IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA HELD AT GABORONE

MAHGB-000819-17

In the matter between:

MALETE LAND BOARD	**APPLICANT**
And	
THE REGISTRAR OF DEEDS FOR BOTSWANA	**FIRST RESPONDENT**
THE ATTORNEY-GENERAL OF BOTSWANA	**SECOND RESPONDENT**
KGOSI MOSADI SEBOKO N.O.	**THIRD RESPONDENT**
GAMALETE DEVELOPMENT TRUST	**FOURTH RESPONDENT**

Advocate Mr. Redman N. SC (appearing with him Attorney Mr Muzimo P.) for the Applicant

Advocate Mr Rammidi O.S. (appearing with him Attorney Mr Taunyane M) for the 1st and 2nd Respondents

Advocate Mr Budlender G. SC. (appearing with him Advocate Mr. Debeer M. and Attorneys Mr Motlhala O.T,. Mr Rantao T. and Mr. Botlhole K.) for the 3rd and 4th Respondent

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JUDGMENT

JUDGMENT

MOTHOBI,J.:

Since this case raises an issue of general public importance we decided to grant permission, as requested, for oral submissions to be heard through the Webex platform. The reason was because some of the counsel briefed in the case was foreign-based. And so it is established with us, under clause 2.1.2.2.3 of Practice Directive No. 3 of 2020, that "At the direction of the Judicial Officer, oral submissions may be done through ICT platforms [etc.]." Lastly, we requested the Registrar to explore the possibility of the Botswana Television covering the reading of this judgment for the benefit of the population at large.

Unfortunately, counsel had hardly begun to address us when technical problems started to develop. As a result the proceedings were adjourned and it was agreed that the parties would have to rely on the papers already before the court. In addition, the counsel would be at liberty to file and serve supplementary heads as deemed necessary. There would, of course, be adherence to mutually agreed timelines.

We express our indebtedness to counsel for having obliged. We also thank them for the careful, clear and economical way in which they submitted both virtually and in black and white. At first, we found them all to be attractive and compelling. Now with the benefit of hindsight, we have reached the conclusion that some of the submissions are valid and others open to criticism. My reasons behind the unanimous decision of the court now follow.

The present matter is a sequel to applications previously brought before the High Court and the Court of Appeal, respectively, Case No. MAHLB 000045-08 and, upon appeal, Case No. CA CLB 036-10. As is well known, those proceedings concerned a long-standing dispute over the ownership of a certain piece of land described in the original title deed as "the remaining extent of the farm FORREST HILL, situate in the Administrative Area in the Bakwena Country in the BECHUANALAND PROTECTORATE." On the one hand, members of the Bamalete tribe regard the remainder of the farm as theirs to this day. They maintain that it belongs to no one else. On the other hand, the Malete Land Board maintain that ownership vests in them by virtue of legislation.

The recital of the facts that follows below rests upon the matters disclosed in the various affidavits and documents filed by the parties. The interaction between the various

legal issues which arise is complex. I will therefore seek, first, to give an account of the facts, before turning to legislation and legal principles which in my view are in play in order that my exposition of the facts and conclusions in this case will be more intelligible.

The applicant, established as a land board in terms of section 3 of the Tribal Land Act [CAP. 32:02], brought an application by notice of motion dated 11 December 2017, seeking the following orders:

(1) an order directing the 1st respondent (the Registrar of Deeds) to cancel deed of transfer No. 387 passed in favour of the Bamalete tribe in respect of Farm Forrest Hill 9-KO;

(2) an order directing the 3rd and 4th respondents to deliver the floating copy of the deed of transfer No. 37 passed in favour of Bamalete Tribe in respect of Farm Forrest Hill 9-KO to the applicant within seven days of the date of this order;

(3) in the event that the 3rd and 4th respondents fail, neglect and refuse to deliver the said floating copy within seven days, a deputy sheriff of this court is to be authorised to sign all documents and do everything

necessary for the purposes of cancellation of the deed of transfer;

(4) an order for the payment of the costs of this application to be made against the 3rd and 4th respondents; and

(5) further or alternative relief.

When the case came before the court on 20 June 2019 another Joint Report, now more expanded than that to which reference has been made above, was handed into court by counsel who moved the court to have it made an Order of Court. It was made an Order accordingly. I propose to set out, below, those contentious paragraphs of the Order with which we propose to deal. But, firstly, I will summarise the facts which are common cause.

It is not in dispute that Farm Forrest Hill 9-KO was acquired by the tribe from Aaron Siew in 1925 under Deed of Transfer No. 387; that in 1968 the Tribal Land Act, Act No. 54 of 1968, was enacted by Parliament and came into operation in January 1970; and that section 10(2) of the Act was repealed in 1993 by section 7(b) of Act 14 of 1993, whereas section 10(1) was amended.

It is also not in dispute that "The first schedule of the TLA included among areas listed the Bamalete tribal territory

and the Applicant was set out in the second column of the schedule as the land board vested with Bamalete Tribal Territory"; that the said area is defined in the Tribal Territories Act [CAP. 32:03], which was enacted in 1983; nor that section 7 of the said Act, which gives a description of the Bamalete Tribal Territory was later amended in 1973 to include the remaining extent of Forrest Hill 9 K-O. Lastly, it is not in dispute that there has been litigation previously in relation to the Farm involving Quarries Botswana (Pty) Ltd, the 3rd and 4th respondents, Tshepo Phuthego, Bashi Buti and the applicant.

On or about 1 July 1925 the late Chief Seboko Mokgosi, acting for and on behalf of the Bamalete Tribe, purchased certain piece of land being the remaining extent of the Farm Forrest Hill 9-KO. The purchase was made with the consent of the High Commissioner in terms of Proclamation No. 56 of 1921. The result was Deed of Transfer No. 387 passed in favour of "CHIEF SEBOKO MOKGOSI, N.O. BY AARON SIEW" before the Registrar of Deeds Office in Mafeking.

Before proceeding any further, I cannot but notice that in paragraphs 16 and 17 of the founding affidavit deposed to on 1 December 2017 by the applicant's board secretary, Ikgopoleng Shabane, it is said that "A deed of transfer No. 387 was passed in favour of Bamalete Tribe". It is further said that "The said title deed (FA1) vested Farm Forrest Hill

[in] the Bamalete Tribe." However, a careful reading of the deed reveals that it is not so.

Firstly, the deed shows that the property was lawfully sold and ceded to the "hereinafter mentioned transferee, SEBOKO MOKGOSI CHIEF OF THE BAMALETE TRIBE" and "for and on behalf of THE BAMALETE TRIBE". Therefore, the deed of transfer was not simply passed in favour of the tribe. Secondly, it is evident from the deed that the cession and transfer would apply to Chief Seboko's "Successors in Office". We can take judicial notice that this phraseology refers to those whom it was envisaged by the authorities would in future succeed the office of chief of the Balete tribe. It does not appear to me to be in dispute that Kgosi Mosadi Seboko, who is cited in these proceedings as the 3rd Respondent, is one of those successors.

Now that I have commented on the subject of succession, I would draw attention to section 8(5)(b)(iv) of the Constitution. The provision covers property subject to a trust. It is not, as incorrectly averred by the applicant's board secretary, that the deed of transfer was passed in favour of the tribe. The deed expressly states that transfer is passed in favour of Chief Seboko Mokgosi.

It may be asked "How could title pass to Chief Seboko Mokgosi and on his demise, to his successors in office, when the purchase price of the property had been paid by

members of the Bamalete tribe? If we are to understand the answer to this question we must remind ourselves of the nature of trust. Our common law says that a trustee is the owner of the property. However, the law says the trustee is the legal owner of the property but equity supplements the law by saying that the Chief holds it on trust for the beneficiary, and thus a trust is created. In this case members of the Bamalete tribe constitute the beneficiaries under the trust. When I speak of equity I employ it in its broad sense, as distinct from a system of law. Equity can only be administered as modified in accordance with the principles of our common law, or not at all.

I would go further in the analysis in order to clarify this concept of the trust. One can only invoke in aid the authoritative opinions of academic writers in the field who explain that "the essential characteristic of the trust is the separation of title to property and the right to use and enjoy it" (see, e.g. under English common law, MacKenzie, J-A, and Phillips, M.A., *A Practical Approach to Land Law* (2nd ed.), Blackstone Press Limited, London, 1986, p. 164; see, too, as to the position in Roman-Dutch law, Hutchinson, D., *et al, Wille's Principles of South African Law*, 8 ed., Juta & Co. Ltd., 1991, Cape Town). In the view of this court the system of common law, similarly as in England and South Africa, recognises that the trustee is the owner of the property, since he or she has legal title but holds such property not for himself or herself but for the beneficiary,

who is protected by equity and accordingly has an equitable interest in that property.

In the case before us, it is clear that the late Chief Seboko Mokgosi was the legal owner of the property in his capacity as trustee; that he held it not for himself but for the beneficiaries, that is to say, members of his tribe. It follows that Kgosi Mosadi Seboko is, assuming for present purposes that the trust continued to exist at the time of bringing the application, in the same position in relation to the property as were her predecessors in title. It should be noted that the abbreviation "N.O." appears at the end of the 3rd respondent's name, which is the Latin *patois* that she is cited in these proceedings in the name of her office.

It may then be asked, "What duties and liabilities does the law attach to the office of trustee? The trustee must administer property for the benefit of the beneficiary, not for himself or herself, and may not normally derive personal benefit for his or her trusteeship (*Harris v. Fischer N.O.* 1960 (4) SA 855 (A) 862.

In his affidavit, the applicant's board secretary correctly states that section 10(1) of the Tribal Land Act, which came into effect in January 1970, vested all rights in the land board set out in relation to it in the second column of the First Schedule. He points out that the latter Schedule included, among the areas listed, the Bamalete Tribal

Territory and, in relation to it, the applicant. So far, what the board secretary has stated is not in dispute, except as concerns the vesting of the freehold in the applicant, which is highly contested in this case. He then concludes that the effect of section 10 of the Tribal Land Act was to vest land in the Bamalete Tribal Territory in the applicant from 1970. What is questionable is the analysis undertaken by him about the legal position. He deposes in his affidavit thus:

> "Section 7 of the Tribal Territories Act, describing the Bamalete Tribal Territory was amended in 1973 to include [the] Farm Forest Hill 9-KO"; that the amendment had the effect of vesting the Farm in the applicant under section 10 while simultaneously divesting or removing its "administration and management" from the 3rd and 4th respondents; and further that: "The rights, title and interest vested [in] the Bamalete Tribe by virtue of Deed of Transfer No. 387 were terminated by operation of law and passed to the Applicant."

In the premises, one of the problems to be resolved in this case is whether the amendment referred to above by the applicant's board secretary has had the effect which it is contended it has, namely, the effect of expropriating the rights of the trustee and beneficiaries in the Farm and vesting the same in the applicant, without more.

On 4 June 2018, Kgosi Mosadi Seboko, as the 3rd respondent, filed an answering affidavit both in her own capacity and – as she put it – "on behalf of the 4th respondent." In the affidavit, the 3rd respondent states that she opposes the application and sets out the history of acquisition of the Farm by the tribe which, as before said, is not in dispute. However, in paragraph 13 of her affidavit, the 3rd respondent says: "The colonial government and the Government of the Republic of Botswana have never exercised any ownership or management or land allocation rights in respect of the Farm." On the contrary, she says, the Government recognised and acknowledged prior to and since the enactment of the Tribal Territories Amendment Act of 1973 "the Tribe's proprietary right, interest and title to the Farm when it purchased Portion 5 of Forest Hill 9-KO from the Tribe for the sum of R4039.00"; that the transfer thereof was effected by way of Deed of Transfer No. 22 of 1970.

It is pointed out by the 3rd respondent that the Government "obtained ownership" of another piece of land, Tribal Grant No. 21-KO, deducted from the Remaining Extent of the Farm, resulting in issuance of a Certificate of Registered Title No 18/87 dated 16 January 1987. Furthermore, it is said that both these transactions were in recognition and acknowledgement by the Government of the tribe's proprietary rights and title to the Farm. I pause here to note that this is argumentative material which, under the rules

of this court, is impermissible. However, no objection was taken.

The 3rd respondent also makes reference in her affidavit to the Tribal Territories (Amendment) Act 1987, which it is said was in recognition by Parliament at the time of the tribe's ownership of the Farm. In essence, it is alleged by the 3rd respondent that notwithstanding that location of the Farm is within the area known as the Bamalete Tribal Territory, it never vested in the Malete Land Board.

The language of the provisions of the relevant legislation referred to on both sides requires very careful consideration, for the matters raised in this important case depend very largely upon their true construction. All land within Botswana, as we conceive it, can be classified as State Land, Tribal Land, Railway Land, Tati Concessions Land, and British South Africa Company Land. With the latter three types, we are not here concerned.

In section 2 of the State Land Act [CAP. 32:01], state land has been described as "unalienated state land and reacquired state land and includes any land outside Botswana ownership whereof is vested in the Republic." The phraseology "unalienated state land" is defined in the section as any land in Botswana other than "(a) land included in any tribal territory or the Barolong Farms other than land within a township established under the

Townships Act; (b) land included in any grant thereof made by or on behalf of Her Majesty prior to the commencement of this Act or on behalf of the President under this Act; (c) the farms "Ramatlabama's Kuil" (60-JO), "Forrest Hill" (9-KO), "Traquair" (10-KO) and "Crocodile Pools" (15-KO).

It is clear from what has been stated above that the farm "Forrest Hill (9-KO)" does not fall into the category of state land or unalienated state land", that is to say, by virtue of the provisions of the State Land Act [CAP. 32:01] ownership of the land in question was never acquired by the State with exception of the two purchases transacted between the 3rd respondent and the State as appears above.

Now turning to tribal land, section 2 of the Tribal Land Act [CAP. 32:02] ("the Act") defines the word "land" as meaning "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 and 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." The phraseology "tribal area" means every tribal territory as defined in section 2 of the Bogosi Act and the areas defined in the Second, Third, Fourth and Fifth Schedules, respectively, Tati Tribal Area, Chobe Tribal Area, Kgalagadi Tribal Area and Ghanzi Tribal Area.

The establishment of land boards is sanctioned by section 3(1) of the Tribal Land Act. Section 10 of the Act vests all tribal land in the land board and although the latter is a body corporate, its remit is restricted to mainly transactions in customary forms of tenure and matters incidental thereto.

Mention must also be made of the Tribal Territories Act [CAP. 32:03], the date of commencement of which was 4 August 1933. The enactment defines, in section 7, the boundaries of the following tribal territories: Bamangwato; Batawana; Bakgalta; Bakwena; Bangwaketse; Bamalete; and Batlokwa. The boundary of the Bamalete Tribal Territory, in particular, is defined in the last but one paragraph of the Act to include the following land as appears from Diagram DSL No. 3/85:

"The remainder of the Farm Forrest Hill 9-KO from which has been deducted Tribal Grant No. 21-KO as per Diagram DSL No. 3/85."

Thus far what I have said is all about the boundaries of the Bamalete Tribal Territory and other tribal territories. At first it may seem odd that there should be any question about the matter at all: surely everybody knows where to go to find out who owns what land. The question "Whose land is it?" however, has been left for the courts to answer.

The Tribal Land Act [CAP. 32:02] was passed in 1968. The Act came into effect early in 1970. All rights and title to land in each tribal area were vested in a land board established under section 3 in respect of every tribal area. By section 10(1), each land board in a tribal area owns all tribal land in that area. Such land is expressly sated to be held "in trust for the benefit and advantage of the citizens of Botswana and for the purposes of promoting the economic and social development of all the people of Botswana."

The Act defines "tribal land" and makes provision for acquisition or grant of land in a "tribal area". The meaning of "tribal area" is "(a) every tribal territory as defined in section 2 of the Bogosi Act"; and "(b) the areas defined in the Second, Third, Fourth and Fifth Schedules." The words "all rights and title to land in each tribal area" refer to the grant of rights under the customary forms of tenure, inclusive of all the powers previously enjoyed by a Chief and a subordinate land authority under customary law in relation to land in the land board; and the grant, variation and

cancellation of common law forms of tenure of land such as common law leases.

Regarding grants, variation and cancellation of common law forms of tenure of land, the provisions of Part IV apply. For example, a land board may let to any person land not exceeding five acres, or on terms other than those imposed by other provisions of the Act, but it cannot grant land in ownership except only to the State (see, s. 24(1)). The President of the Republic must first determine that it is in the public interest that land vested in the land board under section 10 should be acquired by the State. If there is refusal, the Minister may direct that an inquiry should be held by a commission appointed under section 35. Provision is made for payment of compensation where a grant is made. And so we have a paradox if the contention by the applicant that it owns the Farm were sustainable, since it would give rise to the question whether the applicant could lawfully grant ownership rights on such freehold other than only to the State. To explain it strikes me that unless there is conversion of tenure to customary law or lease hold rights, the only candidate would be the State if the applicant was to grant a portion or the whole of the farm.

Importantly, section 34 of the Tribal Land Act provides:

"Where any right to land (other than a right vested in the land board), is not of the nature described in section 33(1), the State may acquire such right in accordance with the provisions of the Acquisition of Property Act which shall, to this extent, and notwithstanding anything to the contrary in that Act, be deemed to be applicable to the tribal territories."

The Acquisition of Property Act [CAP. 32:10], referred to in Section 34 above, is considerably older than the Tribal Land Act [CAP. 32:02]. The enactment replaces Proclamation 80 of 1954 and subsequent colonial enactments. The measure gives the President power to acquire any real property where it is "necessary or expedient in the interests of defence, public safety, town and country planning or land settlement; or in order to secure the development or utilization of that or other property for a purpose beneficial to the community...." Compensation shall be paid as may be agreed or determined under the Act.

If one were to decide the case before us without regard to subsequent developments in the law, there is no doubt that before the date of commencement of the Constitution on 30 September 1966, had the Government acquired the land, they would have been entitled to do it without payment of compensation to the tribe since the provision under which it was recoverable was a provision under which, according to

the old legislation, acquisition could not be prevented by order of the court, but only by order of the High Commissioner.

The 1966 Constitution stepped in, however, and said that no property of any description and no interest in or right over property shall be compulsorily taken possession of or acquired except where the taking of property or acquisition is necessary or expedient in the interests *inter alia* of town and country planning, or for a purpose beneficial to the community, or in order to secure the development or utilization of the country's mineral resources and permission is made by a law applicable to the taking of possession or acquisition. That is spelt out in section 8(1) of the Constitution. As to the requirement that permission be made by a law applicable to the taking of possession or acquisition, we can only point out to section 34 of the Tribal Land Act [CAP. 32:02], the deeming provisions of which apply the Acquisition of Property Act [CAP. 32:10] to the tribal territories.

The picture that emerges from what I have said so far is the following: under the laws of Botswana an authority cannot normally, without clear constitutional or constitutionally enacted statutory authorisation, take rights over land in full ownership or in the limited form of a right of way or a similar right over another's land. If the whole or part only of an owner's land is to be acquired, the owner can require the

authority to pay adequate compensation. If any dispute which results over the payment of compensation or the amount of such compensation arises, it is to be settled by the High Court or other court with competent jurisdiction. However, it cannot be stressed enough that the protection of real property provided by section 8(1) of the Constitution presupposes that such property is required for public purposes, but guarantees that it shall not be taken without compensation.

I am of the opinion that the provision declaring that private property shall not be taken for public purposes without just and adequate compensation is intended as a limitation on the exercise of power by the President, Government or other State institution. As one views it, the Second Chapter of the Constitution constitutes a "Bill of Rights", which are the bedrock of the individual liberties that have been guarded jealously in this country since 30 September 1966. Section 3(c) of the Constitution *inter alia* guarantees protection from deprivation of property without compensation. Needless to say, the Constitution of Botswana is supreme.

At the outset, I expressed the view that attention to the law and procedures of compulsory acquisition is critical if a government's exercise of compulsory acquisition is to be fair and legitimate. (The phraseology "government" is employed here in a broader sense here). There is a risk that citizens and non-citizens alike, their legal rights aside, may believe

that they lack tenure or security if the government can acquire rights in private land without following defined legal procedures, which are not hortatory, but are compulsory, and without offering adequate compensation as required by the Constitution. Any perceived lack of protection and transparency can result in injustices which anger citizens and undermine the legitimacy of government.

Although private landed property is inviolable in this country, as intimated, however, the Constitution in section 3 provides for both the protection of private property rights and the power of the State to acquire land without the willing consent of the owner. While the power to compulsorily acquire land is found, as before said, in the Constitution, Chapter II, section 8, the law introduces another safeguard against arbitrary action. The details of compulsory acquisition are left to other legislation, which, for present purposes, is the Acquisition of Property Act [CAP. 32:10]. But it does not end there.

The Act, in section 2, which provision deals with interpretation, defines the terms "real property" and "property" as meaning any real right in immovable property, etc. However, the same section states that the term "shall not include Tribal Territories as defined by the Tribal Territories Act." What does it all amount to? There can be

no doubt that the legislative intention is that the President may not acquire any real right in immovable property or freehold land in Tribal Territories as defined by the Tribal Territories Act. In other words, the Acquisition of Property Act does not authorise the acquisition of such land in Tribal Territories, which is a safeguard against territorial encroachments.

In my considered view, since the Farm was incorporated within the Bamalete Tribal Territory by legislation, it cannot be said to have vested in the applicant by virtue of the provisions of the Tribal Territories Act, or any other Act. If so, the act would be in effect, but not in language, compulsory acquisition by the back door. Consequently, the Farm remains the property of the 3rd respondent which she holds in trust on behalf of the Bamalete Tribe, and any other act would be would be invalid.

For the aforegoing reasons, and those advanced in the judgment of their Lordships, which I adopt without qualification, the application is dismissed with costs.

DELIVERED IN OPEN COURT AT GABORONE THIS 21ST DAY OF MAY 2021.

MICHAEL MOTHOBI LETSOGILE MOTHOBI