

## **CASE SUMMARY: ATTORNEY GENERAL OF BOTSWANA & REGISTRAR OF DEEDS FOR BOTSWANA v KGOSI MOSADI SEBOKO N.O., & GAMALETE DEVELOPMENT TRUST**

### **INTRODUCTION**

This case involves a dispute over title deed land of a tribal community of Botswana and draws attention to the disparities in access to land affecting indigenous people in rural areas. The cases deals with property rights, which are constitutionally guaranteed and protected against unconstitutional interference by the State. It also looks at how public authorities can acquire such rights in a non-discriminatory manner while statutorily recognising individual land titles, which ensure security of tenure.

In this case, the Ba-Gamalete Tribe, represented by Kgosi Mosadi Seboko and the Gamalete Development Trust, opposed an application brought by the Malete Land Board for an order directing the Registrar of Deeds to cancel their title deed. The Malete Land Board argue that specific provisions of the Tribal Land Act of 1970 and the Tribal Territories Act of 1973 have conferred the Board with ownership of the Farm the Ba-Gamalete Tribe has collectively purchased for grazing purposes. The Tribe argues that when correctly interpreted, the legislative scheme did not deprive the Tribe of its ownership of the Farm and that they were never consulted before the expropriation of their land, nor was there any form of payment offered to them by the State as prescribed in the Constitution of Botswana.

### **PARTIES IN THE CASE**

The Appellants are the Attorney General of Botswana and the Registrar of Deeds for Botswana. The Respondents are Kgosi Mosadi Seboko, the paramount chief of the Tribe, and the Gamalete Development Trust, which administers the assets of the Tribe.

### **FACTUAL BACKGROUND OF THE CASE**

In 1925, the Ba-Gamalete Tribe purchased Forest Hill Farm using its own funds to address a shortage of land for grazing purposes. The Deed of Transfer indicates that the Farm was transferred to Chief Seboko Mokgosi “*for and on behalf of*” the Tribe. Since its acquisition, the Tribe and its members have exercised control over the. Neither the colonial government nor the Republic ever exercised any ownership or management regarding the Farm.

In 1933, shortly after the Tribe purchased the Farm, the Tribal Territories Act was enacted, which defined the boundaries of tribes throughout Botswana. While the territory was defined and designated for the Tribe, the Farm was not included within its boundary.

The Tribal Land Act came into operation in 1970 and created Land Boards, vesting all the land of each tribal area with their respective Tribal Land Board. In 1973, the Tribal Land Act was amended and redefined the boundaries of the Bamalete Tribal Territory to include the Farm. There was never a consultation with the Tribe regarding the 1973 amendment to the Tribal Land Act.

On 11 December 2017, the Malete Land Board, which historically supported the Tribe’s ownership of the Farm, filed a case in the High Court asking for an order directing the Registrar of Deeds for Botswana to cancel the Deed of Transfer passed in favour of the Ba-Gamalete Tribe.

### **LEGAL ARGUMENTS BEFORE THE HIGH COURT**

The Land Board contends that, under the Tribal Land Act of 1970 and the Tribal Territories Act of 1973, all rights and titles to land in tribal areas, including the Farm, vests in the Malete Land Board.

The Tribe argued in the High Court that they never relinquished ownership of their Farm and that such a process could only have taken place after extensive consultation between themselves and the government, which in this case did not occur. They argue that when correctly interpreted, both the Tribal Land Act and the Tribal Territories Act cannot be construed to divest them of ownership of the Farm. The Tribe further argued that:

- If the Court found that the Farm is vested in the Land Board, the legislative scheme violates their rights to property and freedom from discrimination as protected in sections 8 and 15 of the Constitution, respectively.
- In effect, it would mean that land which the Tribe purchased is taken from them and given to a statutory body without any compensation.
- Such an interpretation would further mean that the legislative scheme treats the civil rights of tribes and their members less favourably than the treatment of non-tribal citizens, in contravention of section 15 of the Constitution.

The Attorney General of Botswana opposed the Tribe's Counter Application, arguing that the ownership of the Farm and the constitutionality of its acquisition had already been determined in the *Quarries of Botswana* case and that such issues could not be raised again.

On 21 May 2022, a full bench of the High Court delivered the [judgment](#) dismissing the Land Board's Application with costs. The Court struck out section 7(ii) of the Tribal Territories Act for violating the Constitution and further declared that Forest Hill Farm vested in the Tribe. The High Court did not deal with the Tribe's constitutional challenge in its conditional Counter-Application concerning the legislative scheme's violation of equality rights.

### **LEGAL ARGUMENTS BEFORE THE COURT OF APPEAL**

On 29 June 2022, the Attorney General of Botswana filed a Notice of Appeal against the judgment of the High Court on the basis that:

- The Court of Appeal already determined the constitutionality of the Farm's acquisition in the *Quarries of Botswana* case and that such issues could not be raised again.
- Sections 8 and 15 of the Constitution do not apply because the Farm was never compulsorily acquired because the Tribe allegedly consented to the transfer of the Farm to the Malete Land Board.

The Tribe argues that the breach of the Tribe's rights and, consequentially, the constitutionality of the legislative scheme were never challenged before or considered by the Court of Appeal in the *Quarries of Botswana* case.

The Tribe never consented to the acquisition of the Farm by the Board. This is illustrated by the fact that the Tribe continued to exercise control over the Farm for over 35 years after the legislative scheme was enacted. At a legal level, whether the owner has consented, the acquisition of ownership using Acts of Parliament is, by its very nature, a unilateral and compulsory act.

### **STATUS OF CASE**

On 2 December 2022, the Court of Appeal dismissed the Malete Land Board's application to appeal out of time. The Court of Appeal equally rejected the Tribe's application for condonation of the late filing of its Notice of Appeal and Cross-Appeal. However, the Court granted the Tribe permission to present oral arguments opposing the Attorney General's Appeal. **The appeal will be heard on 24 January 2023 at 09:30 in a double court at the Gaborone High Court.**

*Mothala Ketshabile & Company, Bothole Law Group, Rantao Attorneys, Adv Geoff Budlender SC, and Adv Mitchell de Beer represent the Tribe. The Southern Africa Litigation Centre supports the Tribe.*