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

Case No: **CAHMN-000021-23**

In the matter between:

TAWANA LAND BOARD	**1st APPLICANT**
KGOSIKGOLO TAWANA LETSHOLATHEBE MOREMI	**2nd APPLICANT**

and

BOTSWANA KHWEDOM COUNCIL	**1st RESPONDENT**
ODUMETSE KATA	**2nd RESPONDENT**
BONTSHEDITSWE SAXHAGO	**3rd RESPONDENT**
SETHOMO MOTLALESELELO	**4th RESPONDENT**
BOTSHOLEDITSWE MONNALEBALA	**5th RESPONDENT**
DIMBO BOIKAEGO	**6th RESPONDENT**
LETSHOGILE SAXHAGO	**7th RESPONDENT**
KETHUSEGILE ODUMETSE	**8th RESPONDENT**
CISCO MAJIRALETIO	**9th RESPONDENT**
KENEETSWENG MANGE	**10th RESPONDENT**

IN RE:

TAWANA LAND BOARD	**APPELLANT**

And

BOTSWANA KHWEDOM COUNCIL	**1st RESPONDENT**
ODUMETSE KATA	**2nd RESPONDENT**
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KENEETSWENG MANGE	**10th RESPONDENT**

KGOSIKGOLO TAWANA
LETSHOLATHEBE MOREMI **11th RESPONDENT**

Mr. M. Otukile for the 1st Applicant
Mr S. Vivian SC with Mr T. Gaongalelwe
and Mr. M. Moseki for the 2nd Applicant
Mr M. Maswabi for the Respondents

Ruling

Maripe J

1. On the 26th April 2024, this court handed down judgment on an appeal against the decision of the Land Tribunal delivered on the 23rd September 2022. This court upheld the decision of the Land Tribunal. I should record at this early stage that during the proceedings before this court at the time, only the 1st applicant had appealed the decision of the Land Tribunal. The 2nd applicant was the 11th respondent, although he supported the appeal brought by the 1st applicant in a material way as I shall demonstrate hereunder.

2. The 1st to 10th respondents also filed a cross appeal, which was similarly dismissed as may be discerned from the judgment of the 26th April 2024. Now this is an application for leave to appeal to the Court of Appeal by the applicants. The

respondents have not made a similar application. I believe the issues can best be addressed in the order in which they are raised by the applicants.

3. I see that there is a bit of mix up in the parties' heads of argument as to the description of the applicants in these proceedings. For purposes of this ruling, the Tawana Land Board shall be referred to as the 1st applicant and Kgosikgolo Tawana Letsholathebe Moremi as the 2nd applicant. The 1st - 10th respondents shall be referred to as the respondents. I shall deal with those of the 1st applicant first.

The 1st applicant's complaints

4. In its proposed Notice and grounds of appeal accompanying the application, the applicant raises a raft of grounds which in my view are a duplication of essentially one complaint, the alleged lack of *locus standi* on the part of the respondents. There is then an isolated ground on jurisdiction which I shall address briefly in due course.

Locus standi

5. From the outset, I find no merit in this ground. I do not have to re-write the reasons for the position I have taken on the point. This is because the 1st applicant raises the same submissions that were presented during the appeal proceedings and were found to have no merit. Accordingly, I do not have to rehash the reasons. I do incorporate herein by reference, the reasons contained at Paragraphs 13 to 52 of the impugned judgment and repeat the same herein. However there is a couple of issues that appear on the applicant's proposed grounds of appeal that I need to address. I do so hereunder.

6. Ground X of the applicant's grounds of appeal alleges that the court raised new legal issues without affording the parties the opportunity to address it thereon. The issue so identified by the applicant is one relating to the capacity of heirs to sue on matters of the estate without the assistance of the executor.

7. With the greatest of respect this is disingenuous. This issue was raised by the 1st applicant itself when it filed its grounds

of appeal against the decision of the Land Tribunal. And counsel *Otukile* made submissions thereon on the very first paragraph of his heads of argument filed with this court on the 30th October 2023, whereat he extensively addresses the issue. Paragraphs 18 and 19 of the impugned judgment show clearly that what was being addressed are issues raised by the 1st applicant, as the appellant then.

8. I think the 1st applicant has elected to misunderstand the genesis of the issue. The issue emanated from the objection raised by the respondents during the engagement with the Land Board, and during the proceedings at the Land Tribunal. The bases for the respondents' appeal to the Land Tribunal appear at Paragraph 6 of the judgment of the court, and those are extracted from the grounds they presented to the Land Tribunal for determination.

9. Ground (d) thereof shows generally that the dispute generally centred around succession or inheritance and specifically that the issue of them being heirs was raised. See Paragraph (iii) thereof. The Land Tribunal addressed it, and this court

similarly addressed it. So it cannot be a new issue. Even then, to the extent that the issue is about *locus standi*, the court would have been at large to deal with from all angles as long as those were raised, and they were. It is not a new issue. I therefore dismiss this basis for the application as lacking merit and without prospects of success.

10. At Paragraphs 47 to 52 of the judgment of this court, I made reference to the fact that the 2nd applicant's claim before the Land Board was based on inheritance. That is not denied. So the 1st applicant accepts that the 2nd applicant was within his rights to pursue such a claim before them. It is strange that they say that the respondent's objection could not have been based on similar considerations. I repeat what I said at Paragraph 51 that in adopting this position the 1st applicant is approbating and reprobating. I also repeat Paragraph 52 of the judgment. This ground is without prospects of success and I dismiss it.

Jurisdiction

11. The 1st applicant complains that this court failed to dismiss the issue of jurisdiction raised by the respondents as opportunistic and an afterthought. Again this complaint is based on a false premise. All parties accepted that the Land Tribunal was right to hold that it had no jurisdiction to determine inheritance disputes. It seems the complaint is that the respondents should have been estopped in claiming that the Land Board had no jurisdiction to determine an inheritance dispute.

12. The 2nd applicant is seeking to confer jurisdiction on the Land Board by estoppel. This cannot be. A Land Board is a statutory creature and its jurisdiction is based on its founding statutory framework. It cannot seize any form of jurisdiction other than the one conferred by statute.

13. Speaking about the jurisdiction of the Industrial Court in *Sebudi v Beverages and Allied Workers Union* [1997] BLR 12 (IC), at p15, De Villiers J said;

> The Industrial Court is a creature of statute and all powers it has, can only be derived from the empowering statute, which in this case is the Trade Disputes Act. This court has no inherent jurisdiction like the High Court.
>
> ...so All parties...

14. Although the learned judge was dealing with the jurisdiction of the Industrial Court, the same principle applies here as both the Land Board and the Land Tribunal are creatures of statute and their jurisdiction is statutorily circumscribed. The jurisdiction of the Land Board cannot therefore be conferred by the parties before it, not can it exist because one is estopped from denying its existence.

15. The 1st applicant says this court should have held that since the Tribunal has no jurisdiction to entertain inheritance disputes, the court should have advised the respondents to seek an interdict against the Land Board. This court does not advise parties. It makes determinations on disputes before it, which it did. The Land Board would have been proceeding at its own peril if it proceeded to determine an inheritance dispute, and risking its decision being set aside for want of

jurisdiction. The complaint has no merit and no prospects of success and is dismissed.

The 2nd Applicant

16. The case of the 2nd applicant differs slightly from that of the 1st applicant in that on the 7th June 2024, he filed a substantive appeal before the Court of Appeal. It is registered in that court under Case No. CACGB-156-24. The appeal is against the same judgment of this court which is the subject of the current application proceedings. It awaits determination by that court. Against this development, the respondents have taken a point *in limine* in these proceedings.

17. The point is raised on a Notice to raise points *in limine* and is captured at Paragraph 3.1 of the respondents' heads of argument as follows:

> The 1st applicant's application is incompetent because he has simultaneously filed an appeal at the Court of Appeal involving the exact same parties and challenging the same judgment-which is fatal.

18. The same is raised at Paragraph 5 of the heads of argument. It must be understood that reference to the 1st

applicant in the paragraph referred to above is to the 2nd applicant in these proceedings.

19. The 2nd applicant does not deny that he has filed an appeal against the judgment of this court of the 26th April 2024 with the Court of Appeal. In fact, he confirms it in his affidavit filed in support of his application before this court. It would appear from the 2nd applicant's papers that he filed with the Court of Appeal because in his view this court exercised original jurisdiction in one instance, but if it did not, then that is the reason he filed this application.

20. To avoid possibly misrepresenting the 2nd applicant's position, it is well to reproduce Paragraph 4 of his heads of argument. It runs as follows:

> The applicant contends that the Land Tribunal improperly referred the matter to the High Court under Section 18(3) of the Constitution without resolving the substantive appeal before it. Further, the High Court, sitting as a court of first instance, erroneously set aside the decision of the TLB despite none of the parties seeking this relief, and without due consideration of its jurisdictional limits and the interests

of third parties, including NS Moremi Proprietary Limited, which holds a sublease over the allocated land and has made significant investments in its development.

21. There is some heavy weather made of the Land Tribunal's referral of the matter to the High Court. At Paragraph 6.18 of his affidavit filed in support of this application, the 2nd applicant says:

> The matter accordingly served before this court not as an appeal, but as a referral to the High Court in terms of Section 18(3) of the Constitution. Even if the inheritance issue as well as other incidental issues were properly referred to the High Court (which I dispute), the High Court sat as a court instance.

22. This is repeated at Paragraph 8.1.6 of his affidavit. I think the 2nd applicant is reading the order of the Land Tribunal selectively, and he also disregards the steps he took and the manner of his participation in the matter when it landed in this court.

23. While it is correct that the first paragraph of the Order of the Land Tribunal of the 23rd September 2022 refers the matter to

the High Court in terms of Section 18(3) of the Constitution, the last Paragraph reserves, and informs the parties of their right to appeal to the High Court if aggrieved by that decision.

24. The parties were aggrieved by that and exercised their rights to appeal as advised. That is how the matter landed in this court, at the instigation of either parties since they both filed appeals, except the 2nd applicant who supported, in all respects the appeal of the 1st applicant.

25. This court sat on appeal from the decision of the Land Tribunal. And the parties, except the 1st applicant filed notices of appeal challenging the decision of the Land Tribunal in one respect or other. The suggestion that this court sat at first instance cannot therefore be correct.

26. At Paragraph 5.5 of the affidavit filed in support of this application, the 2nd applicant takes the position that he did not file a notice and grounds of appeal before this court and that he only supported the 1st applicant's notice and grounds of appeal. While it may be correct that he did not file a notice

and grounds of appeal, the impression should not be created that the 2nd applicant was a passive party. He was very active as I shall shortly demonstrate.

27. He was represented by counsel, Mr *Dingake*, during those proceedings, under whose hand comprehensive heads of argument were filed on the 20th November 2023. Paragraph 3 of those heads of argument reads as follows:

> The 11th respondent files these heads of argument in support of the appellant's notice and grounds of appeal, as well as opposing the 1st to 10th respondents' notice and grounds of appeal.

28. He had previously, and precisely on the 13th October 2023, filed a Notice of support, in which he signified his intention to support the notice and grounds of appeal filed by the 1st applicant. On the same day he filed a notice of opposition in which he signified his intention to oppose the grounds of appeal filed by the respondents.

29. And he prayed that the 1st applicant's appeal should succeed and that the 1st to 10th respondents' appeal be dismissed. He also prayed for costs.

30. The 12nd applicant supported the appeal brought by the 1st applicant, and he was a party to those proceedings. He was not a passive party, otherwise he would have filed a notice to abide, which he did not.

31. The main appeal was brought by the 1st applicant, and the respondents, as the 1st-10th respondents, filed a cross appeal. The decision of the court was to dismiss both the appeal and the cross appeal. Critically, the decision left the parties to their full options to institute proceedings in any competent forum as they may desire. So this court only exercised appellate jurisdiction and did not sit at first instance.

32. At Paragraph 34 of his heads of argument, Mr *Vivian SC* contends that this court sat at first instance and exercised its jurisdiction under Section 18(3) of the Constitution. This is incorrect. This court sat on appeal. I have searched through

the judgment in a bid to find any pronouncement on the rights of the parties in terms of section 18(3) of the Constitution. There is none.

33. Now, there is an appeal pending before the Court of Appeal arising from the judgment of this court and which is the subject of these proceedings. The parties are the same. The same issues are raised. And it is the same judgment of this court that is subject of those proceedings. Can I hear the matter? No. I cannot. In this I agree with the respondents that this application is incompetent for the reason that the matter is serving and awaiting determination by the Court of Appeal.

34. The applicant says he has filed this application out of caution. During oral address, I put the question to Mr *Vivian SC,* learned counsel for the 2nd applicant as to whether the hearing of this application when the Court of Appeal is seized of the matter does not amount to crossing jurisdictional lines. Counsel said they were acting out of abundance of caution. This appears even in his heads of argument. I do not agree that caution can cure the impropriety.

35. I agree with Mr *Maswabi* that an applicant for leave to appeal is seeking permission to appeal. In this case the 2nd applicant seeks that permission when he has already filed an appeal. Any order I am to make will be inconsequential, and a *brutum fulmen* as counsel submitted, since it cannot affect the proceedings before the Court of Appeal.

36. In my view, once the Court of Appeal is seized of a matter, all matters before the inferior courts involving the same issues and between the same parties must be stayed pending determination by that court. In this case, the 2nd applicant filed proceedings before the Court of Appeal, before launching this application. This cannot be right. Instead of staying the matter it has to be dismissed as improperly before the court. I also agree that it is abuse of court process to have instituted these proceedings when the matter is serving before the Court of Appeal.

37. Having said the above, I cannot comment on the competence or otherwise of the matter before the Court of Appeal. That is

for that court to determine. I cannot begin to second guess its decisions. It would highly be improper and amounting to encroachment into the jurisdiction of the Court of Appeal. For the reasons stated above, the 2nd applicant's application is incompetent and improperly before this court.

Conclusion

38. For the reasons stated above, the two applications are not successful for the various reasons stated. Accordingly, I make the following orders:

(a) The 1st applicant's application for leave to appeal to the Court of Appeal is refused and dismissed;

(b) The 2nd applicant's application for leave to appeal to the Court of Appeal is refused and dismissed;

(c) Both applicants shall bear the costs of the proceedings.

DELIVERED IN OPEN COURT AT MAUN THIS 20th DAY OF JUNE 2025.

B. MARIPE

(Judge)