

THE ACQUISITION OF TRIBAL LAND BY NON-CITIZENS UNDER THE CURRENT TRIBAL LAND ACT - (Mark McKee, Partner)

Original Acquisition of Tribal Land

In terms of Sections 24 and 31 of the Act, no land may be granted or leased to a non-citizen by a Tribal Land Board without written consent from the Minister of Lands and Housing. The effect of these Sections is that there is a clear and express prohibition on the original granting or leasing of tribal land to non-citizens by the Tribal Land Board.

This means that should a non-citizen elect to enter into a direct lease with the relevant Tribal Land Board they will require Ministerial consent in terms of Sections 24 and 31.

Secondary Acquisitions of Tribal Land

Transfers of tribal land or interests therein (i.e. secondary dealings in land by the grantees or lessee of tribal land) are dealt with under Section 38 of the Act. In terms of Section 38, the rights conferred upon any person in respect of any grant or lease of tribal land shall not be transferred, whether by sale or otherwise, to any other person without the consent of the Land Board concerned, provided however, that such consent shall not be required where:

- land has been developed to the satisfaction of the Land Board concerned;
- there is a sale in execution to a citizen of Botswana;
- there is a hypothecation by a citizen of Botswana; or
- there is the devolution of such land on inheritance.

Section 38 of the Act does not however, expressly restrict a transfer of rights or interests in tribal land to a non-citizen. There is also no other provision in the Act or regulations that does so. On the basis of this omission there is a strong argument that a secondary dealing in tribal land with a non-citizen is not prohibited or regulated under the Act.

We should however point out that there is a counter argument to the above, namely:

- in terms of Section 10 of the Act the primary purpose of the Act is to regulate tribal land 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;
- interpreting Section 38 in the manner suggested above would result in Land Boards' not being capable of regulating or controlling the disposal of tribal land to non-citizens;
- the unregulated or uncontrolled transfer of tribal land to non-citizens could potentially result in large amounts of tribal land becoming unavailable to the citizens of Botswana and this would not be to the benefit or in the best interest of the citizens of Botswana;
- the provisions of Section 38 should therefore be widely construed to take into account the primary purpose of the Act and consequently be interpreted to require consent for all dealings with non-citizens.

Additionally, we point out that in terms of Section 38 a disposal of tribal land to a non-citizen by way of sale in execution or hypothecation, requires Land Board consent whereas a disposal by way of lease or private treaty does not. In our opinion, this is illogical considering that each such transaction has the

same result, namely the acquisition of tribal land by a non-citizen. It consequently could be argued that Section 38 be interpreted so as to avoid it having such an absurd or illogical effect.

We recommend that a cautious and prudent approach be taken to secondary dealings in tribal land involving non-citizens. More specifically we recommend that both Ministerial and Land board consent be obtained for such transactions as not only will this avoid potential challenges based on the arguments set out above, but more importantly it will permit tribal land to be used as security by the acquiring non-citizen. With respect to the latter, it is pointed out that for tribal land to be used as security, it must first be registered at the Deeds Registry. Such registration is not however possible where a non-citizen has not obtained Ministerial consent to hold such land. This is because the Deeds Registry, as a policy, will not register tribal land held by a non-citizen unless that person can produce Ministerial consent.

Finally, it is important to bear in mind that most tribal leases will require the consent of the Land Board for a sublease or assignment of that lease. Practically, this means that the consent of the Land Board must be obtained for any sub-lease or secondary dealing in tribal land and if the sub-lessee or assignee is a non-citizen, it is highly likely that the Land Board will not give such consent until Ministerial consent is obtained.