

IMPLICATIONS OF THE TRIBAL LAND ACT, 2018 ON THE RIGHT TO PROTECTION OF PROPERTY

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ABSTRACT

This article will interrogate the recent amendment to the Tribal Land Act which led to the Act being repealed and replaced by the Tribal Land Act, 2018¹ (herein referred to as the 'Tribal Land Act'), as well as the Deeds Registry (Amendment) Act of 2017² (herein referred to as the 'Deeds Registry (Amendment) Act') and how they affect the right to protection of property as outlined by the Constitution of Botswana³. This article will also investigate the Botswana Land Policy 2019⁴ vis a vis the amendments and their effectiveness or otherwise in preserving the right to protection of property as envisioned in Section 3 of the Constitution of Botswana⁵. Lastly, the article will provide a conclusion and outline possible recommendations if any.

1. INTRODUCTION

The Tribal land Act has come a long way in its amendments since independence, however the recent amendment⁶ came with more prominent changes which saw the manner of dealing with customary land transform. According to the preamble, the aim of the Act⁷ is to, “improve the economic value of customary land by making it a registrable title”. The Act in effect, seeks to

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¹ Tribal Land Act 2018, Act 1 of 2018, Supplementary A- Botswana Government Gazette dated 2nd March 2018 which came into force on 20th April 2022.

² Deeds Registry (Amendment) Act, 2017, Act No. 15 of 2017, which came into force on the 20th of November 2020, under Statutory Instrument No. 137 of 2020.

³ Constitution of Botswana.

⁴ Government Paper No.1 of 2019, Revised Botswana Land Policy, October 2019, approved by the National Assembly on the 8th August 2019.

⁵ Constitution (n 3).

⁶ Tribal Land Act, 2018 (n 1).

⁷ Ibid.

change the manner of dealing with customary land by making it registrable at the Deeds Registry just like State land or freehold land. The State believes that this will unlock the economic value of customary land grant and possibly the effect of which would be to bring about positive changes in the lives of its people. This is a welcome Policy and legal development. The article will first explore these changes, followed by their implications and lastly a conclusion will follow.

2. CUSTOMARY LAND LAW CHANGES

Customary land refers to the land that before colonialization belonged to the tribe and was administered by the tribal chief's on behalf of a particular tribe.⁸ The customary land law changes brought about by the Deeds Registry (Amendment Act) include surveying of all tribal land, issuances of Secure Land Title Deed by the Deeds Registry Department and the removal of the development covenant of customary land. The changes in the manner of dealing with customary land was brought about by the Botswana Land Policy 2019⁹. This Policy led to a review and amendment of various Acts which deal with registration of land, the most prominent of which being the Tribal Land Act¹⁰ and the Deeds Registry (Amendment) Act¹¹, which two Acts are the basis of this article. Some of these changes directly correlate with the rights conferred in the Constitution.¹²

⁸ Kwame Frimpong, "*The Administration of Tribal Lands in Botswana*", *Journal of African Law*, Vol. 30, No. 1 (Spring, 1986), pp.51-74.

⁹ Botswana Land Policy, 2019 (n 4).

¹⁰ Tribal Land Act, 2018 (n 1).

¹¹ Deeds Registry (Amendment) Act, 2017 (n 2).

¹² Constitution (n 3).

2.1. BOTSWANA LAND POLICY 2019

The State, through the Land Policy 2019¹³ introduced some changes in the manner of dealing with customary land and ways in which such changes are going to be implemented. The object of the Land Policy 2019 as a whole is stated as to;

“Protect and promote land rights of all land holders and promote sustainable human settlement.”¹⁴

The Land Policy 2019¹⁵ strives to further “improve the land administration and management, both from a system, environmental and economic perspective.”¹⁶ The major changes brought about by the Land Policy 2019 was that it recognized some shortcomings in the land administrative process and it proposed to, “create changes in the management system including changes in the legal framework” the purpose of which is to ensure and improve the administration of tribal land in Botswana.¹⁷

The Land Policy 2019 sought to make customary land registrable so that its economic value can be unlocked, such as having customary land titles also being accepted by commercial banks.¹⁸ This changed the manner in which customary land grants were registered before which was to obtain a lease from the Land Board and to register the lease with the Deeds Registry Office and only after that is when the customary land title would be accepted by the banks. This

¹³ Botswana Land Policy, 2019 (n 4).

¹⁴ Ibid, clause III (50).

¹⁵ Botswana Land Policy, 2019 (n 4).

¹⁶ Botswana Land Policy, 2019 (n 4), clause 51.

¹⁷ Botswana Land Policy, 2019 (n 4), clause 52.

¹⁸ Botswana Land Policy, 2019 (n 4), Clause 53. Also see clause 68 which provides thus, “...the law shall be amended to i. Ensure that land titles are issued for Customary Land Grant Certificate and Certificate of Rights are registered; ii. Compel all land rights holders to register their land rights with Land Authorities; and; iii. Exempt first time home owners from VAT and transfer duty.” Pp22.

process in its entirety was cumbersome and time consuming more so because of the delay in obtaining leases from land boards. Therefore, by introducing the registration of a Deed of Customary Land Grant as a secure land title it offered banks with more security as now the property was a real right. This in turn would lead to improved financial access and improvement of the economy of Botswana.¹⁹

Clause 53 of the Land Policy 2019 stated that;

“Tribal land is held under a Certificate of Customary land grant and Common law leases. Customary land grant is not registrable as such is not accepted by financial institutions as a form of security. The following will be done to make the Certificate of Customary land grant registrable:

- i. Tribal land will be planned and surveyed before allocation to facilitate registration; and
- ii. The Certificate of Customary land grant will be registrable under the Deeds Registry Act, without the need to convert to common law rights.”²⁰

With clause 53, the State recognizes that customary land was excluded from being registered for all these years, since Botswana gained independence in 1966²¹. It seems at the time, the registration of customary land was not a priority for the State.²²

¹⁹ Botswana Land Policy, 2019 (n 4), clause 57.

²⁰ Botswana Land Policy, 2019 (n 4), clause 53.

²¹ Kwame Frimpong, “Post-Independence land legislation and the process of land tenure reform in Botswana”, *The Comparative and International Law Journal of Southern Africa*, November 1993, Vol. 26, No. 3 (November 1993), pp.385 – 395.

²² Clement Ngongola, “Land Problems in Some Peri-Urban Villages in Botswana and Problems of Conception, Description and Transformation of ‘Tribal’ Land Tenure”, *Journal of African Law*, Vol. 36, No. 2 (Autumn, 1992), pp. 140-167. Stated that, at the time Botswana took Independence, “The focus in Botswana...was primarily on the institutions of land control and administration: chiefs and ‘subordinate land authorities’ were to be replaced by statutory land boards”. Ngongola however stated that, “It must be appreciated, however, that the nerve centre of any tenurial system must be located within the institutions of land control, and any reconstruction of such administrations must *ipso facto* amount to a fundamental transformation of the system. This is not often openly acknowledged in discussions of the Botswana reforms.”

Furthermore, the State through the adoption of the recommendations in the Land Policy 2019²³ is acknowledging that in order to achieve their goal of registering customary land, the State has to first recognize that customary land had not been surveyed for all these years. That this may have been the cause of lack of complete land records.²⁴

It is submitted that issues of land are of paramount importance and the right to protection of property is a fundamental right protected by the Constitution of Botswana²⁵ which right was violated by the State when they failed to survey customary land and register the customary land grants.²⁶ This means that the customary land grants enjoyed no security of tenure and the owners thereof were vulnerable. One may argue that the lack of proper record keeping by the land boards has led to many land disputes, with land boards causing double allocations among others and the land board giving people plots in unconducive places such as in hills, river dams and so forth, simply because the land has not been surveyed and properly planned for.²⁷

In order to effect the registration of customary land grant, the land would have to be surveyed and registered at the Deeds Registry department in terms of the Deeds Registry (Amendment) Act. To make the customary land to be registrable, the Tribal Land Act would also have to be amended. This would thus necessitate the amendment of the Deeds Registry Act to allow for the customary land grants to be registrable at the Deeds Registry office.

²³ Botswana Land Policy, 2019 (n 4).

²⁴ Ngongola, (n 21)

²⁵ Constitution, s3 (n 3).

²⁶ Constitution, s3 (n 3).

²⁷ Botswana Land Policy, 2019 (n 4). The State acknowledges this by stating in Clause 81 that, "Land information is necessary for efficient and sustainable management of resources, both from an environmental and economic perspective. Land information is also important to enable land administrators to allocate land equitably and efficiently and to establish effective demand for land, as well as to enable holders to realize the value of their properties and thus improve their economic opportunities. It is also important to enable land based taxes and rents to be collected efficiently."

The State identified solution to this predicament was to get all tribal land in the country surveyed. This solution is justifiable as the majority of the land in Botswana is tribal land.²⁸ However, the State did not mention anything regarding who would bear the cost of surveying the land, whether the State or private individuals. This position is represented clearly in clause 86 which states that, “currently, land is allocated either surveyed or unsurveyed. This aim is to ensure that all land parcels in the country are surveyed and registered and to that end, efforts will be made to: i. Survey all plots in the Country that were allocated unsurveyed; and ii. Survey all plots before allocation”.²⁹

It seems from the studying of the Land Policy 2019 that the registration of customary land grant is conditioned upon the surveyance of all tribal land in Botswana. The land boards and the Department of Surveys and Mapping have not communicated with the public the progress they are making in surveying tribal land so that people can be in possession of their title deeds. It is anticipated that this will result in unprecedented delays in the issuance of registration of customary land grants and the issuance of the Deed of Customary Land Grant. It is opined that, in turn this would infringe on the right to protection of property of people, as they will not be in possession of any title deed to that effect, while they are awaiting the surveyance of all tribal land and the issuance of the Deed of Customary Land Grant to be issued by the land boards. It is further submitted that the likely delay in the issuance of the Deed of Customary Land Grants titles, citizens will be unable to create title deeds with ease at the Deeds Registry as per the initial procedure³⁰, and there will be delays in processing loan applications or processing land transfers.

²⁸ Botswana Land Policy, 2019 (n 4).

²⁹ Botswana Land Policy, 2019 (n 4).

³⁰ The initial procedure involved people converting their customary land grants to common law leases and getting them registered with the Deeds Registry. See: Ngongola (n 21).

It is submitted that it was very presumptuous for the State to propose these amendments without having surveyed all tribal land.

The right to protection of property is provided for under section 3(c) of the Constitution³¹ which states that,

“Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely-

(c) protection for the privacy of his or her home and other property and from deprivation of property without compensation...”

Therefore, by delaying to provide the citizens with possession of their land by the issuance of the title deeds, the State is effectively infringing on the Constitutional right to protection of property of its people. The people should be in possession of their property and enjoy the rights they have. However, if there is delay in surveying, which in turns leads to the delay in registration and issuance of the Deed of Customary Land Grant, it infringes on the people’s right to exercise their rights, this includes selling the land, taking mortgage bonds on the property as well as any other encumbrances which a property owner may wish to bestow on the property. As it stands the State has allocated 100,000 plots but not all of those plots have been surveyed. This in effect means that citizens have land but have no proof of ownership of their land as they currently have no land titles to show ownership to that land. In addition, since the Deeds Registry

³¹ Constitution (n 3).

(Amendment) Act in 2020 till now majority of the land in Botswana is still not all surveyed. A reasonable man would therefore conclude that the delay in surveying tribal land is not unacceptable and deeply infringes on one's right to protection of property as afforded by the Constitution.

2.2. TRIBAL LAND ACT, 2018

The Tribal Land Act has been repealed and replaced with the Tribal land Act, 2018³². The major change brought about by this Act is the registration of customary land at the Deeds Registry office. Section 23(1) of the Tribal Land Act states that, "Subject to subsection (2), no person may occupy any land granted under the provisions of this Act or the repealed Tribal Land Act unless there has been issued to him or her by the Registrar of Deeds, in the prescribed format, a deed of customary land grant in relation to such land."³³ This section highlights that every person who is to occupy tribal land should do so only with a Deed of Customary Land Grant.

However, section 23(3)³⁴ acknowledges that there are other persons who hold a certificate of land grants and leases granted under the old Act, and has given such persons a period of '6 months' from the date of the Commencement of the Tribal Land Act to re-register such customary land grants or leases.³⁵ It is opined that, this section has not taken into consideration what the new Act seeks to achieve. That is to change the manner of dealing with customary land and such a process takes time. In addition, this section does not recognize the fact that the land may be burdened for example by mortgage bonds and servitudes among others

³² Tribal Land Act, 2018, (n 1).

³³ Ibid.

³⁴ Ibid.

³⁵ Tribal Land Act, 2018, (n 1), section 23(3) states that, "A person who at the commencement of this Act is already in occupation of land referred to in subsection (1) and who holds a certificate of customary land grant or lease issued to him or her in terms of the repealed Act shall make an application for registration of his or her certificate of customary land grant or lease within six months of the commencement of this Act."

that run for a long time, longer than the prescribed 6 months period. Therefore, the 6 months or the next extension which the State may provide, will not resolve the issue of non-registration by some people.

For instance, property which is held under a registered common law right at the Deeds Registry's office, which may have been mortgaged for a period of 20 years, the owner will not be able to re-register their land right to comply with this section and may need the bondholder's consent, which may be withheld. This provision therefore infringes on the right to protection of property³⁶ as it purports to interrupt the creditor's rights and put the creditor's security at risk. It is thus submitted that section 23 (3)³⁷ should have been left open and not include any unreasonable re-registration period.

In addition, section 23(8) states that failure to re-register the property within the prescribed time period the land board will act on behalf of the person by, "...completing and signing the necessary documents in the name of the person."³⁸ This provision is contrary to the Constitution³⁹ by giving the land board the right to act on behalf of the person who is in possession of the property without their consent. This section infringes on the freedom of choice of the owner of the property in that the owner may have possession of the title deed but the land board can still make decisions pertaining to that property without their knowledge and consent and still issue out another title on their property.⁴⁰ In addition, if the land board continues and issues a Deed of Customary Land Grant without the knowledge of the owner of the property, the risk will be that there will be two titles deeds over the same property, one done by the land board

³⁶ Constitution, (n 3).

³⁷ Tribal Land Act, 2018 (n 1).

³⁸ Tribal Land Act 2018, (n 1).

³⁹ Constitution (n 3).

⁴⁰ Constitution, (n 3), s3(b) provides for the protections of ... "freedom of conscience, of expression...".

and the other by the owner. This sets a very dangerous precedent both for protection of security of property and tenure especially for the owner and the lending institutions. It is thus submitted that this section should be revised and possibly deleted from the Tribal Land Act as it is contrary to the protection of property and freedom of choice as provided for by the Constitution.⁴¹ As it stands particularly in relation to Deeds of Customary Land Transfer titles, the land boards issue out a new title deed to the first owner of the property before proceeding to transfer and issue out the new title deed for the new owner. Most land board records are also not accurate as they have old records. That is why shortly after the Deeds Registry (Amendment) Act and the Tribal Land Act came into force, the State issued out a notice to the public to submit Know Your Customer (KYC) documents to the nearest land board. The State even went further to hold KYC outreach stations in various malls in Gaborone to receive these customer documents. The aim was to update their records to make sure that they don't do double allocations on land and to issue titles to the rightful people. This exercise has since stopped and its effectiveness or otherwise has not been communicated. However, it highlights the dangers the land board face if they were to issue out new title deeds on behalf of the owners without their knowledge or consent. This is because they might dispossess an owner by issuing out a new title in the name of an old owner according to their records. This provision therefore infringes on the right to protection of property and right to protection of deprivation of property as outlined by section 3 and 8 of the Constitution. In addition, in light of the Kgabo Commission report which highlighted corruption practices that were occurring at Mogoditshane Land Board, one would assume that the State would have learnt that the powers of the land board need to be regulated.⁴²

⁴¹ Constitution (n 3), s3(b) and s3(c).

⁴² Republic of Botswana, Report of the Presidential Commission of Inquiry into Land Problems in Mogoditshane and other Peri-urban Villages, (Gaborone, 1992) otherwise known as The Kgabo Land Commission Report.

2.3. THE DEEDS REGISTRY ACT AMENDMENTS

The Deeds Registry (Amendment) Act was introduced to allow for the registration of customary land.⁴³ Section 16(3)(b) of the Deeds Registry (Amendment) Act provides that conveyancers shall not conveyance, “the registration of customary land grants and transfer of deed of customary land rights.”⁴⁴ Thereafter, section 4 of the Deeds Registry (Amendment) Act provides that, “Notwithstanding subsection 3(b), sectional titles in relation to customary land grants shall not be attested, executed or registered by the Registrar unless they have been prepared by a conveyancer.”⁴⁵

This is a very interesting addition to the amendment. Essentially, the State is introducing the registration of Deed of Customary Land Grants and denying the conveyancers the right to prepare any transaction in relation to such. However, even though the Conveyancers are restricted from conveyancing customary land grants, they have however been explicitly given the task of conveyancing sectional titles. The State failed to consider the fact that a sectional scheme can be opened on property held under a Deed of Customary Land Grant. This is because, even now sectional title schemes are being opened on tribal land, and if the owners should re-register, they will be possibly awarded Deed of Customary Land Grant title over the property which holds the sectional title. In addition, a person may obtain a Deed of Customary Land Grant and open a sectional title scheme on it. Therefore, these two amendments to section 16 of the Act are contradictory to each other.

⁴³ Deeds Registry (Amendment) Act (n 2), s5(c) provides for the duties of the Deeds registry are to, “register customary land grants, grants or leases of land lawfully issued by the Government or grants issues by any other competent authority...”

⁴⁴ Deeds Registry (Amendment) Act, 2017, (n 2).

⁴⁵ Deeds Registry (Amendment) Act, 2017, (n 2), s16(4).

According to an article by F.G.T Radloff⁴⁶,

“South Africa believes an effective system of title registration is impossible unless each registered unit of land is surveyed and represented on a diagram or general plan... Two categories of to land registration in South Africa: (1) Specialized lawyers known as conveyancers representing the private sector; and (2) Registrars of Deeds assisted by examiners representing the public sector. There is a healthy interaction between the private and public sectors, mainly because their respective roles are clearly defined. Mutual respect is given, mainly because both conveyancers and registrars (and their examiners) are well qualified... a person cannot become a Conveyancer in South Africa unless he or she is admitted as an Attorney in the Supreme Court, one needs to have completed a law degree...the object of registration is to afford protection for registered rights, to give notice to the public of such protection and to provide an easily accessible record should disputes arise.”⁴⁷

The aspect highlighted by Radloff⁴⁸ is that, there is a healthy relationship between the conveyancers and the Deeds Registry office, it is submitted that the same healthy relation can be cultivated between the conveyancers and the land boards. Moreover, Radloff’s⁴⁹ explanation also focused on the preparation of deeds by attorneys who have been admitted as conveyancers. The Tribal Land Act⁵⁰ has not stipulated who at the land board will be in charge of conveyancing the customary land grant. It is submitted that this is a grave omission on behalf of the State, and one

⁴⁶ F.G.T Radloff, “Land Registration and Land Reform in South Africa”, UIC Law Review, Vol. 29, issue 3, Article No.9, (1996), p811. Accessed on 20/08/2023 at:

<https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1726&context=lawreview>

⁴⁷Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Tribal Land Act, 2018 (n 1).

which they may have intended to omit, thus excluding sectional titles from being registered by them. However, it is submitted that the Tribal Land Act, should have explicitly stated that the conveyance of the customary land grants should be done by attorneys who have been admitted to practice as conveyancers by the courts of Botswana.

In addition, this amendment creates a legal problem, because private conveyancers are the ones tasked with representing their clients with Banks via a Power of Attorney, now are the clients going to be engaging land board conveyancers to do transactions for them? It is submitted that the Act should not have restricted customary land grant transactions to only be prepared by the land board, however, it should have been open, to give people a choice of convenience to choose which conveyancer they are going to use. It is important to note at this juncture that people have always had the right to choose which conveyancers can register their pieces of land. This restriction also infringes on this right and forces people to only use the land board to conveyance customary land grants. Likewise, the Deeds Registry does not prepare the Deeds they register, why should the land boards do? Therefore, it is argued that this amendment infringes on the right to protection of property of the people as it is restricting how they can use their property and not giving the people the choice that they had.⁵¹ It is further argued that this unclear process and restriction on the manner in which people conveyance their properties, is also a way to diminish their right to protection of property and how they can deal with their property, which is in turn contradicts the rights protected under section 3 of the Constitution. The Land Policy 2019 has stated that part of the reason for the amendment is to reduce the cost of conveyancing for it's people, however, this should not have been a blanket consideration. Which reason does not apply to everyone as some people do actually afford conveyancers while

⁵¹ Constitution (n 3), s3(b) and s3(c).

some are free to choose any conveyancers within their price range especially with many law firms being registered by the Law Society every year.⁵²

Be that as it may, the State has however also limited themselves by stating in section 16(4) of the Deeds Registry (Amendment) Act⁵³ that they will not be doing any preparation of sectional titles. It seems the owners of property are being pulled in many different directions, on one hand the land board is the one that prepares the customary land grants and all relative transactions thereto, and on the other they are not the one who prepares them. It is humbly submitted that the State has failed to recognize that the conveyance of property and all other aspects of it is a wholesome process and one cannot pick and choose which one they are doing. It also begs the question, if the private conveyancers are to open a sectional title scheme on tribal land held under deed of customary land grant, do they lodge such a transaction with the Deeds Registry or with the land board first? Such has not been explained in the Act, in addition, what titles are going to come out thereof, is it Deed of Customary Land Grant sectional titles and exclusive use areas? Or will the owner of the land have to convert their land back to common law so that it does not go through the route of conveyance by the land board. This creates a grave infringement on the right to protection of property as now people's rights are being intentionally limited by the legislature.

3. CONCLUSION

In conclusion, the amendments were necessary as they paved way to have customary land grants registrable, thus improving the value of tribal land and customary land. Now citizens will be able

⁵² Botswana Land Policy, 2019 (n 4).

⁵³ Deeds Registry (Amendment) Act, 2017, which states that, "Notwithstanding subsection (3)(b), sectional titles in relation to customary land grants shall not be attested, executed or registered by the Registrar unless they have been prepared by a conveyancer".

to use their customary land titles together with their lease titles to benefit themselves. Furthermore, the banks will also start registering mortgage bonds over customary land which is something which was not possible before which fulfils the will of the Land Policy 2019.⁵⁴

However, the State in implementing these amendments has also taken away the rights of the land owners. This is because it has given the land board the express right to act on behalf of the land owners who may for whichever reasons fail to re-register their title deeds and leases with the land board within the stipulated time frame.⁵⁵ Thus violating their right to protection of property, protection against deprivation of property and their right to freedom of conscience as outline in section 3 of the Constitution of Botswana. In addition, the State has further limited the rights of owners by limiting who they can go to, to deal in any way with their customary land grant, in effect they have no other choice than to use the land board. This is an infringement of the people's right of choice as provided by the constitution.

Lastly, the State has also failed to recognize the very nature of property law, that the right to protection of property is a liberating right, which allows the owner of that property to bestow various encumbrances on that land. This was demonstrated by the State's failure to recognize that sectional titles can also be opened on tribal land, thus proving the contradiction highlighted in section 16 of the Deeds Registry (Amendment) Act.

It is however recommended that, the Tribal Land Act be amended to reduce the limitations of rights the State has bestowed on the owners of land by deleting the amendments proposed in section 16 of the Deeds Registry (Amendment) Act. Furthermore, the removal of the specific duration on which such re-registrations should occur and the rights given to the land

⁵⁴ Botswana Land Policy (n 4).

⁵⁵ Tribal Land Act, 2018 (n 1), s23(3), (8) and (9).

board if such re-registration does not occur as outlined in section 23(8) and section 28(9) of the Tribal Land Act as they contradict the provisions of the Constitution.