

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
JUDGMENT

CASE NO. HC-MD-CIV-MOT-REV-2018/00426

In the matter between:

**THEOPHILUS NGAUJAKE**

**1<sup>ST</sup> APPLICANT**

**WILLY WAPAHATJIKE**

**2<sup>ND</sup> APPLICANT**

**BETHOLD KANDJII**

**3<sup>RD</sup> APPLICANT**

and

**THE MINISTER OF LAND REFORM**

**1<sup>ST</sup> RESPONDENT**

**K. F. MUNDIA**

**2<sup>ND</sup> RESPONDENT**

**OMAHEKE COMMUNAL LAND BOARD**

**3<sup>RD</sup> RESPONDENT**

**LIBAHRDT GIDEON KAHIREKE**

**4<sup>TH</sup> RESPONDENT**

**BAKGALAGADI TRADITIONAL AUTHORITY**

**5<sup>TH</sup> RESPONDENT**

**OVAHERERO TRADITIONAL AUTHORITY**

**6<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *Ngaujake v Minister of Land Reform* (HC-MD-CIV-MOT-REV-2018/00426) [2021] NAHCMD 39 (11 February 2021).

**CORAM:** MASUKU J

**Heard:** Determined on the papers

**Delivered:** 11 February 2021

**Flynote:** Administrative Law- Legislation- Communal Land Reform Act, No 5 of 2002- Land Appeal Tribunal- Ambit of appeal tribunal powers conferred to it by Section 39 of the Act- Interpretation of section 39 of the Act- Actions of the Appeal Tribunal *Ultra Vires* the provisions of the Act.

**Summary:** In this matter the Applicants seek an order reviewing and setting aside an order made by the Chairperson of the Land Appeal Tribunal delivered on the 12 September 2018. The appeal pertained to the decision of the Omaheke Communal Land Board to reject the fourth respondent's application for the recognition of existing customary land rights and for the authorization for him to retain his fence. The appeal emanated from the application brought by the fourth respondent, in 2014, when he applied to the Omaheke Communal Land Board for the recognition of his existing customary land rights over Okutikuatate village which he occupied from 1996/1997 to date and for the authorization to retain his fence erected there; in accordance with Section 28 (1) of the Communal land Reform Act, No. 5 of 2002.

The Appeal Tribunal noted that the Communal Land Board only dealt with one portion of the Fourth Respondent's application and as a result the Appeal tribunal proceeded to re-call witnesses to make submissions to supplement and clarify the issues; it embarked upon a fact-finding mission and conducted an inspection in loco. The Appeal Tribunal on the basis of its further findings upheld the appeal against the decision of the Third Respondent and set aside that decision and the third respondent was ordered to grant and recognise the appellant's customary land rights. Dissatisfied with the decision of the Tribunal, the applicants approached this court on review.

*Held:* The common practice is that appellate courts interfere with decisions of trial courts on four types of errors: (1) error of law; (2) error of fact; (3) error of mixed fact and law; and (4) error in exercising discretion.

*Held:* that an appellate court may only intervene on questions of fact where the error is obvious and had an effect on the outcome of the case.

*Held:* that the Act does not allow for the second respondent to exercise powers it does not in terms of enabling legislation have.

*Held:* that when proper regard is had to s 37 of the Act, it becomes clear that the power of investigation of claims to existing rights, is vested exclusively in a board established by the Minister. Where that board, for any reason fails to properly perform its duties and its decision is taken on appeal to the second respondent, it would be gravely wrong to require of the second respondent, to leave his appellate seat and expect him to perform the functions of investigating the issues.

*Held:* that from reading s 39 of the Act, the powers of the second respondent, are limited to 'confirm, set aside or amend the decision which is the subject of the appeal'.

*Held:* that s 39(6)(b) of the Act cannot be construed as authorising an appellate body to go beyond a record of proceedings and subsequently fill gaps that are unclear in so far as such record is concerned, by conducting further investigations, hearing fresh evidence by witnesses and conducting an *inspectio in loco* as it did.

*Held:* The power in s39 (6) (b) is linked to and designed to give efficacy to the powers of the Tribunal set out in s39 (6) (a).

*Held:* that the decision of the Second Respondent, the Appeal Tribunal, contained in its judgment dated 12 September 2018 is reviewed and set aside.

---

## ORDER

---

1. The decision of the Second Respondent, the Appeal Tribunal, contained in its judgment dated 12 September 2018 is hereby reviewed and set aside.
  2. There is no order as to costs.
  3. The matter is removed from the roll and is regarded as finalised.
-

## JUDGMENT

---

### Introduction

[1] Three applicants, namely Messrs. Theophilus Ngaujake, Willy Wapahatjike and Bethold Kandjii are before court essentially seeking an order reviewing and setting aside an order contained in the judgment of the 2<sup>nd</sup> respondent, Dr. K.F. Mundia, delivered on 12 September 2018. This decision was made by the 2<sup>nd</sup> respondent in his capacity as the Chairperson of the Land Appeal Tribunal, established in terms of the Communal Land Reform Act, No. 5 of 2002, ('the Act').

[2] The application is opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents. The bases upon which the said respondents oppose the application will be addressed as the judgment unfolds. The applicants state that no relief is sought against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondent. They were all cited in appreciation of the interest that they may have in respect of the relief sought.

[3] I should pertinently mention that the applicants point out very early in their founding affidavit that they seek no order as to costs or disbursements against the respondents, considering that the applicants are represented by the Legal Assistance Centre. In that regard, no order for costs will be issued in the applicants' favour even if the applicants succeed in obtaining the relief they seek.

### Background

[4] The matter serves before court following the procedure set out in rule 63, of this court's rules, which governs stated cases. In a statement of facts dated 25 July 2019, the parties agreed that the matter would proceed for determination on the following agreed facts:

1. 'The land under dispute is situated at Okutikuatate village in the Aminuis constituency, Omaheke region.

2. The aggrieved members of the Otjipandjarua village, represented by the Applicants, claim that the Fourth Respondent has infringed upon their right to use the commonage by fencing off Okutikuatate village.
3. The parties are also in dispute over whether Okutikuatate village where the Fourth Respondent resides is to be recognized as a village on its own.
4. The Fourth Respondent was initially a resident of the community of Otjipandjarua village.
5. There was an agreement by the community members to fence off their homesteads and which the community members could not meet, only the Fourth Respondent.
6. There was a discussion between the Fourth respondent, the Applicants and the community members to allow the Fourth Respondent to move to another area; now known as Okutikuatate village.
7. The Fourth Respondent also obtained permission to rehabilitate an old borehole in that area for his cattle to graze there.
8. The community agreed that since the water borehole was restored and Fourth Respondents' cattle were grazing in two areas; he was directed to move with the concurrence of the Traditional Authority to move his homestead to avoid having two grazing fields.
9. Sometime in the year 1996/1997 the Fourth Respondent, by agreement with Otjipandjarua community members agreed, to move out of Otjipandjarua village to a nearby area of what is now known as Okutikuatate village. '
10. The aggrieved members of the Otjipandjarua village represented by the Applicants also demanded that the Fourth Respondent; a) avail the privately drilled borehole of the Fourth Respondents to all the Otjipandjarua community members; b) allow all Otjipandjarua livestock to have access to the Fourth Respondent's fenced-off area; c) that the people, including family members of the Fourth Respondent, be evicted from the said village; d) that all fences in the Otjipandjarua surrounding area or commonage be removed as they curtail the use and enjoyment by members of the traditional community.
11. The Fourth Respondent, in 2014, applied to the Omaheke Communal Land Board for the recognition of his existing customary land rights over Okutikuatate village which he occupied from 1996/1997 to date and for the authorization to retain his fence erected there; in accordance with Section 28 (1) of the Communal land Reform Act, No. 5 of 2002.
12. The Fourth Respondent's application was supported by the Fifth Respondent stating that the disputed Okutikuatate is a village on its own and does not form part of the

commonage. The Fifth Respondent's support is contained in a letter attached marked annexure "A".

13. The Applicants and a few members of the Otjipandjarua and Sarie Maree communities objected to the Fourth Respondent's claims.
14. Upon receipt of the objections the Third Respondent (Omaheke Communal Land Board) convened a hearing that took place on the 28th of August, 2017 and where all the parties were present.
15. The Communal Land Board, after hearing all the parties, made a decision in the form of a resolution attached hereto marked "B". There was no substantive record of proceedings of the Communal Land Board hearing.
16. The Fourth Respondent lodged an appeal against the decision of the Omaheke Communal Land Board in terms of section 39 of the Communal Land Reform Act (as amended).
17. The appeal pertains to the decision of the Omaheke Communal Land Board to reject the Fourth respondent's application for the recognition of existing customary land rights and for the authorization for him to retain his fence.
18. The legal and factual basis of the appeal to the Tribunal was: (a) that the Omaheke Communal Land Board acted unlawfully when it ordered the Fourth Respondent to remove the fences, when the board, in terms of Section 28 (11), had referred the matter back to the Traditional Authority to commence de novo, as it were a new application in accordance with Section 28 (12); (b) that the village in question, Okutikuatate did not form part of the commonage of Otjipandjarua and Sarie Maree villages; and (c) that the Board's decision was Very prejudicial to the Fourth Respondent in light of the manner in which he had acquired the right to erect the fences around Okutikuatate Village and the investments that he had made since he started living in the said Okutikuatate village back in 1996/1997.
19. The Applicants herein, being the Respondents in that matter, applied for review relief, inter alia, for the setting aside of the order made by the Second Respondent as Chairperson of the Appeal Tribunal in a judgment dated 12th September 2018 attached hereto marked annexure "C".
20. The Appeal Tribunal convened a hearing in terms of the Communal Land reform Act and its Rules in terms of its Operational Framework & Regulations, attached hereto marked annexure "D11, specifically under Rule 2 on page 9 thereof.
21. The Appeal Tribunal noted that the Communal Land Board only dealt with one portion of the Fourth Respondent's application; i.e. the retention of the fence and pronounced themselves therein, but did not deal with the application for the recognition of the Customary land right.

22. It was not clear to the Appeal Tribunal as to how the Third Respondent dealt with the second issue. The Appeal tribunal proceeded to re-call all the concerned parties to make submissions to supplement and clarify the issues.
23. The Appeal Tribunal embarked upon a fact-finding mission it attributed to the incomplete record and the need for clarification and an inspection in loco.
24. All the parties agreed to the making of submissions and also to attending the inspection in loco, to observe the area in question, the extent of the fences and the distance between the disputed villages.
25. The Appeal Tribunal upheld the appeal against the decision of the Third Respondent and set aside that decision. The Third Respondent was ordered to grant and recognise the appellant's (Fourth Respondents') customary land rights at Okutikuatate and to grant authorization for the retention of the appellant's fence.
26. The Applicants in the review before the court complain that the powers exercised by the Appeal Tribunal during its procedures were *ultra vires* those conferred on it by the enabling statute, being the Communal Land Reform Act No. 5 of 2002 as read with its accompanying regulations (CLRA).'

[5] The questions of law submitted to the court for determination, were the following:

- (1) whether or not the appeal tribunal, constituted in terms of s 39 of the Act acts *ultra vires* its statutory powers by holding a hearing *de novo*?
- (2) Whether or not an appeal tribunal has powers to adduce evidence or conduct an investigation, either with the purpose to amplify, clarify or supplement the factual issues as contained in the Regional Land Board record of proceedings?
- (3) What are the Appeal Tribunal's statutory powers and duties in terms of the ambit of its functions under the CLRA and its applicable regulations and procedures? Should the Appeal Tribunal have to descend into the arena on this 'fact-finding' effort and is it able to do so?
- (4) Did the Tribunal conduct a hearing *de novo* or rehear the matter or did the evidence adduced at the Appeal Tribunal amount to amplification, clarification or supplementation?
- (5) Whether the appeal Tribunal's decision to adduce factors beyond the appeal record as evidence or by conducting an investigation, either with the purpose to amplify, clarify or supplement the factual issues as contained in the

Regional Communal Land Board hearing record, or otherwise was unjustified?

- (6) What was the extent of the permissible statutory powers and procedures of the Appeal Tribunal in determining an appeal are?

[6] On 12 September 2018, the Appeal Tribunal, constituted in terms of s. 39 of the Act, rendered a judgment, which is the subject of a review by this court. The applicants allege that the said Tribunal, which presided, purported to exercise powers it did not, in terms of the applicable law possess. It is further alleged that it conducted the proceedings unlawfully. In this regard, a litany of allegations are made, including

—

- (a) that the Tribunal took evidence when it did not have the power to do so;
- (b) it invited submissions to be made and then used the submissions made as evidence to refute the Communal Land Board's ruling;
- (c) it did not properly consider the record of the decision of the Communal Land Board;
- (d) it did not inform the parties that they were entitled to legal representation to assist in the conduct of the trial;
- (e) it accepted submissions made on behalf of the 4<sup>th</sup> respondent by his legal practitioner without hearing submissions or evidence from the 4<sup>th</sup> respondent himself;
- (f) it held a number of *inspectios in loco* without the presence, consent or application by any of the parties for such;
- (g) it did not afford the applicants an opportunity to cross-examine the witnesses it called;
- (h) it violated the *audi alteram partem* rule;
- (i) did not inform the parties that their submissions tendered to it would be used as evidence for the findings it would later make;
- (j) the applicants' Art 18 of the Namibian Constitution rights were violated as the applicants were denied fair administrative action;
- (k) the Tribunal usurped the powers and functions of the Communal Land Board or those granted to the investigation Committee and made an order that is incompetent in the circumstances; and



- (l) the Tribunal failed to refer the dispute back to the Communal Land Board to construct the record of proceedings when it determined that the record of proceedings before it was insufficient to make a proper finding when it was in law obliged to do so.

[7] The respondents take the position that there is no merit in the application and that it should be dismissed without further ceremony. In particular, the 4<sup>th</sup> respondent, in whose favour the decision sought to be impugned was, is of the view that there is insufficient factual background material before court to enable it to make an order on the merits. It is the 4<sup>th</sup> respondent's case that the proper order to make, if there are any irregularities established, is to remit the matter back to the 2<sup>nd</sup> respondent. The 4<sup>th</sup> respondent, does, however, support the decision of the 2<sup>nd</sup> respondent. This is not surprisingly as the order was in the 4<sup>th</sup> respondent's favour.

[8] The Government respondents, who include the 2<sup>nd</sup> respondent, take the position that the provisions of the Act, s 39, in particular, give the 2<sup>nd</sup> respondent wide discretionary powers to exercise when dealing with appeals serving before it. The said provision, they contend, grants the 2<sup>nd</sup> respondent power 'to make any order in connection therewith, as it may think fit.' It is contended that the decision complained of, seen in the context of this provision, is not a proper basis for the court to review and set the decision aside. These respondents further contend that the tribunal was within its powers in following the course that it did and reaching the decision that it did.

[9] The question for determination, in the circumstances, is which of the parties is on the correct side of the law? Is there any merit to the applicants' contentions that the decision should not be allowed to stand, or the argument advanced by the respondents should carry the day?

#### Determination

[10] I am of the considered view that there is no need to traverse a lot of ground in this matter. It would appear that the decision of the matter rests with the proper interpretation to be accorded the provisions of s 39 of the Act. Once that provision

has been interpreted, the way will have been cleared for the court to determine whether the procedure and actions adopted by the 2<sup>nd</sup> respondent, of which the applicant complains, as stated above, fall within its statutory remit.

[11] Section 39(1) of the Act, reads as follows:

‘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.’

[12] Section 39(6) of the Act, dealing with the powers of the tribunal, on the other hand, reads as follows:

- ‘(6) An appeal tribunal may –
- (a) confirm, set aside or amend the decision which is the subject of the appeal;
  - (b) make any order in connection therewith as it may think fit.’

[13] Put in a proper context, the question for the court to determine is whether the tribunal was at large, as it did, to call for fresh evidence and to conduct an *inspectio in loco*, as it did among other things. The applicants contend it did not have the power to do so and as a result, its decision must be set aside. The respondents, on the other hand, contend that the provisions of s 39(6) of the Act, are wide enough to enable or entitle the 2<sup>nd</sup> respondent to do what it did.

[14] Before I determine the scope and extent of the powers of the 2<sup>nd</sup> respondent, it is important that I remind myself pertinently, what the concept of an appeal entails. This exercise was undertaken with aplomb in the matter of *Mutharika and the Electoral Commission v Dr. Saulos Klaus Chilima and Dr. Lazarus McCarthy Chikweyai*<sup>1</sup>. Nyirenda CJ, writing for the majority of the court, carefully scrutinised what powers a court or tribunal has on matters brought to it on appeal.

[15] After considering the applicable rules, he discussed the principle of rehearing a case on appeal. I am not fond of quoting generously from judgments but I consider

---

<sup>1</sup> MSCA Constitutional Appeal No. 01 of 2020, delivered on 8 May 2020.

the importance of the excerpts from the judgment, hence the lengthy quotation below. The learned Chief Justice said:

‘What this means has been discussed in a number of instances by our courts and beyond. The role of an appellate court is not to retry a case, but to determine whether there was a reviewable error made by the Court below or trial court. The nature of an alleged error will determine whether and how an appellate court is permitted to interfere with the trial court’s decision. As to what, by way of rehearing connotes, was eloquently explained by this Court in *Steve Chingwalu and DHL International v Redson Chabuka and Hastings Magwarani* [2007] MLR 382 at 388 as follows:

“Finally, we bear in mind that an appeal to this Court is by way of rehearing which basically means that the appellate court considers the whole of the evidence given in the court below and the whole course of trial; it is as a general rule, a rehearing on the documents including a record of the evidence. The case of *Msemwe v City Motors Limited* 15 MLR 302, is to that effect. In the case of *Coghlan v Cumberland* (1898) 1Ch 704, cited by Counsel for the respondents, Lindsey MR, stated:

“Even where . . . the appeal turns on a question of fact, the court has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge, with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on the full consideration it comes to the conclusion that it is wrong.”

[16] The learned Chief Justice continued to reason as follows:

‘The common practice is that appellate courts interfere with decisions of trial courts on four types of errors: (i) error of law; error of fact; (iii) error of mixed fact and law; and (iv) error in exercising discretion.

On matters of law, an appellate court can reverse trial courts findings if the law was misapplied to the found facts. Questions of law are questions that deal with the scope, effect and application of a legal rule or test to be applied in determining the rights of the parties. These questions will be reviewed by appellate courts using the standard of review of “correctness”. That is to say, a trial court’s order must be correct in law. Where a legal error

can be demonstrated by an appellant, the appellate court is at liberty to replace the opinion of the trial judge with its own.

In contrast, questions of fact deal with what actually took place between the parties. These questions will call for the standard of review of “palpable and overriding error. This accords a high standard of deference towards findings of the trial judge. An appellate court may only intervene on questions of fact where the error is obvious and had an effect on the outcome of the case. Again it was put more appropriately in the *Chingwalu* case as follows at page 388-

“The position of the law regarding appeals involving issues of fact is that this Court is slow to interfere with the findings of fact made by a tribunal properly mandated to make decisions on disputes of facts, unless there exists some misdirection or misreception of evidence or unless the decisions are of such a nature that, having regard to the evidence, no reasonable man could make such a decision.”

In *Kenya Airports Authority v Mitu-Belle Welfare Society and 2 Others* [2016] eKLR, the Supreme Court of Kenya explained –

“In our consideration and determination of this appeal, we remind ourselves that there are issues of fact and points of law that have been before us. This Court, as an appellate court, will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judge has misdirected himself or acted on matters which he/she should not have taken into consideration and in doing so arrived at a wrong conclusion.” . . .’

Questions of mixed fact and law involve the application of a set of facts to a legal standard or principle. It requires a trial judge to determine the appropriate standard, which is a question of law, and apply the particular facts to that legal standard. The appropriate standard of review for questions of mixed fact and law falls somewhere on a sliding scale between correctness on one end and palpable and overriding error on the other.

Lastly, on the role of appellate courts in matters involving the exercise of discretion by courts below R.P. Kenan, in his book, “Standards of Review Employed by Appellate Courts” (Edmonton: Juriliber Limited, 1994) at 124-126 explains –

“One can lump the ‘discretion’ cases roughly into two sub-groups; the first are those cases involving the management of the trial and the pre-trial process; the second are those where the rule of law governing the case makes many factors relevant, and requires the decision-maker to weigh and balance them.”

Appellate courts are most likely reluctant to interfere with the exercise of a trial judge's discretion where the trial judge has incorrectly applied a legal principle or the decision is so clearly wrong that it amount to an injustice.'

[17] Although this matter deals with an appeal before a tribunal, I am of the considered view that the principles so ably propounded by the learned Chief Justice are useful and may serve as a proper guide as to what an appeal tribunal may and may not do in the course of rehearing, so to say, of an appeal that properly lies before it.

[18] Considering that the matter served on appeal, it is clear that the issue fell within one of the four types of matters the learned Chief Justice discussed above. It would appear that the matter was before the 2<sup>nd</sup> respondent as an appeal against a decision of the Omaheke Communal Land Board to refuse to reject his application for the recognition of existing communal land rights and for authorisation to retain his fence. This decision was taken on 28 August 2017. Dissatisfied with the decision, the 4<sup>th</sup> respondent appealed to the 2<sup>nd</sup> respondent, who found in the former's favour hence the appeal.

[19] The applicants allege that the 2<sup>nd</sup> respondent committed errors of law in the conduct of the proceedings before him. The first issue that I have noted, is that there is no record of the proceedings before the 2<sup>nd</sup> respondent. As such, it is not clear, outside what is recorded in the 2<sup>nd</sup> respondent's judgment, as to who were present, what material was presented, what evidence if any, was led and what submissions were made.

[20] This renders that the task of this court extremely difficult as the court is not placed in a situation where it can, from the record of proceedings, properly determine if the 2<sup>nd</sup> respondent was guilty, as alleged, of committing serious irregularities, including the procedure adopted. For this reason, it would seem to me that Mr. Muharukua is eminently correct in his submissions that this is a matter that ought to be returned to the 2<sup>nd</sup> respondent to compile a proper record which will enable this court to follow closely all the events that took place during the proceedings.

[21] It is only when that full and certified record of proceedings before the 2<sup>nd</sup> respondent, is before this court that the court can be properly placed to exercise its appellate powers one way or the other. To exercise these powers as it is, in a vacuum, may be a dangerous enterprise for the court to embark upon.

[22] In this regard, the bases for the appeal, would have been supported or controverted by the relevant portions of the record of proceedings. The fact that the parties have submitted a stated case, does not in any manner, shape or form, in my considered view, exonerate the decision-making body from filing a complete record of proceedings, from which the merits or demerits of the appeal, can be determined. For instance, if some evidence was led and it is agreed in the statement of agreed facts, the nature, extent and impact of the evidence led would have to be available to this court in assisting it to deal with the plausibility of the evidence received and how, if at all, it affected the outcome.

[23] The absence of the record of proceedings seriously and effectively hampers the court in the performance of its powers of review. It would therefor appear to me that an order the court may consider, in the premises, would be to remit the matter back to the 2<sup>nd</sup> respondent to compile and provide a full record of the proceedings before him.

[24] If that is not possible, as it might well be, it would appear to me that the court may also consider remitting the matter back to the 2<sup>nd</sup> respondent to deal with the dispute afresh, appreciating as he should, the centrality of the record of proceedings in the prosecution of an appeal. Its absence renders the appellate court a sitting duck as it were, totally unable to perform its review function. I will keep my options on the proper order to issue open until the last word has been spoken on the current dispute.

[25] I now turn to deal with the issues raised by the appellants as grounds for the appeal in so far as these, or some of them are borne out by the statement of agreed facts. It is a matter of consensus that the 2<sup>nd</sup> respondent for instance, allowed some evidence to be led and further called for an *inspectio in loco* to be conducted. In regard to the latter, there is no record whatsoever of what transpired during that

process – who was present, what was said, seen or pointed out, for the record and information particularly of an appellate court, in case a review is lodged, as has been the case.

[26] The Government respondents point out that the 2<sup>nd</sup> respondent found itself in a precarious position in which there was no proper record of the proceedings of the body appealed from. It was necessary, so the said respondents contended, to ‘use their own discretion, and in the best interests of justice, allow for (re) calling of witnesses evidence in an effort to clarify and supplement the factual issues as contained in the Communal Land Board record or otherwise.’<sup>2</sup>

[27] The GRN respondents further argued that the role and function of the 2<sup>nd</sup> respondent is investigatory/inquisitorial in nature. In this regard, operational framework and guidelines were formulated although not Gazetted, to guide the procedures to be followed. As the procedure to be followed in conducting the hearing, further contended the GRN respondents, is not prescribed in the Act, the 2<sup>nd</sup> respondent should be allowed, if the circumstances dictate, for it to perform investigative and inquisitorial functions.

[28] I do not agree with the respondents at all. It is not in keeping with the scheme of the Act to allow the 2<sup>nd</sup> respondent to exercise powers it does not, in terms of the enabling legislation have. When proper regard is had to s 37 of the Act, it becomes clear that the power of investigation of claims to existing rights, is vested, I dare say, exclusively in a board established by the Minister. Where that board, for any reason fails to properly perform its duties and its decision is taken on appeal to the 2<sup>nd</sup> respondent, it would be gravely wrong to require of the 2<sup>nd</sup> respondent, to leave his appellate seat and expect him to perform the functions of investigating the issues. It is not clear, in any event, whether he has the wherewithal, together with the skills necessary to conduct the requisite investigations. The legislation vests the power and duty to conduct investigations in another body altogether.

[29] The interests of justice, and the fact that the members of the board established in terms of s 37 are not trained in law and may not investigate matters properly for

---

<sup>2</sup> Para 16 of the GRN respondents’ heads of argument.

the 2<sup>nd</sup> respondent to be able to properly deal with them on the documents filed, can never be a good or proper reason to require the 2<sup>nd</sup> respondent to, in the absence of powers, commence with or flavour its functions with inquisitorial or investigative powers. It is not vested with those powers and it cannot arrogate upon itself those powers. This is so regardless of how noble the reason for doing so may be perceived to be.

[30] If there are any deficiencies with the board, including the lack of necessary skills and expertise, this must be drawn to the attention of the Minister so that appropriate remedial action can be taken. The lack of expertise can never, standing alone, or together with other factors, be a proper basis for the 2<sup>nd</sup> respondent to abdicate his appellate functions and reincarnate himself into an investigative body. The 2<sup>nd</sup> respondent is not allowed by law to take the bull by the horns as it were, and to perform the duties assigned to another body by law.

[31] It is clear, from reading s 39 of the Act, that the powers of the 2<sup>nd</sup> respondent, are limited to 'confirm, set aside or amend the decision which is the subject of the appeal'. It does not lie in the mouth of the 2<sup>nd</sup> respondent to justify incursion into other territory on the basis of necessity or other subjectively noble reason.

[32] It appears to me that the GRN respondents appear to contend that the use of the words 'make any other order in connection therewith as it may think' which occur in s 39(6)(b), are wide enough to enable the 2<sup>nd</sup> respondent to conduct the matter in the manner it did, including arrogating to itself the powers it does not have. In this, the said respondents are gravely wrong.

[33] To my understanding, the words 'make any other order' must not be taken literally to say the 2<sup>nd</sup> respondent has a *laissez-faire* to do literally anything it wants or considers convenient or appropriate. It must be remembered, for instance, that an appellate body does not have power to go beyond the record of proceedings. It has to be confined to that record. Where it considers the record to be deficient, it has no power to call evidence of its own motion as it lacks the powers at law to do so.



[34] Although this is unusual, there are instances in which legislation permits an appellate structure to hear or receive evidence additional evidence on appeal. Section 42(1) of The Veteran Act, Act No. 2 of 2008, and the regulations made thereunder, for instance, imbue the Appeal Board with power to consider documentary or oral evidence submitted or given to the Appeals Board with its permission and other information at its disposal. Furthermore, the Appeals Board 'may hear such evidence as may be necessary for the determination of the appeal and hear or receive oral or written submissions made by the parties to the appeal.'<sup>3</sup>

[35] It is beyond disputation that the Act does not have similar provisions to those in the Veteran Act. As such, the scope and powers of the 2<sup>nd</sup> respondent are limited those stated in the enactment. What is not permitted in the wording of the Act may not be done by the 2<sup>nd</sup> respondent, regardless of how convenient or praiseworthy it may subjectively appear to be.

[36] The residual power vested in the 2<sup>nd</sup> respondent to 'make any order in connection therewith' must be confined and read in context with the powers vested in the said tribunal. By adding the residual powers, the legislature understood that there may be cases where a need arises to give efficacy to the powers mentioned in s 39(6)(a). That power must be specifically used to render the order empowered by s 39(6)(a) efficacious and no more.

[37] In this regard, sight must not be lost of the fact that the wording employed by the legislature in s 39(6) (a) and (b), shows indubitably that these two subsections are connected and joined at the hip, as it were. The additional powers conferred in subsection (b) must be exercised 'in connection' with the powers in subsection (a). This appears clearly from the said provisions.

[38] For instance, there may be a need to stay certain actions that may undermine the efficacy of any decision made in terms of s 39(6). This 'additional power' in s 39(6)(b) must be read in line with the powers of the tribunal in terms of s 39. It does not permit the tribunal to literally do anything it wishes. Any exercise of the additional

---

<sup>3</sup> See *Kashe v Veterans Board* (HC-MD-CIV-APP-ATL-2019-00003) [2020] NAHCMD 535 (20 November 2020).

powers must be geared to giving full effect to its powers given in s 39(6)(a), it must be emphasised.

[39] I accordingly throw out the argument by the respondents in this regard, with both hands. The yearnings and prodding of convenience, efficacy and subjective grounds of necessity can never be the proper basis for crossing the legislative line of powers and exercising powers not granted to the 2<sup>nd</sup> respondent by law.

[40] Going back to the classification of appeal cases by Nyirenda CJ, it becomes apparent that the instant case is one where it is contended that there is an error of law. It is clear that the tribunal purported to exercise powers that the legislation does not give it. It went out of the bounds of the appeal processes to engage in other methods of fact-finding that it is not empowered by law to traverse. This renders the procedure followed by the 2<sup>nd</sup> respondent reviewable by this court.

[41] I can mention in passing, for instance, the expose on *res derelicta* and *res nullius* that the 2<sup>nd</sup> respondent so eloquently dealt with in his erudite judgment. There is unfortunately no indication whatsoever that there was any admissible evidence before him that placed the 4<sup>th</sup> respondent's case within the realms of the *res nullius and derelicta* as found by the 2<sup>nd</sup> respondent. Any conclusion of law in this regard, must be based on admissible evidence and proven facts, which the 2<sup>nd</sup> respondent is not entitled to introduce in evidence in a new process on appeal, as this is not allowed by law.

[42] I am accordingly of the considered view that it is not necessary, in the premises, to deal with each failure and crossing of the line by the 2<sup>nd</sup> respondent neatly as the applicants have done in their papers. It is apparent, as I said that the tribunal went well beyond the call and realms of appellate duty and conducted a trial of sorts and such is not permitted by law governing the process.

### Conclusion

[43] In view of what is stated above, I come to the conclusion, which I consider inevitable in the circumstances, that the applicants have made a fairly good case that

the 2<sup>nd</sup> respondent acted outside its remit in dealing with the appeal that served before him. For those reasons, the decision of the 2<sup>nd</sup> respondent cannot be allowed to stand. It is accordingly liable to be reviewed and set aside.

### Order

[44] In the premises, the following order commends itself as being appropriate in the circumstances:

1. The decision of the Second Respondent, the Appeal Tribunal, contained in its judgment dated 12 September 2018 is hereby reviewed and set aside.
2. There is no order as to costs.
3. The matter is removed from the roll and is regarded as finalised.

---

T. S. MASUKU  
Judge

APPEARANCES:

APPLICANTS:

C. Van Wyk  
Legal Assistance Centre

GOVERNMENT RESPONDENTS:

S. Kahengombe  
Of the Office Government Attorney

4<sup>TH</sup> RESPONDENT:

V. I. Muharukua  
Of Swaartbooï & Muharukua