



REPUBLIC OF BOTSWANA

IN THE LAND TRIBUNAL
HELD IN FRANCISTOWN

CASE NO: FLT LB 051/17

IN THE MATTER BETWEEN

THEMBANI BACHOPI

APPELLANT

And

NGWATO LAND BOARD
GABRIEL G. PULE

1ST RESPONDENT
2ND RESPONDENT

CORAM: B. Mokakangwe
 G. Tobedza
 J. Gabanamotse

APPEARANCES: T. Bachopi (Appellant in person)
 K. Lesego (1st Respondent's Attorney)
 G. Pule (2nd Respondent in person)

JUDGMENT

B. MOKAKANGWE
INTRODUCTION

1. The Appellant is challenging the decision of the 1st Respondent dismissing his complaint against transfer of an Open Well at Makweetane cattle post near Mabesekwa village to the 2nd Respondent within Ngwato Land Board jurisdiction area. The 1st Respondent dismissed the Appellant's complaint on the basis that the Open Well was procedurally transferred from Mr Dikobe Ontumetse to the 2nd Respondent.

BACKGROUND

2. Around June 2013 a dispute over ownership of an open well at Makweetane cattle post within Tonota Sub Land Board area between Mr Thembane Bachopi and Mr Gabriel Gadibolae Pule was referred to Tonota Sub Land Board by Kgosi S. Seretse of the Serowe Tribal Authority. As a result of that referral the Appellant and 2nd Respondent appeared before the Tonota Sub Land Board at its sitting of 2nd June – 11th July 2014 where the Tonota Sub Land Board resolved that Mr Gabriel Gadibolae Pule is the rightful owner of the open well.
3. While the matter was still at the Land Board Mr Gabriel Pule opened a parallel case with Tonota Tribal Authority (cited as case CRB TNT No.67/2014) against Mr Thembani Bachopi regarding his occupation of said open well. The Tribal Authority on the 8th August ruled in favour of Mr Pule and ordered Mr Bachopi to vacate the area within one month.

4. Mr Thembani Bachopi was not happy with both the decisions of Tonota Sub Land Board and Tonota Tribal Authority. He made two separate appeals, one to Ngwato Land Board and the other to Serowe Tribal Authority (cited as Serowe CRB No. APP22/2015). The dispute was set for hearing on the 18th February 2015 before Serowe Tribal Authority where upon it was decided to confirm the Tonota Tribal Authority's judgment. The Appellant then appealed to the Francistown Customary Court of Appeal (Appeal case No. FCIVA 26/2015). Thereat, on the 8th September 2015 the appeal was upheld on the basis that it was still pending finalization before the Land Board who are the rightful authority to have dealt with the matter. The Land Board was therefore ordered to finalize the matter.
5. Thereafter, the Ngwato Land Board invited the parties for hearing and at its sitting of the 9th June - 17th July 2015 it resolved that the matter was not properly before it because the matter was *functus officio*. The Appellant then requested reconsideration where the 1st Respondent at its meeting of 10th October – 2nd November 2016 again resolved to dismiss the complaint on the basis that the Land Board was *functus officio*.
6. The Appellant being aggrieved by the Land Board's decision registered an appeal with Palapye Land Tribunal on the 28th

November 2016. The matter however ended up being heard before the Francistown Land Tribunal on the 23 May 2017 for a hearing on a point of law raised by the 1st Respondent that the matter was *functus officio* before it. The Tribunal ruled against the point of law and ordered the Land Board to hear the dispute on its merits within three (3) months.

7. Pursuant to the said order the Ngwato Land Board at its sitting of 18th September – 5th October 2017 considered the dispute between Them bani Bachopi and Gabriel Pule over the open well at Makweetane cattle post and resolved as follows;

“The open well was procedurally transferred from Mr Dikobe Ontumetse to Mr Gabriel Gadibolae Pule”.

8. This decision of the Respondent was communicated to the Appellant by letter dated the 9th October 2017. The Appellant again did not accept that decision of the 1st Respondent. He therefore lodged another appeal with the Land Tribunal on the 1st November 2017.

APPELLANT’S CASE

9. Mr Them bani Bachopi alleges that the transfer of the open well at Makweetane area to Mr Grabriel Pule was not based on applicable laws and procedures because Ngwato Land Board has always failed to produce vital information even during the hearing before the Land Tribunal. He submitted that a certificate of open well grant without supporting documents is

insufficient as it proves that it was obtained fraudulently. He also said that there is mismatch of information on certificates and sketch plans produced by Mr Pule. The Appellant informed Court that a certificate granted without a Land Board Resolution and Minutes approving allocation of the open well is evidence that the transaction was dubious which renders the document fake. He decried that it is regrettable for Ngwato land Board to have resolved that the transfer was procedural without the aid of reliable documentation.

- 10.** Mr Bachopi submitted that he bought the unregistered open well from the late Ms Susan Maswikiti in 2011. He added that this is the open well that he found being used by a certain Mr Tshenolo Nyama who was Ms Maswikiti's former head boy. He also stated that Mr Pule had the knowledge of the sale of the open well and that Ms Maswikiti passed on unaware that Mr Pule has a claim on same as he never complained during her lifetime. He told the court that Ms Maswikiti died before they could register and transfer the open well to his names, however that agreement letters were existent and payments settled. It is the Appellant's view that Mr Pule having delayed on his rights to complain has therefore forfeited his rights. He informed court that he has never applied for registration of the open well.

- 11.** In conclusion the Appellant's prayers are that the Tribunal set aside the decision of Ngwato Land Board as full facts were not placed before the Board so that it makes an informed decision thereon. He also beseeched Court to declare that the certificate of the open well granted to Mr Gabriel Pule is invalid evicting him as a result. That he as a consequence be issued with the certificate in respect of the open well as the rightful owner.

1st RESPONDENT'S CASE

- 12.** The 1st Respondent's Counsel opposed the appeal and submitted that the Appellant has failed to prove his case. She said this is basically a case centered on ownership of an open well and the Appellant has failed to establish Ms Susan Maswikiti's ownership. She pointed out that without records within the Land Board that speak of Ms Maswikiti the Appellant could have at least filed an affidavit from Ms Maswikiti's heirs to establish ownership but they did not do so.
- 13.** She continued to argue that it is not sustainable for the Appellant to make his case only by punching holes on the 1st Respondent's filed documents. She said the fact of the matter is that he has not established the ownership of the open well by Ms Maswikiti. It is the 1st Respondent's argument that there is proof of ownership of the open well by the 2nd Respondent as the certificate of grant clearly states it that was

a transfer. That there is also an affidavit of transfer from Mr Emmanuel Ontumetse to the effect that the open well was transferred to the 2nd Respondent.

14. The 1st Respondent representative went on to state that the Tonota Sub Land Board minutes of 1996 bearing the Gumare Sub Land Board stamp actually originate from the Tonota Sub Land Board except that it was inexplicable as to why the stamp bore the names Gumare. She pleaded with the Court to uphold the 1st Respondent decision even though there are considerable inconsistencies on the 2nd Respondent certificates and sketch plans.

2nd RESPONDENT'S CASE

15. Mr Gabriel Gadibolae Pule argued that Mr Bachopi is making lots of allegations without proof. Mr Pule's account is that he bought an open well at Makweetane cattle post near Mabesekwa village in or around 1996. He says he bought the said well from the wife of the late Mr Dikobe Ontumetse assisted by Mr Emmanuel Ontumetse and the open well had a certificate. He stated that he had to travel to and from Radisele to complete the sale and finally collect the certificate from the Ontumetses. He then duly submitted the transfer application forms with supporting letters to Tonota Sub Land Board to effect the transfer. He stated that during the site visit by the Land Board they were using a vehicle to measure distances as

there were no GPS (Geographical Positioning System) instruments hence the inconsistencies in sketch plans measurements. Mr Pule submitted that he was excited for the approval of the transfer and collected the certificate in 1997, so he overlooked some inconsistent entries in the certificate.

- 16.** The 2nd Respondent explained that Mr Emmanuel Ontumetse informed him that his neighbours are Mr Kethaetse and Mr Moeti. He was informed also that the open well was occupied by Mr Tshenolo Nyama who was Mr Ntshwarisang Maswikiti's head boy. He indicated that he also informed him to continue using the open well. Mr Pule told court that sometime in 2012 he received a call from Mr Emmanuel Ontumentse that Mr Thembani Bachopi was occupying the open well that belonged to him. He then informed Mr Bachopi that he is trespassing and that he should stop developing the well but Mr Bachopi did not accede to his request that is when he opened a case with Tonota Tribal Authority.
- 17.** Mr Pule indicated that since 2012 hearings before the Tribal Authorities and Land Boards, Mr Bachopi has always challenged the validity of his certificate, but both Tribal Authorities and Land Boards have ruled in his favour. Further that the documents wanted by Mr Bachopi were submitted to Land Board and that it is the Land Board who keeps the records not him, and to this end he could not be blamed for

their absence. The 2nd Respondent prayed for dismissal of the appeal.

THE ISSUE FOR DETERMINATION

- 18.** This Tribunal is called to make determination on whether the reason used by the 1st Respondent to dismiss the Appellant's claim over an open well at Makweetane cattle post in favour of 2nd Respondent is valid. In other words has the Appellant proved on a balance of probability that he is entitled to the open well.

COURT'S ANALYSIS OF THE EVIDENCE

- 19.** Ngwato Land Board is a creation of statute under the Tribal Land Act (CAP. 32:02) Section 10 of Tribal Land Act has put custody of tribal land into the Land Board and its functions are provided under Section 13. It trite law that land allocation process terminates with issuance of certificate of grants as echoed by the judgment of Court of Appeal in case of **SPANADOKIS AND ANOTHER V. NGWATO LAND BOARD AND ANOTHER [1994] BLR** where at page 297 STEYN J.A said;

“At this point it would be convenient to examine some of the provisions of relevant legislation. It is clear from the requirements of Part III of the Act that the statute contemplates a process terminating with the issuing of a certificate of

grant of the kind evidenced in court by second Respondent. She has therefore prima facie established title to the land. Moreover the legislation in pursuit of the requirement of certainty, clearly contemplates that any claim to land acquired in terms of the Act should be reduced to writing. I therefore find that the Court a quo was right when it held that it had been established that the second Respondent had proved her right to the undisputed possession and occupation of the plot. Moreover, Appellants could not in terms of the Act have acquired any rights pursuant of any alleged verbal allocation. They do not contend that either of them acquired rights through any other means. This in my view effectively disposes of the principal matter before us”.

In applying the above to this matter, it is indisputable that second Respondent has established a prima facie case that he owns the open well in dispute. The certificate he has presented in court and it only serves to persuade court to make a finding (except if otherwise is proven) that an allocation or in this case a transfer process was initiated and it terminated at the time the certificate was obtained.

- 20.** Our law of evidence establishes a principle that he who alleges must prove. In an attempt to discharge the burden of proof

Appellant filed a letter of sale agreement between him and Ms Maswikiti, a letter from Ms Maswikiti to Mr Nyama and an affidavit from Ms Eve Kaisara. All these documents purport to prove that an open well was sold to the Appellant. The Court having perused those letters, affidavits, Land Board minutes, Customary Court proceedings and having heard oral submissions by the Appellant concludes that the proof is lacking in as far they seek to show ownership by Maswikiti.

21. None of the documents filed by the Appellant speaks of the open well at Makweetane belonging to Ms Maswikiti. Mr Nyama who was using the open well clearly stated in the proceedings before the Customary Court that it is Mr Pule who informed him that he had purchased the open well and asked him to continue occupying the same while Mr Bachopi followed at a later time claiming to have bought the open well from Ms Maswikiti. It seems Ms Maswikiti sold an open well when she neither had its certificate nor occupied it. It is therefore this Court's finding that there is no evidence produced both at Customary Courts and Land Board that Ms Maswikiti has an open well at Makweetane. As a result court conclude that Mr Bachopi has not established title to the open well, actual or *prima facie*.

22. The Appellant punched holes on the documents filed by 1st Respondent in pursuit of proving his allegation that the

transfer was done improperly as there are no application forms, supporting letters, Board minutes and resolution of 1996 produced before court. He indicated to court also that minutes of Tonota Sub Land Board have a stamp of Gumare Sub Land Board and the resultant certificates and sketch plans have inconsistent entries. In defense the 1st Respondent acknowledged the inconsistency and fact that they were unable to retrieve some documents. The 1st Respondent countered however that even though they failed to retrieve some vital documents, the documents available have shown that at least there was transfer to 2nd Respondent. The 2nd Respondent insist that custody of the application documents are with the 1st Respondent and he has no explanation on the inconsistencies. As far as he is concerned he did everything according to book.

- 23.** Court is not impressed with lack of production of vital transfer documents in evidence, however the Court is alive to and appreciates the fact that during the 1990s, Land Board records systems were not up to standard as they were operating with limited and constrained resources. Inadequacy of the Respondents documents and over reliance by the Appellant on their deficiencies did not assist him to prove his case. The court finds that there is no other evidence contradicting Respondents submissions. Even if the court was to decide that those transfer documents were inadequate this would not necessarily mean that the open well belongs to the

Appellant. Therefore the Appellant's case has no merit and stands to fail.

24. COURT'S DETERMINATION

- (i) That the appeal fails.
- (ii) The resolution of the Land Board is upheld and confirmed.
- (iii) Each party is to bear its own costs.

RIGHTS OF APPEAL

The parties are informed of their right to appeal to the High Court within eight (8) weeks of delivery of this judgment if any feels aggrieved.

Delivered in Francistown this **08th** day of **May 2018**.

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B. MOKAKANGWE
PRESIDENT OF THE LAND TRIBUNAL