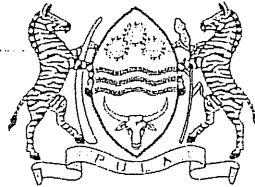


89

2



IN THE HIGH COURT OF BOTSWANA HELD AT LOBATSE

CAHLB-000035-12

In the matter between:

**KGALAGADI LAND BOARD
BOARD SECRETARY
BOARD CHAIRPERSON**

**1st Appellant
2nd Appellant
3rd Appellant**

and

MOSELETSANE SYNDICATE

Respondent

Attorney Mr K. Pogiso for the Appellants
No appearance for the Respondent

JUDGMENT

GAREKWE J:

1. Appellants, Kgalagadi Land Board as 1st Appellant, Board Secretary as 2nd Appellant, and Board Chairperson as 3rd Appellant, (hereafter "Appellants") have appealed the Land Tribunal (hereafter "the Tribunal")'s decision of 27th March 2012 to the effect that-

- (i) The three Respondents are hereby fined P3,000.00 (Three Thousand Pula) each for contempt payable within 30 days from today.

(ii) The 1st Respondent is granted 30 days extension to comply with the Court order of 9th February 2011.

(iii) The 1st Respondent shall pay the costs of the application on ordinary scale.

2. The decision complained of resulted from contempt proceedings brought by the now Respondent before the Tribunal following non-compliance by the 1st Appellant with the Tribunal's order or decision of 9th February 2011 to the following effect:-

"i) The Respondent's resolution as contained in its minutes of 12th - 16th June 2006 is hereby declared to be invalid and it is accordingly set aside;

ii) This matter is hereby remitted to Respondent for it to reconsider the Appellant's application and make a decision on it within three (3) months from today;

iii) In reconsidering the matter, the Respondent shall afford the Appellant a hearing and shall disclose the basis for reaching the decision together with supporting proof;

iv) In the event the Appellant is aggrieved by the decision of the Respondent arising from the

reconsideration, the Appellant shall be able to exercise its right of appeal to this Court; and;

v) *There is no order as to costs."*

3. The Appellants' grounds of appeal as captured in their notice and grounds of appeal are:-

(a) That the Land Tribunal erred in law by finding that the 2nd and 3rd Appellants were properly cited and/or joined in the contempt proceedings, when they were originally not parties of (sic) the main action contrary to paragraph **6(10) (B) of the Tribunals**

Establishment Order;

(b) That the Land Tribunal further erred in law by ordering that 2nd and 3rd Appellants were personally liable each to pay the sum of P3,000.00 (Three Thousand Pula) as contempt fine, dispute the fact that the said Appellants were never parties to the main action and had not been proved to have been personally contemptuous of the Tribunal order of 9th February 2011, contrary to paragraph **6(10) (B) of the Tribunals Establishment Order** or as required by law;

- (c) That the Tribunal further erred in law by purporting to have competent jurisdiction to try and convict Appellants on Criminal Contempt offences under **Section 25 of the Penal Code [Cap. 08:01]**, when in law it does not have such jurisdiction, but its powers for contempt only limited to those under Sections **10(A) and 10(B) of the Tribunal Establishment Order of the Tribal Land Act**, as creature of statute, and hence its decision a nullity;
- (d) That in the whole the Land Tribunal gravely erred in law by finding Appellants guilty of contempt of Court, when Applicant or Respondent's pleadings were legally defective and failed to ~~disclose any cause of action for contempt against Appellants.~~

4. I propose to deal first with grounds (c) and (d) before dealing with the first two. Respecting ground (c), I find such ground unmerited in that the Tribunal did not convict the Appellants under **Section 25 of the Penal Code** as alleged. Rather, at page 10 of its ruling, it held that nothing precludes the Tribunal from ordering imprisonment in default of payment of a fine. The Tribunal based its conclusion on its interpretation of **Section 40(4) of the Tribal Land Act** read with Sections **25 and 21 (i) (c) of the Penal Code**. The Tribunal however, noted that it was mindful of the fact that the matter before it was a

civil contempt matter and proceeded to impose only a fine and not an imprisonment term.

-
5. By imposing a fine only, the Tribunal acted in terms of **Section 6 10(B) of the Tribal Land (Establishment of Land Tribunals) Order** which provides:-

“A land board, or any other party to an appeal before a Land Tribunal that, without reasonable excuse, fails to enforce any determination made by the Land Tribunal in relation to an appeal under this Order shall be guilty of an offence and liable to a fine of P10,000.00 or if the offence is a corporate body, to a fine of P20,000.00”

6. To argue therefore that the fine imposed by the Tribunal following a finding of guilt on the Appellants' part was done in terms of the Penal Code, makes no sense at all. This ground therefore is dismissed.
7. In so far as ground (d) is concerned, Appellants decry the verdict of guilty visited upon them by the Tribunal on the basis that the Respondent's pleadings did not disclose a cause of action and were therefore defective. The Appellants seem to premise this contention on

their averment that they did not, or rather, Respondent failed to show that they “unlawfully and intentionally disobeyed the Tribunal order of 9th February 2011”. Expanding on their averment above, they contend that following the Tribunal order they have been held to be in contempt of, they extended invitations to the Respondent who never honoured same. That, it was as such Respondent’s conduct which made it impossible for them to meet the Tribunal’s ordered deadline of three months.

8. In terms of the record of proceedings of the Tribunal, there are contradictions in respect of Appellants’ submissions on why they failed to comply with the Tribunal Order of 9th February 2011.

9. The Appellants allege on one hand to not have been aware of the Tribunal Order of 9th February 2011 until they received such Order on 25th February 2011. On the other hand, Appellants seem to contend that they dealt with the matter on 15 – 24th March 2011, but were not aware of the Tribunal order at the time. The two averments above are incapable of reconciliation. Most important, they fail, individually or even collectively sufficiently explain their default as it were. Clearly, Appellants were represented when the order of 9th February 2011 was issued by the Tribunal and are deemed to have known of such order on that very day. At worst however, they are deemed to have become

aware of the order on 25th February 2011 the day they contend to have received such Order. What they did after that date however, is not clear respecting compliance with the Tribunal Order. Their mention or allegation of “dealing” with the matter on 15- 24th March 2011, begs many questions without answers. For instance, what then happened if they dealt with the matter on that day? By their own admission, they did not provide anybody with the minutes of such hearing. The fact that they still invited the Respondent for a meeting on the same issue on 24th January 2012, confirms that the meeting of 15 - 24th March 2011 did not bare any fruit (assuming the Respondent was invited for same (which has not been proved). This Court, neither the Tribunal ~~could guess and even conclude that Appellants made attempts to~~ comply with the Tribunal order of 9th February 2011.

10. For Appellants therefore to argue on the basis of the above, that Respondent’s contempt proceedings did not disclose a cause of action, leaves a lot to be desired. As stated by the Tribunal in its ruling, -

- a) a clear Tribunal order of 9th February 2011 existed or was issued by the tribunal;
- b) it called upon the Appellants to act within three (3) months from the date of the order;

c) the Appellants being present on the 9th February 2011 became aware of the order on that date, and in any event by 25th February 2011 earliest;

d) the Appellants failed to comply with the order without any lawful excuse;

e) purported reasons advanced by Appellants for their non-compliance are at best bare contradictory allegations of attempts to comply.

11. Faced with the above, it is clear that contempt with the Tribunal order ~~was clear and easily ascertainable prima facie the complaints of the~~

Respondent hence the order for contempt issued by the Tribunal. This ground therefore is unmerited.

12. I will now go back to grounds a) and b) which I will deal with together and very briefly. The Appellants contend that it was erroneous for the Tribunal to first allow the inclusion of 2nd and 3rd Appellants in the contempt proceedings and second, to impose a penalty against such Appellants, when they were not parties to the proceedings which gave rise to the contempt application. In dealing with this issue, the Tribunal quoted its decision of **MELATSWANA SYNDICATE VS**

KGALAGADI LAND BOARD LT 83/10 where the Tribunal had cited with approval Van Winsen The Civil Practice of the Supreme Court of South Africa at page 816 to the effect that –

“A corporation can comply with a Court order only through its officers and can thus be convicted of contempt only if the officers for whose conduct it can in law be held liable have refused or failed to comply with the order. A person who contributes to the commission of the offence can, without being a principal offender, be punishable as an accomplice. Thus, a director of a company, who with knowledge of an order of Court against the company causes the company to disobey the order, is himself guilty of contempt of Court.”

Underlining for emphasis]

13. Closer home, I want to refer to the Court of Appeal decision of **SILVESTONE V. LOBATSE CLAY WORKS** where Tebutt JA had this to say at page 2011 G - H –

“Notwithstanding the effect of a company’s incorporation, in some cases the Court will pierce the corporate veil in order to enable it to do justice by treating a particular company, for the purposes of the litigation before it, as identical with the person or persons who control it. This will be done not only where there is fraud or improper conduct but in all cases

where the character of the company or the nature of the persons who control it, is a relevant feature."

14. In casu, it has been argued by the Appellants that 1st Appellant is a statutory body with capacity to sue and be sued on its own name, and that as such it has a separate legal personality from its employees. It is a given however, that in that state, it depends upon such employees, especially those who run or control its operations to do anything and in particular to comply with Court orders. It is common knowledge in this jurisdiction, and I do take judicial notice of this fact that, land boards operate mainly through the Board Chairperson and the Board Secretary, these two being the most recognized employees who push the agenda of the land boards and their businesses. Necessarily, the two are the main officers who ought to foresee compliance with Court Orders by the land board in as much as the land boards function through them.
15. In a case as the present one, where a Court order was not complied with, they are the land board personnel who have to be held responsible for such non-compliance. More so where proceedings for contempt have been brought before a Tribunal or Court which have the effect of resulting in an imposition of an imprisonment term. A land board cannot be imprisoned. To therefore suggest that its most responsible officers cannot be cited for contempt purely on the basis

that they were not parties to initial proceedings, will defeat the whole purpose of contempt proceedings in cases of juristic persons. I therefore also find this ground unmerited.

16. Though this appeal was unopposed, it behooved this Court to properly determine the issues before it and arrive at an informed decision. In the result, this appeal is dismissed with costs.

DELIVERED IN OPEN COURT THIS 26th DAY OF APRIL 2013.

M.T. Garekwe

.....
M.T. GAREKWE

[JUDGE]

Maphakwane & Partners – appellants’ attorneys
Mack Bahuma attorneys – Respondent’s attorneys