



**IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA**  
**HELD AT GABORONE**

**MAHGB-000819-17**

**In the matter between:**

**Malete Land Board**

**APPLICANT**

**and**

**The Registrar of Deeds for Botswana**

**1<sup>st</sup> RESPONDENT**

**The Attorney General of Botswana**

**2<sup>nd</sup> RESPONDENT**

**(Representing the Registrar of Deeds)**

**Kgosi Mosadi Seboko N. O.**

**3<sup>rd</sup> RESPONDENT**

**Gamalete Development Trust**

**4<sup>th</sup> RESPONDENT**

**Heard: 22<sup>nd</sup> March 2021**

**Delivered: 21<sup>st</sup> May 2021**

**Advocate Mr. Redman N. (appearing with him Attorney Mr. Muzimo P.) for the Applicant**

**Advocate Mr. Rammidi O. S. (appearing with him Attorney Mr. Taunyane M) for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

**Advocate Mr. Budlender G. (appearing with him Advocate Mr. Debeer M. and Attorneys Mr. Motlhala O. T., Mr. Rantao T. and Mr. Bothole K.) for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents**

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**J U D G M E N T**

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**CORAM: MOTHOB I J.**

**GABANAGAE J.  
KOMBONI J.**

**KOMBONI J;**

**INTRODUCTION**

1. This is an application in which the Applicant seeks an order directing the Registrar of Deeds being the 1<sup>st</sup> Respondent herein to cancel Deed of transfer No. 387 passed in favour of the Bamalete Tribe in respect of farm Forest Hill 9-KO. The Applicant further seeks an order directing the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to deliver the floating copy of the same title deed for the purposes of its cancellation within 7 days of the date of the order.
2. The Applicant further seeks an order directing the Deputy Sheriff to sign all necessary documents and do everything necessary for the purposes of cancelling the same title deed in the event that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents refuse to deliver the said title deed.
3. The Applicant is a Land Authority in charge of all land in Bamalete Tribal Territory in terms of the Tribal Land Act.
4. The Attorney General for the Republic of Botswana is cited herein in his capacity as the official legal representative of the Registrar of Deeds in terms of the relevant legislation.

5. The 3<sup>rd</sup> Respondent being Kgosi Mosadi Seboko is the paramount chief of the Balete Tribe and is cited herein in her official capacity.
6. The 4<sup>th</sup> Respondent is the Gamalete Development Trust which is a trust charged with the Administration of the Assets of the Bamalete Tribe.
7. The essence of this application is that the Applicant seeks to get hold of the title deed aforesaid for the purposes of taking control of the farm under which the title deed is held. The Applicant takes the view that in terms of relevant legislation the details of which shall appear hereunder the farm was acquired from the tribe which has owned the same farm since 1925 and now the same farm has to fall under control and administration of the Applicant.
8. The application is opposed and there is a counter application filed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
9. The matter is of much importance to the parties as it involves a dispute over a large piece of land in the periphery of the capital city which is evidently valuable. It raises constitutional issues around

property rights and how such rights can be acquired by public authorities such as the Applicant.

## **THE PLEADINGS**

10. At this point it is appropriate to make reference to the pleadings filed by the parties. We have already stated above the orders sought by the Applicant from this court. These orders are based on a founding affidavit deposed to by the Applicant's Board Secretary.
11. The answering affidavit in opposition to the application was deposed to by the 3rd Respondent who as already stated above is the Chief of the Bamalete Tribe (hereinafter the Tribe). The 3rd Respondent filed the same answering affidavit on her own behalf and also on behalf of the 4th Respondent being the Bamalete Development Trust (hereinafter the Trust)
12. In addition to filing the answering affidavit, the 3rd Respondent filed a conditional counter application which was supported by a founding affidavit. In the conditional counter application the 3rd Respondent seeks certain orders in the event that it is found that in terms of the Tribal Land Act and the Tribal Territories Act, the right and title of

the tribe to farm Forest Hill 9 – KO have vested in the Applicant. The orders sought are as follows:

1. Section 7 of the Tribal Territories Act, alternatively the Tribal Territories Amendment Act of 1973, alternatively section 10 (1) of the Tribal Land Act, alternatively the repeal of section 10(2) of the Tribal Land Act by Act 14 of 1993 is inconsistent with section 8 of the constitution of Botswana and invalid, on the grounds that it brings about an impermissible compulsory acquisition of an interest in or right over a property
2. Section 7 of the Tribal Territories Act, alternatively the Tribal Territories Amendment Act of 1973, alternatively section 10 (1) of the Tribal Land Act, alternatively the repeal of section 10(2) of the Tribal Land Act by Act 14 of 1993 is inconsistent with section 15 of the Constitution of Botswana and invalid, on the grounds that it impermissibly discriminates in itself and in its effect
3. Section 7 of the Tribal Territories Act, alternatively the Tribal Territories Amendment Act of 1973, alternatively section 10 (1) of the Tribal Land Act, alternatively the repeal of section 10 (2)

of the Tribal Land Act by Act 14 of 1993 be and are hereby struck down

4. It is declared that the remainder of farm Forest Hill 9 – KO vests in the Bamalete (Ba-Ga-Malete) tribe
  5. The 1<sup>st</sup> Respondent is ordered to pay the costs of this counter application
  6. In the event of the 2<sup>nd</sup> Respondent opposing this counter application, it is ordered to pay the costs of this counter application, jointly and severally with the 1<sup>st</sup> Respondent
  7. Further, other or alternative relief
13. In this conditional counter application the 3<sup>rd</sup> Respondent is the 1<sup>st</sup> Applicant and the 4<sup>th</sup> Respondent is the 2<sup>nd</sup> Applicant. The Attorney General of Botswana in his representative capacity of the Government of Botswana is cited as the 1<sup>st</sup> Respondent and the Malete Land Board (hereinafter the Land Board) is cited as the 2<sup>nd</sup> Respondent.
14. The Attorney General filed an answering affidavit to the counter application. The Land Board also filed an answering affidavit to the

counter application and further filed *points in Limine*. In the same *points in limine* the Land Board states that the issues raised by the tribe and the trust in both their answering affidavit as well as the founding affidavit in the conditional counter application are all issues which have been addressed and fully ventilated in both the High Court and in the Court of Appeal under civil appeal case number CA CLB 036 – 10 and High Court civil Case number MAHLB000045 – 08. Consequently it is stated in the said points in *limine* that the Land Board and the trust are precluded and/or *estopped* from raising these issues in this Court in accordance with the principles of *exceptio rei iudicatae* alternatively *estoppel* by judgment, further alternatively, issue *estoppel*.

15. The usual and complete set of affidavits filed in applications and counter applications were filed by all the parties and the pleadings were subsequently closed.
16. Subsequently on 18<sup>th</sup> June 2019 the parties filed a joint case management report in which the facts which are not in dispute, the issues of law and facts to be resolved during the hearing were stated together with other items required by the Rules of Court. On 20<sup>th</sup> June 2019, the same report was made an order of the Court at the

instance of the parties. The matter was further set for hearing on 23<sup>rd</sup> October 2019.

17. On 13<sup>th</sup> September 2019 the tribe and the trust filed a notice of amendment to the counter application in which they sought to add a prayer the essence of which was to declare the amendment of section 10 (1) of the Tribal Land Act by Act 14 of 1993 inconsistent with section 8 and section 15 of the Constitution of Botswana and invalid on the grounds that it brings about an impermissible compulsory acquisition of an interest in or right over property and on the grounds that it impermissibly discriminates in itself and in its effect, and therefore is to be struck down.
18. The Land Board opposed the application for amendment and filed its opposing affidavit.
19. We scheduled the hearing of the application to amend the notice of motion in the counter application on 19<sup>th</sup> October 2020. After hearing full argument, we dismissed the application for amendment and stated that we shall give our reasons for the same in this judgment. We shall now proceed to do so below.



## **The Tribes Application for Amendment**

20. According to the tribe in its affidavit in support of the application to amend the notice of motion in the conditional counter application the same amendment is in order to address a matter which was raised in the Land Board's answering affidavit to the counter application.
  
21. In its answering affidavit the Land Board stated that when the Tribal Land Act was enacted section 10 (1) provided that land vested in the Land Board in trust for the benefit and advantage of the tribesmen of that area and for the purpose of promoting Economic and Social Development of all the peoples of Botswana. The Land Board states that the same subsection was amended in 1993 to its present formulation which removes the reference to tribesmen of the area and replaces it with reference to the citizens of Botswana. The Land Board therefore states that if the compulsory acquisition of the farm occurred under the Tribal Territories Act read with section 10 (1) in its unamended form and therefore that when

section 10 of the Tribal Land Act was amended in 1993 the tribe had already been divested of their rights and title in the land.

22. The tribe says that what the Land Board states is not a correct analysis of the legal consequences of what has happened and that it will address the same in argument. It however says that out of an abundance of caution it has been advised to seek an amendment in the alternative to declare the invalidity of the amendment of section 10 (1) of the Tribal Land Act in 1993
23. The tribe further states that the amendment of the notice of motion will not cause any prejudice to the respondents in the counter application as it addresses a purely legal submission which arises from the contentions raised by the Land Board in its answer to the counter application.
24. The tribe further states that it relies on its founding affidavit in the counter application for the additional prayer brought about by the amendment proposed.
25. The Land Board in its opposing affidavit narrates the status of the pleadings and the trouble it had to go into in searching and

investigating material in order to file an answering affidavit to the various constitutional challenges stated in the counter application.

26. The Land Board further states that the amendment sought is a substantial and new legal and constitutional point. The Land Board further states that the said constitutional point will not only affect the parties in this dispute but other Land Boards throughout the country which Land Boards have not been joined to the application.
27. The Land Board further states that the proposed amendment will require it to access parliamentary archives and retrieve Hansard reports dealing with amendment to section 10 of the Tribal Land Act in order to establish the rationale behind the amendment. It says that the new constitutional challenge would have to be fully researched and ventilated in the affidavits.
28. The Land Board further states that the tribe has not placed any facts before the court to motivate the new constitutional challenge and there is no explanation as to why the tribe never raised the point when they filed the counter application or at the time that they filed a replying affidavit.

29. In a nutshell therefore the Land Board alleges prejudice that will be occasioned by the amendment for the various reasons given in its affidavit as summarised above.
30. The law relating to amendment of pleadings is more or less settled in this jurisdiction. I need only to refer to one case which I believe gives a good account of the applicable legal principles. This is the case of Metcash Trading Africa (Pty) Ltd t/a Friendly Distribution v Properties (Pty) Ltd t/a Kgale West Friendly Supermarket and Others 2007(1) BLR 707. In the same case, Kirby J as he then was stated as follows:

*"The general principles on the allowing of amendments to pleadings have been confirmed by the Court of Appeal in Coetzee v National Railways of Zimbabwe's [1982] BLR 64, CA p71 as follows:*

- (a) *The courts will usually grant applications to amend pleadings where the amendments sought will not cause an injustice to the opposite party that cannot be compensated by an appropriate order as to costs.*

(b) *Since the application is for an indulgence the Applicant must afford an explanation for his request, more especially if his application is not timeous, involves the withdrawal of significant admissions, or where his opponent could be substantially prejudiced when the amendment is to be granted.*

(c) *Generally speaking it is necessary to file an affidavit of merits, in answer to which his opponent may advance reasons as to why he may be prejudiced if the application is allowed.*

*To these may be added the following:*

(d) *An amendment should not be refused merely to punish the plaintiff for his neglect.*

(e) *In order to determine the real issue between the parties, the court may permit a new cause of action to be introduced by way of amendment.*

(f) The party seeking an amendment bears the onus of showing it is made bona fide and that there is absence of prejudice.

(g) An Applicant cannot be allowed to harass his opponent by an amendment which has no foundation – he cannot please on the record in issue which has no supporting evidence.

(h) The Court will disallow an amendment if it will lead to an excipiable pleading

(i) Where an amendment will simply prolong and complicate the proceedings, rather than to contribute to the real issue between the parties, it will not be allowed

(j) An amendment will not be allowed to introduce a new cause of action which has clearly prescribed.

(k) An amendment should be refused where the averment sought to be introduced has no prospect of success.

(l) *Where there is a real doubt whether prejudice or injustice would result therefrom, an amendment should be refused”.*

31. We came to the decision to refuse the granting of the application to amend for the reason that the tribe has not discharged the onus of showing that no prejudice would be caused to the other parties which prejudice cannot be compensated by an appropriate order for costs. On the other hand the Land Board has demonstrated the prejudice that will be caused by the amendment.
32. The tribe has not made out a cause of action in its founding papers regarding the amendment. It has referred to the founding affidavit to the counter application as forming the basis for the amendment. The founding affidavit however does not have information to support the amendment proposed.
33. Given the status of the pleadings and the age of the matter, and the far-reaching nature of the amendment proposed, the matter will essentially stall to enable the Land Board and other Respondents to search archives in order to contextualise the amendment. There is also the possibility of having to join other parties such as other Land

Boards which would be directly affected by the constitutional challenge to the 1993 amendment of the act. This will just serve to further delay the matter.

34. It is also apposite for us to point out that in this matter, the parties' final case management report which distilled all the issues for the decision of this court had already been made and order of the court. The proposed amendment of necessity requires the alteration of the final case management order and we do not believe that a case for such amendment in view of the relevant provisions of the rules of the High Court has been made.
35. It was therefore on the basis of the above and applicable legal principles already enunciated above that we refused to allow the proposed amendment to the prayers in the counter application.
36. We now turn to summarise certain factual and legal issues that will inform our decision on the main issues which the parties have identified for our decision.
37. The Land Board's claim against the Tribe and the Trust for the cancellation of Deed of Transfer No. 387 under which farm Forest Hill 9 – KO is held is premised on the Tribal Territories Act, Tribal



Land Act and the Court of Appeal decision in the case of Quarries of Botswana Pty Ltd v Bamalete Development Trust, Tshepho Phuthego, Bashi Buti, Kgosi Mosadi Seboko N.O and Maletse Land Board Case No. CACLB - 036-10( hereinafter the Quarries case). The judgement in the Quarries case involved an application for an interdict by Quarries of Botswana against the Respondents in respect of the use of a road which passed through the farm under dispute. During the course of the litigation, the issue of ownership of the farm became relevant. The Court of Appeal consisting of five Justices of Appeal in its judgment delivered on 29<sup>th</sup> July 2011 made a finding that the farm vested in the Land Board in terms of the Tribal Territories Act read with the Tribal Land Act.

38. It is perhaps necessary at this juncture to give a historical background to the Tribal Territories Act and the Tribal Land Act as well as a synopsis of the Quarries case. This will assist in better appreciating some of the issues at hand.

### **The Tribal Territories Act**

39. The Tribal Territories Act is deeply rooted in the colonial history of this country. It came about as a proclamation of native reserves

within the Bechuanaland Protectorate for ease of administration and tax collection. It was enacted as proclamation number 9 of 1899 dated 29th March 1899. In its initial form it created native reserves for 5 tribes being Bamangwato, Batawana, Bakgatla, Bakwena and Bangwaketsi. The Bamalete native reserve was established later in 1909 through Proclamation No. 28 of 1909.

40. It was observed by a three-member bench of the High Court in the case of Kamanakao 1 and Others v The Attorney General and Another 2001(2) BLR 654(HC) at page 676 which matter was dealing with matters in respect of the Wayeyi tribe Chieftainship issues as follows:

*"The Tribal Territories Act was first enacted as proclamation number 9 of 1899 and was continually amended and re-enacted; the last replacement law being proclamation number 45 of 1933. This last proclamation has been amended from time to time but essentially it is the 1933 Act which presently exists in our statutes. The act sets out tribal territories in Botswana and delineates and specifies the boundaries thereof. These areas are those of the Bamagwato, Bakgatla, Bakwena, Bangwaketse, Bamalete, Barolong, Batawana, and Batlokwa tribes. The law omits in this or subsequent*

amendments any mention of any area for the Wayeyi tribe. Furthermore, other pieces of land in Botswana are not designated Tribal Territories even though tribal Communities reside therein."

41. We take judicial notice of the fact that the administrative structure of Botswana is largely anchored on the Tribal Territories Act. Delineation of districts and the jurisdiction of various chiefs in the country are largely along the lines of the same Act. Laws such as the Bogosi Act, Tribal Land Act and Administrative District Act are either directly or indirectly connected to the Tribal Territories Act.
42. We further note in passing that the general character and substance of the Tribal Territories Act has remained unchanged even after the end of the Bechunaland Protectorate.

### **The Tribal Land Act**

43. The Tribal Land Act was enacted in 1968 and came into effect in 1970. The main purpose of the same Act was to remove the powers of the chiefs in respect of Land Administration in Tribal Territories and give the same powers to Land Boards. Each Land Board was given jurisdiction over land which fell within the tribal territory for

which it was constituted. Of significance is section 10 of the Act which in its original form read as follows:

*"10 vesting of Tribal Land in Land Boards*

*10 (1) All the rights and the title of the chief and tribe to land in each tribal area listed in the first column of the first schedule shall vest in the Land Board set out in relation to it in the second column of the schedule in trust for the benefit and advantage of the tribesmen of that area and for the purpose of promoting the economic and Social Development of all the peoples of Botswana"*

44. Section 10 (1) of the Tribal Land Act was subsequently amended to replace "*tribesmen*" with "*citizens of Botswana*"

**The "Acquisition "Amendment**

45. By way of Act No. 3 of 1973, The Tribal Territories Act was amended at section 7 by repealing the same section and replacing it with a new section that described the Bamalete Tribal Territory. The same Act defined in the Bamalete Tribal Territory as including "*the remainder of the farm Forest Hill No. 9 – KO shown on plan KO – 208 deposited with the director of Surveys and Lands*"

46. In terms of documentation filed by the parties particularly a document dated 25<sup>th</sup> October 1972 which was a presentation by the then Minister of Local Government and Lands Honourable Mr Kgabo when moving for the amendment aforesaid he is quoted as saying the following *"Mr Speaker the amendments proposed to the Tribal Territories Proclamations are very brief. The description of Bamalete Tribal Territory is to be amended to reflect the fact that the tribe has acquired two farms. The remainder of farm Forest Hill No. 9-KO and portions one and two of farm Quethiok No. 2 JO. Henceforth this land will be Tribal Land and not private land. This Bill has been presented to, and approved unanimously by the House of Chiefs at the recent sitting"*

### **The Quarries of Botswana Case**

47. The Land Board relies on paragraphs 38 and 39 of the quarries of Botswana case judgment of the Court of Appeal which states as follows per Howie JA who penned the unanimous decision of the Court:

*"38. The constitutionality of the TTA and the TLA in the relevant respects has never been challenged. The*

*inclusion of Forest Hill in the Bamalete tribal territory and its consequent vesting in the 5<sup>th</sup> Respondent involved removal of certain powers of the Bamalete Chief and affected tribal property. Accordingly, the constitution, in terms of the provision now contained in section 88 (2), required referral of the proposed legislative changes in question to the House of Chiefs established under section 77 (1) of the constitution. It has not been alleged that such a referral did not occur or that the Bamalete Chief at the time objected. It must follow that the statutory termination of Bamalete freehold title in Forest Hill and the vesting of the land in the 5<sup>th</sup> Respondent was not unconstitutional.*

*39. I therefore conclude that at the time of the events giving rise to this litigation Forest Hill rested not in the tribe, through the 4<sup>th</sup> Respondent, but vested in the 5<sup>th</sup> Respondent."*

48. We need to clarify that the current Applicant in this matter being the Land Board was originally not a party to the Quarries case. The Land Board was added as 5<sup>th</sup> Respondent by the Court of Appeal at its own motion after it appeared that it could be an interested party

in respect of the ownership of the farm. Even though it was joined as 5<sup>th</sup> Respondent due to the possibility that it was the owner of the farm, the Land Board at the Court of Appeal filed an affidavit disavowing ownership of the farm and indicating that as far as it knows and informed by legal opinions tendered by the Attorney General the farm belonged to the tribe. Be that as it may, the Land Board is relying on the very same judgment to claim ownership or jurisdiction over the farm.

### **The Applicants Case**

49. The Land Board's case is premised on the following facts and averments as enunciated in its founding affidavit which we will summarise.
  
50. According to the Land Board the effect of section 10 of the Tribal Land Act is that all land in the Bamalete Tribal Territory is vested in the Malete Land Board and that in terms of section 7 of the Tribal Territories Act describing the Bamalete Tribal Territory the same Act was amended to include farm Forest Hill 9 – KO in the same Tribal Territory. It therefore avers that in terms of the said amendment

as read with section 10 of the Tribal Land Act the farm vested in the Land Board.

51. The Land Board states that as a consequence of the aforesaid Acts, the tribe was divested of the farm and its administration and management of the farm was removed from the chief and the trust. The Land Board proceeds to state that the rights title and interest vested in the Tribe by virtue of Deed of Transfer No. 387 were terminated by operation of law and passed to the Land Board.

### **The Tribes Response**

52. The tribe's responds to the Land Board's claim for cancellation of the title deed by stating that at all material times the farm has always been the freehold farm of the tribe since 1925 after the tribe purchased the same. The same farm was registered at the Deeds registry on 1<sup>st</sup> July 1925 under No. 387. The tribe states that the purchase price of the farm was raised from the members of the tribe and the purchase was meant to address the acute land shortage particularly grazing land.
53. The tribe further states that government purchased the two portions from the tribe which were duly transferred to Government. It is



further stated that at all material times the government and other stakeholders have always considered and treated the farm as freehold property of the tribe. It is further stated that in 2007 the government engaged in protracted negotiations with the tribe for the possible purchase of the farm however the said negotiations fell through. Indeed documentation in that regard has been attached.

54. The tribe further states that it never relinquished ownership of the same farm and that any such divesting of the ownership of the farm from the tribe would necessitate and be preceded by an extensive and transparent process of consultation between the tribe and the government with the tribe finally signifying its consent if so disposed through Kgotla resolutions. It is further stated that no such consultation or consultation process has ever taken place in that regard and that the tribe has never consented to be divested of its proprietary rights and interest in the farm.
55. The tribe states that at the time of the enactment of the Tribal Land Act in 1970, the farm was not listed as part of the Bamalete Tribal Territory and that the 1973 amendment of the Tribal Territories Act to include the farm in the Bamalete Tribal Territory could not have signified Parliament's intention to bring about an uncompensated

expropriation or the possession of land owned by the tribe and that such dispossession would be inconsistent with the constitution and that section 7 of the Tribal Territories Act and the 1973 Tribal Territories Amendment Act are not to be interpreted so as to bring about the expropriation result.

56. The tribe in addition to filing its answering affidavit as stated above, filed a conditional counter application which is to the effect that in the event that it is found that in terms of the Tribal Land Act and the Tribal Territories Act, the rights and title of the tribe to farm Forest Hill No. 9-KO have vested in the Land Board then the relevant sections which have been used to acquire the farm violated section 8 of the constitution in that it brings about an impermissible compulsory acquisition of an interest or right to property. Further that the same sections are inconsistent with section 15 of the Constitution of Botswana and are invalid on the grounds that they impermissibly discriminate in themselves and in their effect. The tribe then seeks the striking down of the same sections and a declaration that the farm Forest Hill No.9-KO vests in the Bamalete tribe. We have already reproduced above the orders sought by the tribe and the thrust of the conditional counter application.

57. As already stated above, the Land Board has raised *points in limine* which target the conditional counter application based on averments that the issue of ownership of the farm and the legality thereof as well as the constitutionality of the same acquisition have already been decided in the Quarries case. This is the issue of res judicata alternatively estoppel by judgement and further alternatively issue estoppel. This is an issue that the parties have identified as standing for decision by this court in the final case management report which was made an order of the court. We shall decide this issue together with the other issues that have been identified in the final case management order.

### **The issues**

58. At this point we shall proceed to deal with the issues raised by the parties as distilled in the final case management conference report which was made an order of the Court. We shall not necessarily deal with each and every issue identified by the parties in view of the fact that some of the issues are overlapping and a decision on one issue might resolve the other issues not specifically addressed.

59. We find it convenient to start with the issue of *res judicata/estoppel* by judgment/issue estoppel. The parties have formulated the same issue as follows:

*"Whether the 3<sup>d</sup> and 4th Respondents are precluded and or estopped from raising the issue of ownership and the issue of the constitutionality of the impugned provisions and the acquisition of the property pursuant to section 7 of the Tribal Territories Act of 1973 in accordance with the principle of exceptio rei judicatae, alternatively estoppel by judgment, further alternatively issue estoppel"*

### **Res judicata and issue estoppel**

60. The parties have filed comprehensive heads of argument in respect of this issue touching on the applicable legal principles. We are indebted to them.

61. The requirements of *res judicata* have been stated by our Courts in many decisions and are fairly settled. They are as follows:

62. There has to be a judgment given by a competent Court

- (a) between the same parties (b) based on the same cause of action and (c) with respect to the same subject matter or thing (see Leoifo v Ngwato Land Board and Others [2014] 3 BLR 468 (CA) at 470 to 471; Standard Chartered Bank of Botswana Ltd v Isaacs and another [1999] 1 BLR 453 (CA))

63. It has also been said that the last two requirements of *res judicata* are not immutable and have in some cases been relaxed by applying the English law doctrine of issue *estoppel*. The requirements of issue *estoppel* were described in the case of Bafokeng Tribe v Impala Platinum Ltd and Others 1999(3) SA 517 as follows:

*"The doctrine of issue estoppel has the following requirements: (a) where a court in a final judgement on a cause has determined any issue involved in the cause of action in a certain way, (b) if the same issue is again involved, and the right to reclaim depends on that issue, a determination in (a) may be advanced as an estoppel in a later action between the same parties, even if the later action is founded on a dissimilar cause of action."*

64. It has to be noted however that the relaxation of the *res judicata* requirements and application of issue *estoppel* which is an English

law doctrine of estoppel turns on whether it will do justice between the parties. It was said in the case of Smith v Porrit and Others 2008(6) SA 303 (SCA) that:

*"Each case will depend on its own facts and an extension of the defence [of res judicata ] will be on a case-by-case basis. Relevant considerations will also include questions of equity and fairness not only to the parties but also to others"*

65. This statement was quoted with approval in the case of Leoifo referred to above.
66. The Land Board urges for the extension of the requirements of *res judicata* to include the issue *estoppel* while the tribe and the trust says that this is not a proper case for the application of issue *estoppel*.
67. We now turn to consider whether the requirements of *res judicata* have been met in this case such that the court would not entertain the tribes counter application. From the papers filed it is clear that the Land Board urges the application of *res judicata* or issue estoppel in respect of the claim of unconstitutional compulsory acquisition of the farm and not the unconstitutional discrimination

contrary to section 15 of the Constitution. We will proceed to interrogate the *res judicata* requirements one after the other.

68. The parties in the quarries case did not include the Attorney General who has been cited in these proceedings only in respect of the constitutional challenge counter application. The Land Board was not a party at the High Court where it was held that the farm belongs to the tribe. The Land Board was joined at the tail end of the proceedings at the instance of the Court of Appeal and even then the Land Board said under oath that the farm has at all material times belonged to the tribe. The quarries case was primarily about an interdict to enforce a servitude. The constitutional challenge is directed against the government represented by the Attorney General. The Attorney General was not a party to the quarries case. The Land Board was an obscure and unwilling party to the quarries case having only been joined on appeal. We therefore hold that the quarries case was not a dispute between the same parties now before the Court.

69. The quarries case was primarily an interdict to enforce the existence of a servitude of Public Right of way or a way of necessity which

according to the Applicant has existed over the farm from time immemorial. This is clearly indicated by the notice of motion in the same case. The issue of ownership of the farm was decided in the context of the application of an interdict and this is not an unusual occurrence in interdict applications where the legal requirements of an interdict particularly the requirement of a clear right comes into play. In upholding the appeal, the Court of Appeal made the following order: *"the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>d</sup> Respondents are interdicted and restrained from impeding the use of that portion of Mokolodi Road which traverses the farm Forest Hill by the Applicant, its directors and employees, in the exercise of their function and fulfilment of their duties in the conduct of the business of Mokolodi Quarry "*

70. On the other hand in the counter application the tribes' cause of action is the unconstitutionality of the impugned legislation which is an entirely different cause of action to the one in the quarries case. At the High Court, the issue of the Constitutional Interpretation of the Legislative Scheme in the quarries case raised by the tribe was not decided. A close reading of the Court of Appeal judgment would show that such a an issue was not decided. Neither the High Court



nor the Court of Appeal dealt with any cause of action in respect of the Constitutional Right to be protected from discrimination.

71. Reliance by the Land Board is placed on the statement by the Court of Appeal to the effect that *"the constitutionality of the Tribal Territories Act and the Tribal Land Act in the relevant respects has never been challenged"*. What the Court was saying there was that the constitutionality of the legislation in question has not been challenged not that it has been decided upon. It is now being challenged in the counter application.
72. We therefore hold that the cause of action in the quarries case and the cause of action in the current application as well as the relief sought are not the same.

### **Issue Estoppel**

73. As regards the relaxation of the last two requirements of *res judicata* to accommodate issue *estoppel* we do not believe that this is an appropriate case to apply the same doctrine. This is because an injustice may be committed in that the tribe will be prevented from challenging fully the legislation that deprived it of ownership of the farm which it held for many years. We believe that application of

issue *estoppel* in the circumstances of this case is capable of producing an injustice.

74. On the basis of the foregoing therefore we decide the issue of *res judicata* and the issue estoppel in favour of the tribe and the trust. We therefore hold that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are not precluded and/or estopped from raising the issue of ownership and the issue of the constitutionality of the impugned provisions and acquisition of the property.

75. Another issue which the parties identified for our decision is:

*"Whether the Court of Appeal has dealt with and determined the issue of ownership of the farm together with the constitutionality of section 7 of the Tribal Territories Act of 1973".*

76. This issue is closely related to the one of *res judicata* and issue estoppel which we have just disposed of. We dismissed the points in *limine* in respect of *res judicata* and issue *estoppel* on the basis that the Court of Appeal did not decide the issue of ownership and the Constitutional issues now raised in these proceedings. We therefore hold that the Court of Appeal did not deal with and

determine the issue of ownership of the farm together with the Constitutionality of section 7 of the Tribal Territories Act of 1973.

77. The next question for the decision of this Court which we wish to decide on which has been identified in the final case management order is as follows:

*"Whether farm Forest Hill 9 – KO vests in the Applicant by virtue of section 10 of the Tribal Land Act read with section 7 of the Tribal Territories Act"*

78. We think the correct question should be " *whether farm Forest Hill 9 – KO lawfully vests in the Applicant by virtue of section 10 of the Tribal Land Act read with section 7 of the Tribal Territories Act*"

79. From the pleadings filed and the synopsis of the facts of this matter stated above together with the history of all the relevant legislation including the amendment of section 7 of the Tribal Territories Act in 1973 there is no doubt that the intention of the legislature was to incorporate private property of the tribe being farm Forest Hill 9-KO into the Bamalete Tribal Territory despite the fact that the same property was freehold property held by the tribe under a title deed

following the purchase of the same property from a private individual who was paid fully by the tribe.

80. There is also no doubt that in terms section 10 of the Tribal Land Act, all land within the Bamalete Tribal Territory is owned by the Land Board in trust having assumed powers previously held by the chief of the tribe.
81. The Minister of Local Government was very clear when he brought about the amendment of the Tribal Territories Act 1973 in order to incorporate the farm into the Bamalete Tribal Territory. He clearly said that from henceforth the property shall no longer be private but tribal property.
82. The fact that the property was privately held by the tribe through a title deed issued in the Chief's name in trust for the tribe means that at the relevant time in 1925 and subsequently it was lawful for the tribe to own property in freehold title. The issue therefore that arises is whether it was lawful for the government to incorporate the property into the Bamalete Tribal Territory regard being had to the nature of the title held by the tribe and the provisions of the constitution which protect private ownership of property.

83. We do not think that the answer to this question is dependent on the interpretation of the relevant legislation. In our view the intention of the legislature in passing the laws that are in question particularly the amendment of the Tribal Territories Act was very clear.

84. The answer therefore to the question as to whether farm Forest Hill 9-KO lawfully vests in the Applicant by virtue of section 10 of the Tribal Land Act read with section 7 of the Tribal Territories Act is dependent on our decision on the following issue which the parties have formulated as follows:

*"Whether the Bamalete tribe has been unconstitutionally deprived of its property contrary to section 3, 8 and 15 of the Constitution of Botswana"*

85. For convenience we find it appropriate to decide the possible contravention of section 3 and 8 of the constitution separately from the section 15 of the Constitution challenge.

86. The common law recognises what has been called the incidents of ownership of property. These incidents have been enunciated to be the following:

*"The right to possess, the right to use, the right to manage, the right to income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident residuary [i.e the residuary right of an owner of property once all other rights come to an end]: this makes eleven leading incidents" (see Honore " Ownership" in Guest (ed) Oxford Essays in Jurisprudence (1961)107 at 113*

87. We must however add that despite the classical incidents of ownership, there are statutory limitations on the rights of owners including restrictions on the right to use or dispose of the property but such do not in any way detract from the fact that the owner remains the owner of the property.

88. Thus in recognition of the incidents of ownership, section 3(c) of the Constitution entrenches the freedom or right from the deprivation of property without compensation. In addition, section 8 of the

constitution sets the conditions upon which any compulsory acquisition of private property can be undertaken.

89. We wish to add that the private ownership of the tribe of the farm in question is not captured by the judgment of the Court of Appeal in Kweneng Land Board v Mpofu and Another [2005] 1 BLR 3 where it was held that customary land tenure does not permit for private ownership of land. In the same case, the Court of Appeal clearly said that this rule applied to tribal land whose tenure was governed by customary law. In this case however the land in question was not held under customary law tenure before it was incorporated into the Bamalete Tribal Territory by the 1973 amendment of the Tribal Territories Act.

90. A letter filed of record under the letterhead of the Attorney General prepared by the Registrar of Deeds addressed to the Land Board dated 15 June 2000 gives the history of ownership of farm Forest Hill 9-KO. It is clearly stated therein that this farm was originally 6000 Morgen and was registered in favour of Richard Goldman on 23 March 1898. It was then sold to Aaron Sieu on 10<sup>th</sup> June 1904. Aaron Sieu sub divided the same property into two portions being

portion 1 which was sold to one Theodore Richard Transfeld measuring 3000 Morgen and the remaining portion being the current property in dispute also measuring 3000 Morgen was transferred on 1<sup>st</sup> July 1925 to chief Seboko Mokgosi in trust for the tribe. The letter shows that the portion owned by Transfeld was subsequently subdivided into three portions which were dealt with through the years by further subdivisions. The said portions are owned amongst others by Rhodesia Railway Ltd (which should now be Botswana Railways), Roman Catholic Church, Time Projects Botswana (Pty) Ltd as well as Botswana government

Section 8 of the constitution states as follows:

*"8. No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say –*

*(a) The taking of possession or acquisition is necessary or expedient –*

*(i) In the interests of defence, public safety, public order, public morality, public health,*



*Town & Country planning or land settlement;*

*(ii) In order to secure the development or utilisation of that, or other, property for a purpose beneficial to the community; or*

*(iii) In order to secure the development or utilisation of the mineral resources of Botswana; and*

*(b) Provision is made by a law applicable to that taking of possession or acquisition –*

*(i) For the prompt payment of adequate compensation; and*

*(ii) Securing to any person having an interest in or right over the property right of access to the High Court, either direct or on appeal from any other authority, for the determination of his or her interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation.*

*.....*

*.....*

*(6) nothing contained in or done under the authority of any law shall be held to be*

*inconsistent with or in contravention of subsection (1) of this section to the extent that the law in question makes provision for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest in or right over property, when that property, interest or right is held by a body corporate established by law for public purposes in which no monies have been invested other than monies provided by Parliament"*

91. The simple meaning of section 8 of the constitution is that where private property is to be acquired by the state or its agencies, then such can only be done where the property is required for public purposes and upon prompt compensation for the same. There also have to be a law that enables those affected by the acquisition to get prompt and adequate compensation and further to have access to the High Court where they have issues with the acquisition of the property and the compensation they may be entitled to.
92. A law which goes to satisfy the provisions of the constitution just stated above is the Acquisition of Property Act CAP 32:10. The

heading of the same Act states that it is "*an Act to make provision authorising the acquisition of property for public and other purposes, and for settling the amount of any compensation to be paid, or any matter in difference*"

93. The Acquisition of Property Act gives the President of the country the power to acquire any real property if it is expedient in the public interest, security, public health morality or land settlement. The same Act provides the procedure for such acquisition and how disputes in that regard have to be resolved. Most importantly section 9 thereof gives any person who disputes the legality of the proposed acquisition to apply to the High Court to determine the same.

94. It would therefore be seen that the Acquisition of Property Act mirrors section 8 of the constitution. In the case of Bruwer v President of the Republic of Botswana and Others 1997 BLR 477 (HC) Nganunu J as he then was, stated as follows at page 484 to 485 regarding the compulsory acquisition of property:

*"it can immediately be seen that the prohibition to deprivation covers every property, every interest or right of property of any description. It is unambiguous and covers any and every kind of property interest or right. The only*

*exception countenanced is that undertaken strictly for the public purposes stated in section 8(1)(a). Any compulsory taking, in addition to being for any one of the public purposes mentioned, must be carried out under the provisions of a law dealing with the compulsory acquisition of property and providing for the two matters mentioned in section 8(1)(b)(i) and (ii) quoted above.*

*The Act is therefore a vehicle for the enforcement and implementation of the rights given both to the State to legitimately compulsorily acquire properties of others on the one hand; whilst on the other it seeks to protect those affected by the taking by giving them the right to challenge it, inter alia for its legality, for quantum or other matters as above described. Section 8 shows that any and every kind of property is protected.*

*... When therefore we examine the words of the Act and in particular those of section 9, we should bear in mind that, as far as people who have or claim any interest or right over property proposed to be acquired, those words are intended to achieve the beneficial effects of section 8 of the constitution."*

95. On the basis of the undisputed facts in this matter and also on the basis of the foregoing, it is clear that the constitutional provisions regarding compulsory Acquisition of Property as well as the provisions of the Acquisition of Property Act were not followed when

the farm was acquired for the purposes of incorporating it into the tribal territory and thus removing it from being private land. The use of the amended Tribal Territories Act 1973 read with section 10 of the Tribal Land Act to acquire the farm which is private property does not pass legal and constitutional muster. There was no attempt at all to follow the constitution or the Acquisition of Property Act.

96. The fact that the property would be in the hands of the Land Board such that the tribe would have access to it does not change the legal requirements of acquiring the same property.
97. We also note that even if it can be said that the tribe will still have access to the farm once its title deed has been cancelled and the Land Board is capable of dealing with it in terms of the Tribal Land Act, the tribe will not have control of the property and as to who will be allocated the same property in view of the fact that section 10 of the Tribal Land Act was amended to ensure that Tribal Land is no longer reserved for the tribesmen of the specific Tribal Territory but for citizens of Botswana. The tribe would therefore have lost the incidents of ownership which we have narrated above. The tribe will no longer be able to control the use of the farm.

98. We note that the Court of Appeal in the quarries case stated that the requirement by section 8(1) of the constitution to the effect that compulsory acquisition or possession of property can only be done for public purposes and upon adequate compensation is not applicable in this case as it falls under the exception stated in section 8(6) of the constitution which exempts the requirements of section 8(1) where *"the compulsory acquisition in the public interest in a right over the property, where that property, interest or right is held by a body corporate established by law for public purposes in which no monies have been invested other than the monies provided by Parliament"*

99. In our view, and with respect, the Court of Appeal misinterpreted section 8(6) of the constitution. On a proper reading of the same section, it exempts the requirements of section 8(1) of the constitution where the entity from which the property is compulsorily acquired is held by a body corporate established by law for public purposes in which monies for that body corporate are provided by Parliament.

100. In our respectful view therefore the aforesaid provision refers to the property being held by a body corporate at the time of acquisition

and not that it is to be held by a body corporate in the future. The tribe from which the property has been acquired is certainly not a body corporate established for public purposes. The money it used to fund the purchase of the property was not appropriated from Parliament.

101. We however take the view that the decision of the Court of Appeal in this regard was obiter for the reasons we gave above in respect of *res judicata* and *estoppel* issues. The main matter before the Court of Appeal was not the constitutionality of the compulsory acquisition of the property but servitude of right of way over the property. The same decision does therefore not bind us.
102. Our decision is therefore that Farm Forest Hill 9-KO does not lawfully vest in the Applicant by virtue of section 10 of the Tribal Land Act read with section 7 of the Tribal Territories Act. We also hold that the Bamalete Tribe has been unconstitutionally deprived of its property contrary to section 3 and 8 of the constitution of Botswana.
103. We have also been called upon to decide the issue of whether the Tribal territories Amendment Act of 1973 and the repeal of section 10 (2) of the Tribal Land Act by Act No. 14 of 1993 is inconsistent

with section 15 of the Constitution of Botswana and therefore invalid. The tribe and the Trust state that the legislative scheme is discriminatory and in breach of section 15 (1) of the constitution as it treats the Civil Rights of tribes and their members less favourably and imposes disabilities and restrictions on them compared with the treatment of non-tribal citizens on the sole ground of the membership of a tribe and that the scheme treats affected people differently in that it is only black Africans who are subjected to the legislative scheme.

104. We take the view that there has not been sufficient basis and evidence laid before us to enable us to meaningfully deal with this constitutional challenge. We also take the view of the established practice that where a decision can be made on the basis other than a constitutional challenge then that would be the route to take. We therefore decline to deal with the constitution challenge based on section 15 (1) of the constitution.

105. Having decided in the manner that we have done above, we do not believe that it is necessary to deal with the other itemised issues identified by the parties for our decision as most of them are just details and conclusions which we believe have been adequately



addressed in the body of this judgment otherwise it will also make this already lengthy judgment unwieldy.

## **CONCLUSION**

106. On the basis of the foregoing therefore we make the following orders:

a) The application is dismissed with costs which costs shall include the costs attended on the employment of two counsel;

b) The counter application is upheld with costs to the extent of the following orders:

(i) Section 7 (ii) of the Tribal Territories Act enacted under the Tribal Territories Amendment Act No. 3 of 1973 is inconsistent with section 8 of the Constitution of Botswana and invalid on the ground that it brings about an impermissible compulsory acquisition of an interest in or right over property and it is hereby struck down.

(ii) It is declared that the remainder of farm Forrest Hill 9-KO vests in the Bamalete (Ba-Ga-Malete) Tribe.

(iii) The Applicant and the 2<sup>nd</sup> Respondent shall pay the costs of the counter application one paying the other to be absolved.

**DELIVERED IN OPEN COURT AT GABORONE THIS 21<sup>st</sup> DAY OF MAY, 2021.**



**KOMBONI G. G.  
JUDGE**

**I AGREE**



**MOTHOBI M. L.  
JUDGE**

**I AGREE**



**GABANAGAE M. C.  
JUDGE**