



**REPORTABLE**

CASE NO'S: SA 44/2019  
SA 18/2020

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**JOSIA JOSEPH  
JOSEPH ANTONIO  
OIVA JOSEPH**

**First Appellant  
Second Appellant  
Third Appellant**

and

**MATHEUS JOSEPH**

**Respondent**

AND

**MATHEUS JOSEPH**

**Appellant**

and

**JOSIA JOSEPH  
JOSEPH ANTONIO  
OIVA JOSEPH**

**First Respondent  
Second Respondent  
Third Respondent**

**Coram:** DAMASEB DCJ, MAINGA JA and FRANK AJA

**Heard:** 26 June 2020

**Delivered:** 30 July 2020

**Summary:** The plaintiff instituted an action against the defendants in the High Court for an eviction order from a land that he has the right to occupy pursuant to a customary land right recognised in terms of s 28 of the Communal Land Reform Act 5 of 2002 ('the Act'). The defendants raised a special plea. They raised two defences: (a) with reference to s 43 of the Act and regulation 35, the defendants claimed that the plaintiff did not have *locus standi* to institute the claim against them and (b) on the merits, a defence that necessary and useful improvements had been made to the land in question by the defendants to the value of N\$800 000 and that until payment in this amount had been made by the plaintiff, no eviction could take place (in other words the defendants aver they are entitled to exercise a retention lien pending payment for the improvements). The defendants filed a counterclaim against the plaintiff. They claimed for the N\$800 000 they alleged was spent to make improvements on the land in question. Plaintiff defended the counterclaim by claiming that the defendants are precluded from claiming for the alleged improvements by virtue of s 40.

The court *a quo* upheld defendants' special plea relating to plaintiff's lack of *locus standi* as he was not a Chief nor did he act for the Traditional Authority. Plaintiff's claim was thus dismissed. Likewise, in respect of the counterclaim, the court *a quo* upheld the plaintiff's point that the defendants were not entitled to compensation. The result was that both the claim and counterclaim were dismissed with costs.

The court *a quo* referred to High Court cases that dealt with customary law land rights preceding this one – ie in *Kanguatjivi v Kanguatjivi*, the issue *locus standi* was not questioned nor was s 43 of the Act or reg 35 raised by the defendant. The court never considered the impact of these legislative instruments. The decision in the *Kanguatjivi* matter was thus *per incuriam* and not much relevance to its decision was based on the impact of the mentioned legislation/regulation. In *Ndevahoma v Shimwooshili & others*, the court found that the plaintiff in that case lacked *locus standi* to evict the defendant. The court based its findings on two reasons: (a) that an ejection order can only be granted to an owner of the property and (b) that s 43 of the Act limits such

proceedings for eviction to Chief, Traditional Authorities or the Land Boards. Although the court *a quo* referred to both decisions, it followed the reasoning in the *Ndevahoma* case in its decision.

This court must determine the following issues: whether the plaintiff has the *locus standi* to institute eviction proceedings against the defendants; how the applicable sections of the Act are to be interpreted and whether the defendants can exercise a retention lien and claim for improvements made on the land?

In the context of the Act, it is clear and just as an important objective that, what was intended was to provide holders of customary land rights security of tenure and by way of registration, a public register of their title is kept so as to avoid any confusion as to their rights. Common law provides a vindicatory action to a possessor, the only way to interpret s 43 of the Act so as to do away with this common law right is to insert the word 'only' in front of s 43(2) to make it read 'only a Chief or a Traditional Authority or the Land Board concerned' may evict a person who occupies land without it being allocated to such person. Whereas the Act vests the relevant Chief, Traditional Authority or the Land Board with *locus standi* as the statutory appointed administrators of communal land to evict persons who occupy land not allocated to them, it does not mean that other persons who have the right to evict such persons are no longer vested with such a right.

*Held that*, the plain meaning of s 43 does not give the Chief, Traditional Authority or the Land Board the sole right to evict persons from land not allocated to them. The only change to the common law is that it gives the Chief, Traditional Authorities and the Land Board *locus standi* to bring eviction proceedings in respect of land they are neither the owners nor the possessors of. As mentioned, there are other persons who may have such rights under common law and there is no indication in the Act that the intention was to abolish their common law rights.

*Held that*, to grant a person a right which is registered and then say that such person cannot personally protect that right seems to be an absurdity.

*Held that*, to make the right dependent on the decision of a functionary is to water down the right to such an extent that it goes against the grain of the Act which seeks to establish a register of right holders with the concomitant security of tenure.

*Held that*, s 43 of the Act does not prevent a person who has a right to communal land allocated to him or her from protecting such right through the use of a vindicatory action available to possessors under common law.

*Held that*, reg 35, criminalises conduct that is supposedly contrary to s 43 of the Act (which means that the institution of eviction proceedings by the plaintiff may accordingly constitute a criminal offence) and same is invalid as it creates an offence contrary to the Act. As found above, s 43 does not prevent persons who hold recognised customary law land rights from launching eviction proceedings against occupiers of their allotments. Regulation 35 creates an offence where there is no offence in the Act.

*Held that*, reg 35 is *ultra vires* the provisions of the Act on the basis of this interpretation and is declared invalid.

*It is held that*, the plaintiff has *locus standi* to seek eviction of the defendants from the property he possesses pursuant to the common law and that the Act does not prohibit this. The decisions in the *Ndevahoma* case and in the court *a quo* were wrong on this issue.

Defendants resisted the eviction claim in their plea based on the right to retain the property until they are compensated an amount of N\$800 000 for necessary and useful improvements they allegedly made to the land. Plaintiff pleaded that the defendants are precluded by s 40 of the Act from claiming such compensation – and

also denied in the plea to the counterclaim that the alleged improvements had been made.

This reliance on s 40 of the Act is clearly a legal issue which could be determinative of the defendants' claim if it was decided against the defendants. The court *a quo* was thus entitled to deal with it separately from the merits pursuant to the High Court Rule 63(6) which provides for directives to hear issues separately where this is convenient. In fact an exception should have been taken on this basis as it is purely a legal question.

The position in s 40 reiterates the position with regard to improvements in respect of communal land that existed under the Bantu Areas Land Regulations No. R 188 of 1969 prior to the promulgation of the Act. Under s 40, improvements cannot be claimed from the Chief, Traditional Authority, the Land Board or the State. Compensation is thus excluded from the State or any of the statutory functionaries who act to execute the State policy as contemplated in the Act. Does this mean improvements can be claimed from the holder of the right as it is submitted by the legal practitioner for the defendants?

With regard to the retention lien and claim for improvements, the court held that the principle of accession provides that the improvements become part of the land and hence the property of the land owner. This is one of the original modes of acquisition of ownership in accordance with the *maxim superficies solo cedit*. Thus, where a house or other structure is built or affixed to land it becomes part of the land and hence the owner of the land becomes the owner of such building or structure according to the doctrine of *inaedificatio*. Thus, in the present context, the State becomes the owner of such improvements on communal land *ex lege* by virtue of the doctrine of *inaedificatio*.

*Held that*, on the pleadings, there is no basis in law to allow the defendants' claim for the improvements they allegedly made to the property which forms the subject matter of the plaintiff's customary rights.

*Held that*, the court *a quo* erred by relying on s 40 to decide the matter against the defendants as s 40 finds no application – the counterclaim was not directed at the Chief, Traditional Authority, the relevant Land Board or the State.

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## APPEAL JUDGMENT

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FRANK AJA (DAMASEB DCJ and MAINGA JA concurring):

### Introduction

[1] Matheus Joseph (as plaintiff) instituted an action against the respondents (as defendants) in the High Court to evict them from land that he has the right to occupy pursuant to a customary land right recognised in terms of s 28 of the Communal Land Reform Act 5 of 2002 ('the Act').

[2] In a special plea, a defence is raised that the plaintiff does not have *locus standi* to institute the claim with reference to, *inter alia*, s 43 of the Act. On the merits, one of the defences raised is that, necessary and useful improvements had been made to the land in question by the defendants to the value of N\$800 000 and that until payment in this amount had been made by the plaintiff, no eviction could take

place. In other words, the defendants aver they are entitled to exercise a retention lien pending payment for the improvements.

[3] In a counterclaim, the defendants claim the N\$800 000 allegedly spent on the mentioned improvements. In defence to the counterclaim, one of the defences raised is that the defendants are precluded from claiming for the alleged improvements by virtue of s 40 of the Act.

[4] Section 43 of the Act which deals with the unlawful occupation of communal land reads as follows:

'(1) No person may occupy or use for any purpose any communal land other than under a right acquired in accordance with the provisions of this Act . . . .

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

[5] Regulation 35 of the relevant regulations<sup>1</sup> deals with eviction of persons occupying communal land and reads as follows:

'Any person other than a Chief, a Traditional Authority or a board who evicts any person occupying communal land from communal land which he or she legally occupies, is guilty of an offence.'

[6] Section 40 of the Act deals with compensation for improvements on traditional land and s 40(1)(a) reads as follows:

<sup>1</sup> Regulations made in terms s 45 of the Communal Land Reform Act 5 of 2002, GN 37, GG 2926, 1 March 2003.

'(1) No person –

- (a) has any claim against a Chief, a Traditional Authority, a board or the State for compensation in respect of any improvement effected by him or her or any other person on land in respect of which such person holds or held a customary land right or a right of leasehold under this Act, including a right referred to in section 28(1) or 35(1) . . . .'

[7] The court *a quo* directed that the questions relating to the effect of the sections of the Act pleaded by the parties be dealt with upfront as the decisions on these aspects could have the effect of disposing of both the claim and counterclaim without the need for other evidence. As it will become apparent this is exactly what happened.

[8] The court *a quo* upheld the point relating to the lack of *locus standi* of the plaintiff as he was not a Chief nor did he act for the Traditional Authority. The claim was thus dismissed. Likewise, in respect of the counterclaim, the point that defendants were not entitled to compensation was upheld. The result was that both the claim and counterclaim were dismissed with costs.

[9] This led to two appeals. One from the plaintiff (SA 18/2020) against the dismissal of his claim and one from the defendants (SA 44/2019) against the dismissal of the counterclaim. The reasons for the two case numbers are explained below.



Condonation application

[10] Plaintiff, being dissatisfied with the dismissal of his claim on the basis that he lacked *locus standi* approached the court *a quo* for leave to appeal. The court *a quo* correctly struck the application from the roll as leave was not needed as the effect of the judgment meant the matter had been finally disposed of as far as the plaintiff's claim was concerned and hence he could appeal to this court as of right.

[11] So as to not run out of time, the defendants in the meantime noted an appeal against the dismissal of the counterclaim which, as it was done timeously, was allocated a case number, namely SA 44/2019.

[12] Subsequent to the leave to appeal application being struck from the roll, the plaintiff filed a petition to this court to be given leave to appeal. This court granted his application subject to seeking condonation for the late filing of the appeal. This process caused a new case number (SA 18/2020) to be allocated to the plaintiff's intended appeal.

[13] It goes without saying that the wrong understanding of the legal practitioner as to the law which caused an unnecessary application for leave to appeal played a part in the appeal not being instituted timeously. Furthermore, the process to finalise the petition to this court had its own challenges. The plaintiff is a semi-literate person who resides on the land in question in a remote rural location. To explain the legal processes, to obtain instructions from him and to arrange for the signing of

documents took longer than usual. It is however clear that the plaintiff was at all times desirous of appealing the decision of the High Court which made no sense to him.

[14] I do not intend to reiterate the normal factors that this court considers in adjudicating condonation applications which can be gleaned from numerous decisions of this court.<sup>2</sup> These factors are simply indications of how the court exercises its general discretion to condone non-compliance with its rules. Apart from the fact that the late filing of the appeal was caused by the factors already mentioned, the plaintiff at all times desired to appeal the matter and the condonation application is not opposed. These factors favour the granting of condonation. Furthermore, the prospects of success on appeal cannot be described as totally lacking as plaintiff has a clearly arguable case to make on appeal.

[15] However, the decisive factor in my view is the fact that the matter is of great public importance. Thus, the interpretation of the sections in the Act which is the subject matter of both appeals will not only be relevant to the dispute between the parties in these appeals, but will be relevant to literally thousands of people in this country who occupy land pursuant to customary land rights granted to them in terms of the Act.

[16] The application for condonation and reinstatement of the appeal is thus granted.

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<sup>2</sup> See, eg *Telecom Namibia Ltd v Nangolo & others* 2015 (2) NR 510 (SC), *Felisberto v Meyer* (SA 33/2014) [2017] NASC 11 (12 April 2017), *Metropolitan Namibia v Nangolo* (CA 03/2015) [2017] NAHCNLD 02 (30 January 2017) and *Minister of Health and Social Services v Amakali* 2019 (1) NR 262 (SC).

Proceedings and judgment *a quo*

[17] The court *a quo* directed that the special plea raised by the defendants as to the plaintiff's standing be dealt with separately as it had the potential to be determinative of the plaintiff's claim for eviction. The court *a quo* also held that the 'special plea' to the counterclaim is that s 40 of the Act precluded the defendants from instituting a claim for necessary and useful improvements allegedly effected on the property likewise be dealt with separately presumably because, if the Act indeed precluded the defendants from claiming for the alleged improvements, that would be the end of the counterclaim and the end of their defence that they had a lien over the property and hence could not be evicted.

[18] The two issues identified by the court *a quo* mentioned above were argued without any evidence being led and the court *a quo* upheld both special pleas. It should be mentioned that the issue pertaining to the Act precluding claims for improvements was not raised as a special plea, but was contained in the plea on the merits to the counterclaim. The legal practitioner for the defendants made submissions in this regard which I deal with below.

[19] I deal with the two aspects relevant to this appeal below *seriatim*. As both appeals emanate from the same case before the High Court and also from the same judgment, they are dealt with together in this judgment on appeal. So as to avoid confusion I shall, as I have above, continue to refer to Matheus Joseph as the plaintiff and Josia Joseph, Joseph Antonio and Oiva Joseph as the defendants.

### Judgments of the High Court

[20] In *Kanguatjivi v Kanguatjivi*<sup>3</sup> the plaintiff was a holder of a registered customary land right pursuant to the provisions of the Act. She sought an eviction order against the defendant who was a son of her late husband. Unengu AJ granted an eviction order on the basis that the defendant could not show that he had a better title than plaintiff to the land in question. As will become evident from what is stated below, the common law was applied.

[21] The *locus standi* of the plaintiff in the *Kanguatjivi* case was not questioned nor was s 43 of the Act or reg 35 raised by the defendant. The court thus never considered the impact of these legislative instruments (if any) on the case before it. As far as the court *a quo* in the present appeal is concerned the decision of the court in the *Kanguatjivi* case was thus *per incuriam* and not of much relevance to its decision as it was based on the impact of the mentioned legislation or regulation.

[22] In *Ndevahoma v Shimwooshili & others*<sup>4</sup> the plaintiff was in possession of communal land pursuant to s 33 of the Act.<sup>5</sup> He sought to evict a family member from this land. The plaintiff alleged that this family member occupied a part of his leasehold land in terms of an agreement between them and that he had terminated this agreement because of the family member's non-adherence to the terms of the agreement. Ueitele J, found that the plaintiff did not have *locus standi* to

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<sup>3</sup> *Kanguatjivi v Kanguatjivi* (I 309/2013) [2015] NAHCMD 106 (30 April 2015).

<sup>4</sup> *Ndevahoma v Shimwooshili & others* 2019 (2) NR 394 (HC).

<sup>5</sup> A registered right of leaseholds.

seek eviction of the defendant. This appears to be based on two reasons. Firstly, that an ejection order can only be granted to an owner of the property. Secondly, that s 43 of the Act limits such proceedings for eviction to Chief, Traditional Authorities or Land Boards.<sup>6</sup>

[23] The court *a quo* referred to both the abovementioned decisions. It correctly pointed out that the court in the *Kanguatjivi* case did not consider the provisions of s 43 of the Act at all. The court *a quo* then basically embraced the decision reached in the *Ndevahoma* case. According to the court *a quo*'s reasoning, a person with a customary land right must seek the assistance of the relevant Chief, Traditional Authority or Land Board to assist him or her to evict a trespasser of his or her allotment and failing such assistance such person must appeal to an appeal tribunal appointed by the Minister pursuant to s 39 of the Act. Indeed for a right holder to attempt to evict someone could also amount to a criminal offence pursuant to the provisions of reg 35 according to the court *a quo*.

#### Locus standi of plaintiff to institute eviction proceedings

[24] The alleged lack of *locus standi* on the part of the plaintiff is raised in a special plea. The special plea contains five subparagraphs which, in essence contain legal argument and even a reference to case law, to justify with references to sections in the Act why the special plea should be upheld. No new facts or additional facts are raised in the special plea. Special pleas are to be raised where, apart from the merits, there is 'some special defence not apparent *ex facie*' the particulars of claim.<sup>7</sup> Hence,

<sup>6</sup> *Ndevahoma* case above paras 51-54.

<sup>7</sup> *Brown v Vlok* 1925 AD 56 at 58.

if it is apparent from the averments in the particulars of claim that the plaintiff lacks *locus standi* this must be raised by way of an exception.<sup>8</sup> The fact that there was no evidence or allegations necessary in addition to what is referred to for the purposes of the special plea is also evident from the fact that the point was argued on the pleadings without the need for any evidence. This was thus a case where the *locus* point should have been raised as an exception and not in a special plea.

[25] I have quoted s 43 of the Act above which appears under the heading 'Unlawful occupation of communal land'. The gist of the defendants case is that, the plaintiff's right to occupy the communal land granted to him pursuant to s 28 of the Act does not give him the power to evict anyone from such land as this power is reserved in the Act to the relevant Traditional Authority, Chief or the Land Board.

[26] In the normal course, a plaintiff who seeks the eviction or ejection of someone from the property needs to prove only a possessory claim based on his or her right to possess and that the person he is seeking to evict does not have a better claim than him or her.<sup>9</sup> Obviously an owner can also vindicate his or her own property based on the ownership thereof by way of a *rei vindicatio*. Ownership is however not the only possessory right that can sustain a vindicatory claim as suggested in the *Ndevahoma* case. It is common cause that the ownership of communal land vests in the State. In fact s 17(1) of the Act makes this clear. It states that ' . . . all communal land areas vest in the State in trust for the benefit of the traditional communities

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<sup>8</sup> *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759-760.

<sup>9</sup> *Ebrahim v Pretoria Stadsraad* 1980 (4) SA 10 (T) and *Steenkamp v Mienies & andere* 1987 (4) SA 186 (NC).

residing in those areas . . .'. Section 17(2) of the Act further stipulates that 'no right conferring freehold ownership is capable of being granted or acquired' in respect of communal land.

[27] It is clear that the Act intends to regulate the way communal land is allocated to persons living in communal areas and that a system was put in place to achieve this which at the same time creates certainty as to the extent and nature of such allocations and who the right holders in respect of such allocations are. Thus, the Land Boards are established to among others, exercise control over allocations of land or the cancellation of such allocations by a Chief, Traditional Authority or the Land Board; to consider applications for leasehold in respect of communal land; and to maintain a register and a system of registration so as to keep up to date registers as to who the right holders are in respect of allocations or leaseholds and the nature of such registered rights.

[28] The customary land rights recognised in the Act are the 'right to a farming unit' and the 'right to residential unit' and those other rights that may be recognised by the Minister by notice in the Gazette.<sup>10</sup> These rights are allocated by the relevant Chief or the Traditional Authority.<sup>11</sup> The Land Board must ratify allocations of land and once this is done they are registered in the prescribed register and the certificate to this effect is issued to the holder of the right.<sup>12</sup> On the death of the rights holder the land reverts to the Chief or Traditional Authority for re-allocation. This re-allocation is

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<sup>10</sup> Section 21 of the Act.

<sup>11</sup> Section 20 of the Act.

<sup>12</sup> Section 25 of the Act.

however circumscribed so that, eg the surviving spouse will be entitled to such allocation if so desired.<sup>13</sup>

[29] Plaintiff in his particulars of claim attaches his certificate from the Omusati Land Board indicating that in terms of s 28 of the Act he was granted the right to farm and reside on the property allocated to him which is stated to be 8.4 hectares big. Section 28 deals with the recognition of pre-existing rights.

[30] Other than customary rights reverting to the State for re-allocation in the designated manner upon the death of a rights holder, it may also revert to the State to be re-allocated in the manner described where it is cancelled due to the non-compliance by the rights holder of the terms of such allocation.<sup>14</sup>

[31] The legal practitioner for the defendants submitted that the scheme of the Act is clear. It is to leave the total administration as to the allocation and regulation of customary land rights to the Chief, Traditional Authorities and Land Boards to manage. This includes the authority to evict persons from such land and hence only they can do it. This is to ensure orderly administration of the system.

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<sup>13</sup> Section 26 of the Act.

<sup>14</sup> Section 27 of the Act.



[32] As to the approach to the interpretation of statutes, this court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*<sup>15</sup> quoted the following statement made in the South African Supreme Court of Appeal<sup>16</sup> with approval:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

[33] In my view, the analysis by the legal practitioner for the defendants does not paint the full picture. In the context of the Act, it is also clear and just as an important objective as the one submitted on behalf of the defendants that, what was intended was to provide holders of customary land rights security of tenure and by way of registration, a public register of their title is kept so as to avoid any confusion as to their rights. The latter aspect (registration) is also intended to be a relatively easy manner to prove entitlement to possession and hence to defend such holder against possible encroachment onto such registered allotment of land by third parties.

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<sup>15</sup> *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC) para 18.

<sup>16</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[34] In view of the fact that the common law provides a vindicatory action to a possessor, the only way to interpret s 43 of the Act so as to do away with this common law right is to insert the word 'only' in front of s 43(2) to make it read 'only a Chief or a Traditional Authority or the Land Board concerned' may evict a person who occupies land without it being allocated to such person. Whereas the Act vests the relevant Chief, Traditional Authority or Land Board with *locus standi* as the statutory appointed administrators of communal land to evict persons who occupy land not allocated to them, it does not mean that other possessors who have the right under common law to evict such persons are no longer vested with such a right as:

'It is a sound rule to construe a statute in a conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law.'<sup>17</sup>

[35] There is no basis to suggest that the Act intended to alter the common law as suggested. Section 43(1) does not start with the word 'only' and it is clear that it was never the intention of the Act that only the person in whose name the allocation was granted would be able to occupy the land covered by such grant. It is stating the obvious that a person who has a residential allocation will occupy the land with his or her family and similarly a person with an agricultural allocation or allotment may utilise it by entering into some business venture with a third party or parties. The other persons will occupy the land by virtue of their agreements (expressly or tacitly) with the right holder. These agreements are, in general, of no concern to the Chief, Traditional Authority or Land Board who must simply ensure that an allotment is used

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<sup>17</sup> *Johannesburg Municipality v Cohen's Trustees* 1908 TS 811 at 823 quoting from *R v Morris* (1867) LR 1 CCR 90 at 95.

for the purpose granted and that terms and conditions attached thereto are adhered to.

[36] In short, the plain meaning of s 43 does not give the Chief, Traditional Authority or Land Board the sole right to evict persons from land not allocated to them. The only change to the common law is that it gives the Chief, Traditional Authorities and Land Boards *locus standi* to bring eviction proceedings in respect of land they are neither the owners nor the possessors of. As mentioned, there are other persons who may have such rights under the common law and there is no indication in the Act that the intention was to abolish their common law rights. In short, s 43 grants a Chief, Traditional Authority or Land Board the same rights as possessors under the common law despite the fact that they are not possessors. It does not take away the right from the possessors.

[37] To grant a person a right which is registered and then to say that such person cannot personally protect that right seems to me an absurdity. The normal approach is *ubi rem ibi remedium*. To give a person a right but no remedy to protect it has long been held as an anomaly.<sup>18</sup> To make the right dependent on the decision of a functionary is to water down the right to such extent that it goes against the grain of the Act which seeks to establish a register of right holders with the concomitant security of tenure this will bring about.

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<sup>18</sup> *Kashela v Katima Mulilo Town Council & others* 2018 (4) NR 1160 (SC) para 71.

[38] I, in any event, do not agree with the submission of the legal practitioner on behalf of the defendants and the finding of the court *a quo* that the structure of the Act is such that a right holder must request a Chief, Traditional Authority or Land Board to evict persons from his or her allocated land and cannot take such steps him or herself. Why must the right holder be dependent on the mentioned persons or entities who may have no interest to interfere in what they could perceive as a personal issue between parties, the relationship between whom they have no knowledge of? With the right holder having no *locus standi* and thus not being a party to the proceedings how will he raise, eg contractual rights against the other party to occupy part of the property. In my view, s 17 was not primarily aimed to address the issue of encroachments onto an already allocated and registered land. Why would the Act want to take away an effective remedy and replace it with an ineffective and impractical remedy which makes the enforcement of a right dependent on a third party?

[39] In the above context and on a careful reading of s 43 of the Act it is clear that subsec (1) prohibits persons from occupying communal land without an allocation being granted. Where land has been allocated, the persons to whom such land has been allocated to will occupy it but he or she will not necessarily be the only occupant. The right holder will surely allow others to occupy it with them, eg his or her family, employees or business associates. These other persons derive their right to occupy through an agreement with the person to whom the land has been allocated to and who has the possession of the land as a result of such allocation. Prior to such allocation, the land falls within the sole custody and control of the Chief, Traditional

Authority or the Land Board and it is primarily in respect of such land that the prohibition applies, not to communal land already allocated. Thus, the land in respect whereof 'a legal action for eviction' can be instituted by a Chief, Traditional Authority or Land Board in subsec (2) is primarily in respect of communal land which has not yet been allocated to someone. Where the customary land right is cancelled, the person who prior to such cancellation was a right holder can also be evicted pursuant to the provisions of s 43.

[40] It thus follows that, s 43 of the Act does not prevent a person who has a right to communal land allocated to him or her from protecting such right through the use of a vindicatory action available to possessors under common law.

[41] This brings me to the relevance of reg 35.

#### Regulation 35

[42] The court *a quo* referred to reg 35 to buttress its finding that the right holder had no *locus standi*. This regulation was not referred to in the *Ndevahoma* case.

[43] This court invited the parties and the Minister of Land Reform<sup>19</sup> to address it on the validity of the regulation if it has the effect of depriving right holders of communal land allocations of their common law rights to protect their allocations. The Minister indicated that he will abide the decision of this court.

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<sup>19</sup> Now the Minister of Agriculture, Water and Land Reform when this matter was heard.

[44] It is trite law that the Minister can only make such regulations as authorised by the Act. This is so because he or she has no power other than that conferred upon him or her by the Act.<sup>20</sup>

[45] Section 45(1) of the Act authorises the Minister to make regulations in respect of the matters mentioned in the section. This section in subsections (1)(a) – (k) thereof stipulate the matters in respect whereof regulations can be made. The only one that contains an unspecified subject matter is s 45(1)(k) which authorises regulation in respect of ‘any other matter as the Minister may consider necessary or expedient for giving effect to this Act and for its administration’. In terms of s 45(2)(b) the regulations may prescribe penalties for a contravention or non-compliance with the regulations. Both legal practitioners submitted that reg 35 should be approached on the basis that it was promulgated pursuant to s 45(2)(b) as it creates an offence.

[46] The legal practitioner for the defendants submits that, reg 35 is *ultra vires* as it does not prescribe a penalty for a contravention or non-compliance with the regulation but ‘imposes a penalty for conduct provided for in the Act’. In other words it criminalises conduct contrary to s 43 which means that the fact that the plaintiff instituted eviction proceedings may accordingly constitute a criminal offence.

[47] As pointed out above, s 43 does not prevent persons who hold recognised customary law land rights from launching eviction proceedings against occupiers of

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<sup>20</sup> See, eg *De Villiers v The Pretoria Municipality* 1912 TPD 626 at 632, 640, and 643-646, *Principal Immigration Officer v Medh* 1928 AD 451 at 457-458, *Mustapha & another v Receiver of Revenue, Lichtenburg & others* 1958 (3) SA 343 (A) at 347D-G and *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA) para 10.

their allotments. On this basis, the regulation would be invalid as it creates an offence contrary to the Act. It creates an offence where there is no such offence in the Act.

[48] The legal practitioner for the plaintiff agrees with the approach adopted by the defendants to reg 35, but does not agree with the interpretation thereof to mean that a right holder is prohibited from evicting an occupier of his or her allotment. According to the submission made on behalf of the plaintiff, the regulation is aimed at eviction of right holders, ie persons who 'legally occupies' communal land and this can only be by a Chief, Traditional Authority or a Land Board.

[49] On this interpretation advanced on behalf of the plaintiff, the regulation is difficult to understand as it refers to the eviction of persons from land they 'legally' occupy and unlike the Act which refers to 'legal action for the eviction of any person' the regulation simply states 'evicts any person'<sup>21</sup> which in its normal meaning simply refers to the physical act of eviction without recourse to the law. Thus, on the face thereof of this interpretation, it grants the Chief or Traditional Authority or the Land Board concerned the right to physically remove right holders from the allocations without recourse to the law. It is further inconceivable that the regulation would authorise the eviction of persons from land they 'legally' occupy. The interpretation advanced on behalf of the plaintiff is in my view thus not correct and not what the regulation intended.

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<sup>21</sup> Section 43(2).

[50] Needless to say, the Act does not make provision for the physical eviction of anyone without recourse to the law, never mind of persons who legally occupy land from such land without recourse to the law and thus neither can the regulation. The regulation is thus *ultra vires* the provisions of the Act on the basis of this interpretation as well and should be declared invalid.

#### Conclusion on *locus standi*

[51] It follows from what is stated above that the plaintiff has *locus standi* to seek eviction of the defendants from the property he possesses pursuant to the provisions of the Act. It further follows that both the decision in the *Ndevahoma* case and in the court *a quo* were wrongly decided on this issue.

#### Can defendants exercise a retention lien and can they claim for improvements?

[52] Defendants resisted the eviction claim in their plea based on the right to retain the property until they are compensated for necessary and useful improvements they allegedly made to the land. The amount among them in this regard is stated to be N\$800 000 and this is the amount of the claim in the counterclaim.

[53] Apart from denying in the plea to the counterclaim that the alleged improvements had been made, it is pleaded that the defendants are precluded by s 40 of the Act from claiming such compensation.



[54] The legal practitioner for the defendants levelled criticisms that this was regarded as a special plea by the court *a quo* when it was not pleaded as such. In my view, this is harping on semantics. It is clearly a legal issue which could be determinative of the defendants' claim if it was decided against the defendants. Thus, the court *a quo* was entitled to deal with it separately from the merits pursuant to High Court Rule 63(6) which provides for directives to hear issues separately where this is convenient. In fact, this was also a case where an exception should have been taken as it is purely a legal question.

[55] Section 40 of the Act in essence reiterates the position with regard to improvements in respect of communal land that existed prior to the promulgation of the Act.

[56] In the prior regime, occupants of communal land were issued 'Permissions to Occupy' (PTO's) which were written documents in a prescribed form which authorised persons to occupy the land described there for the purpose specified therein. When such PTO's are terminated the holder involved could, subject to the permission of an official, remove improvements where it did not cause damage to the land. Improvements that could not be removed became the property of the State 'without payment of compensation'.<sup>22</sup>

[57] Whereas the prior legal regime stated that no right to compensation would arise from improvements made to communal land, s 40 states improvements cannot be claimed from the Chief, Traditional Authority, the Land Board or the State. Thus,

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<sup>22</sup> Bantu Areas Land Regulations No. R 188 of 1969 in general and reg 61, Annexure 5(11) and Annexure 28 (8).

compensation is excluded from the State or any of the statutory functionaries who act to execute the State policy as contemplated in the Act. Does this mean it can be claimed from the holder of the right as it is submitted by the legal practitioner for the defendants?

[58] Under the common law, a possessor of property may claim in respect of necessary and useful improvements to such property. This claim is based on enrichment and the claim is limited to the lesser of the costs incurred to effect the improvements or the extent of the increase in value of the property concerned.<sup>23</sup> In addition, a *bona fide* possessor has a lien or right of retention over the property until paid for the improvements. A *mala fide* possessor, on the contrary, may also have a claim for compensation in respect of the improvements to the property but does not have a right of retention.<sup>24</sup> It goes without saying that the right of retention is accessory to the principal obligation and should there not be a principal debt (ie the right to compensation for the improvements), there cannot be a right of retention.<sup>25</sup> This possessory claim *ex lege* is a claim against the owner of the property improved and not against anyone else. This follows from the principle of accession where the improvements become part of the land and hence the property of the land owner. This is one of the original modes of acquisition of ownership in accordance with the *maxim superficies solo cedit*. Thus, where a house or other structure is built or affixed to the land it becomes part of the land and hence the owner of the land becomes the owner of such building or structure according to the doctrine of *inaedificatio*. Thus, in

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<sup>23</sup> Things 27 *Lawsa* para 93.

<sup>24</sup> *Bella Vista Investments v Pombili & another* 2011 (2) NR 694 (HC) paras 24-27. I use the word 'may' as it is not yet clear whether a *mala fide* possessor has a claim for such improvements.

<sup>25</sup> Lien 15 *Lawsa* first reissue para 55.

the present context, the State becomes the owner of such improvements on communal land *ex lege* by virtue of the doctrine of *inaedificatio*.

[59] The defences available to claims for improvements are also only apposite to owners. Thus, the court may in its discretion decide whether it is reasonable in the circumstances to expect the owner (taking his status and means into consideration) to pay for improvements he might not have effected himself or herself and whether the occupier should rather be allowed a *ius tollendi*.<sup>26</sup>

[60] There are liens operating between possessors of property of which they are not the owners. These however can only arise *ex contractu*. Thus, where A takes a car of which he is not the owner for repairs to B, the latter has a lien in respect of repairs to the vehicle which is referred to as a salvage lien. (Debtor and creditor liens are of the same ilk). These liens are only effective in respect of claims by the other party to the contract and furthermore as indicated above based on some underlying contract between the parties. Thus, if in the present case, the plaintiff had contracted (expressly or tacitly) with the defendants to effect the improvements, the defendants would have a lien over the property improved in respect of any amount outstanding in respect of such project provided, of course, they are in possession of the building so improved. The defendants would thus be entitled, as against the plaintiff to exercise the lien until paid. There is however no suggestion in the pleadings that the improvement lien and the claim for compensation arose *ex contractu*.

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<sup>26</sup> Things 27 *Lawsa* para 201(d).

[61] As it is evident from what is stated above, claims in respect of necessary and useful improvements arise *ex lege* only against the owner of such property and not against anyone else. When it comes to communal land, such claims are expressly excluded by virtue of s 40 of the Act. It must be borne in mind that whenever an allotment is terminated by whatever reason it reverts to the State to be dealt with in terms of the Act. Furthermore, the Act intends to regulate the allocation of land in communal areas occupied by traditional communities so as to recognise the customs and to protect the traditional lifestyles which consist mostly of humble abodes and thus substantial improvements which adhere to the land is not encouraged.

[62] On the pleadings, there is thus no basis in law to allow the defendants' claim for the improvements they alleged they made to the land which forms the subject matter of the plaintiff's customary rights. This however was not the basis of the finding of the court *a quo* that relied on s 40 of the Act to decide the matter against the defendants. I revert to this aspect below.

#### Comments on pleadings

[63] I have already alluded to the fact that both the legal issues should have been raised by way of exception. The fact that it was not, however did not preclude the court *a quo* from dealing with them separately from the other issues for the reasons indicated above.

[64] For the defendants to raise a lien as a defence to the eviction, they had to allege that they are in possession of the property concerned and furthermore that

they are *bona fide* possessors. This is for the reasons mentioned above namely that whereas a *mala fide* possessor may have a claim for improvements he or she does not have a lien over the property as security for the claim in respect of the improvements. A *mala fide* possessor is a person who must have some doubt as to his or her right to remain in possession as:

‘A man whose state of mind is that of doubt cannot be classed as a *bona fide* possessor.’<sup>27</sup>

[65] In the particulars of claim for the order of eviction, the only allegation as to the defendants’ possession of the property is one paragraph that alleges they are in unlawful occupation, alternatively are in occupation despite their rights to occupy having been terminated, further alternatively, their right to occupy is terminated in the particulars of claim. This whole paragraph is simply ‘denied as specifically traversed and denied’. The defendants then plead that they made necessary and useful improvements to the tune of N\$800 000 and hence are entitled to exercise a lien over the property pending payment for the mentioned improvements.

[66] The denial amounts to a negative pregnant and made the plea vague and embarrassing. Are they admitting that they are in occupation but denying this is unlawful or without the permission of plaintiff or are they denying that they are in occupation in which case it is not necessary to deal with the other aspects.<sup>28</sup> As they deny everything, they are on their version not in occupation or possession of the property which means that their reliance on the possessory lien is fatally flawed

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<sup>27</sup> *Bella Vista* case *supra* at 704A-B.

<sup>28</sup> *Dlamini v Jooste* 1925 OPD 223 at 239; *Mostert v Bleden* 1927 CPD 89, *SA Railways and Harbours v Landau & Co* 1917 TPD 485 and *Careless v Stalbaun* 1925 (2) PH L16.

and an exception could have been raised in this regard. Furthermore, there is also no suggestion that they are *bona fide* possessors which was a further ground for an exception.

[67] The legal practitioner for the plaintiff was apparently not concerned to establish the defendants' case from the pleadings and the matter proceeded on the two legal points discussed above and nothing more needs to be said about the pleadings.

#### Section 40 of the Act

[68] Section 40 prevents a claim against the State or any of its statutory functionaries appointed in the Act for improvements to customary land by persons who were granted a right to such land pursuant to the provisions of the Act.

[69] Section 40 does not deal with claims for such improvements from persons who occupied such communal land, on whatever basis, against the person who is the recognised rights holder or possessor of such land. It is thus totally irrelevant to the issue at hand. The counterclaim is not directed at the Chief, Traditional Authority, relevant Land Board or the State and hence s 40 finds no application.

[70] While it is correct that the allegations in the counterclaim did not establish a cause of action against the plaintiff this was not because of the impact of s 40 but for the reasons mentioned above. Section 40 was a red herring which unfortunately detracted both the legal practitioners and the court *a quo*. It was not s 40 that non-suited the defendants but, on the pleadings as they stand, it should have been the common law relating to improvements as indicated above. The counterclaim is

excipiable as indicated above but no exception was raised (not even as a legal point). Instead s 40 was relied upon.

[71] The legal practitioner for defendants accepts that the pleadings of the defendants are excipiable but submits that this was not the issue that the defendants were called upon to deal with but only whether s 40 prevented the defendants from claiming for improvements. He further submits that the defendants are still entitled to amend their pleadings. He did not suggest in which manner they could do it to avoid it still being excipiable but maintained that he should be granted an opportunity to consider and discuss it with defendants. As the usual order where exceptions are upheld is to allow a party to consider amendments to the pleadings, I intend to adhere to this practise.<sup>29</sup>

[72] Apart from failing to grant the defendants leave to amend their pleadings, the counterclaim was correctly dismissed albeit for the wrong reasons. As an appeal lies against an order or judgment and not against the reasons for such order or judgment, the appeal against the order that the counterclaim be dismissed cannot succeed.<sup>30</sup>

### Conclusion

[73] From what is stated above, the appeal in respect of the judgment that the plaintiff had no *locus standi* to bring an action for the eviction of the defendants from

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<sup>29</sup> *Hallie Investment 142 CC t/a Wimpy Maerua & another v Caterplus Namibia (Pty) Ltd t/a Blue Marine Interfish* 2016 (1) NR 291 (SC) paras 53-63 and *Total Namibia (Pty) Ltd v Van der Merwe t/a Ampies Motors* 1998 NR 176 (HC) at 180C-D.

<sup>30</sup> *Administrator, Cape, & another v Ntshwaqela & others* 1990 (1) SA 705 (A) at 714J-715F and *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 772D-E.

the communal land allocated to him pursuant to the Act is successful. The appeal against the order dismissing the counterclaim instituted by the defendants seeking compensation from plaintiff in respect of necessary and useful improvements allegedly made to the land which is the subject of the communal land allocation of plaintiff is dismissed.

[74] As no evidence was led in respect of the *locus standi* point and the matter was disposed of by way of legal argument in the High Court, there is no good reason to deviate from the normal costs order in this regard. As far as s 40 is concerned, the court *a quo* was correct to conclude that on the pleadings, the defendants 'have no right to compensation in respect of improvements effected on communal land'. This conclusion however was wrongly premised on the provisions of s 40. In my view, the fact that plaintiff attempted to justify the invocation of s 40 by the court *a quo* to find against the defendants without taking issue with the defendants' pleadings and their claim based on common law does not warrant a costs order in favour of the plaintiff. Furthermore, the deficiency in defendant's case was pointed out by the court and did not come to light as a result of the stance taken on behalf of the plaintiff. It would thus not be fair to grant to the plaintiff the costs in respect of this appeal. In my view, it would be fair to make no order as to the costs in respect of the appeal on the counterclaim.

[75] In the result, the following order is made:

Appeal SA 18/2020



- (a) The appeal against the order that the plaintiff lacks *locus standi* to bring an action to evict the defendants from land allocated to him in terms of s 43 of the Communal Land Reform Act 5 of 2002 is upheld.
- (b) The order of the court *a quo* in respect of the claim is deleted and substituted with the following order:

‘The defendants’ special plea of *locus standi* is dismissed with costs.’

#### Appeal SA 44/2019

- (a) The appeal against the order dismissing the defendants’ counterclaim is dismissed.
- (b) The order of the court *a quo* in respect of the counterclaim is deleted and substituted with the following order:
  - (i) The defendants’ counterclaim is dismissed with costs. The defendants are given leave, if so advised, to amend its pleadings within 14 days of the delivery of this judgment.

#### Regulation 35

- (a) Regulation 35 of the regulations made in terms s 45 of the Communal Land Reform Act 5 of 2002, GN 37, GG 2926, 1 March 2003 is declared invalid and of no force and effect.

In general

- (a) The defendants shall pay the costs of the appeal in respect of the appeal relating to the *locus standi* of the plaintiff (appellant in case no. SA 18/2020).
  
- (b) There shall be no order as to the costs in the appeal relating to the applicability of s 40 of the Communal Land Reform Act 5 of 2002 (case no. SA 44/2019).
  
- (c) The matter is referred back to the High Court for case management so as to finalise it taking cognisance of the order of this court.

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**FRANK AJA**

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**DAMASEB DCJ**

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**MAINGA JA****APPEARANCES****APPELLANTS/RESPONDENTS:**

A van Vuuren

Instructed by Fischer, Quarmby &  
Pfeifer, Windhoek**RESPONDENT/APPELANT:**

S Namandje (with him M Ntinda)

Of Sisa Namandje &amp; Co. Inc., Windhoek