

IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

Court of Appeal CACLB-055-07
High Court MHLB 000086-07

In the matter of

SHINY KALE

Appellant

vs

ATTORNEY GENERAL
GHANZI LAND BOARD
NJONGANJONGA KASUME

1ST Respondent
2ND Respondent
3RD Respondent

Raurau Attorneys for Appellant

For the Respondent: Mr C Gulubane with Ms Gogonye

JUDGMENT

MOORE JA
LORD COULSFIELD JA
S. TWUM JA

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The appellant appeals against the judgment of Kirby J. given at Lobatse on 3rd August 2007. It dismissed her application for review of the decision of the Minister of Local Government, Lands and Housing not to appoint her to either the Main Ghanzi Land Board or to the Charleshill Sub Land Board.

The facts relied upon by the Appellant in her application were that consequent upon an advertisement issued on 3rd November, 2006, by the Ministry of Local

Government, Lands and Housing, calling for applications for membership of the various land boards throughout the country, the appellant applied to the Secretary of the Ghanzi Main Land Board to be considered for appointment to the Charleshill Sub Land Board. At the appropriate time all the applications received were processed by a Selection Committee of the Ghanzi Main Land Board.

In due course, the Appellant was invited to an interview to determine her qualifications and suitability for appointment. She placed second in the order of merit as assessed by the Committee and the Third Respondent in this appeal, Njonganjonga Kasume, was fourth. Thereafter, the Appellant and three others, including the Third Respondent, were selected to contest elections at the Charleshill Kgotla. In these elections, the Appellant again came second. The third Respondent was third.

It is the duty of the Selection Committee to recommend "the most eligible candidates" to the Minister who will consider who to appoint to the Main Ghanzi Board or Charleshill Sub-Board. For this purpose, two separate lists were prepared by the committee. The first, which was referred to by Kirby J. in his judgment as the "Principal List" had two parts. One part contained the names of "Minister's nominees", the other contained the "Di-Kgotla nominees". The

second list is the "Reserve list". The Appellant was listed as No 10 on the principal list.

The Selection Committee recommended Ngayozekua Oman, who had come first in both the interview and the Kgotla elections, as the Kgotla choice for the Charleshill Sub-Land Board while the Third Respondent herein was recommended as one of the five ministerial nominations to the Ghanzi Sub-Land Board. The Appellant was recommended as one of the five ministerial nominations to the Ghanzi Main Land Board and Njala Njala who came third in both the interview and the Kgotla elections was recommended for appointment to the Charleshill Sub-Land Board. Njala Njala had been placed on the "Reserve List". In sum, ten nominations on the "Principal List" and seven on the "Reserve List" were forwarded to the Minister for the Ghanzi Main Board. For the Charleshill Sub-Land Board, eight people were recommended for appointment with five names on the "Reserve List". The "Reserve List" serves as a reservoir out of which, for example, temporary vacancies on the Land Boards may be filled. The minister was also at liberty to appoint from that list.

When the nominations reached the Ministry, officials there recommended a variation in the recommendations submitted by the Selection Committee. They suggested that Mr. Njala Njala who comes from Charleshill should replace Tshupo Ramoswaana, 4th on the list of Minister's Nominees. Their reasons were

that Mr Njala Njala was more experienced, having being a Deputy Head Teacher before. They were also of the view that all the recommended candidates for Charleshill Sub-Land Board were below 35 years but Mr. Njala Njala was 46 years and he would bring both maturity and experience to that relatively young Board.

After a full consideration of the qualifications, experience and places of origin of the nominees, apart from replacing the Appellant, (ie No 10) on the recommended nominations for the Ghanzi Main Land Board with Xhukuri Xhoma, the Minister approved all the other nominees on that list. With respect to the Charleshill Sub-Land Board, the Minister rejected the recommendations of his officials that he should replace Tshepo Ramoswaana and appointed all the nominees recommended by the Selection Committee.

It is common cause that the Minister is at liberty to select from the names on either the Principal List or the Reserve list. In doing so he was expected to ensure that as far as possible, villages of Charleshill, Makunda, Mamuno and Ncojane were represented in the Sub Land Board. The record shows that the Minister considered all the recommendations made to him as well as the recommendation from his own officials and made two changes in the Selection Committee's recommendations.

He replaced one Tsholetsana Mosetlhane Ncojane (a man) with Andelinah Mokgatlanyane of Chobokwane (a woman). He also replaced the Appellant with Xhoma Xhukuri of East Hanahai. It is the latter of these two changes the Minister made that spawned this litigation.

On the 27th February 2007, the Appellant filed a Notice of Motion in the High Court Lobatse. The Respondents were :-

- (i) Attorney General
- (ii) Ghanzi Land Board
- (iii) Njonganjonga Kasume

She prayed for an order that :-

- (i) "The decision by the 1st Respondent in appointing 3rd Respondent as 2nd Respondent Board member to be reviewed and/ or set aside"
- (ii) "That 1st Respondent's rejection of the applicant's recommendation for appointment as 2nd Respondent's member was unlawful and be reviewed and/or set aside".
- (iii) "1st Respondent to pay the costs of the application".
- (iv) "Further and or alternative relief"

The Appellant based her action upon two main grounds (see Founding Affidavit – paragraph 25)

- (a) "In terms of the results of the election, I should be preferred and appointed over and instead of 3rd Respondent".
- (b) "I believe the decision was arbitrary and/or based on ulterior motive and must be reviewed and set aside".

On 30th March 2007 the 2nd Respondent filed "Notice of Opposition". The Appellant filed a Supplementary Affidavit on 10th May 2007 in which she deposed to "facts regarding the matter herein which facts were not available to me at the
✓ time of filling of this application"

In this Supplementary Affidavit, the Appellant elaborated on the original complaint by emphasizing her academic superiority and work experience over the Third Respondent. She further alleged that going by the final appointment list there was no one who hailed from any one of the four villages that constituted the Charleshill Sub-Land Board. In the premises, she submitted "the 1st and 2nd Respondents' decisions throughout the proceedings in this matter were arbitrary unjustified, (sic) biased and undemocratic....."

The Minister, Dikgakangamatso Ndelu Seretse, filed an Answering Affidavit on 19th June 2007. In it he answered the Appellant's complaints with candour and dignity. First, he pointed out that the Appellant was recommended for membership at the main Ghanzi Land Board and not the Charleshill Sub-Land

Board whereas the 3rd Respondent and the said Ngajozikwe Oman, were listed for recommendation to the Charleshill Sub-Land Board. Consequently, the 3rd Respondent was not in competition with the Appellant in those appointments as they were recommended to different Boards. He further pointed out that as the appointing officer it was part of his duties to distribute the membership of these boards in such a way that all relevant parts of the tribal area were represented. It was for that reason that he substituted in the list for the Ghanzi Land Board two people, namely the Appellant and Tsholetsa Mosetlhane with Xhikuri Xhoma and Mokgatlanyana Andelina, respectively. He said Xhoma was from East Hanahai, which according to him was not represented on the Ghanzi Land Board.

The Minister concluded his answer by stressing that in making these appointments he considered among other things, educational qualifications, work experience, geographical representations as well as the result of the Kgotla elections.

In his Heads of Argument, Counsel for the Appellant relied on the triad of illegality, irrationality and impropriety. The Learned High Court judge considered the statutory enactments governing these boards as well as decided cases in the context of the facts reviewed above, and concluded that there was no basis for the Appellant to suggest that she had a legitimate expectation of being appointed to any of the boards and was therefore entitled to a hearing when the

Minister replaced her. In his view, the legislation on the Land Boards confirmed that in the exercise of his discretion, the Minister was entitled to make appointments from the full pool of names submitted to him by the Selection Committee.

In all the circumstances, the court dismissed the Appellant's application and ordered her to bear the Respondent's costs.

The Appellant filed an appeal against the decision of Kirby J. The Appellant noted the following grounds of appeal:

"(a) That the Court *a quo* erred and misdirected itself by finding that the 1st Respondent acted properly in appointing 3rd Respondent over this Applicant" (ie Appellant)

"(b) That the Court *a quo* erred and misdirected itself in finding that the 1st Respondent acted lawfully in replacing and/or removing Applicant (ie Appellant) from the recommended list"

(c) That the court *a quo* erred and misdirected itself in finding that the Applicant (ie Appellant) did not have a legitimate expectation". Counsel for the Appellant filed the "Appellant's Heads of Argument" with the grounds of appeal on 20th

December 2007. The Respondent's Head of Argument were filed in January 2008.

At the hearing of the appeal Learned Counsel informed the court that the Appellant was relying on her grounds of appeal. He then addressed the Court briefly that the Minister committed impropriety when he failed to appoint the Appellant to the Ghanzi Land Board. He submitted that by virtue of Regulation 2 (8) of the Tribal Land Act (Cap 32:02), the Minister was to "endeavor to ensure that, so far as possible, all relevant parts of the tribal area, including subordinate areas, were represented on the law board"

Frankly, Counsel for the Appellant did not make any submission that showed that the decision of the Court *a quo* was wrong. The law applicable to judicial review of administrative actions, cannot be applied outside its proper context. It was common cause among the parties that the Minister had a discretion in making appointments. It was also common cause that the composition of the Selection Committed, which was really not in issue before the court *a quo*, was such as to ensure that the Minister received "objective, knowledgeable and independent advice" before making the appointments. In my view, the exercise of any discretion will be a meaningless activity if the donee of the discretion was expected to be a mere robot rubber-stamping the recommendations of another body.

Of course, it is good law that where discretionary power is vested in any person or authority, that the exercise of that discretionary power shall be deemed to be fair and candid. As Article 296 (b) of the Constitution of the Republic of Ghana (1992) puts it, "the exercise of discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with the due process of law". This Article fairly summarises the decisions in cases such as CCSU v the Minister for the Civil Service (1984) 3 ALLER. 935 and our own **Good v Attorney General** (2005) 3 BLR 337.

But the law operates within a context and a content. The context is the factual basis and the content is the particular rule of law. In casu, the Appellant simply accused the Minister that his actions were informed by illegal or other oblique motives without an iota of evidence in support. Allegations such as those made by the appellant should carry little weight in the absence of full particulars. It is plainly undesirable that this should be so, and in my view, should be deprecated. The Minister adverted his mind to his duties under the enabling Act and supporting regulations, one of which was to distribute the membership of the boards in such a way that all relevant parts of the tribal area were represented. It was for that reason that he replaced the Appellant.

It may well be that if the Appellant were the Minister, she would have distributed the membership differently. But surely, the fact that the Minister acted

differently from how she would have done, is no ground to say that his decision was arbitrary, unlawful and questionable. In my view the Appellant was only anguished about her ruffled dignity in not getting appointed to a Land Board. She did not make any case before this Court to review the Minister's undoubted and properly exercised discretion in the matter. This court would be usurping the discretion legitimately conferred on the Minister by the enabling legislation if it reviewed his exercise of his discretion upon baseless allegations of impropriety. I will dismiss the appeal as completely unmeritorious.

The Appellant is to bear the Respondent's costs in this appeal

**DELIVERED IN OPEN COURT AT LOBATSE ON^{30th} DAY OF JANUARY
2008**

**DR SETH TWUM
JUDGE OF APPEAL**

I agree

**S A MOORE
JUDGE OF APPEAL**

I agree

**LORD COULSFIELD
JUDGE OF APPEAL**