



REPUBLIC OF BOTSWANA

IN THE LAND TRIBUNAL
HELD AT FRANCISTOWN

CASE NO: FLT LB 040/16

IN THE MATTER BETWEEN

MOSHE PHOLOGOLO

APPELLANT

AND

NGWATO LAND BOARD
DEBSWANA DIAMOND COMPANY

1ST RESPONDENT
2ND RESPONDENT

CORAM: B. Mokakangwe
G. Tobedza
J. Gabanamotse

APPEARANCES: M. Phologolo (Appellant in person)
O. Phologolo (Appellant's Assistant/Son)
M. Phologolo (Appellant's Assistant/Brother)
T. Ogotseng (1st Respondent's Attorney)
T. S. Moipolai (2nd Respondent's Attorney)

JUDGMENT

B. MOKAKANGWE

1. The Appellant is challenging the decision of Ngwato Land Board for nullifying the Appellant's rights over a registered borehole. The borehole is located on a point with coordinates S21 13.494, E025 21.645 at Tjaigae area within the Orapa Mine lease area in the 1st Respondent's area of jurisdiction. The registration of the borehole was nullified on the ground that it was erroneously granted on already leased land.

BACKGROUND

2. The Appellant applied for registration of an existing borehole located at the Letlhakane Sub Land Board in or around 2014. The Appellant was inheriting the borehole from his late father. The Sub Land Board at its meeting of the 16th June 2015 considered the application and resolved to defer the application pending input from the Department of Geological Surveys regarding the existence of the borehole being registered. The Appellant was further advised to contact Debswana, Orapa and Letlhakane Mine authorities as the borehole falls within the Mine Lease expansion area.
3. The Sub Land Board approved the application through letter dated 22nd July 2016 and the borehole was duly registered. A certificate for the borehole was issued to the Appellant upon approval of the application.

4. It is not clear how the registration of the borehole in question and in Appellant's favour became a subject of discussion at the main Land Board, the Respondent. However, the Respondent at its meeting of the 23rd September 2016 considered the matter and resolved as follows;

“The Board resolved to nullify your rights of the point registration on grounds that the rights registered have already prescribed as the point remained unused and unregistered for 51 years. Further the point falls within a piece of land already allocated to Debswana Diamond Company. You are requested to revert the certificate to the Sub Land Board within 30 days”.

5. This decision of the Respondent was communicated to the Appellant in a letter dated the 23rd September 2016. Aggrieved by the decision of the Respondent, the Appellant lodged this appeal with the Land Tribunal.

APPELLANT'S CASE

6. The Appellant's main grounds of appeal are that the borehole was originally owned by his late father as allocated by bogosi in 1960 and developed in 1961. He stated that he acquired the borehole point by way of inheritance upon the demise of his father. He explained that the area where the borehole is located

only formed part of the Debswana Mine Lease area in 1970 or 1971. The borehole could not be developed or be used thereafter as it formed part of the mine lease area. He averred that all borehole owners in the area in similar circumstances to his were compensated by Debswana in line with its compensation policies.

- 7.** Appellant further stated that he got the borehole registered by the Letlhakane Sub Land Board in 2016, after the Geological Surveys Department ascertained the borehole's existence. He contended that the registration by the Sub Land Board was proper and valid as his rights in the area preceded the granting of lease to Debswana mine. On the issue of abandonment, Appellant argued the borehole point was never abandoned but rather they were not allowed to use or develop it since 1970, when Debswana was granted lease over the area. He also argued that he held real rights in the area which cannot prescribe. He argued that even if the 1st Respondent's argument on prescription could be entertained, the claimed prescription would have been interrupted by the passing on of his father in 1994.
- 8.** In conclusion the Appellant beseeched the court to set aside the resolution of the 1st Respondent as the claimed double allocation should not prejudice him since the borehole precedes the mine lease in the area. He stated that he deserves compensation like other borehole owners in the area.

RESPONDENTS' CASE

9. Counsel for the Respondent, attorney Ms T. Ogotseng submitted that the Sub land Board made an error to register the Appellant's borehole over already allocated land and that the allocation is null and void. The 1st Respondent's opposition to the appeal is premised on the following grounds as submitted in court:

- (i) The borehole point in question had been unutilized for 51 years, and that the rights if ever existed, had prescribed.
- (ii) The point was purportedly allocated to the Appellant's father in 1960 but had not been used, even until he died in 1994. Even post 1994 the Appellant nor any of his fellow heirs sought to assert their rights of inheritance over the disputed point. It is the position of the 1st Respondent therefore that the Appellant cannot seek to resurrect what his father, the deceased and alleged owner, had willfully chosen to abandon, after an unreasonably long time.
- (iii) The purported registration was a serious after-thought that it cannot reasonably be expected to be

condoned. She added that the Appellant sat on his rights to lay claim over his father's estate.

- (iv) Moreover she averred that the point has been registered over an area already allocated to the 2nd Respondent. It therefore follows that there were no rights to register or allocate at the material time. The 1st Respondent stressed that a land right is only legitimately granted if it is existent. It is against this backdrop that the 1st Respondent invoked its statutory discretionary powers and revoked the erroneous registration of the water point and consequently the certificate. The 1st Respondent referred court to similar matter where Tribunal set out the requirements to register the old rights in the case of **OPHOMOTSE B. RANKOIFANG v NGWATO LAND BOARD AND KUTSAFALO HARRY CASE NO. LTP NGT 2009/1025**. This will be discussed later in the judgment. On the basis of the above, Counsel prayed for the appeal dismissal.

10. Counsel Ms T. S. Moipolai representing the 2nd Respondent opposes the appeal on the ground that the purported registration of the borehole rights of the Appellants are within the mining lease area which has long been allocated to the 2nd Respondent since 1971.

ISSUE FOR DETERMINATION

- 11.** The Land Tribunal is to determine whether the nullification of the Appellant's registered borehole rights by the 1st Respondent is valid based on proven facts, relevant laws and policies.

COURT'S FINDINGS AND DETERMINATION

- 12.** It is common cause that the borehole point in question is located on a piece of land that is under the jurisdiction of the 1st Respondent. The 1st Respondent is charged with responsibility of managing tribal land in line with provisions of applicable laws particularly the Tribal Land Act of 1968. Among other duties, the 1st Respondent is charged with granting and cancelling of rights on Tribal Land. Section 13(1) of Tribal Land Act provides as follows:

“All the powers previously vested in a Chief and a subordinate land authority under customary law in relation to land, including-

- (a) granting of rights to use any land;**
- (b) The cancellation of the grant of any rights to use any land;**
- (c) The imposition of restrictions on the use of tribal land;**

(d) Authorizing any change of user of tribal land or

(e) Authorizing any transfer of tribal land,

(f) Shall vest in and be performed by a Land Board acting in accordance with powers conferred on it by or under this Act.”

13. It is important to note that the provisions above settle the question on whether the 1st Respondent is vested with powers to cancel any rights it has granted on tribal land. It is however critical to note further that any exercise of discretion in a purported cancellation of rights by the 1st Respondent would be invalid if it is not consistent with the provisions of Tribal Land Act. At Section 15, the Act provides as follows:

“The grounds upon which a grant of land may be cancelled, whether or not such grant was made before or after the coming into operation of this Act shall be-

(a) That the holder of the grant is no longer eligible to hold land under the provisions of this Part;

- (b) Failure to observe restrictions imposed under section 13(1)(d) or the provisions of any law relating to town or country planning or good husbandry;**
- (c) That the cancellation is necessary for ensuring the fair and just distribution of land among citizens of Botswana;**
- (d) That the land has been used for a purpose not authorized by customary law or that the holder thereof has contravened any customary law relating to the use thereof;**
- (e) That, without sufficient excuse, the land has not been cultivated, used or developed to the satisfaction of the land board for such period as may be prescribed in respect of that land, or has not been cultivated, used or developed in accordance with the purpose for which the grant was made; or**
- (f) Subject to the provisions of section 33, that the land is required for public purposes;**

And no cancellation for any other reason shall be of any force or effect.”

- 14 Upon close examination of the stated elements that would make any cancellation of grants by the Respondent valid, the court finds that in the matter at hand, of the grounds stated by the 1st Respondent the most relevant would be Section 15 (e).
15. The 1st Respondent has argued vehemently that Appellant has abandoned the borehole point in question for unreasonably long period of time. The argument is that after failure to use the point for the stated period of time the Appellant has slept on his rights and has as a result forfeited his rights on the point. The Appellant's counter argument is that after 1970 the point could not have been used as the Respondent had granted the 2nd Respondent a mining lease over it. Further that the grant of the lease was a double allocation over the pre-existing rights of the Appellant on the area.
16. The Tribal Land Act, its regulations or any allocation policy of the 1st Respondent has not prescribed a period within which rights over developed boreholes should be registered. The 1st Respondent does not dispute that the Appellant's father was allocated a borehole point by *bogosi* in the area in 1960 and there is no dispute as to the development of the borehole in 1961 as confirmed by the Department of Geological Surveys. In

the light of the above, the court concludes that any claim that the Appellant's rights over the borehole point have extinguished is not supported by any legal authority.

17. The 1st Respondent sought to rely on a judgment from the Land Tribunal on the **OPHOMOTSE B. RANKOIFANG v NGWATO LAND BOARD AND KUTSAFALO HARRY CASE NO. LTP NGT 2009/1025** case cited above. The court notes substantial differences between the cited case and matter at hand as follows:

- During the cited case no credible proof of existence nor its inheritance of the ploughing field that was to be registered was placed before court whereas in the current case the Geological Surveys Department proved the existence of the borehole in question and there was no one who disputed the authenticity of its inheritance to the Appellant as further supported by the *bogosi*.
- In the cited case the land in question is sought by the litigants for the same purpose of ploughing whereas in the current matter the Appellant seeks the borehole registration for the purpose of obtaining compensation as the land has been granted to the 2nd Respondent for mining purposes.

- 17.** It is therefore clear that the cited case is irrelevant for purposes of the matter at hand. It is further noted in the current case that, the manner in which the matter reached the Respondent was not explained. It appears that the matter was considered by the Respondent despite the fact the complainant in the matter remains unknown. The court observes further that upon establishment of subordinate land boards and conferring on the Subordinate Land Boards of functions of the land board in line with Section 19 of the Tribal Land Act, then any allocation of the sub land becomes an allocation of the main land board. Therefore the granting of the borehole rights to the Appellant was a grant by the 1st Respondent. See the case of **MALEMOGO SYNDICATE v NGWATO LAND BOARD AND ANOTHER 2001 (2) BLR 278 (HC)**. As it became clear during the submissions the Appellant had registered the borehole in order to benefit from compensation that the 2nd Respondent has extended to other borehole owners in the area.
- 18.** In the final analysis the court is convinced that the 1st Respondent misdirected itself when it purported to cancel the Appellant borehole certificate as the action has no legal basis. In the premises the resolution of the 1st Respondent is declared null and void. The court finds that the borehole certificate registered in favour of the Appellant is valid and can be officially used. The court orders as follows:

1. That the appeal **SUCCEEDS**.
2. The resolution of the 1st Respondent ordering return of the certificate is hereby set aside.
3. The certificate granted in favour of Appellant is hereby declared valid.
4. Each party is to bear its own costs.

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 open Court this **22nd** day of **August 2017** in **Francistown**

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B. MOKAKANGWE
PRESIDENT OF THE LAND TRIBUNAL