



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

CACLB-014-09

In the matter between:

**JOHN M. MPUGWA
JOSEPH MHLAMBI
LEBONENG ALFONS MPUGWA
NTSHINOANG CHINYEPI
GABOUTWELWE MADZONGA
BATUNGAMILI MPUGWA
GRACE MBANGA**

**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT
5TH APPELLANT
6TH APPELLANT
7TH APPELLANT**

AND

**ATTORNEY-GENERAL
KESEGOFETSE KEBATSHOLETSE
NGWATO LAND BOARD**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

Lobatse, 23 and 30 July 2009

**P. A. Kgalemang for the appellants
G. G. Komboni for the second respondent**

J U D G M E N T

**CORAM: N. J. MCNALLY JA
 M. M. RAMODIBEDI JA
 A. B. TAFA AJA**

N. J. McNALLY JA

BACKGROUND

1. This is a dispute about a borehole, specifically about Borehole No. 1033 situated at Sekulane. There has been a long running tension between two families over the use of the borehole. It appears that in 1962 the father of the present first appellant had a lease over the borehole, which was on government land. I should say in passing that the word “lease” is used frequently in the papers and the correspondence. What is really meant is a water right, a right to extract water from a borehole for domestic use and for the watering of cattle. Whatever that right was, it was apparently terminated on 7 June 1962. Although it may be that the Mpugwa family has used the water from the borehole from that day to the present, the fact is that no single official document has been produced to show that that family has any rights in the borehole. Certainly none recognized by the authorities. Their use of the borehole was legally precarious.
2. In contrast, there is considerable evidence of official recognition of one Autlwetse Kebotsholetse, the late father-in-law of the second respondent, as the holder of rights in the borehole. The first document is a letter from the Tribal Authority dated 19 October 1969 addressed “To whom it may concern” and entitled -

“The Water Act 1967

Registration of Existing Rights (note “Existing”)

3. The body of the letter reads as follows:

“AUTLWETSE KEBATSHOLETSE of P O Box 18, SEROWE has permission/authority from me to have the right of using his Borehole/open Wells situated at the following places (1) BONWAKGAMA – WELL (2) SEKULANI – BOREHOLE in my capacity as Tribal Authority of the Bamangwato Tribe.”

4. The next document is dated 5 November 1981. It is also headed “Registration of Existing Rights.” It confirms the document of 19 October 1969, above, and is signed on behalf of the Ngwato Land Board, which by that date had replaced the Tribal Authority as the appropriate authority.

5. Finally there is a certificate of Registration of Existing Right dated 15 March 1982 and issued by the Water Apportionment Board, Gaborone, to Autlwetse Kebatsholetse. The right is described as -

“To abstract up to a maximum quantity of 18, 200 litres per day (4 000 g.p.d) from borehole No. 1033 at Sekulane for domestic use.”

THE PREVIOUS LITIGATION

6. The first appellant annexed to his papers in the present application (for the setting aside of the sale and transfer of the borehole to the second respondent) a copy of a judgment in the High Court, reported as *Kebatsholetse v Madzonga & Another* [1989] BLR 414.

This was a dispute between the members of the previous generation of both parties over the same borehole.

7. The case was decided ultimately on a technicality. Kebatsholetse had founded his claim on an allegation of ownership of the borehole. The court found that he did not own it. He was a lessee (I would prefer to say, a holder of a water right). Therefore his pleadings did not support the case he sought to make out. Therefore he failed, and his action was dismissed with costs.
8. I am reluctant to place reliance on the findings of fact in that case, because, in the light of the final decision, they were essentially obiter dicta. But I may say that the findings of fact that His Lordship made were strongly in favour of the Kebatsholetse camp and strongly against the Madzonga/Mpugwa camp.

THE SALE AND TRANSFER OF THE BOREHOLE

9. Some time towards the end of 2004, the government adopted a new policy towards boreholes, the vast majority of which belonged to government. It decided, as a cost recovery measure, to lease boreholes to users at a rental of P3 480.00 per annum. It further decided as an alternative to offer to sell the boreholes to users.

10. In pursuance of this policy the Water Registrar wrote to Autlwetse Kebatsholetse on 11 November 2004 proposing a lease on terms set out in the letter, but offering also to sell the borehole outright. The second respondent replied on 20 December 2004 indicating her willingness to buy the borehole and asking to be provided with details of cost. She went on to explain that she was the daughter of Autlwetse (in fact of course she was his daughter-in-law) and that he had died. She enclosed copies of her father-in-law's death certificate and of her Omang.
11. On 16 May 2005 the Director of Water Affairs wrote back to her advising that the purchase price was P20 000. He continued –

“You are advised that the amount should be paid in full, and bring with you the customary land grant certificate confirming your right to occupy the land where the borehole is situated. Please note that you have up to 31 July 2005 to have paid this amount, failure to do so shall result in the government repossessing the borehole.”
12. Second respondent paid the amount in full on 4 August 2005, and on 18 March 2006 she was issued with a certificate of Customary Land Grant, made out at her request to Maitlamo Syndicate, covering both the borehole and a designated area of land around it.
13. In view of what happened later it is necessary to point out that on 15 May 2005, long before this transaction was finalized, the

Ministry of Minerals, Energy and Water Resources put out a Press Release in the Daily News. It invited “users” of boreholes to apply for leases or the purchase of boreholes on the terms already discussed. The Daily News is a free government newspaper, widely circulated, and it is inconceivable that not one of the appellants’ group would have seen it. Yet they took no action.

THE APPLICATION TO COURT

14. Only on 14 December 2006 did the appellants, by Notice of Motion, invite the High Court to set aside the sale. They sought an order -

- “(a) Reviewing and setting aside the decision of the Water Apportionment Board to lease, sell and alienate the right in respect of Borehole No. 1033 situate at Sekulwane to the 2nd Respondent to the prejudice and detriment of the Applicants who were jointly occupants of the aforesaid borehole as of right.
- (b) Reviewing and setting aside, the lease, sale and transfer of the aforesaid borehole to the 2nd Respondent as having no validity in law as it was actuated by fraud.”

15. It is difficult to understand what ground in law is intended by paragraph (a). Mr. *Kgalemang* claims to rely on the doctrine of fairness. I know of no basis in law by which a third party can have a sale, perfected by delivery, set aside on the ground of unfairness.

16. In any event there is no meaningful suggestion of unfairness. When Mr. *Kgalemang* wrote to the Water Apportionment Board to complain about the alleged unfairness to his clients he received the following reply dated 1 August 2006:

“RE; BOREHOLE NO. 1033 SEKULANE RIGHT
NUMBER A2052 DATED 15-03-1983

We acknowledge with thanks receipt of your letter PAK/kk/11291 dated 19-06-2006. We confirm to you that we know nothing about your Clients and attached please find the application form for Water Right submitted to our office by Mr. Kebatsholetse in 1969.

Documents (copies) pertaining to the purchase are attached for ease of reference. The borehole has been sold to Mr. Autlwetse Kebatsholetse and Government has been paid the total costs as required. The position now is that we have advised the Ngwato Land Board to transfer the borehole outright to him and see copy of our letter dated 11-07-2005 to Ngwato Land Board.

We will appreciate if you could make a copy of Court order available to us which you refer to it.

Please be informed that we cannot nullify the sale as you require and borehole No. 1033 does no longer belong to the Botswana Government.”

17. The appellant was unknown to the Board; there was no documentary support for his claim to some sort of entitlement; and he had failed to come forward in response to the Press Release.

FRAUD

18. Fraud of course stands on a different footing. An allegation of fraud is serious and not lightly to be made. Even then, if the

purchaser is innocent, it may not be possible to set aside the transaction. In the present case, what is being suggested is some sort of secretive collusion between the seller and the purchaser in order to do the appellants out of their rights.

19. The first appellant has not shown that he and his colleagues had any rights. Certainly they had nothing in writing to show that the government had given them any rights. At best they have been surviving precariously over the years on the basis of the tolerance of the water right holders. There was nothing secretive about the government's handling of the matter as is evidenced first by the Press Release and second by their statement that "we know nothing about your clients." How would they know? To say, as in Mr. *Kgalemang's* Heads of Argument para 4.3, that the decision to sell the borehole to the second respondent was reached "dishonestly" is wholly without foundation and wholly unjustified. I can find no factual basis for an allegation of fraud either against the government as seller or against the second respondent as purchaser.

20. Indeed the very case on which Mr. *Kgalemang* relies makes the point against him very clearly. In *African Realty Trust Ltd v*

Johannesburg Municipality 1906 T.H. 179 at 182 BRISTOWE J
said –

“If a public body exceeds its powers, the Court will exercise a restraining influence, and if, while ostensibly confining itself within the scope of its powers, it nevertheless acts *mala fide* or dishonestly ... then again the court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body who has decided it, then the court has no function whatever.”

This proposition has been repeated time and again in more recent cases, and is one which really needs no further authority.

21. There being no evidence of fraud, dishonesty or gross unreasonableness amounting to *mala fides*, there was no basis upon which the High Court could have granted the appellants’ prayer for relief.

COSTS IN THE COURT BELOW

22. We are concerned only that the High Court made an order against the appellants for costs on the higher scale. The learned judge, in dealing with this point, said -

“The applicants knew, or ought to have known after perusing the judgment in Kebatsholetse’s case that their application was doomed to fail; yet they persisted in it even after this court gently probed the wisdom of pursuing it, and by consent, gave them more than a month’s adjournment to reconsider their position. It will be remiss not to consider punitive measures in these circumstances.”

23. The impression created is that the appellants are being punished for persisting in a hopeless case against the advice of the presiding officer. The approach of the learned judge is in conflict with the decision of this Court in *Chicole v Sun Publishing (Pty) Ltd & Another* [1997] BLR 139. I draw attention, without repeating them here, to the remarks of AGUDA J.A. at p 141 H to 142 D. A man should not be punished if he is misguided in bringing a hopeless case before the court. Only if he has been guilty of grave misconduct should the court consider imposing a penal order for costs. In this case I would set it aside.

COUNTER-APPLICATION

24. In the court below, the second respondent made a counter-application for the eviction of the appellants from the borehole and other declaratory relief. This was granted, and in particular the applicants and anyone claiming through them were ordered to vacate the borehole within three months, failing which the Deputy Sheriff was to evict them. This order must, it seems to me, stand, in the light of the rejection of the applicants' appeal.

THE ORDER

25. Accordingly the following order is made:

- (a) The appeal is dismissed with costs, save that the order in the High Court for costs on the attorney and client scale is set aside, and replaced with an order for costs simpliciter.
- (b) The High Court Order upholding the second respondent's counter application is confirmed and it is ordered that the appellants and any person claiming through them, shall vacate Borehole No. 1033 within three months of the date of this order, failing which the Deputy Sheriff is to evict them.

DELIVERED IN OPEN COURT AT LOBATSE ON THURSDAY 30 JULY 2009.

N. J. McNALLY
JUSTICE OF APPEAL

I AGREE

M. M. RAMODIBEDI
JUSTICE OF APPEAL

I AGREE

A. B. TAFA
ACTING JUSTICE OF APPEAL

Kgalemang & Associates – Legal practitioner for the appellants
Phumaphi, Chakalisa & Co. – Legal practitioner for the second respondent