



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

Court of Appeal Civil Appeal No.CACLB-057-06
High Court MISCA 532-2003

In the matter between:

MMAPULA RAKHUDU & 4 OTHERS

APPELLANTS

and

MODISE MOSARWA

RESPONDENT

Mr K.N. Monthe for the Appellantⁱ
Mr M. Kgafela for the Respondentⁱⁱ

JUDGMENT

CORAM: **TEBBUTT J.P.**
 FOXCROFT J.A.
 HOWIE J.A.

FOXCROFT J.A.

1. This is an appeal against the decision of Sarkodie-Mensah, Ag. J on 24 October 2006 dismissing, with costs, an application by the appellants for the eviction of the respondent from “borehole No. 1739 at Poloka, in Kweneng Administrative District”, that the respondent should remove all his livestock from the borehole, and that “all persons purporting to derive the right to water their livestock at the borehole aforesaid through the respondent be evicted therefrom.” It does not

appear that these last mentioned persons were joined in the application. The application was referred to trial after disputes of fact emerged.

2. The five appellants had collectively instituted their application as members of a group called the POLOKA SYNDICATE. The grounds for the relief sought were set out in the founding affidavit of Leo Mokoka, first appellant, now deceased, who claimed that the said borehole:

“is the property of the applicants alternatively, the applicants have a right of use of such borehole and applicants are collectively called POLOKA SYNDICATE”

3. First appellant went on to say that:

“The applicant (sic) were granted the right to use the borehole way back in 1965 by the predecessor of Kweneng District Council, together with one MOFFAT GAETWESEPE KEPAANTSWE MOSARWA, now deceased, and such deceased person was the father of the respondent.”

It seems that the first appellant had intended to say that the applicants were granted the right to use the borehole to draw water in 1965. In about 1993, Moffat Mosarwa had claimed sole ownership of the rights to the borehole in an application to the High Court. That Court had dismissed his claim and the Court of Appeal later dismissed his appeal.

4. In the judgment of Tebbutt, JA (as he then was) the learned Judge of Appeal referred at the outset to Moffat Mosarwa's assertion that the borehole belonged to the seventh respondent in that matter, the Kweneng District Council, but that "they (the respondents) have the right to use it for the purpose of watering their cattle." At page 2 of his judgment Tebbutt, JA, also referred to the evidence of the appellant Moffat Mosarwa that a Water Right Certificate was issued to him on 25 January 1988, following an application made on 16 September 1969. That evidence is confirmed by the new Certificate of Grant of Water Right which forms part of the record on appeal before us. That certificate, dated 24 October 2003, granted to the Poloka Syndicate Water Right No. B4349 which permitted the right to extract water up to a maximum quantity of 18,2m³ per day from borehole number 1739 at Poloka for domestic use. The certificate concluded with the words that:

"This grant of water right supersedes water right No.A2975 dated 25-01-1988 which is now declared redundant."

It is clear, therefore, that when Moffat Mosarwa went to court in 1994, the dispute was about the right of use of water and not the ownership of land. That remains the position.

- [5] The present dispute is between the syndicate and Modise Mosarwa, the son of Moffat Mosarwa. The appellants contend that the respondent, Modise Mosarwa, is not and never has been a member of the Poloka Syndicate. They aver that at a meeting of members of the syndicate in 1995 at which respondent's father, Moffat

Mosarwa was present, the other members, displeased with his having taken them to court, resolved to expel him from the syndicate and the respondent had not taken his place. Accordingly their application was for his ejectment from borehole No.1739 at Poloka. The respondent opposed the application and filed an answering affidavit, asserting that the members of the syndicate were indeed displeased with his father who had unsuccessfully taken them to court. This meeting had occurred early in 1996 and he, the respondent, was also present. Respondent added that the members did not resolve to expel his father from the syndicate but:

“agreed on terms for him to vacate ...the meeting unanimously agreed that they did not trust my father any longer and did not wish to deal with him in the syndicate.

10. It was suggested that for the sake of peace in the future my father’s son being myself should take over his place and membership in the syndicate in the same spirit and principle previously followed by the syndicate to allow heirs to take over membership of their

deceased fathers in the syndicate. At this point I must mention that Kobamelo Leero had taken over membership after his father had died.”

6. Kobamelo Leero, second appellant, was later to testify that he had not stepped into his father’s shoes on father’s death but:

“I was accepted as a member when my father was still alive.”

He immediately conceded that he and his father were not members at the same time. On affidavit, the respondent had stated that at the time of his father's death in February 1996, the latter was running his affairs elsewhere, the respondent having taken his place. The respondent also denied that he had been allowed to stay on to water his and his father's cattle as an act of pity. In evidence at the trial, the respondent corrected the date of his father's death to February 1999, explaining that the date in the affidavit was an error. He added that he had his father's death certificate which showed the correct date as 1999.

7. The respondent also asserted that his father's membership in the syndicate made him joint owner in the property of the syndicate including the borehole, adding:

“It would not have been lawful or possible for applicants to expel my father without paying him his share in the ownership of property belonging to the syndicate.”

The respondent also maintained that the appellants had conducted themselves in a manner inconsistent with the position they have now adopted “that I am not a member of the syndicate.” He put this change of stance down to his objection to Pholoso Kgaswane, fifth appellant, becoming a member of the syndicate. Eventually, after a number of meetings of the syndicate to consider his objections, three members supported the respondent against two in favour of fifth appellant's membership. This had led to a split in the syndicate. The respondent had bought

a new engine, reservoir and water trough for the borehole with another's assistance. The two camps had existed since 1999 and the respondent continued to assist farmers with watering their cattle (as had been the position since he joined the syndicate in 1996) on a tenancy basis. The affidavit ended with the assertion that the respondent's name appears in all the recorded minutes of the secretary, Shorty Kaefarura, secretary of the syndicate, and that for the seven years from 1996 to 2004 all the appellants had dealt with him as a member of the syndicate.

8. First appellant denied, in a replying affidavit that the respondent was present at the meeting where his father was expelled "to the best of my recollection." He admitted that at the time the respondent's father died in February 1996 he still watered his cattle at Poloka. In an extraordinary paragraph he added:

"10.1 The defendant is not a member of the syndicate and as such he is not being ejected from the syndicate. The respondent is simply being asked to leave the borehole as a non-member."

He also denied the alleged split in the syndicate and the alleged substitution of the respondent for his father which he characterized as "inconceivable." The respondent had simply been allowed to water his livestock at the borehole and to buy equipment jointly with members:

“For indeed respondent had to share in the expenses but that such conduct did not turn respondent into a member of the syndicate.”

9. Mr. Shorty Kaefarura, secretary of the syndicate, filed a supporting affidavit to the effect that names recorded in his minutes of meetings indicated the names of persons present at a meeting, not who the members of the syndicate were.

10. In view of the dispute of fact, the matter went to trial, the agreed issues being:

“whether or not the respondent is a member of the applicant otherwise known as Poloka Syndicate,... and whether or not Gaetwesepe Mosarwa died as a member of the applicant and could pass his membership to the respondent.”

The Court a quo correctly expressed concern about item 1.2 under “Issues for Trial” in the minute of the Pre-trial conference reading:

“The respondent bears the onus that he is a member.”

The respondent bore no onus in the sense of the overall onus of proof, as Mr Monthe, for the appellants, appeared to concede, his reply being:

“all he has to do is to dispute”

11. Kuate Phuthegolo, third appellant, was the first witness for the appellants. He was 80 years old at the time and he claimed to have been the founding member of

the syndicate. He was the last surviving of the original members and said that Moffat Mosarwa ceased to be a member of the syndicate “because he took us to the High Court.” He had been told that he should leave around 1994/1995 at a meeting of the syndicate. Moffat Mosarwa had said that he would repair his own borehole and then leave “and while we were waiting for him he got sick and died.” He added, in chief, that Modise Mosarwa, the respondent is not a member and explained that:

“We were waiting for his father to leave the syndicate and we also wanted him to leave the syndicate.”

This evidence suggests that no formal expulsion had occurred. There is certainly no written record of any expulsion or the date on which any such expulsion occurred. The further statement that the members of the syndicate also wanted the respondent to leave the syndicate suggests that he was at some time being treated as a member. PW1 also said that first respondent was not in attendance when the members resolved to expel his father. Under cross-examination, PW1 testified that the syndicate does not and never did have a constitution.

12. Kobamelo Leero, second appellant, testified as PW2. He became a member of the syndicate in 1970, succeeding his father Mapako Leero while, according to him, his father was still alive. PW2 gave similar evidence to that of PW1 on the reaction of Moffat Mosarwa to the decision that he should leave the syndicate. He added that the members had agreed to his request that he should “stay for

sometime and that he would leave later.” The respondent was not present. PW2 concluded his evidence in chief by confirming that Moffat Mosarwa did not remove his cattle from the borehole after this meeting, and that he died before he could finish repairing his own borehole at Sethule. Clearly, his cattle continued to be watered, on this evidence, as those of a member despite the expulsion resolution, since PW2 agreed that those who have a right to water their cattle at the syndicate borehole are members of the syndicate. PW2 also testified that the parties who water their cattle from different troughs “are in conflict with each other.”

13. PW3, Pholoso Kgaswane, (the fifth appellant) testified that he became a member of the syndicate in 1999 after reaching a settlement with the syndicate members in regard to compensation for equipment he had installed at the borehole. He confirmed that the respondent was present at the meeting where he, PW3, was invited to become a member of Poloka. He recalled that the respondent had said that PW3 should pay an additional P15000 to the syndicate as a price for joining the syndicate. PW3 recalled asking the respondent how much he had paid for his membership “when they started.” The respondent had said he did not know. A little later PW3 said that the respondent is not a member of the syndicate despite the fact that he used to come to meetings, and despite his earlier evidence about the respondent’s membership fee.

It is passing strange that the respondent would have suggested a membership fee for PW3 of P15000 in the presence of the other members if the respondent had not been a member.

Under cross-examination, PW3 conceded that the respondent attended meetings in 2001, but he did not know the capacity in which respondent attended. His later evidence that he would like the respondent evicted because “he is not conducting himself well and he is also selling water from the borehole” and that if the respondent had not done anything “we could have reconsidered”, suggests the real reason for this dispute.

14. PW4 was Zaccheus “Shorty” Kaeparura, a headman at Pilane, and secretary of the syndicate. He recalled a meeting at which the membership of the respondent was discussed. The effect of the discussion was that the respondent would be told to take his father’s cattle and remove them from Poloka. A letter was to be sent informing the respondent.

Under cross-examination, PW4 read an entry made by him in the minute book of the syndicate to the following effect:

“8 January 2000

AGENDA

- 1. payment for cattle*
- 2. engine for the borehole (Poloka)*

3. *contribution by membership of P2000*

The names following were “Modise Mosarwa and the others”

PW4 added that not all the names recorded were members. He himself was not and Tosi Koontse and Modise Mosarwa also were not. He also recalled that at a meeting in 2003 a decision to expel the respondent had been reached. He was not aware of any earlier decision to expel him. This, in summary, was the evidence for the appellants at the trial.

15. The respondent’s evidence followed the lines of his affidavit. He repeated that he had been at a syndicate meeting with his father where his father agreed to leave the syndicate and the members agreed that he should replace his father. He listed a number of actions taken by him on behalf of the syndicate such as talking to the Department of Water Affairs about redrilling of the borehole. He also transported concrete to Poloka, without payment, for the members, and paid his share of a summons issued against the members by a Mr Letsatle. He denied that he had been allowed to water his father’s cattle for so long on compassionate grounds. The reason was that the syndicate had accepted him as a member in his father’s place. In re-examination, he maintained that his father had exercised a right to water which he had transferred to him.
16. DW2 did not give evidence on the issues of the respondent’s membership or his father’s “expulsion” but DW3, a member of the syndicate, testified that the respondent was, and remained, a member of the syndicate. DW3 had succeeded

his father as a member and he denied that the respondent's father had ever been expelled. He also denied that Kgaswane, fifth appellant, was a member of the syndicate.

17. On this evidence the learned trial Judge dismissed the application to evict the respondent. In so doing, she felt that the appellants had not been truthful and recorded that she believed the evidence of the respondent. The Court a quo added that:

“It will in any event be inequitable and unconscionable to expel the respondent, who has rights in the property, who has a kraal and a homestead at Poloka without any discussions as to compensation.”

Mr. Monthe conceded that some form of compensation would have to be calculated and paid to the respondent before he could be lawfully expelled from the borehole. It was common cause that he had contributed financially to the equipment in use at Poloka.

THE APPEAL GROUNDS

18. Mr. Monthe submitted that the Court a quo erred and misdirected itself in making findings which were “so unjustified that no sensible Court which had applied its mind to the question to be decided could have arrived at such a conclusion.”

It is so that the Court a quo erred in minor respects such as finding that PW1 had said that the respondent's father was expelled in 1993, when in fact he had said

this had occurred in 1994 or 1995. A further minor error was the finding that PW2 had testified to the effect that Moffat was expelled in 1993, when PW2 was not actually able to put a year on it.

Mr. Monthe also submitted that for the Court a quo to use words of the deceased Leo Mokoka was most unfortunate since:

“had he been alive, he would probably have given an explanation for his remarks.”

The remarks referred to appear in paragraph 42 of the judgment and relate to entries in the minutes of 5 August 2001 and 12 August 2001. The minutes of 5 August 2001 reflect Kuate Phuthegelo, third appellant, saying:

“That they were not going to register the borehole in their own name instead they were going to find out who had won the case in their matter between Moffat Mosarwa. And if in their investigations they were to discover that Mosarwa had won the borehole, they would leave the borehole and if Mosarwa had lost the case, he would have to leave the borehole.”

At a meeting a week later, on 12 August, a minute reflects a question by M. Mosarwa “why they did not give up these issues while his father was alive.”

Mr Mokoka’s reply was:

“they had not raised these issues because they had assumed that this was a syndicate. Now they will start to talk and they will want to know who had won the court case.”

Page 33, of the Minute Book recorded that the respondent, Modise, had said:

“what he knows for a fact is that he is a member of the syndicate having stepped into the vacancy that was created by the departure of his father.”

What Mr Mokoka might have said at the trial if he had been alive, about these entries in the Minute Book is entirely speculative. There is accordingly no merit in Mr Monthe’s submission that these words would have been satisfactorily explained by Mr Mokoka if he had been alive to testify.

What the entries do show is that in 2001, the respondent was claiming that he was a member of the syndicate.

Nor, in my view, is there any merit in Mr Monthe’s submission that the Court a quo was not entitled to have regard to the Minutes, and to draw reasonable inferences therefrom.

20. It is not necessary to go minutely through each argument raised in the appellant’s Heads of Argument. In the main, the matters raised are of a minor nature. The

matters raised at pages 5, 20 and 21 of the judgment of the Court a quo clearly played a part in the reasoning of the learned judge but were not the only basis for her decision. The decision was clearly founded largely on credibility. She believed the “evidence of the Respondent” [Judgment: paragraph 45] and therefore disbelieved the evidence of the applicants before her.

21. In his Heads of Argument, Mr. Monthe devoted a good deal of attention to the argument that there had been a “failure to cross-examine” the appellants’ witnesses on crucial issues. It was submitted that such failures may have the effect that evidence becomes uncontested and that it was “grossly unfair and improper” to let a witness’s evidence go unchallenged in cross-examination and thereafter to argue that such witness must be disbelieved.
22. In my view these well-known general principles do not apply in the present case. For one thing, the respondent’s version was fully set out in his affidavit in response to the application on motion. The dispute which emerged and resulted in the motion going to trial was the issue of his father’s alleged expulsion from the syndicate before his death in 1999, and the consequential dispute whether the respondent had become a member of the syndicate in his father’s place even before his father died. Battle lines were clearly drawn and there can be no serious suggestion that the evidence of the respondent, that the appellants’ witnesses were being untruthful as to Moffat Mosarwa’s alleged expulsion, was an afterthought. Nor in these circumstances, can it be seriously submitted that because it was not

specifically put to appellants' witnesses that they were lying, the respondent was not contesting their evidence.

In any event, it is not quite correct to assert that the witnesses were not challenged. During the evidence of PW1 [at record, p134] Mr Kgafela wanted the witness to repeat the names of members present at the alleged meeting to expel Moffat Mosarwa. The witness who had not mentioned the name of Modise Mosarwa was then asked:

Was his son Modise Mosarwa not there?"

The answer was in the negative.

The question was a clear challenge, incorporating an implied assertion that Modise Mosarwa had been present, given the content of Modise's affidavit in the earlier motion proceedings.

Would it have taken the matter any further for the cross-examiner to have said "I put it to you that he was?" when the obvious answer would have been "He wasn't." This could have gone on for some time.

23. As far as PW2 was concerned, it was specifically put to him in chief [Record, 149] that the respondent had filed an affidavit under oath to the effect that, for the

sake of peace, it was recorded that he should step into his father's shoes as a syndicate member.

This shows that the attorney for the appellants was aware of the respondent's stance, and there can be no merit in the submission that the later absence of a question by the cross-examiner such as "You are not telling the truth?" amounts to an acceptance of PW1's evidence in chief.

24. Reverting to the judgment of Tebbutt, JA in the matter previously referred to:-

"The principle is well-established that a Court on appeal will only upset a Trial Court's finding on fact where it is satisfied that the Court's finding is clearly wrong (R. Dhlumayo 1948 (2) SA 677 (AD); Merchand v. Butlers Furniture Factory 1963 (1) S.A. 885 (AD) at 890B."

Was the court a quo clearly wrong?

Mr. Kgafela submitted that the respondent's version was not only supported by the evidence of PW3 but also by PW4, the syndicate secretary who testified that the decision to expel the respondent from the syndicate was taken around 2003. The counter to this, namely that because PW4 was not secretary in 1994/1995 and that there were no minutes, any evidence of an earlier expulsion by him would have amounted to hearsay, misses the point. PW4 did not attempt to repeat hearsay. He testified to a later expulsion.

25. It is in any event inconceivable, in my view, that the secretary would not have been told of an earlier expulsion if it had indeed happened. It seems likely that what did happen was that the respondent's father agreed to go because of the ill-will engendered by the earlier court case. Before any "resolution" to expel him was actually effected, he died. His cattle were still being watered at Poloka by his son, and no compensation for the loss of his right to water his cattle had been considered. This is understandable since his cattle were still being watered after his departure from Poloka.
26. There are many indications that the respondent was treated as a member after his father left. He attended meetings (although non-members apparently also did so on occasion), one such meeting being one when he proposed that an additional fee ought to be paid by a prospective new member. He contributed to the equipment of the borehole and bought an engine to operate the pump. There is no evidence that he paid for water like some others and he clearly played a prominent part in the affairs of the syndicate. His part in the objection to the addition of the fifth appellant to the syndicate, and the development of two camps at Poloka, shows activities not normally associated with a non-member of any association.

Since his father's death in 1996, the respondent has conducted himself as a member of the syndicate and formal steps to remove him commenced only in 2003.

27. Did the appellants discharge the onus of proving that the respondent never became a member of the syndicate, either by resolution in 1996 or by acceptance thereafter? In the light of his use of a water right from 1996 to date, I cannot find that the Court a quo was so wrong as suggested in finding that appellants had not discharged the onus. On the contrary, the probabilities are at least evenly balanced. Even if the appellants had determined to expel the respondent's father, from whom the respondent claimed to have inherited the water right, they would not, lawfully, have been able to carry out that intention without compensating the respondent's father. That never happened.

28. In the result, I am not persuaded that the learned judge reached the wrong conclusion in this matter. The appeal is accordingly dismissed with costs.

DELIVERED IN OPEN COURT AT LOBATSE THIS...30thDAY OF JANUARY 2009

.....
J.G. FOXCROFT
JUDGE OF APPEAL

I agree:

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P. H. TEBBUTT
JUDGE PRESIDENT

I agree:

.....
C. T. HOWIE
JUDGE OF APPEAL

- ⁱ Monthe Marumo & Co. Attorneys for the Appellants
ⁱⁱ K. Kgafela Law Practice Attorneys for the Respondent