



REPUBLIC OF BOTSWANA
IN THE LAND TRIBUNAL HELD IN GABORONE

In the matter between

Case No. LT 196/2013

BOJELAPHITSHANA SYNDICATE

APPELLANT

And

KGATLENG LAND BOARD
MAITEKO SYNDICATE

1ST RESPONDENT
2ND RESPONDENT

Coram: S.B. Kaisara
K. Rutherford
G. Tobedza

APPEARANCES:

1. M. Mogomotsi (Chairperson of Appellant)
2. D. Sebole (Secretary of the Appellant)
3. G. Lesiela (In house attorney of 1st Respondent)
4. M. Mokgwa (Secretary of 2nd Respondent)
5. L. Moloi (Chairperson of 2nd Respondent)

JUDGMENT

S.B. KAISARA

The Appellant is challenging the 1st Respondent's decision to decide in favour of the 2nd Respondent in a dispute over a borehole point situate at Bojelaphitshana, west of Artesia village on the basis of first come first served principle.

BACKGROUND

This dispute has a very long history as follows;

On 15th February 2001, the 2nd Respondent applied to the 1st Respondent through Artesia Sub Land Board for a borehole point at Bojelaphitshana. The application was rejected at the 1st Respondent's meeting of 24th-26th July 2001 on the basis that the proposed point was within an area proposed for fencing for grazing in North West of Kgatleng District following advice from the District Land Use Planning Unit(DLUPU).

On 18th March 2004, the 2nd Respondent applied for reconsideration of the 2001 application on the basis that the area was still unutilized. The application was again rejected at 1st Respondent's meeting of 14th -25th June 2004 as per the earlier rejection grounds.

In April 2007, the Appellant applied to Artesia Sub Land Board for a livestock borehole in a point drilled by De Beers Prospecting Botswana at Bojelaphitshana. The application was deferred at the meeting of 17th -21 September 2007 for range assessment.

At its meeting of 8th - 16th September 2008, the 1st Respondent rejected the Appellant's application on the basis that the area was heavily grazed as per the range assessment report and 6km distance from another water point was not

met. The Appellant then appealed to the Land Tribunal under **LT 104/2008** on 18th December 2008.

In the meantime on 29th October 2008, the 2nd Respondent made a written enquiry to the 1st Respondent on whether the Land Board was still to implement the fencing of grazing and further requesting that its earlier application be reconsidered. At the 1st Respondent's meeting of 15th -22nd March 2010, the Board resolved to shift the 2nd Respondent's application in principle subject to shifting the point 1.8km from initial point to achieve required distance to Sebetesakwena borehole which was 5.34km away. At the 1st Respondent's meeting of 24th- 31st May 2010, the 2nd Respondent was allocated a point 1.8km north east of initial proposed point and were given a go ahead to drill.

Subsequently, at the hearing of the Appellant's appeal to the Tribunal on 25th November 2010, the 1st Respondent applied for remittal on the basis that the Appellant was not granted a hearing especially in relation to the assessment report. The remittal was also inevitable after the Appellant pointed out that the 2nd Respondent was allocated a borehole point 3.7km from the disputed area. The matter was therefore remitted and the 1st Respondent was to take into account the allocation of Maiteko syndicate in the dispute area.

At the 1st Respondent's meeting of 13th-20th December 2010, the matter was further rejected on the basis of disqualifying distances to Maiteko Syndicate 3.796km and 5.116km to Ratshweu Syndicate. Further, that the point was situated in an area which was already overgrazed as per a range ecology report. The Appellant then appealed to the Tribunal under case No. LT **091/2011**. On 7th May 2012, the Tribunal again remitted the matter to the 1st Respondent and directed it once more to take into account the Appellant's objection to 2nd Respondent's allocation in the disputed area.

In terms of the 1st Respondent's meeting of 13th June -22nd June 2012, the 1st Respondent rejected the Appellant's application on the basis of disqualifying distances noted above as well as the fact that the Area was overgrazed as per assessment report. Furthermore the 1st Respondent noted that Maiteko syndicate applied for a borehole in 2001 and were rejected due to proposed ranches in the area and were subsequently approved when the ranch project failed to take off. The Appellant then filed another appeal to the Land Tribunal under case number **LT 161/2012**.

The above appeal was once more remitted on 30th January 2015. In terms of the remittal order, the Tribunal directed the 1st Respondent to *interalia* determine whether a rejection decision brings an application before the Board to finality or

the application becomes pending in perpetuity until approved when circumstances changed. The 1st Respondent was also to consider the involvement of Mr Mogapi former chairperson of the 1st Respondent in the matter and his interest in the 2nd Respondent's syndicate.

In terms of the 1st Respondent's decision of 22nd July-6th August 2013, the Appellant's application was rejected as follows;

(a)The proposed point does not meet the required distance of 6km as it is situated 3.796km from Maiteko syndicate and 5.116km from Ratshweu syndicate.

(b)Maiteko syndicate's reconsideration was in order and procedural.

(c)The involvement of Mr Mogapi with Maiteko syndicate did not in any way affect the manner in which the decision was taken"

Susequently, the Appellant filed the present appeal being the fourth appeal on the matter. In terms of the sketch plan (annexure 24) compiled in 2010, the Appellant's proposed point is 3.76km from 2nd Respondent's allocated point, and 5.116km from Ratshweu syndicate point.

APPELLANT'S CASE

The Appellant's representatives highlighted that the present dispute has been running for a long time and therefore should be finalized and not remitted. Further that there is an indication the various 1st Respondent's resolutions were contradictory; the first 3 resolutions were based on the range assessment, 2nd resolution was based on Maiteko syndicate and 4th resolution was based on distances.

Regarding the range assessment report, Mr Mogomotsi stated that in terms of the first three rejections, their application was rejected because the proposed point is in an area which is already overgrazed as per the report. Further, although in the report the area was said to be suitable for small stock, Maiteko was allocated for cattle management. At that point, Mr Lesiela for the 1st Respondent explained that the ground was not contained in the latest decision as the 1st Respondent did not wish to pursue the ground any further. Despite this, the Appellant's representatives insisted that the point should be debated as it was not valid and had clouded the whole case. The court determined that the Appellant be allowed to prove the point.

The Appellant called an expert witness Kgomotsego Mazebedi (Aged 48 years old), District Coordinator of Forestry and Range Resources based in Mochudi. She is a forester and holds a

Master's Degree in Forestry Ecosystem Science. The witness stated that she had seen the range assessment report conducted in July 2008. She obtained a copy of the report from 1st Respondent as she could not locate a file of the report in their office or anything pertaining to this report. She said it was difficult to say if the report was produced at their office. She observed that the report lacked some of the essential information being;

- Name and signature of officer who authored the report.
- Logo of the department;
- Date of compilation;
- The area assessed;
- Date stamp.

The witness stated that according to the analysis of the information and recommendations made, the allocation would intensify the grazing in the area. The witness was not able to determine whether the conclusion was right or wrong because it all depends on what was there and was based on information gathered by the author based on available wood species at the time of assessment. Under cross examination the witness stated that she was not working in the concerned district at the time the report was produced; she started working in Mochudi in 2013.

The Appellant's representatives submitted that the range assessment report jeopardized their application. Mr Mogomotsi stated that they have always been suspicious of the report as it does not contain all the essentials. Further that the Land Board said they will call an expert to explain the report but an expert was never called. Therefore, the report could not be used as a basis for rejection.

On the issue of disqualifying distance; Mr Mogomotsi stated that as the distance from Ratshweu was 5.11km their intention was to reticulate to achieve 6km distance. Further they were banking on the Land Board to advise them on what to do to attain the 6km, as they did with Maiteko.

Regarding the latest decision based on Maiteko; Mr Mogomotsi submitted that the Maiteko's rejection of 2001 was never appealed; they followed up in 2004 and were rejected. When the Appellant applied in 2007, the area was not occupied. Further that the 1st Respondent allocated the 2nd Respondent when the Appellant's appeal was pending before the Tribunal. In addition the 1st Respondent failed to deal with the issue of what happens to an application if its rejection was never appealed, does it become valid and can be considered when the circumstances change. Mr Mogomotsi concluded that the

court should set aside Maiteko's allocation because its application was rejected and not deferred in 2001.

Concerning the issue of Mr Mogapi; Mr Mogomotsi stated that when Maiteko syndicate applied, Mr Mogapi was the chairperson of the Land Board. Further, Mr Mogapi sat in all considerations of Maiteko syndicate's matter. After Maiteko syndicate was allocated in May 2010, he joined Maiteko syndicate as a member in June 2010. In December 2010 after first remittal of the Appellant's application, Mr Mogapi who was a member of 2nd Respondent sat in the meeting considering the Appellant's application, but he did not declare his interest in this matter to the Board. The Appellant concluded that his involvement in both cases influenced the Land Board decision. Further that his involvement was contrary to Section 7 (5) of the Tribal Land Act, which says as a member who has interest in a matter, you have to declare your interest and excuse yourself but Mr Mogapi failed to do that.

In conclusion, the Appellant prayed that the 2nd Respondent's allocation be nullified and that the Appellant be allocated in the area applied for as they came first. Further that they earlier suggested as a last resort that the 1st Respondent could allocate both the Appellant and the 2nd Respondent in the area such that the latter reticulates.

1ST RESPONDENT'S CASE

Counsel Lesiela on behalf of the 1st Respondent submitted that the present dispute was considered on 2nd July to 6th August 2013 following a remittal order from the Land Tribunal. In terms of the remittal order, the Land Board was to consider *inter alia* whether a rejection decision brings a matter to finality and also investigate Mr Mogapi's involvement. Mr Lesiela submitted that the Land Board is not a court of law, it cannot make precise findings but they explained why Maiteko syndicate was allocated. The 1st Respondent's representative identified two issues for consideration as follows;

1. Whether the Land Board has power to consider an application which was rejected, does it remain outstanding or does a rejection decision bring the matter to finality?

Counsel submitted that as a general principle rejection of an application by the Land Board brings a matter to finality. This applies to decisions of a *quasi-judicial* body or court of law. The Land Board does not have power to rescind its decision; however there are exceptions such as where circumstances have changed substantially the decision was as a result of fraud or mistake. He cited the case of **7th Wonder VS Ngwato Land Board and others CACGB 032 -12 (Cyclostyled)**. Mr Lesiela reasoned that in this case, the Land Board acted

within its power in considering the 2nd Respondent's application. The Land Board had earlier rejected on basis that there was a freeze and after the freeze was lifted, the matter was reconsidered. Mr Lesiela stated that it is not clear when the freeze on allocation in the area was lifted; but it was sometime between 2001 and 2008.

2. Issue of first come first served

Mr Lesiela submitted that the principle of first come first served is a bedrock of legal principles of any democratic country. He said that in dealing with competing interests, the guiding principle is incorporated in the maxim **“he has the better title who is first in point of time”** See case of ***Victoria Secret VS Edgars Stores Limited 1993 (3) SALR 739***. Counsel argued that there is no dispute that the 2nd Respondent applied in 2001 and the Appellant in 2007; therefore 2nd Respondent applied first for the area so using the above principle they were entitled to be allocated the land in question. Further, there is no limit to validity of application as long as the land becomes available.

On the issue whether the 2nd Respondent was allocated when the Appellant's appeal was pending before the Tribunal, Mr Lesiela noted the Land Board was not alive to the fact that the matter was pending at Land Tribunal and the matters were treated separately. He said that when a higher authority is

seized with a matter the subordinate body cannot deal with the matter. Therefore it was not proper for the Land Board to proceed with 2nd Respondent's allocation when the matter was pending. He concluded that the 2nd Respondent's allocation however remains valid until nullified by the Tribunal. The court however cannot consider the matter in isolation especially as the matter was subsequently reconsidered by the 1st Respondent. Again if the court considers the point in isolation, the decision would be null and void and the matter would have to be remitted.

Regarding the range assessment, Mr Lesiela stated that they have withdrawn the ground on negative range assessment report. He also noted that there is no record that its application was challenged. Further, the court does not have jurisdiction to pronounce on the legality of the report as the Land Board was no longer relying on the point and the decision has already been quashed. Mr Lesiela pointed out that the 2nd Respondent was not required to file an assessment report because in determining their application the distance was not an issue although they were later shifted. He said the policy said no allocation below 6km but between 5 to 6km the application has to be supported by range assessment. Answering a question on why was the Appellant not offered an opportunity to shift, counsel said such depends on how one presents their case.

Concerning Mr Mogapi's involvement counsel stated that Mr Mogapi became a member of 2nd Respondent in June 2010, after the 2nd Respondent's application was approved in May 2010. He argued that his membership did not influence the outcome of the matter. Counsel however conceded that Mogapi's non-disclosure contravened Section 7(5) of the Tribal Land. Mr Mogapi was a member of the Land Board in 2010.

In conclusion, Mr Lesiela prayed for dismissal as the 1st Respondent applied its mind properly based on the principle of first come first served.

2ND RESPONDENT'S SUBMISSIONS

The 2nd Respondent's case is that they applied in 2001 and were rejected based on ranches. In 2004, they applied for reconsideration and the application was also rejected. In October 2008, they applied for reconsideration as there was no freeze and they were allocated in May 2010. Mr Lehuma argued that they deserved to be allocated as they applied for the area first; and when circumstances changed, they could be allocated. Further, they were allocated after the Appellant was rejected. They first became aware of Appellant's involvement in the area in 2012 after the matter was remitted.

On the developments effected, the 2nd Respondent has to date drilled three boreholes; first borehole was drilled in November

2010 and they hit a blank. In August 2011, they hit another blank. In January 2012, they drilled the third and the only operational borehole.

Regarding Mr Mogapi's involvement Mr Mokgwa said that Mr Mogapi became a member after the 2nd Respondent's allocation. He applied for membership in the 2nd Respondent syndicate in June 2010; his application was considered and approved in July 2010.

The 2nd Respondent prayed that its allocation be confirmed as allocated by the Land Board.

In reply, Mr Mogomotsi for the Appellant stated that the two main issues which determine the Appellant's case are the range assessment report and Mr Mogapi's involvement. On the latter, he urged the court to refer the matter to specialized bodies like the DCEC and DIS and CID to investigate it. On the uuuuuuuurange assessment, although they questioned the report, the Land Board did not call an expert witness to verify the report.

ISSUES FOR DETERMINATION

The main issue calling for determination is who between the Appellant and 2nd Respondent should prevail based on the principle of first come first served. A related sub issue is what

happens to a rejected application; does it remain outstanding to be considered when circumstances change?

The court has also identified other matters worth considering as follows;

1. Validity of the 2nd Respondent's allocation in May 2010 whilst Appellant's appeal was pending at Tribunal;
2. The effect of the range assessment report in the present dispute;
3. Did the involvement of Mr Mogapi in the present dispute amount to a conflict of interest?

COURT'S FINDINGS AND DETERMINATIONS

The court will proceed to address the identified issues under separate paragraphs as follows;

1. Which party is entitled to allocation in the disputed area based on principle of first come first served.

In the present context the principle means applicants would be dealt with in the order they applied to avoid preferential treatment in line with the quotation cited by Mr Lesiela that *"he has the better title who is first in point of time"*

The Respondents' argument is that the 2nd Respondent applied in 2001 and the Appellant in 2007, so having applied first, the

2nd Respondent was entitled to be allocated the disputed land. The Appellant argues that the 2nd Respondent's 2001 and 2004 rejections were never appealed; therefore when the Appellant applied in 2007, the area was free for allocation. The court is therefore required to determine who between the parties was first in time.

To answer the question, it is important to first deal with the issue of what happens to an application once rejected, does it remain outstanding to be considered when circumstances change. The Appellant argues that the 2nd Respondent's applications could not have remained outstanding as they were rejected and not deferred. The Respondents argue that the 2nd Respondent was entitled to be allocated when circumstances changed that is when the allocation freeze was lifted.

When an application is rejected that brings the application to an end unless there is an appeal in terms of **Section 14 of the Tribal Land Act**. To claim that applications remain pending in perpetuity would lead to absurd results; there has to be finality in the determination of applications. When circumstances change, it will be upon the applicant to apply for reconsideration. Therefore, at the time the Appellant applied the 2nd Respondent's application was no longer pending. Accordingly, the court finds that the Appellant

deserves to be allocated ahead of the 2nd Respondent in line with the principle of first come first served.

2. Rejection of the Appellant's application on the Basis of the Range Assessment Report

Whilst the ground that the area is overgrazed was not used to reject the Appellant's application in the latest resolution, the Appellant's position is that the report jeopardized its application and that the ground should never have been used as it was invalid. In support, the Appellant called an expert witness who testified that the report lacked essential information and that its origins could not be traced. The 1st Respondent's attitude is that having withdrawn the ground on the adverse range assessment report and the ground having been quashed, the court cannot pronounce on the legality of the report.

The court's view is that whilst the ground is no longer valid, it is worth discussing as it is the very ground that was used in the rejection of the Appellant's application all along. In the Appellant's words, it is the ground which clouded the whole case. In particular, the court wants to determine the integrity of the record filed in support of the ground.

The key principle relating to integrity of a record is that it must be complete and authentic. This means a record must be

what it purports to be and that the entity claiming to be its author indeed created it. Further, it should contain all contents in terms of both the structural and contextual information. The court observes that this cannot be said to be true for the record in issue. Therefore, the court's view is that the record should never have been applied in the case as it lacks essential information and traceability. In law, without relevant jurisdictional facts, the consequent decision is inherently unreasonable and will lead to unfair consequences see the case of ***Associated Provincial Picture House Ltd v Wednesbury Corporation (1948) 2KB 233.***

3. The Validity of the 2nd Respondent's allocation when the Appellant's appeal was pending at the Tribunal

It is trite that when the 2nd Respondent was allocated in May 2010, the Appellant's December 2008 appeal was still pending before the Land Tribunal. The 1st Respondent's position is that it was not aware of the Appellant's pending appeal hence the parties' matters were treated separately. The 2nd Respondent claims to have first become aware of Appellant's interest in the disputed area in 2012.

As stated by 1st Respondent's counsel, when a higher authority is seized with a matter, a lower body cannot entertain it. This would therefore mean the decision to allocate the 2nd Respondent in May 2010 when Appellant's appeal for

the same area was pending was invalid and is therefore liable to be set aside.

4. Did the involvement of Mr Mogapi in the matter amount to a conflict of interest

Mr Mogapi is the former chairperson of the 1st Respondent. Whilst still holding this position, he joined the 2nd Respondent syndicate in June 2010, a month after the syndicate was allocated. The Respondent's position is that as Mr Mogapi became a member after the 2nd Respondent's application was approved, his membership did not influence the outcome of the present dispute. The Appellant argues that Mr Mogapi sat in the meetings where the Appellant's application was considered without declaring his interest contrary to Section 7 (5) of the Tribal Land Act.

Conflict of interest means a situation which has the potential to undermine the impartiality of a person owing to the person's competing interests e.g personal *vis-a-vis* official interest. From the onset the court dismisses the argument that Mr Mogapi was not conflicted as he only became a member of 2nd Respondent in June 2010. This cannot be conclusive proof that he had no personal interest in the matter at the material time. The issue actually raises eyebrows particularly considering that Mr Mogapi chaired the March 2010 meeting where the 2nd Respondent's application was

provisionally approved and its point shifted to accommodate it. However, the court is constrained to make a precise finding on the issue as it is one matter which requires specialized probing. The court would therefore leave the issue to the 1st Respondent to determine appropriate action to be taken noting the issue does not portray the organization in good light. It was conceded by 1st Respondent that Mogapi's non-disclosure as a member of the 2nd Respondent when he sat in a meeting discussing the Appellant's application contravened **Section 7(5) of the Tribal Land.**

What then is the appropriate order? The Appellant's representatives suggested that the two contesting parties could be allocated boreholes in the area and the Appellant could then reticulate to achieve the required distances. Whilst we were not advised by the 1st Respondent whether this is feasible, we believe it an option worth exploring. In determining the order, the court is alive to the fact that notwithstanding the above conclusions, the 2nd Respondent expressed interest in area first. Further the expectation is that when the idea of ranches was dropped, the public (including the Appellant) would have been informed that the area was now open for allocation; this is in line with sentiments expressed in the case of **7th Wonder (Pty) Ltd** supra. The court also notes the 2nd Respondent has already developed the point earlier allocated.

In the premise, the appeal succeeds and the court orders as follows;

1. The 1st Respondent's decision contained in the minutes of 24th-31st May 2010 allocating the 2nd Respondent a borehole point is declared to be invalid and it is accordingly set aside;
2. The 1st Respondent's decision contained in the minutes of 22nd July-6th August 2013 rejecting the Appellant's application is declared to be invalid and it is accordingly set aside;
3. The 1st Respondent shall within **2months** explore the possibility of allocating **both** parties borehole points in the vicinity of the disputed area or in any other place in the 1st Respondent's jurisdictional area;
4. In the event paragraph 3 fails, the 1st Respondent shall within **2months** allocate the Appellant the borehole point applied for.
5. In the event the 2nd Respondent is not allocated the presently occupied borehole point in terms of paragraph 3 above, the 2nd Respondent shall vacate the borehole point and remove all improvements thereof within **4 months** from today.
6. In the event the 2nd Respondent is required to vacate as per paragraph 5 above, the 1st Respondent shall compensate the 2nd Respondent for improvements

effected within **6months** from today. In the event the 2nd Respondent fails to vacate, the 1st Respondent shall evict the 2nd Respondent and claim the costs of doing so from the 2nd Respondent;

7. No order as to costs;

The parties are hereby 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 open court this **31st** day of **July 2015** at Gaborone.

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S.B KAISARA

President of Land Tribunal