



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

VARIED JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2021/00482

In the matter between:

ANDELINE MAURIHUNGIRIRE

APPLICANT

and

MINISTER OF AGRICULTURE, WATER

FIRST RESPONDENT

AND LAND REFORM

SECOND RESPONDENT

NAFTAL NENDONGO N.O.

**OTJOZONJUPA COMMUNAL
LAND BOARD**

THIRD RESPONDENT

KAMBAZEMBI TRADITIONAL AUTHORITY

FOURTH RESPONDENT

ETLA UAZENGISA

FIFTH RESPONDENT

Neutral citation: *Maurihungirire v Minister of Agriculture, Water and Land Reform* (HC-MD-CIV-MOT-REV-2021/00482) 117 [2024]
NAHCMD (15 March 2024)

Coram: CLAASEN J

Heard: 6 September 2023

Delivered: 15 March 2024

Flynote: Review application – Communal Land Reform Act, 5 of 2002 – Land Appeal Tribunal – Scope of appeal tribunal powers conferred to it by Section 39 of the Act – New evidence during the appeal hearing – New evidence *ultra vires* the provisions of the Act.

Summary: In this matter two women claim to have been married to the same husband. The review emanated from an appeal to the land appeal tribunal by the fifth respondent (the second wife). She was aggrieved by a decision by the communal land board to re-allocate the customary land right of the late husband, in terms of s 26(2)(a) of the Act, to the applicant herein (the first wife). The appeal tribunal delivered its ruling on 6 September 2021 and the decision regarded the fifth respondent as the surviving spouse.

The applicant applied for orders *inter alia* to review and set aside the decision of the Lands Appeal Tribunal made on 6 September 2021, wherein it ordered the Communal Land Board to cause the disputed land to be transferred to the fifth respondent herein and for an order that the disputed customary land right be transferred to the applicant. The applicant further sought a declaratory order that the customary union between the late husband of the applicant and the fifth respondent be declared null and void.

Held – The applicant has come to court for judicial review of the decision made by the appeal tribunal about the customary land dispute. The fifth respondent, whose customary union is sought to be annulled, in this fashion, is not an administrative official or body.

Held further – The decision making powers of the appeal tribunal are not subjected to that of the Minister, but it was created by statute to function as an independent administrative body. It is the tribunal's decision that forms the subject matter of this review. If the Chairperson was inclined to oppose the matter he should have done so in his own right.

Held further– Section 39(6) of the Act defines the scope of the appeal tribunal and it is circumscribed therein. Section 39(6)(b) of the Act does not allow the appellate body do go beyond a record of the authority *a quo*.

Held further – The appeal tribunal had no power to receive further evidence during the hearing and it acted *ultra vires* the enabling legislation in that regard. The decision stands to be reviewed and set aside as article 18 of the Namibian Constitution requires that administrative bodies and officials must comply with the requirements imposed on them by any relevant legislation.

ORDER

1. The decision of the land appeal tribunal dated 6 September 2021 insofar as it ordered the Otjozonjupa Communal Land Board to register the disputed customary land right into the fifth respondent's name is hereby reviewed and set aside.
2. The Otjozonjupa Communal Land Board is directed to register the said customary land right held by the applicant's late husband Ebson Maurihungirire under certificate number OTCLB-CL0002507 in the name of the applicant herein.
3. The first, second and fifth respondents are directed to pay the cost of the application, jointly and severally, the one paying the other to be absolved, such cost to be for one instructing and one instructed counsel.
4. The matter is regarded as finalised and it is removed from the roll.

JUDGMENT

CLAASEN J:

The judgment of 15 March 2024 is varied in terms of Rule 103(c) of the Rules of the High Court to clear up the ambiguity in para 11 and patent errors in para

14 and para 16 wherein the fifth respondent was referred to as the fifth applicant.

Introduction

[1] This is an application to review the decision made on 6 September 2021 by the second respondent, (hereinafter referred to as the tribunal) in his capacity as the Chairperson of the Land Appeal Tribunal. The decision relates to a communal land rights dispute between the applicant and the fifth respondent.

Parties

[2] The applicant is a disabled and elderly female residing at Ozongue Village in the Kambazembi Traditional Area, Otjozonjupa Region in the Grootfontein district. She was represented by Ms Kauta in the hearing.

[3] The first respondent is the Minister of Agriculture, Water and Land Reform Lands and Reform (hereinafter 'the Minister'). He was cited in his official capacity as the Minister responsible for the overall management and implementation of the Communal Land Reform Act 5 of 2002, (the Act) and the establishment of the second respondent.

[4] The second respondent is the Chairperson of the tribunal, a statutory appeal body appointed and established in terms of s 39(2) read with ss (3) of the Act. The first and second respondent opposed the matter and were represented by Mr Kauari during the proceedings.

[5] The third respondent is Otjozondjupa Communal Land Board, a body duly established in terms of s 2 of the Act for the Otjozonjupa Region. It will be referred to as the 'CLB'. It has its principal address at Dr Frans Indongo Street, Otjiwarongo.

[6] The fourth respondent is Kambazembi 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'. It has its principal address at Chief Tjokuua Street Okakarara Otjozonjupa Region. No relief is sought against this respondent.

[7] The fifth respondent is Ms Etna Uazengisa an adult female residing at Otjituuo Okatjoruu, Okakarara District Otjozondupa region, alternatively Ende Village, Kamabzemi Traditional Area in the Grootfontein District. She opposed the matter and was represented by Ms Kemp during the proceedings.

Background:

[8] This court is seized with a purported polygynous marriage wherein two women claim to have been married to the same husband. The applicant relies on a marriage in terms of customary law as well as civil law, whereas the fifth respondent relies on a purported customary union. The husband passed away on 28 May 2019. That led to a relentless dispute about the customary land right at Ozongue registered in his name for which the parties approached several forums.

[9] The fourth respondent conducted a hearing into the dispute and decided that the applicant herein should get the homestead. The fourth respondent came to that conclusion on the basis of Ovaherereo customary law that the first wife is the senior wife (first marriage) and is regarded as the surviving spouse. She remains in the main house and takes control of the property. The junior wife (second marriage) normally stays at a dwelling constructed on the left side of the main house is regarded as a dependent of the first wife. It issued a written decision on 4 December 2019 in accordance with that view. It also gave written consent to the effect that the said customary land right was reallocated to the surviving spouse (the applicant herein) in line with s 26(2)(a) of the Act.

[10] The applicant submitted her application to the third respondent for ratification of the decision of the fourth respondent. On 26 October 2020 the

third respondent, after having conducted an investigation into the matter, also concluded that the applicant is the surviving spouse to inherit the said customary land right of the late husband.

[11] Having learnt about that decision of the CLB the fifth respondent was aggrieved by the outcome. She lodged an appeal against the decision of the CLB and was successful as the tribunal reversed the decisions of the third and the fourth respondent. The tribunal gave orders to the effect that the third and fourth respondents must cause the disputed customary land right to be registered or transferred in the name of the fifth respondent. That triggered the applicant herein to launch this application to court to have the decision of the tribunal reviewed and set aside.

Relief sought:

[12] In its Notice of Motion, the applicant called upon the first and second respondents to show cause why:

1. The decision by Chairperson of the Lands Appeal Tribunal dated 6th September 2021 wherein it ordered the Otjozonjupa Communal Land Board to register the customary land rights which was held by the applicant's late husband Ebson Mauhiringirire under certificate of customary land OTCLB-CL0002507 into the fifth respondent's name should not be reviewed, corrected and set aside;
2. The customary union between the late Ebson Mauhiringirire and the fifth respondent on 21 June 1998 should not be declared null and void for want of non-compliance with the Native Administration Proclamation 15 of 1928;
3. They should not be directed to transfer and register the customary land rights which was held by the applicant's late husband Ebson Mauhiringirire under certificate of customary land OTCLB-CL0002507 to the applicant in terms of section 26(2)(a) of the Act and;

4. Ordering the Respondent(s) who oppose the matter to pay the costs of this application, jointly and severally, the one pay the other to be absolved and such costs being the costs of two instructing and one instructed counsel.

The applicant's version

[13] The applicant's case is that she is the first wife of the late Mr Ebson Mauhiringirire whom she married in terms of the Ovaherero customs in 1963. The couple also concluded a civil marriage on 10 June 1991.

[14] The applicant deposed that they moved from their parents' homestead and stayed at various villages as they were always scouting for better grazing land. She was a homemaker, taking care of the children and the cattle, whereas her husband was employed by the Government. The applicant asserts that the fifth respondent was not a part of their lives whilst they were moving between the different villages.

[15] She deposed that as from the early 1980's, the couple settled at Ozongue Otjituue. That is the birthplace of their six children and the family resided there for more than 40 years. Her husband obtained a certificate number OTCLB-CL0002507 to the effect that he is the holder of a customary land right in respect of 13.3 hectares of land, on which their main homestead is situated. The couple had cattle at Okatjiparanga and moved back and forth between the cattle-post and the main homestead.

[16] After her husband's passing in 2019, the fifth respondent relocated and moved into the applicant's main house. That happened without the consent of the applicant and the fifth respondent and her group refused to vacate the house despite being requested to do so. The applicant deposed that prior to that the fifth respondent resided at her own homestead situated at Ende Village, and owns a second communal land property at Okatjotuu village.

[17] It is the applicant's case that the tribunal acted *ultra vires* the empowering legislation and she proceeded to allege the manner in which the tribunal acted unlawfully in no less than 14 ways. The professed grounds are not a model of clarity with an overlap in some of them and some take more after grounds of appeal instead of being grounds of judicial review.

[18] It is an opportune time to reiterate that the onus rest on an applicant for review to satisfy the court that cogent and relevant grounds are placed before the court to review the conduct complained of. In *Nolte v The Minister of Environment, Forestry and Tourism*¹ Parker J explained that:

‘Good grounds are grounds anchored in the common law² and article 18 of the Namibian Constitution which embraces the common law principles³ and whose object ‘is to ensure that acts and decisions of administrative bodies and officials are lawful, in the sense that they are fair and reasonable’.⁴

[19] Had the grounds not been so longwinded I would have reproduced them, instead I will summarise them to the extent that it can be gleaned what they depict. Firstly, there was non-compliance with the legislation, Regulation 25 in particular, as the appeal was filed out of time. The applicant also alleges that the tribunal acted *ultra vires* its powers by receiving evidence during the hearing, by treating the hearing as ‘a trial *de novo*’ and by conducting an investigation whilst, in law, the appeal tribunal does not have such powers.

[20] Furthermore, that the tribunal failed to apply its mind and committed an error in law by disregarding the applicable Ovaherero tradition that dictated that the first wife is considered the surviving spouse and the second is a dependent of the first wife. The tribunal committed errors of fact by holding that the

¹ *Nolte v The Minister of Environment, Forestry and Tourism* (HC-MD-CIV-MOT-GEN-2022/00116) [2023] NAHCMD 361 (28 JUNE 2023) para 5.

² *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS III, applied by the court in, for example, *Federal Convention of Namibia v Speaker, National Assembly of Namibia and Others* 1991 NR 69 (HC); and *New Era Investment (Pty) Ltd v Roads Authority and Others* footnote 1.

³ *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC) at 265e-f.

⁴ *Minister of Mines and Energy v Petroneft International* 2012 (2) NR 781 (SC) para 33.

applicant did not reside on the disputed land before or after the death of the deceased and that the fifth respondent stayed there for more than 20 years. The applicant also contends that the tribunal failed to look or consider the record of the CLB and also failed to provide the record to the parties.

Respondents' cases

[21] The first respondent filed an answering affidavit on behalf of the second respondent and the latter filed a confirmatory affidavit. They essentially opposed each and every ground and raised a *point in limine*. I will return to this answering affidavit shortly.

[22] The fifth respondent generally denies the grounds of review and put the applicant to the proof thereof. She also pleaded that she was unable to dispute the migration history of the applicant but denies the applicant's contention that she resided with her late husband at the homestead until his passing and to date. According to her, the Tribunal has the powers to overturn the decision of the Communal Land Board and may make any appropriate orders for the adjudication of the matter, including hearing new evidence.

Preliminary issue by applicant

[23] Upon observing that the Minister filed an answering affidavit for the first and second respondent, the applicant signaled that as an irregularity in her replying affidavit. In my view it should be dealt with upfront.

[24] The applicant contends that the second respondent is an independent quasi-judicial body appointed by the Minister. As such, the Chairperson should have formulated the position on behalf of the tribunal if he wanted to oppose the matter. Instead, the Minister deposed to information about the hearing by the tribunal which he received second hand, to set out the opposition. The

applicant also referred to the case of *Esau v Director-General: Anti-Corruption Commission*⁵ wherein it was stated it is not advisable that judicial officers should join issue in matters wherein their decisions or orders are taken up on review.

[25] The *Esau*⁶ matter is distinguishable as it concerns a search warrant issued by a Magistrate, whereas the impugned decision herein is that of an administrative body. This body was created by an Act of Parliament⁷ with its own independent powers and functions. Section 39(6) of the Act provides that:

‘(a) an appeal tribunal may 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’.

[26] Undoubtedly, the decision making powers of the appeal tribunal are not subjected to that of the Minister, but the tribunal was created by statute to function as an independent administrative body. In this instance, there was no reason why the Minister, who has no personal knowledge of what transpired in the appeal hearing, filed the opposing affidavit on behalf of the Chairperson of the tribunal. It is the tribunal's decision that forms the subject matter of this administrative review. I hold the view that in this circumstances it was wrong for the Minister to have deposed to an affidavit for the Chairperson. If the Chairperson was inclined to oppose this review on behalf of the tribunal, he should have done so in his own right. Given that there is no such affidavit by the Chairperson, I will disregard the affidavit deposed to by the Minister on behalf of the Chairperson.

[27] Although the fifth respondent opposed the matter, she did not take the decision that is challenged herein. She is not the decision maker and cannot answer for the irregularities allegedly committed by the tribunal and its decision. In my understanding she is cited purely because she has an interest in the outcome of the matter.

⁵ *Esau v Director-General: Anti-Corruption Commission* 2020 (1) NR 123.

⁶ *Ibid.*

⁷ Section 39 of the Communal Land Reform Act, 5 of 2002.

[28] At this stage it is apposite to refer to the prayer pertaining to the annulment of the fifth respondent's purported customary union. It is strange to seek such relief in this proceedings. I say so because in this matter the applicant has come to court for judicial review of the decision made by the appeal tribunal about the customary land dispute. The fifth respondent, whose customary union is sought to be annulled, in this fashion, is not an administrative official or body. As such this court will not entertain that in this administrative review. Although there may be a remedy for annulment of the customary marriage, it does not lie in the instant proceedings.

[29] In order to provide context to the matter I briefly refer to the system of allocation of customary land rights as provided for in the Act. The primary power to assign customary land rights in a communal area of a traditional community vests, firstly in the Chief of that traditional community; or where the Chief so determines, in the Traditional Authority of that traditional community.⁸ The Chief or Traditional Authority has powers to investigate and consult people about the application and hold a hearing if there are objections to the application.⁹

[30] Section 26(2) of the Act stipulates that upon the death of a holder of a customary land right, the right reverts back to the Chief or the Traditional Authority for re-allocation to a surviving spouse or a child of the deceased person. This indicates that a surviving spouse is first in line for re-allocation and that traditional authorities are expected to respect the widow's (or widower's) right to re-allocation of the customary land on the death of his or her spouse.

[31] Before such allocation is valid in law it has to be ratified by the Communal Land Board of that area¹⁰, which should register the customary land right and issue a certificate to that effect, if it is satisfied that the allocation was properly made. If that is not the case the Communal Land Board must refuse

⁸ Section 20 of the Communal Land Reform Act 5 of 2002.

⁹ Section 22(3) of the Communal Land Reform Act 5 of 2002.

¹⁰ Section 24 of the Communal Land Reform Act 5 of 2002.

the allocation. The Board may even refer a matter back to the Chief or Traditional Authority to decide the matter again. Once a party is aggrieved by a decision of a Chief, Traditional authority or a Communal Land Board, he or she may lodge an appeal with the Permanent Secretary within 30 days of the decision or within 30 days of becoming aware of the decision.¹¹

[32] In returning to the grounds to assess if there is any merit I do not regard it necessary to traverse all of them. I will start with the complaint that the tribunal acted *ultra vires* its powers by receiving evidence during the hearing. The applicant maintains that the second respondent conducted a trial *de novo* and did not confine itself to the record or material that was before the decision maker. In that regard her counsel referred the court to the supplementary record that was filed. She pointed out certain documents that were handed up by the representative of the fifth respondent namely a water account and inventories of ear-tag of the animals of the applicant. She argued that it was done to sway the Tribunal to conclude that the applicant resided at Okatjiparanga. She submitted that their strategy worked as it is evident from the tribunal's judgment that they made their decision on the basis of what they concluded to be the respective residences of the two women.

[33] The pertinent issue revolves around the depth and breadth of the powers of the appeal tribunal i.e. whether it has wide or limited powers. Before dealing with whether the tribunal had the power to receive new evidence it is necessary to consider whether further evidence (that did not feature before the CLB) was indeed received by the tribunal. The record confirms the submission by the applicant's council in that regard. The record shows that Mr Uazekuani, the spokesperson for the fifth respondent said to the tribunal '*We have attached proof of that stock band and NamWater bills shows that Ms Andeline is a registered resident of Okatjiparanga*'¹² (sic). Additionally, it appears from the record that the tribunal embarked on hearing wide ranging submissions regarding the merits from all the parties instead of it being confined to specific 'grounds' of appeal against the decision by the CLB when it decided that the applicant should be awarded the title to the disputed customary land right.

¹¹ Section 39(1) of the Communal Land Reform Act 5 of 2002.

¹² Page 1 of Supplementary record as reconstructed by M H Muhongo an appeal tribunal member.

[34] The general premise is that an ‘ordinary’ appeal is a rehearing on the merits but it is limited to the evidence or information on which the decision under appeal was given. That means that new or further evidence is not done in the ordinary course and a party that is desirous of that has to apply to court for it.

[35] Baxter in his authoritative work *Administrative Law* (1984) 262, writes that the scope of the appeal may often be deduced from the procedural powers conferred upon the appellate tribunal. Thus, where a statute confers identical investigative and evidential powers upon the appellate body as are conferred upon the authority *a quo*, the inference that wide appellate jurisdiction has been conferred is strong. These powers enable the appellate tribunal to conduct a full hearing *de novo* if it so wishes, and this facilitates the broadest decision making possible.

[36] Section 39(6) of the Act deals with the scope and powers of the tribunal herein. I have set out the content thereof earlier. In *Wildlife Ranching Namibia v Minister of Environment and Tourism*¹³ it was stated that it is trite that the intention of the Legislature can be gathered from the words of the particular legislation only. In reading the applicable provision it does not appear to me that the legislature contemplated appeal powers within the fullest sense. The scope and powers of the tribunal is circumscribed and it does not include the power to hear new evidence. It is a mistaken notion that to ‘make any order in connection therewith’ in s 39(6)(b) allows the appellate body do go beyond a record of the authority *a quo*. I can do no better than to refer to what had been said by Masuku J in *Ngaujake v Minister of Land Reform*¹⁴ which involved the same issue at para 33:

‘To my understanding, the words ‘make any other order’ must not be taken literally to say the 2nd respondent has a *laissez-faire* to do literally anything it wants or

¹³ *Wildlife Ranching Namibia v Minister of Environment and Tourism* (A86/2016)[2016] NAHCMD 110 (13 April 2016).

¹⁴ *Ngaujake v Minister of Land Reform* (HC-MD-CIV-REV-2018/00426) [2021] NAHCMD (11 February 2021).

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.

[37] In subsequent paragraphs the Masuku J explained it as follows:

‘ [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 2nd respondent are limited those stated in the enactment. What is not permitted in the wording of the Act may not be done by the 2nd respondent, regardless of how convenient or praiseworthy it may subjectively appear to be.

[36] The residual power vested in the 2nd 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.’

[38] It leaves no doubt that the tribunal had no power to receive further evidence and go as wide as it did during the hearing. By doing so it acted *ultra vires* the enabling legislation. The decision stands to be reviewed as article 18 of the Namibian Constitution requires that administrative bodies and officials must ‘comply with the requirements imposed by any relevant legislation,’ which did not happen in this case.

[39] Consequently, the applicant is successful insofar as it seeks to set aside the decision of the tribunal dated 6 September 2021 wherein it ordered the Otjozonjupa Communal Land Board to register the disputed customary land into the fifth respondent’s name and the said right to be registered in the name of the applicant herein.

[40] The applicant prayed for cost of two instructing and one instructed counsel, but having considered the matter I do not regard it appropriate to give cost for two instructing counsel.

[41] In the premise I find the following order appropriate in the circumstances:

1. The decision of the land appeal tribunal dated 6 September 2021 insofar as it ordered the Otjozonjupa Communal Land Board to register the disputed customary land right into the fifth respondent's name is hereby reviewed and set aside.
2. The Otjozonjupa Communal Land Board is directed to register the said customary land right held by the applicant's late husband Ebson Maurihungirire under certificate number OTCLB-CL0002507 in the name of the applicant herein.
3. The first, second and fifth respondents are directed to pay the cost of the application, jointly and severally, the one paying the other to be absolved, such cost to be for one instructing and one instructed counsel.
4. The matter is regarded as finalised and it is removed from the roll.

C CLAASEN

Judge

APPEARANCES:

APPLICANT:

V KAUTA

Instructed by Sisa Namandje & Co Inc,

Windhoek

FIRST and SECOND

RESPONDENTS:

N KAUARI

Instructed by Office of the Government Attorney,

Windhoek

FIFTH RESPONDENT:

M KEMP

Of Metcalfe Beukes Attorneys