IN THE HIGH COURT OF BOTSWANA
HELD AT GABORONE

MAHGB-000140-13

In the matter between:

KEOTLHABETSI ITHUTSENG — **1st Applicant**
MOSIMANE MALEFO — **2nd & Further Applicants**

and

ATTORNEY GENERAL — **Respondent**

Mr. Attorney D.G. Boko for the Applicant
Mr. Attorney D. Phagane (with Mr. Attorney B.G. Mosweu) for the Respondent

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RULING

WALIA J:

1. By notice of motion filed on 8th March 2013, the applicants, described therein as follows:

   KEOTLHABETSI ITHUTSENG — 1st Applicant
   MOSIMANE MALEFO — 2nd and Further Applicants

   seek the following declaratory orders:

   "(1) The Applicants identified in Part 1 of the Schedule have the right to enter, re-enter and remain in the Central Kalahari Game Reserve ("the Reserve") without the permission of the Respondent.

(2) The refusal or failure of the Respondent to allow those Applicants to exercise that right unless they are in possession of a valid entry permit issued under Regulation 4 of the National Parks and Game Reserves Regulations 2000 is unlawful and/or unconstitutional.

(3) All the Applicants, whether they are identified in Part 1 or Part 2 of the Schedule, have the right to enter into and travel within the Reserve by means of donkeys or horses without the permission of the Respondent.

(4) The refusal or failure of the Respondent to permit the Applicants to enter or travel within the Reserve by means of donkeys or horses is contrary to Regulation 25 of the said Regulations and/or is otherwise unlawful or unconstitutional.

(5) All other persons who were relocated or whose property or belongings were relocated from the Reserve in the course of the relocation described in Sesana and Others v Attorney General [2006] BWHC I have the rights referred to in (1) and (3) above, as do their children and the children of the Applicants."

2. The application is opposed under notice of opposition filed on 4th April 2013. The notice of opposition was followed, on 11th April 2013, with a notice of objections *in limine*.

3. The notice aforesaid lists 10 objections as follows:

"1. The purported founding affidavit is not signed and/or deposed to by the deponent thereof and therefore a nullity;

2. This application raises material disputes of fact which cannot be decided on paper. The applicants were aware of such disputes of fact at the initiation of the proceedings and/or foresaw them but they nonetheless chose motion proceedings which are improper. The application stands to be dismissed on this ground alone;

3. The founding affidavit contains facts which the deponent has no personal knowledge of but they have not been confirmed by persons having the requisite personal knowledge. The said paragraphs and/or affidavit stands to be struck out as inadmissible;

4. To the extent that the supporting affidavit seeks to lead evidence on behalf of a client's cause, such affidavit is improper and liable to be expunged;

5. The applicants have annexed privileged notices and other correspondence which are not a subject of disclosure in any

or later court proceedings. The said exhibits should be struck out together with every paragraph predicated thereupon;

6. The purported founding affidavit is invalid in that the legal capacity of the deponent is not alleged and/or established;
7. The applicants have no *locus standi* to bring these proceedings on behalf of others;
8. The applicants have annexed documentary exhibits which are not pleaded and should be struck out; the Respondent does not know how she is expected to react to such;
9. The proceedings are invalid and authorized (sic) in that there is no power of attorney or other authority for the purported attorneys to commence and/or prosecute this matter;
10. The founding affidavit is invalid as it does not disclose the time when it was made."

4. On 30th May 2013, the respondent filed an application for condonation of the late filing of the answering affidavit.

5. When the matter came before me on 31st May 2013 for roll call, there was no indication that the respondents intended to oppose the application. Cogent reasons have been given for condonation to be granted and I can see no reason why it should not.

6. The late filing of the answering affidavit is therefore condoned with no order as to costs.

7. On 31st May, it was agreed that the preliminary issues raised by the respondent be determined first and the following orders were made.

"1. Argument on the respondent's points *in limine* will be heard on 29th July 2013;

2. The Parties' heads of argument shall be delivered not later than 19th July 2013."

8. Heads of argument were duly filed by the parties and argument was heard on the scheduled date. This ruling is thus concerned with the preliminary issues.

9. I will deal with each point *in limine*, but not necessarily in the order it appears in the notice.

10. The very first objection is that the purported affidavit is not signed or deposed to by the deponent. The founding affidavit is made by Keotlhabetsi Ithutseng. The jurat bears the following endorsement:

"The deponent appearing to me to be illiterate, I hereby certify in accordance with order 13, rule 12 (1) of the rules of the High Court that the affidavit was read to the deponent in my present (sic) in the Gana language, and that he seemed perfectly to understand it, and that the deponent made his mark in my presence."

11. The signature of the commissioner of oaths appears at the bottom right of the last page of the affidavit. Immediately on the left of the commissioner's signature, appears a signature. I have little doubt that that is the "mark" referred to by the commissioner. It has not been shown that it is not the mark or signature of the first applicant.

12. The first objection is therefore without merit.

13. In Paragraph 3 of the objection, the respondent argues that a number of paragraphs enumerated in the heads of argument contain matters which the 1st applicant has no direct knowledge of and therefore stand to be struck out.

14. I have subjected the alleged offending paragraphs to close scrutiny. For purposes of this ruling it suffices to say that even if each of the

paragraphs is expunged, the remaining paragraphs of the founding affidavit provide sufficient material to support the applicant's case. At this stage, therefore and having regard to the final conclusion I have reached on the application, I find it unnecessary to make a specific finding on whether or not to strike the said paragraphs out.

15. Similar considerations apply to the so called privileged notices and exhibits referred to in paragraphs 5 and 8 of the notice of objection. I cannot say that the exclusion of the documents complained of will render the application fatally defective.

16. It must be borne in mind, at all times while dealing with the objections, that the basis of the application is the applicants' assertion that they have a right to enter and re-enter and remain in the Central Kalahari Game Reserve.

17. To succeed in the application, it is enough for them to establish that the respondent has denied them that right. If therefore, in considering that issue the exclusion of certain averments and documents does not affect the fundamentals of the application, the application does not, on that account alone, stand to be dismissed.

18. Viewed in that context, paragraph 6 of the objection is difficult to comprehend. The respondent contends that the founding affidavit is invalid because the legal capacity of the deponent is not established.

19. In the founding affidavit, the deponent says that he is an adult, discloses his place of residence and provides occupational details. In my view, there is sufficient information in the founding affidavit, to meet the requirements of order 6 rule 4 of the rules of this Court.

20. Paragraph 4 of the notice of objection deserves closer scrutiny. The supporting affidavit in question is made by the applicants' attorney of record and the respondent complains that the attorney seeks to lead evidence on behalf of his client. It therefore stands to be struck out.

21. It is trite that as a general rule, while an attorney takes up the cudgels on behalf of his client, it is improper for him to take on the role of a witness.

22. It is clear from the contents of the supporting affidavit of Mr. Boko that it seeks to provide evidence of facts which are not alluded to in the founding affidavit, thus introducing entirely new matters.

23. The undesirability of an attorney deposing to an affidavit instead of his client, was succinctly stated in **MOGATUSI v. ELMA BUILDING CONSTRUCTION (PTY) LTD and ANOTHER 1998 BLR 554**. More recently, Dingake J had occasion to deal with the issue in **ATTORNEY GENERAL v. FAHEEM INVESTMENTS (PTY) LTD AND OTHERS 2010 (2) BLR 466**, where, adopting **Mogatusi** (supra), he said, at Page 470:

> "I have a number of difficulties with the affidavit of Mr. Keetshabe. First of all, Mr. Keetshabe is an attorney, and it is inappropriate and indeed undesirable to have him depose to an affidavit, instead of his client. The practice of attorneys deposing to affidavits on behalf of their clients has been deprecated by this Court on several occasions....."

24. In the circumstances of this case, I agree with the respondent that the applicant's attorney has, to use the words of Dow J in **Mogatusi** (supra), crossed the professional line between attorney and client.

25. The attorney's supporting affidavit therefore stands to be struck out.

26. In paragraph 9 of the notice of objection, the respondent seeks to invalidate the application on account of the power of attorney authorizing the applicant's attorney to act on their behalf not having been filed with the originating process.

27. There is some merit in this argument. The application was filed without a power of attorney, clearly in breach of order 4 of the rules. The Registrar was also in error in issuing the application in the absence of the power of attorney.

28. On 28th May 2013, without leave of Court, the applicants filed a special power of attorney by Ithutseng authorizing Duma Boko and Company to act for him and other former residents of the Central Kalahari Game Reserve. Annexed to that power of Attorney is a power of Attorney by a number of such former residents authorizing Ithutseng, on their behalf, to take the necessary steps to prosecute the application and to instruct attorneys.

29. The applicants have not, in their heads of argument, referred at all to the absence of a power of attorney when the notice of motion

was filed. Instead, at the hearing, Mr. Boko asked the Court to exercise its powers under order 5 rule 1, to condone the applicants' failure and admit the power of attorney filed on 28th May 2013.

30. Mr. Boko argues, further, that in matters of constitutional importance, which he submits this application is, the courts should interpret the rules of court liberally to avoid injustice to a party.

31. It is now well established that in applying the rules, Courts should not lose sight of order 1 rule 2. This view is expressed in no uncertain terms by the Court of Appeal in **SAME SEGOTSO and OTHERS v. ORIGINAL APOSTOLIC CHURCH CACGB-055-12** [unreported] where the court said:

> "I do not seek to underestimate the importance of Rules of Court in the administration of justice. But they are the servants of justice, not masters. It is important not to lose sight of order 1 Rule 2 of the Rules of the High Court, which provides that "Application of these rules shall be directed towards the achievement of a just, efficient and speedy dispensation of justice." In other words, form should not normally prevail over substance in the administration of justice."

32. In this case, however, Mr. Boko asks the Court not to bend the rules, but to break them. The circumstances under which a power of attorney may be introduced are circumscribed and do not apply to this application.

33. The flip side to Mr. Boko's argument on constitutional matters deserving a more liberal application of the rules is that, in matters of this nature, it behoves applicants to be more diligent and punctilious in obeying the rules when fighting for their rights.

34. The power of attorney in this case was filed in disregard of order 4 and without any application for condonation of such late filing. This is not a simple case of not allowing form to prevail over substance. The power of attorney is simply not properly before the Court. It follows that on the papers before me, Ithutseng is not authorized to act for the applicants and Duma Boko and Company have no authority to act for Ithutseng.

35. The documentation also reveals unresolved incongruencies. The power of Attorney filed on 28th May 2013 is dated 3rd March 2012, while the power of Attorney from the other applicants in favour of Ithutseng is dated September 2012. It is not explained how Ithutseng assumed the right to represent the other

applicants on the papers before me, as at 3rd March 2012, Ithutseng had not been authorized to act on behalf of any of the applicants. That authority was only given to him in September 2012.

36. This, in turn brings into play the respondent's argument that the applicants, with the exception of Ithutseng, lack the necessary *locus standi* to bring this application.

37. The importance of establishing the parties' *locus standi* was emphasized by Kirby J as he then was, in **KALAHARI RANCHES (PTY) LTD v. BOTSWANA NETWORK OF AIDS AND SERVICE ORGANISATIONS 2007 (1) BLR 646** where he said:

"In my judgment objections relating to *locus standi* can be raised at any time, because this is a *sine qua non* to valid legal proceedings. See **Morenane Syndicate and Others v. Loeto (2005) 2 BLR 37** where it was held that the *locus standi* of the parties is fundamental to due process and without it proceedings would be invalidated. *Locus standi in judicio* is a matter of law. It cannot be conferred by consent."

38. In the circumstances, while the power of attorney by Ithutseng in favour of Duma Boko and Company may, on proper application, be

admitted, the failure to establish the other applicants' *locus standi* renders the application, in so far as it relates to them, invalid.

39. I now turn to the respondent's argument that the papers reveal such disputes of fact that the application is incapable of being resolved on the affidavits.

40. The applicants' consent to the answering affidavit being admitted is manifest in the heads of argument, where Mr. Boko has raised preliminary objections to numerous paragraphs thereof and has dealt with the affidavit in general in some detail.

41. Mr. Boko argues that the application does not raise any material disputes of fact. However, a reproduction of paragraphs 7 and 8 of his head of argument clearly acknowledges that such disputes do exist.

> "7. In order to substantiate this ground of opposition AG should have (i) identified each material fact which she claims to dispute; and (ii) summarized the evidence which she intended to call to disprove the disputed fact. It is not enough merely to "deny" a fact but put forward no alternative version of events.

8. The only fact that the AG appears to dispute is that the NSA were residents of the CKGR at the time of the relocation. She does not intend to call any evidence of her own to show that they resided somewhere else. Instead she appears to rely solely on the statement and list of signatories at Pages 5 to 10 to annexure "MM1" ("the statement and the list.")."

42. I do not agree that the answering affidavit comprises bare denials of the averments in the Founding Affidavit. I have read and re-read the founding and answering affidavits and cannot but come to the conclusion that material disputes of fact do exist, making it impossible to determine the application on the affidavits before me.

43. The fundamental premise of the application is that the applicants were, at some stage, resident in the CKGR and that they have the right to return, unimpeded by the Government.

44. Their status as former residents of CKGR cannot be resolved by a simple balancing of the respective averments and denials. The very fact of their being so resident requires proof. Numerous other factors such as Government Policy and conditions in the CKGR need to be aired and debated before a decision is made.

45. Order 12 rule (10) provides:

"Where an application cannot properly be decided upon affidavit, the judge may dismiss the application or the judge at the pre-trial conference may make such order as to him seems meet with a view to ensuring a just and expeditious decision; and in particular, but without affecting the generality of the foregoing, he may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness, or he may refer the matter to trial with appropriate directions as to pleadings or definition of issues or otherwise."

46. The locus classicus on how to deal with dispute of facts is the South African case of **ROOMHIRE CO. (PTY) LTD v JEPPE STREET MANSIONS LTD 1949 (3) SA 1155** which has been followed consistently in Botswana. The following statement by Murray AJP is of particular significance to this case:

"It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event .....the Court has a

discretion as to the future course of the proceedings.....or the application may even be dismissed with costs, particularly where the applicant should have realized when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of a probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the court to apply rule 9 to what is essentially the subject of an ordinary trial action."

47. This case has an uncanny resemblance to **SESANA and OTHERS v. THE ATTORNEY GENERAL 2002 (1) BLR 452**. In that case too, the application had been brought in breach of numerous rules of Court and without disclosing the necessary *locus standi.*

48. The Court in that case had dismissed the application and was constrained to make the following remarks:

"Before I conclude, I must state that I am perturbed and astounded by the laxity and carefree manner in which the applicants' papers in a case of such immense public interest

have been prepared; there has been considerable disregard of the rules of court and this is totally unacceptable."

49. In the context of the applicants' papers, I am constrained to repeat the remarks.

50. In that case, the application was dismissed but the applicant given leave to reinstitute in compliance with the rules.

51. On appeal, the matter was referred to oral evidence and in due course, after lengthy evidence, the celebrated **SESANA v. ATTORNEY GENERAL CASE 2006 (2) BLR 633** eventuated.

52. In this case, the cumulative effect of disregard of the rules and the material dispute of facts is such that referring the matter to oral evidence or to trial on the basis of the papers now before me will resolve no problems. It will, on the contrary cause considerable prejudice to the applicants and the respondent.

53.I have no choice but to take the regrettable step of dismissing the application, and the application is hereby dismissed with costs.

54. Given the importance and constitutional implications of this case, it would be unjust to non-suit the applicants entirely. Leave is therefore granted to the applicants to proceed in action if so advised.

Delivered in open court at Gaborone this 29th day of August 2013.

.....
L.S. WALIA
JUDGE

Duma Boko Attorneys for the Applicants
Attorney General for the Respondent