the *LA 1979* and bringing it into operation in June 1980 to remedy the defects of the customary law.

According to Hall,¹⁴⁰

...the *LA 1979* was praised not only for attempting to create greater transparency in the land allocation process but also for introducing a leasehold system of land tenure in Lesotho in a bid to make land tenure more secure.

¹³² Thabane "Land Tenure, Housing Rights and Gender" 37.

¹³³ Leduka *Urban Land Market* 7.

¹³⁴ Leduka *Urban Land Market* 7.

¹³⁵ Mosaase "Lesotho's Land Policy" 63-66.

¹³⁶ Leduka *Informal Land Delivery Processes in Maseru* 11.

¹³⁷ Leduka *Informal Land Delivery Processes in Maseru* 11.

¹³⁸ Mosaase "Lesotho's Land Policy" 63-66.

¹³⁹ Mosaase "Lesotho's Land Policy" 63-66.

¹⁴⁰ Hall *Regulatory Guidelines for Affordable Shelter* 15.

Nevertheless, the *LA 1979* was also criticised for a number of reasons. First, even though the leasehold system was introduced, there was no awareness campaign made to educate allottees of their right to a lease.¹⁴¹ As a result, few people from the urban areas applied for leases while in the rural areas the leasehold system remain a foreign concept.¹⁴² Second, because there were no proper records kept of "Formcs" documents issued by the Chiefs, the documents had become a source of malpractice and a subject of forgery facilitating illegal occupations of land.¹⁴³ In the case of *Moletsane v Attorney General*,¹⁴⁴ Maqutu JC stated that even though the law¹⁴⁵ provided for keeping of land registers by Chiefs and the issuing of certificate of allocations known as "Formcs", the land registers were not kept properly or in some instances land allocation records were non-existent. As a result, there was often an allocation of the same piece of land to more than one person. Moreover, there were numerous land disputes before the courts relating to the irregularities and errors resulting from issued "Formc" documents.

Furthermore, after the abolishment the "Formcs," the Chiefs continued to issue "Formcs" as documentary evidence of allocation backdating the documents to dates prior to 1980. The "Formcs," therefore, became a source of malpractice and a subject of forgery facilitating illegal occupations of land. This was the issue in *Tsotako v Matabola*.¹⁴⁶ The defendant in this case claimed to have been allocated the site in 1973 but the "Formc" used as evidence was only stamped in 1978. As a result, the Court of Appeal declared the "Formc" presented as evidence in that case as a false document. An in-depth discussion on the "Formc" as a document used as proof of land allocation will be made in the following paragraphs.

Additionally, according to Hall,¹⁴⁷ the *LA 1979* introduced a democratic element to land allocation through the establishment of Land Allocation Committees.¹⁴⁸ Hall¹⁴⁹ further

¹⁴¹ Hall *Regulatory Guidelines for Affordable Shelter* 15.

¹⁴² Hall *Regulatory Guidelines for Affordable Shelter* 15.

¹⁴³ Hall *Regulatory Guidelines for Affordable Shelter* 15.

¹⁴⁴ *Moletsane and Others v Attorney General and Another* case number (CIV/APN/163/2001) para 42-43.

¹⁴⁵ The court in this case was referring to the *Land Procedure Act 1967* which was the relevant Act at the time.

¹⁴⁶ *Tsotako v Matabola* C.of A. (CIV) No.10 Of 1986 para 10.

¹⁴⁷ Hall *Regulatory Guidelines for Affordable Shelter* 15.

¹⁴⁸ Hall *Regulatory Guidelines for Affordable Shelter* 15.

¹⁴⁹ Hall *Regulatory Guidelines for Affordable Shelter* 15.

maintains that this action resulted in a lot of acrimony between the Land Allocation Committees and Chiefs, mainly because the latter felt threatened in their traditional powers. Therefore, because of the conflict of power between Chiefs and the Land Allocation Committee, the land administration was chaotic and lawlessness and illegal occupations of land prevailed.¹⁵⁰ For instance, the Chiefs continued to enter into private agreements in terms of which part of agricultural plots were cut into sites for residential purposes.¹⁵¹ Since there was no strict regulatory system there was inefficient control of urban and peri-urban areas resulting in for example ribbon developments along the main roads.¹⁵²

Lastly the *LA 1979* was found to be irresponsible to the economic needs of the country.¹⁵³ For example, because of the requirement that prior ministerial consent had to be acquired before transacting with a lease, there were delays and complications when a person needed to transact with a lease.¹⁵⁴ According to Leduca,¹⁵⁵

people had to wait for months or years for such consent by the Minister, which resulted in delays in transactions and became a major drag on the leasehold market and mortgage lending.¹⁵⁶

Therefore, according to Bruce,¹⁵⁷

consent requirements under this Act tended to limit the ability of landholders to respond to land market demands.

Again, since under the communal system of land tenure no one had the right to sell land, hundreds of hectares of agricultural land lay idle mainly because Basotho who had rights to the land were without the economic means to utilise it.¹⁵⁸ When referring to the *LA 1979*, the then Minister of Finance Thahane¹⁵⁹ said

...people who have no land but have money and are willing to invest in agriculture are loath to do so as there is no security of tenure. The owner of land might want to evict

¹⁵⁰ Hall *Regulatory Guidelines for Affordable Shelter* 15.

¹⁵¹ Leduca *Informal Land Delivery Processes in Maseru* 11.

¹⁵² Leduca *Informal Land Delivery Processes in Maseru* 11.

¹⁵³ Mosaase "Lesotho's Land Policy" 63-66.

¹⁵⁴ UNCTAD *Investment Policy Review* 36.

¹⁵⁵ Leduca "Privatising Land Rights" 8-20.

¹⁵⁶ Leduca "Privatising Land Rights" 8-20.

¹⁵⁷ Bruce *Lesotho's Draft Land Act: Issues and Recommendations* 22.

¹⁵⁸ Ndimba *et al* "Sustainable Land Use" 2-12.

¹⁵⁹ Lee 2011 [http:// www.osisa.org](http://www.osisa.org).

you after you sink lots of money in the land, and you have no recourse because land cannot be sold.

2.5 Concluding statement

To summarise, considering that the customary land tenure was seen as an obstacle to among others the commercialisation of agriculture and enhanced food security,¹⁶⁰ the *LA 1979* was as a result enacted to remedy the deficiencies of the traditional land tenure. However, it is submitted that *LA 1979* was also not without faults. In due course this Act was then concluded to have failed to achieve the unitary efficient land management system that the state had hoped to achieve through its enactment.¹⁶¹ According to Hall,¹⁶² the *LA 1979* produced less than the desired results. For example, instead of an effective land administration envisaged, the implementation of the Act resulted in the co-existence of the customary and statutory systems, thereby causing chaos.¹⁶³ That is why as a response to the problems caused by the Act, the government of Lesotho established a Land Policy Review Commission¹⁶⁴ (hereinafter referred to as the LPRC) of inquiry to look into matters of land reform. In the next chapter the current land law in Lesotho will be analysed.

3 Discussion on the land laws and the limitation on foreign ownership of land

The aim of this section is to discuss the law governing use and ownership in Lesotho. This chapter will focus more specifically on the provisions of the *LA 2010*, which is the legislation governing land use in Lesotho. As an introduction, the chapter will delve into a brief background of the country and provide an emphasis why land is 'gold' in Lesotho.

3.1 Background

Lesotho is a small mountainous country surrounded by the Republic of South Africa with a population of 1.8 million.¹⁶⁵ The country covers 30, 350 square kilometres in size, and since the country is characterised by a rugged mountainous terrain, only eleven percent

¹⁶⁰ Mosaase "Lesotho's Land Policy" 63-66.

¹⁶¹ Leduka *Informal Land Delivery Processes in Maseru* 12.

¹⁶² Hall *Regulatory Guidelines for Affordable Shelter* 15.

¹⁶³ Leduka *Informal Land Delivery Processes in Maseru* 12.

¹⁶⁴ The Commission was established in the early 2000s and was chaired by Judge Ramodibeli.

¹⁶⁵ Thabane "Land Tenure, Housing Rights and Gender" 29.

of the total land is classified as arable land.¹⁶⁶ Lesotho has limited natural endowments and land is one of those resources; the others include water and diamonds.¹⁶⁷ Due to its limited resources, it follows that the country would strive for optimum and effective utilisation of the available resources particularly land.¹⁶⁸

Land is one of the resources that contribute significantly towards the country's economic development, food security and poverty reduction.¹⁶⁹ Put differently, land is regarded as a major contributing factor towards the country's economic growth.¹⁷⁰ In addition, it constitutes as the main livelihood basis for a large portion of the Basotho.¹⁷¹ This is so because most households depend on subsistence farming and limited pastoral production for their livelihood. As an important asset, land is the main vehicle for investment, wealth accumulation and transfer of wealth between generations.¹⁷² Nonetheless, land especially agricultural land has become increasingly scarce for the majority of people due to a variety of pressures, such as soil erosion and population growth.¹⁷³ According to Selebalo,¹⁷⁴ rapid and uncontrolled growth and sprawls of unplanned settlements in especially the urban areas diminishes the country land quality.

The land tenure system under both customary law and the *LA 1979* was mainly communal.¹⁷⁵ This was problematic. As a response, parliament had to erode the customary or traditional rules and adopt new laws governing land tenure administration.¹⁷⁶

It was at this point that the Land Policy Review Commission (herein referred to as the LPRC) was established to make inquiries and look further into the possibility of land reform.¹⁷⁷ The central findings of the LPRC were that the main shortfall of the *LA 1979* was that the land administration and tenure under the *LA 1979* were ineffective in such

¹⁶⁶ Ministry of Trade and Industries Trinidad and Tobago 2004 <http://www.intracen.org/WorkArea>.

¹⁶⁷ Sekatle "World Bank Securing Land Rights" 1-10.

¹⁶⁸ Sekatle "World Bank Securing Land Rights" 1-10.

¹⁶⁹ Sekatle "World Bank Securing Land Rights" 1-10.

¹⁷⁰ CBL 2010 *Economic Review 5*; Sekatle "World Bank Securing Land Rights" 1-10.

¹⁷¹ CBL 2010 *Economic Review 5*.

¹⁷² Leduka "Privatising Land Rights" 8-20.

¹⁷³ Johnson *Reforming Land Administration in Lesotho 2*.

¹⁷⁴ Selebalo "Creation of Land Records" 7.

¹⁷⁵ Damane 2012 *JSDA* 166.

¹⁷⁶ Damane 2012 *JSDA* 166.

¹⁷⁷ Leduka "Privatising Land Rights" 8-20.

a way that it was hampering economic development.¹⁷⁸ The recommendations made by the LPRC then paved way for the promulgation of the *Land Act 8 2010* (hereinafter the *LA 2010*).

It is material to note that when it embarked on its land reform mission, the government of Lesotho was assisted by the Millennium Challenge Corporation. The Millennium Challenge Corporation (hereinafter MCC) is an innovative and independent U.S. foreign aid agency that is helping lead the fight against global poverty.¹⁷⁹ The MCC spearheaded the land reform processes and its main purpose was to manage the USA's aid to Lesotho.¹⁸⁰ According to Leduka,¹⁸¹ in order for MCC to enforce its mandate, it significantly departed from the customary rule and land registration. Instead, "it aimed at formalising individual land rights and thereby strengthening the land administration system."¹⁸² Firstly, the MCC was engaged in reforming the laws and policies governing land through the enactment of the *Land Act 2010*. Secondly, it regularised land in urban areas and improved the rural land allocation processes. Lastly, it modernised and improved land administration services.¹⁸³ In order to achieve these objectives, the Land Administration Authority was formed to replace the Land Surveys Physical Planning (hereinafter referred to as the LSPP).¹⁸⁴

3.2 The Millennium challenge reforms

3.2.1 Land Act No 8 2010

The previous chapter has discussed the evolution and development of the land tenure from the customary land system till the enactment of the *LA 1979*. The reforms made were necessary to remove the constraints imposed by the previous customary traditional land tenure system as well as the *LA 1979*.¹⁸⁵ Thus, as seen in the previous chapter, even though the *LA 1979* was an invaluable milestone, it failed to address the land tenure

¹⁷⁸ Leduka *Informal Land Delivery Process in Maseru* 19.

¹⁷⁹ MCC 2013 <https://www.mcc.gov/where-we-work/program/lesotho>.

¹⁸⁰ MCC 2013 <https://www.mcc.gov/where-we-work/program/lesotho>.

¹⁸¹ Leduka "Privatising Land Rights"8-20.

¹⁸² Leduka "Privatising Land Rights"8-20.

¹⁸³ Mabesa and Whittal "Governance in Land Administration Systems" 1-13.

¹⁸⁴ Leduka *Informal Land Delivery Process in Maseru* 17 Mabesa and Whittal "Governance in Land Administration Systems" 1-13.

¹⁸⁵ CBL 2010 *Economic Review* 6.

setbacks of the customary and traditional system adequately.¹⁸⁶ As a result, it is submitted that when it became evident that the *LA 1979* was ineffective to an extent that it was hampering economic development, *LA 2010* was enacted.

3.2.1.1 Objectives of the LA 2010

In its preamble, the *LA 2010* states that the purpose of the Act is to

...repeal and replace the law relating to land, provide for the grant of titles to land, the conversion of titles to land, the better securing of titles to land, the administration of land, the expropriation of land for public purposes, the grant of servitudes, the creation of land courts and the settlement of disputes relating to land; systematic regularisation and adjudication; and for connected purposes.

According to Leduca,¹⁸⁷ the objectives of the *LA 2010* include *inter alia* to modernise land administration, to facilitate investment including foreign investment and to create land markets.

Section 4 of the *LA 2010* reiterates the constitutional provision¹⁸⁸ that land in Lesotho is vested in the Basotho nation and held in trust by the King. As stated in the preceding chapter, this principle of communal land tenure is regarded an important principle because it recognised that land is an invaluable natural resource that ought to be used for the benefit of the present and future generation.¹⁸⁹ Seemingly, perhaps, even today that is why the freehold system of tenure is not recognised in Lesotho and the leasehold system is the preferred tenure system instead.

3.2.1.2 People eligible to hold title to land

The issue of land holding is regarded as a sensitive matter that led to a controversy after the publication of the *Land Bill 2009*¹⁹⁰ preceding the enactment of the *LA 2010*. The aforementioned provision that granted non-Basotho right to hold land triggered a major debate.¹⁹¹ Some people argued that permitting non-citizens to hold land could transfer

¹⁸⁶ Daemane 2012 *JSDA* 167.

¹⁸⁷ Leduca *Urban Land Market* 6.

¹⁸⁸ Section 107 of the *Constitution of Lesotho* 1993.

¹⁸⁹ Mosaase "Lesotho's Land Policy"63-66.

¹⁹⁰ Section 6 of the Land Bill 2009 listed people who can hold title to land in Lesotho. Included among these people were non-citizens subject on condition that "the applicant should be a natural person who has resided in Lesotho for a period of not less than six months.

¹⁹¹ Lesotho Times 2009 <http://lestimes.com/land-bill-will-unlock-development>.

the Basotho's precious land rights to foreigners thereby dilute the equitable distribution of land that the nation has long cherished.¹⁹² While others, were of a different opinion that if foreigners own land in Lesotho, they will be able to invest and contribute significantly to the economic well-being of the country.¹⁹³

After extensive discussions, the general feeling amongst Basotho was that if there were no restrictions with regard to foreign landholding this might jeopardise the interest of Basotho.¹⁹⁴ Consequently, all persons eligible to hold title to land have been categorised exclusively by the *LA 2010*. In terms of section 6 of that Act, foreign individuals have been excluded from the list of people entitled to hold land in Lesotho. In the same vein, foreign businesses are also limited from holding title to land as the section provides that

...a foreign enterprise may hold land for investment purposes, provided Basotho whose land may be valued so that it may form part of the shareholding in such a partnership, form at least 20% of the membership or shareholding of the enterprise.¹⁹⁵

Section 6 is to be read with regulation 4(1) of the *Land Regulations 2010*, providing that

...an application for allocation of land by a foreign enterprise shall be lodged with the relevant allocating authority and application to hold title to land held under a lease by a foreign enterprise shall be made to the Commissioner.

This provision further complicates the acquisition of land by foreign entities and has a negative implication for foreign entity land holding. Pule¹⁹⁶ is of the opinion that the landholding limitation is red tape and has been inimical to foreign investment. In view of that, because of this restriction, foreign investors are likely to be hesitant and discouraged from making permanent improvements on land that they cannot hold in perpetuity. According to Weigel,¹⁹⁷ foreign investors who face difficulty in owning or leasing land in a host country are discouraged to invest in that country because no firm wants to invest without secure tenure of the land where its facilities are located.

¹⁹² Lesotho Times 2009 <http://lestimes.com/land-bill-will-unlock-development>.

¹⁹³ Kleinbooi *Review of Land Reforms in Southern Africa* 16.

¹⁹⁴ Lesotho Times 2009 <http://lestimes.com>.

¹⁹⁵ Section 6(c) *LA 2010*.

¹⁹⁶ Pule and Thabane 2004 *Journal of Modern African Studies* 283.

¹⁹⁷ Weigel *Foreign Direct Investors* 26.

The report compiled by the Governor of the Central Bank of Lesotho (CBL)¹⁹⁸ emphasised that granting land titles to foreigners could be a positive step towards increased physical as well as financial investment. The governor further pointed out that

...spill over effects of foreigners coming into the country cannot be understated. They are likely to come with new methods of agriculture production and industrial development. Improved methods of technology and their utilisation will follow up should foreigners hold land titles in Lesotho.¹⁹⁹

3.2.1.3 Leasehold system in Lesotho

Section 30 of the *LA 2010* provides for a leasehold system and reads as follows

Whenever a person holding land other than land held under a lease upon commencement of this Act is desirous of registering it or creating interest in the land or granting any interest in the land held by him, he shall apply for a lease with the Commissioner for issue of a lease.

Thus, according to this section, if a person holding land desires to convert his or her title holding to a leasehold system they can apply to be issued with a lease. In terms of section 13 of the *LA 2010* a person may be allocated land in the rural area by the local allocating authority. As proof of allocation, the allottee will be provided with an allocation certificate. In terms of section 30 of the *LA 2010*, if an allottee desires to have the right registered, he shall apply for a lease. Therefore, this implies that a statutory lease is optional.

3.3 Systematic land regularisation project

As part of the land reforms, the MCC also initiated the systematic land regularisation project.²⁰⁰ The aim of this project was to carry out registration of allocated land by issuing leases in the urban and peri-urban areas.²⁰¹ As reported by Maredia²⁰²

The main objective of this project, is to strengthen the rights of the legitimate occupiers of the land by a process of formalising those rights. The goal is to register 55,000 parcels and give their owners a title deed of their property (referred to as "Lease") and to record the ownership in Lesotho's reformed land information system.

¹⁹⁸ Matope *Lesotho Times* 6.

¹⁹⁹ Matope *Lesotho Times* 6.

²⁰⁰ Bennekom-Minnema *et al* "Systematic Land Regularisation in Lesotho" 1-14.

²⁰¹ Bennekom-Minnema *et al* "Systematic Land Regularisation in Lesotho" 1-14; Maredia *et al* *Impact Evaluation of Systematic Regularisation of Land* 14.

²⁰² Maredia *et al* *Impact Evaluation of Systematic Regularisation of Land* 12.

The registration of leases was necessary according to Thebe and Rakotje²⁰³ for it ensured an improved security of land tenure because a lease compared to the previous title document – the "Formc" constituted a more reliable documentation of proof of title or ownership of land rights. Moreover, according to Maredia,²⁰⁴

...the formalisation process of the rights to land is considered fundamental to promote private sector development and stimulate economic growth. An updated register of property rights is expected to enable the land to be traded more easily in the form of sale or rent. An improved system should lower land-transaction costs, lower the risk of expropriation or conflict, and increase tenure security. It is also expected to improve the confidence on the part of lenders to secure loans against registered leases (titles), and an increased understanding amongst citizens of the importance and use of land as an economic asset, which in turn can contribute to more efficient land uses due to improved productivity, increased investment, and the development of land markets. More productive land should result in higher asset/land values and higher incomes for property owners. Over time, as land and financial markets develop formal land rights can also be used as collateral for loans.

Prior to the MCC initiative, the majority of Basotho did not have leases, or rather failed to convert their previous title holding to leases. Only a few Basotho had leases despite calls under section 28 of the *LA 1979* to convert all titles to land in urban areas to leases, this section provides that

...title to land in the urban areas, other than land predominately used for agricultural purposes held by any person on the date of commencement of this Act shall be deemed to be converted to leases.

Although the conversion of the land holding to leases was provided for in the *LA 1979*, the Act did not provide for automatic conversion instead, title such as Form "c", "c1" "c2" "cc2" and c3 were converted to leases upon the holders' application for a lease in accordance with Section 29 which provides that,

Whenever a person to whom section 28(1) or (3) applies is desirous of granting or creating any interest in the land held by him or whenever section 30 or 31 applies to that person, he shall apply to the commissioner for issue of a lease.²⁰⁵

One could therefore submit that since conversion of land titles to leasehold was not successful, land remained unregistered and the customary tenure system still prevailed. The lack of interest to convert to leases was due to various reasons including *inter alia*

²⁰³ Thebe and Rakotje 2013 *ASJ* 403.

²⁰⁴ Maredia *et al* *Impact Evaluation of Systematic Regularisation of Land* 12.

²⁰⁵ *Section 29 LA 1979*.

that the lease applications were circumscribed by requirements for prior consent, which could only be granted by the Minister responsible for Lands.²⁰⁶ As a result, lease applicants had to wait for a long before being granted the ministerial consent.²⁰⁷ This resulted in delays in transactions and became a major drag on the leasehold market and mortgage lending.²⁰⁸

Under the *LA 1979*, LSPP was empowered to carry out the land administration. However, according to Mabesa and Whittal²⁰⁹ there were many challenges that hindered the LSPP from providing efficient and effective land administration services. The said challenges included *inter alia* lack or shortage of resources and equipment, complicated application processes, and poor record keeping.²¹⁰ Mabesa and Whittal²¹¹ further opine that due to the stated challenges, the LSPP contributed to slow economic growth and thus resulted in poverty. Additionally, Leduka²¹² reckons that the LSPP's capacity to handle land administration work generated by the *LA 1979* was extremely limited. After it became clear that the LSPP had failed to respond to the economic needs of the country the government confirmed that there was a need to reform the LSPP.²¹³ Hence, a new agency was established to ensure improvement of land tenure security and promote the use of land as a valuable asset for Basotho.²¹⁴

3.4 Land Administration Authority

The Land Administration Authority (hereinafter LAA) is an autonomous government organisation created under the *LA 2010* and governed by the *Land Administration Act 2010*. The LAA is an agency that is responsible for land administration duties that include amongst others maintenance of accurate and complete data base information on land holding in Lesotho. Besides the aforementioned, the LAA is also tasked with issuing leases

²⁰⁶ Leduka "Privatising Land Rights" 12-13.

²⁰⁷ Leduka "Privatising Land Rights" 12-13

²⁰⁸ Leduka "Privatising Land Rights" 12-13.

²⁰⁹ Mabesa and Whittal "Governance in Land Administration Systems" 1-13.

²¹⁰ Mabesa and Whittal "Governance in Land Administration Systems" 1-13.

²¹¹ Mabesa and Whittal "Governance in Land Administration Systems" 1-13.

²¹² Leduka *Informal Land Delivery Processes in Maseru* 17.

²¹³ Mabesa and Whittal "Governance in Land Administration Systems" 1-13.

²¹⁴ Daemane 2012 *JSDA* 167.

and the registration of other deeds. The organisation was established by merging the LSPP and the Deeds Registry.²¹⁵

3.5 Concluding remarks

Despite the fact that the leasehold system was introduced by the *LA 1979* and then strengthened through the systematic regularisation project, the vast majority of the land in the country, especially in rural areas, is still held under customary tenure.²¹⁶ In fact, Lesotho still practices a dual land tenure system, where the customary land tenure and leasehold systems operate concurrently. Customary and traditional land rules are still applicable in the rural areas.²¹⁷

3.5.1 Urbanisation²¹⁸

According to Motsoene,²¹⁹ over the past decade Lesotho like most developing countries, has been affected by a massive influx of migration towards the urban areas, and this has resulted in a significant proportion of population increase in the urban areas.²²⁰ In the mist of this uncontrolled urbanisation, there was an urgent need for residential land in the urban areas. In order to realise this need for residential land, agricultural land was subdivided and the country's subdivision laws and planning standards or laws of planning were disregarded.²²¹ Since the majority of the land was acquired using informal means, a large number of settlers did not have documents to proof allocation be it the "Formc" or any other allocation evidential document. For this reason, the systematic land regularisation project was ushered in to change the landholding mostly in the urban area through registration of the previously unregistered plots.

On the other hand, following the rapid urbanisation, idle and unutilised land remained behind in the rural areas.²²² The systematic land regularisation project failed to address

²¹⁵ Mabesa and Whittal "Governance in Land Administration Systems" 1-13.

²¹⁶ Thabane *Southern African Law and Tenure Review* 13.

²¹⁷ Thabane *Southern African Law and Tenure Review* 13.

²¹⁸ As stated by Axel Urbanisation is understood to refer to a process by which an increasing proportion of a country's population ends up living in towns or cities:www.fao.org/fileadmin/templates/FCIT/PDF/sofa.pdf

²¹⁹ Motsoene *Urbanization and Poverty in Maseru* 43.

²²⁰ Mohapi *Urban Environmental Problems* 2.

²²¹ Leduca *Lesotho Urban Land Market* 14.

²²² Mabesa and Whittal "Governance in Land Administration Systems" 1-13.

the land holding in the rural area and as a result, land tenure in the rural areas remains mostly informal and precarious.²²³ The economic growth in the rural areas therefore remains sluggish²²⁴ in fact one could conclude that the country could greatly benefit from the economic upsurge if land parcels were also regularised by issuing leases in order to provide security of tenure in the rural areas. This is because where title holding is secure and the land holding rights are registered by way of a lease, that leaseholder has rights afforded to them by section 35 of the *LA 2010*. These rights include amongst others: the right to exclusive possession²²⁵ and the right to encumber the land leased by mortgage.²²⁶ Further, the leaseholders can enter into formal sublease agreements with possible investors or sell the property to people who have the economic power to utilise it.²²⁷

The current challenge with regards to rural land is that rural property markets are highly illiquid and function poorly, making it difficult to sell property and thereby hampering rural businesses from for example using land as collateral in order to access financial assistance from possible investors.²²⁸ One could then submit that if there was proper land registration in the rural areas the country would benefit economically for investors would be motivated to invest in land.

According to Thebe,²²⁹ in as much as the majority of the households in Lesotho are believed to engage in agricultural activities as their means of livelihood, a minority can actually sustain arable land in the rural area. Consequently, as stated by Thahane,²³⁰ land held by Basotho lies idle because they have no economic means to exploit it.

Lastly, it has been mentioned that land is regarded as an invaluable resource and if utilised to its potential, it can contribute significantly towards the economic growth of the

²²³ Thabane "Land Tenure, Housing Rights and Gender" 13.

²²⁴ CBL 2010 *Economic Review*.

²²⁵ Section 35(1)(i)

²²⁶ Section 35 (1)(ii)

²²⁷ Section 35 also provides for the right to dispose of the leased property and the right to sub-let the land leased provided consent has been granted by the Commissioner of Lands.

²²⁸ Trade white paper

²²⁹ Thebe and Rakotje 2013 *ASJ* 403.

²³⁰ Lee 2011 <http://www.osisa.org>.

Lesotho.²³¹ The issue of whether enough measures, policies and laws have been put in place to ensure that land is utilised to its full extend, will be addressed in the next chapter.

4 Introduction

Lesotho is a small developing country surrounded by South Africa.²³² Its economy is based largely on subsistence farming, livestock, remittances from migrant workers in South Africa (mining) and a manufacturing sector.²³³ Since the country is land-locked by South Africa, the economies of the two countries are integrated.²³⁴ According to UNCTAD report, Lesotho is at a critical juncture in its development and Foreign Direct Investment (herein referred to as FDI) plays a central role in sustaining it by providing indispensable resources and ingredients that include *inter alia* capital.²³⁵ The capital referred to is then invested in the country's major economic sectors comprising of manufacturing, mining, agriculture and other services.²³⁶ For the purpose of this dissertation, manufacturing and agricultural sectors will be discussed.

Lesotho's economy depends on FDIs for growth, employment and export revenues.²³⁷ Accordingly, FDI is important in Lesotho's economy.²³⁸ According to Adewumi²³⁹ since FDI plays an invaluable role in the economic growth of developing countries, it is essential that policy makers are encouraged to improve internal regulatory frameworks to afford openness and access to investors. In this part of the dissertation, the importance of foreign investment in Lesotho, as well as the ease with which foreign investors are able to trade in the country, to the betterment of the country's economy will be discussed. Thus, the problem to be discussed is whether there are enough policies and laws put in place to unlock the potential of the country's main resource being land.

4.1 Foreign Direct Investors: overview

²³¹ CBL 2010 *Economic Review* 7.

²³² Mbata 2001 *JSA* 5.

²³³ UNCTAD *Investment policy review: Lesotho* 1.

²³⁴ Anon 2018 <http://www.lesothoreview.com/contents/foreign-trade-investment/>.

²³⁵ UNCTAD *Investment Policy Review* 3.

²³⁶ Mahembe and Odhiambo 2013 *Problems and Perspectives in Management* 36.

²³⁷ Mahembe and Odhiambo 2013 *Problems and Perspectives in Management* 36.

²³⁸ UNCTAD *Investment Policy Review* 1.

²³⁹ Adewumi *The Impact of FDI* 1.

Lesotho's economy, like many small economies, is relatively undiversified, and apart from mining and water, agriculture and textile manufacturing contribute significantly towards the country's economic development.²⁴⁰ As will be discussed later, similar with most developing countries, Lesotho is faced with a major problem of inadequate resources to finance long-term investment. As a result, the insufficiency of funds becomes a big setback to a country's economic growth. Hence, FDI is perceived as a means of acquiring the much-needed funds for investment. It is for this reason that there is a need to offer incentives to encourage foreign investors to remain in the host countries.²⁴¹

Moreover, in the succeeding paragraphs it will be demonstrated that FDI plays a significant part in boosting the country's productivity, employment, skills and technology transfer, all of which are important for economic growth and development.²⁴² In Lesotho, rapid and sustainable economic growth is necessary and it is essential not only for the creation of employment but also for improving agriculture productivity. In line with the fact that foreign direct investment is important in Lesotho's economy, Leduka²⁴³ asserts that

Similar to other African post-colonial states, the state in Lesotho has been labelled developmentalist. However in reality it is a client developmentalist state whose economic survival depends on foreign aid and investment. Its dependence on foreign financial resources, which is a consequence of history, geography, politics and economics, has essentially shaped the development agenda of the post-colonial state and the policy-making environment.

In 1994, Lesotho witnessed a surge in foreign investment, which was attributed to the country's comparative advantage with respect to productive labour and trade arrangement.²⁴⁴ During this time, the majority of the incoming investors were concentrated in the manufacturing sector of which more than 90 percent invested particularly in garments.²⁴⁵ Because of the massive inflow of foreign investors, Lesotho's economy developed substantially. More specifically, the development was due to the benefits brought in by the FDI. The benefits included, amongst others employment;

²⁴⁰ Lesotho Review 2018 <http://www.lesothoreview.com/contents/foreign-trade-investment/>.

²⁴¹ UNCTAD *Investment Policy Review* 1.

²⁴² CBL 2012 *Economic Review* 5.

²⁴³ Leduka *Informal Land Delivery Processes in Maseru* 7.

²⁴⁴ UNCTAD *Investment Policy Review* 20.

²⁴⁵ UNCTAD *Investment Policy Review*: 8.

particularly for female workers.²⁴⁶ In addition, FDI also led to the creation of new skills and work attitudes, better trade infrastructure and support services geared to export markets.²⁴⁷

4.1.1 Manufacturing Textile industry in Lesotho

According to the US Department of State, Lesotho's attraction of FDI had been commendable.²⁴⁸ Bearing in mind that Lesotho is a least developed country; its ability to attract export-oriented investment is considered a success story.²⁴⁹ As already noted, around 95 percent of FDI into the country has been channelled into the manufacturing sector, especially with regard to textiles and apparel.²⁵⁰ As a result, there is a high employment rate of people in the manufacturing or textile industry, especially among Basotho women. The importance of the manufacturing sector to the economy of the country cannot be emphasised enough given that Lesotho's economy depends for growth and for employment on the manufacturing sector.²⁵¹ Foreign investors, mostly from Asian countries dominate this sector.²⁵² This is in spite of the fact that the textile sector is currently Lesotho's largest single formal sector employer since it provides employment for most Basotho women. Thus, despite its dominance, all of the textiles and clothing firms in the country are foreign owned.²⁵³ There are no local firms in operation to compete with foreign owned firms or even provide them "with services and inputs such as packaging materials or accessories."²⁵⁴

4.1.1.1 Preferential Market Access

The UNCTAD report has observed that among countries with similar developmental characteristics or least developed countries, Lesotho's foreign trade and investment performance stands out.²⁵⁵ The country has been successful in attracting FDI inflows and

²⁴⁶ UNCTAD *Investment Policy Review* 8.

²⁴⁷ UNCTAD *Investment Policy Review* 20.

²⁴⁸ US Department 2011 <https://2009-2017.state.gov/e/eb/rls/othr/ics/2011/157310.htm>.

²⁴⁹ UNCTAD *Investment Policy Review* 8.

²⁵⁰ UNCTAD *Investment Policy Review* 8.

²⁵¹ Ayiko *The Textile and Clothing Industry in Lesotho* 11.

²⁵² UNCTAD *Investment Policy Review* 20.

²⁵³ Ayiko *The Textile and Clothing Industry in Lesotho* 6.

²⁵⁴ CBL 2011 *Economic Review* 3.

²⁵⁵ UNCTAD *Investment Policy Review* 20.

the manufacturing sector account for the bulk of total investment amounting to approximately 90 percent thereof. In order to attract FDI, most countries dependent on FDI have to increase investor confidence through the inclusion of multilateral investment and tax agreements pertaining to FDI.²⁵⁶ Lesotho is not different in this regard, and the country's success in attracting export oriented foreign direct investment is primarily because of its advantage with respect to favorable trade arrangements.²⁵⁷ One major trade privilege that will be discussed is AGOA.²⁵⁸

4.1.1.1.1 AGOA

In May 2000, the United States (US) Government signed AGOA into law. The main objective of AGOA is to

...promote economic development and reform in Sub-Saharan Africa (SSA), by encouraging increased investment and trade between SSA and the US.²⁵⁹

Also to

...to eliminate tariff barriers on a large range of products exported from AGOA eligible SSA countries to the US market.²⁶⁰

The Act originally covered the 8 year period from 2000 to 2008 but has since been renewed to 2025.²⁶¹ In short, as noted by Ayiko,²⁶² "AGOA has given Lesotho the opportunity to export apparel duty and quota free to the US." Most foreign investors, particularly from Asian countries, have taken advantage of the privileges that come with AGOA by coming in large numbers to have businesses in Lesotho.²⁶³ The foreigners own manufacturing firms and this has led to a considerable growth of the manufacturing sector and the creation of employment for Basotho.²⁶⁴ In particular, the sector has created jobs for uneducated Basotho, mostly women, who in the past struggled to find

²⁵⁶ Malefane 2007 *SAJEMS* 99.

²⁵⁷ Ayiko *The Textile and Clothing Industry in Lesotho* 6.

²⁵⁸ *African Growth and Opportunity Act*.

²⁵⁹ AGOA 2018 <https://agoa.info>.

²⁶⁰ Ayiko *The Textile and Clothing Industry in Lesotho* 6.

²⁶¹ Ayiko *The Textile and Clothing Industry in Lesotho* 11.

²⁶² Ayiko *The Textile and Clothing Industry in Lesotho* 6.

²⁶³ Ayiko *The Textile and Clothing Industry in Lesotho* 6.

²⁶⁴ CBL 2011 *Economic Review* 2.

employment. In fact, the manufacturing sector became the largest employer in the country, surpassing Government for the first time in 2001.²⁶⁵

4.1.1.2 Effects of the Multi Fibre Agreement (MFA) termination

Following the phasing out of the Multi Fibre Agreement (MFA) in December 2004, Lesotho faced some economic setback. A huge number of workers employed in the textile and clothing industry lost their jobs due to closure of four textile firms in the first quarter of 2005. To be precise, it was reported that as a result of the MFA coming to an end, more than 4,570 workers lost their jobs at the end of March 2005.²⁶⁶ Consequently, even though Lesotho is currently obtaining significant FDI because of the trade privileges, one can argue that it is not enough to sustain the economic development. As the dominant sector in the economy, the manufacturing sector has great potential to generate sustainable growth and create employment opportunities in Lesotho in the future.²⁶⁷ According to the UNCTAD report however, such investment is traditionally "foot loose" and could relocate when trade privileges are phased out one day.²⁶⁸ Given the fact that the textile and the manufacturing sector is dominated by FDI, which have been drawn to the country by trade-privileges, what then would happen to the manufacturing sector once the trade privileges expire?

Since the industry is largely dependent on time-bound privileges in one market, it is therefore apparent that this industry could face serious economic challenges once the AGOA privilege phases out.²⁶⁹ Lesotho, therefore, faces a problem of heavy reliance on clothing and garment exports controlled by FDIs.²⁷⁰ In terms of the country's investment report,²⁷¹

...the country has not yet been able to exploit fully long-term access to other markets. Therefore, the challenge for Lesotho is to attract greater FDI, diversifying it away from its overwhelming reliance on one activity while trying to retain as much of this activity as possible by deepening its roots in the economy. The report further clarifies that, to do so, Lesotho must develop a competitive base for manufacturing FDI; exploit more

²⁶⁵ CBL 2012 *Economic Review* 8.

²⁶⁶ Ayoki *The Textile and Clothing Industry in Lesotho* 7.

²⁶⁷ CBL 2005 *Economic Review* 5.

²⁶⁸ UNCTAD *Investment Policy Review* 8.

²⁶⁹ CBL 2012 *Economic Review* 8.

²⁷⁰ CBL 2012 *Economic Review* 8.

²⁷¹ National Investment Policy of Lesotho (2015).

fully its complementarities with the economy of its giant neighbour that surrounds it on all sides -- South Africa; improve access to other large markets; and build up its own capabilities in manufacturing, services and agriculture.

4.1.2 Diversification of FDI

From the above quote, one may submit that, Lesotho relies heavily on foreign investment in the manufacturing industry and much has not been done to ensure that FDIs reach other economic areas such as agriculture. It is further submitted that, there is a need for Lesotho to improve the base for its existing foreign operations as well as raise its attractiveness to new FDIs.²⁷² As outlined in the UNCTAD,²⁷³

FDI inflows have been very unstable, as they are very dependent on trade preferences unilaterally conceded by major trading partners and are, therefore, very vulnerable to trade preference erosion.

In other words, at present, FDI in Lesotho is not very diverse seeing as most foreign investors are found in the manufacturing sectors. Since it is apparent that the FDI are lured into the country because of the existence of trade privileges, it is submitted that once the trade privileges phase out, that will impinge on the country's overall economic development. Therefore, there is a need for the country to lessen the extent to which the economy is currently dependent upon preferential market access for the export of clothing.²⁷⁴

Put differently, given that FDIs are exclusively available in the manufacturing sector perhaps, it is time that measures are taken to ensure that FDI infiltrate other economic sectors such as agriculture. It is further submitted that one way of attracting FDI into Lesotho, could be by strengthening land tenure policies. This is because if the investors have access to ownership of land this may entice them into staying in the country. In this way, the country will cease to rely too heavily on time bound trade privileges to attract FDIs.

Instead, access to land could be an additional measure that may assist to draw foreign investors into the country. As will be seen in the ensuing paragraphs, sustainable land

²⁷² UNCTAD *Investment Policy Review* 8.

²⁷³ UNCTAD *Investment Policy Review* 8.

²⁷⁴ CBL 2006 *Economic Review* 1.

use and management policies can provide the necessary incentives to motivate investors to engage in various business sectors in the country.

4.2 FDI and Land tenure System in Lesotho

The UNCTAD²⁷⁵ noted that there is a feeling in Lesotho that since useable land is scarce, the land system allows only Basotho to have a right to land. Foreigners on the other hand are excluded from holding title to land. Hence, under the current legislative framework, land in Lesotho is vested in the nation and held in trust by the King.²⁷⁶ Further, land in Lesotho is held through a leasehold system. In terms of section 35 of the *LA 2010*,

...a lessee not only has a right to the exclusive possession of the leased land, subject to certain statutory conditions, but also has a right to dispose of his interest, to mortgage the lease and to sub-let the land with the consent of the Commissioner of Lands.²⁷⁷

In addition, section 6 of the *LA 2010* has identified all persons eligible to hold title to land in Lesotho. In terms of this section, persons who may hold title to land include *inter alia* citizens of Lesotho, companies registered in Lesotho of which shareholders are Basotho, partnerships which the majority of partners are Basotho or bodies registered under the laws of Lesotho.

Section 6 (1) (c) further provides that the persons who may hold title to land include:

...a foreign enterprise for investment purposes, provided Basotho, whose land may be valued so that it may form part of the shareholding in such a partnership form at least 20% of the membership or shareholding of the enterprise.

According to section 2 of the *LA 2010*, a foreign enterprise is defined as

- a) a partnership in which any partner is a non-citizen or
- b) a body corporate which any of the directors or shareholders is a non-citizen

From the above it is clear that foreign companies may hold title to land provided there are Basotho who form part of that company. However, before a foreign entity is allocated land, other factors provided in section 6 (4) should be considered and met. These factors are:

²⁷⁵ UNCTAD *Investment Policy Review 23*.

²⁷⁶ Section 107 of the *Lesotho Constitution*; section 4 of the *LA 2010*.

²⁷⁷ See also *Deeds Registry Act* section 24(2).

- a) the magnitude and origin of the tangible and intangible assets
- b) employment generation
- c) strategic nature of the enterprise
- d) whether the business in relation to the application provides for the transfer of the business expertise
- e) advancement of business undertaking owned by the citizens and
- f) environment protection

Over and above the previously mentioned restrictions, in order to be allocated land, a foreign entity has to get a ministerial consent as per regulation 4 of the *Land Regulations 2011*.

It is important to note that prior to the enactment of the *LA2010*, it was argued that the provisions of the preceding Act (*LA 1979*) of prescribing majority shareholding in favour of Basotho, created insecurity of tenure and has thus chased away foreign investors to the economic detriment of the country.²⁷⁸ As a result, when the *LA 1979* was repealed, its successor only required 20 percent Basotho shareholding. It is submitted that even though the prescribed Basotho shareholding requirement was reduced, the other limiting factors discussed above still present a challenge to foreigners having a right to hold title to land. Given that under the current land laws, foreign investors seeking to hold land are still restricted by burdensome requirements that include prior consent, which can only be granted by the Minister responsible for Lands;²⁷⁹ these limitations have a negative impact on the country's economic investment. Arguably, one could conclude that the Ministerial approvals make obtaining a lease to land bureaucratically difficult and time-consuming for foreigners.²⁸⁰

One may further submit that these limitations also negate the implementation of the objective of the *LA 2010* which was enacted principally to create an environment that is favourable to agriculture development and economic investment.²⁸¹ Leduka argues that, the conditionality of leaseholds is crucial to security of tenure.²⁸² Therefore in order to

²⁷⁸ S 6 (c) *LA 1979* provided that only a company that is registered in Lesotho and of which at least 51% remains at all-time Basotho could be eligible to hold title to land.

²⁷⁹ Iwanow, Selelo and Morojele *Investor Roadmap Lesotho* 59.

²⁸⁰ Iwanow, Selelo and Morojele *Investor Roadmap Lesotho* 61.

²⁸¹ Nte *et al.* *Land Reform and Rural Transformation 2*.

²⁸² Leduka "Privatising Land Rights" 8-20.

achieve tenure security, registering or acquiring a lease ought to be without impediments.²⁸³ The UNCTAD report²⁸⁴ likewise recognises that

the restrictions placed on foreigners' access to land constitute barriers to the entry of FDIs in property and infrastructure development.

Similarly, Iwanow, Selelo and Morojele²⁸⁵ opine that "the current provisions in the *LA 2010* continue to be a disincentive to foreign investments." They proceed to reason that few Basotho are willing and have the resources or funds to hold even 20 percent shares in a company to comply with the *LA 2010*. For this reason, these limiting provisions have a negative effect on investors' decisions to do business in the country. Furthermore, according to Iwanow, Selelo and Morojele,²⁸⁶

...investors complain that it is difficult to expand their production because the land that is sublet to them may not be able to accommodate an expansion.

The next part of the study will therefore address foreign sublease agreements constraints on the expansion on foreign owned businesses in Lesotho.

4.2.1.1 Subleases

Although foreigners do not have a right to hold title to land, in terms of section 6(3) of *LA 2010*,²⁸⁷ they are, however, not prohibited from holding any right subsidiary to a lease. That is, even though foreigners are restricted from holding title to land, they can sub-lease land from Basotho leaseholders. Section 24 of the *Deeds Registry Act* provides that the process of sub-lease registration require the parties to first get ministerial consent from the Commissioner of Lands whose office is based at the Land Administration Authority (LAA). Once the consent is granted, the sublease agreement must be registered in the Deeds registry office where after the agreement will be legally acceptable.²⁸⁸

²⁸³ Leduka "Privatising Land Rights" 8-20.

²⁸⁴ UNCTAD *Investment Policy Review* 23.

²⁸⁵ Iwanow, Selelo and Morojele *Investor Roadmap Lesotho* 61.

²⁸⁶ Iwanow, *Selelo and Morojele Investor Roadmap Lesotho* 61.

²⁸⁷ S6(3) provides that S6(1) shall not be construed as prohibiting any person disqualified under from holding any subsidiary right to a lease, including a sub-lease or mortgage, subject to the Consent of the Commissioner being obtained where so required by this Act.

²⁸⁸ Section 24 (2).

4.2.1.2 LNDC

Apart from subleasing land from Basotho leaseholders, to further ensure that foreign investors have access to land, the foreign investors can also sub-lease industrial building, from the Lesotho National Development Corporation (hereinafter referred to as LNDC). The LNDC is the main parastatal of the Government of Lesotho established by the *LNDC Act* in 1967²⁸⁹ with the objective of promoting the development of industry and commerce in Lesotho. In accordance with section 4 (1) of the *LNDC Act*, the mandate of the LNDC is

to initiate, promote and facilitate the development of manufacturing and processing industries, mining and commerce in a manner calculated to raise the level of income and employment in Lesotho.

The corporation has an obligation to attract and retain foreign investors into the country.²⁹⁰ In pursuing its objective of attracting FDIs, as stated by UNCTAD²⁹¹

LNDC essentially plays a facilitating role for foreign investors providing information to prospective investors, arranging for site visits and helping with permits and licences as well as with operational problems as they arise. Largely, the LNDC subleases developed factory shells to foreign investors.²⁹²

4.2.1.2.1 LNDC Constraints

As already stated, LNDC has a mandate to provide commercial properties to FDIs. However, this mandate between the FDIs and LNDC has not been without challenges. For instance, according to the UNCTAD report,²⁹³ there is an unsatisfied demand for factory shells and the LNDC is unable to meet the demand because of financial constraints in developing new estates and constructing new buildings. As a result, of shortage of shells, new FDIs may not have an opportunity to work in the country.

One other restriction facing potential foreign investors relates to the location of the shells. Considering that the LNDC have built factory shells in specific localities being Thetsane,

²⁸⁹ The *LNDC Act* No. 20 of 1967.

²⁹⁰ US Department 2011 <https://2009-2017.state.gov/e/eb/rls/othr/ics/2011/157310.htm>.

²⁹¹ UNCTAD Investment Policy Review 73.

²⁹² LNDC has acquired land in specific parts of the country, and have developed commercial firms or Industrial firms on the land. The buildings which are called shells are then subleased to investors.

²⁹³ UNCTAD *Investment Policy Review* 38.

Mafeteng and Ha Nyenye, this fact can be limiting to FDIs who wish to pursue alternative locations to those proposed by LNDC.²⁹⁴

4.2.1.3 Sub-lease Constraints

It is material to note that even though the *LA 2010* was introduced to improve land market and development, there are still critical bottlenecks with regard to enhancement of foreigners' security of land tenure.²⁹⁵ Prior to the enactment of *LA 2010* the UNCTAD concluded that the fact that foreigners may only sub-lease land jeopardises the initiative to promote the commercial use of land.²⁹⁶ A sublease is the creation of a right out of a lease whereby the leaseholder grants to a sub lessee exclusive possession of the whole or part of the leased premises for a term that expires before expiry of the primary lease.²⁹⁷ In terms of the *LA 2010* the maximum lease tenure for commercial leases is either 60 years²⁹⁸ or 30 years²⁹⁹ for industrial use. Thus, commercial subleases in Lesotho can be for the maximum duration of 60 years depending on their type of use. Therefore, according to the UNCTAD report³⁰⁰ a sub-lease title presents risks to a foreign investor wishing to develop land for commercial use. One may further submit that since sub-leases are time-bound this may discourage investors from engaging in long term investments which could of course be economically beneficial to the country.

Furthermore, in a sub-lease title, the foreign investor is not in control of the primary relationship between the leaseholder and the Government and therefore, any default by the lessee will affect the sub-lessee's security of the title.³⁰¹ For example, in terms of section 37(1)

a lease may be terminated by the Minister by giving at least one month's notice to the lessee where the lessee is in breach of any conditions of the lease and has failed to

²⁹⁴ UNCTAD *Investment Policy Review* 39.

²⁹⁵ Iwanow, Selelo and Morojele *Investor Roadmap Lesotho* 59.

²⁹⁶ UNCTAD *Investment Policy Review* 37.

²⁹⁷ Yankholmes 2012 <https://www.academia.edu/29638512>.

²⁹⁸ Section 32 (1)(b) A lease is granted for 60 years where it is used for i) heavy industrial purposes (ii) commercial or light industrial purposes other than the sale of petroleum retail or hotel purposes.

²⁹⁹ Section 32(1)(c) A lease is granted for 30 years where it is used for i) sales of petroleum or oil ii) purposes of wholesale storage of petroleum or oil.

³⁰⁰ UNCTAD *Investment Policy Review* 38.

³⁰¹ UNCTAD *Investment Policy Review* 38.

comply with a notice from the Commissioner calling upon him to remedy the breach within a reasonable period of time.

From the above it is clear that once the lessee has failed to comply with an obligation set out in the lease, the lease agreement may be terminated and thereby affect the sub-lease agreement and the security of tenure.

Land is an important resource³⁰² and apart from its value for agriculture, land ownership is also a key issue in promoting investment, since it is a cornerstone of economic activity and can serve as collateral in order to access credit.³⁰³ For these reasons, according to Werner and Bayer³⁰⁴ "there is a need for friendly policies and governance frameworks that provide assurance of land ownership and security of tenure." More so, because, according to Atwood,³⁰⁵ "land cannot serve as security or collateral unless the rights allow for easy land transfers." Werner and Bayer share the same sentiments and they affirm that

Banks are not likely to accept as collateral land for which foreclosure in case of default is difficult, costly, or forbidden by law or social custom. In addition, banks are likely to accept land as collateral only in situations where the land market is sufficiently active for foreclosed land to be disposed of easily.³⁰⁶

From the above, it is apparent that security of tenure is significant to ensure that land can be used as financial security or collateral. On the other hand, according to the UNCTAD,³⁰⁷ the land system in Lesotho has not permitted a sensible land market to develop in which foreign investors requiring land are able to purchase land and then put the land to improved commercial use. It is significant to note that even though the UNCTAD report was concluded to pave way for the enactment of the *LA 2010*, the position with regard to foreign and sub-lease title did not change. Basically, one could conclude that a sub-lease does not afford the tenure as secure as ownership. On the other hand, there is insecurity of tenure brought about by the fact that investors can only access land

³⁰² Chaka *et al.* "Good Land Governance" 5-18.

³⁰³ Turner and Adams 2004 *SARPV* 1.

³⁰⁴ Werner and Bayer "Leasehold as a Vehicle for Economic Development" 1-29.

³⁰⁵ Werner and Bayer "Leasehold as a Vehicle for Economic Development" 1-29.

³⁰⁶ Werner and Bayer "Leasehold as a Vehicle for Economic Development" 1-29.

³⁰⁷ UNCTAD *Investment Policy Review* 38.

through time restricted sub-lease agreements as opposed to owning land for an indefinite period.

As has been stated earlier, one other significant use of land is for agriculture. In addition, the *LA 2010* was enacted to provide better security of tenure that will ultimately lead to improved agricultural performance in the country's economic development. The next part of the study will, therefore, unpack the effect of the *LA2010* on agriculture and its contribution to the country's economy.

4.3 Agriculture

4.3.1 Importance of agriculture in Lesotho's economy

As already noted, apart from apparel manufacturing, agriculture is regarded as one of the most important sectors of Lesotho's economy.³⁰⁸ During the 1960s, the sector contributed over 80 percent of the country's Gross Domestic Product (GDP).³⁰⁹ However, the agriculture contribution has changed and the sector's share has declined to below 20 percent in recent years.³¹⁰ In other words, agriculture in the present day contributes a relatively small portion towards Lesotho's economy. The sector contributes an average of 6 percent to the national GDP.³¹¹ Mekbib is of the view that agriculture has been languishing due to factors that include poor land management and farming practices.³¹²

He further stated that other major factors that contribute towards the decline are soil erosion urbanisation and industrialisation.³¹³ In order to ensure that the agriculture sector is sustainable, Maile³¹⁴ believes that Lesotho needs to have a well-functioning agricultural sector. He again clarifies that

poor transportation facilities in remote regions hinders contact between rural farmers and agricultural extension specialists responsible for sharing strategies that could improve crop yields.³¹⁵

³⁰⁸ Mbata 2001 *JSA* 9.

³⁰⁹ Ukaejiofo 2018 www.worldbank.org/en/country/lesotho Climate-Smart Agriculture in Lesotho.

³¹⁰ Mbata 2001 *JSA* 9.

³¹¹ Ukaejiofo 2018 www.theglobaleconomy.com/Lesotho/ Climate-Smart Agriculture in Lesotho.

³¹² Mekbib *Capacity of the Machobane Farming System* 20.

³¹³ Mekbib *Capacity of the Machobane Farming System* 19.

³¹⁴ Maile 2001 *A Brief on the Forestry Outlook* 23.

³¹⁵ Maile 2001 *A Brief on the Forestry Outlook* 23.

Furthermore, he stated that because many households engaged in agriculture do not have the financial capacity to buy farm implements, this creates problems that impinge on the growth of the agricultural sector.³¹⁶

As noted earlier, Lesotho is not naturally endowed with arable land.³¹⁷ As provided for by Maile,³¹⁸

...out of the total land of 3,035,800 hectares, only about 394, 580 hectares are suitable for cultivation. This situation would naturally have called for judicious and efficient use of this scarce resource.

Instead, according to Mbata,³¹⁹

the land use practice adopted by Basotho has led to the over-exploitation of this natural resource to the point where access to a productive land area is no longer a guarantee.

For example, according to Thebe,³²⁰ one common practice among Basotho is where people have subdivided their agricultural land into portions used for residential purposes. Thebe further submitted that instead of producing crops, harvesting rent has emerged as predominant household land strategy for survival for the majority of landholding households.³²¹ In other words some landholders, in order to survive, have resorted to subdividing their arable land and then building residential houses, as opposed to exploiting the land for agricultural purposes. This is because most Basotho in the rural areas may have arable land but then lack the means to engage in agricultural activities.³²²

In addition, in the rural areas, acres of arable land have been left idle or unutilised because in some instances the land belongs to either older people or people who lack the economic means of utilising it.³²³ Worse still, the land belongs to people who have no interest in using their land for agriculture.³²⁴ Thus, about 25 percent of households have given up some parts of their land because it is becoming difficult to put the land into

³¹⁶ Maile 2001 *A Brief on the Forestry Outlook* 23.

³¹⁷ Mekbib *Capacity of the Machobane Farming System* 5.

³¹⁸ Maile 2001 *A Brief on the Forestry Outlook* 23.

³¹⁹ Mbata 2001 *JSA* 12.

³²⁰ Thebe *et al* 2013 *African Studies* 406.

³²¹ Thebe *et al.* 2013 *African studies* 411.

³²² Thebe *et al.* 2013 *African Studies* 400.

³²³ Thebe *et al.* 2013 *African Studies* 400.

³²⁴ Thebe *et al.* 2013 *African Studies* 400.

productive use.³²⁵ Overall, Lesotho's land tenure system has been identified as the major constraint to agricultural development.³²⁶

According to the International Fund for Agricultural Development (IFAD) report,³²⁷ despite its low contribution towards the country's economy, the agriculture sector is still the primary source of income and an important supplementary source for the majority of the country's population who live in rural areas. It is worth noting that about 80 percent of the country's population lives in the rural areas, and about 60 to 70 percent of the country's labour force obtain supplemental income from agriculture.³²⁸ Hence, notwithstanding its diminished role in contributing to Lesotho's GDP, it is submitted that the agricultural sector continues to play a major role in Lesotho's economic development. This is because the sector remains a key livelihood for the majority of the rural population who are engaged in subsistence farming and small-scale commercial farming.³²⁹ Furthermore, wool and mohair farming form an integral part of the economy.³³⁰

4.3.1.1 Commercialisation of agriculture

For many years, Lesotho has been considered as a country that relies on subsistence farming as opposed to commercial farming.³³¹ In 2010, the Governor of the Central Bank Dr Matlanyane conceded to the fact that the agriculture sector has immense potential to diversify and improve the economy.³³² She further emphasised

that for a country such as Lesotho that mainly focuses on subsistence farming the development of that agricultural sector involves a number of issues such as the education of farmers on the best farming methods, development of organised markets, storage and packaging, infrastructure development to enable easy and quick movement of produce, abattoirs, quality assurance, irrigation systems, financial support, diversified production, value addition facilities and skills development.³³³

The above statement seems to imply that commercialising agriculture in Lesotho can improve the country's economy. However, engaging in commercial agriculture will

³²⁵ Thebe *et al.* 2013 *African Studies* 410.

³²⁶ Maile 2001 *A Brief on the Forestry Outlook* 23.

³²⁷ IFAD 2017 <https://operations.ifad.org>.

³²⁸ Lesotho Country Analysis Working Document (2017) 42.

³²⁹ World Bank 2018 www.worldbank.org/en/country/lesotho Climate-Smart Agriculture in Lesotho.

³³⁰ World Bank 2018 www.worldbank.org/en/country/lesotho Climate-Smart Agriculture in Lesotho.

³³¹ National Investment Policy of Lesotho (2015) 7.

³³² Matope *Lesotho Times* 6.

³³³ Matope *Lesotho Times* 6.

require exceptional agriculture skills and capital. It is submitted that most Basotho lack the aforementioned abilities required to engage in large-scale agriculture.³³⁴ Ukaejiofo³³⁵ supports this fact and is of the opinion that adoption of modern agricultural practices by Basotho farmers is relatively low. This has been attributed to a lack of knowledge about improved agricultural practices, high poverty levels that make most of the adaptation practices unaffordable to farmers and an unfavourable land tenure system.³³⁶ In agreement, Pule³³⁷ is of the view that agriculture in Lesotho is not able to advance because of inadequate farming equipment. He further avers that few Basotho farmers can afford modern farming equipment.³³⁸

It is submitted that, when compared to the manufacturing sector, the agricultural sector is still lagging behind. As stated earlier, FDI's play a vital part in the manufacturing sector by providing indispensable resources and ingredients that include *inter alia* capital and technology.³³⁹ In essence, the success of the manufacturing sector is attributed to the foreign investors infiltrating the sector and thus making it the country's largest formal sector employer.³⁴⁰ Accordingly, one could conclude that perhaps, if FDI is encouraged to finance or invest in the country's agriculture, this sector can also grow extensively.

It is evident that land will play a vital role in intensifying or commercialising agriculture in the country. Matlanyane also recognised that commercialising the agriculture sector requires a complimentary land tenure system. This is so because land resolves the challenges around access to finance, lack of adequate land and sustainability of operations if the land is on a lease basis.³⁴¹

4.3.2 Land tenure security and agriculture

³³⁴ Thebe *et al.* 2013 *African Studies* 407.

³³⁵ Ukaejiofo 2018 www.worldbank.org/en/country/lesotho Climate-Smart Agriculture in Lesotho.

³³⁶ Ukaejiofo 2018 www.worldbank.org/en/country/lesotho Climate-Smart Agriculture in Lesotho.

³³⁷ Pule *et al.* 2004 *Journal of Modern African Studies* 293.

³³⁸ Pule *et al.* 2004 *Journal of Modern African Studies* 293.

³³⁹ UNCTAD "Investment Policy Review"3.

³⁴⁰ Ayiko *The Textile and clothing Industry in Lesotho* 11.

³⁴¹ Matope *Lesotho Times* 6.

4.3.2.1 Security of tenure

According to Mokitimi,³⁴² the question of security of tenure is important in agriculture. It is because security of tenure is associated with greater investment in agriculture that leads to increased productivity.³⁴³ Security of tenure is defined by Munro-Faure,

...as the certainty that a person's rights to land will be recognised by others and protected in cases of specific challenges.³⁴⁴

Conversely, land tenure insecurity occurs when there is an uncertainty with regard the landholder's right to land.³⁴⁵ Moreover, that landholders' "right" to make decisions on that land is limited; consequently, he cannot alienate it.³⁴⁶ Hence, according to Brassel,³⁴⁷ land tenure security is achieved when individuals have rights in land

...on a continuous basis, free from imposition or interference from outside sources as well as the ability to reap the benefits of labour and capital invested in that land, either in use or upon the transfer to another holder.

As previously stated, in Lesotho there is a limitation placed on foreigners holding title to land.³⁴⁸ As a result, against the background of the given definition of security of tenure, one can conclude that foreigners' tenure security is questionable. Therefore, due to foreigners having limited rights to hold title to land, this fact can dissuade most FDIs from investing in the agricultural sector of the country. Bruce³⁴⁹ is of an opinion that a farmer will not make long-term investment in his holding unless he is secure in reaping the benefits of his investment. It is, therefore, submitted that for FDIs to be enticed into investing in the country's agricultural sector, there is a need to offer them secure tenure.

Currently, even though the land tenure system prevalent in Lesotho is usually termed "communal," it is important to note that communal does not correctly describe the land tenure system in Lesotho.³⁵⁰ It should however be noted that description is done mainly to distinguish it from individual freehold and leasehold. As stated in preceding chapters,

³⁴² Mokitimi *The Land Tenure Systems of Lesotho* 13.

³⁴³ Mokitimi *The Land Tenure Systems of Lesotho* 13.

³⁴⁴ Munro-Faure *et al. Land Tenure and Rural development* 18.

³⁴⁵ Mokitimi *The Land Tenure Systems of Lesotho* 16.

³⁴⁶ Brassel *et al.* 2001 *JDE* 371; Tlale *A Critical Evaluation of the South African Land Tenure* 3.

³⁴⁷ Brassel *et al.* 2001 *JDE* 371.

³⁴⁸ Section 6 *LA 2010*.

³⁴⁹ Migot-Adholla and Bruce *Searching For Land Tenure Security* 5.

³⁵⁰ Mokitimi *The Land Tenure System of Lesotho* 8.

in Lesotho, the agriculture landowners have exclusive rights during crop-growing season only. After harvest, the land becomes communal as everybody can graze animals and collect resources like wild vegetables.³⁵¹ Mokitimi maintains that concerns are often raised with regard to the land tenure in Lesotho, that it does not provide sufficient security of tenure to encourage farmers to make investments in their land holdings.³⁵²

4.3.2.2 Formalisation of agricultural land

Land is an essential resource that can be utilised for the country's economic development.³⁵³ This is why in the past, when it became apparent that the provisions of *LA 1979* were ineffective in such a way that it was hampering the economic development, reforms were undertaken and the *LA 2010* was enacted. As mentioned several times in this study, one objective of the *LA 2010* is to provide better security of tenure and ultimately lead to improved agricultural performance.³⁵⁴ Accordingly, the land reforms introduced in the *LA 2010* were said to be directed to confer some security of tenure to land holders as a way of encouraging economic investment in land.³⁵⁵

It has also been mentioned in the preceding chapter that as a way of ensuring there is better security, the leasehold system was introduced. Furthermore, a regularisation process was undertaken whereby landholders converted from customary landholding to lease holding. This formalisation of land rights was considered to be an important step to stimulate economic growth by promoting intensive agricultural practices and private sector development.³⁵⁶

However, even though Basotho have registered leases, the problem that now persists is that of lack of resources to develop agricultural plots.³⁵⁷ In other words, one can submit that the land reforms³⁵⁸ implemented focused on the issue of securing and

³⁵¹ Mokitimi *The Land Tenure Systems of Lesotho* 16.

³⁵² Mokitimi *The Land Tenure Systems of Lesotho* 16.

³⁵³ CBL 2010 *Economic Review* 5.

³⁵⁴ Thebe *et al* 2013 *African studies* 399.

³⁵⁵ CBL 2010 *Economic Review* 5.

³⁵⁶ UNRISD Discussion Paper No. 60 14.

³⁵⁷ CBL 2010 *Economic Review* 6.

³⁵⁸ The land reforms referred to being the enactment of *LA 2010* to replace the repealed *LA 1979* and the Systematic Land Regularisation Project.

formalising rights but other impediments or constraints such as insufficient capital to engage in commercial farming is still an issue that needs to be addressed. Thus apart from the land security issue there are other production constraints faced by farmers that simply outweighs the land security issues.³⁵⁹

On the issue of secure rights, Erlank³⁶⁰ is of a view that,

...even if people who live in rural areas are given more secure rights in terms of the proposed system of tenure, these rights will promote security of housing but not necessarily result in productive livelihoods (food security). This is due to the fact that the ability to be productive in the rural environment usually equates to being productive in the agricultural industry. In order to be productive and be able to develop and make beneficial use of rural (usually agricultural) land, a person would normally need to obtain financing for such development.

Similarly, Ndimba³⁶¹ states that

...sustainable land use and management requires a holistic approach that include providing the necessary incentives to motivate people to engage in productive agricultural practices and optimally utilise the land. This should be backed by friendly policies and governance frameworks that provide assurance of land ownership and security of tenure in order to promote infrastructural development on the land and preserve it from degradation.

Therefore, against the background of the aforesaid, it is submitted that the land reforms introduced by the *LA 2010* to the effect that agricultural land should be leased, was an optimistic step. However, one can argue that formalisation of land holding was not an issue.³⁶² Rather, Basotho landholders do not have the funds or the skills to engage in large agriculture that will contribute towards the country's economic development. Thebe³⁶³ supports this fact and is of the opinion that

...instead of engaging in ploughing on arable land, Basotho have the tendency of subdividing those lands and turning them into residential housing, which they then rent out.

She further concludes that policy has failed to take into account the unfolding dynamics of land, agriculture and livelihood in rural communities.³⁶⁴

³⁵⁹ Bruce *Country Profile* 227.

³⁶⁰ Erlank 2014 *PELJ* 9.

³⁶¹ Ndimba *Sustainable Land Use and Management* 2.

³⁶² Thebe *et al.* 2013 *African studies* 1.

³⁶³ Thebe *et al.* 2013 *African studies* 1.

³⁶⁴ Thebe *et al.* 2013 *African Studies* 400.

Arguably, against foregoing assertions, it is clear that FDIs can be a solution to the declining agriculture activities in Lesotho. However, the issue of restraining foreigners' from holding title to land is a discouraging fact on foreign investors.

4.4 Concluding remarks

To sum up, according to Iwanow, Selelo and Morojele³⁶⁵

the restrictions on access to land for foreigners are usually implemented to avoid land speculations and excessive ownership of national land by non-locals. However, in the short to medium term this is unlikely to be a significant problem in Lesotho. Moreover, given Lesotho's relatively small economic size and the limited capacity of local entrepreneurs it is crucial for Lesotho to attract foreign investment. FDI is likely to provide employment and some technology transfer to local companies; therefore, from the perspective of overall economic development it may be more effective to liberalize access to land for foreigners for investment purposes. This policy may be implemented in a carefully managed way and once, for example, foreign purchases reach a certain percentage of Lesotho's total land for investment purposes, automatic restriction on such purchases will re-apply.

Therefore, it is submitted that perhaps restricting foreigners' access to land does more harm than good. Even though the FDIs contribution into the country economic development is clearly apparent given the success of the manufacturing sector; not much has been done to ensure that FDIs remain invested in the country. The current land tenure system does not introduce adequate title for foreign investors and a free market that encourages land use to be more in tune with commercial needs. Providing FDIs with secure tenure to land can improve agricultural production by encouraging FDIs to engage in long-term investment in the country's agriculture sector. In this way, foreign investment will be diverse and this will result in the country's economic development.

5 Summary, conclusion and recommendation

5.1 Summary and conclusion

In this final chapter, a review of the previous chapters, conclusion and recommendations will be given. The main aim of the research as stated from the onset is to analyse the land tenure system in Lesotho and to determine how the land tenure system affects FDI, given the fact that FDI forms an integral part of the country's economic development.

³⁶⁵ Iwanow, Selelo and Morojele *Investor Roadmap Lesotho* 61.

In chapter one, the following research question was stated: whether the land tenure system in Lesotho could accommodate foreign investors keen and desirous to invest in Lesotho for the economic development of the country. In order to answer the research question, the land tenure system in Lesotho was analysed.

With a view to lay down a conceptual basis of a land tenure system, chapter two of the study discussed the meaning of the land tenure concept as defined by various sources. Overall land tenure was described by Munro-Faure³⁶⁶ as "the relationship, whether legally or customarily defined among people, as individuals or groups, with respect to land." There are various land tenure systems that have been developed worldwide to determine who can use what resources for how long, and under what conditions.³⁶⁷

In Lesotho, the customary land tenure system has been in practice for some time. The *Laws of Lerotholi* are usually regarded as the source of all customs and traditions of Basotho.³⁶⁸ In terms of the provisions of the *Laws of Lerotholi*, the fundamental principle of land tenure in Lesotho is that all land in Lesotho is vested in the Basotho Nation and is held in trust by the King.³⁶⁹ Accordingly, in Lesotho, individuals have no ownership rights to land; instead land holders normally enjoy rights of usage.³⁷⁰ Further, under the customary law, the Chiefs acting on behalf of the King had a right to allocate and administer land.³⁷¹ This, however, is no longer the case, because the customary land principle that empowered the Chiefs with powers to allocate land has been abolished.³⁷² As was discussed in the study, the traditional land tenure system performed well and equitably while land was accessible to all citizens and land management by chiefs posed no problems.³⁷³ With the passage of time, however, there was a series of grievances concerning the arbitrary land allocation by the chiefs.³⁷⁴ Not only that, but a major concern was that since under the customary land tenure system there was no security of tenure, the system was then concluded to be unfavourable to the economic development

³⁶⁶ Munro-Faure *et al. Land Tenure and Rural Development* 7.

³⁶⁷ Munro- Faure *et al. Land Tenure and Rural Development* 7.

³⁶⁸ See Chapter 2 paragraph 2.3.1.

³⁶⁹ See Chapter 2 paragraph 2.3.1.

³⁷⁰ See Chapter 2 paragraph 2.2.1.1.

³⁷¹ See Chapter 2 paragraph 2.3.1.

³⁷² See Chapter 2 paragraph 2.4.3.

³⁷³ See Chapter 2 paragraph 2.3.2.

³⁷⁴ See Chapter 2 paragraph 2.3.2.

of the country. Also, because under the traditional system of land tenure, land could not be bought, sold, transferred or exchanged, one could therefore submit that it was impossible to use land for commercial purposes.³⁷⁵

In an effort to ensure that the country departs from the strict application of the customary rule of land tenure that was hampering the country's economic development, land reform attempts were initiated in 1967. The *LPA 1967* and *Deeds Registry Act* were enacted in that year. Nevertheless, seeing as both *LPA 1967* and the *Deeds Registry Act* still upheld and promoted the customary principle of tenure that stated that land was non-transferable; the Acts failed to remedy the inadequacies of the traditional land tenure system.³⁷⁶

It was against this background that two other land laws were passed in 1973: the *LA 1973* and the *ALA 1973*. Apart from introducing the Land Allocation Committees; the *LA 1973* brought no significant transformation from the traditional customary land tenure. More so because the Land Allocation Committees established were merely authorised to advise the Chiefs on matters of land administration. However, as it was evidenced by the sources in chapter 2, most Chiefs often ignored the advice of the Committees rendering such committees ineffective.³⁷⁷ Furthermore, the *LA 1973* still upheld the customary notion that land in Lesotho is vested in the Basotho Nation but the land administration vested in the King, whose powers were to be exercised by the Chiefs.³⁷⁸

As was seen in Chapter 2, the *ALA 1973* despite attempting to bring in some major reforms, it never came into operation. As discussed in chapter 2, the *ALA 1973*, attempted to nationalise land by placing the administration of the land with the government and removing such powers from the control of the Chiefs.³⁷⁹ This Act also introduced the leasehold concept as well as land revenue by way of ground rent.³⁸⁰ Most importantly, it introduced the "Formc" document, which was a formal document issued by the Chief as proof of allocation.³⁸¹ However, in due course, there were numerous land disputes before

³⁷⁵ See Chapter 2 paragraph 24.2.3.

³⁷⁶ See Chapter 2 paragraph 2.4.1.

³⁷⁷ See Chapter 2 paragraph 2.4.2.1

³⁷⁸ Section 3 *LA 1973*.

³⁷⁹ See Chapter 2 paragraph 2.4.2.2.

³⁸⁰ See Chapter 2 paragraph 2.4.2.2.

³⁸¹ See Chapter 2 paragraph 2.4.2.2.

the courts relating to the irregularities and errors resulting from the issued "Formc" documents.³⁸²

For instance, in the case of *Moletsane v Attorney General*,³⁸³ Maqutu JC stated that even though the law provided for keeping of land registers by Chiefs and the issuing of certificate of allocations known as "Formc," the land registers were not kept properly or in some instances land allocation records were non-existent. As a result, there was often an allocation of the same piece of land to more than one person. Also in the case of *Selloane Putsoane v Motlatsi Lekatsu*³⁸⁴ the applicant claimed to be the rightful owner of a certain plot and he had a "Formc" document issued by the area in 1985 as proof of title. The court found that the Chief could not have lawfully issued a "Formc" document because by 1980 the Chiefs had no power to allocate land. Moreover the "Formc" documents were no longer in use as they had been replaced by the "Form c1", "Formc2 and "Formc 3".³⁸⁵

In due course, the two 1973 Acts were then consolidated into the *LA 1979*. This Act, as discussed in chapter two, deviated from the traditional tenure rules where land was held in trust by the King and instead provided that land in Lesotho is vested in the Basotho Nation and held in trust by the state.³⁸⁶ It is under the *LA 1979* where the notion of leases was further strengthened in a bid to make land tenure more secure. For example, unlike the "Formc" document which was issued by the Chief on a plot that was not surveyed, it was a requirement for a lease to be issued on a plot that has been surveyed. In this way proper records were kept when issuing leases as opposed to the "Formc" documents which resulted in some disastrous instances discussed in chapter 2.³⁸⁷

Even though the *LA 1979* was originally praised for transforming the land laws in Lesotho, the Act was, however, not without fault.³⁸⁸ Ultimately, in the same vein as its predecessors, the *LA 1979* was concluded to be irresponsible to the economic needs of

³⁸² See Chapter 2 paragraph 2.4.3.2.

³⁸³ *Moletsane and Others v Attorney General and Another* case number (CIV/APN/163/2001)para 42-43.

³⁸⁴ *Putsoane v Lekatsu* C. of A (CIV) No.16 of 1990 paragraph 5.

³⁸⁵ See Chapter 2 paragraph 2.4.3.

³⁸⁶ See Chapter 2 paragraph 2.4.3.

³⁸⁷ Paragraph 2.4.3.2.

³⁸⁸ See Chapter 2 paragraph 2.4.3.2.

the country.³⁸⁹ The reasons that were attributed to the failure of this Act included *inter alia* that provisions of the *LA 1979* that required transactions involving leases to have prior ministerial consent were cumbersome and therefore impinged on the use of land as a commercial commodity. Additionally, under the *LA 1979* agricultural land was held by a licence and not leasehold system, such land remained non-transferable and non-negotiable for cash.³⁹⁰ As a result, hundreds of hectares of agricultural land lay idle, mainly because Basotho who had rights to the land were without the economic means to utilise it.³⁹¹ By virtue of the aforementioned facts, one might perhaps conclude that the *LA 1979* failed to promote the commercialisation of agriculture.³⁹²

Lesotho is a small developing country that is endowed with limited natural resources and one of the important natural resources is land. Not only is land the main livelihood for Basotho, but it is also a major contributing factor towards the country's economic growth. This is why, when it became apparent that the land tenure system under the *LA 1979* was ineffective in a way that was hampering economic development, the Act was then repealed. One major reason attributed to the demise of the *LA 1979* is that the Act failed to provide for the utilisation of land as an economic asset. As a result, the *LA 2010* was enacted to achieve objectives that include *inter alia* the abolishment of customary land tenure, the creation of land markets and the facilitation and the promotion of land investments.³⁹³

It is important to note that under *LA 2010* the key focus has been placed on the promotion of land investment by foreigners. The importance of FDI in Lesotho cannot be overemphasised because it plays a central role in sustaining the country's economy. FDI provides indispensable resources and ingredients that include *inter alia* capital.³⁹⁴ As it has been discussed in chapter 4, with the support of FDI the manufacturing sector became the largest formal employment sector in the country. However, there are

³⁸⁹ See Chapter 2 paragraph 2.4.3.2.

³⁹⁰ See Chapter 2 paragraph 2.4.3.1.3.

³⁹¹ See Chapter 2 paragraph 2.4.3.1.3.

³⁹² See Chapter 2 paragraph 2.4.3.1.3.

³⁹³ See Chapter 3 paragraph 3.2.1.1.

³⁹⁴ See Chapter 4 paragraph 4.

concerns that the manufacturing sector is reliant on the investors brought in by the "foot loose" trade privileges.³⁹⁵

Apart from the trade privileges, there is no incentive that would encourage the investors to stay in the country. Also, not much is being done to ensure that there is FDI diversity, in other words nothing attracts or encourages foreign investors to engage in other economic sectors such as agriculture. Instead, foreign individuals are excluded from acquiring the rights to land in Lesotho and foreign enterprises are restricted from also acquiring the rights to land. Only Basotho have a right to land in Lesotho.

5.2 Recommendations

As noted in chapter 4,³⁹⁶ even though a restriction of foreign ownership is premised on the fact that usable land is scarce, for that reason foreigners are barred from acquiring excessive land holding. A submission is made that the restrictions placed on foreigner's access to land constitute barriers to the entry of FDIs in property and land infrastructure development.³⁹⁷ Few Basotho have access to funds and resources to utilise their land as an economic asset. In light of this fact, it is recommended that foreign investors be allowed to lease land. In this way, a property development market will be open to foreign investors. According to UNCTAD,³⁹⁸

...the current land tenure system is based on genuine sensitivities, but it is archaic and cumbersome and not suited to a modern business environment.

If, on the other hand, foreign investors are allowed to hold title to land, there will be sufficient title for all investors and this will encourage land use in tune with commercial needs.³⁹⁹

In addition, the current sub-lease facilities as discussed in chapter 4 present risks to foreign investors wishing to develop commercial and industrial property. For instance, the foreign investor is not a party in the lease contract or agreement between the lessee and the government as a result; any default by the lessee can impact on the sub-lessee's (foreign investor) security of title. In other words, the sub-lease option available to FDI

³⁹⁵ See Chapter 4 paragraph 4.1.2

³⁹⁶ Chapter 3 Paragraph 4.4.

³⁹⁷ UNCTAD *Investment Policy Review* 23.

³⁹⁸ UNCTAD *Investment Policy Review* 39.

³⁹⁹ UNCTAD *Investment Policy Review* 39.

does not supply sufficient security of tenure to enable them to use land as security or collateral to acquire financial assistance from financial institutions. Taking into account the abovementioned, a recommendation is made that foreign investors be permitted to hold leases in order to have enhanced security of tenure for their business development. Where this is so, foreign investors will be encouraged to make long term investments in the country and thereby contribute towards the country's economic growth.

Currently, a foreign enterprise may hold title only upon being granted a ministerial consent. As has been shown in chapter 4,⁴⁰⁰ the requirement of a prior consent before issuing a lease to a foreign enterprise makes obtaining a lease difficult and time-consuming for foreigners. As a result, the prior consent requirement ultimately has a negative impact of FDI intending to invest in Lesotho. On this basis, it is recommended that the prior consent requirement be removed. Instead, a provision could be made that if a business entity is registered in Lesotho in terms of the country's laws, such entity should be eligible to hold title to land, irrespective of its members being foreigners.

Moreover, it is submitted that if foreign investors could be permitted to hold title to land this will open access to other markets, particularly the agricultural sector. Given that the *LA 2010* seeks to promote commercialisation of agriculture, one can submit that limiting foreigners from holding title to land negates this objective. As stated in chapter 4, agriculture's contribution toward the country's economic development has been languishing. The decline in agriculture has been attributed to a number of reasons that include, *inter alia*, inadequate farming equipment, poor land management and a lack of modern farming skills. It is submitted that all these factors hampering the commercialisation of agriculture can be alleviated if foreign investors are enabled to hold title to land. The foreign investors will be encouraged to bring in their skills and more importantly capital. In this way, the country could be in a position to engage in large scale agriculture as opposed to the current position whereby Basotho can only afford to engage in subsistence farming to the detriment of the country's economic development.

The importance of FDI contribution towards Lesotho's economic development can be demonstrated by the success of the country's manufacturing sector. Through several favourable trade arrangements, the country has been able to attract foreign investors

⁴⁰⁰ Chapter 4 Paragraph 4.2.

who in turn have created a successful manufacturing sector to the betterment of the country's economy. The manufacturing sector in the country, which is dominated by foreign investors, provides employment for most Basotho. The investors currently in the country have been attracted by the existing time bound trade privileges. Therefore, it is submitted that, but for the existing trade privileges, the success of the manufacturing sector will be in jeopardy. For this reason, one can conclude that perhaps it is time that land is used as an additional incentive to lure investors into the country. In this way, the manufacturing sector will cease to rely on the time bound privileges, and therefore upon the expiration of the trade privileges, the manufacturing sector will remain intact.

Based on the aforementioned facts, one can again conclude that if foreign investors are encouraged to invest in agriculture, this sector's success can be on par with the manufacturing sector. Foreign investors can, therefore, be incentivised to invest in the agricultural sector by offering them recognised rights to hold title to land. In other words, if foreign investors' tenure in land is secure, they are likely to be encouraged to invest more in the agricultural sector. Bruce is of the opinion that a farmer will not make long-term investment in his holding unless he is secure in reaping the benefits of his investment.⁴⁰¹ Therefore, it is submitted that for foreign investors to be enticed into investing in the country's agricultural sector, there is a need to offer them secure tenure.

The duration of commercial leases in Lesotho is for a maximum of 60 years, whereas the duration of a residential lease is 99 years.⁴⁰² It is submitted that given the limited duration of the commercial leases this may be discouraging to investors, for they will fear that the lease will expire before they could recuperate profits. Considering that a lease that is acquired for sale of petroleum and oil can only be granted for a maximum of 30 years, such provision is discouraging, not only for foreign investors, but to most business people who intent to engage in long term business in Lesotho. A recommendation is hereby made that all leases be granted for a maximum period of 99 years.

5.3 Conclusion

⁴⁰¹ See Chapter 1 paragraph 1.2.

⁴⁰² Section 32 *LA 2010*.

Against the background given, one can conclude that in Lesotho a majority of the people who have the rights to hold land do not necessarily have the means to utilise it efficiently. On the other hand, foreign investors who could use the land for the betterment of the country's economy are limited from investing in land. It is therefore submitted that restricting foreigner's access to land does more harm than good.

Bibliography

Literature

Adams *et al* "Land Tenure Reform and Rural Livelihood in Southern Africa"

Adams M, Cousins and Manona "Land Tenure and Economic Development in Rural South Africa: Constraints and Opportunities" *National Conference on Land and Agrarian Reform in South Africa* (26–28 July 1998 Johannesburg)

Adams *et al* *Land Tenure Reform and Rural livelihoods in Southern Africa*

Adewumi *The Impact of FDI*

Adewumi S *The Impact of FDI on Growth in Developing Countries An African Experience* (Master Thesis Jonkoping International Business School 2006)

Asiedu 2004 *Development Policy Review*

Asiedu E "Policy Reform and Foreign Direct Investment in Africa: Absolute Progress but Relative Decline" 2004 *Development Policy Review* 41-48

Ayoki *The Textile and Clothing Industry in Lesotho*

Ayoki M *The Textile and Clothing Industry in Lesotho in the Wake of The Multi-Fibre Agreement Phase-Out* (Institute of Policy Research and Analysis Kampala Uganda 2017)

Badenhorst *et al* *Silberberg and Schoeman's The Law of Property*

Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The Law of Property* 5th ed (Lexis Nexis Cape Town 2006)

Busingye "Land Reform in Africa: Lessons for South Africa"

Busingye "Customary Land Tenure Reform in Uganda: Lessons for South Africa" *International Symposium on Communal Tenure Reform* (12-13 August 2002, Johannesburg)

Bruce *Country Profiles of Land Tenure*

Bruce JW *Country Profiles of Land Tenure: Africa* (University of Wisconsin-Madison 1998)

Chaka *et al* "Good Land Governance"

Chaka M, N Putsoa and M Mohafa "Good Land Governance is Essential to Effective Administration of Land" *World Bank Conference on Land and Poverty* (19-23 March 2018 Washington DC)

CBL 2005 *Economic Review*

CBL "Lesotho Signs a Grant Agreement with the Millennium Challenge Corporation" 2005 *Economic Review* 1-3

CBL 2006 *Economic Review*

CBL "Lesotho's Potential for Export Diversification" 2006 *Economic Review* 1-5

CBL 2009 *Economic Review*

CBL "Labour Market Developments in Lesotho" 2009 *Economic Review* 1-7

CBL 2010 *Economic Review*

CBL "Land Bill Reform in Lesotho: Implications for the Economy of Lesotho" 2010
Economic Review 5-8

Collins and Mitchell 2016 *Journal of Agrarian Change*

Collins A and Mitchell MI "Revisiting the World Bank's Land Law Reform Agenda in Africa: The Promise and Perils of Customary Practices" *Journal of Agrarian Change* 2016 112-131

Cotula (ed) *Changes in Customary Systems in Africa*

Cotula L *Changes in Customary Systems in Africa* (Russell Press Hertfordshire 2007)

Daemane 2012 *JSDA*

Daemane "Problems of Land Tenure System in Lesotho since Post-independence: Challenging Perspectives for Sustainable Development in Land Administration and Land Management" *JSDA* 2012 164-175

Erlank 2014 *PER*

Erlank W "Green Paper on Land Reform: Overview and Challenges" *PER* 2014 614-640

Fisher "Tensions and Tenures in Post-Apartheid South Africa"

Fisher F "Tensions and Tenures in Post-Apartheid South Africa" Royal Institution of Surveyors *Conference on International Land Tenure* (December 1993 University of East London)

Gerstter *et al* *An Assessment of the Effect on Land Ownership*

Gerstter C, Timo K and Doris K *An Assessment of the Effect on Land Ownership and Land Grab on Development with a Particular Focus on Small Holdings and Rural Areas* (Ecologic Institute, Germany 2011)

Hall *Regulatory Guidelines for Affordable Shelter*

Hall D *Regulatory Guidelines for Affordable Shelter Regulatory Frameworks Governing Access to Legal Low-Income Housing in Maseru* ()

Iwanow, Selelo and Morojele *Lesotho Investor Roadmap*

Iwanow I, Selelo R, Morabo M *Lesotho Investor Roadmap a Guide Towards a More Conducive Business and Investment Climate* (United States Agency for Development March 2012)

Johnson "Reforming Land Administration in Lesotho" 1-13

Johnson S "Reforming Land Administration in Lesotho: A Result Report" *Conference on Environment for Sustainability* (6-10 May 2013 Abuja Nigeria)

Juma 2011 *Pace International Law Review*

Juma L "The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho" 2011 *Pace International Law Review* 92-139

Kleinbooi *Review of Land Reforms in Southern Africa*

Kleinbooi ED, Turner S *Review of Land Reforms in Southern Africa 2010* (Institute for Poverty, Land and Agrarian Studies 2010)

Lawry S *et al The Impact of Land Property Rights*

Lawry S, Samii C and Hall R *The Impact of Land Property Rights Interventions on Investment and Agricultural Productivity in Developing Countries: a Systematic Review* (The Campbell Collaboration 2014)

Leduka 2007 *Africa Today*

Leduka CR "Recycled Fable or Immutable Truth? Reflections on the 1973 Land Tenure Reform Project in Lesotho and Lessons for the Future" 2007 *Africa Today* 91-111

Leduka "From Illegality to Legality"

Leduka CR "From Illegality to Legality: Illegal Urban Development and the Transformation of Urban Property Rights in Lesotho" *Conference on Coping with Informality and Illegality* (23-26 March 2001 Belgium)

Leduka CR "Informal Land Delivery Processes"

Leduka CR "Informal Land Delivery Processes" in Maseru, Lesotho Summary of Findings and Policy Implications" *Conference on Land Delivery Processes in Africa* (11-12 March 2003 Thaba Bosiu Maseru) 1-45

Leduka "Privatising Land Rights"

Leduka "Privatising Land Rights in Pursuit of Poverty Reduction: Commentary on the 2010 Lesotho Land Reform Project" *Conference on Investing in Land and Strengthening Property Rights* (12-13 April 2012 Johannesburg)

Leduka CR *Urban Land Market*

Leduka CR *Lesotho Urban Land Market Scoping Study* (Institute of Southern African studies 2012)

Mabesa and Whittal "A Comparative Analysis of the LSPP and LAA"

Mabesa M and Whittal J "A Comparative Analysis of the former (LSPP) and the Current (LAA) Land Administration System in Lesotho" *Conference on Governance in Land Administration Systems* (University of Cape Town January 2014) 1-13

Mahembe and Odhiambo *Problems and Perspectives in Management* 36.

Mahembe E and Odhiambo N M "The dynamics of Foreign Direct Investment in SADC Countries: Experiences from Five Middle-income Economies" 2013 *Problems and Perspectives of Management* 35-45

Maile 2001 *A Brief on the Forestry Outlook*

Maile N *A Brief on the Forestry Outlook Study (FOSA 2001)*

Malefane 2007 *SAJEMS*

Malefane MR "Determinants of Foreign Direct Investment in Lesotho: Evidence from Co-integration and Error Correction Modeling" 2007 *SAJEMS* 99-106

Maredia *et al* *Impact Evaluation of Systematic Regulation*

Maredia M, Muraoka R, Songging J and Gerhardus S *Impact Evaluation of Systematic Regularization of Land in Urban/Peri-Urban Areas of Maseru, Lesotho: Baseline Survey Report* (Michigan State University 2016)

Mbata 2001 *JSA*

Mbata J N "Land Use Practices in Lesotho: Implications for Sustainability in Agricultural Production" 2001 *JSA* 5-23

Mekbib *et al* *Capacity of the Machobane Farming System*

Mekbib SB, Olaye AO, Mokhothu MN *Assessment of the impacts and Adaptive Capacity of the Machobane Farming System to Climate Change in Lesotho* (African Technology Policy Studies Network 2012)

Mends *et al* "A Study of the Institution of the Customary Land Tenure System"

Mends TM and De Meijer J "A Study of the Customary Land Tenure System in the Supply of Property Rights for Urban Development- An Example of Accra, Ghana" *Conference on Promoting Land Administration and Good Governance* (March 8-11 2016 Accra Ghana) 1-14.

Migot-Adholla *et al* 1991 *World Bank Economic Review*

Migot-Adholla S, Peter H, and Benoit B "Indigenous Land Rights Systems in Sub-Saharan Africa: A Constraint on Productivity?" 1991 *World Bank Economic Review* 155-175

Mohapi "Urban Environmental Problems"

Mohapi T "Urban Environmental Problems: Implications of Rapid Urbanisation without Adequate Urban Governance in Lesotho" in Sassen S (ed) *Human Settlement Development* (Encyclopaedia of Life Support Systems 2009) 35-50

Mokitimi *Analysis of Security of Tenure*

Mokitimi N *Analysis of Security of Tenure under the Customary Land Tenure System of Lesotho* (Institute of Southern African Studies National University of Lesotho 2002)

Mosito 2014 *SADCLJ*

Mosito K E "The Role of Traditional Authorities in Land Allocation and Management in Lesotho" 2014 *SADCLJ* 68-80

Mosaase "Lesotho's Land Policy under the Land Act 1979"

Mosaase "Lesotho's Land Policy under the Land Act 1979 and its Implications for the Agricultural Sector" in Arntzen JW, Ngcongco LD and Turner SD (eds) *Land Policy and Agriculture in Eastern and Southern Africa* (United Nations University Press 1986) 63-66

Motsoene 2016 *Journal of Social Science for Policy Implications*

Motsoene K "Urban Governance and Urban Poverty: The Critical Analysis of Basic Services Provision in Maseru, Lesotho" 2016 *Journal of Social Science for Policy Implications* 1-18

Nte and Nkumandla *Land Reform and Transformation*

Nte B and Nkumandla V *Land Reform and Rural Transformation* (Political Economy Southern Africa 2018)

Munro-Faure *et al Land Tenure and Rural Development*

Munro-Faure P, Groppo P and Jonathan *Land Tenure and Rural Development* (FAO 2002)

Ryan and Cooper *Those Who Can Teach*

Ryan K and Cooper J *Those Who Can Teach* (Boston: Houghton Mifflin Co 1984)

Payne *Urban Land Tenure and Property Rights*

Payne G *Urban Land Tenure and Property Rights in Developing Countries: A review of the Literature* (The Overseas Development Administration 1996)

Pitoro 2017 *African Journal of Agricultural and Resource Economics*

Pitoro R "Land Tenure and Land Values in an Underdeveloped Land Market Context" 2017 *African Journal of Agricultural and Resource Economics* 189-203

Pule and Thabane 2004 *Journal of Modern African Studies*

Pule NV and Thabane M "Lesotho's Land Tenure Regimes: Experiences of Rural Communities and the Calls for Land Reform" 2004 *Journal of Modern African Studies* 283-303

Sekatle "World bank Securing Land Rights"

Sekatle P "World Bank Securing Land Rights for the Poor and Marginalised in Lesotho" *Conference on Land Policy and Land administration()*

Selebalo "The Land Reform in Lesotho"

Selebalo QC "The Land Reform in Lesotho: Will It Lead to Poverty Reduction in Rural Areas" *Fostering Rural Economic Development Through Agriculture-based Enterprises and Services International Workshop* (20-22 November 2002)

Thabane *Who Owns Land in Lesotho*

Thabane M *Who Owns the Land in Lesotho? Land Disputes and the Politics of Land Ownership in Lesotho* (Institute of Southern African Studies National University of Lesotho 1998)

Thabane "Land Tenure, Housing Rights and Gender"

Thabane "Land Tenure, Housing Rights and Gender in Lesotho" in Benschop M *Land, Law Tenure and Gender Review Series: Southern Africa* (UN-HABITAT 2005) 29-75

Thebe and Rakotje 2013 *African Studies Journal*

Thebe V and Rakotje M F "Land Strategies and Livelihood Dynamics in Peri-Urban Communities: Challenges to Land and Agricultural Policy in Lesotho" *African Studies 2013 Journal* 399-415

Turner and Adams 2004 *SARPN*

Turner S and Adams M "A Note on Food Security and Land Tenure Security in Lesotho" *SARPN* 2004 1-4

UNCTAD *Investment Policy Review*

UNCTAD *Investment Policy Review: Lesotho* (United Nations Publications 2003)

Van Bennekom-Minnema J *et al* "Systemic Land Regularisation in Lesotho"

Van Bennekom-Minnema, J Riise and I Corker "Systematic Land Regularisation in Lesotho" *Conference on Engaging the Challenges-Enhancing the Relevance* (16-21 June 2014 Kuala Lumpur, Malaysia) 1-14

Van der Walt and Pienaar *Introduction to the Law of Property*

Van der Walt AJ and Pienaar *Introduction to the Law of Property* 5th ed (Juta Town) Year

Werner and Bayer "Leasehold as a Vehicle for Economic Development" 1-29.

Werner W and Bayer C "Leasehold Rights as a Vehicle for Economic Development:" *A Case Study of Small Scale Farmers in Oshikoto Region World Bank Conference on Land and Poverty* (24-27 March 2017 Washington DC) 1-29

Weigel *Foreign Direct Investors*

Case law

Gien v Gien 1979(2) SA 1113

Moletsane v Attorney General

Selloane Putsoane v Motlatsi Lekatsu (C of A) (CIV) No. 16 of 1990

Tsotako v Matabola (Cof A. (CIV) No.10 of 1986

Vicenti v Lesotho Bank unreported case number unreported case number
CIV/APN/350/99 UN

Legislation

Constitution of Lesotho, 1993

Deeds Registry Act 12 of 1967

Land Act 20 1973

Land Act 17 of 1979

Land Act 28 of 2010

Land Administration Act 1973

Land Procedure Act 1967

Land Husbandry Act 1969

International Instruments

African Growth and Opportunity Act

Government Publications

Land Regulations of 2011

Systematic Land Regularisation Regulations of 2010

Internet sources

AGOA 2018 <https://agoa.info>

AGOA 2018 *AGOA Country Eligibility* <https://agoa.info/about-agoa/> accessed on 15 August 2019

Anon 2017 http://www.theglobaleconomy.com/Lesotho/Share_of_agriculture

Anonymous 2017 Lesotho: GDP Share of Agriculture <http://www.theglobaleconomy.com> accessed on 20 May 2018.

Anon 2018 <http://www.lesothoreview.com/contents/foreign-trade-investment/>

Anonymous 2018 Foreign Trade Investments <http://www.lesothoreview.com/contents/foreign-trade-investment/>

Anon 2017 <https://www.undp.org/content/dam/unct/Lesotho/docs>

Anonymous <https://www.undp.org/content/dam/unct/lesotho/docs> Lesotho Country Analysis Working Document Final Draft September 2017 accessed on 24 July 2018

FAO 2002 <http://www.fao.org>

FAO 2010 *Land Tenure Studies* <http://www.fao.org/3/y4307e/y4307e00.htm>

Freudenberger 2013 <http://usaidlandtenure.net>.

Freudenberger 2013. The Future of Customary Tenure <http://usaidlandtenure.net>. Accessed on 22 August 2019

IFAD 2017 <https://www.ifad.org>

IFAD 2017 *Lesotho* <https://www.ifad.org> accessed on 20th August 2019

Lesotho Times 2009 <http://Lestimes.com/land-unlock-development>

Lesotho Times "Land Bill will unlock development" Lesotho Times 22 October 2009 <http://lestimes.com/land-bill-will-unlock-development/> accessed on 12 May 2018

Lee 2011 *Land Reform in Lesotho* www.osisa.org

Lee R 2011 *Land Reform in Lesotho* www.osisa.org accessed on 25 September 2017

MCC 2013 <https://www.mcc.gov/where-we-work/program/lesotho>

MCC 2013 <https://www.mcc.gov/where-we-work/program/lesotho> accessed on 02 September 2019

Ukaejiofo 2018 <http://documents.worldbank.org>

Ukaejiofo RU 2018 Climate-smart agriculture in Lesotho (English) <http://documents.worldbank.org> accessed on 23 July 2019

Wily 2011 <https://dlc.dlib.indiana.edu>

Wily L 2011 *Customary Land Tenure in the Modern World* <https://dlc.dlib.indiana.edu> accessed on 20 August 2018

Yankholmes 2012 <https://www.academia.edu/29638512>

Yankholmes W 2012 Introduction and Definition of Leases <https://www.academia.edu/29638512>