

Reportable .

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Appeal No. 38/2004
High Court Miscellaneous Application No. F 280/2001

In the matter between:

AFRICAN HOLDINGS (Pty) Ltd

Appellant

and

**PHADI SOLOMON (in her capacity as President
of the Land Tribunal)**

1st Respondent

TAWANA LAND BOARD

2nd Respondent

POTSO TSHENYEGO AND FAMILY

3rd Respondent

Mr. Sechele for the Appellant

No appearance for the 1st Respondent

Mr. B. D. Leburu for the 2nd Respondent

Mr. L. M. Lecha for the 3rd Respondent

J U D G M E N T

CORAM: TEBBUTT J. P.
KORSAH J. A.
GROSSKOPF J. A.

GROSSKOPF J. A.:

In June 1998 the subordinate land board at Maun granted the use of a certain piece of land to one Gbadise Obitseng ("Obitseng") who had purchased that right from one Konopang Mopalo ("Mopalo"). At its meeting in November 1998 the second respondent, the Tawana Land Board ("the Land Board"), approved an application for the transfer of that

right to the appellant, African Holdings (Pty) Ltd ("African Holdings"). The Land Board subsequently considered an objection to those transfers lodged by the third respondent, Ms Potso Tshenyego ("Ms Tshenyego"). She alleged that the transfer by Mopalo to Obitseng had been obtained by fraud and that Obitseng had no right to transfer the property to African Holdings. The Land Board thereupon referred the matter in February 2001 to the Land Tribunal ("the Land Tribunal") to set aside those transfers.

The attorneys acting for African Holdings objected to a hearing by the Land Tribunal and submitted that the Land Board could not appeal against its own decision. They further maintained that the Land Tribunal was an appellate tribunal without powers to review decisions of the Land Board. The Land Tribunal nevertheless heard the matter in August 2001 and ruled at the outset that Ms. Tshenyego, and not the Land Board, would be the appellant. The Land Board became the first respondent, Mopalo the second respondent, Obitseng the third respondent and African Holdings the fourth respondent.

The Land Tribunal upheld the appeal on 11 August 2001 and ordered the Land Board to cancel the transfers to Obitseng and African Holdings and to prepare a new certificate in the name of the person to whom the

right to use the land was originally allocated, namely the late Mopalo Masupatsela, who was the father of Ms. Tshenyego.

African Holdings was not satisfied with the order of the Land Tribunal and launched review proceedings in the High Court against Ms. Phadi Solomon, in her capacity as President of the Land Tribunal, as first respondent, the Land Board as second respondent and Ms. Tshenyego as third respondent. I need not deal with all the points raised by African Holdings in the court a quo, nor with the Land Board's contention that African Holdings should have proceeded by way of appeal rather than review, seeing that the issues raised by African Holdings in its review application were legal points.

Counsel for the Land Board did, however, raise a preliminary point in the court a quo, namely that African Holdings as applicant had omitted to comply with section 3 of the Local Authority (Proceedings) Act [Cap 10:04], which provides as follows:

“No action shall be brought against a local authority unless at least 30 days' written notice of an intention to bring such action has been served on the local authority.”

Section 2 of the Act provides specifically that “local authority” includes a land board established under the Tribal Land Act [Cap 32:02]. It is common cause that African Holdings did not give the Land Board any notice of its intention to bring the review proceedings. The question is

whether African Holdings was obliged, in the circumstances of this case, to give the Land Board notice. That would depend, inter alia, on whether the review proceedings brought by the appellant can be described as an action brought against the Land Board, and if so, whether that action was the commencement of the proceedings.

The court a quo pointed out that a similar omission had occurred in respect of Ms. Solomon, in her capacity as President of the Land Tribunal. Section 4 of the State Proceedings (Civil Actions by or against Government or Public Officers) Act [Cap 10:01] provides as follows:

“No action shall be instituted against the Government, or against a public officer in respect of any act done in pursuance, or execution, or intended execution of any law, or any public duty or authority or in respect of any alleged neglect or default in the execution of any such law, duty or authority, until the expiration of one month next after notice in writing has been, in the case of the Government, delivered to or left at the office of the Attorney-General, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims.”

It is not in dispute that the President of the Land Tribunal, Ms. Solomon, is a public officer to whom notice had to be given in terms of section 4 and it is common cause that the appellant did not give Ms. Solomon any notice as is required by section 4. The question is whether African Holdings was obliged, in the circumstances of this case, to give her notice in terms of section 4. That would depend on the same considerations as mentioned in the case of the Land Board.

The court a quo in my view correctly held that both these provisions are couched in peremptory terms and that any action brought in the absence of the required notice is a complete nullity. (See Du Toit and Megaw v Attorney-General 1974 (2) BLR 1 at 2; Mokgalagadi and Others v Kweneng Land Board 1994 BLR 65 (C.A.), at 70 C-D; Moremi and Others v Attorney-General and Another 2000 (1) BLR 280 at 283 B.)

The court a quo further held that the word “action” in both these statutory provisions should not be limited to proceedings commenced by a writ of summons but that it also includes, for instance, applications brought on notice of motion. This was indeed held to be the position in both Du Toit’s case, supra, at page 2 and Mokgalagadi’s case, supra, at pages 68D-69G, 70B. Such an interpretation is also borne out by dictionary meanings of the word “action”. The Oxford Dictionary of Law, 4th Edition 1997, defines “action” as “a proceeding in which a party pursues a legal right in a civil court”. Black’s Law Dictionary, 7th Edition 1999, defines “action” inter alia as “any judicial proceeding”. The Concise Oxford English Dictionary, 10th Edition 1999, gives the following meaning of the word “action”: “a legal process; a lawsuit”. I therefore hold that African Holdings did indeed bring an action when it instituted the review proceedings in the court a quo.

The court a quo came to the conclusion that African Holdings was obliged to give the required statutory notice to Ms. Solomon as public officer and to the Land Board as local authority and that the review proceedings were a nullity because of its failure to do so. The court a quo did not however make an order to strike out the review application, as was held in Mokgalagadi's case, supra, at 70D. We shall amend the order of the court a quo in this regard.

African Holdings was not satisfied with the decision of the court a quo and lodged an appeal. It is their contention that proceedings were first commenced when Ms. Tshenyego raised her objection to the transfers before the Land Board. Those proceedings were then further carried on before the Land Tribunal. Counsel for African Holdings submitted that both the Land Board and Ms. Solomon, in her capacity as President of the Land Tribunal, were by that time fully aware of the nature of the proceedings which had been brought before the Land Board and Land Tribunal and that it would have served no purpose to give them notice once again when African Holdings brought its review proceedings, which was in effect a continuation of those proceedings.

I do not agree with these submissions. Even if it be accepted that the initial proceedings brought before the Land Board were judicial proceedings then it still required no notice to the Land Board since those

proceedings were not brought against the Land Board. When those proceedings went on appeal before the Land Tribunal there was once again no need to give any statutory notice since no relief was in fact sought against either Ms. Solomon as a public officer, or the Land Board, despite the fact that it was cited as second respondent in the appeal before the Land Tribunal. The purpose of giving notice to a local authority is to afford such local authority the opportunity to investigate the question of its liability and to consider whether it should meet the claim before getting itself involved in costly legal proceedings (see Mokgalagadi's case, supra, at 69 D-E). The same purpose is served when a public officer is given notice in terms of section 4 of the Act.

There was, however, no need to give any statutory notice when proceedings were instituted in the Land Board and the Land Tribunal since those proceedings were not brought against either the Land Board or Ms. Solomon as a public officer. It would in any event have served no purpose to give them notice since no relief was claimed against them. The first time when proceedings were commenced against either Ms. Solomon as public officer, or the Land Board as local authority, was when African Holdings instituted the review proceedings. It was only then that the statutory notices were required. The Land Board and Ms. Solomon in her official capacity may have had knowledge of the background to the dispute, but it was only when African Holdings

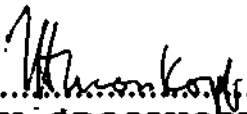
brought the review proceedings in which specific relief was claimed against them that they required the opportunity to investigate the possibility of a settlement. It was only then that the statutory notices would have served any purpose.

I am therefore of the view that African Holdings was obliged to give both Ms. Solomon (in her capacity as President of the Land Tribunal) and the Land Board the necessary statutory notice and that its failure to do so caused the review proceedings to be a nullity. The review application should therefore be struck out.

In the result, the following order is made:

1. The appeal is dismissed with costs.
2. The order of the court a quo is amended to read: "The review application is struck out with costs."

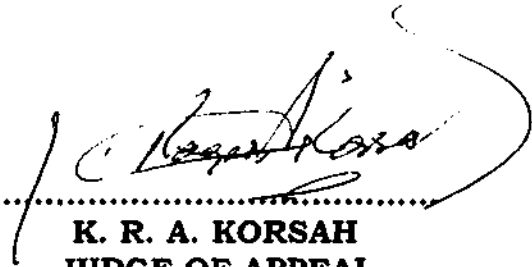
DELIVERED IN OPEN COURT AT THE COURT OF APPEAL THIS
28th DAY OF JANUARY 2005.

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F. H. GROSSKOPF
JUDGE OF APPEAL

I agree


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P. H. TEBBUTT
JUDGE PRESIDENT

I agree


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K. R. A. KORSAH
JUDGE OF APPEAL