

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

Miscellaneous Civil Application No. F110 of 2003

In the matter of:

TAWANA LAND BOARD

APPLICANT

AND

THE KAMANAKAO ASSOCIATION

RESPONDENT

Mr. N. Chadwick for the Applicant

Mr. G. Kanjabanga for the Respondent

J U D G M E N T

WALIA J:-

This is, hopefully, the final chapter of this long, hotly contested and often acrimonious litigation between the Tawana Land Board ("Land Board") and the Kamanakao Association ("the Association") about the burial of the late Chief Calvin Kamanakao at the land allocated to the Association for use as a culture centre.

There have been a number of interlocutory proceedings and although the history of the matter has been recited in each Ruling on such proceedings, it will help to once again trace the background to this judgment.



Following an urgent *ex parte* application made by the Land Board, the following orders were made by Marumo J on the 17th May, 2003:-

- “ 1. That the matter be treated as one of urgency.

2. *Rule nisi* be and is hereby issued calling on the Respondent to show cause, if any, to this Honourable Court on 23rd May 2003 at 9:30 a.m. or so soon thereafter as counsel may be heard why it should not be ordered:
 - (i) That the Respondent be strictly restrained and enjoined itself or through any of its members, servants or agents from burying or causing or permitting the burial of, the mortal remains of the late **CALVIN D KAMANAKAO** at the site allocated to it by the Applicant at Gumare Village for use as a cultural centre.

 - (ii) That the Respondent be ordered to pay the costs of the suit.

3. That the *rule nisi* shall operate as an interim interdict in terms of paragraph 2 (ii) above until the return date.

4. That the Respondent be at liberty to anticipate the return date on 48 hours notice to the Applicant's attorneys.

5. That the Applicant is authorized to immediately serve fax copies of the court documents and order on the Respondent."

It is common cause that the Association proceeded to bury the late Kamanakao at the culture centre in defiance of Marumo J's order and that the Association and some of its members were held in contempt and duly punished therefor.

In the course of the contempt proceedings the Land Board sought to introduce a revised draft order and I ruled that the exercise amounted to an amendment and that if the Land Board intended to amend, then proper application for amendment should be made.

Formal application for amendment was duly made and the amended notice of motion read:

"AMENDED NOTICE OF MOTION ON CERTIFICATE OF URGENCY

BE PLEASED TO TAKE NOTICE that Application will be made to the above Honourable Court in the following terms:-

1. That the matter be treated as one of urgency.

2. That a *rule nisi* be and is hereby issued calling on the Respondent to show cause, if any, to this Honourable Court at 9:30 am or so soon thereafter as counsel may be heard why it should not be Ordered:-

(i) that the Respondent be strictly restrained and enjoined itself or through any of its members, servants or agents from burying or causing or permitting the burial of the mortal remains of the late **CALVIN KAMANAKAO I** at the site allocated to it by the Applicant at Gumare Village for use as a cultural centre.

(ii) that the Respondent be Ordered to pay the costs of the suit.

(iii) that it be and is hereby declared that the burial of the mortal remains of **CALVIN KAMANAKAO I** at the Kamanakao Culture Centre on 18th May 2003 constituted an unlawful act perpetrated by the Respondent in that it

(a) was perpetrated in breach of the written lease entered into between the Applicant and the Respondent for 50 years with effect from 27th August 2001 in respect of the said Kamanakao Culture Centre and/or;

(b) was perpetrated in breach of a valid refusal by the Applicant under section 27 (2) of the Tribal Land Act of an application by the Respondent under section 27 (1) of the said Act to change the user of the land in which the said remains were buried, without recourse to the Respondent's right of appeal against such refusal expressly referred to in the said section 27 or of any other legal rights it may have to challenge or review the said refusal by due legal process and/or;

(c) constituted an offence under section 39 (1)(b) of the Tribal Land Act in respect of the land on which the said remains were buried.

(iii) that the Respondent is Ordered to pay the costs of these proceedings on the scale as between attorney and client.

3. That the *rule nisi* shall operate as an interim interdict in terms of paragraph 2 (i) above until the return date.
4. That the Respondent be at liberty to anticipate the return date on 48 hours notice to the Applicant's Attorneys.

BE PLEASED TO TAKE FURTHER NOTICE that the accompanying affidavits of ANDREW MOREMI PITSE and PARRET MBUZINI DLODLO annexed hereto will be used in support of this application.

BE PLEASED TO TAKE NOTICE FURTHER that the Applicant has appointed THE OFFICE OF attorneys Chadwick, Anderson & Partners as set out below as the address at which will accept notice and service of all process in these proceedings.

DATED AT FRANCISTOWN THIS - DAY OF "

Subsequently a corrigendum was filed substituting paragraphs 2 (iii)(c) of the amended notice of motion with the following:

"Constituted a change of user of that land in which the said mortal remains were buried to which section 39 (1) of the Tribal Land Act as amended applied."

The application to amend was vehemently opposed by the Association principally on the grounds that any order the Court may make in pursuance of the amendment would be ineffective; that the application for amendment was calculated to embarrass the Association and that the Land Board was being disingenuous in using the application not to properly determine the issues arising from the substantive application, but to get directions from the Court on matters of interest to the Land Board and other Land Boards in Botswana but not related to the substantive application thus raising a new cause of action altogether.

The Land Board on the other hand, contented that the Association was the architect of its own misfortunes. It could not plead embarrassment or ineffectiveness of a court order, having itself been responsible for rendering an order ineffective by burying the late Kamanakao in defiance of a court order.

The amendment was allowed with reasons to follow.

The Association's arguments would most certainly have substance at the stage of dealing with the substantive application but at the stage of application for amendment I agree that a party having wilfully disobeyed and frustrated an order of the Court cannot then return to Court pleading embarrassment or ineffectiveness.

Paramount in my mind when dealing with the application for amendment was the consideration of whether or not the amendment would prejudice the Association.

In my view, the proposed amendment did no more than crystallize the issues before me. The order preventing the burial at the culture centre was wilfully disobeyed and the Association was duly punished for that disobedience. It is quite clear that an order now made confirming the *rule nisi* in its original form would be vacuous. The amendment sought by the Land Board, simply stated, is for a

declaration that the burial of the late chief at the culture centre was unlawful for reasons stated in paragraphs (iii)(a)(b) and (c) of the amended notice of motion which reasons I will deal with in detail later in this judgment.

This change in direction by the Land Board is perfectly understandable, the original order granted in its favour having been frustrated by the Association.

In my view, there could be no prejudice to the Association in proceeding with the substantive application on the basis of the amended notice of motion and the application for amendment was therefore allowed.

One more matter needs to be dealt with before I proceed to deal with the substantive application. Appearing for the Association, Mr. Kanjabanga asserted most vehemently that the Association had already been punished for its actions and proceeding on the amended notice of motion would be going back to the *rule nisi* stage and making the same orders. He also threatened that in that event, the Association would play no further part in the proceedings.

I was at pains to explain to Mr. Kanjabanga that the Association was punished for wilful disobedience of a Court order and no

decision has been made on whether or not the Association had the right to bury the late chief at the culture centre. This not so subtle distinction had obviously escaped Mr. Kanjabanga and he appeared suitably appeased when it was explained to him that the amended notice of motion squarely addresses the latter issue.

Turning now to the substantive application, the first prayer, that the Association be restrained from burying the late **CALVIN KAMANAKAO** at the Association's culture centre at Gumare is purely academic and in view of what follows, it is unnecessary for me to deal with it.

In terms of the amended notice of motion, the Land Board seeks a declaration that the burial of the late Chief Kamanakao at the cultural centre was unlawful in that:

- (a) it was perpetrated in breach of the written lease agreement between the Land Board and the Association.
- (b) It was perpetrated in breach of a valid refusal by the Land Board under Section 27 (2) of the Tribal Land Act of the application by the Respondent under Section 27 (1) of the Act to change the use of the land allocated to it and the

Association's failure to follow the appeal procedures prescribed by the Act.

- (c) The culture centre site being utilized for purposes of the burial of the late chief Kamanakao constituted a change of user to which Section 39 (1)(b) of the Tribal Land Act as amended applied.

A convenient starting point in dealing with these prayers would be to recite the relevant provisions of the lease and the Sections of the Tribal Land Act referred to therein.

The Agreement of Lease entered into between the parties is incorporated in a document headed "AGREEMENT OF GRANT OF LEASE FOR BUSINESS PLOTS." Only page one of the Agreement has been annexed to the papers before me and that page shows that the lease is in respect of a piece of land measuring 600m² situate at Gumare in the Batawana Tribal area, which land is to be used as "culture centre".

Section 27 of the Tribal Land Act ("The Act") provides:-

"27 (1) where the grantee of any land under the

provisions of this part desires to change the use of any land or where the grantee of any land under the provisions of this part wishes to hold such land under the provisions of this part, he may make application in writing to the Land Board.

- (2) The Land Board may after considering the application, refuse or allow the application provided that there shall be an appeal to the Minister against any refusal within such time as may be prescribed.

The relevant provisions of Section 39 of the Act provide:-

"39 (1) Any person who -

- (a) acquires or takes occupation of any tribal land without having an appropriate lease or a certificate issued by the Land Board concerned;
- (b) changes the use of any such land without the prior approval of the appropriate Land Board
- (c)
- (d)

shall be guilty of an offence"

The spat between the parties started on 10th May 2003 when the Gumare branch of the Association wrote to the Land Board in the following terms:-

"This letter from the Kamanakao Association serves to officially inform you of the death of the Paramount Chief of Bayeyi, **CALVIN D. KAMANAKAO I** .

We further inform you that the tribe wishes to bury the late Kamanakao in the plot that has been allocated to the Association in Gumare. The funeral will be held on the 17th May 2003..

We would be grateful should you accede to our request."

To this, the Land Board responded as follows on 13th May 2003:-

"The above captioned request as per your letter of 10th May 2003 and Kamanakao representatives meeting with Tawana Land Board on the same day 10th May 2003 have reference.

Please be informed that your request cannot be acceded to because:-

1. Gumare has areas that are designated as cemeteries where the body of the late **CALVIN KAMANAKAO** could be laid to rest.

2. Gumare has a development plan which has zoned areas for various uses, cemeteries being one of them as already mentioned above.

Consequently allowing burials on areas not zoned for cemetery would be going against the essence of the plan.

You are therefore hereby advised and requested to bury the late Kamanakao in an area designated for that purpose."

As Mr. Chadwick pointed out, the arguments on the amended prayers are bound to run into one another and also as suggested by Mr. Chadwick, I will first deal with the validity or effect of the general plan for the Gumare area referred to extensively in the Land Board's papers.

The Public Health Act [Cap. 63:01] in dealing with cemeteries spells out unequivocally that burial at cemeteries is obligatory where cemeteries have been properly designated. Section 70 (1) of that Act provides:-

It shall be lawful for the Minister by order published in the Gazette to select and declare cemeteries for certain areas and to notify in the Gazette proper places to be sites, of and to be used as cemeteries, and except as

provided in sub-sections (2) and (3), it shall be obligatory to bury the dead in such cemeteries."

It follows that designation of cemeteries becomes effective only on publication in the gazette.

"General plans" are made, approved and take effect in terms of the Town and Country Planning Act [Cap. 32:09].

It is not necessary to traverse the detailed provisions of that Act relating to General Plans save to say that General Plans made under the Act apply only to areas declared by order published in the Gazette to be planning areas; and that a development plan or any revision thereof becomes operative on the date of its publication in the gazette or on such later date as the Minister may determine.

Gumare is not an area designated as a planning area and therefore no general plan made under the Town and Country Planning Act exists in respect of Gumare. The concept of legislated land utilisation is a relatively new one in respect of tribal land, having been introduced in the 1993 amendment of the Act.

Section 17 of the Act now provides:

- “17 (1) A land Board shall, after due consultation with the district council, determine and define land zones within the tribal area, and may from time to time make amendments thereto.
- (2) The Land Board shall furnish the Minister with details of all determinations, definitions or amendments thereto made under sub-section (1) and if the Minister is satisfied therewith, that the descriptions of the land concerned are satisfactory and that the land use zoning is in accordance with any regulations made under Section 37 in respect of the types of land use for which the land may be zoned he shall give notice thereof in the gazette.
- (3) The Land Board shall not make grants of land under this part for any land use which is in conflict with the use for which the land is zoned.
- (4) After consultation with the District Council, Village Development Committees, Tribal Authorities and any other interested institutions, the Land Board may determine management plans, and their revision from time to time, for purposes of assisting or giving guidance on the use and development of each land use zone within a tribal area.”

In referring to a general plan in respect of Gumare made under Section 17 of the Act, the Land Board is quite clearly referring to a land use zoning determination made under that Section.

Section 17 is quite unambiguous. No zoning determination made under that Section is valid or of legislative effect unless the Minister has granted his approval thereto and given notice thereof in the gazette.

The reason for the requirements of publication in the gazette in respect of the designation of cemeteries under the Public Health Act, the development plans under the Town and Country Planning Act and the Land use zoning determination under Section 17 of the Act is not difficult to fathom. It is simply to apprise those to whom the provisions are meant to apply of the content and effect of what has been properly determined to enable them to understand them and act in accordance therewith.

There is nothing before me to suggest that such land utilization plan as may exist has been approved by the Minister, while there is an acknowledgment by the Applicant that it certainly has not been gazetted nor is there anything before me to suggest that the residents of Gumare have been made aware of, either at public

meetings or otherwise, of the existence of a "development plan" applicable to their village.

It was suggested by Mr. Chadwick that Section 17 (4) allows a land board, non publication of land utilization zones notwithstanding, to implement village development plans. I cannot agree. Section 17 (4) cannot be construed disjunctively. It can only have application if the other provisions of Section 17 have been complied with. A Land Board can only determine management plans to assist and give guidance on the use and development of land use zones and land use zones are only effective if approved by the Minister and notice thereof given in the gazette.

In refusing to allow the burial of the late Chief Kamanakao at the culture centre for reason of such burial contravening the general plan for Gumare, the Land Board sought to enforce what was not legislated or properly prescribed.

To all intents and purposes and having particular regard to Section 17 (2) of the Act, no development plan exists for Gumare and the Land Board was, in my view, wrong in proscribing burial at the culture centre for reason of that burial contravening the general plan.

This however, deals with one aspect only of the Land Board's challenge to the burial.

It will be recalled that the Land Board letter of 13th May 2003, prohibiting burial at the culture centre made no reference whatsoever to the burial contravening any covenants in the lease or that the burial would constitute a change of use. The prohibition was purely and only on the grounds of contravention of the general plan.

It is the amended notice of motion that breaks entirely new ground in seeking an order that the Association was in breach of the user covenants of the lease and that the burial constituted unauthorised use of the culture centre. It is curious that the matter of the user prescribed in the lease had not been raised at all by the Land Board in its prohibiting burial at the culture centre. It is therefore tempting to regard the prayers in the amended notice of motion as efforts by the Land Board to add more strings to its bow by creating an alternative reason for its decision at a late stage of the proceedings. This, indeed, was an aspect of the application for amendment adumbrated by Mr. Kanjabanga for the Association but not seriously pursued.

I will, however, brush aside the temptation and proceed on the basis that the user assigned to the culture centre was in contemplation of the Land Board when referring to the general plan. Although the land in question was allocated to the Association for use as a culture centre, no description exists of the nature of cultural activities that may be conducted thereat.

The minutes of the Land Board meeting where the decision was made to allocate the land to the Association, read, in part:-

"BACKGROUND INFORMATION

The Association is intending to include the following in their structure:

- 2 cultural podiums
- festival area
- museum
- sales shops for selling cultural products
- pre-school
- toilets (at least 6)
- office space
- garden area".

The use of the word "includes" suggests immediately that the list is not exhaustive.

The Land Board in paragraph 8 of the founding affidavit by the Secretary, says this of its understanding of a culture centre:-

"It must be pointed out from the onset that a cultural centre in terms of the land use plan falls under tourism and is envisaged to encompass a traditional or cultural village where the Association displays its traditional way of life, in the erection of traditional huts, the display and sale of traditional crafts, the preparation and sale of traditional foods and the putting up of performances of traditional dances, plays and story telling for the tourist market"

The affidavit of Lydia Ramahobo, Coordinator of the Association provides the Association's view of why the late Chief Kamanakao was buried at the culture centre.

"Paragraph 3 (1) In view of the fact that the lease for the plot clearly indicates that it was to be used as a cultural centre, and the burial of a chief is part of the history of the people, who need to bury him in accordance with their culture as one of their cultural activities, it was then logical that it was proper to bury the Chief at the cultural centre. An annual celebration for the installation of Shikati Kamanakao has taken place at the cultural centre for three years."

Paragraph 3 (c) Shikati Kamanakao was a leader of his tribe and had his mission to revive the Wayeyi culture. It is therefore proper that his vision be continued by burying him at the cultural centre where his people would honour him. He had devoted his life energy and resources to the development and promotion of the Wayeyi culture, for which they applied for a plot to preserve it, being the culture centre.

Should tourists be interested in the Wayeyi culture, it would be unwise to have a museum, for instance, with writings about Shikati Kamanakao at the centre, and then go to the cemetery to see his tomb. It is more proper that a tourist should read about him in the museum and go outside the museum in the centre and see his tomb."

This affidavit provides numerous examples of burials at places other than designated cemeteries:-

- The burial of Letsholathebe Moremi at the kgotla in Maun.
- The burial of the eight chiefs of Tswana speaking tribes at special places not designated as cemeteries.
- The burial of Batlokwa at their homesteads.
- The burial of Mr. Mokgwathi at his yard at Shakawe.

- The burial of Mr. Morapedi at his cattle post.
- The burial of Mr. Lekgwedi at Sedie ward in Maun.
- The burial of Mr. Sadimbo at his cattle kraal.
- The burial of some members of the Welio family at J.S. Welio's yard.
- The burial of Mr. Sawete in his residential yard at Matlapaneng.
- The burial of Mr. Moutlakgola Nwako at his farm at Mookane.

In his replying affidavit, Parrett Mbuzini Dlodlo, the Board chairman of the Land Board meets those averments by acknowledging that the burials did take place as alleged but that these burials were either in places such as Shakawe where no development plans exist, or were perpetrated without the Land Board's knowledge.

Of particular relevance is the custom of burial by Batlokwa in their homesteads and the burial of the late Nwako at his farm. Dealing first with the Nwako burial, that burial became the subject of an urgent appeal to the Land Tribunal. Following his death, the late Nwako's son applied to Ngwato Land Board for permission to bury his father at his farm at Mookane. Permission was refused for the following reasons:

1. The refusal is in contravention of the provisions of Section 17 (3) of the Tribal Land Act (as amended) which provides "The Land Board shall not make any grants of land under this part, for any use which is in conflict with the use for which the land is zoned.
2. The land in question is zoned for arable farming whilst the use requested is a cemetery.
3. A precedent may be set which shall subsequently make it impossible to administer land.

The appeal to the Land Tribunal against that decision was allowed and the Tribunal said:-

"In this case the Land Board has failed to produce a policy which prohibits burial in homesteads and in ploughing areas. The reasons given for rejecting the request have not been supported by any legal provision. Since it has been conceded that Section 17 (3) is not relevant to this matter.

If the Land Board wants to avoid setting precedents like they assert, then they have to follow the procedure set down under Section 17 (4) and carry out consultations with a view to developing the land zones at village level. The policies agreed upon should be recorded for the use of future holders of office in those institutions."

There are glaring similarities between this and the Nwako case, except that I have gone a lot further than the Land Tribunal in finding that non-compliance with the provisions of Section 17 renders any development plan the Land Board may have prepared, of no force or effect.

As regards the Batlokwa custom of burying their dead in homesteads, this is but one burial custom. There is not, to my knowledge, uniformity of burial customs and rites in Botswana. There are as many variations as there are tribes and burials take place in homesteads, cattle posts, royal burial sites, ploughing fields, private family graveyards and any number of other sites according to the wishes of the deceased or the family.

Given that and having rejected the Land Board's argument that the burial was unlawful for reason of contravention of the development plan, I must find that *per se*, the burial at the culture centre was not unlawful.

The issue for determination, however, is whether that burial was unlawful for reason of it contravening the lease agreement and rendering the burial exercise an unauthorised change of use.

Both parties have, in their affidavits, rendered their interpretation of cultural activities and Mr. Chadwick has referred me to the ordinary dictionary meaning of culture as:

"Culture – the customs, institutions and achievements of a particular nation, people or group. Centre 2 – a place or group buildings where a specific activity is concentrated. Purpose – 2 the reason for which something is done or for which something exists."

In my view, however, culture and cultural matters transcend the narrow and emotion-free meanings assigned by dictionaries. Cultural matters evoke passions that mere words cannot capture.

Botswana's National Policy on culture, approved by the Cabinet on 4th April 2001, provides an impressive definition of culture, which definition, when read in the context of the National Policy document, in my view captures the essence of culture. That definition reads:

"Culture in the context of this policy is understood here to be the whole complex of distinctive, spiritual, material, intellectual and emotional features that characterise a society or social group. It includes not only the arts and

letters, but also modes of life, the fundamental rights of the human being, value systems traditions and beliefs.”

A similar definition is contained in the South African Government White Paper on Arts, Culture and Heritage wherein culture is defined as follows:-

“Culture refers to the dynamic totality of distinctive spiritual, material, intellectual and emotional features which characterise a society or social group. It includes the arts and letters, but also modes of life, the fundamental rights of the human being value systems, traditions heritage and beliefs developed over time and subject to change.” (See **Joubert Law of South Africa, 1st re-issue, Vol. 5, paragraph 242**).”

These definitions acknowledge that the culture of a society reflects its way of life, its aspirations, its beliefs and heritage. The Land Board in according the Association’s culture centre the status of a tourism attraction shows a narrow minded approach and it is perhaps this approach that prevented it from looking beyond the pigeon hole in which it had placed the culture centre in its “development plan” - a component of its tourism policy with little regard for the aspirations and expectations of the Association.

That burial and burial ceremonies have immense socio cultural significance cannot be denied and for centuries societies have buried their leaders, social luminaries, cultural figures and loved ones at sites other than recognised graveyards. An example that comes to mind immediately is the Westminster Abbey in London, a church where the remains of English monarchs and famous British subjects have been buried for centuries and continue to be buried today. At home the remains of the famous El Negro are interred at Tsholofelo Park in Gaborone.

It is not in dispute that the late Calvin Kamanakao was the paramount chief of the Wayeyi. In my view, the burial of the chief at the culture centre in Gumare was a cultural event for the Wayeyi. His burial at the culture centre was therefore not a breach of paragraph 2 of the Agreement of Lease between the Land Board and the Association and did not amount to change of use.

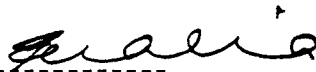
The prayers in the amended Notice of Motion are therefore refused and to all intents and purposes, the *rule nisi* granted on 17th May, 2003, is discharged.

It was suggested by the Land Board that the findings of this Court would be of interest to the Land Board and to land boards generally in the implementation of their policies and programmes. To this, I

can only respond that Land Boards wishing to utilise the provisions of the Act to implement or enforce their plans, programmes or land use zoning decisions must themselves comply fully with the relevant provisions of the Act and to draft their lease documentation with sufficient care to avoid ambiguity and misinterpretation.

As regards costs, save for costs previously awarded against the Association, the costs of the application shall be borne by the Land Board on the ordinary scale.

DELIVERED IN OPEN COURT THIS ^{9th} ~~---~~ DAY OF AUGUST, 2004.



L.S. WALIA
JUDGE

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