



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

**JUDGMENT**

Case no: HC-MD-CIV-MOT-GEN-2017/00415

In the matter between:

**HOLTER NGURIJE MBAI**

**APPLICANT**

and

**MINISTER OF LAND REFORM**

**FIRST RESPONDENT**

**PERMANENT SECRETARY - MINISTRY OF  
LAND REFORM**

**SECOND RESPONDENT**

**CHAIRPERSON OF THE OMAHEKE COMMUNAL  
LAND BOARD**

**THIRD RESPONDENT**

**OMAHEKE COMMUNAL LAND BOARD**

**FOURTH RESPONDENT**

**EVA KAMBATO**

**FIFTH RESPONDENT**

**OVAMBANDERU TRADITIONAL AUTHORITY**

**SIXTH RESPONDENT**

**CHAIRPERSON OF THE LAND APPEALS TRIBUNAL SEVENTH RESPONDENT**

**Neutral citation:** *Mbai v Minister of Land Reform* (HC-MD-CIV-MOT-GEN-2017/00415) [2020] NAHCMD 425 (18 September 2020)

**Coram:** ANGULA DJP

**Heard:** 3 June 2020

**Delivered:** 18 September 2020

**Flynote:** Review application – Communal Land Reform Act, 5 of 2002 – *Locus standi* – Statutory interpretation – Focus at ascertaining the legislative intent.

**Summary:** The applicant applied for order *inter alia* to review and set aside the decision of the Communal Land Board to evict him from a piece of land situated at Otjekende village – And further to review and set aside the decision of the Land Appeals Tribunal which confirmed the decision of the Communal Land Board – The applicant further sought an order that the matter be remitted to the Traditional Authority for reconsideration.

The decisions in question were made following a complaint made to the board by the fifth respondent against the applicant that he occupied her land without her consent.

Before court the applicant contended that had applied to be granted land right in respect of that piece of land – It was common cause that the applicant was already in occupation of that piece of land by the time he submitted his application – The application was in a form of a letter addressed to one of the councillors of the Traditional Authority – The applicant contended that subsequent to submitting his application he received a verbal communication that his application was successful and that he had been granted customary land rights in respect of that land – It was further common cause that the applicant had not applied using the prescribed ‘Form A’.

The fifth respondent raised two points in law *in limine*: first that the applicant lacked *locus standi* in that he has been allocated land right entitling him to protection from the court; and second, that the relief sought namely to remit the matter to the Traditional Authority for reconsideration was incompetent as that body (on his version) became *functus officio* after it allocated the land right to the applicant.

*Held*; that addressing the application letter to an individual councillor and not the Chief or the Traditional Authority, was fatal to the applicant’s application;

*Held;* further that there was no application before the Traditional Authority as prescribed by the Act. In any event, even if an allocation of a land right was made by the Traditional Authority, that allocation had not been ratified by the board as stipulated the Act.

*Held;* further that in terms of the Act, it is an offence for a person to take abode on communal land without first having been allocated a land right which allocation has been ratified by the board.

*Held;* if indeed the Traditional Authority had allocated land rights to the applicant, it is *functus officio* and remitting it to the Traditional Authority, without that decision having been set aside, would be incompetent because, on the applicant's own version, the decision of the Traditional Authority to allocate land right to the applicant still stands .

*Held;* the applicant's points *in limine* were upheld and the application was accordingly, dismissed with costs.

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### **ORDER**

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1. The fifth respondent's points *in limine* are upheld and the application is dismissed.
2. The applicant is ordered to pay the costs of the respondents who opposed the application.
3. The matter is removed from the roll and regarded as finalized.

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### **JUDGMENT**

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ANGULA DJP:

Introduction:

[1] This is an opposed review application against the decisions taken by the Omaheke Land Board (the third respondent) which was subsequently ratified by the Land Appeals Board (the seventh respondent), in respect of a communal land rights dispute between the applicant and Ms Eva Kambato (the fifth respondent). The applicant seeks orders to have those decisions reviewed and set aside and for the court to remit the matter to the Traditional Authority for reconsideration.

Parties:

[2] The applicant is Holter Ngurije Mbai, an adult male employed as an Artisan Foreman, in the Directorate of Rural Water Supply, Sanitation and Co-ordination in the Ministry of Agriculture, Water and Forestry, hereinafter referred to as 'the applicant'. The applicant was represented by Ms Kavijene in these proceedings.

[3] The first respondent is the Minister of Lands and Reform, cited in his official capacity as the responsible minister as contemplated in s 1 of the Communal Land Reform Act, 5 of 2002, hereinafter referred to as the 'minister'. The minister did not oppose the application.

[4] The second respondent is the Permanent Secretary of the Ministry of Land Reform, cited in his official capacity as contemplated in s 1 of the Communal Land Reform Act, 5 of 2002. He also did not oppose the application.

[5] The third respondent is the Chairperson of the Omaheke Communal Land Board, duly appointed in terms of s 6(5) of the Communal Reform Act, 5 of 2002, hereinafter referred to as 'the Chairperson'.

[6] The fourth respondent is Omaheke Communal Land Board, a body duly established in terms of s 2 of the Communal Land Reform Act, 5 of 2002,

hereinafter referred to as 'the board'. The third and fourth respondents were represented by Mr Mutorwa from the Office of the Government Attorneys.

[7] The fifth respondent is Ms Eva Kambato, an adult female residing at Rakutuka location in Gobabis, and at times she resides at, Otjovakueuva village, Otjombinde Constituency, Omaheke Region. She will be referred in this judgment as 'Ms Kambato'. She is represented by Mr Kanguuehi in these proceedings.

[8] The sixth respondent is the Ovambanderu Traditional Authority, a juristic person duly established by s 2 of the Traditional Authorities Act, 25 of 2000. It will be referred to in this judgment as 'the Traditional Authority'. The Traditional Authority did not oppose this application.

[9] The seventh respondent is the Land Appeals Tribunal established in terms of s 39 of the Communal Land Reform Act, 5 of 2002. The seventh respondent also did not oppose this application.

#### Background:

[10] On or about January 2015, the applicant applied to the Ministry of Agriculture, Water and Forestry for permission to rehabilitate a borehole situated at Otjekende village. On 10 February 2015, the applicant was granted permission to rehabilitate the said borehole.

[11] On or about August and/or September 2015, the applicant moved to Otjekende village. On or about 2 February 2016, he applied to the senior traditional councillor to be granted customary land rights at Otjekende village, Otjombinde Constituency. In particular a farming right. It needs mentioning that his 'application' was made after he had already taken occupation of a piece of land at Otjekende village which ultimately led to a dispute between the applicant and Ms Kambato.

[12] Subsequent thereto and during March 2016, Ms Kambato, lodged a complaint with the board regarding applicant's 'illegal' occupation of that piece of land at Otjekende village. She contended that the applicant took occupation of that

land without having been allocated a customary land right in terms of the Communal Land Reform Act, 5 of 2002 ('the Act').

[13] The applicant averred that he was informed by the office of the Traditional Authority at Otjombinde on 1 April 2016 that his application for customary land rights was successful.

[14] On 4 July 2016, the hearing of the complaint lodged by Ms Kambato took place before the board. Thereafter on 15 August 2016, the applicant received a communication that the board upheld Ms Kambato complaint. Dissatisfied with the board's decision, the applicant on or about 15 September 2016 lodged an appeal with the Permanent Secretary (now referred to as the Executive Director) of the Ministry of Land Reform. A Land Appeals Tribunal was then constituted to hear the applicant's appeal. The Appeal Tribunal upheld the decision of the board. The applicant then instituted the present proceedings.

[15] Now before this court, the applicant seeks orders reviewing and setting aside the decisions of the board and the Land Appeals Tribunal and a further order that the matter be remitted to the Traditional Authority for reconsideration.

Relief sought:

[16] In this application, the applicant seeks the following orders:

'An order –

1. Reviewing and correcting or setting aside the decision of the 3<sup>rd</sup> Respondent [the Chairperson of the Board] dated 15<sup>th</sup> August 2016 and the finding that the Applicant is legally resident at Otjorusuvo village and not at Otjekende, and declaring such decision to be of no force or effect.
2. Reviewing and correcting or setting aside the decision of the 4<sup>th</sup> Respondent [the board] dated 15<sup>th</sup> August 2016 finding that the Applicant illegally occupied land at Otjekende village and requesting the Applicant to vacate Otjekende village within 30

days from receipt of the letter communicating the decision, and declaring such decision to be invalid and of no force effect.

3. Reviewing and correcting or setting aside the decision 4<sup>th</sup> Respondent [the board] dated the 15<sup>th</sup> August 2016 and the 29<sup>th</sup> September 2017 respectively requesting or ordering the Applicant to vacate Otjekende (or a portion thereof) and to remove any infrastructure therefrom, and declaring such decision to be of no force or effect.
4. Ordering that the matter be remitted back to the 6<sup>th</sup> Respondent [Traditional Authority] to reconsider the Applicant's application in terms of Section 22 of the Communal Land Reform Act, Act 5 of 2002 ("the Act") and consider the 5<sup>th</sup> Respondent's [Ms Kambato] objection as set out in Section 22(3) and (4) of the Act.
5. Reviewing and correcting or setting aside the decision of the Land Appeals Tribunal dated the 10<sup>th</sup> April 2017 upholding the decision of the 3<sup>rd</sup> Respondent [the Board], and declaring such decision to be of no force or effect.
6. Reviewing and correcting or setting aside the decision of the 1<sup>st</sup> Respondent [the Minister of Lands] dated the 19<sup>th</sup> May 2017 endorsing the decision of the Land Appeal Tribunal and that of the 3<sup>rd</sup> Respondent, and declaring such decision to be invalid and of no force or effect.
7. Ordering the Respondent(s), in the event that this application is opposed, to pay the costs of this application, jointly and severally, the one pay the other to be absolved.'

The versions of the parties:

*The applicant's version*

[17] The applicant's case is that he moved to Otjekende village on or about August/September 2015, with the oral permission by the Traditional Authority. He then applied for customary land rights in respect of that piece of land situated at Otjekende village during February 2016. In doing so, he wrote a letter titled 'Request for customary land rights' addressed to the Senior Traditional Councillor of Otjikende village. It is the applicant's contention that he applied to the Traditional

Authority, albeit not on the prescribed form and he implores this court to consider form over substance as there had been substantial compliance.

[18] In respect of the hearing of 4 July 2016 conducted by the board, which he now challenges, he contends that, the failure by the board to invite the Traditional Authority to the said board's hearing was not fair and reasonable and thereby renders the procedure employed by the board flawed.

[19] The applicant further avers that the board took into account irrelevant considerations such as, the fact that applicant had an agreement with Ms Kambato's son in terms whereof he was given customary land rights and that the applicant was never granted grazing rights by the water point committee of Otjokueuva and Otjekende village.

[20] The applicant argues that the board ought to have remitted the matter to the Traditional Authority as it did in other cases on previous occasions. He contends further that by failing to do so, the board usurped the powers of the Traditional Authority. And further that, by finding in favour of Ms Kambato, in respect of her complaint, despite not hearing her evidence and having her cross-examined by the applicant and other witnesses, the board demonstrated bias.

#### *Third and fourth respondent's case*

[21] The former chairperson of the board, Ms Maria Vaendwanawa deposed to the answering affidavit on behalf of the board. In her affidavit, she avers that there was no record indicating that Ms Kambato had abandoned her rights over that portion of land at Otjekende village and as such that piece of land had not reverted back to the State. Further, that the registration for the recognition of existing rights has been extended by the minister for an indefinite period. The deponent furthermore points out that Ms Kambato only moved her residence from Otjekende due to the fact that the borehole at Otjekende village had dried up. The deponent points out further that, during the hearing held by the board on 4 July 2016, Ms Kambato's evidence as captured in her letter of complaint was read into the record at the hearing. It recorded that Otjekende village was allocated to her late husband



in the 1980's and that they had been farming there until the borehole dried up. And that they then moved to Otjovakueuva village and agreed with the residents of that village that they would share grazing and water between residents of the two villages.

[22] It is further the deponent's deposition that the applicant had moved to Otjekende village before he had applied for customary land rights; and that the board only received the applicant's application for customary land rights at the hearing of 4 July 2016.

[23] The deponent further states that the board had by then already received a complaint from Ms Kambato against the applicant to the effect that the applicant had occupied her piece of land at Otjekende village without having been allocated customary land rights by the chief or traditional authority, which rights (even if they were allocated) were not ratified by the board. According to the deponent, the board found that under those circumstances the applicant was illegally residing at Otjekende village and issued the applicant with an eviction order.

[24] Lastly, the deponent points out that the applicant did not raise the issue at the board hearing that he was not allowed to call some witnesses or that he intended to call witnesses. According to this deponent, an opportunity was granted to both the applicant and Ms Kambato to cross-examine witnesses and to put questions to the board members. The deponent further states that the applicant did also not deny at the hearing that, that piece of land belongs to Ms Kambato.

#### *Fifth respondent's case*

[25] Ms Kambato, deposes in her answering affidavit to the fact that her late husband and she had been occupying the piece of land in question at Otjekende village since the year 1979. It was only when they started experiencing scarcity of water from the borehole around 1983 that they started to take their livestock for water to the Otjovakueuva village. During 1985, her husband reached an agreement with the residents of Otjovakueuva village that he and his family would be permitted to settle at Otjovakueuva village, so as to access water for their

livestock daily. In exchange for access to water, the residents of Otjovakueuva village would graze their livestock at Otjekende village. Shortly thereafter her husband passed away in 1986.

[26] It is Ms Kambato's contention that the applicant is illegally residing at that piece of land at Otjekende village. She argues further that even if the Traditional Authority had granted the applicant customary land rights in respect of that piece of land at Otjekende village, such right had not been ratified by the board in terms of s 24 of the Act.

[27] As regards the board's proceedings of 4 July 2016, Ms Kambato states that both the applicant and her son gave evidence at the hearing. However, they both were not afforded an opportunity to cross-examine witnesses.

[28] Ms Kambato takes issue with contents of a letter by the Traditional Authority, which states that the applicant 'followed the normal and formal procedures which are required when one wants to resettle in a certain area in a communal area'. She denies the correctness of that statement in that it did not comply with the provisions of the Act which deal with the allocation of rights in respect of communal land. And further to that, that the residents of Otjekende village were not consulted with regards to the allocation of the communal land rights to the applicant.

[29] Ms Kambato further denies the applicant's allegation that her rights to that piece of land at Otjekende village had reverted back to the State. Instead she asserts that the applicant had no right to occupy that piece of land at Otjekende village without ratification of such rights purportedly allocated to him by the Traditional Authority.

[30] Ms Kambato raised two points *in limine*. The first point is that, the applicant lacks *locus standi* as he did not apply for customary land rights in terms of the Act and the Regulations made thereunder. The second point is, that the relief sought by the applicant is incompetent in so far as he seeks that the matter be referred back to the Traditional Authority for rehearing. In this regard she points out that, on the applicant's version, the Traditional Authority had allocated customary land rights to

him therefor it cannot rehear the matter. In any event the Traditional Authority having already allocated that land right to him is *functus officio*.

Issues for determination:

[31] Before I consider the merits for the application for review, I first have to consider the points *in limine* raised by Ms Kambato. These points are:

- (a) Does the applicant have *locus standi* to bring this application?; and
- (b) Is the relief sought namely to remit the matter to the Traditional Authority competent?

(a) *Does the applicant have locus standi to bring this application?*

[32] The concept of *locus standi* – the right of standing by a litigating party to be before court. *Locus standi* requires that a litigant such as the applicant in this matter must show that he or she has direct and/or substantial interest in the subject matter of the application.<sup>1</sup> This interest should be current and actual and should not be hypothetical or abstract.<sup>2</sup> This interest is an interest in a right which is the subject matter of the litigation.<sup>3</sup> The concept has further been explained that the litigant must show that he or she has ‘some right which he was personally entitled to exercise was interfered with, or that he was personally injured by the act complained of...’<sup>4</sup>

[33] In deciding the above question in the present matter, the court will necessarily have to turn to the Communal Land Reform Act, 5 of 2002 (‘the Act’) and to embark upon the interpretation of the relevant provisions, in order to determine whether in terms of the Act, the applicant has a right or interest which requires protection by this court. This implies that, the applicant must have been allocated some form of customary land right in terms of s 22 by the chief or the

<sup>1</sup> *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16;

<sup>2</sup> *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* 2012 (1) NR 331 (HC) at para 11;

<sup>3</sup> Van Winsen, L et Eksteen, J. 1979. *Herbstein and Van Winsen: Civil Procedure of the Superior Courts in South Africa*, 3<sup>rd</sup> ed. Juta & Company Ltd, Cape Town.

<sup>4</sup> *Wood and Others v Ondonga Tribal Authority and Another* 1975 (2) SA 294 (AD) at 306 C.

traditional authority. The chief or the traditional authority must have subsequent to the application, allocated that right to the applicant and such allocation must have been ratified by the board. For only the act of ratification by the board bestows a right upon an applicant in terms of the Act.

[34] Section 22 of the Act provides thus: -

**'Application for customary land right**

22. (1) An application for the allocation of a customary land right in respect of communal land must –
- (a) be made in writing in the prescribed form; and
  - (b) be submitted to the Chief of the traditional community within whose communal area the land in question is situated.'

[35] Regulation 2 of General Regulations published in Government Notice 37 of 2003 under the Act is also relevant to the present proceedings. It provides as follows:

**'Application for customary land right**

2. (1) Every application in terms of section 22(1) of the Act for the allocation of a customary land right **must** be made in the form of Form A set out in Annexure 1 and must be submitted in triplicate to the Chief. [subregulation (1) amended by GN 15/2014]
- (2) **All the information required in Form A must be furnished fully therein.** [subregulation (2) amended by GN 15/2014]
- (3) Before the allocation of any customary land right a Chief or a Traditional Authority must display for a period of at least seven days on a notice board at the offices of the Traditional Authority a notice –
- (a) stating –
    - (i) the name of the applicant;

- (ii) the approximate size of the land applied for;
- (iii) the geographical location of the land applied for; and
- (iv) the type of customary land right applied for, and

(b) inviting interested parties to lodge with the Chief or Traditional Authority within a period of seven days any objections regarding the application.

(4) A Chief or a Traditional Authority may cause the information contained in the notice referred to in subregulation (3) to be published in any newspaper circulating in its communal area or to be broadcasted on any radio station broadcasting in its communal area.' (Underlining supplied for emphasis)

[36] In *Namibia Competition Commission v Puma Energy Namibia (Pty) Ltd* (SA 67/2018) [2020] NASC (8 September 2020), Damaseb, DCJ had the following to say regarding statutory interpretation -

*'Purposive interpretation and its limits*

[51] At the heart of 'purposive interpretation' lies, as Lord Denning put it in *Notham v London Borough of Barnet*,<sup>5</sup> the principle that the court must interpret a statute in a way that 'promotes the general legislative purpose underlying the provisions'. . . .

[53] The modern approach to statutory interpretation requires that the words of a statute be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>6</sup> Thus, the court strives to construe statutory language in accordance with the object and intent of the legislation.'

[37] Applying the foregoing approach to the communal Land Reform Act in the present matter, it appears from the preamble of the Act that the purpose of the Act is to regulate and control the allocation of customary land rights in communal areas. Section 20 of the Act, stipulates that the primary power to allocate or cancel any customary land right in respect of any portion of a communal area of a traditional

<sup>5</sup> [1978] 1 WLR 220 at 228C-D. See also *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 at 639H.

<sup>6</sup> See, for example, the Canadian case of *Re Rizzo & Rizzo Shoes Ltd* 1998 1 SCR 27.

community vests in 'the chief of that traditional community or where the chief so determines, the traditional authority of that traditional community'. In this connection this court held in the *Vita Royal House* matter, that where a traditional community has a traditional authority, then it is not the chief, but the traditional authority that must allocate the customary land rights.<sup>7</sup>

[38] Section 22 deals with the application of customary land rights. It is clear from s 22 and the Regulations made under the Act that not only must the application in question be in writing, it must be made on Form A and it must be submitted in triplicate to the chief or traditional authority.

[39] It is common cause that the applicant did not apply using Form A as prescribed. He simply used an ordinary letter. The letter was addressed to one of Senior Traditional Councillors of the Traditional Authority and not to the Traditional Authority itself as prescribed. In that letter titled 'Request for customary land rights' the applicant sets out the following particulars -

- (a) His name, identity number and contact detail;
- (b) That he is a family man and wished to apply for customary land right at Otjekende village;
- (c) To farm thereon and grow a garden; and
- (d) He addressed the letter to the senior traditional councillor.

[40] On closer scrutiny of the letter, it appears that it suffered from the following defects which cause the application to be non-compliance with the requirements set out in the regulations.

- (a) The letter was directed to one senior traditional councillor to the exclusion of other senior councillors who together constituted the Traditional Authority;

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<sup>7</sup> *Vita Royal House v The Minister of Land Reform* (A 109-2015) [2016] NAHCMD 339 (7 November 2016).

- (b) The letter was not addressed to the Chief or to the Traditional Authority;
- (c) Nothing on record shows or evidences that the letter was submitted in triplicate;
- (d) The letter did not indicate whether the application was in respect a new right or whether it was for the recognition of an existing land right;
- (e) The applicant failed to indicate whether he was married. This is because had he used Form A as prescribed, if he was married, his spouse was required to fill in the portion of Form A that deals with the particulars of the spouse;
- (f) The applicant failed to state his marital status. As a result of that failure it caused him to further fail to indicate whether he was applying jointly with his spouse or not;
- (g) There is no indication that the purported application was submitted with copies of the applicant's identity document or that of his spouse, if he was married at the time the letter was written;
- (h) The letter failed to state whether or not Otjekende village is located in a conservancy or community forest;
- (i) The letter failed to state whether the applicant holds a land right on any other portion of land in a communal area, granted in terms of the Act;

[41] It is clear from the above that an application suffered from serious defects fatal to his application due to non-compliance with the provisions of regulation 2.

[42] In this case there was a duly appointed traditional authority, no issue was brought up in this respect and keeping in mind the reasoning in the Vita Royal House insofar as the powers of the Chief and Traditional Authority to allocate and

cancel customary land rights was concerned. It was wrong and non-compliant with the regulations for the applicant to address the letter to an individual Senior Traditional Councillor.<sup>8</sup> In terms of the Act, a traditional authority comprises of the chief or head of the traditional community and the senior traditional councillors and traditional councillors. Therefore an application directed to an individual member of the traditional authority was fatal. The power to allocate and cancel customary land rights vests in the Chief or Traditional Authority.<sup>9</sup> The power does not vests in an individual traditional councillors to allocate a land right. He who has no power has none to give. Further, even if the applicant had complied with all the other requirements, which he did not, the application still suffered from compliance with the requirement of submitting the application to the Chief or Traditional Authority. This was fatal to the application.

[43] Counsel for the applicant submitted that in the event it is found that the letter by the applicant did not comply with the provisions of the regulations, then in that even counsel implored the court to hold that there was substantial compliance and that the applicant indeed applied for customary land right.

[44] Even if this court were to hold that there had been substantial compliance with the requirement of the regulations; and further that the traditional authority allocated customary land right to him, this still would not assist the applicants in his dilemma of non-compliance. This is because, s 24(1) of the Act provides that -

'Any allocation of a customary land right made by a chief or traditional authority under section 22 has no legal effect unless the allocation is ratified by the relevant board in accordance with the provisions of this section.'

[45] It is common cause that the board did not ratify the allocation. According to the chairperson of the board at the time, a copy of the application was seen for the first time by the board at the hearing of the complaint laid against the applicant by Ms Kambato. Any application and subsequent approval both have to be in writing and for such allocation to have legal force and effect. It have to be ratified by the

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<sup>8</sup> Para 25 of the *Vita Royal House* judgment.

<sup>9</sup> Section 20 of the Act.



board. Absent that, it means that the applicant occupied that piece of land at Otjekende village without a ratified land right to do so.

[46] In light of the finding that the board had not ratified an allocation of customary land right in respect of the applicant, the provisions of s 29(4) and (5) come into effect. Section 29(4) provides that any person who occupies communal land without written authority by the chief or traditional authority and ratification by the board, is guilty of an offence and liable on conviction to a fine not exceeding N\$4 000 or imprisonment for a period not exceeding one year.

[47] Since the applicant was not vested with any right in terms of the Act, it follows that he does not have any right worth protection by this court and thus he lacks *locus standi*.

Applicant seeks incompetent relief:

[48] It would appear that in anticipation of the court finding the applicant lacking *locus standi*, he prays that the matter be referred back to the traditional authority to reconsider his application. As shown earlier in this judgment, Ms Kambato raised a second point *in limine* against this relief.

[49] According to Ms Kambato, the relief sought by the applicant is incompetent. The reason for that point is that, the traditional authority is *functus officio* on the applicant's version. Further, that as was found above, and it is clear from Eva Kambato's evidence throughout, there was no application before the traditional authority and therefor even if the matter were to be referred back to the traditional authority, that traditional authority would have no application before it to 'reconsider'. This is in light of the earlier finding, that the applicant's purported application did not comply with the requirements of the Act and the Regulations.

[50] Secondly, on the applicant's own version, he had already been allocated customary land rights by the traditional authority, therefor the referral back to the traditional authority for reconsideration of his application would contradict his own version. In addition, the traditional authority is *functus officio* as it has already, on

his version, allocated him land rights. In other words, the traditional authority became *functus officio* the moment the decision to allocate the rights was made and communicated by the one councillor to the applicant. In any event, it is doubtful whether that communication can be regarded as formal communication by the Traditional Authority for the reason that it was made by one councillor and not on behalf of the Traditional Authority.

[51] For all those reason I have arrived at the conclusion that the relief sought by the applicant is incompetent. This point in *limine* similarly succeeds.

[52] In the result, I make the following order:

1. The fifth respondent's points *in limine* are upheld and the application is dismissed.
2. The applicant is ordered to pay the costs of the respondents who opposed the application.
3. The matter is removed from the roll and regarded as finalized.

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H Angula  
Deputy-Judge President

## APPEARANCES:

APPLICANT: C KAVITJENE  
Of Tjombe-Elago Inc., Windhoek

FIRST, SECOND and  
THIRD RESPONDENTS: N MUTORWA  
Of Office of the Government Attorney, Windhoek

FIFTH RESPONDENT: N K G KANGUEEHI  
Of Kangueehi & Kavendjii Inc., Windhoek