REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 265/2013

In the matter between:

1.1.1.1. **TILEINGE WAPULILE**

APPLICANT

and

CHAIRMAN, OHANGWENA COMMUNAL
LAND BOARD N.O. **RESPONDENT**

Neutral citation: Wapulile v Chairman Ohangwena Communal Land Board NO (A 265/2013) [2013] NAHCMD 340 (15 November 2013)

Coram: Smuts, J
Heard: 6 November 2013
Delivered: 15 November 2013

Flynote: application to interdict a communal land board from removing fences in a communal area on the basis that the fence had been erected prior to the coming into force of the Communal Land Reform Act, 5 of 2002. The court

found that s18 of that Act read with s28 contemplates that persons can apply to retain fencing erected prior to the Act within the period to do so which expires in February 2014. Given the entitlement to retain a fence if the statutory requisites in s28(80 are met, it would be unlawful for boards to remove such fencing where applicants intend to make such application prior to the expiration of the period set by the Minister pursuant to s18. Interdictory relief granted.

ORDER

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1. The rule is anticipated to today.

2. The rule is confirmed with costs, which included the costs of two instructed and one instructing counsel.

3. The application to strike is granted with costs.

4. The above costs are to include the costs of two instructed counsel and one instructing counsel.

JUDGMENT

Smuts, J

(b) At issue on the extended date of this *rule nisi* in this application is the lawfulness of the removal of fencing surrounding land for agricultural purposes in a communal area. The respondent is the Ohangwena Communal Board (the board), established under s 2 of the Communal Land Reform Act, 5 of 2002 ("the Act"). It is represented in these proceedings by its chairperson. It had proceeded to remove fencing erected by the applicant around a vast tract of land used for agricultural purposes in a communal area which the applicant said had been duly allocated to him in 1986, known as the Odjele grazing farm.

(c) The applicant approached this court on an urgent basis for an interdict to restrain the board from removing the fencing surrounding that grazing farm and

from disposing of the fencing material already removed. He also sought an order directing that the board restore his fences already removed to their original state. He also sought a cost order against the board.

(d) When the matter was first enrolled, the respondent took a number of preliminary points but also stated that the relief sought by the applicant was largely academic by virtue of the fact that the fencing in question had already been removed and dismantled. The applicant then confined the relief sought. After hearing argument, I granted a rule *nisi* on 9 August 2013 in the following terms:

'1. That a rule nisi is hereby issued calling upon the respondent to show cause, if any, on **18 September 2013** at **9h00** why this court should not make an order in the following terms:

1.1 Interdicting and restraining the Ohangwena Communal Land Board from disposing the material used for the erection of such fences on Ondjele Grazing Farm situated in Onalusheshete, Ondonga traditional district.

1.2 Ordering the Ohangwena Communal Land Board to restore applicant's fences already removed at the aforesaid Ondjele Grazing Farm to its original state.

1.3 Ordering the Ohangwena Communal Land Board to pay the costs of this application.

1.4 That sub-paragraph 2.1 shall operate with immediate effect as an interim order and interdict pending the return date.

2. Respondent may amplify its papers on or before 30 August 2013.

5. Applicant may reply on or before 12 September 2013.

6. That the matter is postponed for hearing to **18 September 2013** at **9h00**.'

(e) The respondent filed an affidavit shortly before the matter was originally heard as one of urgency on 9 August 2013, taking certain points *in limine* as well as raising further matter. In granting the rule *nisi*, the court provided directions for the filing of a supplementary answering affidavit on the part of the

respondent together with the date for a replying affidavit in advance of the return date which was set. The applicant provided heads of argument. But this was not done by the respondent. It was stated on its behalf that counsel did not anticipate that argument would be heard on the return date, despite the directions made by this court. The matter was then postponed at the respondent's costs to the extended return date. At the conclusion of argument, I extended the return date to 20 November 2013 to prepare a judgment. As this judgment has been prepared in advance of that date, I accordingly anticipate that rule to 15 November 2013 to hand down this judgment.

Applicant's case

(f) The applicant states in his founding affidavit that he had been granted the right to occupy the grazing farm by the Ondonga Traditional Authority in 1986. He states that the traditional leader who had granted him that right and allocated the land to him was a certain Mr Nakale ka Nepolo. He says that he has conducted cattle farming on the area in question since then.

(g)

(h) The area allocated to him is, as I have already said, vast in the context of communal land. It comprises 4354, 8 hectares. In support of this claim, he attaches a letter from the Ondonga Traditional Authority signed by the head of that authority, King Immanuel Kauluma Eliphas. The applicant states that he had, soon after the allocation of the land, started erecting a fence around the entire perimeter which was completed by 1989. He states that he has occupied that land continuously since then.

(i)

(j) In the meantime, the Act was passed in 2002 and put into operation on 1 March 2003. In s 18 of the Act there is a prohibition against fences in communal land unless authorisation for their erection or retention has been granted. Section 18 provides:

> 'Subject to such exemptions as may be prescribed, no fence of any nature-
>
> (a) shall, after the commencement of this Act, be erected or caused to be

erected by any person on any portion of land situated within a communal land area; or

(b) which, upon the commencement of this Act, exists on any portion of such land, by whomsoever erected, shall after such date as may be notified by the Minister by notice in the Gazette, be retained on such land,

unless authorisation for such erection or retention has been granted in accordance with the provisions of this Act.'

(k) The applicant maintains that in terms of s 18(b) read with s 28(2)(b) and 28(3) of the Act, he is entitled to retain the fences which he had erected on and around the Odjele grazing farm at least until February 2014. He submits that the decision to remove his fence was unlawful and *ultra vires* the functions of the respondent.

(l)

(m) In order to assess this claim, the provisions of s 18 and s 28(2)(b) and 28(3) of the Act are to be considered together with the facts raised by the respondent in opposition to this application.

(n) In a nutshell, s 28(2)(b) of the Act provides that, with effect from a date to be published by the Minister, anyone who claims to hold a right in respect of communal land is required to apply in the prescribed form and manner to the relevant board for the retention of any fence or fences existing on the land if the applicant wished to do so. This sub-section is to be read in the context of s 28, entitled "recognition of existing customary land rights" and in particular with regard to s 28(1) which sets the principle embodied in the section. Section 28(1), (2) and (3) provide as follows:

'(1) Subject to subsection (2), any person who immediately before the commencement of this Act held a right in respect of the occupation or use of communal land, being a right of a nature referred to in section 21, and which was granted to or acquired by such person in terms of any law or otherwise, shall continue to hold that right, unless-

(a) such person's claim to the right to such land is rejected upon an application contemplated in subsection (2); or

(b) such land reverts to the State by virtue of the provisions of subsection (13).

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

(a) for the recognition and registration of such right under this Act; and
(b) where applicable, for authorisation for the retention of any fence or fences existing on the land, if the applicant wishes to retain such fence or fences.

(3) Subject to section 37, an application in terms of subsection (2) must be made within a period of three years of the date notified under that subsection, but the Minister may by public notification extend that period by such further period or periods as the Minister may determine.'

(o) The applicant points out that the notice referred to in s 28(2) was published by the Minister in the Government Gazette in 2006. In terms of that notice, the period within which an application for the retention of an existing fence was to be made was a period of 3 years from the date of publication, namely 3 years from 15 February 2006. A subsequent notice was published on 16 February 2009. In that notice, the Minister extended the period from 1 March 2009 to the end of February 2012. That period has again been extended by the Minister in a subsequent Government Notice with effect from 1 March 2012 to the end of February 2014.

(p) The applicant states that he applied to the Oshikoto Communal Land Board during 2005 / 2006 for the authorisation to retain his fences pursuant to

ss 18 and 28 of the Act. He states that he has not received a reply and that his application is pending, as is confirmed by his legal practitioner. But he points out that the period determined by the Minister has not yet expired and that the removal of his fence prior to the expiration of that period would be unlawful and *ultra vires*. He states that the Oshikoto Communal Land Board was the relevant board at the time although it was accepted in argument by Mr Frank SC, who appeared for the applicant together with Dr S Akweenda, that the area falls within the jurisdiction of the respondent.

(q) The applicant states that he was invited by the respondent to Eenhana in September / October 2012. The purpose of that invitation was to serve a notice upon him entitled "Notification order to remove the fence". It was dated 30 August 2012. In this notice of the respondent, signed by its chairperson, it was stated that the respondent had conducted an investigation and determined that the applicant's fence located at Odjele village covering an area of 4354, 8 hectares had not been authorised in terms of the Act and that respondent was accordingly empowered to cause the fence to be removed under s 44(3) of the Act. It was further stated in the notice that the applicant could appeal in terms of s 39 of the Act within 30 days of receipt of the letter. He was further given notice that if he failed to remove his fence within 30 days or lodge an appeal, the respondent would proceed to do so pursuant to the regulations.

(r)

(s) The applicant points out that the description of the area in question referred to in the notice to him corresponded with latitudes and longitudes of the boundaries of the grazing farm allocated to him. (Although the applicant refers to the grazing farm as his farm, he does not allege that any title was conferred upon him. Nor can he, as was accepted by his counsel. This was because Art 100 of the Constitution vested ownership of communal land in the State, [1] if not otherwise lawfully owned. The Act provides that communal land is held in trust for the benefit of the traditional communities residing in those areas and excludes freehold title.[2]

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[1] *Namanjebo Tilahun N.O and another v Northgate Properties (Pty) Ltd and others,* unreported Supreme Court, 7 October 2013, Case No SA 33/2011.

[2] S17 (1) and (2) of the Act.

(t)

(u) Following receipt of this notice, the applicant contacted his legal practitioner of record, Mr S Namandje. He in turn stated that he received the notice on or about 4 November 2012 and on the following day sent a fax to the respondent requesting reasons and the record of the board's decision to enable him to meaningfully assist the appellant with an appeal or a review application to the High Court. In his supporting affidavit, which was not contested, Mr Namandje also states that he addressed another letter on 16 November 2012, requesting reasons as a matter of urgency as he had not had any response to his earlier letter.

(v)

(w) In the meantime, the applicant also took the issue up with the Ondonga Traditional Authority which had allocated the land to him in the first place. He requested its assistance. That authority took the matter up with the Minister of Lands and Resettlement and a meeting was arranged for 11 February 2013 where the Minister was requested by the head of that authority to stop the removal of fences by the respondent until a border dispute between the Ondonga Traditional Authority and the Oukwanyma Traditional Authority had been determined.

(x)

(y) Mr Namandje had during this period received no response at all from the respondent. He says that the assumed that the respondent had abandoned steps to remove the applicant's fence following the intervention by the Ondonga Traditional Authority to the Minister. Despite this, on 26 July 2013 officials from the Ministry of Lands and Resettlement accompanied by police officers arrived at the applicant's grazing farm and commenced dismantling his fences. They stated that they were doing so on the authority of the respondent with reference to the notice given to the applicant.

(z) The applicant thereafter approached his lawyers and brought the urgent application. As I have already indicated, when the matter was called on 9 August 2013, it was pointed out that the respondent had completed the removal of the fences on the previous day. This resulted in the applicant amending the notice of motion and seeking more confirmed relief which was

granted in the terms set out in the rule *nisi*.

The respondent's case

(aa) The respondent took the position in its original answering affidavit that the applicant had erected his fence on land which is designated as commonage. It contended that the applicant would not be entitled to erect a fence upon any area designated as commonage, relying upon s 29 of the Act. The respondent did not deny that the land had been allocated to the applicant but rather stated that it had no knowledge of the allegations raised in support of that claim by the applicant.

(bb) The respondent stated that reports were made to it by persons within its geographical area of jurisdiction complaining about the applicant's fences. The respondent referred to different reports concerning fences erected in the Okongo constituency within which the Odjele grazing farm was located. The respondent stated that it had endeavoured to amicably resolve the conflicting claims about fencing in the area.

(cc)

(dd) The respondent stated that between 2010 and 2012, further reports were receiving stating that fences were still being erected in the area despite the provisions of the Act prohibiting the erection of fences without due authorisation. The respondent stated that it proceeded to investigate the nature and extent of fencing in the area. After its investigation, it sent notices to 17 farmers which it had found had erected fences in the area. The respondent was included in this number. It was stated by the respondent in the original answering affidavit that he had erected fencing after 2002. The relevance of this date is not quite clear, given the fact that the Act came into operation only in 2003. The respondent also referred to fencing at certain areas in the vicinity of the village called Ekoka which would appear to be some distance from the grazing farm.

(ee)

(ff) The respondent alleged in its supplementary affidavit that a number of servitudes enjoyed by residents of the area over the land. As was rightly pointed out by Mr Frank, these were not raised in the notice to remove the fence. But

there was no admissible evidence adduced in support of these claims by anyone who allegedly enjoyed such rights.

(gg) The respondent's position in its supplementary affidavit was that the applicant had continued to erect fences until 2013 and that these fences included those at Ekoka. Given the location of this village some distance from the grazing farm, those allegations are not relevant for present purposes. The respondent also denied that the Ondonga Traditional Authority gave the applicant permission to erect a fence but raised no material in support of this denial. It was disputed in the alternative to this bare denial that the Ondonga Traditional Authority had no legal authority to grant a right to fence State land 'and/or it did not have the authority to authorise the applicant to erect a fence covering an area of 4354, 8 hectares of State land.' In reply to this, the applicant said the allocation was lawful as it was effected by the competent chief at the time and was confirmed in 1996 by the head of that authority, King Elifas. The applicant further referred to ss18 and 28 which, he said conferred upon him the right to retain the fencing for the period within which an application for its retention could be made.

(hh) The applicant also attached affidavits in reply from herders who were maintaining the camps within the grazing farm. They state that the recent fencing was in respect of the maintenance of the fencing of inner camps (and not the perimeter) of the farm, in issue in these proceedings.

(ii)

(jj) The applicant also adduced an affidavit by a member of the Ondonga Traditional Authority, Mr P.S. Kauluma who stated that the applicant had fenced off the grazing farm prior to 1996 when the Ondonga Traditional Authority had confirmed his allocation of that land. He also said that he had participated in an investigation of the applicant's fencing and confirmed the fencing of the grazing farm was erected prior to 2003.

(kk)

(ll) There were also affidavits from persons who had resided at the grazing farm, attesting to the erection of the fence prior to 1990. The applicant also made it clear in his replying affidavit the fencing in question (raised in the

respondent's notice to him) concerned the perimeter fencing which had been completed and not the internal fences of camps located within the grazing farm. The latitude and longitudes contained in the respondent's notice confirmed this.

Application to strike

(mm) The applicant brought an application to strike out certain portions of the respondent's supplementary affidavit on the basis that they contained inadmissible hearsay evidence as well as certain portions on the grounds of being scandalous or vexatious or irrelevant and prejudicial to the applicant.

(nn)

(oo) The applicant also applied to strike certain photographs because the person who had taken the photographs was not identified. Nor was any affidavit obtained from the photographer. The applicant only however sought to strike the photographs where the places were not properly identified which prejudiced the applicant in dealing with them. The applicant also did not seek to strike photographs in which the deponents to the respondent's affidavits were depicted and where reference was made by those deponents to the photographs, including the location of the photograph. Given its sound basis, the application to strike the photographs in which deponents are not depicted is upheld.

(pp)

(qq) The portions sought to be struck on the grounds of constituting inadmissible hearsay evidence are also hereby struck although these portions would in any event have been disregarded as they do not contain admissible evidence.

(rr)

(ss) The portion to be struck in paragraph 3 of the notice on the grounds of being scandalous or vexatious or irrelevant is also struck as it is irrelevant prejudicial to the applicant.

(tt) The first portion identified in paragraph 1 of the notice is a reference to Mr P. S. Kauluma's affidavit. It is stated that he is a member of the Ondonga Traditional Authority and his contrary evidence is then dismissed on the basis that he had 'adopted a tribal alliance.' The implication is plain he is motivated to

say what he has said on the basis of tribal allegiance. That in my view constitutes a vexatious and scandalous averment and an unwarranted attack upon his integrity and credibility which should be struck. His affidavit is also further on disparagingly referred to in inexplicable terms. It is implied that it was not open to him to make an affidavit concerning facts relating to his participation in the respondent's proceedings or of one of its committees because 'all averments made by or on behalf of the respondent are by operation of law binding upon him and he cannot contrary to such facts depose to another affidavit and assert other instructions that conflicts with those taken by the respondent in the same proceedings.' (sic) As this assertion was not sought to be struck, I refrain from making a further reference to it, except to point out its untenability and singular inappropriateness on the part of the chairperson of a statutory body.

(uu)

(vv) The application to strike is accordingly granted with costs.

Disputes of facts

(ww) Mr Frank argued that it would not be necessary to refer factual disputes for the hearing of oral evidence. He contended that the real issues between the parties were not affected by the issues disputed by the respondent as certain of those disputes were by means of bald denial and/or could be resolved on the papers. He further pointed out that the probabilities would overwhelmingly favour factual findings necessary for the dispute with reference to authority[3] and that this court may then take a robust approach and make the necessary finding without a referral to evidence.

(xx)

(yy) This contention would appear to be directed at the denial on the part of the respondent that the applicant had erected his perimeter fencing prior to the coming into operation of the Act. It would however appear to me that the respondent's denial of this issue is bald and unsupported in the face of the applicant's testimony to that effect which is supported by Mr Kauluma and

[3] *Dhadla v Erasmus* 1999(1) SA 1065 (LCC) at 1072, par [13] and also *Garment Workers Union v De Vries and others* 1949(1) SA 1110 (W) at 1133.

reinforced in reply by several witnesses who testified on behalf of the applicant as to the existence of the fences prior to the coming into operation of the Act. What clearly emerges from the affidavits construed together is that certain fencing was erected or maintained in recent years and that this fencing included internal fencing of camps within the applicant's allocation but not the perimeter fencing which is in issue in this matter.

(zz)

(aaa) When these affidavits are taken together, it becomes plain that the respondent is not in a position to refute the evidence presented by the applicant and by witnesses in support of his statement of the fencing of the perimeter prior to the coming into force of the Act. These witnesses (and the applicant) all profess personal knowledge as to what they testified about concerning the perimeter fencing unlike the respondent's deponents. But the respondent's difficulty in this regard is compounded by the fact that it stated in its initial answering affidavit that the applicant had engaged in fencing in 2002 which was prior to the coming into operation of the Act in March 2003. The different periods contended for in the supplementary answering affidavit are to be considered in the light of this statement as well as the affidavits provided by the applicant in support of his statement by persons who have personal knowledge of the erection of the perimeter fence. The respondent's unsupported denial of this fact is not in my view genuine and I consider myself to be in a position to find that the applicant established that he had erected perimeter fencing by 1990 and at least prior to the coming into force of the Act. I hereby make such a finding.

Was the removal unlawful?

(bbb) Mr Frank argued that the Act through s 18(b) and 28(2)(b) and 28(3) intended to protect the vested rights of persons who had existing fences prior to the coming into operation of the Act. I agree with that submission. That is in my view the starting point.

(ccc)

(ddd) Mr Frank argued that the applicant fell squarely within that category of persons. He referred in detail to the provisions of s 18 read with s 28 and in

particular s 28(8) which required that a board must grant an applicant authorisation for the retention of fences if the requisites of that sub-section are met. Section 28(8) provides:

> '(8) If the applicant has, in terms of subsection (2)(b), applied for authorisation to retain any fence or fences which exist on the land in question and the board is satisfied that-
>
> (a) the fence or fences were erected in accordance with customary law or the provisions of any statutory law;
>
> (b) the fence will not unreasonably interfere with or curtail the use and enjoyment of the commonage by members of the traditional community; and
>
> (c) in the circumstances of the particular case, reasonable grounds exist to allow the applicant to retain the fence or fences concerned,
>
> the board must grant to the applicant authorisation for the retention thereof, subject to any conditions which it may consider expedient to impose.'

(eee) Mr Frank contended that the term 'must' should enjoy its ordinary and literal meaning, relying upon a recent judgment in the Supreme Court in *Minister of Justice v Magistrate's Commission and another*[4] where the court restated the fundamental approach to the interpretation of statutes as follows:

> 'In terms of what is commonly referred to as the cardinal rule of interpretation, where the words of a statute are clear, they must be given their ordinary, literal and grammatical meaning unless it is apparent that such an interpretation would lead to manifest absurdity, inconsistency or hardship or would be contrary to the intention of the legislature. In that instance, . . .there is no room for applying any of the principles of interpretation which are merely presumptions in cases of ambiguity in the statute.'

(fff) The Supreme Court in that matter then proceeded to interpret the term

[4]2012 (2) NR 743 (SC).

"must" in the following way:

> 'In its most basic meaning, the word *must* is obligatory and does not give the minister a choice or a discretion not to dismiss.'[5]

(ggg) Mr Frank argued that the applicant would be entitled to the retention of his perimeter fence if he were to establish the requisites set out in s28 (8) in an application to the board. Although the applicant had made an application to the Oshikoto Board, this clearly evinced an intention on his part to proceed with such an application. But, as Mr Frank pointed out, he also had until the end of February 2014 to bring an application before the respondent to obtain authorisation to retain his perimeter fence. To remove the fencing prior to March 2014 was, Mr Frank submitted, unlawful and contrary to the Act.

(hhh)

(iii) Mr Frank accordingly submitted that the applicant was entitled to the confirmation of the rule.

(jjj) Mr Khama who represented the respondent together with Mr E Nekwaya, argued that the applicant had not established his right to have erected a perimeter fence around the grazing farm. He submitted that the applicant had the onus to establish this right and that he had not done so. The fence was thus unlawful and the respondent was entitled to remove it, so he argued. As I pointed out below this approach is in conflict with the procedure set out in the Act in respect of fences erected prior to the coming into force of the Act.

(kkk)

(lll) Mr Khama however went further in his heads of argument and contended that the applicant had no such right to erect a fence on communal land under the law in force prior to the enactment of the Act.

(mmm)

(nnn) This approach would in my view negate the express provisions of the Act which clearly contemplate that fences could have been lawfully erected prior to the coming into force of the Act by providing for a mechanism to authorise their retention thereafter. When I put this to him, he confined his approach to contend

[5]Supra at par [28].

that the Ondonga Traditional Authority did not have the power under the then prevailing legislation to allocate the land and confer upon the applicant the right to erect a fence on the communal land in question.

(ooo)

(ppp) Mr Khama then proceeded to refer to several statutory instruments which he submitted were applicable to black people in the previous dispensation, referring to the position prior to independence. He referred to the Native Land Act, 27 of 1913, the Native Administration Act, 38 of 1927, the Native Trust and Land Act, 18 of 1936, the Native Trust and Land Amendment Act, 18 of 1954, the South West Africa Native Affairs and Administration Act, 56 of 1954, the Reservation of State Land for Natives Ordinance, 35 of 1967, the Bantu Areas Land Regulations promulgated under Government Notice R188 of 1969 on 11 July 1969, the Reservation of State Land for Natives Amendment Ordinance, 5 of 1969, the Reservation of State Land for Natives Ordinance, 19 of 1971, the Reservation of State Land for Natives Ordinance, 16 of 1974 and the Reservation of State Land for Natives Amendment Ordinance, 5 of 1975. He submitted with reference to these statutory instruments (and without reference to any sections in the legislation except for references to specific regulations in the Bantu Area Land Regulations) that communal land was vested in the "Bantu Trust" and that in terms of the substantive law at the time, the President of the Republic of South Africa was the supreme chief of all black people in Namibia and was trustee of the trust and that these powers were subsequently conferred on the Administrator-General. He submitted that the control of trust land was conferred on bantu affairs commissioners in specific districts[6] and not a traditional authority such as the Ondonga Traditional Authority. He accordingly submitted that the Ondonga Traditional Authority did not have the right, power or authority to confer upon the applicant the right to occupy the land and to erect a fence around land allocated to him.

(qqq) Mr Frank submitted that it was not open to the respondent to seek to rely upon the range of legislation raised for the first time shortly before the hearing in

[6]With reference to *Namundjembo-Tilahun N.O. and Another v Northgate Properties (Pty) Ltd and Others* supra.

heads of argument. He referred to *Yannakou v Apollo Club*[7], repeatedly followed by this court and its constitutional predecessor,[8] in which it has been held that where a party seeks to rely upon a statutory provision, it should be expressly pleaded and not merely raised in argument for the first time. He also relied upon *Matador Enterprises (Pty) Ltd v The Namibian Agronomic Board*[9] where this court did not permit fresh grounds of review to be advanced in reply on the basis that it would be "disturbingly unfair to the respondent" in that matter and citing *Administrator, Transvaal and others v Theletsane and others*[10] in support of this approach.

(rrr)

(sss) I respectfully agree with the approach set out these authorities. It is thus not open to the respondents to raise in argument for the first time that the Ondonga Traditional Authority was precluded by statute from allocating rights to communal land including the right to fence upon communal land.

(ttt) Mr Frank also with some justification and in any event questioned whether the statutory instruments cited were all made applicable to Namibia and their completeness, given the failure to refer to Proclamation AG 8 of 1980 and the proclamation setting up a second tier authority for the area previously referred to as Owambo. It is however not necessary for the purpose of this judgment to further consider this question, given the manner in which it has been raised – by a respondent in heads of argument shortly before a hearing without having been properly foreshadowed beforehand. The unfairness of raising such an issue at that stage is demonstrated by the facts of this case.

(uuu)

(vvv) As his argument developed (and given his concession that fencing in communal areas was not entirely precluded by virtue of the provisions of ss18 and 28 of the Act), Mr Khama ultimately contended that the applicant had not established that the Ondonga Traditional Authority was vested with the power

[7]1974(1) SA 614 (A) at 626.

[8]*Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) 634 E-H (full bench), followed in *Van den Berg v Chairman of the Disciplinary Committee and Others* 1991 NR 417 (HC) at 421; *Augusto v Socieda De Angolana De Commercio International* 1997 NR 213 (HC) at 218.

[9]2010(1) NR 212 (HC).

[10]1991(2) SA 192 (A) at 196 H-I.

and authority to confer upon the applicant the right to fence land in a communal area for agricultural purposes. Mr Khama argued that this alone could have been authorised by a bantu commissioner prior to independence. Had the applicant been properly alerted to this point, it would have been open to him to investigate whether that proposition was correct and, if so, whether that power had been delegated and, if so, to the second tier authority for that area or to the Ondonga Traditional Authority, particularly in view of the fact that it is not clear to me that bantu commissioners exercised such powers or such an office continued to operate until independence and after the establishment of a second tier authority for that area under Proclamation AG 8 of 1980. It would be clearly unfair for the respondent to contest that issue with reference to statutory instruments not foreshadowed in its answering affidavit and its supplementary affidavits.

(www) But as Mr Frank contended, the purported reliance upon the legislation referred to in the heads of argument would in any event not avail the respondent on the facts of this case. The respondent in its answering affidavit had not denied that the Ondonga Traditional Authority had allocated exclusive rights to land to the applicant. It was thus not open to the respondent to deny that fact in heads of argument with reference to legislation. At best for the respondent, it had placed in issue the authority of the Ondonga Traditional Authority to grant permission to fence communal land in the supplementary affidavit. But as I have said, no statutory provision is raised in support of this denial. Once the respondent has not placed in issue that that authority could grant rights to communal land, it has not set out a proper basis as to why those rights would not include the right to fence such land.

(xxx) It is furthermore clear that ss18 and 28 the Act contemplated pre-existing fencing in communal areas, as was conceded by Mr Khama. Section 28(1) expressly recognises rights in respect of the occupational or use of communal land granted or acquired (prior to the Act) ‘in terms of any law or otherwise.’ Such a right would, by virtue of the further provisions of s28 include the right to

have fences on such land.[11] Mr Frank argued with reference to authority[12] that the term 'otherwise' used in s28(1) should enjoy a very wide meaning. I agree that a wide meaning is to be accorded to that term in its use in s28(1). This would include a right acquired or granted under custom or customary law. Mr Khama however argued that this right could not be granted under customary law with reference a work entitled Customary Law Ascertained by Hinz.[13] But the extracts relied upon by him do not lend support to the proposition raised by him. More importantly, this point should have been taken in the answering affidavits or under Rule 6(5). But in view of the fact that the work relied upon does not support the contention, it is not necessary to further address this issue.

(yyy)

(zzz) What is clear, is that the term 'otherwise' would in my view mean that the right need not only have been acquired or granted in terms of a law but also in another way such as in terms of custom or customary law. The traditional authority which had allocated the right to occupy also accepted that the applicant could fence the area – as is made plain by one of its members, Mr P.S. Kauluma. But this question is, as I understand the structure of s28 as a whole and particularly s28(8), an aspect which the board having jurisdiction would determine (under s28(8)(a)). If it were to be of the opinion that reasonable grounds exist to doubt the validity of the applicant's claim, then it must cause a hearing to be conducted in the prescribed manner to solve the matter and make its decision, as is expressly provided for in s28 (9).

(aaaa) The applicant has made it clear that he intends to pursue an application under s28 read with s18. He has lodged one before the Oshikoto board. It is still open to him to bring it before the respondent prior to the end of February 2014. If the board is of the opinion that reasonable grounds exist to doubt the validity of the applicant's claim, it is required in peremptory terms to cause a hearing to be conducted to determine the issue, as I have pointed out. This is the

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[11]Referred to in ss28(2) and 28(8).

[12]*R v Bono* 1953 (3) SA (C) 506 at 509; *Coutselinis v Minister of Justice and Another* 1965 (4) SA (W) 278 at 279 E-F; *Pietermaritzburg City Council v PMB Armature Winders* 1983 (3) SA 9 (A) at 26 B-C.

[13]Vol 1 (2010) at 93-96 and 117.

procedure which the Act prescribes in peremptory terms to determine the validity of claims to retain fences which existed prior to the Act coming into force. This is a far cry from the summary procedure adopted by respondent, with its own investigation to which the applicant was not party to and thereafter without hearing him, decided to remove the fencing and then proceeded to do so. Mr Khama argued that s28 and the period within which applications are to be made would not preclude the respondent from investigating fencing in its area. That is undoubtedly so. But where a pre-existing fence is concerned or is claimed, it would plainly be premature and indeed contrary to the Act to summarily remove such fencing, given the provisions of s18 and 28.

(bbbb) Having established that he had erected the perimeter fence prior to the coming into force of the Act and his intention to apply for authorisation for the retention of the perimeter fence – which he may still do until the end of February 2014 – it would follow that the removal of that fence which occurred at the instance of the respondent, was in my view unlawful and in clear conflict with the Act.

(cccc) It would further follow that the applicant is entitled to confirmation of the *rule nisi*. The matter in my view warranted the employment of two instructed counsel. The applicant was successful in his application to strike and is entitled to those costs. For the purpose of the taxing master, the time spent on the application to strike was approximately 15 minutes.

(dddd) I accordingly make the following order:

1. The rule is anticipated to today
2. The rule is confirmed with costs.
3. The application to strike is granted with costs.
4. The above costs are to include the costs of two instructed counsel and one instructing counsel.

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DF SMUTS

Judge

APPLICANT:	T J Frank SC (with him S Akweenda) Instructed by Sisa Namandje & Co. Inc.
RESPONDENT:	D Khama (with him E Nekwaya) Government Attorney