

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

CASE NO.: HC-MD-CIV-MOT-GEN-2017/00292

In the matter between:

MARTIN HAFENI KAISHUNGU

APPLICANT

and

MINISTER OF LAND REFORM

FIRST RESPONDENT

**CHAIRPERSON OF THE APPEAL
TRIBUNAL**

SECOND RESPONDENT

**CHAIRPERSON OF THE OSHIKOTO
COMMUNAL LAND BOARD**

THIRD RESPONDENT

KING IMMANUEL ELIFAS KAULUMA

FOURTH RESPONDENT

**CHAIRPERSON OF THE ONDONGA
TRADITIONAL AUTHORITY**

FIFTH RESPONDENT

ELIFAS KAVALE

SIXTH RESPONDENT

Neutral Citation: *Kaishugu v Minister of Land Reform* (HC-MD-CIV-MOT-GEN-2017/00292) [2018] NAHCMD 329 (18 October 2018)

CORAM: MASUKU J

Heard: 17 April 2018

Delivered: 18 October 2018

Flynote: Administrative law – failure to file review application within a reasonable time – the right to be heard (*audi alteram partem*) applicable considerations – Civil procedure – joinder of parties – the test to be applied – Legislation – Communal Land Reform Act – erection of fences in communal land considered.

Summary: The applicant was granted rights to communal land, after his father had passed on. The rights to the farm in question were shared with the 6th respondent until the traditional authority decided to give the rights exclusively to the applicant, leaving the 6th respondent to exercise any such rights at the pleasure of the applicant. Dissatisfied with this arrangement, the 6th respondent approached the 2nd respondent on appeal. His appeal succeeded in terms of which the 6th respondent erected a fence on the farm in question. The applicant sought to review the decision of the 2nd respondent on the grounds that he had not been cited nor served with the appeal papers.

Held – that the applicant's application was not, in all the circumstances, filed after an unreasonable delay had been incurred and that in any event, the applicant had provided a full and reasonable explanation for the delay.

Held further that – the applicant had a right to be cited in the appeal proceedings as he had and that s. 39 of the Act does not operate to deny the applicant from participating in the appeal merely because he is not aggrieved by the decision submitted on appeal.

Held – that the applicant had a direct and substantial interest in the matter and that any order the appellate body would make would affect him and his interests.

Held further – that the decision to exclude the applicant on the basis that he was not aggrieved by the decision had the deleterious effect of depriving him of the right to be heard by the 2nd respondent although the decision made would impact on his rights, contrary to the *audi alteram partem* principle.

Held – that the fence erected by the applicant had not been duly authorised in terms of the Act and that a fence is not, in consideration of the Act as a whole, to be considered as a structure or building within the meaning of s. 29(5) of the Act.

The court found that the applicant's application was sound and granted the relief prayed for by the applicant with costs.

ORDER

1. The proceedings and decision of the Appeal Tribunal, taken on or about 11 August 2016 is hereby set aside as unlawful and of no force or effect.
2. The fence erected by Mr. Elifas Kavale on the Farm *Okulimi*, Oshikoto Region, Namibia, is hereby declared to be in violation of the provisions of Section 18(a) of the Communal Land Reform Act, No. 5 of 2002 (as amended) and is therefore unlawful.
3. Mr. Elifas Kavale is hereby directed and ordered to remove the fence he erected on the Farm *Okulimbi*, Oshikoto Region, Namibia, within thirty (30) days of the service upon him of this order.

4. The First, Second and Sixth Respondents are ordered to pay the costs of this application jointly and severally, the one paying and the other being absolved.
 5. The matter is removed from the roll and is regarded as finalised.
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RULING

MASUKU J:

Introduction

[1] This is an application for review. The applicant is Mr. Martin Hafeni Kaishungu, a Namibian male adult. He has approached this court seeking the following order:

'1. Review of the proceedings and decision of the Appeal Tribunal purportedly taken on or about 11 August 2016, and setting aside such proceedings and decision as unlawful and of no force or effect.

2. Declaring that the fence erected by Mr. Elifas Kavale (the Sixth Respondent) on the Farm *Okulimbi*, Oshikoto Region, Namibia to be in violation of section 18(a) of the Communal Land Reform Act, Act No.6 of 2002, (as amended), and therefore illegal and unlawful.

3. Ordering the fence erected by Mr. Elifas Kavale (the Sixth Respondent) on Farm *Okulimbi*, Oshikoto region, Namibia be removed within 30 days of an order in terms hereof.

4. That the First Respondent, Second Respondent and Sixth Respondents pay the costs (together with such further respondents electing to oppose the application), jointly and severally, the one paying the other to be absolved.'

[2] The application appears not to be opposed by any other respondent than the 6th respondent, Mr. Kavale. I say so for the reason that none of the other

respondents filed notices to oppose affidavit of record. I shall refer to Mr. Kavale as the 6th respondent in order to distinguish him from his co-respondents. I will, however, for the most part, refer to him as the respondent.

Background

[3] The facts that appear to give rise to this dispute may be briefly summed up as follows: The applicant's father Mr. Lot Kaishungu was granted rights to the farm in question which he later shared with the respondent. Upon his death, the applicant stepped in his late father's shoes and continued to share the use of the farm with the respondent until June 2015, when the 5th respondent cancelled the grazing permit of the respondent and left the respondent to be accommodated on the farm by the applicant.

[4] The respondent, aggrieved by the developments, appealed 5th respondent's decision to the 2nd respondent. It would appear that the 2nd respondent found in the respondent's favour. The bone of contention on the part of the applicant is that he was not notified of the hearing nor was he invited to the appeal hearing on 11 August 2016. It is the decision of the 2nd respondent that he seeks in this application, to have reviewed and set aside.

The case management report

[5] In their case management report, the parties identified the following issues as those falling for determination before this court, viz:

(a) whether or not the applicant was entitled to be joined as a party in terms of the Communal Land Reform Act;

(b) whether or not the applicant had a direct and substantial interest in the appeal proceedings, and if that be the case, whether or not the applicant was a necessary party deserving of being joined as a party to the appeal proceedings;

(c) if the court finds that the applicant was a necessary party that ought to be joined in the appeal proceedings, whether or no the appeal proceedings and the decision rendered thereat were vitiated by the fact of the applicant not having been cited as a party or not having been invited to partake in the proceedings in question and to make representations before the decision was made;

(d) whether or not the fence erected on the property in question was in violation of s. 18 of the Act and therefor illegal and unlawful;

(e) in the event a finding is made that the fence was erected in contravention of the Act, whether or not the said fence should be removed within the period stipulated in para 4 of the notice of motion quoted above.

(f) Whether or not the applicant should be non-suited for the delay in launching the review proceedings.

[6] It appears common cause that the parties agreed that the first five issues would be dealt with on the merits. The last issue captured above, of the delay in launching the application for review, it was agreed would have to be dealt with *in limine*. That is the structure that was adopted by the court at the hearing of the matter. I will, for that reason, deal first with the issue of delay. It must be obvious that if the court finds that the applicant was guilty of an unreasonably long delay before launching the review application that, may serve to spell an end to the applicant's case, rendering it unnecessary for the court to consider the merits of the application.

Was there a delay by the applicant in launching the application for review

[7] Mr. Kavale argues that the period that the applicant took to launch these proceedings for review is unreasonably long. In this regard, he argues that the decision sought to be reviewed was taken on 11 August 2016 and the applicant only filed his application for review on 17 August 2017. It is, in this regard, contended that the applicant took a period in the excess of a year to

launch these proceedings and which it is submitted, is unreasonably long in all the circumstances. What is the applicant's answer to this criticism?

[8] The applicant, for his part, denies that there was any unreasonable delay in approaching this court on review. In this regard, he contends that he learnt of the adverse decision at the beginning of March 2017 when he was placed in possession of the decision sought to be impugned. It is his further contention that upon receipt of the decision, he sought legal advice from his legal practitioners of record, who wrote a letter to the Permanent Secretary of the 1st respondent. The first letter was dated 31 March 2017 and it was followed by another dated 18 May 2017 and another dated 18 July 2017.

[9] He is criticised by the 1st respondent of prevaricating after receipt of the decision of the appeal in respect of which he was informed that he should have been cited and granted audience before the adverse decision was made. Mr. Marcus argued that the applicant put to waste, so to speak a period of 5 months engaged in fruitless correspondence with the Ministry, which time could have been used more profitably in approaching the court as the dispute had crystallised upon receipt of the decision of the appeal tribunal.

[10] Mr. Tjombe, in his contrary argument, argued that it was necessary for the applicant, before launching the application for review, to write to the Ministry seeking a record of the proceedings as the applicant had given instructions to review and have the decision in question set aside. His first letter was not responded to by the Ministry. He caused another letter to be written to the Ministry dated 14 July 2017 following upon the earlier letter.

[11] The applicant further explains that part of the delay, besides not receiving any responses from the Ministry, was that his legal practitioner's child was taken seriously ill and eventually passed on, resulting in his legal practitioner, due to the personal tragedy he and his family faced, being unable to attend to the matter. This appears to be common cause.

[12] It further appears to be common cause, that the period of delay in this matter is a period of five months. The question for determination, is whether this court should non-suit the applicant therefor. Mr. Marcus answers this question in the affirmative, whereas Mr. Tjombe, for the applicant answers contrariwise.

[13] Mr. Marcus, in his heads of argument, referred the court to *Rabede v Government of the Republic of South Africa*,¹ where the court remarked as follows:

'When considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings. Such steps include steps taken to ascertain the terms and effect of the decision sought to be reviewed; to ascertain the reasons for the decision; to consider and take advice from lawyers and other experts where it is reasonable to do so; to make representations where it is reasonable to do so; to attempt to negotiate an acceptable compromise before resorting to litigations (*Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1192); to obtain copies of relevant documents; to consult with possible deponents and to obtain affidavits from them; to obtain real evidence where applicable and place the attorney in funds; to prepare the necessary papers and to lodge and serve those papers.'

[14] I agree with the sentiments expressed in this case as they are fully reflective of the position canvassed by Damaseb JP in *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*,² especially in para (iv) below, where the learned Judge President said the following:

'In *Ebson Keya v Chief of the Defence Forces and Three Others* the court had occasion to revisit the authorities on unreasonable delay and to extract from them legal principles applied by the courts when the issue of unreasonable delay is raised in administrative law review cases. The following principles are discernible from the authorities:

¹ 1995 (3) SA 787 (N) p 799.

² 2011 (2) NR 437.

i) The review remedy is in the discretion of the court and it can be denied if there has been an unreasonable delay in seeking it: There is no prescribed time limit and each case will be determined on its facts. The discretion is necessary to ensure finality to administrative decisions to avoid prejudice and promote the public interest in certainty. The first issue to consider is whether on the facts the applicant's inaction was unreasonable: That is a question of law.

ii) If the delay was unreasonable, the court has discretion to condone it.

iii) There must be some evidential basis for the exercise of the discretion: The court does not exercise the discretion on the basis of an abstract notion of equity and the need to do justice between the parties.

iv) An applicant seeking review is not expected to rush to court upon the cause of action arising: She is entitled to first ascertain the terms and effect of the decision sought to be impugned; to receive the reasons for the decision if not self-evident; to seek legal and other expert advice where necessary; to endeavour to reach an amicable solution if that is possible; to consult with persons who may depose to affidavits in support of the relief.

v) The list of preparatory steps in (iv) is not exhaustive but in each case where they are undertaken they should be shown to have been necessary and reasonable.

vi) In some cases it may be necessary for the applicant, as part of the preparatory steps, to identify potential respondent(s) and to warn them that a review application is contemplated. In certain cases the failure to warn a potential respondent could lead to an inference of unreasonable delay.' See also *South African Poultry Association & Others v Minister of Trade and Industry and Others*.³

[14] On appeal, in *Keya v Chief of the Defence Forces and Others*,⁴ the Supreme Court reasoned as follows:

'[22] This court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the

³ Case number SA 37/2016 (delivered on 17 January 2018).

⁴ 2013 (3) NR 770 (SC) at para 21 and 22.

time it took the litigant to institute the proceedings was unreasonable, then the question arises whether the court should, in exercise of its discretion, grant condonation for the unreasonable delay. In considering whether there has been unreasonable delay, the High Court has held that each case must be judged on its own facts and circumstances so what may be reasonable in one case may not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.

[22] The reason for requiring applicants not to delay unreasonably in judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established. There may, of course be circumstances when the public interest in finality and certainty should give way to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.'

[15] I have to decide in the instant case, whether Mr. Marcus is correct in submitting that the delay was unreasonable. I am of the considered view that regard had to the explanation proffered by the applicant, I am of the view that the delay, if there was, was not unreasonable. In this regard, it is clear that the applicant's legal practitioner had first, before launching the application, seek the record of proceedings from the Ministry. This would have enabled the applicant's legal practitioners of record, to familiarise themselves with the reasons and the record and then make up their minds as to what appropriate steps should be taken.

[16] The Ministry, despite being requested to provide the record in three letters, did not reply. This situation was then perpetuated by the unfortunate

personal circumstances of the applicant's legal practitioner, adverted to earlier, which saw him unable to deal with the matter and move it forward as soon as may otherwise have been the case.

[17] One cannot legislate against occurrences like that Mr. Tjombe faced and the court should be mindful to treat such circumstances with the requisite degree of humanity and understanding. I take judicial notice of how the serious sickness of a child and his or her eventual passing may have on the most resolute and conscientious of professionals. I accordingly come to the view that the delay in the present case was not unreasonable and for that reason, the 6th respondent's point *in limine* is dismissed.

[18] In the event that I may be found to have erred in this regard, I am of the considered view that the very facts and circumstances attendant to the matter as stated in the foregoing paragraph, form a sufficient basis for this court to condone the applicant's delay in launching the proceedings. The applicant had to obtain the record of proceedings, which was not availed by the Ministry despite repeated requests. After that, as stated, Mr. Tjombe's personal situation intervened and constitutes an acceptable and reasonable explanation for the delay. The delay, if any, is to that extent condoned hereby.

[19] Having found in the main that the applicant is not guilty of delay in this matter as alleged, I now proceed to deal with the matter on the merits. I will deal with the following questions in turn, (i) whether the applicant was entitled to be joined as a party in the appeal; (ii) whether the applicant had a direct and substantial interest in the appeal proceedings and whether the applicant had a right to make representations before the decision sought to be impugned, was made.

[20] Although the parties have chosen to frame the questions in the manner they have, it would appear to me, on first principle, with the benefit of hindsight, that the question is in real essence one – did the applicant have a right to be joined as a party to the proceedings. Once that is answered in the affirmative, it would seem to me, there can only be one answer, namely that

he had a right to be cited in the proceedings and consequently, a right to make representations before the decision in question was made.

Was the applicant entitled to be joined as a party in terms of the Act?

[21] It may be important to recite the relevant facts in this matter which are common cause, and which will naturally lead to a decision on the question framed immediately above. They are the following:

(a) In 1996, the respondent was granted permission by the late Mr. Lot Kaishungu, the applicant's father, to graze his cattle on the former's farm and to farm crops;

(b) In November 2005, Mr. Lot Kaishungu and the applicant told the respondent to leave the farm;

(c) A family meeting was convened on 18 February 2006 where it was agreed that the applicant's father and the respondent would share the use of the farm;

(d) On 21 February 2006, the applicant obtained a letter by the 5th respondent confirming that the applicant enjoyed grazing rights over the farm in question;

(e) On 5 April 2006, the applicant's father met the 5th respondent and advised of the agreement by the applicant's father and the respondent, to share the farm. This agreement was formalised by the 5th respondent on 30 April 2006 in consequence of which a resolution no. 7/2007, was passed to the effect that both the applicant's father and the respondent would share the farm;

(f) In consequence of the agreement referred to immediately above, the 6th respondent decided to divide the farm into two equal parts for the use of the two aforementioned gentlemen;

(g) On 27 April 2011, the respondent, was granted a grazing permit for the portion of the farm he would use. In September 2014, a delegation from the 5th respondent visited the farm and drew the boundaries of the farm and where it would be divided between the two gentlemen;

(h) The applicant's father passed on in March 2011 and the applicant took over the portion of the farm his father had occupied;

(i) On 27 November 2015, the respondent and the applicant were advised of the decision of the 5th respondent to divide the farm between the applicant and the respondent. The respondent claims that he was given permission to erect a fence in the middle of the farm to divide the two portions of the farm;

(j) On 9 June 2015, the 5th respondent held a meeting with both parties and in that meeting decided to cancel the grazing permit of the respondent and that he would thenceforth be accommodated by the applicant. Aggrieved by this decision, the respondent appealed the decision successfully, it would seem to the 2nd respondent.

[22] It is the respondent's case that the applicant did not have any right to be have been cited in the appeal as he is not a person that was aggrieved by the decision appealed from. In this regard, the respondent lays much store on the provisions of s. 39 of the Act, which have the following rendering:

'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.'

[23] Mr. Marcus argued that the word 'aggrieved' employed in the section quoted above, must be interpreted broadly and understood to include persons who may have any kind of grievance regarding the decision appealed against, even if they are not affected directly by the decision but are merely registering their unhappiness about it. Mr. Marcus further quoted the provisions of the

regulations⁵ in order to substantiate his argument that there is no requirement in terms of the Act for a person in the applicant's position, to be notified of the appeal.

[24] It was his further argument that in the light of no specific requirement for a person in the applicant's position to be notified of the appeal, there was equally no requirement to do so by implication. He reasoned that the decision made is, in terms of the regulations,⁶ is conclusive and binding on the parties. Parties, he further argued, would, in the context, refer to a person aggrieved by the decision and the tribunal hearing the grievance.

[25] Mr. Marcus further argued that although no further person is mentioned, it would stand to reason that a person who stands in such a position that the order in question may not be properly carried out or at all without them, or if the carrying out of the order would affect their interests, would be rendered necessary parties and who would have to be cited in the appeal. Finally, he argued that the applicant does not fall into any of these categories and was therefore not entitled to notice of the appeal. Is he correct?

[26] Mr. Tjombe's argument, in this regard, was a horse of a different colour altogether. It was his submission that the texture of s.39 does not purport to provide a list of persons entitled to be joined, as parties to appeal proceedings. All the provision does, he argued, was to provide a right to an aggrieved person to lodge an appeal against a decision of a Chief, Traditional Authority or any board under the Act. As to who is to be joined as a party, he argued, is a matter to be determined in the context of the facts of the matter at hand.

[27] I agree with Mr. Tjombe. It is, in my considered opinion wrong to conflate the right to appeal by a person aggrieved by a decision of the Chief, Traditional Authority or board created under the Act, with the classes of

⁵ Regulation 25 of the Act.

⁶ Regulation 26(6).

persons who may be affected by any decision that the appeal tribunal may make and therefore have a right to be notified about the appeal. The notification about the appeal, it would seem to me, does not stem from their being aggrieved by the decision made but stems from the fact that the order made on appeal may affect them or that they have a direct and substantial interest in the order that may be made on appeal, such that they have to be cited and joined in the appeal.

[28] In the circumstances, I am of the view that a clear distinction must be made between the right to lodge an appeal by a person aggrieved by the decision sought to be appealed and the right of parties likely to be affected by any decision or order made on appeal, to be notified. The scheme of the Act does not purport to create a *numerus clausus* (exhaustive list) of persons who may be joined or cited in any appeal but it identifies the class of persons entitled to note an appeal.

[29] It is, in my considered view a wholesome conclusion that a person who is aggrieved by a decision does not thereby, become the only player before the board, to the exclusion of other players, particularly those in whose favour the decision sought to be impugned happened to be. Once the person aggrieved by the decision properly identifies him or herself as such and they have decided to note an appeal, they have an unyielding duty to ensure that other persons in whose favour the decision was made or who are likely to be affected persons or their interests by the decision, should be cited and accordingly joined as parties.

[30] In this regard, Mr. Tjombe referred the court to a judgment handed down by the learned Judge President Damaseb in *Kleynhans (supra)*,⁷ where the learned JP adumbrated the applicable law as follows:

'The leading case on joinder in our jurisprudence is *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). It establishes that it is necessary to join as a party to litigation any person who has a direct and substantial interest in any order, which the court might make in the litigation with which it is seized. If the order which

⁷ *Kleynhans Ibid* at p.447, para 32.

might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion from the litigation. Clearly, the *ratio* in *Amalgamated Engineering Union* is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court, has a direct and substantial interest in the matter and should be joined as a party.’

[31] I am of the considered view, in the light of the above pure and stainless statement of the law, that the applicant falls neatly within the category of persons who, and I make bold to say, would and not might be affected by the decision that the appeal tribunal made. In that regard, the applicant was a necessary party and in respect of whom the court has no option but to join as of necessity and not merely convenience. In this regard, the decision made was in the applicant’s favour and the upsetting of that decision on appeal had a deleterious effect on the applicant’s rights without question.

[32] If any further authority is required in this connection, in *The Judicial Services Commission v The Cape Bar Council*,⁸ the Supreme Court of Appeal of South Africa, stated the following in regard to this very issue:

‘It has now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned.’

I adopt these sentiments as a reiteration of the applicable principles in the instant matter. I need not say nothing more in this connection.

[33] It must be mentioned that the argument advanced by Mr. Marcus seems to have serious but probably unintended consequences, namely, of depriving a party the right to be heard on a matter in which he has an interest. This is in legal parlance referred to as the *audi alteram partem*, meaning, the other side must be heard. If the interpretation accorded the section in question

⁸ *Judicial Service Commission and Another v Cape Bar Council and Another* (818/2011) [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA) 2013 (1) SCA; [2013] 1 All SA 40 (SCA) (14 September 2012).

by Mr. Marcus was given effect to, it would mean that the applicant had no right to be heard on a matter that affects his interests directly and materially.

[34] It must be necessarily pointed out in this regard that the right to be heard, even if it is not expressly provided for in legislation, is presumed to have been intended to apply by the Legislature, unless it excludes the said right in clear and explicit terms. In this regard, Hannah J in *Westair Aviation (Pty) Ltd and Others v Namibia Airports Company and Others*,⁹ quoted with approval the sentiments expressed by Rumpff JA in *Publications Control Board v Central News Agency Ltd*¹⁰ in regard to the right to be heard:

'One begins with a presumption that the kind of statute referred to impliedly enacts that the *audi alteram partem* is to be observed, and, because there is always a presumption of an implied enactment, the implication will stand unless the clear intention of Parliament negatives and excludes the implication.'

[35] So important is this right that Browde JA stated the following lapidary remarks in *Swaziland Federation of Trade Unions v The President of the Industrial Court*:¹¹

'The *audi alteram partem* principle i.e. that the other party must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law. That no man is to be judged unheard was a precept known to the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18th century English judge to be a principle of divine justice and traced to the events in the Garden of Eden, and has been applied in cases from 1723 to the present time . . . Embraced in the principle is also the rule that an interested party against whom an order may be made must be informed of any possibly prejudicial facts or considerations that may be raised against him in order to afford him the opportunity of responding to them or defending himself against them.'

⁹ 2001 NR 256 at 265D.

¹⁰ 1970 (3) SA 479 (A) at 489C-D.

¹¹ (11/97) [1998] SZSC 8 (01 January 1998).

[36] I am of the view that to uphold Mr. Marcus' argument would be to run roughshod over settled principles of the law which not only find expression in the common law, but which have, additionally received constitutional imprimatur by being enshrined in the Constitution of this Republic.¹² It may be treasonous to then give effect to argument that seems to override or lose sight of so fundamental principles the consequences of which may be far reaching as being regarded as even too ghastly to contemplate.

[37] In this regard, Mr. Tjombe, for the applicant, was eminently correct in submitting that the proceedings of the appellate tribunal, which proceeded in the absence of the applicant, in part, due possibly to the view taken by Mr. Marcus that the applicant was not a necessary party as he was not aggrieved by the decision placed on appeal, were defective and ought for that reason alone, to be set aside. There can be no other alternative in this regard, particular consideration being given to the strong remarks by Browde JA quoted above. That result, in my view follows naturally as night follows day.

Declarator on removal or otherwise of the fence erected by the respondent

[38] The last main question to be answered, relates to the legality of the erection of the fence on the property by the respondent. If the respondent was correct in erecting the said fence in law, then the result should be that he is entitled to maintain that fence. I say this advisedly, recognising, as I should the fact that the applicant was excluded from the appeal although he had a direct and substantial interest in the matter, in my view affects the lawfulness of the erection of the fence.

[39] S. 18 of the Act provides the following:

'Subject to such exemptions as may be prescribed, no fence of any nature –

¹² Art. 18 of the Namibian Constitution. – 'Administrative Justice – Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

- (a) shall, after the commencement of this Act, be erected or caused to be erected by any person on any portion of land situated within a communal land area; or
- (b) which upon the commencement of this Act, exists on any portion of such land, by whomsoever erected, shall after such date as may be notified by notice in the Gazette, be retained on such land, unless authorisation for such erection or retention has been granted in accordance with the provisions of this Act.'

[40] On the other hand, s. 28 (2) of the Act provides the following:

'With effect from a date to be publicly notified by the Minister, either generally or with respect to an area specified in the notice, every person who claims to hold a right referred to in subsection (1) in respect of land situated in the area to which the notice relates, shall be required, subject to subsection (3), to apply in the prescribed form and manner to the relevant board.'

[41] In section 28(8) of the Act, on the other hand, the Legislature, makes the following provision:

'If the applicant has, in terms of subsection (2) (b), applied for authorisation to retain any fence or fences which exist on the land in question and the board is satisfied that

—

- (a) the fence or fences were erected in accordance with customary law or the provisions of any statutory law;
- (b) the fence will not unreasonably interfere with or curtail the use and enjoyment of the commonage by members of the traditional community; and
- (c) in the circumstances of the particular case, reasonable grounds exist to allow the applicant to retain the fence or fences concerned; and the board must grant to the applicant authorisation for the retention thereof, subject to any added conditions which it may consider expedient to impose.'

[42] The question that requires an answer returned is whether the respondent obtained the necessary authorisation when he erected the fence

in the instant case. A reading of the section quoted above, seems to show that the Legislature frowns and gets a furrowed brow once a person has erected a fence in the absence of specific authorisation from the relevant board. The same, it would seem, goes for the instances, where the fences were previously erected and are sought to be retained and recognised, as it were, after the coming into force of the Act.

[43] Mr. Marcus further argued that since the fence in question in this case was erected in 2014, after the coming into force of the Act, the provisions of s. 28 are inapplicable. It is unfortunate that the allegation that s. 28 does not apply is made as a general proposition, without any basis in law or fact being suggested. I do not agree that the provisions of s. 28 are inapplicable to a case where a person seeks to and actually erects a fence after the coming into force of the Act. It seems to me that s. 28 applies and requires the said person to obtain authorisation from the board for the retention thereof.¹³

[44] In the circumstances, it would seem to me, a person who has an erected fence must show that he or she obtained authorisation from the relevant board before erecting same or, if the fence was erected previously, and before the coming into force of the Act, that leave or permission to have the fence retained was sought in the prescribed form and more importantly, was granted. The question that has to be answered is whether the respondent in this case did seek and obtain authorisation from the relevant board to erect the fence that constitutes a rock of offence with the applicant.

[45] It appears, and there is no contest in this regard, that the fence in the instant case, was erected after the coming into force of the Act. I say so because the Act came into force in 2002 and the fence in question was erected sometime in 2015. In that connection, it would seem that the respondent would have had to apply to the relevant land board for leave to erect the fence in question. In this regard, it appears to me that the onus is on the respondent to show that he complied with the legislative solicitudes, which, when properly construed, are couched in peremptory terms.

¹³ S. 28 (8) (c) of the Act.

[46] Mr. Marcus argued that since the fence was erected after the coming into force of the Act, the provisions of s. 28 do not apply in the instant case. He argued that the provisions of s. 29 (4) of the Act apply. He, in particular, argued that the provision of ss (4) of that provisions apply and they read as follows:

‘Except with the written authority of the Chief or Traditional Authority, and ratification by the board concerned, no person shall –

(a) erect or occupy any building or other structure on the commonage;’

[47] It was his argument that a fence would, in the circumstances qualify to be regarded as a structure, within the provisions of the subsection. Is there any merit to this ingenuous argument? I think not. It is stretching credulity too far to try, as the respondent is bent on doing, to consider that a fence must be regarded as a structure, which, in terms of the relevant, is capable of being ‘occupied’. I agree that a fence may be erected, but that does not make it amenable to being occupied as a building or ‘other structure.’

[48] I accordingly find that the argument advanced by the respondent is no sustainable as a fence is not capable of being a structure or building that may be occupied. A reading of s. 28, which the respondent discounted as being inapplicable, seems to be the provision that applies neatly to the present matter. The question, in my view, must be this – did the respondent obtain authorisation to erect the fence? There is, according to the regulations, a prescribed form that must be completed for this purpose as evidence. That is what the respondent would produce in order to show that he has properly applied and would then have to produce the authorisation. He has done neither in the instant case.

[49] In the circumstances, I am of the considered view that the respondent is barking the wrong tree. The law is simply, by no one’s predestined design, against the respondent. A compelling position that stares the respondent

starkly and ominously in the face, are the provisions of s.44 (1) of the Act, which criminalise the illegal fencing, which from all indications, the respondent, seems to fall foul of.¹⁴

[50] It would seem, from the papers filed of record that the respondent applied for the authorisation from the Ondonga Traditional Authority, which, in terms of the law, has no power to grant the authorisation that the respondent required. In terms of the law, only the Communal Land Board is possessed of the power to grant the necessary authorisation. He never applied to the said Authority and for that reason, I come to what I consider to be the ineluctable conclusion that the respondent never complied with the applicable law in erecting the fence in question, which I must authoritatively state, is not a structure. His erection, which is a criminal offence, may not, for that reason, be recognised as lawful.

[51] In the circumstances, I am of the considered view that the only reasonable and logical conclusion in all the circumstances of the case, taking into consideration the facts of the case and the applicable law, as discussed above, that the declarator must unfortunately, be returned in the applicant's favour and by necessary implication, to the detriment of respondent's case so valiantly waged.

Conclusion

[52] In the circumstances, I am of the considered view that the respondent has, unfortunately fallen on the wrong side of the law. This is, with respect, both in relation to the point in *limine* and the merits of the matter. I accordingly

¹⁴ 1. Any person who, without the required authorisation granted under this Act, and subject to such exemptions as may be prescribed -

- (a) erects or causes to be erected on any communal land any fence of whatever nature; or
- (b) a person referred to in section 28(1) or 35(1), retains any fence on any communal land after the expiry of a period of 30 days after his or her application for such authorisation in terms of section 28(2)(b) or 35(2)(b) has been refused, is guilty of an offence and on conviction liable to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

find and hold that the applicant should succeed in terms of the relief he seeks in his notice of motion.

Costs

[53] The last question relates to the costs of the application. The normal rule that applies in issues relating to costs, is that the costs should follow the event. There is no reason in law or logic as to why this rule should not apply. I will consider that the other respondents, save the 6th respondent, did not challenge the applicant's application.

[54] I am of the considered view although the respondents, save Mr. Kavale, have not opposed the application, the actions or inactions of some of them have served to put the applicant out of pocket in having to institute this application for review. I will accordingly grant costs in favour of the applicant against the First, Second and Sixth Respondents, as prayed for by the applicant.

Order

[55] In the premises I issue the following order:

1. The proceedings and decision of the Appeal Tribunal, taken on or about 11 August 2016 is hereby set aside as unlawful and of no force or effect.
2. The fence erected by Mr. Elifas Kavale on the Farm *Okulimi*, Oshikoto Region, Namibia, is hereby declared to be in violation of the provisions of Section 18(a) of the Communal Land Reform Act, No. 5 of 2002 (as amended) and is therefore unlawful.
3. Mr. Elifas Kavale is hereby directed and ordered to remove the fence he erected on the Farm *Okulimbi*, Oshikoto Region, Namibia, within thirty (30) days of the service upon him of this order.

4. The First, Second and Sixth Respondents are ordered to pay the costs of this application jointly and severally, the one paying and the other being absolved.
5. The matter is removed from the roll and is regarded as finalised.

TS Masuku

APPEARANCES

APPLICANT: N Tjombe
of Tjombe Elago Inc., Windhoek

6TH RESPONDENT:

N Marcus

of Nixon Marcus Public Law Office, Windhoek