



REPUBLIC OF BOTSWANA

IN THE LAND TRIBUNAL
HELD IN FRANCISTOWN

Case No. FLT LB 043/16

IN THE MATTER BETWEEN

GODFREY MAKOBO

APPELLANT

And

NGWATO LAND BOARD

RESPONDENT

Coram: B. Mokakangwe
J. Gabanamotse
G. Tobedza

APPEARANCES: Kose Makobo (Appellant's Representative/Daughter)
G. Makobo (Appellant in person)
T. Ogotseng (Respondent's Attorney)

JUDGMENT

B. MOKAKANGWE

INTRODUCTION

1. The Appellant is seeking the setting aside of the decision of the Ngwato Land Board sitting on the 10th October to the 04th

November 2016 rejecting his application for surface rights in respect of a water point at Matsima within the Ngwato Land Board jurisdiction area.

2. The Respondent's contention is that if it allocates water point, the minimum 6km apart provision of the Ngwato Land Board Allocation Policy of 2011 would be contravened hence the rejection.

BACKGROUND

3. The Appellant, was apparently granted a livestock water point by the Water Apportionment Board on condition that he gets approval for surface rights from the Land Board.
4. He accordingly applied for the point with the Sub Land Board who rejected his application on the basis that the point does not meet distance requirements between boreholes as per the Land Board Allocation Policy.
5. Aggrieved, he appealed to the Ngwato Land Board. His application was again rejected on the same grounds. Unsatisfied, Appellant has now brought this matter before the Land Tribunal for relief.
6. In summary the Appellant's grounds of appeal were presented as follows:

- The Land Board erred in law in that when it assessed the Appellants application, it did not do so on individual merits of the case, but did so solely on the basis of a Policy.
- That a wholesome adoption of a Policy without considering individual merits of the application had the effect of fettering the Land Board's discretion.
- That a policy is meant to guide an administrative authority in making decisions and the aspects set out below should have been considered:
 - (i) That the neighbouring boreholes are themselves less than 6km apart.
 - (ii) That the Appellant's cattle have been in the area for over twenty one (21) years and the grazing pastures and underground water could not be affected by the grant of rights applied for.
 - (iii) The grant of rights in respect of an existing borehole and would not affect the water table as the borehole was already tapping therefrom.

7. On the other hand, the Respondent's defense is centered around the fact that the application has failed to satisfy the required 6 km distance from neighbouring boreholes as required by Ngwato Allocation Policy. Ms Ogotseng for Respondent argued that Section 11 of the Tribal Land Act provides for formulation of Policy and therefore making it a legal instrument. She also contends that discretion can only be exercised in exceptional circumstances where there is no particular law providing for the case at hand. To that end any act contrary to the provisions of the Policy would be unlawful.

ISSUE FOR DETERMINATION

8. The issue for determination before this Tribunal is whether the Land Board fettered its discretion by placing reliance solely on its Policy thereby rendering its decision unlawful and liable to being set aside.

THE LAW

9. In terms of Section 10 of the Tribal Land Act (Cap32:02), all the rights and title to land in each tribal area listed in the second column of the schedule shall vest in the Land Board set out in relation to it in the second column of the schedule in trust for the benefit and advantage of the citizens of Botswana and for the purpose of promoting the economic and social development of all the people of Botswana.

- 10.** It is trite that the Act confers statutory unfettered discretion on the Land Board in carrying out its functions except that it shall consult the District Council in the formulation of Policy relating to the exercise of its functions and that the President may give direction to any Land Board in terms of Section 11.
- 11.** The Ngwato Land Board is listed in the second Column of the schedule and therefore the area subject to this matter vests in the said Land Board, this is common cause. Empowered by the Act, the Land Board has formulated the Ngwato Land Board Allocation Policy to assist in the exercise of its functions.
- 12.** By virtue of Clause 9.0 of the Policy:
- (i) Water points which include boreholes, shall be allocated at a minimum distance of 6km from each other,
 - (ii) Any water point below 6km shall not be considered.
 - (iii) Once a proposed livestock water point has been determined as unsuitable for allocation, the Board shall no longer consider the point for allocation to any other person.
- 13.** On the strength of the above provision the Respondent rejected the Appellant's application. The question that beckons is, was it

proper in law for the Land Board to use the Clause alone to disapprove the application without looking at the threshold of circumstances of this particular case before making the decision? In this case, was the Land Board's action tantamount to unlawful fettering of its statutory discretion?

- 14.** Lord Browne - Wilkinson in **R V HOME SECRETARY EXPARTE VENABLES (1998) AC 407**, at page 407 set out the applicable principles as follows:

“When parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as the way in which he will use his power in future. He cannot exercise the power nunc pro tunc. By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out consideration on the future exercise of that power factors which may then be relevant to such exercise.

These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases. But the position is different if the policy adopted is such as to preclude the person on whom the power is

conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which discretion is being exercised. If adopted, both the Policy and the decision taken pursuant to it will be unlawful.”

From the above, it is clear that a Policy is not precisely a law, it is required by the law to be applied without rigidity, and to be used and adopted in the interests of fairness and good sense.

15. The principles were also echoed by Kirby J (as he then was) in **KER AND DOWNEY (BOTSWANA) (PTY) LTD V LAND TRIBUNAL AND ANOTHER 2007 (2) BLR 47 HC** where he stated that it is not permissible for a statutory body charged with exercise of a discretion to lay down in advance obligatory rules and procedures in relation to its duties which have the effect of replacing or cutting down its discretion. He had found support in **COMPUTER INVESTORS GROUP INC AND ANOTHER V MINISTER OF FINANCE 1979 (1) SA 879**.
16. A contrasting position has however been expressed to the effect that sometimes fairness becomes paramount in the administrative decision making process. In the case of **THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND ANOTHER V SCENEMATIC FOURTEEN Case No. 85/04**

(unreported) the Supreme Court of Appeal of South Africa when dealing with a similar matter stated at page 21:

“The position must necessarily be somewhat different where the decision-maker is faced with a large volume of competing applications and the need for consistency becomes an imperative requirement for fairness.”

- 17.** In the case **BATO STAR FISHING (PTY) LTD V MINISTER OF ENVIRONMENTAL AFFAIRS 2004 (4) SA 490** the court expressed the principle as follows:

“In circumstances such as these, moreover, where the decision – maker is seeking to evaluate a large number of applications against similar criteria, the dictum in the Computer Investors Group case is not relevant. In cases such as the present, it will be permissible, and indeed will often be desirable, for administrative decision – makers to adopt and apply general criteria evenly to each application in order to ensure that the decision subsequently made is fair and consistent”.

- 18.** I find substance in the Appellant’s argument that the Policy formulated by the Respondent is a guidance tool, and must not be used invariably in every case to the exclusion of all other relevant facts. In the current matter the 6 km distance rule was

the decisive factor and the other factors were ignored. I also find the view expressed in the paragraph above persuasive. In as much as a decision that is the product of a fettered discretion is unlawful, the current case needs to be treated differently. In light of the relevant statutory language, its purpose, objectives and other contextual indicators it is reasonable that one is won over and swayed towards application of consistent general criteria.

19. The underlying rationale of this finding is to ensure that two perfectly legitimate principles, namely consistency and objectivity in public law are protected. Allocation of land is a sensitive issue of considerable importance. It must be handled meticulously and with a high degree of transparency and consistency. Failure to apply the principles has led to great wars and civil strife.

20. The Legislature through the Tribal Land Act was formulated with the objective to ensure the fair and equitable distribution of tribal land in Botswana. By empowering Land Boards to formulate Policies in exercise of their duties, the Act intends to standardize its land allocation processes. A high volume of applications in respect of Water Points and other types of requests on a daily basis makes consistency an imperative requirement. Without use of set guidelines and Policies, the processes would be at risk of abuse, leading to a high volume of

litigation. I therefore find that this case is a good candidate for the use of the approach set out in the Bato Star Fishing case (*supra*).

- 21.** In any event it is not in dispute that properly formulated Policies, notwithstanding that they are not law, must not be completely ignored. They must be applied and interpreted within the ambit of the enabling Act and within the spirit of established public law principles.
- 22.** On the basis of a foregoing reasons, to address the issue for determination, the Respondent did not err in law in rejecting the Appellant's application as guided by Policy. This appeal stand to fall as a result.
- 23.** It seems the Appellant's ground that all the neighbouring boreholes are less than 6 km apart leading to discriminatory application of the 6 km rule by the Appellant was abandoned as it was not pursued during submissions. The Respondent's Attorney made no mention of it either, leaving court with no alternative but not make a ruling thereon.

(i) In the premises, the appeal is DISMISSED.

(ii) There is no order made as to cost.

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 **28th** day of **April 2017** at **Francistown.**

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B. MOKAKANGWE
PRESIDENT OF THE LAND TRIBUNAL