

ALFRED THAROGHIA V. JAMES BIKUPE

High Court of Solomon Islands
(Palmer CJ)

Civil Case Number 187 of 2004

Hearing: 8th September 2004
Judgment: 15th November 2004

Sol-Law for the Plaintiff
Watts and Associates for the Defendants

Palmer CJ: The Plaintiff applies by Writ of Summons filed 14th May 2004 for an Order of Certiorari that the Judgement of the Ghaobata Council of Chiefs made on 27th September 1998 in respect of Tenagaqa Land (comprising Selabina and Golu land) and also described as lot 6 of LR 653 (Mbalisuna) and registered as perpetual estate in parcel number 192-012-7 or part thereof be removed to the High Court and quashed.

The Plaintiff obtained leave to commence proceedings by order of this court dated 4th June 2004. It is not in dispute that the perpetual estate in parcel number 192-012-7 (hereinafter referred to as "Lot 6" for ease of reference) is registered land and originally registered in the names of Thomas Vithao and Alfred Tharogha on the statutory trusts.

Original claims of ownership over Lot 6.

In his affidavit filed 14th May 2004 at paragraph 3 Alfred Tharogha ("Tharogha") says that the land was owned by the Bonogo clan of which his father, Thomas Vithao ("Vithao") was a member. This is consistent with documentary evidence adduced in the annexures attached to his affidavit. In the affidavit filed on or 7th April 2004 (annexed as "ALT" to his affidavit referred to above) he states at paragraph 7 that when negotiations were commenced in 1970 to acquire Lot 6, his father Vithao was identified as trustee at a meeting held at Mbalisuna Bridge on 17 July 1970. Following registration, Lot 6 was transferred to Vithao and Tharogha on or about 18th June 1985 as registered joint owners on the statutory trusts for and on behalf of the Thogo Bonogo Landholding Group.

Following death of Vithao, title vested on Tharogha as owner on the statutory trusts for and on behalf of the Thogo Bonogo Landholding Group.

Issue of contention in this dispute

Tharogha asserts that title to Lot 6 now vests on him as sole owner for and on behalf of Vithao's family. The Thogo Bonogo Landholding Group's interest if there was any, he contends seems to have ceased to exist according to his affidavit evidence contained in paragraphs 5 and paragraph 9 of his affidavit filed 7th April 2004 in Civil Case 107 of 2004. I quote: "Furthermore, he expressed to me that he would transfer ownership of the land to me as his eldest son to hold it for and on behalf of his children since there was no member of the clan to survive him." See also paragraph 9: "In 1970 he asked me to be a joint trustee with him because he was the last surviving member of his clan living in the area and I agreed to be a trustee..."

The first Defendant is of the Buru clan. He disputes the separate existence of the Bonogo clan from the Buru clan. He says Bonogo clan does not exist and says that Vithao and

himself are second cousins, grandsons of two sisters **Masivia and Mala**. He says they are all from the Buru clan. James Bikupe ("**Bikupe**") also says in his affidavit that he was contented with the appointment of Vithao as their trustee or representative in the earlier land transactions and did not raise objections. The royalties received were always shared with them when Vithao was still alive. Following his death however, things changed with the assertion by Tharoghia that title to the land now vested on him for and on behalf of Vithao's family alone and no one else. Accordingly royalty payments received for Lot 6 were not shared by Tharoghia with the first Defendant and others.

Sometimes in May of 1998, Bikupe lodged a complaint with the Ghaobata Council of Chiefs ("**Chiefs Council**") regarding this dispute, to be included as trustees or representatives over the said land. The Chiefs heard the dispute on 27th May 1998 and delivered decision on or about 6th September 1998. The Chiefs Council found as follows:

1. *James Bikupe was a true relative of Thomas Vithao fully witnessed by his family trees.*
2. *Alfred Tharoghia would have right over registered land only of the disputed land.*
3. *James Bikupe who represent his own tribe, has fully satisfied the Council of Chiefs that any future land acquisition, on Lot 6 of LR 653, one named James Bikupe should be added."*

Tharoghia contends that the Chiefs Council had no jurisdiction to deal with any issues of land dispute over Lot 6 it being registered land and in so doing had acted *ultra vires* its powers.

Findings

The issue of contention between the parties is payment of royalties derived from lease of Lot 6; whether Bikupe was entitled to any portion of the royalties from Lot 6. This raises the question in turn as to whether Bikupe is part of, a member of, or so closely connected with the Thogo Bonogo Landholding Group.

The evidence adduced refers not only to the Thogo Bonogo Landholding Group but also identifies the **Lathi Clan** and **Sili Clan** as beneficial owners (see paragraph 7(b) of annexure ALT). At paragraph 10 of annexure ALT Tharoghia says that the Bonogo clan is also sometimes called the **Thogo Lalathi**. This raises the question of identity or membership of the above landholding group and whether there is any relationship between the Buru and the Bonogo Clans. Bikupe says they come from the same ancestors and therefore are one; Tharoghia says they are different.

When the matter came before the Chiefs Council, the issue in contention between the parties according to my reading of the judgement and confirmed by the affidavit of John Selea and Francis Garimane dated 2nd September 2004 was whether Bikupe had rights to be included as a member of the landowning group, the Thogo Bonogo Landholding Group for which Vithao and Tharogia had been registered as joint owners on the statutory trusts. I quote: "*The Plaintiff J. Bikupe disputed A. Tharoghia the son of the late T. Vithao claiming that he was an oldman from his tribe Thogo Lalathi. However, A. Tharoghia denied this right so the Plaintiff has taken the issue before the Council of Chiefs for hearing.*" In other words, the issue before the Chiefs Council was whether Bikupe was a member of the Thogo Lalathi Tribe. If this issue is answered in the affirmative then he is entitled to any shares in the royalties received for Lot 6.

Forum for determination of membership of a tribe or inclusion of membership as a trustee or representative.

Inevitably the question whether Bikupe is a member of the Thogo Lalathi Tribe and thereby a member of the Bonogo Landholding Group is a question which entails customary knowledge of tribal genealogy, tribal rights, land rights, historical and traditional knowledge, which reposes in the Chiefs Council. The rightful person/authority therefore to deal with such disputes in this instance are none other than the Chief's Council or the local courts. To that extent the reference of this dispute to the Chiefs Council was entirely appropriate and I find nothing unlawful or improper about it. The Chiefs Council was not deliberating over ownership of Lot 6. It was deliberating over a tribal dispute where one person representing a group of people claims right to be included as a member in the landholding group and rights of representation. The courts would be very reluctant to interfere in such situations unless it can be shown that a jurisdictional error had been committed which would warrant intervention. In the circumstances of this case, no such error had been committed.

In this instance, the Chiefs Council found inter alia, that the parties are actually closely related to each other, that is, "*James Bikupe was a true relative of Thomas Vithao fully witnessed by his family trees.*", and confirmed in the affidavit evidence adduced that they are descendants from two sisters, Masivia and Mala. To that extent they are directly connected to each other; Bikupe cannot be ignored by Tharoghia when it comes to the question of representation or trusteeship over Lot 6, and ultimately the question of distribution or sharing of royalties.

Decision

In the circumstances I am not satisfied an Order of Certiorari can be granted.

ORDERS OF THE COURT:

1. Refuse order for issue of certiorari sought in the Notice of Motion filed 7th June 2004.
2. The Plaintiff pays the costs of and incidental to this action.

THE COURT.