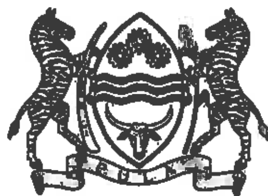

IN THE COURT OF APPEAL OF BOTSWANA HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO. CACGB-153-21
High Court Civil Case No. MAHGB-000819-19

In the matter between:

ATTORNEY GENERAL	**1st APPELLANT**
REGISTRAR OF DEEDS FOR BOTSWANA (Represented by Attorney General of Botswana)	**2ND APPELLANT**

and

KGOSI MOSADI SEBOKO (NOMINEE OFFICIO)	**1ST RESPONDENT**
GAMALETE DEVELOPMENT TRUST	**2ND RESPONDENT**

Advocate Dr Pilane S T with Advocate Dr Kebonang S; Attorney Mr Leinaeng K P; Attorney Mr Kwape O M and Attorney Mrs Bolotsang A D for the Appellants

Advocate Mr Budlender G M SC with Advocate Mr De Beer M N with Attorney Mr O T Motlhala and Attorney Mr Rantao T for the Respondents

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JUDGMENT

CORAM: T TAU P
LESETEDI J A
BRAND JA
WALIA JA
GAREKWE J A

TAU P:

INTRODUCTION

1. This appeal concerns ownership of the remaining extent of Farm Forest Hill 9-KO (the Farm). The facts giving rise to the dispute between the parties are largely common cause.

HISTORY

2. In 1925 Bamalete Tribe represented by Kgosi Seboko Mokgosi acquired the remainder of Farm Forest Hill 9-KO from Aaron Siew of Cape Town to address shortage of land for grazing purposes. A Deed of Transfer No 387 was passed in favour of the Chief for and on behalf of the Bamalete Tribe by Aaron Siew and registered in the Deeds Registry.

3. In 1933 the Tribal Territories Act which defined boundaries of tribal land throughout the then Bechuanaland (now Botswana) was enacted. While a territory was defined and designated for the Bamalete Tribe, Farm Forest Hill 9-KO was not included in the boundaries of the Bamalete Tribe.

4. In 1968, the Tribal Land Act No 54 of 1968 was enacted and it came into operation in January 1970. Section 10 of that Act initially provided that the rights and title in land in tribal areas including the Tribe's defined territory vested in the Land Board. It provided as follows:

> "(1) All rights and title of the Chief and tribe to land in each tribal area listed in the First Column to 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 people of Botswana.
>
> (2) Nothing in this section shall have the effect of vesting in a Land Board any land or right to water held by any person in his personal private capacity."

5. The First Schedule of the Tribal Land Act included among areas listed the Bamalete Tribal Territory and corresponding to it the Malete Land Board was set out in the Second Column of the Schedule as the Land Board vested with Bamalete Tribal Territory.

6. In 1973, Section 7 of the Tribal Territories Act describing the Bamalete Tribal Territory was amended to include the remainder of Farm Forest Hill 9-KO.

7. In 1979, the words "chief and tribe" were deleted from Section 10(1) of the Tribal Land Act. In 1993, and by Section 7 of Act No. 14 of 1993, Section 10 of the Tribal Land Act was amended by, in sub-section (1) thereof, substituting for the words "tribesmen of the area" and the words "citizens of Botswana", and by repealing subsection (2) thereof. With those amendments the section provided as follows:

> "(1) All the rights and title to land in each tribal area listed in the first Column of the First Schedule vested 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 citizens of Botswana and for the purpose of promoting the economic and social development of all the people of Botswana."

8. In the wake of the establishment of the Land Boards, the Bamalete Tribe then requested the Land Board to oversee and administer its various properties namely, portions of Farm Quethick 2-JO, remaining extent of Farm Forest Hill 9-KO and Mogobane Irrigation Scheme.

9. During the period that the Malete Land Board was charged by the Tribe with management of its various land assets inclusive of Farm Forest Hill 9-KO, the Board's control extended to management and not to matters of proprietary title and the vesting or divesting remained at all material times within the Bamalete Tribe and their Kgosi. It is to this extent that when the Bamalete Tribe by their own decision terminated the administrative role of the Land Board, that the full extent of Farm Forest Hill 9-KO reverted back to the custodianship, control and management of Kgosi Mosadi Seboko on behalf of her tribe.

10. The Bamalete Tribe resolved to take over the management and administration of their landed assets inclusive of Farm Forest Hill 9-KO and they registered a Trust referred to as Gamalete Development Trust on the 5th March 2003, to execute that role.

11. After the Trustees' assumption of duty, the Paramount Chief of Bamalete Tribe, Kgosi Mosadi Seboko in terms of a letter dated 13th August 2003, formally handed over the management, administration and control of the Bamalete Tribe's landed assets to the Trust. This new role of the Trust was communicated to the Government of

Botswana by Kgosi Mosadi Seboko through a letter addressed to the Minister of Lands, Housing and Environment dated 18th April 2003, as a result of which the Government in recognition of the Trust's new role began to engage in negotiations for a possible purchase of a portion of Farm Forest Hill 9-KO. A letter dated 19th May 2003 from the Director of Lands, in the Ministry of Lands and Housing addressed to the Secretary of the Trust indicated the intention of Government to purchase the portion. It reads:

"Ref: GC 95 II (107)

19th May 2003

Mr Dennis Maswabi
Ga-Malete Development Trust
Private Bag BR 32
GABORONE

Dear Sir

REQUEST TO PURCHASE PART OF MALETE FARM AT FOREST HILL NO. 9-K0 BY GOVERNMENT

The above matter refers.

The Government has, over the last two years, talked to the Chief of Ga-Malete into buying part of the farm along the Gaborone-Lobatse Road at a point after the St. Josephs College junction. The Chief advised that it is wise and proper to have a trust that could conduct the affairs of Ga-Malete on such matters as land acquisition. In acknowledging such forward looking posture, the Government did wait until now.

The Chief lately communicated the formation of such a trust to the Honourable Minister Nasha. It is on this basis that we now seek to

discuss the matter with the Trustees. We trust a meeting is possible on the week of 2nd – 6th June 2003 at the venue convenient to yourselves, possibly at the offices tsa Kgotla. You will no doubt decide a date in that week and confirm to us. Or, indeed any other date suitable to yourselves but not earlier.

We look forward to meeting with yourselves and making progress as desirable.

Thank you.
Yours faithfully

(signed)
N. Monagen
DIRECTOR OF LANDS

cc: Permanent Secretary, Ministry of Lands and Housing"

12. Over time there have been deductions of at least 4 portions parcelled from Farm Forest Hill 9-KO and transferred to the State on sale. The remaining extent of Farm Forest Hill 9-KO is still registered under Deed No 387 dated 1st July 1925 in favour of the Bamalete Tribe.

PROCEEDINGS IN THE HIGH COURT

13. Before the Court *a quo,* the Malete Land Board sought an order directing the Registrar of Deeds to cancel the Deed of Transfer in favour of the Bamalete Tribe in respect of the Farm. The application was premised on various provisions of the Tribal Land Act, the Tribal Territories Act (and its subsequent amendment) and the Deeds

Registry Act which the Land Board contended vested it with ownership of the Farm. The Land Board relied on a judgment of this Court in the ***Quarries of Botswana (Pty) Ltd v Gamalete Development Trust and Others* [2011] 2 BLR 479 (CA)**. The dispute in that case arose because of the continual passage of heavy duty haulage trucks conveying quarried material using the Mokolodi road. The residents complained that the road was incapable of withstanding use by such large trucks without sustaining substantial damage. Much of that road was privately built and funded. Matters came to a head in February 2008 when Quarries of Botswana approached the High Court for an urgent relief.

14. An interim order pending return day was granted restraining the Respondents from preventing Quarries of Botswana, its transporters and customers from using the road. Dingake J concluded that Farm Forest Hill was a freehold property of the Bamalete Tribe and that Quarries of Botswana had failed to establish that it had a right in law to use the road to pass across Farm Forest Hill.

15. Quarries of Botswana noted an appeal against the decision of Dingake J. Malete Land Board, not a party in the High Court

application, was joined in the proceedings before the Court of Appeal. The Land Board acknowledged that ownership of Farm Forest Hill 9-KO vested not in it but in the Bamalete Tribe. (*underlining for emphasis)*

16. The Court of Appeal in ***Quarries of Botswana*** **case**, *supra*, at p 485 paragraph A stated that:

> "... With the land board having been established in 1970, and the Act having been decreed, in effect, that all the right and title to land in the Bamalete Tribal Territory – plainly meaning all land – vested in the land board, there can only have been one legislative intention in including Forest Hill in that territory and that was, inevitably, to have it thereby vest in the fifth respondent."

17. The Court concluded that at the time of the events giving rise to the litigation, Farm Forest Hill 9-KO vested not in the Bamalete Tribe through Kgosi Mosadi Seboko N.O. but in the Malete Land Board.

18. In the Court *a quo* the Malete Land Board brought the application for cancellation of the Deed of Transfer in order to satisfy the requirements of Section 8 of the Deeds Registry Act which provided

for cancellation of the Deed of Transfer by the Registrar of Deeds from issuances of a Court order directing her to do so.

19. The Land Board argued that the rights, title and interest of the Deed of Transfer which vested on the Bamalete Tribe by virtue of Deed of Transfer No 387 were terminated by operation of law and passed to it. The Board submitted that the existence of the Deed of Transfer created an untenable situation where the same piece of land seems to vest in two different entities. That it could not manage and administer the land because Kgosi Mosadi Seboko N.O. and Gamalete Development Trust claim control over the same by virtue of the Deed of Transfer, hence the application.

20. The Respondents filed a conditional counter application seeking an order striking out the provisions of Section 7 of the Tribal Territories Act alternatively the 1973 amendment, 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 on the basis that they brought about compulsory acquisition of the Farm by Malete Land Board and were as such inconsistent with Sections 8 and 15 of the Constitution and therefore invalid.

21. They contended that if the Farm has vested in the Malete Land Board by operation of law the provisions in question would be discriminatory of themselves and in their effect in breach of Section 15(1) of the Constitution as they impose different and less favourable treatment in respect of the civil rights of Tribes.

22. They argued that the provisions of Section 10 of the Tribal Land Act do not apply to land owned or acquired as freehold by the tribe listed in the Tribal Territories Act but not included in an area designated as tribal territory. Further that Section 10 of the Tribal Land Act brings about compulsory acquisition of all rights and title to land in each tribal area listed in the First Column of the First Schedule. That this brought about the breach of Sections 8 and 15 of the Constitution and that Section 10 of the Tribal Land Act was therefore invalid.

23. They argued further that Section 7 of the Tribal Territories Act triggered compulsory acquisition of the Bamalete land by the Tribal Land Act and that it was therefore invalid or alternatively that the Tribal Territories Amendment Act of 1973 was invalid. Further that the repeal of Section 10(2) of the Tribal Land Act by Act 14 of 1993 was invalid in so far as it brought in application the provisions of

Section 10(1) of the Tribal Land Act to freehold land owned by the Tribe.

24. In their Answering Affidavit to the counter application the Malete Land Board contended that Farm Forest Hill 9-KO was tribalised through the amendment of the Tribal Territories Act of 1973 and it became part of the land area under the administrative jurisdiction of Malete Land Board. The Board also raised a point in *limine* contending that the Tribe was bound by the decision in the ***Quarries of Botswana*** **case** by virtue of the *exceptio res judicata*, issue estoppel or judicial precedent.

25. The Court *a quo* dismissed the Land Board's application and points in *limine* with costs including those of two counsel and upheld the counter application. The Court *a quo* made the following Orders:

    "(i) Section 7(ii) of 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 the property and it is hereby struck down.

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

(iii) The Applicant and the second Respondent shall pay the costs of the counter-application, one paying the other to be absolved."

THE APPEAL

26. The Attorney General appealed against the Court *a quo's* judgment on the following grounds:

    (a) The Court *a quo* erred, with respect, in finding that the land held in terms of Deed of Transfer No 387 in respect of the remainder of the Farm Forest Hill 9-KO vested, not in the Third Respondent but in the First and Second Respondents:

        (i) In circumstances in which the Court of Appeal had in ***Quarries of Botswana (Pty) Ltd v Gamalete Development Trust and Others*** **[2011] 2 BLR 479**, expressly found that ownership of that land did not vest in the First and Second Respondents but in the Third Respondent.

        (ii) In circumstances in which the Court of Appeal had in ***Quarries of Botswana*** **case** (*supra)*, expressly found that ownership of that land vested in the Third Respondent and not in the First and Second Respondents.

        (iii) In circumstances in which the Court of Appeal in ***Quarries of Botswana*** **case** (*supra*), expressly found that the statutory termination of Bamalete freehold title

to the land in question and the vesting of the land in Third Respondent was not unconstitutional.

(b) The Court *a quo* erred, with respect, in finding that the land held in terms of Deed of Transfer No 387 in respect of remainder of the Farm Forest Hill 9-KO was not included in the Bamalete Tribal Territory in circumstances in which the Court of Appeal had, in ***Quarries of Botswana*** *(supra)*, expressly found that the land had been so included.

(c) The Court *a quo* erred, with respect, in exercising jurisdiction and making factual and legal findings upon matters in which the Court of Appeal had made findings and decisions to the contrary.

(d) The Court *a quo* erred, with respect, in exercising jurisdiction and making factual and legal findings upon matters in which it was *functus officio* in that it had, prior to those matters and issues going to the Court of Appeal in ***Quarries of Botswana*** *case*, spent its power and had none remaining.

(e) The Court below was bound by the decision of the Court of Appeal in ***Quarries of Botswana*** **case** and lacked, with respect authority to depart therefrom.

(f) The Court *a quo* erred, with respect, in finding that the decision of the Court of Appeal in ***Quarries of Botswana*** **case**, was wrong, for the decision of the Court of Appeal was, with respect, perfectly right.

(g) The Court *a quo* erred, with respect, in its attempt to distinguish the decision of the Court of Appeal in ***Quarries of Botswana*** **case**, and in so far as it has sought and has done so, that decision not being distinguishable.

(h) The Court *a quo* erred, with respect, in finding that any land at any time in the past owned by the Bamalete Tribe and located within the Tribe's Territory did not fall within Bamalete Tribal Territory.

(i) The Court *a quo* erred, with respect, in finding that the land in question did not, immediately upon its acquisition in 1925, become a part of and fall within Bamalete Tribal Territory.

(j) Alternatively, the Court below erred, with respect, in finding that the main purpose of the Tribal Land 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' if the reference to Tribal Territories is intended to exclude any land owned by a Tribe or Tribal Community and by whatever description it is held in the appropriate Tribal Land Board.

(k) The Court *a quo* erred, with respect, in finding that any provision of the Tribal Territories Act, including the impugned portions, unconstitutional on the grounds stated or any others.

(l) The Court *a quo* erred with respect, in finding that any provision of the Tribal Land Act, including the impugned

portions, unconstitutional on the grounds stated or any others.

(m) The Court *a quo* erred, with respect, in finding that the issues before them upon which their decision depended were neither *res judicata* nor precluded by issue estoppel.

(n) The Court *a quo* erred, with respect, in finding that application of the *res judicata* and issue estoppel doctrines would produce an injustice.

(o) The Court *a quo* erred, with respect, in finding that the issues of *res judicata* and issue estoppel were not, on the declared or any other basis, sufficient to prevent it from granting the judgment and orders it did.

(p) The Court *a quo* erred, with respect, in finding that the Court of Appeal's express finding in ***Quarries of Botswana (Pty) Ltd v Gamalete Development Trust and Others***, (*supra*), that the statutory termination of Bamalete freehold title to the land in question and the vesting of the land in Third Respondent was not unconstitutional left open the question whether the said termination and vesting were unconstitutional on other basis.

(q) The decision of the Court *a quo* was, with respect, wrong on a comprehensive consideration of all the factual and legal questions that arose in the matter, including matters of public policy to which the court gave altogether no consideration and the far reaching implications for the rest of the country of the

decisions at which the Court has arrived and the manner in which it did so.

27. The unnecessarily prolix grounds of appeal can be summarised as follows:

    a) The ownership of the property was determined by this Court in ***Quarries of Botswana* case** and the Tribe was precluded from raising that issue in this case;

    b) The Constitutionality of the property's acquisition was determined by this Court in the ***Quarries of Botswana* case** and the Tribe was precluded from raising it in this case; and

    c) Sections 8 and 15 of the Constitution have no application because there was no compulsory acquisition of the property as the Tribe consented to the property being transferred to the Land Board.

28. On the 2nd July 2021, the Land Board served a notice of appeal on the Registrar of this Court but did not deliver it with the High Court as required by the Rules of this Court. The notice was struck out by this Court for non-compliance with the Rules. A subsequent application for leave to appeal out of time was dismissed by this Court.

29. The Respondents also served a notice of cross-appeal and notice of opposition to appeal on the Registrar of this Court but did not file the same with the High Court as required by the Rules. Their application for condonation of failure to timeously file the notice of cross-appeal and notice of opposition was also dismissed.

30. The only issues remaining for determination are those raised in the appeal by the Attorney General.

DOCTRINES OF *RES JUDICATA* AND *STARE DECISIS*

31. Before the Court *a quo* it was contended by way of a special plea that the Respondents were precluded and estopped from raising both the issue of ownership of the disputed land and the issue of constitutionality of the impugned statutory provisions by virtue of the principle of *exceptio res iudicata,* alternatively by the instrument known as issue estoppel. The factual basis for this contention rested on the judgment of this Court in ***Quarries of Botswana* case** *(supra).* The High Court dismissed the special plea primarily on the basis that the present Appellant was not a party to the ***Quarries of Botswana case.***

32. The *exceptio res judicata* is based on the irrefutable presumption that a final judgment on a claim submitted to a competent court is correct. The presumption is founded on considerations of public policy, which require that litigation should be final. As far as the litigating parties are concerned, the decided issue is therefore no longer in dispute. It has been finally resolved.

33. Closely associated with the principle is the rule derived from English Law which requires that all claims generated by the same cause of action ought to be brought in one action (see e.g. ***National Sorghum Breweries v. International Liquor Distributaries (Pty) Ltd* 2001 (2) SA) 232 (SCA)**. The Appellants' argument that the Respondents should have raised both the ownership argument and the unconstitutionality arguments in the ***Quarries of Botswana* case** and that they were therefore precluded from raising it in this case, must therefore stand or fall with the *exceptio res judicata*. If the latter was rightly dismissed, the former must also fail.

34. The well-established requirements for a successful reliance on the *exceptio res judicata* case are threefold: namely; (a) that the

previous judgment was given in litigation between the same parties; (b) based on the same cause of action; and (c) with regard to the same subject matter or thing (see e.g. ***Leoifo v. Ngwato Land Board*** **[2014] 3 BLR 468 (CA) 470); Mbaiwa v. Kapimbua [2017] 2 BLR 260 (CA)**. Over the years, the ambit of the *exceptio* has however been extended by relaxation in appropriate cases of the common law requirements in (b) and (c) above. In the circumstances of such relaxation, it has become common place to adopt the terminology of English law and to speak of "Issue estoppel." (see e.g. ***Smith v. Porritt*** **2008 (6) SA 306 (SCA) 307**).

35. It follows that requirement (a) above, namely, that the previous litigation must have been between the same parties, remained and still remains an essential element of both the *exceptio res judicata* and the instrument of issue estoppel. It is true that there are exceptions to this rule. Thus it is recognised that where the identity of interest between the party in the first case and the party in the second case is so close as to be virtually identical, the court will be entitled to relax the application of the rule in instances where such

identity of interest was recognised as close enough, for example between a deceased and his heir; an agent and his principal; and between the insolvent and the trustee of his insolvent estate. (see e.g. ***Leoifo v. Ngwato Land Board*** and ***Smith v. Porritt*** (*supra*)). But this is not one of those instances where an exception to the rule will be justified. What was before the Court *a quo* and this Court is that the vesting of the Farm in the Land Board by operation of law would amount to compulsory acquisition of all rights and title to land which would bring about breach of Sections 8 and 15 of the Constitution. The Court *a quo* did not determine the Section 15 argument and it does not arise on appeal. That is not what was argued in the ***Quarries of Botswana*** case. No identity of interest between the Appellant and any of the parties in the ***Quarries of Botswana* case** had been established and the Appellant did not even argue for such identity of interest. What he contended for was that the requirement should be relaxed because he agreed to be bound by the ***Quarries of Botswana*** judgment. But that, as I see it, is insufficient to justify an exception to the same party principle. Application of the *exceptio res judicata* cannot be dependent on the unilateral decision of the party in the second case to be bound by the

decision in the first case, to which it was not a party. That would render it possible for a litigating party to rely on the *exceptio res judicata* as a matter of choice. Hence, we agree with the finding of the Court *a quo* that the special plea of neither the *exceptio res judicata* or of issue estoppel could be upheld.

36. On appeal the Appellant rather surprisingly moved on quite seamlessly from a reliance on the *exceptio res judicata* to a reliance on the rule of precedent (also known as the *stare decisis* doctrine) as if these two instruments are more or less the same. Accordingly, its argument on appeal boiled down to the contention that both the High Court and this Court were bound by virtue of the doctrine of *stare decisis* to follow the judgment of this Court in ***Quarries of Botswana* case**. The notion implied by this change of tack, that the two legal instruments of the *exceptio res judicata* and the doctrine of precedent are the same or even closely related, is simply untenable. As a matter of law, they are two different instruments with different requirements. The import of the doctrine of precedent has been commented on by this Court in ***President of the Republic of Botswana and 3 Others v. Priscilla Nkamo Bando Ditlhong***

CACGB-111-21 (CA). What it essentially amounts to is that the decisions of higher courts on matters of law are binding on lower courts. Moreover, as was said in the ***Priscilla Ditlhong*** case:

> "The doctrine of *stare decisis* or precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These Courts can depart from a previous decision of their own when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher or equal authority. It is a manifestation of the rule of law itself. Deviation from the rule is to invite legal uncertainty and chaos. The emphasis must be on "clearly wrong" as opposed to a mere difference of view or opinion by the second court from the first."

37. In this light the difference between the doctrine of *stare decisis* and the *exceptio res judicata* should be apparent. The doctrine of precedent applies irrespective of whether the parties in the two cases are the same. It binds all courts of both lower and equal jurisdiction to previous judgments, with regard to matters of law with the qualification that where the courts are of equal jurisdiction, the second court can deviate from the previous decision if it is persuaded that the judgment of the first court was clearly wrong. By contrast, the *exceptio res judicata* only finds application if the requirements of this exception are satisfied; including the requirement that the parties

in the two cases must be the same. If these requirements are satisfied, the previous decision binds all courts; independent of whether they are of lower, equal or higher status. This is so because of the underlying principle that between these parties, there is no longer any dispute on the decided issue that any court, including a higher court, can decide. See **Botswana Railways Organisation v. Setsogo & Others [1996] BLR 763 (CA).**

38. On application of the principle of *stare decisis* in this case, I believe the Appellant was right in contending that the High Court was bound by the decision of this Court in the ***Quarries of Botswana* case**, as far as that decision went. Accordingly, I think the High Court was bound by the decision of this Court on the issue of ownership; that on a proper interpretation of the legislative scheme the Land Board was deemed the owner of the disputed land. But as it happened, the High Court decision on that issue is in accordance with this Court's judgment in ***Quarries of Botswana* case**. However, the counter application in the Court *a quo* raised the constitutionality of a statutory framework that deprives an owner of its rights of ownership without constitutional compliance. The issue regarding the

constitutionality of the impugned legislation was neither decided by this Court in the ***Quarries of Botswana* case** nor was it raised therein for determination. That much appears from the express statement by **Howie JA at p 486 B-C of the *Quarries* case** that the unconstitutionality of the Tribal Territories Act and the Tribal Land Act has never been challenged.

39. Hence, there was no previous judgment on that issue by which either the High Court or this Court could have been bound. In the event the Appellant could in my view derive no benefit from the *stare decisis* point.

THE LEGISLATIVE SCHEME

40. For purposes of interpretation of statutory provisions the rules of interpretation are drawn from the Interpretation Act and judicial precedents. See ***BCL v. Commissioner General, Botswana Unified Revenue Services* [2012] 1 BLR 792 (CA); *Seleka v. Bibian Ventures (Pty) Ltd* [2015] BLR 412 (CA); *Botswana Land Boards and Local Authorities Workers' Union and Others v. Botswana Public Employees Union and Others* [2016] 1 BLR 434 (CA); *Botswana Power Corporation v.***

***Botswana Power Corporation Workers Union & Another* [2019] 2 BLR 183 (CA).** In ***Permanent Secretary to the President v. BOPEU* [2017] 2 BLR 626** Lesetedi JA stated the principles of interpretation of statutes at pages 635-636 B-H as follows:

> "Those principles can be reduced thus:
>
> (a) The process of interpretation is one of attributing meaning to the words used in legislation or some other statutory instrument having regard to the context provided by the reading of the particular provision or provisions of such legislation or statutory instrument in the light of the document as a whole and the circumstances attendant upon its coming into existence. The often quoted words of Lord Wilberforce in ***Royal College of Nursing of the United Kingdom Department of Health and Social Security* [1981] 1 All ER 545; [1981] AC 800; [1980] UKHL 10; [1981] 2 WLR 279 at p 822** below elucidates the latter point:
>
>> 'In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs.'
>
> Lord Wilberforce's words were recently confirmed in ***Littlewood's Ltd v. Revenue and Customs Corms***

[2017] UKSC 70; [2018] All ER 83; [2017] 3 WLR 1401.

(b) Where the language of the document is clear in all respects the court must give consideration to that language in the light of the ordinary rules of grammar and syntax, the context in which the provision or the words appear, and the apparent purpose or vice to which it is directed.

(c) If the words or expression used permit more than one possible meaning the court must weigh each such meaning in the light of all the above factors. In this regard ss 26 and 27 of the Interpretations Act (Cap 01:04) also come to bear to wit:

(i) Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit; and

(ii) In the construction of an enactment, an interpretation which will render the enactment ineffective shall be disregarded in favour of an interpretation which will enable it to have effect;

(iii) To this end a sensible meaning is to be preferred to one that leads to insensible results or undermines the apparent purpose of the legislation or statutory instrument.

(d) The process of statutory interpretation is an objective one and in which the court must guard against its own view of what constitutes reasonable or sensible meaning but must look to the language of the provision itself in its correct context having regard to the purpose of the provision, the statute or the state of affairs which Parliament's policy or intention must have been directed to.

(e) Where the interpretation is in respect of a provision which has a bearing on rights entrenched under Ch 2 of the Constitution the court must, where the provision is to promote such rights, give a generous interpretation and, where the provision limits such right, give a narrow interpretation.

See ***Petrus and Another v. The State*** **[1984] BLR 4 (CA)**. The starting point however, is always to recognise that Parliament is empowered under S 86 of the Constitution 'to make laws for the peace, order and good government of Botswana' subject to the provisions of the Constitution. From that premise there is a rebuttable presumption that in passing any legislation Parliament is fully alive to the provisions of the Constitution, its remit, the supremacy of the Constitution and intends to abide by its constitutional mandate. It is from this premise that the presumption in favour of constitutionality of statutes is born. And with that presumption the courts will wherever possible try and interpret a questioned statutory provision in line with constitutional compliance unless on any proper reading of the statute that provision fails constitutional muster."

41. Flowing from the above, therefore, in interpreting a statute, it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time of promulgation of the statute. It is a fair presumption that Parliament policy or intention is directed to that state of affairs.

42. Where the language of the statute is clear in all respects, the Court must give consideration to that language in the light of the ordinary rules of grammar and syntax, the context in which the provision or the words appear, and the apparent purpose or vice to which it is directed. If the words or expressions used permit more than one possible meaning the Court must weigh each such meaning in the light of all the above factors.

43. The Appellant placed its reliance on the finding of this Court in the ***Quarries of Botswana* case** in support of the interpretation that the legislative scheme divested ownership of the Farm from the Respondents and vested it in the Land Board. By so doing the Appellant is arguing the Land Board's case because at the heart of the Land Board's case is the assumption that the legislative scheme

precludes the Tribe from ownership of land in freehold separately from the Land Board's holding of land in that Tribal area.

44. The Respondents submit that properly interpreted, its ownership of the Farm was not divested by the legislative scheme. They submitted further that the Appellant's interpretation of the legislative scheme should not be preferred as it would lead to the inequitable results that the Tribe was deprived of the Farm without compensation and in a discriminatory manner. That if that result had been intended by Parliament, it would have been made explicit in the legislative scheme, further that the 1973 amendment to the Tribal Territories Act should not be interpreted as having the effect of interfering with and extinguishing the Tribe's existing rights in the Farm.

45. The argument by the Tribe stems from the historical events that took place following the 1973 amendment of the Tribal Territories Act. In 1987 the Government purchased portions of the Farm from the Tribe. Thereafter Parliament passed the Tribal Territories Amendment Act of 1987 which provided in Section 3 that a portion of the Farm would no longer form part of Bamalete Tribal Land. There were also

discussions with the Chief in 1991 concerning ownership of the Farm. This was followed by the savingram from the District Commissioner of Ramotswa to the Permanent Secretary, Ministry of Local Government and Lands attached to the opinion, stating that the Farm is owned by the Tribe in freehold, which confirmed the discussion.

"From: District Commissioner RAMOTSWA — C T NTWAAGAE

TELEPHONE NO. 390287

TO: Permanent Secretary, Ministry of Local Government and Lands

REFERENCE NO: N. 25 IV (34)

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cc: Secretary, Malete Land Board
Council Secretary, South East District Council
Attorney General's Chambers (Lands Division)

BAMALETE KHALE FARM 9 KO:

I forward herewith copy of an Information Note on the special joint meeting of the Bamalete Tribal Administration, the Malete Land Board, the South East District Council and the South East District Administration on the 12th July, 1991 with regard to the above-cited subject matter.

2. While the legal status of the farm as explained in the meeting in question is fully understood and appreciated, more worrisome thing is that the Tribal Administration lacks both the capacity and the means to effectively and efficiently manage the farm.

3. I have, in the light of this consideration guardedly advised the Chief to consult, further with the tribe, with a view to securing the tribe's consent to a Deed of Transfer in favour of the Malete Land Board.

4. I have requested the Chief to give me feedback on the outcome of his consultations with the tribe sometime before the end of this year.

5. You will, no doubt, appreciate the need to exercise extreme caution in this matter, lest Balete get the feeling that they are being pressurized into consenting to such transfer of title.

LEGAL STATUS OF THE BAMALETE KHALE FARM CLARIFIED

The legal status of the Bamalete Khale Farm was subject of a Special Joint meeting of the Bamalete Tribal Administration, the Malete Land Board, the South East District Council, and the South East District Administration last week.

The meeting was convened on the 12/7/91 in the Council Chamber in Ramotswa under the chairmanship of the District Commissioner for the area, Mr Charles Ntwaagae. The Member of Parliament for Ramotswa, who is also Assistant Minister of Agriculture, Mr Geoffery Oteng also attended the meeting.

The meeting followed uncertainities *(sic)* which the Malete Land Board had expressed regarding the farm's legal status and the Land Board's jurisdiction, if any, over it. Ms Raseroka of the Attorney General's Chambers, who also attended the meeting, explained that the legal status of the farm is that it is a freehold farm owned by the Bamalete tribe. She said that the Title Deed to the property reflects the name of Kgosi Seboko Mokgosi of the Bamalete tribe.

Ms Raseroka went further to explain that this situation therefore means that the farm remains tribal property under the administration and management of the Bamalete Tribal Administration and that, therefore, legally the Malete Land Board has no jurisdiction over it.

She said the Malete Land Board could only have legal jurisdiction over the farm if the Bamalete tribe were to collectively consent to a Deed of Transfer in favour of the Land Board. She said upon that happening, the Attorney-General's Chambers would, upon receipt of appropriate instructions from the Ministry of Local Government and Lands, effect the transfer.

Councillor A.K. Moagi pointed out that this is a domestic matter which Balete themselves should freely decide upon.

Kgosi Kelemogile Mokgosi had earlier told the meeting that the farm was purchased by his father, the late Kgosi Seboko Mokgosi in 1925 through contributions from Balete tribesmen for the purpose of providing communal grazing for Balete. He said at the last Kgotla meeting on the issue in 1986, Balete were generally not in favour of a change of title to the Malete Land Board and were of the strong view that the farm should continue to serve the purpose for which it was originally intended.

The Council Chairman, Councillor S.D. Morweng, stressed the point that it was important to reserve the farm and use it for its original purpose. He said that alternative uses for the farm, if ever they should be considered, should be decided upon by Balete.

The M.P. Mr. Geoffrey Oteng allayed fears that Government may deprive Balete of the farm in order to accommodate the next expansion phase of Gaborone. He said that, as a matter of routine, whenever Government acquires privately owned land in the rightful owners of such land and they are fairly and adequately compensated.

<u>DISTRICT COMMISSIONER – SOUTH EAST DISTRICT</u>

17/07/91"

46. In 2003, again the Government expressed further interest in purchasing the Farm. The Attorney General also addressed a savingram to the Board stating that the Farm was not tribalised. During the same year the Ministry of Lands and Housing investigated

the ownership of the Farm and came up with a Cabinet Information Note dated 25th November 2005 in which Cabinet was advised that the Farm had been tribalised by the 1973 Tribal Territories Amendment Act, and that the non-cancellation of the Title Deed was just an omission. It reads:

"(This document is the property of the Botswana Government)

CAB INFO NOTE: 53 ITEM: 6

MINISTRY OF LANDS AND HOUSING

MINISTERIAL FILE: SLH 1/15/1 (27) DATED: 23RD NOVEMBER 2005

SUBJECT: OWNERSHIP OF FARM FOREST HILL 9-KO

1.0 PURPOSE

1.1 The purpose of this Cabinet Information Note is to report to Cabinet on the findings of my investigation with regard to the ownership of Bamalete Farm Forest Hill 9-KO.

2.0 BACKGROUND

2.1 My Ministry had intended to enter into a joint venture agreement with Balete Development Trust to develop Farm Forest Hill 9-KO held under Title Deed No. 387 in the name of Chief Seboko N.O. Mokgosi on behalf of Bamalete Tribe. I presented a Cabinet Memorandum to Cabinet on the 3rd June 2005. During the discussions

on the Cabinet Memorandum the issue of ownership of the farm arose.

2.2 Available records in particular, The Tribal Territories (Amendment Act, 1972 showed that Farm Forest Hill 9-KO was incorporated into Bamalete Tribal Territory in 1973, thereby giving Malete Land Board authority over the management of the land. At the same time Bamalete Tribe were in possession of the Title Deed to the farm which indicated that the farm is owned as private property of the tribe.

2.3 It is against this apparent uncertainty in the legal status of the farm that cabinet tasked me to investigate the matter, in consultation with the Attorney General, and report my findings to Cabinet.

3.0 LEGAL POSITION

3.1 Our investigations were focused on the existing legislation and any other relevant documents such as cabinet memoranda and the record of the proceedings of Parliament (HANSARD). The findings are presented below.

3.2 Existing records show that farm Forest Hill 9-KO was bought by Bamalete tribe as a freehold farm and was registered under the Title Deed number 387. Though the farm was owned and used by Bamalete Tribe, it was not part of Bamalete Tribal Territory. Government was

concerned that Bamalete owned and used land outside their Tribal Territory yet other tribes of similar status had well defined tribal territories.

3.3 In 1973, Government amended the Tribal Territories Act (No 3 of 1973) to incorporate farm Forest Hill 9-KO into the Bamalete Tribal Territory so that it is managed by Malete Land Board. The amendment of the Act took place immediately after the establishment of the Tribal Land Boards which took over management of tribal land from the Chiefs. Therefore, it was logical that the Bamalete Chief be relieved of the responsibility to manage farm Forest Hill 9-KO.

3.4 A question might be raised as to whether such incorporation was preceded by the requisite consultations with Bamalete tribe. Our research of the records revealed that the amendment was preceded, as is the normal procedure, by a Cabinet Memorandum. The Cabinet Memorandum 947 dated 21st July 1972 was presented to Cabinet to seek authority for incorporation of both Forest Hill 9-KO and Rankoromane Farms into the Bamalete Tribal Territory through amendment of section 7 of the Tribal Territories (CAP 32:03) which defined the boundaries of the Bamalete Tribal Territory.

3.5 Paragraph 2 of the Cabinet Memorandum clearly stated that farm Forest Hill 9-KO had been used by the tribe for grazing, but it has never been incorporated by law into Bamalete Tribal Territory, and in consequence does

not fall within the jurisdiction of Malete Land Board. This paragraph further states that the purpose of incorporating this farm was to give Malete Land Board power to exercise jurisdiction over it.

3.6 Our investigations also led us to check the records of the National Assembly. The record of the proceedings (Parliament Hansard) on the debate by members of Parliament on the Tribal Territory (Amendment) Bill, 1972 second reading shows that the Bill was presented by the then Minister of Local Government, the late Englishman Kgabo. The Minister asked Parliament to amend the Tribal Territories Act so that the Bamalete Territory is amended to reflect that the tribe has acquired two farms and the farm land will be tribal land and not private land. In his presentation, the Minister indicated that the Bill was discussed by the House of Chiefs and was unanimously recommended for approval.

3.7 Having presented the historical background and developments leading to the incorporation of the farm in question, I now highlight some important provisions of other relevant legislation in this regard.

(a) **Tribal Land Act (CAP 32:02)**

Section 2 of the Act defines tribal areas as:

i) Every Territory as defined in Section 2 of the Chieftainship Act; and

ii) The areas defined in the second, third, fourth and fifth schedules.

Section 10(1) of the Tribal Land Act, indicates that:

"All the rights and title 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 citizen of Botswana and for the purpose of promoting the economic and social development of all the peoples of Botswana."

(b) **Chieftainship Act (CAP 41:01)**

Section 2 of the Act defines Tribal Territories as respectively, the Bamangwato, Batawana, Bakgatla, Bakwena, Bangwaketse, Bamalete and Batlokwa Tribal Territories and the area known as the Barolong farms as described in the Botswana Boundaries Act, and any area which may be added to any such areas by an enactment.

(c) **Tribal Territories Act (CAP 35:02)**

Section 7 of the Act defines the Bamalete Tribal Territory to include the remainder of the Farm Forest Hill 9-KO. As earlier indicated, the amendment of this Act in 1973 incorporated farm Forest Hill 9-KO into the Bamalete Tribal Territory.

(d) **Deeds Registry Act (CAP 35:02)**

Section 8 of the Deeds Registry Act provides that:

"Except as is otherwise provided in this Act or in any other law, no registered deed of grant, deed of transfer, certificate of title or other, deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no

> cession of any registered bond not made as security, shall be cancelled by the Registrar except upon an order of court.

The records in the Deeds Registry show that Bamalete tribe under Chief Seboko N.O. Mokgosi are still holding freehold Title Deed No. 387 of farm Forest Hill 9-KO because the Title Deed was never cancelled as required by section 8 of the Deeds Registry Act.

4.0 ANALYSIS

4.1 In terms of the law, the process of incorporation of the farm into the Bamalete Tribal Territory was followed. It is, however, not clear why at the time of incorporation of the farm into the Bamalete Tribal Territory, the Title Deed of the farm was not cancelled, as is required by the Deeds Registry Act cited above. It is possible that this was simply an omission, which raises the questions of the legal effect of that omission. Two conflicting legal positions are possible in this regard.

4.2 On the one hand, it could be argued that the Title Deed is prima facie evidence of freehold title to which the Balete are entitled. On the other hand, it could be pointed out that a Title Deed such as this one cannot override an Act of Parliament such as the Tribal Territories Act. This is especially so because the Tribal Territories Act was passed after the Title Deed had been obtained, and the Act is unambiguous that the farm is being tribalised.

5.0 CONCLUSION AND RECOMMENDATION

5.1 Existing records show that farm Forest Hill 9-KO was tribalised through the amendment of the Tribal Territories Act in 1973 and it became part of the land area under the administrative jurisdiction of Malete Land Board.

5.2 The non cancellation of the Title Deed is an omission that, in my view, cannot change the tribal status of the farm in question, which is provided for in the legislation.

5.3 I, however, recommend that the Attorney General and I consult with Kgosi ya Balete, to explain the legal position to avoid any possible conflict between Government and the Tribe.

(signed)
D.N. SERETSE
MINISTER OF LANDS AND HOUSING"

47. However, the same Minister held a meeting with the Tribe to reopen negotiations for the purchasing of the Farm. In 2007, the Minister addressed yet another letter to take over the Farm in exchange for compensation. The letter, the contents of which are worth repeating,

reads as follows:

"LH 6/1/6 I (71)

20th November 2007

Kgosi Mosadi Seboko
Kgosi-Kgolo ya Balete
Bamalete Tribal Administration
P O Bo V1
RAMOTSWA

Dear Madam

RE: BALETE FARM – PORTION OF FARM FOREST HILL 9-KO

I refer to the last meeting we held regarding Government's intention to take over this property. You will recall that Government's offer was to compensate Balete with an amount of P5 million.

We agreed at the last meeting that you would consult Morafe and give feedback on their position regarding the offer by Government. The purpose of this letter is therefore to enquire on what the position of Balete is regarding the above proposal.

I would appreciate a prompt response.

I thank you.

Yours faithfully

(signed)
D. Ndelu Seretse
MINISTER OF LANDS AND HOUSING"

48. The Tribe argued that all these facts led to the conclusion that ownership of the Farm has not been divested from the Tribe and vested in the Land Board.

49. As I have already stated above, this Court in the ***Quarries of Botswana* case** deemed ownership of the Farm to be vested in the Land Board solely on the basis of the legislative scheme. The Tribe's case is that such legislative scheme is unconstitutional as it had the effect of taking away its property without process of the law, more particularly, that it never consented to the Farm being taken from it and that to the extent that such taking away amounted to expropriation it was not done in compliance of Section 8 of the Constitution.

50. What then should be considered is whether the Tribe consented to ownership of its Farm being divested from it and vesting on the Land Board.

51. The Appellant's argument is that the Tribe consented to transfer of the Farm to the Land Board. They relied on the Cabinet Memorandum No 947 dated 21st July 1972, which sought authority to incorporate Farm Forest Hill 9-KO into the Bamalete Tribal Territory and the Hansard dated 25th October 1972, where it was stated that the bill was approved by the House of Chiefs and was approved unanimously before it being presented for approval before

Parliament. They also relied on the Minutes of the meeting of the Land Board which was held from the 17th to 19th June 1985 where the Land Board was informed that the Farm was classified as tribal land. During that meeting the Land Board resolved that the Tribe should be consulted.

52. The Tribe argued that they were never consulted when the amendment to the Tribal Territories Act was carried out.

53. In the Replying Affidavit to the conditional counter-application, Kgosi Mosadi Seboko indicated that she was 21 years old when the amendment was made and no consultations with the Tribe were carried out prior to the amendment. This was confirmed by Matshidiso Chester Fologang and Jansen Otukile Batsalelwang. This evidence was not controverted. There is no evidence on the record that the Tribe was consulted and that it gave consent to being divested of its ownership and the ownership being passed to the Land Board. Dr Pilane, counsel for the Appellant, also admitted that there is no evidence that such consultations took place. He argued that the absence of minutes of any meeting by the tribe giving

consent did not mean that there was no such meeting in that tribal meetings are generally not minuted.

54. Given the above conclusion therefore, the issue turns on the constitutionality of the provisions of the 1973 amendment to Section 7 of the Tribal Territories Act, whether or not there was compulsory acquisition of the Farm.

55. The Tribe contended that, the Farm having been acquired from it compulsorily without it being consulted it was deprived of its:

    a) Ownership right over and interest in respect of the Farm;

    b) Rights to manage and administer the land, including rights to control use of the land, and exclude others

    c) Right to the exclusive use and benefit of the land, because the Board is not obliged by the legislative scheme to use the land or make it available for the benefit of the Tribe.

56. They argued that the legislative scheme breached their rights in Sections 3(c) and 8 of the Constitution which rights must be interpreted generously. They relied in the unreported case of ***Attorney General v. Letsweletse Motshidiemang and Others***

CACGB-157-19 where Kirby P, at page 46 paragraph 78 elucidated that:

> "78. Lord Bingham's words in **Reyes v. The Queen**, and also Tebbutt JP's citation of those words, need to be read in context. Lord Bingham's speech contained not only those sentiments, but others as well. He added that:
>
> > "A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society."

57. The Appellant argued that the Respondents had known since 1973 that the Farm vested in the Land Board and not in them and that they were precluded from complaining of violation of their constitutional rights almost 50 years later. This argument is, at the best for the Appellant mischievous, for it was not raised in the Court *a quo* and the Respondents' contentions arise only in response to the claims made by the Land Board.

58. Section 3(c) of the Constitution entrenches the freedom 'from deprivation of property without compensation.'

59. Section 8 prohibits compulsory acquisition unless certain conditions are met i.e.:

    a) Where acquisition is necessary and expedient and cogent reason has been provided for doing so;

    b) Where payment or compensation for compulsory acquisition has been provided;

    c) When the legislative scheme provide for a right of access to the High Court for determination of those rights and interests.

60. Based on the evidence on record, the Farm was not purchased from the Tribe. It was acquired by the Land Board through an Act of Parliament without the consent of the Tribe. That in itself gave rise to compulsory acquisition. Given that scenario, the High Court was correct in holding that the legislative scheme was unconstitutional for permitting the compulsory acquisition of the Tribe's Farm in violation of the protections of the right to property enshrined under Section 8 of the Constitution. The High Court did not err in its decision for

striking out the 1973 amendment to Section 7 of the Tribal Territories Act as that amendment brought about an unconstitutional deprivation of property.

61. The appeal must, for those reasons fail.

62. On the issue of costs, they should follow the event.

63. Accordingly, the Order of this Court is as follows:

    a) The appeal is dismissed with costs, which costs shall include those of two counsel.

    b) The High Court Order is confirmed.

DELIVERED IN OPEN COURT AT GABORONE ON THIS 7TH DAY OF MARCH 2023.

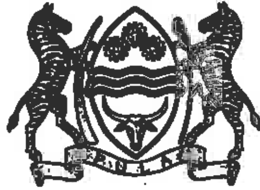
T TAU
PRESIDENT

I AGREE PP---------------------------

F D J BRAND
JUSTICE OF APPEAL

I AGREE ---------------------------

L S WALIA
JUSTICE OF APPEAL



IN THE COURT OF APPEAL OF BOTSWANA HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO. CACGB-153-21
HIGH COURT CASE NO. MAHGB-000819-19

In the matter between:

ATTORNEY GENERAL	**1ST APPELLANT**
REGISTRAR OF DEEDS OF BOTSWANA	**2ND APPELLANT**

and

KGOSI MOSADI SEBOKO (Nominee Officio)	**1ST RESPONDENT**
GAMALETE DEVELOPMENT TRUST	**2ND RESPONDENT**
MALETE LAND BOARD	**3RD RESPONDENT**

Advocate Dr Pilane S T, Advocate Mr Kebonang S, Attorney Leinaeng K, Attorney Mr Kwape O M and Attorney Mrs Bolotsang A D for the Appellants
Advocate Mr Budlender G M, Advocate Mr De Beer M N, Attorney Mr Motlhala O T and Attorney Mr Rantao T for the 1st and 2nd Respondents
Attorney Mr Muzimo P for the 3rd Respondent

JUDGMENT

CORAM: TAU P
LESETEDI JA
BRAND JA
WALIA JA
GAREKWE JA

LESETEDI JA:

The dispute

1. I have read the majority judgment in this matter. I agree with the outcome reached in that judgment, but for the reasons that emerge in this judgment I have reached the same conclusion although through a rather circuitous route.

2. This appeal arises out of a dispute over ownership of a freehold farm described as Farm Forrest Hill 9-KO "the farm", a valuable prime piece of land situated on the outskirts of the capital city, Gaborone.

3. On appeal the primary protagonists are the Attorney General of Botswana cited by virtue of Section 3 of the State Proceedings Act (Cap. 10:01) of the laws of Botswana. He appeals an adverse decision of the High Court impugning the Constitutionality of the statutory framework that divested title of the farm from the tribe. The first respondent, Kgosi Mosadi Seboko, is the current Chief of the Balete tribe and is cited nomine officio for and on behalf of her tribe. She has in that capacity actively participated in the litigations concerning the farm and leads the

tribe's fight for its contending rights over the farm. The 2nd respondent is a registered Trust established by the Bamalete Tribe ("the tribe") in 2003 to manage the properties of the tribe including the farm. It was also cited as the 1st respondent in the *Quarries of Botswana* case, a previous litigation whose outcome has been subject of substantial debate in these proceedings.

The issues

4. Two main issues were raised for determination on this appeal. The first being whether the dispute was finally determined in favour of Malete Land Board by a decision of this Court in *Quarries of Botswana v Bamalete Development Trust and Others* CALCB-036-10, delivered by a full bench of this Court in 2011. If it did, that ends the enquiry. The second is whether, if it did not, the legislative scheme arising from the 1973 amendment of the Tribal Territories Act which incorporated the farm into the Bamalete Tribal territory and or the 1993 amendment of the Tribal Land Act were unconstitutional or had the unconstitutional effect of compulsorily expropriating the Chief and the Tribe of the farm

in violation of the right to property enshrined under Section 8 of the Constitution.

The farm

5. The farm is registered in the Deeds Office under Deed of Transfer number 387, passed in favour of the then Bamalete Chief Seboko Mokgosi as *nominee officio* for and on behalf of his tribe which acquired it by way of sale from Aaron Siew in July 1925.

6. Over the past several decades, from 1970, portions of the farm have been parceled out and transferred by the tribe to the government and to the Roman Catholic church on a sale basis.

The legislative scheme and its bearing on the dispute

7. In 1933, the Tribal Territories Act (Cap. 32:03) defining the boundaries of various tribal areas in the country was enacted. The Act has undergone a number of amendments since then but it was its amendment under Act no. 3 of 1973 that has a critical bearing on the dispute herein. By section 7 (ii) of Act no 3 of 1973, the Bamalete tribal territory was defined to now include "[t]he remainder of farm Forrest

Hill No. 9-KO shown on Plan KO-208 deposited with the Director of Lands" (the farm). The circumstances that led to this amendment and the involvement of the Bamalete (Balete) tribe in sanctioning the amendment is subject of controversy, as shall emerge in due course of this judgment.

8. In 1968, Parliament had by passing the Tribal Land Act, divested the chiefs of control and administration of tribal land and vested all rights and title to land in each tribal area in tribal land boards, the latter a creation of the statute. The various tribal areas and their corresponding land boards are listed in the First Schedule of that Act, appearing in the First and Second Columns respectively. In this regard the Malete Land Board was established as the land board in respect of the Bamalete tribal territory. That Act commenced on 30th January 1970.

9. Section 10 of the Tribal Land Act, the vesting provision, read:

   "(1) All the rights and title 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.

(2) Nothing in this section shall have the effect of vesting in a land board any land or right to water held by any person in his personal and private capacity."

10. The Tribal Land Act subsequently underwent a significant amendment to section 10. By Section 7 of Tribal Land (Amendment) Act No. 14 of 1993, Section 10 was amended, in subsection (1) thereof, by substituting for the words "tribesmen of that area" the words "citizens of Botswana"; and, by deleting subsection (2) thereof.

The Malete Land Board application in the High Court

11. In December 2017, the Malete Land Board (hereinafter referred for brevity as "the land board") launched an application to the High Court on 11 December 2017 for the cancellation of Deed of Transfer no. 387. An order of court is required under Section 8 of the Deeds Registry Act authorizing such cancellation. It also sought an order directing the Kgosi Mosadi Seboko and the Trust to deliver the floating copy of the

title deed to the farm, within 7 days of the grant of the court order sought.

12. The Land Board contended that the rights, title and interest of ownership vesting on the tribe by virtue of Deed of Transfer number 387 ("the title deed"), was terminated by operation of law and passed on to it, the Land Board. The Attorney General was cited as 2nd respondent in a representative capacity for the Registrar of Deeds who was also cited as the 1st respondent. The 3rd respondent was Kgosi Mosadi Seboko, cited in her representative capacity for and on behalf of her tribe. I will therefore in this judgment either refer her by her name and title or as the tribe, to like effect. The Trust was cited as 4th respondent.

13. The application was supported by an affidavit deposed to by the land board Secretary. The cause of action for the application appears from the following paragraphs of that affidavit:

"22. The vast of Bamalete Tribal Territory was defined in the Tribal Territories Act Cap [32:03] which was passed in 1933, with the sole purpose of defining the boundaries of the respective territories of each tribe.

23. Section 7 of the Tribal Territories Act, describing the Bamalete Tribal Territory was amended in 1973 to include Farm Forest Hill 9-KO.

24. By virtue of the said amendment, Farm Forest Hill, in terms of section 10 of the Tribal Land Act vested in Malete Land Board.

25. The said section also in consequence, divested Bamalete Tribe of Farm Forest Hill and/or removed the administration and management of the said Farm from the 3rd and 4th Respondent.

26. The rights, title and interest vested on the Bamalete Tribe by virtue of Deed of Transfer No. 387 were terminated by operation of law and passed to the Applicant.

27. This dispute has been a subject of litigation, in the case of Quarries of Botswana (Pty) Ltd v Bamalete Development Trust, Tshepho Phuthego, Bashi Buti, Kgosi Mosadi Seboko N.O and Malete Land Board under case number CACLB-036-10 where the Court of Appeal held that the inclusion of Farm Forest Hill in the Tribal Territories Act and consequently in the Bamalete

Tribal Territory vested Farm Forest Hill on the Applicant. A copy of the judgment of the court of appeal is attached hereto marked "FA2" and the contents therein are incorporated hereto under oath as if they are specifically pleaded."

14. In sum, the case presented by the land board was that by including the farm as part of the Bamalete tribal territory under the 1973 Tribal Territories (Amendment) Act, read with section 10 of the Tribal Land Act, the legislative scheme divested and terminated the tribe's right, title and interest in the farm by operation of law; the farm now being tribal land falling under the land board.

15. Only Kgosi Mosadi Seboko and the Trust filed an opposition to the application. In her detailed answering affidavit, Kgosi Mosadi Seboko vehemently disputed that the tribe had been divested of ownership of the tribe by that legislative amendment. She asserted on the contrary, and by pointed instances, that the government has:

    a. always recognized and acknowledged that the farm belonged to the tribe even after the 1973 amendment of the Tribal Territories Act as demonstrated the government's various

negotiations with the tribe and purchase of portions of the farm from it over the years until as recently as 2007;

b. after the 1973 amendment, acquired portions of the farm on purchase from the tribe and effecting payment therefor to the Chief on behalf of the tribe;

c. on various occasions over the decades since 1973, expressly acknowledged in writing through Parliamentary instruments, official correspondences by senior officials as well as opinions from the Attorney General's office that the land belonged to the tribe;

d. through the land board, acknowledged even during the *Quarries of Botswana* case, that the farm belonged to the tribe.

16. Kgosi Mosadi Seboko further denied that the tribe ever voluntarily divested itself of the farm, pointing out that such divestiture would have been preceded by an extensive and transparent process of consultation between various sections of the tribe and between the government and the tribe; a process she said never took place.

17. Alongside this opposition, Kgosi Mosadi Seboko launched a conditional counterclaim in the form of a collateral challenge in which she contended that in the event it is found that in terms of the Tribal Territories Act and the Tribal Land Act, the rights and title of the Bamalete tribe to the farm has by law been vested in the land board, then:

    a. The statutory provisions relied upon by the land board, alternatively the repeal of section 10(2) of the Tribal Land Act, are inconsistent with section 8 of the Constitution of Botswana and invalid on the ground that they each bring about an impermissible compulsory acquisition of an interest in or right over property;

    b. The statutory provisions, alternatively the repeal of Section 10(2) of the Tribal Land Act, are inconsistent with section 15(1) of the Constitution of Botswana and invalid on the grounds that they are each impermissibly discriminate of itself and in its effect.

She sought an order: striking down section 7(ii) of Act No 3 of 1973 as well as the repeal of section 10(2) of the Tribal Land Act; and for the court to declare the farm to vest in the tribe.

18. Both the appellant and the land board opposed the counterclaim. The land board first raised preliminary legal points that the question of ownership of the farm was determined in its favour by this Court in the *Quarries of Botswana* case and it contended that for that reason, the defences of issue estoppel or, alternatively *res judicata*, prevented the question of ownership of the farm being litigated upon again.

19. The land board argued on the merits, that the farm was transferred with the consent of the tribe after extensive consultations in which the then Chief, Kgosi Seboko Mokgosi, played a prominent role in his capacity as both the chairperson of the land board and local councilor; the Chief was also a member of the House of Chiefs which endorsed the legislative amendment. The land board also contended that it had, since 1970, been responsible for administering the farm and that although there is no record of when the tribe did meet, there is a reasonable assumption from the surrounding circumstances that the tribe did meet and consent to the statutory amendment.

20. The appellant too, took the position that the process necessary to enact the 1973 amendment was followed in that the Bamalete tribe motivated, consented and participated in the conversion of the freehold farm to tribal land. For that reason, so the appellant posited, the contentions raised and based on infringement of Sections 8 and 15 of the Constitution did not arise as there was no compulsory acquisition but a voluntary act in which the tribe was an eager and willing participant.

The decision of the High Court

21. In the light of the counterclaim, it was evident that the relief sought by the land board was dependent on the outcome of the constitutional challenges including the special pleas thereto.

22. The High Court panel that heard the dispute generated two judgments. The main one by Komboni J, was unanimous. Mothobi J also wrote a separate judgment. The discussion that follows shall confine itself to the unanimous judgment.

23. The High Court rejected the special defence of *res judicata* on several grounds, mainly: that in the *Quarries of Botswana* case the land board was not a party in the litigation at the High Court; the constitutional challenge is directed at the Attorney General who was not a party in that case; and that the issue of ownership of the farm only arose in the context of the interdict proceedings in that case, not as between the land board and the tribe.

24. The High Court also rejected the special defence of issue estoppel as applying that defence would prevent the tribe from challenging the constitutionality of a law that deprived it of ownership of the farm thus occasioning an injustice to the tribe in the circumstances of the case.

25. Turning to the question of constitutionality of the impugned legislative provisions, the High Court upheld the counter application on the ground of unconstitutionality of section 7(ii) of the 1973 Tribal Territories Amendment Act. It found that there was insufficient material before it on which to decide the constitutionality of section 15. In the result, the High Court:-

- Dismissed the land board's application with costs including that those attendant on employment of two counsel;
- Ordered that section 7(ii) of the Tribal Territories Amendment Act No 3 of 1973 which incorporated the farm into the Bamalete tribal territory was inconsistent with section 8 of the Constitution and invalid on the ground that it brings about an impermissible compulsory acquisition of an interest in or right over property;
- Consequently struck down the amendment and declared the farm to vest in the tribe;
- Awarded costs of the counter-application against the land board and the Attorney General jointly and severally one paying the other to be absolved.

The appeal

26. The appeal is against the above orders. The appeal by the land board as well as a counter appeal by Kgosi Mosadi Seboko were struck out for invalidity and applications for leave to file those appeals out of time were unsuccessful. The land board has thus not participated in the appeal while the other respondents oppose the appeal with leave of this Court. Its citation as a respondent is merely nominal.

27. Although the appellant has filed prolix grounds of appeal, the issues fall into a narrow purview. These are whether the High Court erred in:

   a. dismissing the *points in limine* regarding the defences of *res judicata* and issue estoppel;

   b. finding that section 7(ii) of the Tribal Territories Amendment Act of 1973 was inconsistent with section 8 of the Constitution of Botswana and therefore invalid;

   c. exercising jurisdiction and making factual and legal findings on matters in which it was *functus officio* in that it had prior to the matter going on appeal in the *Quarries of Botswana* case spent its jurisdictional powers and had none remaining;

   d. wrongly finding the Court of Appeal to have been wrong in the *Quarries of Botswana* case.

28. Despite the pages generated by the file, the issues require a more digest approach. To give proper context, the starting point in discussing

the appeal is to consider the legal principles on the exceptions raised in the *points in limine.*

The discussion

Requirements of the exceptio res judicata and issue estoppel

29. The requirements and policy considerations behind the defence of *res judicata* have been stated in a plethora of judicial authority. In *Mbaiwa v Kapimbua* [2017] 2 BLR 260 (CA) at 263 Kirby JP gave the following exposition:

> "The *exceptio rei judicatae vel litis finitae* has its origins in the Roman Dutch law. As De Villiers CJ held in *Bertram v Wood* 1893 (10) SC 177 at p 180:
>
> > '(T)he authority of *res judicata* induces a presumption that the judgment upon any claim submitted to a competent court is correct, and this presumption, being *juris et de jure,* excludes every proof to the contrary. The presumption is founded upon public policy which requires that litigation should not be endless and upon the requirements of good faith which, as said by Gaius (Digest 50.17.57), does not permit of the same thing being demanded more than once.'

The requirements for successful reliance on the defence of *res judicata* are *idem actor, idem reus, eadem res* and *eadem causa petendi.* This means that the same plaintiff cannot in subsequent proceedings demand the same thing from the same defendant arising from the same cause of action. The exception can thus be raised by a defendant in a later suit against a plaintiff who is demanding the same thing on the same ground. See *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at p 562. That common law principle is equally applicable in Botswana."

See *National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Limited* [2000] ZASCA 70; 2001 (2) SA 232 (SCA); [2001] 1 All SA 417 (A) at para 2.

30. The two cases cited in the above quotation are recognized authority on the exception. See *Standard Chartered Bank of Botswana Limited v Isaacs* [1999] 1 BLR 453 (CA) at 456.

31. The requirement of sameness of the parties is not inflexible for the law recognizes that there are parties whose commonality of interest in the substance of the litigation renders it logical and good sense to identify

them as essentially the same parties with one stepping into the shoes of the other. Recognized examples are pupil and tutor, deceased and heir, and, principal and agent. See the cases of *Kethel v Kethel's Estate* 1949 (3) SA 598 (A) at 603; *Mitford's Executor v Ebden's Executors and Others* 1917 AD 682.

32. The law is also not inflexible when it comes to the requirement of the sameness of an issue. In *Leoifo v Ngwato Land Board and Others* [2014] 3 BLR 468 (CA) at 472F-G, this Court after consideration of case law, observed:

> "The concept of an issue is also viewed in a broad and not limited perspective. It was discussed in detail by Tebbutt JP in *Kobedi v The State* (2) [2005] 2 BLR 76, (CA) delivering a judgment of the full court. From the extensive judicial authority and *dicta* he cited, it can be summed up that the concept of 'same issue' in a plea of *res judicata* is wide enough to cover matters which belong to the subject of the litigation and which the parties, exercising reasonable diligence, could have brought as part of the dispute in the first matter, but which was not brought forward at the time."

33. The defence of issue estoppel is less exacting in that what it requires is that the parties must be the same and the same issue of fact or law must be an essential element of the judgment already rendered. See *Women in Capital Growth (Pty) Ltd and Another v Scott and Others* [2020] ZASCA 95. The relationship between the defence of *res judicata* and issue estoppel was explained in *Smith v Porrit* 2008 (6) SA 303 (SCA) para 10 as follows:

> "Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same *(eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (idem actor) and that the same issue *(eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res iudicata* is raised in the absence of a communality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 667J-671B, this is

not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis (*Kommissaris van Binnelandse Inkomste v Absa* (supra) at 67E-F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others".

The above passage was endorsed in *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) as a reflection of the relaxation of the *res judicata* defence.

Quarries of Botswana case

34. With the above principles in mind, one must turn to the *Quarries of Botswana* case to find whether the High Court erred in rejecting the *points in limine*.

35. The case in *Quarries of Botswana* was interdict proceedings brought by Quarries of Botswana (Pty) Ltd against Bamalete Development Trust

and two others for an order interdicting the respondents therein from denying vehicles transporting its gravel access through a road traversing the farm. The tribe was not cited as a respondent. Kgosi Mosadi Seboko, on behalf of the tribe, only joined the proceedings after the filing of the replying affidavit with the object of demonstrating that the tribe was the owner of the farm and that the Trust was established by the tribe as a vehicle to manage the tribe's assets.

36. Though Quarries of Botswana (Pty) Ltd argued that the farm was part of Bamalete tribal territory and therefore fell under the control of the land board, it did not join the land board as a respondent in the case. It was only when the matter went on appeal that the Court of Appeal intimated to counsel when the matter was first due to be heard that it would appear necessary that the land board be joined. That having been done, the land board did not seek to abide the Court's decision but chose to make common cause with the other respondents in contending that the farm did not belong to it but to the tribe.

37. Although Kgosi Mosadi Seboko went into considerable detail explaining the tribe's ownership of the farm, the Court of Appeal defined the scope of the issue before it in the below passage:

> "There is one further preliminary observation that must be made. The matter of ownership of Forest Hill is a legal question. The various expressions of opinion, impression and belief to be found in the record are therefore irrelevant to that issue."

38. That circumscribed the scope of the enquiry to the effect, on the tribe's rights and title in the farm, of the legislative scheme of the Tribal Territories Act, as amended by Act No 3 of 1973, and the Tribal Land Act. The Court then proceeded to analyse the legislative scheme as well as the contesting arguments between Quarries of Botswana (Pty) Ltd (for brevity referred to at times simply as Quarries of Botswana) on one side and the respondents on the other. Quarries of Botswana's argument, it will be recalled, was that the incorporation of the farm into the Balete tribal territory *ipso facto* and/or *ipso jure* rendered the farm part of tribal land to be governed by the provisions of the Tribal Land Act. The respondents argued that the farm belonged to the tribe and that its incorporation into the tribe's tribal territory did not extinguish

that right of ownership, noting that the title deed in respect of the property was never cancelled and still remained in the name of the tribe. They argued further that if the argument by Quarries of Botswana was to be accepted, such alleged expropriation would offend statutory provisions of the Acquisition of Property Act as well as violating the tribe's constitutional right to property contained under section 8(6) Constitutional protection of the right to property.

39. In its conclusion, the Court of Appeal held, at paragraph 32 of the judgment in that case, that the effect of incorporating the farm into the Bamalete tribal territory plainly meant, in the light of the Tribal Land Act, that there was one legislative intent, and that intent was, inevitably, to vest the farm in the land board.

40. The Court of Appeal also briefly, at paragraph 37 of the judgment, addressed the constitutional argument and found that the Section 8(6) of the Constitution argument advanced by the respondents was not applicable to the case in that the provision was applicable to body corporates whereas the tribe was not a body corporate.

41. More importantly, the Court observed, at paragraph 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 5th 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 referral did not occur or that the Bamalete Chief at the time objected. It must follow that the statutory termination of the Bamalete freehold title in Forest Hill and the vesting of the land in the fifth respondent was not unconstitutional."

Whether the High Court erred in dismissing the special pleas

42. I now turn to consider the challenge to the decision of the High Court in dismissing the *exceptio* of *res judicata* and the issue estoppel. The Attorney General was, it is common cause, not a party in the *Quarries of Botswana* case. It is however a necessary party in the challenge of the constitutionality of the relevant legislative provisions. The need to

join the Attorney General in such a challenge was underscored in the following passage by KIRBY JP, delivering a judgment of the full bench in *Attorney General and Another v National Amalgamated Local and Central Government and Parastatal Workers Union* [2016] 2 BLR 521 (CA) at 259:

> "It is the responsibility of the Attorney-General, and among the central mandates of that office, both to defend the Constitution and to defend the statutes drafted by her department. There should be no constitutional challenge raised in the courts of Botswana without the full and reasoned arguments of the government, represented by the Attorney-General, being heard and considered. It is to be hoped that this will not occur again."

43. Two of the key parties in the present case were also parties to the *Quarries of Botswana* case but they only joined the dispute when it was well advanced. Kgosi Mosadi Seboko on behalf of the tribe only joined the litigation more than a year after the filing of a replying affidavit by the applicant there, Quarries of Botswana. The land board was only joined on appeal at the instance of the Court of Appeal. Quarries of Botswana (Pty) Ltd which was the main litigant in the *Quarries of Botswana* case is not a party in the present case. The sameness of the

parties requirement of the defences of *res judicata* and issue estoppel therefore stood to fail as the High Court found.

44. The requirement of sameness of issue was also not met. The issue identified by the Court of Appeal in the Quarries of Botswana was a purely legal one – interpretation of the legal effect of the relevant statutory scheme on the question of ownership of the farm. On the other hand the question of whether there was an infringement of the tribe's constitutional right to property was both a factual and legal question. This was accepted to be so by Dr Pilane.

45. It is also not conceivable that the tribe would have raised the issue of unconstitutionality when it and the land board both held the view that the land belonged to the tribe and considering the stages at which each of those parties were joined to that litigation. In any event to close the door on the tribe on the ground of any perceived closeness of issues will occasion grave unfairness to it as it will not have been afforded a fair opportunity to enter the halls of justice and there to plead its

constitutional case in respect of a property of no doubt a substantial value worth millions.

46. Although a substantial part of the heads of argument were dedicated to the *res judicata* and issue estoppel pleas, counsel for the Attorney General did finally concede that these defences were, a red herring.

47. The argument on *functus officio* principle was not pursued in argument. It simply falls for the same reasons as the other special defences in that they are founded on the same considerations.

48. The observations of the Court of Appeal in paragraph 38 of the *Quarries of Botswana* judgment have caused some debate at the hearing of this appeal and an interpretation was given to the latter part of the paragraph as ascribing a final stamp of Constitutional validity of the statutory termination of the tribe's right of ownership over the farm. Such interpretation is flawed primarily for two reasons. Firstly, as observed in the opening statements of that paragraph, the constitutionality of the Tribal Territories Act and the Tribal Land Act in the relevant respects had at that stage never been challenged.

Secondly, in the absence of such a challenge, the principle of presumption of legislative constitutionality must prevail until a Constitutional challenge has dislodged that presumption. See *Kgafela II and Another v The Attorney General; In re: Gabaokelwe v The Director of Public Prosecutions* (1) 2012 (1) BLR 699 (CA) at 714.

49. In my view, in the *Quarries of Botswana* case, the Court of Appeal neither dealt with nor did it close the door to a Constitutional challenge of the impugned legislative scheme. A Constitutional challenge ought not be raised merely in heads of argument but must be raised in pleadings and where appropriate, Order 70(1) of the Rules of the High Court complied with.

50. Before proceeding to the question of constitutionality of the incorporation of the freehold farm into tribal land tenure, it is convenient to dispose of a point raised by the appellant in his heads of argument on appeal though it does not appear to have been raised in the High Court. In his heads of argument, the appellant raised an argument invoking the doctrine of *stare decisis* or binding precedent and it may

have been conflated with the requirements of the *exceptio res judicata*. At paragraph 94 of his heads of argument the appellant invokes part of a passage from the case of *Botswana Railways Organisation v Setsogo & Others* [1996] BLR 763 (CA) (Full Bench) at 806, in support of his argument. It is helpful to recite the whole passage, by Amissah P, as it renders a fuller description of the doctrine and its application, and may assist to dispose of the argument. It states:

> "According to the doctrine of the binding effect of judicial precedent which we apply in this country, a subsequent court of inferior status is bound to follow an earlier decision of a superior decision, and sometimes the court is bound by its own or the decision of a court of co-ordinate jurisdiction. I, for the present, do not debate the question of the appropriateness of a final court of appellate jurisdiction being obliged at all times to follow its own previous decisions, as it has been found in some jurisdictions that such blind application of a previous decision, whatever be the circumstances, may lead to undue repetition of a decision which may be recognised by all as in principle erroneous. But the doctrine of the binding nature of judicial precedent applies to the *ratio decidendi* of a case and not to all dicta or pronouncements in it. And the *ratio decidendi* of the case depends on the issue or issues raised, the facts and arguments made in support thereof, the findings on them, if any, and the holding on the law as applied to the facts and arguments."

In *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) Wallis JA comprehensively summed up the basic principle and policy rationale of *stare decisis* to be that:

> "...the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous. The cases in support of these propositions are legion. The need for palpable error is illustrated by cases in which the court has overruled its earlier decisions. Mere disagreement with the earlier decision on the basis of a differing view of the law by a court differently constituted is not a ground for overruling it.
>
> [4] The doctrine of stare decisis is one that is fundamental to the rule of law. The object of the doctrine is to avoid uncertainty and confusion, to protect vested rights and legitimate expectations as well as to uphold the dignity of the court. It serves to lend certainty to the law."

The ambit and application of the doctrine was also recently similarly discussed by this Court in *Attorney General and Others v Priscilla Nkamo Bando Ditlhong,* CACGB-111-21 delivered 29th April 2022. See also *Attorney General v Motshidiemang* CACGB-157-19 delivered 29 November 2021.

51. As pointed out in the main judgment, there is a distinction between the exception *res judicata* and the doctrine of *stare decisis. Stare decisis* or judicial precedent is concerned with legal principles and rules established by previous judicial authority of the same or a higher court. On the other hand, *res judicata* is merely an estoppel against the same matter being litigated over again after it was definitively concluded by a court of competent jurisdiction even if such court may be subordinate to the court in which the matter is sought to be relitigated.

52. To the extent that the High Court sought to question the correctness of the holding on the law by the Court of Appeal in the *Quarries of Botswana* case that the effect of the 1973 amendment of the Tribal

Territories Act was to divest the tribe of freehold ownership of the farm and to convert it into tribal land under the vestment of the land board, I am unable to agree. The Court of Appeal was no doubt correct as to the legal consequence of that legislative scheme. But if the conclusion reached by the Court of Appeal in that case can be interpreted to bar that legislative effect from constitutional challenge, which I don't accept in the light of the exposition in paragraph 38 of that judgment, such an interpretation would run counter to the rule of law and be clearly wrong and unsupportable for permitting parliament to use its legislative power to override Constitutional protections without recourse to the law.

53. The limitation to legislative power contained in section 86 of the Constitution as well as individual protections and checks of use of public power would be rendered ineffective. The observations made by Kentridge JA in *Attorney General v Odendaal* [1992] 2 BLR 194 (CA) at 223 about the risks of permitting parliament to make legislative inroads into Constitutional protections, though made in the context of evidential rules in criminal matters, is, in my view, relevant here. The constitutional protections under Chapter 2 of the Constitution cannot be

taken away at the stroke of the legislative pen without leaving the person whose rights are alleged to have been infringed, legal recourse to challenge such legislative act in the courts.

54. This clears the way to discussing the main issue, constitutionality of the impugned statutory provisions. The ground raised by the Attorney General on the Constitutionality question before the High Court is factual. The Attorney General's whole case in respect of the challenge to the Tribal Territories Amendment Act No 3 of 1973 incorporating the farm into the Bamalete Tribal Territory is that the incorporation was not by way of compulsory acquisition but was done on the motivation of, consent and eager participation of the tribe to convert the farm to tribal land. Incidentally, that too was the argument of the land board in the court *a quo.*

55. That factual dispute is more apparent than real, as I shall point out in due course. The parties are not in disagreement on a number of significant factual and procedural matters. These include:

a. That for the tribe to make an important decision such as affecting the tenure or ownership of the farm, that would be preceded by extensive consultation within the tribal structures as well as between the tribe and government. (vide., pp170-174; 298; 341-2 of the record)

b. That the land board extensively consulted with Government officials for the transfer of the farm from freehold private ownership by the tribe to tribal land tenure (vide., pp 294-295 of the record)

c. There is no record of the tribe having ever met and where such meeting(s) took place to consult and decide on the transfer (vide., pp 336 para 15.14 of the record)

d. Around 1970-72, the farm together with the Rankoromane farm (also a freehold farm owned by the tribe) were handed over to the land board at the instance of government officials, politicians for better management and land utilisation (vide p 302, 303-4, 307-8 of the record)

e. The farms were subsequently returned to the management of the tribe under the Trust.

f. The tribe through the Kgosi has continued over the years since the incorporation of the farm into the Balete Tribal Territory, to sell portions of the land to, inter alia, the Government as shown by the sale and transfer of a portion of the farm in 1987.

g. Various Government officials including the Attorney General's office and Ministers have over the years, and as late as 14th April 2005 rendered legal opinion that the land belonged to the tribe (pp 212-7, 221, 209-211, 218-9, 516-517).

h. In the *Quarries of Botswana* case, the land board, through its board secretary, stated under oath on the 8th July 2011 that the land board had at all material times understood and treated the farm as the private property of the tribe and that if the opposite was the case, the land board would long have allocated the land under the Tribal Land Act given the acute shortage of land in the land vested in the land board. The affidavit further stated that as a testimony of the view of the land board's view that the land is the private property of the tribe and considered as such by the land board, the farm remained vacant.

i. A Cabinet Info Note under the hand of the then Minister of Lands and Housing, dated 23rd November 2005 indicated a desire by the Ministry to enter into a joint partnership with the Trust to develop the farm but the issue of ownership of the farm arose when it was realized that the farm had been incorporated

into the Bamalete tribal territory in 1973. This realisation led the Minister to investigate the matter and he found that although a question may be raised whether the incorporation was preceded by the requisite consultations with the tribe, the procedural requirements for passing the amendment legislation were met. On the back of this uncertainty, the Info Note recommended a consultation with the Kgosi of the Bamalete to explain to her the legal position with a view to reaching a common understanding and avoid any possible conflict between the Government and the tribe (pp315-321). The Minister also noted that there was no documentary evidence on file that this consultation ever took place. What the Info Note demonstrates is absence of any record or certainty that the consultation with the tribe ever took place, let alone the obtaining of its consent to the incorporation.

j. As late as 20th November 2007, the government, through the Minister of Lands and Housing, wrote to Kgosi Mosadi Seboko offering to take over the farm and paying the tribe P5 Million in compensation.

56. Substantial documentary annexures were filed in this matter. These included minutes of various public entities and officials, opinions rendered by government officials over time and correspondences, some of which I have already referred to. As a reflection of the

contemporaneous events, views and attitudes, the contents of these documents have not been controverted. What the Attorney General now seeks is to persuade this Court that its opinions and those of other Government entities reflected therein were erroneous. This however does not detract from the absence of any record reflected consultation with the tribe let alone its consent to the divesting of its ownership rights. At most these show that at the time of the 1973 amendment of the Tribal Territories Act, the concern was one of land management and utilisation by the tribe and a recognition that the land board could manage it better.

57. That there was no recorded evidence of the existence of the required consultation and consent was accepted by Counsel for the Attorney General during the hearing of the appeal. He however submitted that this should not come as a surprise as kgotla meetings by the tribe are not generally known to record minutes of their proceedings, more to around the early 1970s. That may well be so. But two factors militate against the existence of any such consultations. The first is that even on the part of the land board itself whose minutes appear well

documented, there is no reflection of any consultations with the tribe on the matter.

58. The second is that the tribe provided what can be referred to as direct evidence of the absence of any such consultation with the tribe let alone its consent and this has not been concretely controverted. Other than Kgosi Seboko who on her account was an adult at the time, there is the sworn statements of two other members of the tribe who were adults at the time and one of whom was also working as a clerk at the land board at the time of the alleged consultations. They all deny that any such process took place averring that had it taken place they would have been privy to it. It was incumbent on the Attorney General to have controverted that, not by mere bland statements but concrete evidence in the light of the gravity of legislative overreach alleged.

59. The third is that save for land utilisation management, the tribe continued over the years after the incorporation to exercise its rights of ownership including selling off portions of the farm, openly with the knowledge of the land board and involvement of the Government, the latter being one of the purchasers. From the record, it appears that at

no time was the question of ownership of the farm ever below the radar for an extended period. There was therefore in my view no evidence of any consultation with the tribe let alone the consent to deprive the tribe of its private ownership of the farm and converting it into tribal land.

60. Finally, although Kgosi Seboko Mokgosi was a member of the land Board for several years, chairing its meetings in its early years, he never purported to hold any mandate on behalf of the tribe in respect of transferring ownership of the farm from the tribe.

61. I am satisfied that there is no evidence controverting the tribe's assertions of absence of consent.

62. Section 8 of the Constitution which guarantees the protection from deprivation of property is detailed but as the Attorney General does not seek cover or any justification of the incorporation of the farm into the tribal territory under it, it is unnecessary to recite it in detail save for subsections 1 and 6 which reads:

"(1) 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 and country planning or land settlement;

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

(iii) in order to secure the development or utilization 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 a 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, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided by Parliament."

63. Underlying the Attorney General's submissions is that this was just a conversion of property by the tribe from one form of land tenure to another. This to me seems to miss the essence of the distinction in the concept of land ownership between freehold land tenure and customary land tenure. Freehold ownership can be understood within the common law context as the comprehensive control over a thing empowering the owner to do what he likes with the thing as he deems fit, subject to the

limitations imposed by public and private law. See Silberberg and Schoeman's the Law of Property, 3rd edition at page 161. The definition of ownership offered by Maasdorp's Institutes of South African law, Volume II, is that subject to the maxim that no one is to use his or her property in such a way as to injure another person's rights, ownership is comprised of three real rights: the right of possession and the right to recover such possession; the right of use and enjoyment; and, the right of disposition. Of course, these rights may in certain circumstances be limited, for instance by contractual relations. The right of disposition includes the right to sell the property or any portion thereof.

64. The concept of ownership of land under the common law is more individualistic and absolute than rights conferred to land under customary law tenure, the latter applying to tribal land, where the concept of control was limited and community oriented. In pre legislation era, the residual powers of control and oversight were exercised by the chiefs on behalf of the community. It was the Chief under customary tenure who allocated rights to use of land. Ownership of the land in the common law sense appears to have been an alien

concept under customary law. So too, the concept of sale of tribal land was unknown under customary law. See Martin Adams, Faustin Kalabamu and Richard White's *Land Tenure Policy and Practice in Botswana* published in the Austrian Journal for Development Studies (on line version); Isaac Schapera's *A Handbook of Tswana Law and Custom* and the opinion of Aguda JA on customary land tenure expressed in *Kweneng Land Board v Matlho and Another* 1992 BLR 292 (CA) (*Matlho*). The court in *Matlho* however held, on the basis of an uncontroverted affidavit by one Pule, which went against the body of recognized writers on customary law and the court assessors, that the customary law of the specific part of the tribal area from which that dispute arose may have developed to permit ownership in a personal and private capacity entitling the holder of such title to sell his rights. The correctness of that *Matlho* in so holding and the controversy of whether personal and private ownership was introduced by Section 10(2) of the Tribal Land Act was criticised. See case note on *Kweneng Land Board v Kabelo Matlho and Pheto Motlhabe* by Clement Ng'ong'ola published in the Journal of African Law, Vol 37, No 2 Cambridge Oxford University Press. The notion about the existence of personal and private

ownership of land under customary law tenure was ended with the overruling of the *Matlho* view on the subject in *Kweneng Land Board v Mpofu and Another* [2005] 1 BLR 3 (CA) (*Mpofu* case), a full bench decision. Incidentally, the *Mpofu* case is also a recognized and binding authority in our jurisdiction on the *stare decisis* principle.

65. Since 1970, under the Tribal Land Act of 1968, as amended from time to time and being reenacted in 2016, ultimate control has been moved from the Chiefs to vest in the land boards who are charged with the statutory power to administer such land in terms of the Act.

66. There are no such limitations in respect of the freehold ownership. Once freehold land has been tribalized the tribe loses the right to use and dispose of it. The land board now assumes those rights, it too subject to the ambit of the empowering legislation. The tribe now becomes, in a way, a stranger to that land in the sense that the land then vests in the land board not in the tribe, let alone in trust for the tribe nor solely for the tribe's social and economic wellbeing but the social and well-being of all the people of Botswana. Since the 1993 amendment to

section 10(1) the tribal land vests in the land board in trust for all the citizens of Botswana and for the purpose of promoting the economic and social development of all the peoples of Botswana. The effect of incorporating the freehold farm in the tribal territory was, in this respect, an act of divesting the tribe of ownership of the farm. In the absence of consent of the tribe to bequeath its ownership to the statutory commonwealth, the conversion of the farm into tribal land constituted compulsory acquisition of the farm by statute in favour of the land board in contravention of section 8(1) of the Constitution. The tribe could no longer lawfully exercise any right of ownership over the land as a tribe nor could the tribe continue to use it for its own benefit in a way it deems appropriate. It was now bereft of any ownership rights over the farm.

67. In consequence, the outcome envisaged in the following seminal and timeless statement of Marshall J in the Supreme Court of the United States case of *Marbury v Madison* (1803) 5 US 137, follows:

"those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature, repugnant of the constitution is void."

68. The court *a quo* was in my view correct in its finding that the Tribal Territories Amendment Act No 3 of 1973 was unconstitutional.

The conclusion

69. For the reasons given above, I too agree that section 7(ii) of the Tribal Territories Amendment Act No. 3 of 1973, is unconstitutional and that the appeal should be dismissed with costs. The tribe has prayed for costs to include those of engaging two counsel, it being argued that this was a complex case justifying the engagement of two counsel. That level of costs has not been put in issue. There is no doubt that this was an important and complex case which justified the engagement of two counsel.

The Order

1. The appeal is dismissed with costs against the appellant and such costs to include costs of two counsel.

DELIVERED IN OPEN COURT AT GABORONE ON THE 7TH DAY OF MARCH 2023.

I B K LESETEDI
[JUSTICE OF APPEAL]

IN THE COURT OF APPEAL OF BOTSWANA HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO. CACGB-153-21
(High Court Case No. MAHGB-000819-17)

In the matter between:

ATTORNEY GENERAL	**1ST APPELLANT**
REGISTRAR OF DEEDS OF BOTSWANA	**2ND APPELLANT**

And

KGOSI MOSADI SEBOKO (Nominee Officio)	**1ST RESPONDENT**
GA-MALETE DEVELOPMENT TRUST	**2ND RESPONDENT**
MALETE LAND BOARD	**3RD RESPONDENT**

Advocate Dr. S. T. Pilane with Advocate Mr. S. Kebonang with Attorney Mr. K. Leinaeng and with Attorney Mr. O. M. Kwape for the Appellants
Advocate Mr. G. M. Budlender SC with Advocate Mr. M. N. De Beer with Attorney Mr. O. T. Motlhala and with Attorney Mr. T. Rantao for the 1st and 2nd Respondents

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DISSENTING JUDGMENT

CORAM: TAU P.
LESETEDI J.A.
BRAND J.A.
WALIA J.A.
GAREKWE J.A.

GAREKWE J.A.

PREFACE:

This is a dissenting opinion. I have read the judgments by the majority. I do agree to a large extent with the background as presented in such judgments and further agree with the well settled legal principles on the doctrines of *res judicata,* issue *estopel* and *stare decisis*. I, however, have a different view when it comes to the analysis of the issues arising from the dispute between the parties and the resultant conclusion, hence this dissent. Though in agreement largely with the background, I will, for flow of thought and therefore better appreciation by the parties of this opinion, capture the background to the extent necessary and relevant.

INTRODUCTION:

1. At the centre of this appeal is a piece of land which was acquired by way of purchase as private property by the Bamalete Tribe (hereafter "the Tribe") on 1st July 1925 from one Aaron Siew. The property is commonly known as Forest Hill 9-KO (hereafter "Forest Hill"). It was bought for a purchase consideration of three thousand pounds/sterling and registered under the then Chief of the Tribe, Chief Seboko Mokgosi (for and on behalf of the Tribe) with the consent of the High Commissioner in terms of **Proclamation No. 56 of 1921**.

2. Regarding the Tswana Land Tenure system at the time Forest Hill was purchased by the Tribe, "... *land rights among the Tswana peoples were enjoyed by members of a particular tribe, and there was a specific number of identifiable Tswana tribes. Schapera identified a tribe as a*

'single political unit' under the leadership of a Chief and occupying a fairly distinct geographical territory. A tribe was not a closed group, and it was not necessarily homogeneous, culturally or linguistically. It comprised members determined by birth or descent, as well as those incorporated or absorbed through consent or conquest... Within a particular tribe the Chief was 'head of the tribe, ... symbol of tribal unity, the central figure round whom tribal life revolved. He was at once ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and magician of the people'. His domination of tribal life, and his place at the apex of the land administration system, was such that it was not unusual for people to say that 'the land belongs to the chief', and for the chief himself to proclaim that the land was his. But Schapera cautioned that the chief was not the 'absolute owner'. Although he had the power to allocate and distribute land, to regulate its actual use and to resolve disputes, he could not alienate any part of tribal land to non-tribesmen without the consent of his people, and he did not have unlimited powers to take back allocated land which was properly used or occupied. Schapera suggested that it was more accurate to conceive of a chief as 'a trustee holding land for his tribe.'" **[Clement Ng'ong'ola "Land Problems In Some Peri- Urban Villages" Vol. 36, No. 2 [1992]**

J.A.L; Native Land Tenure in the Bechuanaland Protectorate, (Lovedale, 1943); A Handbook of Tswana Law and Custom, (Frank Cass and Co., 1984); Schapera, Handbook of Tswana Law, I; I. Schapera, "The Tswana", International African Institute monograph, London, 1970]

3. Some few years (8 years) after the purchase by the Tribe of Forest Hill, and in 1933, The **Tribal Territories Act [Cap. 32:03] Laws of Botswana** (hereafter "the TTA") was promulgated and came into operation. Its import and intent was to set up Tribal Territories and importantly, to define or describe their respective boundaries and extent. **Section 7 of the TTA** in that context therefore defines the extent of the Bamalete Tribal Territory (hereafter "the BTT").

4. In 1968, the **Tribal Land Act [Cap. 32:02] Laws of Botswana** (hereafter "the TLA") was enacted and came into operation on 30th January 1970. The purport and intent of the Act was to divest the Chiefs of custodianship of tribal land and vest same in the Land Boards. This is clear from the initial **Section 10 of the TLA** which provided as follows:

"10 (1) *All the rights and title of the Chief and tribe to land in each tribal area listed in the first column to 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."*

5. Of relevance in the original **Section 10 of the TLA,** more so in the context of the instant matter, was the then **sub-section (4),** later to become **sub-section (2)** (and hereafter **"sub-section (2)"),** which provided as follows:

> "*Nothing in this section shall have the effect of vesting in a land board any land ... held by any Chief or other person in his personal and private capacity."*

6. The above reproduced **sub-section (2)** was later repealed by **Act No. 14 of 1993.** The repeal created a situation where **all land** falling within Tribal Territories will vest in the Land Boards, inclusive of land held by the Chief or any person in his or her personal and private capacity. In so far as **Section 10 (1) of the TLA** is concerned, it was amended in **1979** by deletion of the words "of the Chief and tribe". A further amendment, which has a bearing on some of the arguments

raised in this matter, relates to the deletion of the words "*tribesmen of that area*" and the replacing of same with the words "*citizens of Botswana*".

7. It is common cause that, following the advent of the Land Boards, and despite it being very clear to all and sundry at the time that Forest Hill was privately owned by the Tribe and as such not vesting in the Malete Land Board (hereafter "the MLB"), the Tribe, and not Government or any of its entities, requested the MLB to oversee, administer and/or manage Forest Hill. The MLB embraced the management role on the same understanding as the Tribe. The questions become: a) what was the nature of such role? b) did the nature of the role change, and if it did, c) what informed the change and d) what were the consequences of the change. These questions are central to the current dispute and to the determination of this appeal. They will duly be answered in the course of this opinion.

Background:

The Case before the Court *a Quo*:

8. The case of the parties before the Court *a quo* is succinctly and crisply summarised below. The MLB's case, whose appeal was disqualified by reason of non-compliance with the peremptory Rules of this Court, was this, that:

a) in terms of **Section 10 of the TLA",** all land in the BTT vests in the MLB;

b) the BTT and the area covering such Territory or its boundaries, has been defined under **Section 7 of the TTA** (as amended);

c) Forest Hill, which originally did not fall under the BTT, was incorporated into the BTT following the 1973 amendment to the original **Section 7 of the TTA**;

d) that, as a consequence of the legislative scheme (the TTA and TLA)(both as amended), the Tribe was divested of Forest Hill and that the rights, title and interest vested in the Tribe by virtue of Deed of Transfer No. 387 of 1925 were terminated by operation of law and now vests in the MLB.

9. The Tribe's case on the other hand was this, that:-

a) it bought Forest Hill as freehold property from contributions by the Tribe members;

b) Government purchased two portions of Forest Hill from the Tribe in recognition of the Tribe's ownership status. The last attempt by Government to purchase a further portion was in 2007;

c) at all material times, the Government and other stakeholders have always considered and treated Forest Hill as freehold property of the Tribe;

d) the Tribe never relinquished its ownership as such intention would have been preceded by an extensive and transparent process of consultation between it and Government, and Kgotla resolutions to that effect taken. That, no such consultation took place and the Tribe as such never consented to it being divested of its proprietary rights and interest in Forest Hill;

e) that, considering that the initial **Section 7 of the TTA** excluded Forest Hill, its amendment could not have signified an intention by Parliament to bring about an expropriation without compensation; and that if it did, such dispossession would be inconsistent with the Constitution and that therefore **Section 7 of the TTA** (as amended) is not to be interpreted so as to bring about the expropriation without compensation result;

f) should the impugned provisions of the TLA and the TTA be found to vest Forest Hill in the MLB, such provisions, as used to acquire the farm, violate **Section 8 of the Constitution** as it has the effect of bringing about an impermissible compulsory acquisition of an interest or right to property;

g) the same provisions will further be inconsistent with **Section 15 of the Constitution** as they have a discriminatory effect;

h) the Tribe therefore sought (in a conditional counter-application) the striking down of such provisions and a declarator that Forest Hill vests in the Tribe.

f) Rankoromane Farm was handed over following incorrect advise from the AG's office to the effect that both Forest Hill and Rankoromane were not tribalised;

g) the Government in 2003, and while labouring under the mistaken belief of the true ownership status of both farms, engaged in negotiations with the Tribe to purchase a portion of Forest Hill, which purchase was never concluded upon Parliament's advisory that the two farms had been tribalised and vested as such in the MLB;

h) an investigation following Parliament's advice resulted in a Cabinet Information Note which validated the advice received from Parliament;

i) that, notwithstanding the tribalization of Forest Hill, the MLB owes its primary duty to the residents of its area of jurisdiction and thus Forest Hill is available for the benefit of the Tribe; and

j) the laws vesting Forest Hill in the MLB are neither discriminatory in and of themselves nor in their effect.

The Court *a Quo's* Decision:

The Points in Limine

11. There were numerous points *in limine* raised by the MLB in respect of the conditional counter-application filed by the Tribe, *to wit*; *res judicata* alternatively, estoppel by judgment and further alternatively, issue estoppel. In dismissing the *res judicata* point, the Court *a quo* reasoned, in a nutshell, that the AG was not a party in **Quarries of Botswana (Pty) Limited v Gamalete Development Trust and Others 2011 (2) BLR 479** (hereafter "Quarries"). Further that, MLB was an obscure and unwilling party having only been joined at the appeal stage. Additionally that, the issue of ownership of Forest Hill was decided in the context of the application for an interdict. That, on the other hand and in the conditional counter-application, the Tribe's cause of action is the unconstitutionality of the impugned legislation which is an entirely different cause of action to the one in Quarries. Lastly that, neither the High Court nor the Court of Appeal in Quarries dealt with any cause of action in respect of the Constitutional right to be protected from discrimination.

12. On issue estoppel, and in dismissing same, the Court *a quo* concluded that it did not believe this was a case where the last two requirements of *res judicata* could be relaxed to accommodate issue estoppel as an injustice may be committed by preventing the Tribe from fully challenging the legislation that deprived it of ownership of Forest Hill.

13. The Court *a quo* further considered, as a preliminary point, the issue "*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*". It determined that, since such issue was closely related to both *res judicata* and issue estoppel, and further that since it had dismissed the *res judicata* and issue estoppel arguments on the basis that the Court of Appeal did not decide the issue of ownership and the Constitutional issues now raised in the present proceedings, it followed therefore on this point 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 TTA of 1973.

Findings on the Merits:

14. On the issue "*whether farm Forest Hill 9–KO vests in the Applicant [MLB] by virtue of section 10 of the Tribal Land Act read with section 7 of the Tribal Territories Act*" which issue was, *mero motu,* changed by the Court to "*whether the 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*", it is apposite to reproduce a portion of the Court *a quo's* judgment speaking to this issue.

15. The Court *a quo*, after re-purposing the issue, stated as follows at paragraphs 79 through 84 of its cyclostyled judgment:-

> "*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 (sic) 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 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".*

16. The Court *a quo* concluded at paragraph 95 of its judgment 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 purpose 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."

17. The above conclusion was informed by the following analysis. In interpreting **Section 8 of the Constitution**, the Court below concluded that such provision meant that, where private property is to be acquired by the State or its agencies, such acquisition ought only to be done where the property is required for public purposes and upon prompt compensation. That, the law which satisfies the above constitutional provision is the Acquisition of Property Act which gives the President of the country the power to acquire any real property if expedient to do so in the public interest, security, public health morality or land settlement. This Act also provides mechanisms for dispute resolution attendant to any such acquisition.

18. The Court *a quo* noted further that, the fact that the Tribe will have access to the land in issue does not detract from the fact that it would have lost control of the property and further that such land will be subject to allocation not only to Bamalete tribesmen but to the citizens of Botswana in general.

19. Notably, the Court *a quo*, deemed the interpretation afforded **sub-section (6) of Section 8 of the Constitution** by this Court in Quarries incorrect and further that such decision in any event was made obiter. That as such, it was not bound to follow same. Indeed the Court *a quo* did not follow this court's interpretation and hence the decision it arrived at.

20. The Court *a quo* declined to deal with the **Section 15** constitutional argument as brought by the Tribe through its conditional counter-application. This relates to the discrimination challenge where the Tribe contended 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. The Tribe did file a counter-appeal against the Court *a quo's* refusal to deal with the **Section 15(1)** argument. Such counter-appeal was however dismissed by this Court in an interlocutory application for non-compliance with the peremptory Rules of this Court. This judgment therefore, will say no more on this issue.

The Grounds of Appeal:

21. The grounds of appeal have been fully reproduced in one of the majority judgments. I will therefore refrain from reproducing same in this opinion.

The Relevant Legislative Provisions:

22. It is apposite to reproduce the legislative provisions which are relevant to the proper interrogation of the issues that are of moment in this appeal. I will do so without assigning any ranking to such provisions.

23. **Section 7 of the TTA** sets out or describes the boundary of the BTT and where relevant provides as follows:

"The boundary of the Bamalete Tribal Territory is as follows: Commencing at ...

The remainder of the Farm Forest Hill 9-KO from which has been deducted Tribal Grant No. 21-KO as per Diagram DSL No. 3/85. ..."

24. **Section 10 (1) of the TLA** provides:

"All the rights and title 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 citizens of Botswana and for the purpose of promoting the economic and social development of all the peoples of Botswana."

25. "Tribal area" as discerned from **Section 10 (1**) of the TLA reproduced above is defined under **Section 2 of the TLA** as follows:

"(a) every tribal territory as defined in section 2 of the Bogosi Act; and

(b) the areas defined in the Second, Third, Fourth and Fifth Schedules."

26. **Section 2 of the Bogosi Act [Cap. 41:01] Laws of Botswana** defines "tribal territory" as follows:

> *"any territory defined as such in the Tribal Territories Act, and includes the territory defined in Schedule B to the Botswana Boundaries Act."*

27. **Section 8 of the Constitution** where applicable provides:

> *"(1) 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 and country planning or land settlement;*
>
> *(ii) In order to secure the development or utilization of that, or other, property for a purpose beneficial to the community; or*
>
> *(iii) In order to secure the development or utilization 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 a 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.

(1)...
(2)...
(3)...
(4)...
(5)...

(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, where that property, interest or right is held by a body

corporate established by law for public purposes in which no moneys have been invested other than moneys provided by Parliament."

28. **Section 3 of the Acquisition of Property Act [Cap. 32:10] Laws of Botswana** (hereafter "the APA") provides:

> *"(1) The President may acquire any real property where the acquisition of such property is necessary or expedient –*
>
> *(a) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement; or*
>
> *(b) in order to secure the development or utilization of that or other property for a purpose beneficial to the community,*
>
> *paying such compensation therefor as may be agreed upon or determined under the provisions of this Act.*
>
> *(2) The President may agree with the owner of any real property required for public purposes for the purchase of such property, or such portion thereof as he thinks proper, for such consideration or compensation as may be agreed upon or determined under the provisions of this Act; and may in like manner acquire leasehold title."*

29. In terms of **Section 5 of the APA,** notice is to be given by the Minister, where the President has formed an intention to acquire any real property, to persons interested in such property or those entitled by the APA to sell, convey or lease such property. In terms of **Section 7 of the APA**, the President may, by such notice direct interested persons to yield up possession of the property within a specified timeframe at the expiration of which the President or any authorised person may enter the property and take possession of same. The APA provides for dispute resolution mechanisms relative to either the possession itself or the compensation attendant to the possession. [See **Sections 9 through 13 of the APA**]

The Pertinent Findings by the Court of Appeal in Quarries of Botswana:

30. To the extent that several grounds of appeal challenge the Court *a quo* on matters or issues that, it is contended, the Court of Appeal made findings on in Quarries, it is apposite at this juncture to reference such findings as made by the Court of Appeal in Quarries. These are that:

a) the matter of ownership of Forest Hill is a legal question and thus the various expressions of opinion, impression and belief to be found in the record are therefore irrelevant to that issue;

b) when the TTA came into operation in 1933, its purpose was to define the boundaries of the respective territories of each tribe;

c) the effect of section 10(1) of the TLA on its commencement in 1970, was to vest land in the BTT as described in the TTA in the MLB;

d) notwithstanding such vesting, the Tribe, and not the MLB, transferred a portion of Forest Hill (403 acres) to the State;

e) Forest Hill was incorporated into or included within the boundaries of the BTT in 1973 (per amendment to the TTA);

f) further grants of a portion of Forest Hill by the Tribe and not the MLB were made to the State after 1973 (e.g. in 1987);

g) as to whether the Tribe's freehold ownership was indeed terminated by legislation [TTA and the TLA] that, the contention that the legislature would never have intended so prejudicial a consequence and one allegedly glaringly absurd, such contention could only be effective if there is a realistic alternative result which can be seen as the one which the legislature must really have had in mind. That, there is no such alternative here. That, with the land board having been established in 1970, and the Act having decreed, in effect, that all the right and title to land in the BTT – plainly meaning all land – vested in the land board, there can only have been one legislative intention in including Forest Hill in that territory and that was, inevitably, to have it thereby vest in [MLB];

h) harsh as the statutory taking may at first blush appear to be, the fact is that Forest Hill was obviously acquired for the benefit of the Bamalete Tribe, but not acquired as an asset that was freely alienable considering the relatively small land resources that the Tribe had in 1925, which situation had not materially changed;

i) evidence abounds that after the establishment of Land Boards, the Tribe requested [MLB] to oversee and administer its landed

properties, including Forest Hill. In all this time, accepting that the Chief and members of the Tribe were of the view that Forest Hill was freehold property, no thought was given to selling the farm. That therefore, to judge by the evidence, the suggestion that Forest Hill was an asset available for ready sale is fanciful;

j) there is no glaring injustice created by the vesting of Forest Hill in the MLB as Forest Hill is still part of the Tribe's territory and available to the Tribe as before;

k) although the Land Board's trust obligations are said by Section 10 (1) of the TLA to extend to all citizens, such provision is general and applies to all Land Boards. The practical reality is that the Land Board's primary duty will first and foremost have to be to the residents of the Board's area of jurisdiction;

l) regarding the two transfers of part of Forest Hill to the State by the Tribe rather than by the Land Board, such events do not influence the debate in any way as a conceivable short explanation could be that in order for the transfer to effect, the

transferor had necessarily to be the person in whose name the property was formally registered [in those days, the Tribe];

m) Section 8 (6) of the Constitution applies to the case of Forest Hill owing to the fact that per section 9 of the TLA, Land Boards are body corporates which hold land in trust for the benefit of a tribe and the economic and social development of the people of Botswana (per Section 10 (1)). Land Boards were established by means of State funding as in terms of section 36 (3) of the TLA, a Board's surplus funds are liable to Ministerial appropriation to the revenues of the district council within whose area the tribal area is situated. As there is nothing pointing to the contrary (that is, to indicate that Land Boards are privately funded or financed), the public interest and public purpose elements of section 8 (6) of the Constitution are clearly present;

n) as the inclusion of Forest Hill in the BTT involved removal of certain powers of the Bamalete Chief and affected tribal property, it must be inferred, without any evidence to the contrary that, on the strength of Section 88 (2) of the Constitution which required referral of the proposed legislative changes in question to the

House of Chiefs (established under Section 77 (1) of the Constitution), such referral took place and there was no objection by the House;

o) the statutory termination of Bamalete freehold title in Forest Hill and vesting of the land in the MLB was not unconstitutional; and

p) the constitutionality of the TTA and the TLA in the relevant respects has never been challenged.

Essential Evidence and Pertinent Information:

31. Before proceeding to the determination of this appeal, it is important to capture some essential information and/or evidence which will become relevant to the determination of this appeal. This information and/or evidence centres around the issue of consent or lack thereof by the Tribe in respect of the tribalisation and incorporation of Forest Hill into the BTT. On one hand, the Appellants contend that, evidence points to the Tribe having consented to the tribalisation and incorporation of Forest Hill into the BTT. On the part of the Tribe, it is contended that such consent never took place hence their main

contention that the State compulsorily acquired Forest Hill without compensation, and that such act makes the impugned legislative scheme unconstitutional as it has the effect of divesting it of freehold property without compensation.

32. The Appellants' contentions that there was consent and tribalisation of Forest Hill are based on the following factors/information/evidence:

a) after the establishment of the Land Boards, but prior to the 1973 amendment of Section 7 of the TTA which incorporated Forest Hill into the BTT, the Tribe requested the MLB to manage Forest Hill and other freehold properties acquired by the Tribe on the Tribe's behalf, a role that the MLB undertook [this is common cause between the parties];

b) upon the establishment of the Land Boards, Chief Seboko Mokgosi, in whose name the title deed of Forest Hill was registered, not only became a member of the MLB, but its chairperson. Chief Seboko Mokgosi further served as a Councillor;

c) at a meeting of the MLB under the chairmanship of Chief Seboko Mokgosi on **16th June 1971**, it was resolved that a kgotla meeting be convened where the Tribe will be requested to hand over Forest Hill and Rankoromane Farms and that they be incorporated into the BTT;

d) in terms of the Cabinet Memorandum of **21st July 1972** and at the time the then Minister of Local Government & Lands, Mr. E. M. K. Kgabo presented the Tribal Territories (Amendment) Bill of 1972 for the inclusion of Forest Hill and Rankoromane Farms into the BTT, the Minister made note, *inter alia*, of the fact that the two farms had been purchased by the Tribe by a levy of R10.50 on each taxpayer in respect of Forest Hill and R26.25 on each taxpayer in respect of two loans (sourced from National Development Bank and Standard Bank) attendant to the purchase of Rankoromane. That, upon failure by the taxpayers to repay the loans, the Tribe appealed for assistance from the Government and Government accepted the responsibility to pay the outstanding amount on the loans;

e) it was noted further in the Cabinet Memorandum that, due to the non-inclusion of the two farms within the BTT, some members of the Tribe as well as some outsiders who were taking advantage of such non-inclusion, were questioning the propriety of including the Farms within the BTT;

f) during the second reading of the Tribal Territories (Amendment) Bill, 1972, on 25th October 1972, the minutes of Parliament reflect the following pertinent points:-

    i) that Forest Hill, *inter alia*, will by virtue of the amendment become tribal land and not private land;

    ii) that the Bill was presented to and unanimously approved by the House of Chiefs at its recent sitting.

g) at the MLB meeting of **19th June 1985**, the District Officer (Land) reported the advice given by the Attorney General's Chamber on the position of Forest Hill to the effect that the title of the Farm

was automatically cancelled by the establishment of the Land Boards and was not a freehold farm contrary to the previous explanation;

h) at the meeting of the MLB of **5th March 1987**, the Board was informed that Forest Hill was now under its jurisdiction and that **since the Tribe had agreed to hand it over during their Tribal meeting**, the results of such meeting were communicated to the Minister for consideration. The handing over savingram from the Ministry of Local Government and Lands read to the Board was of **ref. CLG 8/27 II dated 12th February, 1987.** The Board invited the Chief to go and show them the boundaries and this was done on **18th March 1987;**

i) at its sitting of **6th to 8th February 1989** the MLB, and in answer to a question regarding ownership of Forest Hill, resolved that Forest Hill was under the MLB;

j) at a joint special meeting of the MLB, Tribal Administration, Council and District Administration held on **23rd October 1990**

at which Chief Seboko Mokgosi was invited, the following pertinent facts are recorded in the minutes of such meeting:-

i) upon inquiry as to whether Forest Hill could be sold, an attorney from the AG's Chambers explained that Tribal Land cannot be sold;

ii) on the question whether the transfer from freehold lease to tribal lease was effected, the Board Secretary read out **savingram CLG8/27 11 of 17th February 1987** which stated that the farm's administration had been transferred to the Land Board **by consent of the tribe**;

iii) the lawyer further advised that once freehold land has been transferred to tribal land, it cannot be transferred back to freehold grant;

iv) during the discussions relative to the advice from the AG's Chamber's attorney, Chief Seboko Mokgosi explained that, he was never in favour of the

transfer of the Farm **but could not stop the Tribe if they demanded same**;

v) some during that meeting expressed the view that the transfer of the farm was a blessing since the selling of same would only benefit the rich and that **by transferring the grant, there was no loss since the land was still available for use by the Tribe**;

k) regarding the confusion that abound in relation to whether Forest Hill vested in the MLB or the Tribe, a proper and correct clarification was ultimately given by the Ministry of Lands and Housing through **Cabinet Information Note No. 53** dated **23rd November 2005.** The author of the Note, in the course of his investigations, checked the official records of the National Assembly (Parliament Hansard) where it was recorded, *inter alia*, that the Tribal Territories (Amendment) Bill, 1975 was discussed by the House of Chiefs which unanimously recommended its approval;

l) the Note further concluded that Forest Hill was tribalised through the amendment of the TTA in 1973 and thereafter fell under the jurisdiction of the MLB;

m) the Note further observed that the Tribe, under Chief Seboko N.O. Mokgosi, was still holding freehold title deed No. 387 over Forest Hill as same was never cancelled as required by Section 8 of the Deeds Registry Act. The Note however concluded that, that notwithstanding, the non-cancellation cannot change the tribal status of the farm.

33. The Tribe's contention that there was no consent and that Forest Hill was never tribalised is premised on the following pieces of information or evidence:-

a) That, the Tribe never instigated the move to have Forest Hill incorporated into the BTT or tribalised. That, such move was instigated by the MLB.

b) the Tribe never held a kgotla meeting at which it agreed to the incorporation of Forest Hill within the BTT and the Appellants have failed to produce any proof of such meeting;

c) that the House of Chiefs never "approved the Amendment Bill in the sense of giving it legal validity" and that the House does not have power to approve Bills passed by the National Assembly nor does it have power to deprive a tribe of ownership of property. That, no proof of the approval has been produced;

d) Kgosi Mosadi Seboko averred in her replying affidavit to the Tribe's conditional counter-application that, in 1971 when the resolution to consult the Tribe was taken by the MLB, she was 21 years and knows of no consultation with the Tribe about the conversion of Forest Hill and change of its ownership. Matshediso Chester Fologang and Jansen Otukile Batsalalwang confirm Kgosi Mosadi Seboko's averments (in confirmatory affidavits to her replying affidavit);

e) in **2003**, Government engaged the Tribe in negotiations to purchase a portion of the farm but the purchase was never concluded;

f) after **2005**, the Government made a further attempt to buy the farm from the Tribe. The negotiations fell through as the purchase price of Five Million Pula offered by Government was not acceptable to the Tribe;

g) since 1925 until recently, Government, the Tribe, MLB and third parties have dealt with Forest Hill as a freehold property of the Tribe. This is evidenced among other things by purchases of portions of Forest Hill by the Government from the Tribe and not the MLB and further attempts to purchase more portions and ultimately the entire farm;

h) if at all Forest Hill was acquired by Government, the Tribe has never been compensated for such acquisition in contravention of the Constitution (Sections 3, 8 and 15);

i) if the impugned legislative scheme was intended and has had the effect of divesting the Tribe of Forest Hill without compensation, then same is unlawful and an illegality.

Analysis:

The Pertinent Issues:

34. In the backdrop of the above background, it becomes easy to resolve the issues that arise in this appeal. I will do so without dealing with each and every ground of appeal as raised but by only dealing with the salient issues.

35. Shown of all frills, the dispute of the parties centres around whether or not the Balete Tribe consented to the tribalisation and incorporation of their then freehold Forest Hill into the BTT. From the manner in which the appeal was argued and the issues presented, should this question be answered in the affirmative, the appeal ought to succeed. The affirmation will confirm the following facts:

a) that it was the Tribe which desired for their otherwise freehold property to loose such status and for same to be tribalised and to be incorporated within the BTT under the control and management of the MLB;

b) that, the above being the case, the issue of compulsory acquisition of Forest Hill by Government or any of its agencies, and compensation ordinarily attendant to such acquisition, does not arise in the case of Forest Hill;

c) that, the above being the case, Sections 7 of the TTA and 10 of the TLA cannot be impugned in the context or premise suggested and in relation to Forest Hill.

36. Before dealing with the issue of consent, it is important to address the doctrine of *stare decisis* or the rule of precedent. The doctrine is well documented and religiously followed by our Courts. It brings about certainty, predictability, reliability, equality, uniformity and convenience. It further binds lower courts to the decisions of the higher courts as well as final courts to their own decisions. [See; **President of the Republic of Botswana & 3 Others v Priscilla**

Ditlhong CACGB-111-21 (not yet reported) (CA); Hahlo & Khan **'The South African Legal System and its Background' (1968) at 214-215; State v Maauwe & Another [2006] 2 BLR 530 (CA); Kobedi v The State [2002] 2 BLR 502 (CA) at 519F-G**]. The only time a departure is allowed, is if the same court or a higher court is satisfied that the previous decision was 'clearly wrong' on some fundamental departure from principle, or a manifest oversight or misunderstanding as opposed to a mere difference of opinion or view by the second court from the first. [**Patmar Explorations (Pty) Limited & Others v The Limpopo Development Tribunal & 11 Others, (1250/2016) [2018] ZACC 19 (16 March 2018) (SCA)**].

37. The Courts in this jurisdiction have fully embraced the doctrine of precedent as discerned from some of the authorities cited above. It will therefore matter not what the view of the High Court is on a point or issue. It will still be bound to follow a decision of this Court even where it considers same to be manifestly wrong. It is only this Court which can, in a different matter, deviate from its earlier decision or determination on a point if it considers the earlier decision to be clearly wrong. This however does not mean that this Court will re-visit the

earlier matter and change its earlier decision for it becomes *functus officio* upon determination of a point in a particular case. For instance, if this Court today, in Case A, interprets a legislative provision and gives same a specific interpretation, which interpretation leads to the grant of judgment in favour of Party Y, Case A will be concluded and the decision of this Court binding on the parties. This Court cannot in the future re-open the same matter and change the bottom line on the basis that its earlier interpretation was manifestly or clearly wrong. What the doctrine means is this that, in the future when this Court, similarly or differently constituted, in dealing with a new Case B, has to interpret the same provision it gave an interpretation on in Case A, it can conclude that the Court in Case A was manifestly wrong in its interpretation and as such give the same provision a different interpretation now under Case B such that a different conclusion from the one under Case A will be reached. If ever this Court was allowed to re-visit concluded matters simply on the basis that its prior decision was manifestly wrong, there would be no end to litigation and this is not what the doctrine propounds.

38. Based on the above principle, it was clearly wrong for the Court *a quo* to, upon registering its adverse opinion to the effect that this Court

misinterpreted **Section 8(6) of the Constitution** in Quarries, to then decide not to be bound by the said interpretation or to depart or ignore or arrive at findings different from the ones the Court in Quarries arrived at. It is clear that though alive to the doctrine of precedent and its import, the Court *a quo* sought to hide behind a conclusion that the decision of this Court in Quarries was obiter, hence its disregard of same. It defies all manner of logic that a Court can delve into the interpretation of any legislative provision, let alone a Constitutional provision in the manner this Court did in Quarries if its intention was to make an obiter statement. To put it beyond doubt, I will reproduce a portion of the relevant part which is at p. 484D through 485F. This Court in Quarries stated as follows:

> *"The appellant's response on the constitutional point was founded on the terms of section 8 (6) of the Constitution. It provides:*
> *'(6)...'*
>
> ***It is necessary to effect some clarification of the language of that subsection to reflect what emerges as its unquestionable meaning.*** *There can be no doubt that the compulsory acquisition mentioned is intended to refer to acquisition of any property or any interest in or right over*

property. The emphasised words appear to have been omitted from the published version. Secondly, the acquisition is plainly to be of property etc to be held by the body corporate referred to. There would be no reason to acquire for public purposes with State funding a property already held for public purposes with State funding.

As to whether the tribe's freehold ownership was indeed terminated by the legislation referred to, the contention for the respondents is that the Legislature could never have intended so prejudicial a consequence; one which, so it was argued, amounted to a glaring absurdity.

That argument can only be effective, if, instead of the result which it is said is glaringly absurd, there is a realistic alternative result which can be seen as the one which the legislature must really have had in mind. ***There is no such alternative here****. With the land board having been established in 1970, and the Act having decreed, in effect, that all the right and title to land in Bamalete Tribal Territory – plainly meaning all land – vested in the land board, there can only have been one legislative intention in including Forest Hill in that territory and that was, inevitably, to have it thereby vest in the fifth respondent.*

Harsh as this statutory taking may at first blush appear to be, the fact is that Forest Hill was obviously acquired for the benefit of the Bamalete Tribe. According to the fourth respondent, the

tribe's land resources in 1925 were 'relatively small'. This situation is not said to have changed materially. Forest Hill was therefore not acquired to be an asset that was freely alienable. Its sale by the chief was initially dependent for validity upon the High Commissioner's approval: s 7 of Proclamation 61 of 1921. ... It is hardly conceivable that attempted disposal of Forest Hill in that time would have received approval by any relevant State authority. And even if, between 1964 and 1970 there was no State authority to oversee the affairs of any tribe, there is nothing in the record to warrant the conclusion that the land on Forest Hill was ever so completely surplus to the tribe's needs in respect of housing, cultivation and grazing that alienation of the land was ever contemplated or would have been. Moreover, the evidence is that after establishment of land boards the tribe requested the fifth respondent to oversee and administer its landed properties, including Forest Hill. In all this time, accepting that the chief and members of the Tribe were of the view that Forest Hill was freehold property, ***no thought was given to selling the Farm.*** *To judge by the evidence, therefore, the suggestion that Forest Hill was an asset available for ready sale is fanciful.*

Its being statutorily taken and vesting in the land board is therefore not at all the glaring injustice it was contended to be. The land is still part of the tribe's territory and available to the tribe as before. Although a land board's trust obligations are said by s 10 (1) of the Act to extend to all citizens, that is a general

provision applying to all land boards. The practical reality is that a land board's primary duty will first and foremost have to be to the residents of the board's area of jurisdiction.

...

Then there is the constitutional point. *In my view the provisions of s 8(6) of the Constitution must pertain to the case of Forest Hill.*

...

The inclusion of Forest Hill in the Bamalete Tribal Territory and its consequent vesting in the fifth respondent involved removal of certain powers of the Bamalete Chief and affected tribal property. Accordingly, the Constitution, in terms of the provisions now contained in s 88(2), required referral of the proposed legislative changes in question to the House of Chiefs established under s 77 (1) of the Constitution. It has not been alleged that such 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 vesting of the land in the fifth respondent was not unconstitutional***.

..."

[Underlining and bold for emphasis]

39. It becomes clear that the Court of Appeal in Quarries and in dealing with or interpreting **subsection (6) of Section 8 of the Constitution**, and in deeming it to pertain to Forest Hill, and in

coming to the conclusion that the termination of the Tribe's freehold title and vesting of Forest Hill in the MLB was not unconstitutional, it did not do so obiter but upon proper reflection, consideration and analysis. The Court *a quo* was therefore wrong to pronounce that it was not bound by such a determination, more so that it did not seek, at the very least, to distinguish the two matters. Any attempt by the Court *a quo* to differentiate between the pertinent issues that were before the Courts in Quarries and those that were before it becomes glaringly absurd when this matter is put in its proper perspective without seeking to nit-pick. I will deal with this aspect of the case later on in this judgment. Suffice for now to conclude that the Court *a quo* was wrong to disregard the findings of this Court which are binding on it.

40. This Court on the other hand, since the issues have now been placed before it, and assuming it has jurisdiction to re-visit issues that were decided in the Quarries (which I say it does not), can only differ with the earlier decision if it arrives at the conclusion that its prior determination was manifestly or clearly wrong. A mere difference of opinion cannot suffice to change the pertinent findings in Quarries.

Upon proper reflection, I cannot give sub-section (6) any different interpretation nor conclude that it does not pertain to Forest Hill.

41. On the issue of *res judicata*, which I will address briefly, to the extent that the Appellants conceded during oral arguments that the constitutionality of Section 7 of the TTA and Section 10 of the TLA was not an issue in the Quarries matter, then the Courts in the present proceedings ought to deal with such issue, provided that in doing so, regard is to be had to the findings made in Quarries. The mere fact that the AG was not a party in Quarries will not give any of the parties to this matter a right to raise afresh matters that the Court of Appeal conclusively made findings on in Quarries, save to the extent allowed by law.

42. I now move to deal with what I will call the elephant in the room. The Court *a quo,* determined that Section 7 (ii) of the TTA is inconsistent with Section 8 of the Constitution and invalid on the ground that it brings about an impermissible compulsory acquisition of an interest in or right over property and struck it down.

43. The Court *a quo* was clear on the legislative scheme and its intent and noted succinctly at paragraph 83 of its cyclostyled judgment that:

> "*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 legislation in passing the laws that are in question particularly the amendment of the Tribal Territories Act was very clear.*"

44. What remains therefore is a determination on whether there was compulsory acquisition of Forest Hill by the Government. The answer to this question will be dependent on whether the Tribe consented to the tribalisation and incorporation of Forest Hill into the BTT. Should it be determined that there was no consent in the manner suggested by the Appellants, Section 7 (as amended) will have the effect of compulsory acquisition which will bring into sharp focus the relevant provisions of the Constitution and the APA and other pieces of legislation dealing with compulsory acquisition of private land or property.

45. In dealing with and determining the issue of compulsory acquisition, the Court *a quo* did not at all consider and interrogate the issue of

consent by the Tribe in the incorporation of Forest Hill into the BTT and the tribalisation of same. Such Court simply focused on the legislative scheme and the constitutional requirements in respect of compulsory acquisition of property and concluded that, since Section 7 of the TTA (as amended) and as read with Section 10 (1) of the TLA had the effect of divesting the Tribe of their freehold land, that amounts to compulsory acquisition which mandated Government or its agencies to follow the relevant legislative requirements in relation to compulsory acquisition. The Court *a quo* concluded that the Government did not follow any of the relevant provisions and that as such the amended Section 7 of the TTA was unconstitutional and ordered its striking down.

46. It is apparent that the Court *a quo* dealt with the issue of compulsory acquisition in the case of Forest Hill in the ordinary sense when it ought not to have done so, regard being had to the manner in which Forest Hill was incorporated into the BTT. Put differently, this case is not about the ordinary acquisition of private land by Government for purposes as allowed by the various pieces of legislation including the Constitution. To pretend it is, is misleading and will invariably lead to an incorrect conclusion.

47. The first thing to note in the context of Forest Hill is this that, when the TTA was first promulgated in 1933, the intent was very clear. That is, to define the boundaries of the respective territories of each tribe. The initial Section 7 which defined the boundaries of the BTT excluded Forest Hill. The reason for this is very easy to find. Forest Hill had some years prior, in 1925, been acquired by the Tribe by way of purchase as freehold property. What then prompted the incorporation of Forest Hill into the BTT some forty-eight years later, is the question that needs an answer, an answer that will assist in the resolution of this dispute.

48. It is common cause that the Chiefs, prior to the establishment of the Land Boards, were custodians of tribal land in their respective tribal areas. They held and managed such land for and on behalf of their tribes and not as their own. This custodianship changed or was transferred to the Land Boards upon their establishment thereby divesting Chiefs of the custodianship referred to. The original Section 10 of the TLA vested the land in each tribal area in the Land Boards. Importantly, sub-section (2) of the then Section 10 clearly excluded land held by any Chief or other person in his personal and private

capacity from vesting in the Land Board. It follows therefore that, at the time, and in confirmation of the then existing Section 7 of the TTA, Forest Hill, which was freehold or private land of the Tribe, was not only excluded from the BTT, but was further excluded from the management or custodianship of the MLB. Sub-section (2) of the Section 10 of the TLA was only repealed by Act No. 14 of 1993, some twenty years after Forest Hill was incorporated into the BTT. I will deal with the effect of this repeal, if any, later on in this judgment.

49. Section 7 of the TTA was amended in 1973, roughly three years after the establishment of the Land Boards. After the establishment of the Land Boards and before the 1973 TTA Section 7 amendment, it is paramount to mention, and this is common cause, that the Tribe in the case instant, requested the MLB to manage Forest Hill and its other privately acquired properties such as the Rankoromane Farm. There is no documentation presented by either party speaking to the formulation of this request, how and when the decision was taken by the Tribe, the rationale behind the request and the legality of the request and the acceptance of same. What is very clear is the fact that the MLB, which was chaired by then Chief, Kgosi Seboko Mokgosi, upon its establishment, who happened to be the same Chief in whose

name the title deed to Forest Hill was registered, agreed to and indeed fully took over the management of Forest Hill on behalf of the Tribe. It has been suggested that it was Government and/or its agencies which instigated the management of the Tribe's freehold properties by the MLB prior to the 1973 amendment of Section 7 of the TTA. This suggestion is incorrect and not backed by anything. The request was made by the Tribe. The Tribe has, in its pleadings confirmed this fact.

50. Let me pause here to interrogate the nature of Forest Hill's management request by the Tribe and acceptance of such request by the MLB. Legally speaking, the MLB had no jurisdiction over Forest Hill between the date of its establishment and the coming into effect of the amendment to Section 7 of the TTA. The management by it of Forest Hill therefore fell outside its statutory mandate though carried out by the MLB during the normal course of the execution of its statutory business or duties. This is evinced among others by what transpired at the MLB sitting of 16th June 1971. It would appear, without any other piece of evidence to the contrary that, the incorporation of Forest Hill into the BTT was first mooted at this meeting. The minutes of that meeting record, *inter alia*, as follows:

"<u>Item MLB 27/71 That Farming operations in both Rankoromane and Khale Farms be stopped:</u>

It was moved and seconded that ploughing operations in both Rankoromane and Khale Farms be stopped:

Resolved: That hold a kgotla meeting to request people about handing over these farms ... and that they be incorporated into the Bamalete Tribal Territory:"

51. Chief K. S. Mokgosi chaired the MLB meeting of 16th June 1971.

52. The MLB therefore, not long after assuming the management of Forest Hill, resolved to request the Tribe to have the farm incorporated into the BTT. The discussion by the MLB relative to the condition of Forest Hill at that time, and the proposal to place it under the legal custodianship of the MLB was not surprising as the body which was already overseeing its operations. It is evident from the minutes referenced above that the MLB did not resolve, on its own, to have Forest Hill incorporated into the BTT but rather resolved to request the Tribe for that to take place.

53. At this point in time, the relationship between the Tribe and the MLB can at best be described as one of principal and agent. The actions of the agent, carried out in the cause of such relationship for and on behalf of the principal, will as such have a binding effect on the principal. It has been contended by the Tribe that it was the MLB, and not itself, who called for the incorporation of Forest Hill into the BTT. In so arguing, the Tribe is seeking to distance itself from the mooting of the incorporation. Importantly, the Tribe seeks to buttress its contention that it was never consulted nor did it consent to the incorporation of Forest Hill into the BTT. This argument is flawed, regard being had to the nature of the relationship (principal/agent) that existed at the time the mooting of the issue took place. In any event, and as stated earlier, the MLB merely mooted the issue and did not unilaterally or at all take the decision to have Forest Hill incorporated into the BTT, neither did any other Government agency.

54. From the time the idea of the incorporation was first mooted, nothing in the record, in the form of minutes of the Kgotla, points to the request having been put before the Tribe and to the attitude of the Tribe in relation to such a request. There however are other pieces of information pointing to the Tribe having consented to the

incorporation of Forest Hill within the BTT. I will make mention of such pieces of information hereunder.

55. About a year later (after the MLB Resolution of 16th June 1971), that is on 21st July 1972, a Cabinet Memorandum was prepared, the subject of which was the TTA (Amendment) Bill 1972 ("the Cab. Memo."). The Cab. Memo traced the history of Forest Hill, how and when it was acquired, its condition and importantly sought authority for the inclusion, *inter alia*, of Forest Hill within the BTT. The draft Bill was attached having ordinarily been drafted by the AG's Chambers. The Cabinet was to advise the President in respect of the sought amendment. The Cab. Memo. and Draft Bill make part of the record of the present proceedings.

56. Parliament convened on 25th October 1972 to discuss the second reading of the Draft Bill. Some of the salient points coming out of the sitting were the following explanations made by the then Minister of Local Government and Lands, Mr. Kgabo:

a) That the farm was acquired by the Tribe;

b) That hence-forth the land will be tribal land and not private land; and

c) That the Bill had been presented to, and approved unanimously by the House of Chiefs at its recent sitting.

57. The following year in 1973, the amendment to Section 7 of the TTA was passed the resultant effect of which was to incorporate Forest Hill into the BTT. After the amendment, (and no challenge has been taken about the legality of same, and none exists) Forest Hill duly fell under the BTT and vested in the MLB. Though at the time sub-section (2) of Section 10 of the TLA was still extent, it had no application in respect of Forest Hill owing to its changed status from private land into tribal land. Had the Tribe not resolved to tribalise the farm, Forest Hill would, after the amendment, still not have vested in the MLB on the reading of sub-section (2). It is therefore very clear that the intention when the amendment was mooted, discussed, agreed to and passed, was not just to have Forest Hill fall under the BTT but importantly, to tribalise same, and the passed legislation as such cemented such understanding.

58. A lot of confusion arose around the incorporation and/or vesting and/or ownership of Forest Hill following the amendment of the TTA of 1973. Instances of this confusion is what the Tribe relies mainly upon to contend that there was never consent by it to have Forest Hill tribalised and incorporated into the BTT and that numerous parties including both Government and the MLB have always regarded Forest Hill as freehold property of the Tribe. Instances of such confusion have led, *inter alia*, to a) the Government purchasing portions of Forest Hill from and in consultation with the Tribe and not the MLB; b) the Attorney General's Chambers at different times giving opinions to the effect that Forest Hill was freehold property of the Tribe (e.g (i) the advice by Ms. Raseroka at the special joint meeting of the Bamalete Tribal Administration, the MLB, the South East District Council and the South East District Administration on 12th July 1991; (ii) the opinion authored by Kennedy Kgabo on behalf of the Registrar of Deeds dated 15th June 2000 and (iii) the legal advise authored by P. S. Makgabenyana dated 14th April 2005. All this is common cause. The question becomes, whether such confusion had the effect of changing the true nature of Forest Hill following the amendment and what preceded or informed such amendment.

59. The issue surrounding the confusion is not new to the instant matter. It was still an issue the Tribe sought to rely upon in Quarries in contending that Forest Hill vested in the Tribe and not the MLB. The Court of Appeal in Quarries as such, gave a definitive answer to the confusion. This is how it dealt and pronounced on the issue at p.482H:

> *"There is one further preliminary observation that must be made. The matter of ownership of Forest Hill is a legal question.* ***<u>The various expressions of opinion, impression and belief to be found in the record are therefore irrelevant to that issue</u>****."*
>
> [Underlining and bold for emphasis].

60. The above observation still holds true as no opinion/impression/belief, no matter how strong and no matter what undertakings it led any party or parties to embark upon, can change the true and legal nature of the ownership or the vesting of Forest Hill post the 1973 amendment especially in the context of how such amendment was conceived. I therefore must state definitively at this juncture that, reliance by the Tribe on the opinions, impressions and beliefs by it, the Government and the MLB on the vesting of and/or ownership of Forest Hill post the

1973 amendment, cannot be good grounds to found or support the alleged lack of consent by the Tribe.

61. In any event, there are other pieces of evidence which have or ought to have been understood by all the parties to bring to an end the confusion. For instance, during 2003 and whilst labouring under the mistaken belief that Forest Hill was freehold land of the Tribe, and as it had done previously and managed to purchase portions of Forest Hill, the Government re-engaged the Tribe with a view to once again purchasing a portion of Forest Hill. This time around, and upon motivation of the purchase by the Department of Lands and consultation being done with Parliament, the latter advised that Forest Hill had been tribalized and vested in the MLB. To verify what Parliament was contending, an investigation was sanctioned the results of which came through a **Cabinet Information Note No. 53** dated **23rd November 2005**. The result was that, existing records showed that Forest Hill was, through the amendment of the Tribal Territories Act in 1973, incorporated into and thus became part of the BTT. Further that, the non-cancellation of the Title Deed was an omission which however did not change the tribal status of Forest Hill.

On that premise, the proposed purchase by Government was cancelled.

62. Though as late as 2003, the confusion over the status of Forest Hill still abound, some clarifications had been offered prior, such as at the MLB meeting held from 17th through 19th June 1985. The minutes of that meeting record as follows at the relevant parts:

> ***"52/85 BAMALETE TRIBAL TERRITORY***
>
> *The District Officer (Land) reported that Attorney General Chambers has advised on the position of Kgale Farm and Land Board's role in it. The meeting he said was attended by him, the Council Secretary, the Principal Administration Officer, the Senior Technical Assistant and the Physical Planner where it was explained to them* ***that the title deed to the freehold farm was automatically cancelled by the establishment of the Land Board and that the area was also classified as Tribal Land and not freehold farm as it was previously explained.*** *However they advised that if the Land Board wished to change the use of the area it was necessary that the District Council, tribe and Local Government be consulted as set out in the Tribal Land Act.*

The Board resolved that the Tribe should be consulted and be given right interpretation *since it was understood that the tribe has already decided to elect a committee responsible to the farm. ..."*
[Underlining and bold for emphasis]

63. Additionally, at the MLB meeting held on **5th March, 1987** the following is recorded in the minute of such meeting to have taken place:

"039/87 BAMALETE KGALE FARM
The Board was informed that the Farm is now under their jurisdiction ***as/since the Tribe has agreed to hand it over during their Tribal meeting, the results of which were communicated to the Ministry for consideration. The handing over savingram from the Ministry of Local Government and Lands read to the Board was of ref. CLG 8/27 II dated 12th February, 1987.***

The Board resolved that the chief be invited to go and show them the boundaries and the condition of the Farm.

This was done the following week on the 18th March, 1987."
[underlining and bold for emphasis]

64. Despite the MLB being aware in **June 1985** or even later in **March 1987** of the true status of Forest Hill, the confusion even for the MLB continued unabated as during the Quarries case, some sixteen (16) or fourteen (14) years later (in **2011**), the MLB expressed the belief that Forest Hill was freehold land of the Tribe. One now ought to surely understand the finding made by the Court of Appeal in Quarries in relation to the confusion and its effect or lack thereof on the true status of Forest Hill.

65. The Tribe itself, perpetuated the mistaken belief despite that at the special joint meetings of the MLB, Tribal Administration, Council and District Administration held on **4th October 1990** and **23rd October 1990**, and at which meeting Chief K. S. Mokgosi (the Chief under whom the title deed was and remains registered) as well as two other members of the Tribe (W. Mogatle and P. N. Motsumi) were invited, the minute of that meeting records the following discussions:

> "... *The Chief came out with a suggestion that kgale should be demarcated and allocated to Balete for residential, commercial and Industrial purposes. One Councillor suggested that kgale could be sold and buy a farm, for Balete. <u>The Board Secretary informed the meeting that **Tribal Land cannot be sold**</u> and*

also that it would be unrealistic for the board to sell the land while there was a common cry of shortage of land in South East District. The Board asked how if an Attorney could be asked to give advice as regards the selling of the Tribal Land. The treasurer advised the meeting that it would be better to seek advice from Attorney General's Chambers rather than engage an Attorney because it would cost more. After a lengthy discussion of selling and allocating plots it was resolved as follows:

(1) To ask Attorney General's Chambers – Lands division <u>to come and give advice on the subdivision of the farm within a Tribal Land</u> and sell to interested parties.

(2) That Kgale use be changed from grazing to residential and commercial.

(3) That permission be sought from the ministry of Local Government and Lands to create a special fund from money paid to Land Board by Botswana Housing Corporation for future development of the district or to purchase a farm whenever someone intends selling his."

[Underlining and bold for emphasis]

66. On the **23rd of October 1990** the minute reflects the following deliberations:-

*"**ATTORNEY GENERAL'S CHAMBER – REPRESENTATIVE***

*Mr. Moupo from Attorney General's Chamber was welcomed in the Meeting. The chairman explained to him that he was called to give the house legal advice as regards the meetings desire to demarcate **Kgale tribal farm** to sell to individuals. A way which was thought could benefit the tribe more.*

Attorney explained that:

(i) *Tribal Land cannot be sold as there cannot be a value attached to it, he said that could be considered if the land is freehold. A question which remained unclear was to actually know the said transfer of the portion from freehold lease to tribal land was effected. The Board Secretary read **savingram CLGB/27 II of 17th February, 1987** which informed that the farm's administration has been transferred to the Land Board by consent of the tribe. According to Mr. Moupo the savingram cannot be said to have changed the status of the farm unless it was preceded by the actual signing of documents revoking the original grant and subsequently gazetting its transfer.*

(ii) *The Ministry of Local Government and Lands had recently passed legislation that no further land should be*

transferred to freehold grant. He said from the near past the government has engaged in the purchase of any freehold grant sold and tribalising the farms so as to give more land to the communities.

(iii) *By law once a freehold grant has been transferred to tribal land it cannot be transferred back to freehold grant.*

Some members of the house wondered if it was not possible to request a waiver from this section of the law to enable us to revert to freehold grant.

Discussing the advice from Attorney General's Chambers some members regretted the transfer. ***The chief explained that he was never for the transfer but he could not stop the tribe if it demanded that.*** *Some felt that the change had been a blessing since now more and more land is needed for allocation. They thought that selling plots would only benefit the rich and that by transferring the grant there was no loss since the land was still available for use by the tribe.*

RESOLUTION: *(i) That the office should investigate from Attorney General's the legality of the transfer.*

(ii) That the planners should prepare a land use plan for Khale for presentation to the Board and relevant

authorities to cover residential, commercial and Industrial needs.

(iii) The tribe be consulted about the recent developments and decisions and also solicit the views of the tribe concerning the use of Khale.

(iv) Meantime a change of use from grazing be processed."

[Underlining and bold for emphasis]

67. In the backdrop of all the above numerous pieces of evidence which support the Appellants' version that the Tribe consented to the incorporation of Forest Hill into the BTT and its tribalisation, and which version I find more credible, is the Tribe's version premised, *inter alia*, on the confusion over the status of Forest Hill which for some strange reason persisted despite clarifications that were made along the way. I have already indicated in respect of this confusion that, it does not in any way enhance the version of the Tribe that it never consented to the incorporation and tribalisation of Forest Hill. I find the observation by the full bench of this Court in Quarries correct and there is no plausible reason to differ with same, *to wit*; that the opinions, impressions and beliefs by various parties at various times regarding

the ownership or status of Forest Hill were irrelevant as ownership or the vesting of Forest Hill on MLB is a legal and not a factual question.

68. I must make some observations in respect of the confusion. On the Government and/or Attorney General's side, the reasons for the confusion could reasonably have been created by the change in the personnel with those who were well vest with the issue leaving the employ of Government and new people coming on board, who then failed to do proper background check and research on the issue. The advices and opinions given were however, clearly incorrect. For instance, between the three officers of the Attorney General's Chambers (Kgabo, Makgabenyana and Segokgo) none seem to have considered the relevant legislation (the TTA and the TLA) at the time they gave their respective opinions and/or advice for none makes reference to such pieces of legislation. Focus seems to have been placed on the title deed which even to date has never been physically cancelled following the 1973 TTA amendment. Assuming they were all alive to the relevant legislative provisions, their interpretation of such provisions was then clearly wrong. The issue of change of personnel applies in equal force to the MLB as time and again there are changes in the staff compliment which will necessarily impact on

the knowledge base of the Board. On the part of the Tribe, it is a fact that people who were intimately connected and alive to the issues back then are no more. The Court of Appeal in Quarries observed for its part that the transfer of parts of Forest Hill to the Government by the Tribe rather than the MLB in 1970 and the mid 1980's does not influence the debate in any way since a short explanation could be that, in order for the transfers to occur the transferor had necessarily to be the person in whose name the property was then formally registered, that is, the Tribe or Chief.

69. With the premise of the confusion out of the way, what is left are the contentions by the 1st Respondent and those who confirmed her averments. The averments made are the following:

a) That the Balete never held a Kgotla meeting in which they agreed to the tribalisation and incorporation of Forest Hill into the BTT, and that no evidence to that effect has been adduced. The 1st Respondent knows this because in 1971 she was 21 years old and knows for a fact that no consultation regarding the conversion was ever done. Those she asked also confirm her version;

b) That, the Bill was not "approved" by the House of Chiefs in the sense of giving it legal validity as such House did not and has no power to approve Bills passed by the National Assembly or power to consent to the deprivation of the Tribe's ownership of its property. That, no evidence of such approval has been produced.

70. I will deal with the above contentions in the order they appear starting with the first. I do note that the 1st Respondent has always (that is, in her answering affidavit to the main MLB application as well as in her founding affidavit to the conditional counter-application) maintained that the Tribe was never consulted nor did it ever consent to the tribalisation and incorporation of Forest Hill into the BTT. These averments, however, have always been made in general terms and without any specifics or elaboration, despite the awareness of the pieces of information or evidence relied upon by the Appellants on the issue of consent when viewed cumulatively. For the first time in her replying affidavit to the conditional counter-application, the 1st Respondent attempts to explain why she has maintained throughout that the Tribe was never consulted and never consented to the incorporation and tribalisation of Forest Hill. For the first time again,

she makes reference to having consulted some of the Tribe members with a view to ascertaining her conviction on the matter and makes mention of two individuals in Matshediso Chester Fologang and Jansen Otukile Batsalelwang who, for their part deponed to confirmatory affidavits to the 1st Respondent's replying affidavit.

71. The first challenge faced by the Respondents in this regard is the fact that they are precluded from making out their case in a replying affidavit in the manner they have sort to do, and this is trite. The issues of consultation and consent have always been in the know of the Respondents, and not just that. The Respondents have always known that these two issues are central to the determination of this dispute. Put differently, the issues of consultation and consent were foreshadowed in the main application. Moreover, the two formed the basis of the Respondents' conditional counter-application. The Respondents therefore cannot claim, and did not seek to claim, even during oral argument that, the issue arose for the first time in the answering affidavit to the counter-application and was as such never foreshadowed by the Appellants at an earlier stage.

72. In the case of **Madisa v Maswabi [2007] 2 BLR 313**, the Court when dealing with the issue whether it is permissible to raise a new issue in a replying affidavit, held as follows:

> *"1) It was trite that a party could not seek to make out a new case in its replying affidavit. Malau and Another v Debswana Diamond Company (Pty) Limited and Another [2004] 2 BLR 497 at p 501 applied.*
>
> *(2) A court would generally allow an applicant to raise a new issue in the replying affidavit only where the issue could not have been known to the applicant at the time of deposing to the founding affidavit. Bayat and Others v Harris and Another 1955 (3) SA 547 (N), Dawood v Mahomed 1979 (2) SA 361 (D) and Registrar of Insurance v Johannesburg Insurance Co Ltd 1962 (4) SA 546 (W) applied."*
>
> [Underlining for emphasis]

73. Following on the above authorities, it behoved the 1st Respondent to speak in depth about the issue of non-consultation and non-consent, which issues she had made reference to even in her answer to the main application filed by the MLB. She however contented herself with making bold unsubstantiated denials on the issue of consultation and consent without more. She is as such precluded from seeking to

expound on her bare contentions as made in her founding affidavit in her reply. To that extent therefore, the issue surrounding her age, and based on such age, her alleged firm knowledge of no consultative meetings in 1971 as well as the confirmations made by the two people she said she consulted with, cannot, should not and will not be heeded by this Court. As stated earlier, the issue of consultation and consent has always been in the fore-front in this matter and in fact central to the resolution of the dispute. To not deal with pertinent averments in her founding affidavit to the counter-application or even in her answering affidavit to the main application is not borne out of ignorance of those pertinent facts. One can therefore only call it an after-thought to which the other party has been denied an opportunity to answer. It therefore cannot be said that the Appellants failed to answer to averments that only arose in the replying affidavit.

74. Even where these new contentions could be heeded by the Court, they still do not carry any weight or are at best very weak when juxtaposed against the other pieces of evidence which point to consultations having taken place and consent of the Tribe having been sought and obtained. First, the averments as they appear in the replying affidavit are to the effect that in 1971 the 1st Respondent was 21 years of age

and as such knows for a fact that there were no consultations with the Tribe about the conversion of Forest Hill and change of its ownership. It is extremely difficult to understand how the age of the 1st Respondent at the time, in and of itself, makes her a firm authority on all the issues of the Tribe at the time in issue. I agree with the argument by Advocate Dr. Pilane that, none of the three who contend that there was no consultation, has deponed under oath to: a) how many Kgotla meetings were held during that period; b) the dates of such meetings; c) what the agenda items were, and d) what resolutions were taken in respect of each agenda item. Importantly, the trio has not claimed to have attended all Kgotla meetings called after 16th June 1971 (the date when the issue of incorporation and tribalisation of Forest Hill was first mooted). The fact that they have deposed to affidavits, and that by its nature an affidavit constitute *prima facie* evidence, does not mean the evidence as presented by the trio in their respective affidavits has to be taken by the Court at face value to be true and correct, more so where there is other evidence pointing in a different direction.

75. For instance, the father to the 1st Respondent, who was the Chief and custodian of tribal land in the Balete tribal area before the advent of

the Land Boards, who after establishment of the Land Boards did not only sit in the MLB but chaired the Board; in whose name Forest Hill was registered, confirmed at a special joint meeting of the Bamalete Tribal Administration, MLB, Council and District Administration in October 1990 (some 17 years after the 1973 TTA amendment incorporating Forest Hill into the BTT) that the Tribe demanded and/or agreed to the tribalisation and incorporation of Forest Hill into the BTT. The 1st Respondent on the other hand, and some fifty years after the 1973 TTA amendment, seeks to discredit that which her father stated more than 33 years back when the father is the one who was intimately involved in the land issues of the Tribe as a Chief and an elder. Can it be said that the 1st Respondent's *ipsi dixit* is weightier or constitutes the only admissible evidence in the context of this case? The answer, in my considered judgment, is a resounding NO. I cannot bury my head in the sand and disregard numerous pieces of evidence which, though not the actual minutes evincing consent by the Tribe, nonetheless, and when cumulatively interrogated, point to consultations having taken place and to the Tribe granting its consent.

76. The statement by the 1st Respondent's father at the referenced meeting, when viewed in light of other pieces of evidence such as:- a)

the mooting of the incorporation of Forest Hill into the BTT at a meeting of the MLB in 1971 (when MLB was still the Tribe's agent), which meeting he chaired and a resolution being taken for the Tribe to be consulted on the issue; b) the minutes of a Cabinet meeting which falls in line with a narrative that such consultation took place after the issue was mooted; c) the fact that the House of Chiefs in considering the issue unanimously agreed with it and Chief Mokgosi not raising any objection; d) several minutes of either the MLB or joint meetings with different stakeholders, all these lead to an inference, in the absence of any minutes of a kgotla meeting where consultation could have been made and consent obtained or refused, that consultation was done and consent given by the Tribe. Moreover, and despite their absence, reference has been made to **savingram CLG 8/27 II of 12th February 1987** and/or **savingram CLG 8/27 II of 17th February 1987,** in terms of which the Tribe allegedly handed over Forest Hill for incorporation and tribalisation purposes. This is the only inference that can reasonably be drawn in line with principles governing the use of circumstantial evidence. On inferential reasoning, this Court in **Bogosi v The State [1996] BLR 702** held that:

"(2) As no State witness could testify directly that they saw the appellant shoot the deceased, a finding that he did so therefore had to depend on the circumstantial evidence led. The inference sought to be drawn from the evidence had to be consistent with all the proved facts and they had to be such that they exclude every other reasonable inference from them save for the one sought to be drawn. ..."

[See also: **State v Mmesetse and Another [2001] 1 BLR 505 (HC); Ndlovu v The State [2002] 2 BLR 158 (CA)]**

77. On the possibility of a consultative meeting having taken place and the Tribe's consent at such meeting to the tribalisation and incorporation of Forest Hill into the BTT, the following facts have been proven:

a) The idea to incorporate Forest Hill into the BTT was mooted in 1971 at the MLB meeting chaired by the Balete then Chief, K. S. Mokgosi. At that time the MLB was acting as an agent of the Tribe and not in its statutory role. Whatever actions taken by the MLB therefore, such as the mooting, can only be attributable to the Tribe;

b) Such meeting resolved that the Tribe be consulted on the issue;

c) Within a year of the mooting of the incorporation idea, a Cabinet Memorandum dated 21st July 1972 reveals a request to Cabinet to advise His Excellency the President to direct that the Amendment Bill (relative to the Forest Hill's incorporation into the BTT) be published in the Gazette and presented to the National Assembly at its next sitting;

d) It is recorded unequivocally in the Hansard minutes of the National Assembly sitting of 25th October 1972 (of the 2nd reading of the Amendment Bill) that such Bill was presented to the House of Chiefs [as dictated by the Constitution] and that the House unanimously approved same [the amendment];

e) Shortly thereafter the amendment was passed and effected;

f) Chief Seboko Mokgosi, who was all along involved in the tribalisation and incorporation issue, confirmed the Tribe's consent to the tribalisation and incorporation of Forest Hill a few years later in 1990 when issues surrounding the farm were under discussion at a joint meeting between different stakeholders.

78. With all the above proven facts, the 1st Respondent's *ipsi dixit* that consultation never took place as she was 21 years of age at the time in issue, is not sufficient to displace the otherwise overwhelming evidence which leads to only one inference and no other. This is that, the Tribe mooted, consulted and consented to the tribalisation and incorporation of Forest Hill into the BTT, and I so find.

79. On the denial that the House of Chiefs approved the Amendment Bill when presented to it as per the dictates of the Constitution, there is no basis proffered for such denial. On the other hand, the minutes of the National Assembly as captured in the Hansard, make mention of the consultation with the House of Chiefs and such House's unanimous agreement. One ought to remember that consultation with the House of Chief was and still is a constitutional requirement. Nowhere in the pleadings before this Court has it ever been suggested that all the legal steps to be taken in the promulgation of any piece of legislation were not followed in the case of the amendment in issue. This Court in Quarries of Botswana observed, and I align myself with such observation, at p. 486B-C that:

*"... The inclusion of Forest Hill in the Bamalete Tribal Territory and its consequent vesting in the fifth 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 s 88 (2), **required referral of the proposed legislative changes in question to the House of Chiefs** established under s 77 (1) of the Constitution. **It has not been alleged that such referral did not occur or that the Bamalete Chief at the time objected.** ..."*

[underlining and bold for emphasis]

80. It has never been contended by the Appellants or any party that the unanimous approval by the House of Chiefs, in and of itself, gave the Amendment Bill legal validity. It however, if that was ever the issue, and it is not, ought to be clear that, to the extent that the Constitution compelled referral of such issue to the House of Chiefs, the passing of the amendment without such referral would have been flawed and would in fact have been a nullity. Referral to the House of Chiefs as such is a legally binding step that gives credence to the law making process. The important issue here however is this that, the mention of the referral of the issue of incorporation of Forest Hill into the BTT to the House of Chiefs and the unanimous approval of the Bill by such House, only puts paid the argument by the Appellants that the Tribe was consulted and consented to the incorporation. Had that not been

the case, the Tribe's Chief then (Chief Seboko Mokgosi), would have vehemently registered his opposition to the Amendment Bill. If he had, his opposition would have been noted. Importantly, it would not have been stated that the House of Chief's decision was unanimous.

81. After all is said and done, and to the extent therefore that the Tribe consented to the tribalisation and incorporation of Forest Hill into the BTT, it becomes clear that the argument that Forest Hill was compulsorily acquired is simply a ruse. I will also add, and in line with what this Court alluded to in Quarries, that, Forest Hill was a freehold property of the Tribe prior to its tribalisation and incorporation into the BTT. It was then under the custodianship of the Chief. Upon the advent of the Land Boards, who took over custodianship of tribal land to manage on behalf of the respective tribes within the respective tribal territories, MLB assumed custodianship of Forest Hill upon its tribalisation and incorporation into the BTT. It therefore is still for the benefit of the Tribe like all other pieces of land that fall within the BTT, and that the amendment of Section 10 (1) of the TLA to the extent that it now seeks to benefit all citizens of Botswana as opposed to a particular tribe, is not at all prejudicial to the Tribe. The Court in Quarries reasoned, and I align myself with such reasoning that, the

amendment is a general provision affecting all Land Boards alike. That, at a practical level, the amendment, and its import notwithstanding, a Land Board's primary duty will first and foremost have to be to the residents of the Board's area of jurisdiction.

82. To put paid the above rationale, I will refer to two examples where the MLB, despite the current Section 10 (1) of the TLA, and its exclusive dominion over tribal land, and further despite such dominion being for the benefit of all citizens of Botswana, has not lost sight of its primary duty to the residents of its area of jurisdiction (that is, the Bamalete Tribe).

83. For instance, at its sittings of **7th through 9th August 1989**, upon concern being raised regarding some farmers who were affected by the sewerage ponds and therefore a need to relocate them, and further upon the Chief making suggestions that pieces of land be availed at Forest Hill for the relocation purpose among others, the MLB resolved that a Kgotla meeting be called to inform the Tribe of the pressing need to allocate such farmers at Forest Hill. If the MLB did not take its primary duty seriously or was of the view that every Motswana was entitled in a similar fashion as the Tribe members, the

resolution to first consult the Tribe where Forest Hill was concerned would never have been passed.

84. Similarly in **1990** at the meeting held on **23rd October**, the MLB resolved to consult the Tribe about the decisions surrounding the tribalisation of Forest Hill and to solicit the views of the Tribe in respect of the use of Forest Hill. Consistently, when one goes through numerous minutes of the MLB and where decisions needed to be taken which affected Forest Hill, the MLB always resolved to consult the Tribe before embarking on anything. It is apparent therefore that, Land Boards in general, and despite the benefit of tribal land being extended to all citizens of Botswana, are alive to the "preferential treatment" they have to give, and have always done so, to the tribe members of their respective areas of jurisdiction over other non-tribesmen.

85. At some of the meetings referenced in this judgment, some members of the Tribe in attendance lauded the incorporation of Forest Hill into the BTT reasoning, *inter alia*, that there is no loss since the land was still available for use by the Tribe. There was also recognition that should the farm have remained freehold land, and suggestions to sub-divide and sell same to have gained traction and eventually

implemented, this would only have worked to the benefit of the rich. Moreover, some felt that the suggestions to sell Forest Hill were unrealistic regard being had to the common cry of shortage of land in the South East District. This Court in Quarries, and on the point of the likelihood of selling Forest Hill, observed at p. 485C-E that:

> *"... It is hardly conceivable that attempted disposal of Forest Hill in that time would have received approval by any relevant State authority. And even if, between 1964 and 1970 there was no authority to oversee the affairs of any tribe, there is nothing on record to warrant the conclusion that the land on Forest Hill was ever so completely surplus to the tribe's needs in respect of housing, cultivation and grazing that alienation of the land was ever contemplated or would have been. Moreover, the evidence is that after establishment of land boards the tribe requested the fifth respondent to oversee and administer its landed properties, including Forest Hill. In all this time, accepting that the chief and members of the Tribe were of the view that Forest Hill was freehold property, no thought was given to selling the farm. To judge by the evidence, therefore, the suggestion that Forest Hill was an asset available for ready sale is fanciful."*

86. Before concluding, it is imperative to briefly address an issue which has been mentioned severally in the pleadings and during argument especially by the Tribe. This is the issue of the unavailability of

minutes of the kgotla confirming that the Tribe indeed consented to the tribalisation and incorporation of Forest Hill. In answer to this issue Advocate Pilane argued that, it is not surprising that the minutes of the kgotla are not available as it ought to be common cause that at the time in issue no minutes were kept during kgotla meetings. I am inclined to agree with Advocate Pilane more so that the Tribe has not sought to present any minutes on its part supporting their contention that the Tribe did not consent. The Tribe has also not sought to argue that at the time in issue kgotla meetings were recorded and minutes kept. An example of such could have been placed before court if at all the position by Advocate Pilane was not true. The lack of minutes therefore cannot be the sole basis upon which the Court will disregard all other pieces of evidence supporting or discrediting the version of either side.

87. In conclusion therefore, there has not been any compulsory acquisition of Forest Hill without compensation contrary to the finding by the Court below. The elements of compulsory acquisition do not exist in respect of Forest Hill because the Amendment to **Section 7 of the TTA** was preceded, and in fact, informed by the Tribe's desire to have their otherwise freehold property tribalised and incorporated into the BTT.

Neither the Government, nor its agencies, sought to acquire Forest Hill for any of the purposes anticipated by the APA and/or the Constitution (Section 8). The MLB, at the time it mooted the issue of incorporation, was standing in the shoes of the Tribe as the Tribe's agent and not as a statutory body in the performance of its statutory functions and mandate. The Court *a quo* therefore, got the sequence wrong. The Tribe mooted and agreed to the tribalisation of Forest Hill and presented their decision to the District Commissioner. The issue eventually reached the law making body being Parliament. After following all the legislative requirements of making laws, Parliament, in endorsing the Tribe's wishes, promulgated the amendment in issue. The impugned provisions of the TTA and TLA do not as such have the effect ascribed to them by the Court *a quo* and the majority. The said provisions as such are not unconstitutional.

88. In the result:

a) The appeal succeeds with Costs in favour of the Appellants including costs of counsel.

b) The order of the Court below is set aside and replaced with the following order:

i) The Registrar of Deeds of Botswana is hereby directed to cancel Deed of Transfer No. 387 passed in favour of Bamalete Tribe in respect of Farm Forest Hill 9-KO.

ii) The 3rd and 4th Respondents are hereby directed to deliver the original Deed of Transfer No 387 passed in favour of Bamalete Tribe in respect of Farm Forest Hill 9-KO to the Applicant within 7 (seven) days of the date of this order.

iii) In the event the 3rd and 4th Respondents fail, neglect and refuse to deliver the said Deed of Transfer No. 387 passed in favour of Bamalete Tribe in respect of Farm Forest Hill 9-KO within 7 (seven) days, a deputy sheriff of this Honourable Court is hereby authorised to sign all documents and do everything necessary for purposes of cancellation of the said Deed of Transfer.

iv) The 3rd and 4th Respondents are hereby ordered to pay the costs of this application.

DELIVERED IN OPEN COURT AT GABORONE ON THE 7TH DAY OF MARCH 2023.

M. T. GAREKWE
(JUSTICE OF APPEAL)