

Reportable ?

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO.7/2004
HIGH COURT CIVIL APPEAL NO.11/2003

In the matter between:

MPAPHI PASSEVIL PHUMAPHI

Appellant

AND

NGWATO LAND BOARD

Respondent

Mr. O.M. Motumise for the Appellant

Adv. P.K. Farlam for the Respondent

J U D G M E N T

CORAM: K.R.A. KORSAH J.A.
AM AKIWUMI J A
F H GROSSKOPF JA

GROSSKOPF J A

The appellant is the holder of certain rights in a borehole ("the borehole") situated at Mogobe wa Diphuti in the Bamangwato tribal territory. This area falls under the control of the respondent, the Ngwato Land Board ("the land board"), as appears from the First Schedule to the Tribal Land Act [Cap 32:02] ("the Act").

The rights in the borehole were first acquired by one Stephen Englton on 27 February 1984. The certificate of customary land grant issued to him by the land board sets out that he -

“has been granted for Borehole site purpose the use of an area of land estimated at approximately 8 k.m. from others.”

(The underlined specifications were typed in on the printed certificate.)

The following condition was also incorporated in the certificate:

“Site only to be used as borehole site for watering livestock.”

The certificate further contained reference to two other boreholes to the north and west of the borehole which Mr. Englton had the right to sink. It is not in dispute that the land board required boreholes to be drilled at least 8 km from one another. It therefore seems probable that the measurement “8 k.m. from others” reflected on Mr. Englton’s certificate referred to the distance which the borehole had to be from other boreholes in that area, and was intended to help define the point where the borehole was to be located. The certificate did not confer any rights to land surrounding the borehole and Mr. Englton could therefore not transfer any such rights to his successors in title. It will appear hereunder that the relief sought by the appellant is indeed inconsistent with the certificate of customary land grant issued to his predecessor, Mr. Englton.

Mr. Englton’s rights were transferred to a Syndicate in August 1990. This was with the consent of the land board, as appears from the minutes of a land board meeting held from 20 to 25 August 1990. One Mortimer Nwako next acquired the rights in the borehole in August 1999.

The certificate of customary land grant issued to Mr. Nwako by the land board set out that he -

“has been granted for borehole purpose the use of an area of land estimated at approximately 8 x 8 km in extent and situated at Mogobe wa Diphuti.”

Thereafter, and on 17 December 1999, the land board granted the appellant a “borehole transfer” from Mr. Nwako. The certificate reflected the distance of the borehole from certain other boreholes and the Setata cordon fence, but omitted to mention the “8 x 8 km” measurement reflected in Mr. Nwako’s certificate. When the land board refused to insert that measurement in the appellant’s certificate the appellant appealed to the land tribunal, seeking an order directing the land board to insert the measurement “8 x 8 km” in his certificate. It was the appellant’s contention that the land board had erred when it omitted to insert the same measurement in his certificate which was reflected in Mr. Nwako’s certificate.

The land tribunal found that it was clear from the appellant’s submissions that he was actually claiming exclusive grazing rights over an area of tribal land measuring 8 x 8 kilometres or 64 square kilometres. The land tribunal held that the appellant’s title to a borehole point transferred to him by Mr. Nwako does not give him exclusive rights to an area measuring 8 x 8 kilometres. The right which he had according

to the land tribunal was a right to graze his livestock in the communal grazing land within 8 km of other boreholes. The land tribunal further concluded that the land board has perpetuated an error for a long time by reflecting measurements in borehole certificate that are misleading as to the nature of the rights conferred, but held that the land board has a right to correct the error. The land tribunal accordingly dismissed the appeal.

The appellant thereupon appealed to the High Court. The relief it sought was an order that the land board amend the appellant's certificate to reflect the 8 x 8 kilometres which is reflected on the certificate of Mr. Nwako. The High Court concluded -

“that the right granted to Engliten was a mere interest to sink a borehole at a defined point in the land. Such right was granted independent of and without any accompanying grant of a piece of land. The land itself remained communal grazing land. Any expression of measurements in the certificate was merely intended to help define the point where the interest was located but did not render any rights to the grantee other than to sink the borehole at the defined site. This is the right that has been transferred to subsequent holders including the appellant. Any references in the certificates to areas or extent of land were of no legal consequence and therefore *pro non scripto*. They do not help to further define any of the parties' rights. In the event no obligation falls upon the respondent to insert such measurements in the appellant's certificate.”

The appeal to the High Court was accordingly dismissed. The appellant now appeals to this Court with leave of the Court *a quo*. The relief the appellant seeks remains the same, namely that the land board be

ordered to insert the measurements "8 x 8 km" on the appellant's certificate of customary land grant. We pointed out to counsel for the appellant that the appellant is not entitled on appeal to ask for further relief falling outside the relief sought in his notice of appeal. The appellant for instance sought a finding that he had a legitimate expectation to be heard before the land board decides to demarcate ranches of 6 x 6 kilometres in areas where there were existing customary land rights, and to grant common law forms of land tenure under part IV of the Act.

It is the appellant's case that when he was issued with the certificate of customary land grant by the land board "he was given exclusive grazing rights in the areas defined in the certificate." There are of course no areas defined in the appellant's certificate, but I shall assume that the appellant refers to the measurement which he claims should be inserted in his certificate.

Section 10(1) of the Act makes it quite clear that all rights and title to land in a tribal area rest in the land board for that area "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 peoples of Botswana." It was pointed out in the case of Kweneng Land Board v The Bosele Syndicate and Others (Court of Appeal Civil Appeal No. 28 of

1998) that the provision of section 10(1) requires a land board at all times to take this trust purpose into account. It is common cause that the present case concerns tribal land where there is communal grazing. There is simply no way in which the land board could legitimately have granted anybody exclusive grazing rights over any tract of land in this tribal area in terms of part 111 of the Act. It should be borne in mind that the certificate which the land board issued to the appellant was a certificate of customary land grant in terms of part 111 of the Act, and not a grant of land rights under common law in terms of part IV of the Act.

The inclusion of the "8 x 8 km" measurement in the appellant's certificate would have served no purpose in the circumstances set out above; it would actually be meaningless. It would in any event have been impossible to determine where this area of 64 square kilometres was situated on the ground. There is indeed no way of assessing the exact boundaries of the 8 x 8 kilometre area to which the appellant lays claim.

In terms of section 2 of the Act the word "land" means :-

"land in a tribal area and subject to the provisions of the Mines and Minerals Act, the Water Act and the Mineral Rights in Tribal Territories Act includes any interest in land and anything which is either artificially or naturally attached to the land and which, by operation of the common law, accedes to it." (Emphasis added.)

In Kwape v Ngwaketse Land Board and Another (Court of Appeal Civil Appeal No. 35 of 2002) this Court confirmed the conclusion of the learned trial judge in that case that a borehole represents an “interest” in land and that a land board is competent to grant permission to sink a borehole, without the inclusion of land, in terms of section 16 of the Act. That is what this court found in Kwape’s case, namely that Kwape’s only right was to a borehole and not to the land itself. In the case before us the appellant did not acquire any exclusive rights to the land but only the right to a borehole and the right to graze his livestock in the communal grazing land surrounding the borehole.

The appellant is faced with a further difficulty mentioned in the judgment of the court *a quo*. Regulation 10 of the Tribal Land Regulations requires the land board, in making a grant of customary rights in respect of a piece of land which is not defined by a diagram, to describe it in the certificate of grant by reference to permanent and ascertainable boundary points, whenever possible. Regulation 10 then requires the grantee, for the purpose of fixing boundary points not otherwise readily ascertainable, to demarcate the land in respect of which customary rights have been granted to him within six weeks of the issue of the certificate. Regulation 10 provides that a grantee who fails to do so shall forfeit his rights to such land. No attempt has been made by the appellant or any of his predecessors in title to define any boundary

points, with the result that any right which they might have had were forfeited. Their failure to define any boundary points confirms once again that the right granted herein was not in respect of a piece of land which could be demarcated.

For the reasons set out above the appeal cannot succeed. The appeal is accordingly dismissed with costs.

DELIVERED IN OPEN COURT THIS 27th DAY OF JULY 2005

.....*F H Grosskopf*.....
F H GROSSKOPF
JUDGE OF APPEAL

I agree

.....*H R A Korsah*.....
H R A KORSAH
JUDGE OF APPEAL

I agree

.....*A M Akiwumi*.....
A M AKIWUMI
JUDGE OF APPEAL