



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO: A 276/2013

In the matter between:

THE N#JAGNA CONSERVANCY COMMITTEE

APPLICANT

and

THE MINISTER OF LANDS AND RESETTLEMENT & 35 OTHERS

RESPONDENTS

Neutral citation: *The Njagna Conservancy Committee v The Minister of Lands and Resettlement (A 276-2013) [2016] NAHCMD 250 (18 August 2016)*

Coram: UEITELE J

Heard: 9 October 2014, 7 November 2014 and 3 February 2015

Delivered: 18 August 2016

Reasons handed down 13 September 2016

Flynote: *Court* - Jurisdiction - Exclusion of by statute, - Approach by Court - Aggrieved party given certain statutory remedies - The mere fact that the Legislature has provided an

extra-judicial right of appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies.

Voluntary association - Power to sue and be sued - Right of unincorporated body to sue or be sued in own name depending upon nature and purpose of body, as well as constitution - Association can sue in own name if proved that it possesses characteristics of legal *persona* or *universitas* - To be *universitas* association to have perpetual succession and capacity to acquire rights apart from members.

Communal Land Reform Act, 2002 - Procedures for obtaining customary land rights and rights of leasehold in respect of land situated in communal land are set out in the Act - *Onus* of proof on plaintiff to show that a person have not acquired customary land rights - But *onus* on defendant to rebut *prima facie* case made out by plaintiff.

Communal Land Reform Act, 2002 - Any allocation of a customary land right made by a Chief or a Traditional Authority under s 22 has no legal effect unless the allocation is ratified by the relevant communal land board in accordance with s 22.

Summary: On 13 August 2013 the N#jagna Conservancy Committee commenced proceedings in this Court by way of a notice of motion in terms of which it sought the following orders: Restraining the fifth to the thirty sixth respondents from occupying areas situated within the N#jagna Conservancy which they are presently occupying; Directing the fifth to the thirty sixth respondents to forthwith remove the illegal fences they have erected within the area of the N#jagna Conservancy; Directing the fifth to the thirty sixth respondents to give vacant possession of the areas which they occupy to the applicant; and Directing the second and third respondent to, as contemplated in s 44(3) & (4) of the Communal Land Reform Act, 2002 cause the removal of the fifth to the thirty sixth respondents' fences and livestock from the area of the N#jagna Conservancy.

The majority of the fifth to thirty sixth respondents, opposed the application, in the opposing affidavits the respondents raised three points in *limine*, namely that the High Court does not have the jurisdiction to hear this matter, that the applicant does not have the necessary

locus standi to institute this proceedings and that the application is defective because the applicant omitted to attach the management and zoning plans to its application.

Held that where a statute provides for an extra judicial remedy (such as in s 39(1) of the Communal Land Reform Act, 2002) the Courts will hold that the court's jurisdiction to hear a civil dispute is only ousted if this is a necessary implication of the statute concerned.

Held further that the implication of the ouster of the Court's jurisdiction must be a necessary one before it will be held to exist, for there is always a strong presumption against a statute being construed so as to oust the jurisdiction of the Court.

Held further that the N#jagna Conservancy Committee possess the characteristics of a corporation or a *universitas* and has therefore proven that it has the power to bring this application to court and sue in its own name.

Held furthermore that s 43(2) does not make it absolutely clear that it was aimed at changing the common law rule which confers upon a person who has a direct and substantial interest in a matter or who is aggrieved by the actions of another to approach this court for the court to determine his or her civil rights.

Held furthermore that all the respondents mentioned in paragraph 1 of the order, except the 29th respondent, have failed to rebut the allegations made by the applicant that they (those mentioned respondents) unlawfully occupied the areas within the conservancy.

ORDER

1. The 5th, 6th, 7th, 8th, 9th, 11th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 31st, 32nd, 33rd, 34th and 35th respondents are restrained from occupying the areas (situated within the geographical area of the N#jagna Communal Conservancy as published

under Government Notice No. 162 of 2003 in Government Gazette No. 3027 of 24 July 2003) which they presently occupy.

2. The 5th, 6th, 7th, 8th, 9th, 10th, 11th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 31st, 32rd, 34th and 35th must, not later than sixty days, from the date of this order, remove the fences which they have erected in the area of the N#jagna Communal Conservancy.
3. The 5th, 6th, 7th, 8th, 10th, 11th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 31st, 32nd, 33rd, 34th and 35th respondents must, not later than sixty days, from the date of this order give vacant possession of the areas they unlawfully occupy to the applicant.
4. The 2nd and 3rd respondents, must, where any one of the respondents mentioned in paragraph 1 of this order fail to remove a fence erected in contravention of the Communal Land Reform Act, 2002, or to remove their livestock from the area constituting the N#jagna Communal Conservancy, take the necessary action to cause to be removed the fences and the livestock.
5. That the settlement agreement between the applicant and the 30th respondent is hereby made an order of Court.

JUDGMENT

Ueitele, J:

Introduction

[1] This matter brings to the fore the tension that may arise when members of society scramble for the few resources that are available. This matter pits one of the marginalised

communities of our society against some members of our society who although historically disadvantaged, do have access to resources to improve their living standards.

[2] The applicant in this matter is a Committee of a body known as N#jagna Communal Conservancy. A Communal Conservancy is a group of persons who reside in a defined area on communal land and who have constituted themselves into a management body with the aim and purpose of managing the sustainable use of wildlife and other natural resources of the area they inhabit and developing the residents of the area they inhabit and who have applied to the Minister responsible for the Environment to be declared a conservancy.

[3] The first to the fourth respondents are governmental bodies (The Minister of Land Reform, the Chairperson of the Otjozondjupa Communal Land Board, the !Kung Traditional Authority and the Minister of Environment and Tourism) who in one way or the other have an oversight responsibility to supervise, protect or assist the advancement of a Communal Conservancy. The remaining thirty two respondents are individuals who hail from the different Regions of Namibia and who in search of grazing for their animals have settled in the area situated in a communal land and which area was declared a Conservancy.

[4] On 13 August 2013 the N#jagna Conservancy Committee commenced proceedings in this Court by way of a Notice of Motion in terms of which it sought an order:

- (a) Restraining the fifth to the thirty sixth respondents from occupying areas which they are presently occupying.
- (b) Directing the fifth to the thirty sixth respondents to forthwith remove the illegal fences they have erected within the area of the N#jagna Conservancy.
- (c) Directing the fifth to the thirty sixth respondents to give vacant possession of the areas which they occupy to the applicant, and

(d) Directing the second and third respondents to, as contemplated in s 44(3) & (4) of the Communal Land Reform Act, 2002¹ cause the removal of the fifth to the thirty sixth respondents' fences and livestock from the area of the N#jagna Conservancy.

[5] The majority of the fifth to thirty sixth respondents, opposed the application, in the opposing affidavits the respondents raised a number of points *in limine*, I will in the course of the judgment return to the points *in limine* raised by the respondents. After pleadings closed the matter was docket allocated to me for me to case manage it. I called the first case management conference in the matter during June 2014, after the case management conference hearing I set the application down for hearing on 9 October 2014. During the hearing on 09 October 2014 the respondents requested that I first determine the points *in limine* separately from the merits of the case. I accordingly asked the legal practitioners to file additional heads of arguments in respect of the points *in limine* (in particular the allegation that the Committee did not have the necessary *locus standi* to institute the proceedings) and I postponed the matter to the 7th November 2014 for arguments on that point *in limine* only.

[6] After I heard arguments I ruled that the applicant had the necessary *locus standi* to institute the proceedings and indicated that I will hand down my reasons for that ruling after I have heard the merits of the application, I accordingly postponed the matter for hearing the merits of the application to 3 February 2015. After hearing arguments on that day I postponed the matter to 10 April 2015 for judgment.

[7] On 10 April 2015 the judgment was not ready and I thereafter postponed the matter on five different occasions to hand down judgment. The only reason why I have narrated the journey of this matter in this Court is to demonstrate to the parties involved, that I am fully conscious of the delay that I have caused. Lord Carswell is quoted by Harms JA² as having said:

'The law's delays have been the subject of complaint from litigants for many centuries, and it behoves all courts to make proper efforts to ensure that the quality of justice is not adversely

¹ Act No. 5 of 2002.

² *New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) at para 39.

affected by delay in dealing with the cases which are brought before them, whether in bringing them on for hearing or in issuing decisions when they have been heard.'

[8] In view of what Lord Carswell said I assure the parties that I am conscious of the fact that there rests an ethical duty on me to give judgment in a case promptly and without undue delay and that litigants are entitled to judgment as soon as reasonably possible. As I have indicated above I have delayed in handing down judgment in this matter promptly and for that delay I unreservedly and sincerely apologize to the N#Jagna Conservancy Committee on the one side and to all the respondents on the other side.

Background.

[9] I am of the view that in order to appreciate the dispute in this matter one must have an understanding of the history of land ownership in this Country and also the legislative framework which is aimed at reforming land ownership in Namibia. I will therefore briefly touch on the history of land ownership in Namibia before I proceed to deal with the legislative framework in respect of the reform of access to land.

History of land ownership in Namibia.

[10] Namibia became a German Protectorate in 1884 and the colonial administration negotiated a number of land purchases and protection treaties with local leaders to give the German Government and German companies' rights to use land. It is recorded in historical annals³ that by 1902 only 6% of Namibia's total land surface area was freehold farmland while 30% was formally recognised as communal land.

[11] The historical annals furthermore record that when the indigenous leaders realized that they were being dispossessed of their land they attempted to reclaim it and that those attempts led to war (between the years 1904 and 1907) between the German colonial forces on the one hand and the Herero and Nama people on the other hand. After the 1904 -1907

³ See John Mendelsohn *et al* *Atlas of Namibia: A Portrait of Land and its People*. David Phillips Publishers, Cape Town, 2003 at 134-137. This court in the matter of *Kessl v Minister of Land Resettlement and Others and Two Similar Cases* 2008 (1) NR 167 (H) cursorily dealt with the history of land ownership in Namibia.

war, large tracts of land were confiscated from the Herero and Nama people by proclamation. By 1911, some 21% of the total land surface area had been allocated as freehold farmland while the total land surface area which made up communal land had shrunk from 30% to a mere 9% while the commercial (freehold) farm land had increased from 6% to 21 %.⁴

[12] It is further common historical knowledge that after the First World War Germany lost all its colonies and Namibia became a Protectorate of Great Britain with the British King's mandate held by South Africa in terms of the Treaty of Versailles. South Africa did not as it was expected of it administer Namibia for the benefit of its inhabitants. During the 1920s South Africa followed a policy of settling poor South African whites in Namibia. In order to achieve its policy settling poor white South Africans in Namibia, the South African Administration introduced Proclamation 11 of 1922 which amongst other things authorized the Administrator General to set aside areas as 'native reserves' for the sole use and occupation of natives generally or for any race or tribe in particular. By 1925 a total of just 2 813 741 hectares of land south of the Police Zone accommodated a black population of 11 740 people while 7 481 371 hectares (880 freehold holdings) were available for 1 106 white settlers.⁵ The process of allocating farms to whites was completed in 1960, by that time Namibia had 5 214 farming units (all in the hands of white settlers) comprising approximately 39 million hectares of land.⁶

[13] At independence in 1990 the Government of Namibia inherited two agricultural sub sectors comprising of communal and commercial land, which divided Namibia in terms of land utilization. Of the 82.4 million hectares of surface area in Namibia, 38% is described as communal land (making up approximately 33, 8 million hectares of land). Much of the remaining land is allocated for freehold farm land (44%), national parks (17%) and declared urban areas (1%). Approximately 1.1 million people live in communal areas. This is just over half the total population; whilst approximately 900 000 (or 42% of the people) live in urban areas and approximately 132 000 (or 6% of the people) live on freehold farms.

⁴ John Mendelsohn *supra*.

⁵ Legal Assistance Centre: *Our Land We Farm: An analysis of the Namibian Commercial Agricultural Land Reform Process*. 2005 at p 2.

⁶ John Mendelsohn *supra*.

[14] The skewed development which was pursued by the South African administration manifested itself in all aspects of life and the utilisation exploitation of Namibia's natural resources. The South African Administration had granted commercial farmers some rights over wildlife, but these rights did not extend to communal areas. During the period over which the war for liberation of Namibia was waged many animals were hunted almost to extinction, and communal farmers were often in conflict with animals such as hippos and elephants which damaged their crops, and therefore adversely affected their livelihoods.

[15] At independence the system under which commercial land was regulated was well organized. In the commercial field land is properly surveyed and is held under title deeds kept in the central deeds registry for commercial land in Windhoek and in a separate deeds registry for property in respect of the *Rehoboth Gebiet*. When a farm or an erf is sold or leased, the transaction is recorded on the title deed of the particular piece of land. Holders of title deeds are free to sell or lease their land subject to the conditions of the title deed. The situation with regards to communal land was much less clear. The uncertainties stemmed from the fact that the extent and role that traditional authorities played over the allocation and utilization of land over communal lands lacked a legal basis and was uncertain.

[16] The Government in a quest to address the challenges posed by the dual land tenure system responded by convening a land conference in 1991 in Windhoek. The land conference resulted in the adoption of a National Land Policy in 1998, in which a unitary land system is proposed. Under this unitary system, "*all citizens have equal rights, opportunities and security across a range of tenure and management systems.*" This proposed system would ensure that communal forms of land tenure are equally recognized and protected by the law, and that communal land is administered according to a uniform system.

[17] Apart from the challenges that the Namibian Government faced with respect to the inequitable distribution of land, it also faced the tasks of improving the management of wildlife resources, which as I have indicated above were severely decimated due to poor management and the armed conflict that raged in Namibia. In 1996 the Government of

Namibia introduced legislation⁷ to allow for the formation of Communal Conservancies ‘to promote activities that demonstrate that sustainably managed natural resources can result in social development and economic growth, and in suitable partnership between local communities and government’.

[18] Four years⁸ after the National Land Policy was adopted the Government introduced the Communal Land Reform Act, 2002⁹ (I will, in this judgment refer to the Communal Land Reform Act, 2002 as ‘the Act’) which aims to improve the system of communal land tenure by setting out the functions of Chiefs, Traditional Authorities and Communal Land Boards with regard to the administration of communal lands. I will in the following paragraphs briefly set out the provisions of the Communal Land Reform, Act, 2002 and the Nature Conservation Amendment Act, 1996.

The legislative framework.

[19] Section 15 of the Act states which areas of Namibia form part of the communal land¹⁰. Under section 16, with the approval of the National Assembly, the President may by proclamation: declare any defined State land to be communal land, add any State land to an existing communal land area, or withdraw a defined area from communal land. Section 17 of the Act makes it very clear that all communal land areas belong to the State, which must keep the land in trust for the benefit of the traditional communities living in those areas. Because communal land belongs to the State, the State is enjoined to promote the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agricultural business activities. The State is furthermore enjoined to put systems in place to make sure that communal lands are administered and managed in the interests of those living in those areas. The Act also makes it clear that communal land cannot be sold as

⁷ The Nature Conservation Amendment Act, 1996 (Act NO. 5 of 1996).

⁸ The Legal Assistance Centre: (supra) at p 5 ascribes the delay to the little capacity, that existed within the new Government of the Republic of Namibia to deal with land reform management, land reform planning and drafting legislation on land reform.

⁹ Act No. 5 of 2002.

¹⁰ The areas which make up communal land are set out in Schedule 1 to the Act.

freehold land to any person. This means that communal land cannot be sold like commercial farmland.

[20] The Act takes a strong position against the erection of fences on communal lands. Section 18 prohibits the erection of new fences without proper authorization obtained in accordance with the Act. Similarly, that section provides that fences that existed at the time when the Act came into operation have to be removed, except where, the people who erected these fences applied for and were granted permission to keep the fences on communal land¹¹. This means that from 1 March 2003 no new fences may be erected and fences may only be retained if authorization is sought and granted under the Act.

[21] Section 19 sets out the rights that may be allocated under the Act. The following rights may be allocated (granted) under the Act:

- (a) Customary land rights. At the moment, the Act only recognizes two forms of customary land rights, namely the right to an area on which a person can farm (a farming unit) and an area where a person can build her or his house (a residential unit); and
- (b) Rights of leasehold.

[22] Section 20 identifies the person in whom the power to allocate or cancel customary land rights is vested. The primary power to allocate and cancel customary land rights is vested in the Chief of a traditional community, or if the Chief so decides, in the Traditional Authority of the particular traditional community. This means that the Chief or Traditional Authority first must decide whether or not to grant an application for a customary land right. Only once this decision has been made will the matter be referred to the Communal Land Board for ratification of the decision by the Chief or Traditional Authority.

[23] Section 22 of the Act sets out the procedures that must be followed when applying for a land right in respect of a communal land. It provides that an application for the allocation of

¹¹ For the purposes of section 18, the Act came into operation on 1 March 2003. (See Government Notice 34 of 2003).

a customary land right in respect of communal land must be made in writing in the prescribed form; and be submitted to the Chief of the traditional community within whose communal area the land in question is situated. The section further provides that an applicant for a land right in respect of a communal land must, in his or her application for the land right, furnish such information and submit such documents as the Chief or the Traditional Authority may require for purpose of consideration of the application. The section furthermore provides that when considering an application for a customary land right in respect of communal land a Chief or Traditional Authority may-

- (a) make investigations and consult persons in connection with the application; and
- (b) if any member of the traditional community objects to the allocation of the right, conduct a hearing to afford the applicant and such objector the opportunity to make representations in connection with the application, and may refuse or, grant the application.

[24] Section 23 of the Act limits the size (the current limit is 20 hectares for a residential land right and 50 hectares for a farming unit)¹² of land which may be allocated and acquired as a customary land right. If the land applied for exceeds the limit set by the Act, the Minister responsible for Land Reform must approve the allocation in writing. The Minister¹³ may prescribe the maximum area after consultations with the Minister responsible for agricultural affairs as stated in the Act. I will now turn to the Nature Conservation Amendment Act, 1996.

[25] Section 24A (1) of the Nature Conservation Ordinance, 1975¹⁴ (I will in this judgment refer to the Nature Conservation Ordinance, 1975 as the 'Ordinance') makes provision for a group of people who reside on communal land and who desire to have the area which they inhabit, or any part of that area to be declared a conservancy, to apply to the Minister responsible for environmental affairs, for the declaration of the area as a Communal Conservancy. If the Minister responsible for environmental affairs is satisfied that the requirements set out in s 24A (1) of the Ordinance are met the Minister is obliged to,

¹² See Regulation 3 of the Regulations in respect of the Communal Land Reform Act, 2005 published under Government Notice No. 37 of 2003 in *Government Gazette* No. 2926 of 1 March 2003.

¹³ The Minister responsible for land reform.

¹⁴ Ordinance 4 of 1975.

- (a) in writing to the committee in question and on such conditions as he or she may determine in addition to any prescribed condition or restriction, recognize that committee as the conservancy committee for the conservancy concerned; and
- (b) by notice in the *Gazette* declare the area to which the application relates as a conservancy. The notice must set out the geographic boundaries of the area in respect of which the conservancy is being declared.

[26] The Ordinance in s 24A (3) empowers the Minister responsible for environmental affairs to withdraw the recognition of a conservancy committee, amend or withdraw any condition subject to which the conservancy committee was recognized and amend or withdraw any notice under which a communal conservancy was declared as such. The subsection furthermore sets out the procedural steps which the Minister must follow before he or she withdraws the recognition of a conservancy committee or amends or withdraws any condition or notice. In ss (4) the Ordinance sets out the rights and duties of a conservancy committee.

[27] Having set out the history of land ownership in Namibia and the legislative framework under which communal land and communal conservancies are managed I will now proceed and set out the events which led to this application.

The events which led to this application.

[28] The !Kung Traditional Community is one of the many traditional communities existing in Namibia. The majority of the members of that community live in the Tsumkwe- West area of Namibia. Tsumkwe-West is situated in the Bushmanland communal area as is defined in Schedule 1 of the Act. The !Kung Traditional Community has, since 1989 been led by the late John Arnold as their Chief, but he was officially installed as Chief of the !Kung Community during 1992. When the Traditional Authorities Act, 1995¹⁵ came into operation the late John Arnold and the !Kung Traditional Community were, in terms of the Traditional

¹⁵ Act No.17 of 1995. This Act was repealed and replaced by Act 25 of 2000.

Authorities Act, 1995, recognised as Chief and Traditional Authority.¹⁶ After the Nature Conservation Amendment Act, 1996 came into operation the !Kung Traditional Authority, in 1998 applied to the Minister responsible for the environmental affairs for a conservancy status. The !Kung Traditional Authority's application was successful and in July 2003 the N#jagna Conservancy, was registered as a Communal Conservancy and the N#jagna Conservancy Committee was also registered in terms of s 24A of the Ordinance.

[29] The N#jagna, Communal Conservancy covers an area of 9120 square kilometres and is inhabited by approximately 5000 people of the San origin. The members of the Conservancy are responsible for protecting and managing their own resources sustainably, particularly the wildlife populations. In pursuance of their goal to protect and sustainably manage the natural resources of the Conservancy the Conservancy Committee adopted a management plan which divides the Conservancy into various zones, namely the core wildlife zones, the mixed farming zones, tourism zones, current settlement zones and the sensitive zone.

[30] During the years between 2002 and 2013 people from other Regions (mainly the Oshikoto, Ohangwena, Oshana, Otjozondjupa and Khomas Regions) started to arrive in the N#jagna Communal Conservancy and started to settle there. The fifth to thirty sixth respondents also arrived in the N#jagna Communal Conservancy over that period. The majority of the fifth to thirty sixth respondents set up boreholes and erected fences on the areas they occupy. Ms. Zhungu who deposed to the affidavit in support of the application alleges that the fences which the respondents have erected were not erected in respect of a homestead, cattle pen or water trough or crop field as envisaged in Regulation 27 of the Regulations in respect of the Communal Land Reform Act, 2005 (I will in this judgment refer to these Regulations simply as the Regulations). Ms. Zhungu furthermore alleges that apart from the fact that the fences were erected in contravention of the Regulations, the settlement by the respondents disregarded the management plan of the conservancy and the settlement and erection of fences interfered with the movement of the wildlife and denied or severely restricted the rightful inhabitants' access to grazing and other resources.

¹⁶ The recognition of Chief John Arnold and the !Kung Traditional Authority was gazetted in *Government Gazette* No. 1828 of 31 March 1998.

[31] During the year 2008 the applicant approached the Otjozondjupa Communal Land Board and the Ministry of Land Reform and requested both the Otjozondjupa Communal Land Board and the Ministry to intervene and halt the erection of fences in the Conservancy. Ms. Zhungu further alleges that their request fell on deaf ears and the first and second respondents failed or neglected to intervene. During June, 2012, August 2012 and September 2012 the applicant addressed letters to the first respondent pleading with it for it to, in terms of s 44 of the Act, issue notices to all persons who have erected fences in contravention of the Act in the Conservancy to remove the fences. By May 2013 the Land Board had not taken any tangible action to cause the illegal fences to be removed. During July 2013 the applicant resolved to institute these proceedings. (A copy of the resolution was annexed to Ms. Zhungu's affidavit).

The points *in limine* raised by the respondents.

[32] I have indicated above that the majority of the respondents opposed the application. The applicant admitted that it did not serve the application on the 12th and 19th respondents and as such did not pursue the application against the 12th and 19th respondents. In respect of the 15th and 30th respondents the applicant withdrew the application as they reached a settlement with the 15th and 30th respondents. The 6th, 31st and 32nd respondents failed to file notices to oppose the application and to file answering affidavits.

[33] I have also indicated above that those respondents who opposed the application raised certain points *in limine*. The points *in limine* raised by the respondents relate to the applicant's alleged lack of *locus standi* to institute the proceedings, the alleged lack of jurisdiction of this court to hear the matter and the allegation that the application is defective because the applicant omitted to attach the management and zoning plans to its application.

[34] In the matter of *Haidongo Shikwetepo v Khomas Regional Council and Others*¹⁷ Parker J said:

¹⁷ An unreported judgment of this Court Case No.: A364/2008 delivered on 24 December 2008.

'...if the jurisdiction of this Court, sitting as the High Court, was being challenged at the threshold, it would not be competent for this Court to determine anything else without first deciding the issue of jurisdiction; that is, without deciding whether it has jurisdiction, in the first place, to determine anything about the application, including whether it should be heard on urgent basis.'

In view of the above statement I find myself duty bound to start off with the question of whether or not this Court has jurisdiction to hear the matter.

Jurisdiction

[35] Both Mr Rukoro who appeared for the majority of the respondents and Ms Shilongo who appeared for the fifth respondent relied on s 39 (1) of the Act to argue that this Court does not have jurisdiction to adjudicate the matter. They argued that s 39 (1) provides a remedy (of appeal to the Minister) for a party who is aggrieved by a decision of a land board, traditional chief or a traditional authority. They argued that the applicant should have appealed to the Minister against the decision of the late Chief John Arnold to allocate land rights to the respondents. Section 39 (1) of the Act reads as follows:

'(1) Any person aggrieved by a decision of a Chief or a Traditional Authority or any board under this Act, may appeal in the prescribed manner against that decision to an appeal tribunal appointed by the Minister for the purpose of the appeal concerned'.

[36] The jurisdiction and powers of the High Court are set out in s 2 of the High Court Act, 1990¹⁸. That section states the High Court shall have jurisdiction to hear and to determine all matters which may be conferred or imposed upon it by this Act or the Namibian Constitution. Article 80 (2) of the Namibia Constitution provides that:

'(2) The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms

¹⁸ Act No. 16 of 1990.

guaranteed thereunder. The High Court shall also have jurisdiction to hear and adjudicate upon appeals from Lower Court.'

[37] It is clear that the High Court has jurisdiction to hear all civil disputes in Namibia. Despite the fact that the Act does not contain any express exclusion of the jurisdiction of the High Court to hear a civil dispute between persons, counsel for the respondents contended that such exclusion or deferment of the this court's jurisdiction was a necessary implication of the provisions creating a right of appeal against a decision of a traditional chief, traditional authority or a land board. Counsel further submitted that the intention to exclude or defer this Court's jurisdiction was to be inferred from the provisions of the Act as a whole.

[38] I do not agree with counsel for the respondents because the authorities indicate that where a statute provides for an extra judicial remedy the Courts will hold that the court's jurisdiction to hear a civil dispute is only ousted if this is a necessary implication of the statute concerned¹⁹. The implication of the ouster of the Court's jurisdiction must be a necessary one before it will be held to exist, for there is always a strong presumption against a statute being construed so as to oust the jurisdiction of the Court²⁰.

[39] The mere fact that a statute provides an extra-judicial remedy in the form of a domestic appeal or similar mechanism which would afford the aggrieved party adequate relief does not give rise to such a necessary implication; in the absence of further conclusive implications to the contrary, it will be considered that such extra-judicial relief was intended to constitute an alternative to, and not a replacement for, the Court's power. In the *Golube v Oosthuizen and Another* matter ²¹ De Wet J said the following:

'The mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies.'

¹⁹ See *Shames v South African Railways & Harbours* 1922 AD 228, *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 351 - 352; *Golube v Oosthuizen and Another* 1955 (3) SA 1 (T) at 3G; *Main Line Transport v Durban Local Road Transportation Board* 1958 (1) SA 65 (D); *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502C - 504B.

²⁰ *Mohamood v Secretary for the Interior* 1974 (2) SA 402 (C).

²¹ *Supra*.

In the light of what I have said above I am of the view that the jurisdiction of this Court to hear the dispute between the parties has been neither excluded nor deferred by s 39(1) of the Act and that the point *in limine* fails.

The applicant's alleged lack of locus standi.

[40] The respondents based their arguments that the applicant lacked *locus standi* to institute these proceedings on two legs. The first is the submission by Ms Shilongo who appeared for the fifth respondent that the applicant said nothing in its founding affidavit to enable the court to determine whether or not the Conservancy Committee as a voluntary body or association is a *universitas* with the capacity to litigate in its name. The second leg is based on s 43 of the Act. Both Mr Rukoro and Ms Shilongo argued that in respect of communal land only a traditional chief, a traditional authority or a land board may institute eviction proceedings against the respondents.

[41] In the matter of *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others*²² this court accepted the common law principle that for the court to hear a person that person must demonstrate that they have a direct and substantial interest in the outcome of legal proceedings. Devenish²³ explains this requirement as follows:

'This [the requirement that a litigant must have legal interest] requires that a litigant should both be endowed with the necessary capacity to sue, and have a legally recognized interests in the relevant action to seek relief.'

[42] Our law recognizes two classes of persons namely natural persons and juristic/artificial persons. A natural person acquires his or her legal personality (rights, duties and capacity) at birth while a juristic person acquires its legal personality from its constituent instrument or by the operation of the law. Our law recognizes the following entities as juristic persons:

²² 2000 NR 1 (HC).

²³ Devenish G E, Govender K, Hulme D *Administrative Law and Justice in South Africa.*, LexisNexis, 2001 at p 455.

- (a) Associations incorporated in terms of general enabling legislation²⁴;
- (b) Associations especially created and recognized as juristic persons in separate legislation²⁵;
- (c) Associations which comply with the common law requirements for the recognition of legal personality of a juristic person. At common law, such juristic persons are known as *universitas*.

[43] I will briefly deal with the third category of juristic person. Herbstein & Van Winsen²⁶ argues as follows with regard to a *universitas*:

‘A universitas is a legal fiction, an aggregation of individuals forming a *persona* or entity having the capacity of acquiring rights and incurring obligations to as great an extent as a human being. The main characteristics of a *universitas* are the capacity to acquire certain rights as apart from the rights of individuals forming it, and perpetual succession.’

[44] In the matter of *Morrison v Standard Building Society*²⁷ Wessels JA said the following:

‘In order to determine whether an association of individuals is a corporate body which can sue in its own name, the court has to consider the nature and objects of the association as well as its constitution and if these shows that it possess the characteristics of a corporation or a *universitas* then it can sue in its own name.’

[45] I have in the part dealing with the background of this matter indicated that the primary objective of the conservancy is to enable the inhabitants of the Conservancy to derive benefits from the sustainable management of the consumptive and non-consumptive

²⁴ Examples of these are companies, banks, close corporations and co-operatives.

²⁵ Examples of these are universities, state owned enterprises and public corporations like Air Namibia, Nampower and the Namibia Broadcasting Corporation.

²⁶ *Supra* at p 175.

²⁷ 1932 AD 229.

utilization of the natural resources in the Conservancy. The Constitution of the applicant was attached to the applicant's founding affidavit as annexure "SZ-3". The constitution of the Conservancy does in clause 5 set out the secondary objectives of the Conservancy. In clause 3 the constitution provides that the Conservancy shall be managed by a Conservancy Committee (the applicant). The constitution confers on the Conservancy the power to, amongst other things:

- (a) acquire, hold and manage property, for the benefit and on behalf of its members;
- (b) establish, monitor and enforce rules and sanctions for the sustainable management of the natural resources in the Conservancy;
- (c) promote the economic and social well-being of the members of the conservancy by equitably distributing the benefits generated through the consumptive and non-consumptive of wildlife and forest resources.²⁸

[46] Clause 8 of the constitution sets out the general and specific powers of the Conservancy Committee. The general and specific powers include the power to:

- (a) institute or defend any legal arbitration proceedings, and to settle any claims made by or against the conservancy; and
- (b) distribute to the members of the Conservancy, invest or reinvest in any financial institution or otherwise use, the proceeds of any assets or any monies of the Conservancy as approved by the district meetings or general meetings.

[47] I am satisfied that from the constitution of the N#jagna Conservancy Committee it is clear that a member of the Committee or the Conservancy is not an agent of the others and his or her individual acts cannot bind his or her fellow members. Nor can a member of the Conservancy Committee be held liable for the debts of the Committee. The Committee is furthermore endowed with the capacity to acquire rights and to incur obligations to as great

²⁸ Clause 5.3 of the constitution of the N#jagna Conservancy Committee.

an extent as a human being and separately from the persons who make up its membership. In my view the objects of the Conservancy shows that it possess the characteristics of a corporation or a *universitas*. I therefore conclude that the applicant has proven that it has the power to bring this application to court and sue in its own name.

[48] As I indicated the second leg of the respondents' arguments that the applicant does not have the *locus standi* to institute these proceedings is based on s 43(2) of the Act. That section amongst other things reads as follows:

'43 Unlawful occupation of communal land.

- (2) A Chief or a Traditional Authority or the board concerned may institute legal action for the eviction of any person who occupies any communal land in contravention of subsection (1).'

[49] Both Mr Rukoro and Ms Shilongo for the respondents argued that because the applicant does not have a title to the land in question it does not have the right to seek an order to evict anybody from the Conservancy. They argued that having regard to the maxim *expressio unius est exclusio alterius*, s 43(2) mentions only a traditional chief, traditional authority, or a communal land board and therefore only the persons mentioned in that subsection have the power to institute eviction proceedings against the respondents. The maxim, *expressio unius est exclusio alterius*, means that 'where there is the express mention of one thing (or person or *modus operandi*), the other is excluded.'²⁹

[50] In the matter of *S.A. Estates and Finance Corporation Ltd. v Commissioner for Inland Revenue*³⁰, it was said that the maxim is one which 'must at all times be applied with great caution'. Kellaway³¹ argues that the maxim must be applied with great circumspection, he proceeded to quote from the English case of *Merchant Shipping Provisions: Lowe v Dorling*³² where it was said:

²⁹ See Kellaway E A: *Principles of Legal Interpretation of Statutes, Contracts and Wills*. LexisNexis, 1995 at 153).

³⁰ 1927 AD 230 at p. 236.

³¹ *Op cit* at 154.

³² (1906) 2 KB 772. At 784

'the maxim *expressio unius est exclusio alterius*, is often a valuable servant, but a dangerous one to follow in the construction of statutes or documents and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.'

[51] I have indicated above that our courts have accepted the common law principle that for the court to hear a person that person must demonstrate that he or she has a direct and substantial interest in the outcome of legal proceedings. If the interpretation advocated by Mr Rukoro and Ms Shilongo is to be accepted this means that s43 (2) of the Act has changed the common law principle that a person who has a direct and substantial interest is barred from approaching the court. In the matter of *Mhlongo v MacDonald*³³ it was held that where the legislature mentions one thing or person or *modus operandi* it must be absolutely clear that the legislative intention was to exclude the other thing or person or *modus operandi*.

[52] In my view s 43(2) does not make it absolutely clear that it was aimed at changing the common law to deny a person who has a direct and substantial interest in a matter or who is aggrieved by the actions of another to approach this court for the court to determine his or her civil rights. I am of the view that it will not only be a serious injustice if a person, who has a direct and substantial interest in matter or who wants his or her civil rights determined, is precluded from approaching the court to protect his or her interest or to have the extent of his or her rights determined, but it will also be a violation of that person's constitutional right, as set out in Article 12(1) of the Namibian Constitution. For these reasons I am of the view that the maxim *expressio unius est exclusio alterius* is not applicable to this matter. The respondents point *in limine* relating to the applicant's standing accordingly also fails.

Alleged defective application

[53] The third point *in limine* is based on the contention that the allegation that the application is defective because the applicant omitted to attach the management and zoning plans to its application. I do not see how the attachment of the management and zoning plans to will assists in the resolution of the dispute between the parties namely the

³³ 1940 AD 299.

contention and counter - contention that the respondents occupy the area of the Conservancy unlawfully. The attachment of the management and zoning plans are, in my opinion of no moment. I will now proceed to look at the merits of the applicant's claim.

Did the respondents unlawfully settle in the Conservancy?

[54] The applicant relies, for the relief she seeks from this court, on the following facts. During the years 2002 to 2013 the fifth to thirty sixth respondents occupied land in the applicant's conservancy and erected their private fences within the applicant's conservancy outside of a settlement area enclosing the commonage to the exclusion of the local community and the respondents farm with livestock. None of the respondents are members of the !Kung Traditional Community and none have acquired any customary or other legal right to occupy the commonage. Despite demand from the applicant, the respondents have failed or refused to remove their fences or vacate the respective occupied areas and to restore vacant possession of the commonage to the applicant, its members and the local community.

[55] Mr Rukoro, during the hearing of this matter conceded, in my view correctly so, that the fences which the respondents erected in the Conservancy were erected in contravention of the Act and the Regulations. What he informed the court is that the respondents whom he represented will, when resources permit, remove the fences. In view of the concession by Mr Rukoro, I will order the respondents whom I will mention in my order, to not later than sixty days from the date of this judgment remove the fences which they have erected in the geographical area (as described in the schedule to Government Notice No. 162 of 2003 published in Government Gazette No. 3027 of 24 July 2003) of the N#jagna, Communal Conservancy.

[56] Most of the respondents admit that they have during the period between 2002 and 2013 settled in the area of the Conservancy but deny that they have settled there unlawfully. I will below deal with the allegations by each respondent (who opposed the application and filed an answering affidavit) in respect of his or her settling in the Conservancy.

The fifth Respondent Ms Teckla Nandjila Lameck.

[57] The 5th respondent, in her answering affidavit, simply states that she was granted customary rights to occupy the conservancy area (which is about 1500-2000) by the relevant Traditional Authority on the 25th June 2003, well before the conservancy was proclaimed. She further avers that except for the borehole which she has caused to be erected thereon and which is still not operational, she has not fenced off the area and is not doing any farming at the Conservancy.

[58] It is now common cause that in application proceedings the affidavits serve as both the pleadings and evidence. An affidavit in motion proceedings must therefore comply with the rules relating to pleadings generally. Rule 45 (6) of this Court's rules amongst other things provides that 'every allegation must be dealt with specifically and not evasively or vaguely.' In the matter of *Makono v Nguvauva*³⁴ this court observed that pleadings are supposed to elucidate and define the issues between the parties and not obfuscate them so as to leave either the parties or the Court to guess at what the true issues are.

[59] Ms Lameck, in my view, miserably failed to elucidate and define her defence to the applicant's claim. In the light of the applicant's clear allegation that the fifth respondent is not a member of the !Kung Traditional Community and did not acquire any customary or other legal right to occupy the commonage. Ms Lameck, in order to succeed in her defence ought to have specifically dealt with those allegations but all that she did was to make a 'sweeping statement' that she was granted customary rights to occupy the conservancy area (which is about 1500-2000) by the relevant Traditional Authority. She does not identify the relevant traditional authority who allegedly granted her customary rights to occupy the Conservancy area. I am therefore satisfied that the fifth respondent's occupation of the Conservancy is unlawful.

³⁴ 2003 NR 138 (HC).

The seventh Respondent Mr Israel Jona.

[60] The 7th respondent, in his answering affidavit, denies that he resides at the Conservancy, he, however admits that he conducts farming operations (he admits that he owns 130 head of cattle and 13 goats) at Bubi Post within the Conservancy. He alleges that during the year 2006 he, in writing, applied to the third respondent for the allocation of grazing rights to enable him to farm with livestock in the Conservancy. He further alleges that after a few weeks he was informed that his application was successful and the grazing rights were afforded to him.

The eight respondent Ms Hilda Nakashole.

[61] The 8th respondent, in her answering affidavit, denies that she resides at the Conservancy, she, however, admits that she conducts part- time farming operations at Bubi Post within the Conservancy. She avers that during March 2010 she approached the late Chief John Arnold and one of his senior councillors Mr Kavetuma and applied for grazing rights. She further avers that she also indicated to them that on a long term she would want to have a piece of land where she can permanently farm with cattle. She alleges that the late Chief Arnold and the senior traditional councillor (Mr Kavetuma) approved the application for grazing rights. After her application for grazing rights was approved she moved on to the piece of land that was allocated to her and she stocked it with cattle.

[62] Ms Nakashole, in her answering affidavit, alleges that she was instructed by Mr Kavetuma to fence off the area of land on which she was to graze her cattle to protect the livestock from a poisonous plant. She states that she therefore erected a fence around the boundaries of the land as they were indicated to her.

[63] Ms Nakashole proceeds and allege that on the 12th June 2012, she was informed that her application (she attached a copy of the application marked as annexure “HN 2” to her affidavit) for customary land right was approved by the third respondent and was provided with prove of such approval which she attached as annexure “HN1” to her affidavit.

The ninth respondent Mr Andreas Asheela.

[64] The 9th respondent, in his answering affidavit, denies that he resides at the Conservancy, he further denies that he conducts any business at the Conservancy. He however admits that he conducts farming operations (he admits that he owns 64 head of cattle) at Bubi Post within the Conservancy. He alleges that during the year 2012, he applied to late Chief, Arnold for the allocation of customary land rights to enable him to farm with cattle in the area. He alleges that at the time of his application it was indicated that he must wait for at least 25 days for the outcome of his application. He avers that on the 8 June 2012 he was informed that his application was successful and he paid the prescribed fee in respect of the customary land right awarded to him.

The tenth respondent Mr Kennedy Ivula Nampala.

[65] The 10th respondent, in his answering affidavit, denies that he resides or conduct business at Plot No. 1 Bubi Post within the Conservancy. He however admits that he, is the owner of four cattle which are grazing at Bubi Post. He alleges that during the year 2008 he applied to the late chief, John Arnold of the third respondent, for grazing rights which application was successful. During August 2012 he applied for customary land rights more specifically a farming unit, this application was done with the third respondent. After a period of twenty five days he was informed, by the third respondent 'duly represented' by its senior councillor Mr Kavetuma that his application for customary land rights was successful. He paid an amount of N\$ 25.00 to have his application processed by the second respondent (the Chairperson of the Otjozondjupa Land Board) but has to date has not received any response from the second or fourth respondent with regards to the application.

The thirteen respondent Mr Mesag Muruko.

[66] The 13th respondent, in his answering affidavit avers that on the 18th June 1995 he arrived at Kameelwoud Post and slept in Omatako in search of grazing for his livestock. At Kameelwoud Post he met two men a certain Mr Tjongora Tjouoro (a pastor with the Seventh

Day Adventist Church for the San Community) and the late Chief John Arnold. He said he explained his problem to them and the Chief gave him a place to settle. He furthermore alleges that on the day he met the late Chief Arnold and the pastor, the two men took him around the villages and showed him different places where he could settle. He said that he was shown Bubi post and he liked the place and he informed the two that he would like to settle at Bubi post. He was then introduced to the community and the Chief asked the Community to accommodate him. The community members showed him an area where he could erect his homestead.

[67] He furthermore alleges that as soon as he was granted permission to settle at Bubi Post, (that is during June 1995) he moved 211 of his cattle and 180 goats to Bubi post and permanently settled there. He furthermore alleges that during the years 1998 and 1999 two Non-Governmental Organisations namely the !Nuwe Farmers Association and the N#jagna Conservancy were formed. He alleges that he was one of the first 200 members of the Conservancy list who attended its first meeting and found the Conservancy.

The fourteenth respondent Ms Elsa Ngwappia.

[68] The 14th respondent, in her answering affidavit, avers that she was born in Okakarara in 1959 and resided there until 1996 when she and her family were relocated to Bubi post by the Minister of Lands and Resettlement. She alleges that the Government of the Republic of Namibia even provided her and her family with transport to relocate to Bubi Post. She furthermore alleges that following the enactment of the Communal Land Reform Act, 2002 she in 2003 applied for the recognition of her land rights with the second respondent through the !Kung Traditional Authority.

The sixteenth respondent Mr Onesmus Warombora.

[69] The 16th respondent, in his answering affidavit, denies that he resides or conducts business at Kanovlei area, Tsumkwe West, within the Conservancy. He however admits that he, is the owner of 120 cattle which are grazing at Kanovlei area, Tsumkwe West, within the applicant's conservancy. During June 2011 he applied with the third applicant represented

by its late Chief Arnold, for the allocation of customary land rights. He further avers that the application was successful and he effected a payment of N\$25.00.

[70] The applicant further avers that he has, up to the date that this application was launched, not received any response from the second respondent with regards to the ratification of the allocation, by the third respondent, of the customary land rights to him. He alleges that he was further instructed to fence off the area allocated to him by Mr. Kavetuma the senior councillor of the third respondent.

The seventeenth respondent Mr Moses Shakela.

[71] The 17th respondent, in his answering affidavit, avers that during October 2010 he applied for a plot and was given same in Kanovlei area. He avers that he erected a fence during April 2013 to stop his livestock from leaving his plot because a poisonous plant is growing on the conservancy area. He further alleges that the area was demarcated by a certain Mr Nshib from the Traditional Authority.

The twentieth respondent Mr Korbinian Vizcaya Amutenya.

[72] The 20th respondent, in his answering affidavit, denies that he resides or conducts business or farms with cattle in the Kanovlei area, Tsumkwe West, within the Conservancy. He however admits that he farms with approximately 18 head of cattle in the Jazu area of the Conservancy. This respondent further denies that he is either unlawfully occupying an area within the Conservancy or illegally farming with cattle within the conservancy.

[73] The twentieth respondent basis his denials, that he unlawfully occupies an area or unlawfully graze his cattle in an area within the Conservancy on the allegation that during March 2011, he applied for a farming unit as well as grazing rights to the !Kung Traditional Authority who was represented by its senior councillor, Mr Kavetuma. He alleges that he was informed that his application is successful and the senior councillor indicated to him which area was allocated to him (he alleges that he believes that the area that was allocated to him was not larger than 20 hectares). He effected a payment of N\$25.00 to the third

respondent in respect of the customary land rights (farming unit) which was allocated to him. This respondent (i.e. the twentieth respondent) furthermore denies that he has erected any fence around the area that was allocated to him.

The twenty third respondent Mr Nghidinwa Hamunyela

[74] The 23rd respondent, in his answering affidavit, states that his correct first name is Nghidinwa and not 'Shipiki' as indicated in the notice of motion. Despite that statement the 23rd respondent still signed his answering affidavit as Shipiki Hamunyela, he denies that he resides at the Conservancy, he, however admits that he conducts farming operations (he admits that he owns 39 head of cattle) in the Jazu area within the Conservancy. He alleges that during the year 2012 he, in writing, applied to the third respondent through a certain senior councillor Kavetuma for the allocation of customary land rights as well as grazing rights to enable him to farm with livestock in the Conservancy. He alleges that after a few weeks he was informed that his application was successful and the grazing rights were afforded to him. He alleges that he was instructed by Mr Kavetuma to fence off the area allocated to him. He stated that he believed that same was legal. The respondent attached the copy of the receipt for the payment effected as well as the permit to move animals.

The twenty fifth respondent Mr Muulu Mickasiu Nghinamwaami

[75] The 25th respondent, in his answering affidavit, states that his correct names are Muulu Mickasiu Nghinamwaami and not 'Michael Muulu' as indicated in the notice of motion. He denies that he resides at the Conservancy, he, however admits that he conducts farming operations (he admits that he owns 15 head of cattle) in the Jazu area within the Conservancy. He alleges that during December 2011 he, approached the late Chief John Arnold for a piece of land in the Conservancy. He alleges that a certain senior councillor Kavetuma was allegedly present when the late Chief Arnold was approached. He further states that he occupies an area of approximately 2 km x 4km (this is approximately 800 hectares of land).

The twenty sixth respondent Mr Leonard Paulus.

[76] The 26th respondent, in his answering affidavit, admits that he is in partnership (with the 27th respondent) and that he has 150 cattle that are grazing in the Conservancy. He alleges that he obtained permission from the Ministry of Environment to move his cattle to Jazu village which is situated within the applicant's conservancy. He baldly states that he has the necessary authority for his cattle to graze in the applicant's conservancy.

The twenty seventh respondent Mr Sakaria Handiya.

[77] The 27th respondent, in his answering affidavit, admits that he is in partnership (with the 26th respondent) and that he co-owns 125 cattle with the 26th respondent (but the 26th respondent indicated that the amount of cattle he and the 27th respondent co-own are 150). He furthermore alleges that at the beginning of the year 2013 he and his partner, the 26th respondent, applied to the third respondent for grazing rights for 125 head of cattle and their offspring. He alleges that the application was granted by the third respondent and after their application was successful they were granted permission by the Ministry of Environment to move their 125 cattle from the Oshikoto Region to the Jazu village in the Conservancy.

The twenty eight respondent Mr Salomon Hainana.

[78] The 28th respondent, in his answering affidavit, admits that he does not reside within the area of the Conservancy. He, however alleges that during August 2009 he applied to the traditional board of the third respondent for a piece of land within the applicant's conservancy. He effected a payment of N\$ 25.00 and he was allocated land by the traditional board. He alleges that the piece of land which the traditional authority allocated to him was 3 km x 3km (which is approximately 900 hectares) and that he erected a fence around the portion of that piece of land.

[79] The applicant furthermore alleges that he does not own any livestock and that he one day intends to go and occupy the piece of land that was allocated to him. He states that he

will proceed to apply to the Ministry of Land Reform for that Ministry to recognize his customary land rights.

The twenty ninth respondent Mr Godfried Matako Tjaanda.

[80] The 29th respondent avers that he resides in Kameelwoud Village within the applicant's conservancy since 1988. He further alleges that he initially lived with his father but later moved on and now lives on his own. He furthermore alleges that during 2003 he applied to the Ministry of Lands and Resettlement for the recognition of his customary land rights. On the 12th June 2013 a certificate of registration of recognition of existing land rights, certificate number OTCLBCL0001666 was issued to him for the land allocated to him measuring 4.3 hectares. The respondent attached a copy of the certificate issued to him to his answering affidavit.

[81] This respondent admits that he had erected a fence around the area where he lived, but claims that he was not aware that he was not allowed to erect any fence. He alleges that after he became aware of the unlawfulness regarding the erection of a fence he removed the fence that he had erected. He furthermore admits he owns 138 cattle, 10 sheep, 10 goats 4 horses and 4 donkeys and these livestock are grazing in the commonage of the Conservancy.

The thirty fourth respondent Mr Christian Uatiruiiana Kazohua.

[82] The 34th respondent, in his answering affidavit, admits that he resides at Kandu, Omatako, Tsumkwe-West which is situated within the Conservancy. He further alleges that he is related to the late Chief Arnold and that during March 2007 he approached the late Chief Arnold for land. The late Chief informed him that if he wants a piece of land he should approach the traditional authority and apply to that authority for the allocation of a piece of land.

[83] He alleges that after the advice from the late Chief he went to the community members who reside at the Kandu village and they allegedly informed him that they will not

have a problem with him settling in the Kandu Village. He alleges that thereafter he went back to the traditional authority and the late Chief Arnold and senior councillor Ngavetene then showed him the area where he now lives. This respondent further alleges that during 2010 he discovered that a certain Ludwig Dausab had moved from the place where he had settled. He (the 34th respondent) then went to the traditional authority who granted him permission to settle at the place previously occupied by Ludwig Dausab.

The thirty fifth respondent Ms Alma Kazonesa Tjkaravize.

[84] The 35th respondent in her answering affidavit, admits that she resides at Kandu, Omatako, Tsumkwe-West which is situated within the Conservancy. She further alleges that during June 2000 she arrived at Kandu Village seeking permission from the late Chief Arnold to settle there. She alleges that the late Chief referred her to the traditional authority.

[85] She alleges that after the advice from the late Chief she approached a certain Councillor by the name of Michael and requested permission to settle in the area of the third respondent. The said councillor Michael allegedly called a community meeting and the community members gave their consent for the 35th respondent to settle at Kandu Village. She furthermore alleges that during the year 2002 she erected a fence of approximately 2 km by 1 km (this is approximately 200 hectares) around the area she occupied in order to prevent her cattle from destroying the residence 'fields'.

Discussion

[86] The procedures for obtaining customary land rights and rights of leasehold in respect of land situated in communal land are clearly set out in the Act. As I have indicated above, at the moment, customary land rights consists of the right to be allocated a right to a farming unit and the right to be allocated a right to a residential unit. The size of a farming unit is limited to 50 hectares whereas a right of a residential unit is limited to 20 hectares. The application for a customary land right must be made in writing on the prescribed form, which must then be submitted to the chief of the traditional community within whose communal area the land in question is situated. If the application is approved, the relevant communal

land board has to ratify the chief's decision and ensure that the right is registered in the name of the applicant in the correct register.

[87] Section 24(1) of the Act stipulates that any allocation of a customary land right made by a Chief or a Traditional Authority under s 22 has no legal effect unless the allocation is ratified by the relevant communal land board in accordance with s 22. With the exception of the 29th respondent none of the respondents attached any document to evidence his or her application for customary land rights or grazing rights nor did they attach any document to evidence that the Otjozondjupa Communal Land Board ratified the alleged allocated customary land rights or the grazing rights. It therefore follows that all the respondents, except the 29th respondent, have failed to rebut the allegations made by the applicant that they (the respondents) unlawfully occupy the areas within the Conservancy.

[88] I have in the background part of this judgment, albeit briefly, set out how the indigenous people of Namibia were dispossessed (by the German and South African Colonial governments) of the land they occupied and how the Namibian Government after independence attempts to redress the inequities caused by colonialism. The marginalisation of the San Community is recorded and the court can take judicial notice of the marginalisation and the continued struggle that many of the people who make the San Communities (this includes the !Kung Traditional community), still face to live dignified lives, free from poverty and discrimination, with access to social services for themselves and their children.

[89] With the adoption of the Namibian Constitution on 9 February 1990 we the people of Namibia declared that we *“desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world”*³⁵. The dignity we desire to attain for all individuals can only be attained if all basic necessities of life – chiefly food, housing, work, water, sanitation, health care and education – are adequately and equitably available to everyone (including the !Kung Traditional community). The actions (in particular the illegal fencing off of large tracks of land and the settling with large numbers of livestock in the Conservancy by the respondents in

³⁵ In the Preamble to the Constitution of the Republic of Namibia, 1990.

this matter not only exacerbates the tenuous situation of the members of the !Kung Traditional Community but negates all the efforts the Government of Namibia has embarked upon to fight poverty amongst the most marginalized members of our society.

[90] What I found disheartening are the allegations by the applicant that its efforts to enlist the assistance of the Otjozondjupa Communal Land Board and the Ministry of Environment and Tourism to rid the Conservancy of the illegal fences and the illegal invasion by the respondents and other persons have not yielded the required results. As I have indicated above all of us as Namibians have a Constitutional obligation to promote amongst all of us the dignity of the individual and the integrity of the Namibian Nation. The State institutions must therefore do all in their power to ensure that we do not denigrate or further impoverish any section of our community. For these reasons I will make the order set out below.

[91] I accordingly make the following order:

- 1 The 5th, 6th, 7th, 8th, 9th, 11th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 31st, 32nd, 33rd, 34th and 35th respondents are restrained from occupying the areas (situated within the geographical area of the N#Jagna Communal Conservancy as published under Government Notice No. 162 of 2003 in Government Gazette No. 3027 of 24 July 2003) which they presently occupy.
- 2 The 5th, 6th, 7th, 8th, 9th, 10th, 11th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 31st, 32rd, 34th and 35th must, not later than sixty days, from the date of this order, remove the fences which they have erected in the area of the N#Jagna Communal Conservancy.
- 3 The 5th, 6th, 7th, 8th, 10th, 11th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 31st, 32nd, 33rd, 34th and 35th respondents must, not later than sixty days, from the date of this order give vacant possession of the areas they unlawfully occupy to the applicant.
- 4 The 2nd and 3rd respondents, must, where any one of the respondents mentioned in paragraph 1 of this order fail to remove a fence erected in contravention of the

Communal Land Reform Act, 2002, or to remove their livestock from the area constituting the N#Jagna Communal Conservancy, take the necessary action to cause to be removed the fences and the livestock.

- 5 That the settlement agreement between the applicant and the 30th respondent is hereby made an order of Court.

SFI Ueitele
Judge

APPEARANCES

APPLICANTS : N TJOMBE
Instructed by: LEGAL ASSISTANCE CENTRE

FIRST to FOURTH RESPONDENTS NO APPEARANCE

FIFTH RESPONDENT MS N SHILONGO OF SISA NAMANDJE INC.

**THE 6TH, 7TH, 8TH, 9TH, 10TH, 11TH, 16TH, 17TH,
20TH, 21ST, 22ND, 23RD, 24TH, 25TH, 26TH,
27TH, 28TH, 31ST, 33RD, 34TH AND 35TH**

RESPONDENTS: MR S RUKORO
Instructed By: THAMBAPILAI ASSOCIATES &
JR KAUMBI INC.