

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2017/03184

In the matter between:

**MATTI TOIVO NDEVAHOMA**

**PLAINTIFF**

and

**VILHO SHIMWOOSHILI**

**FIRST DEFENDANT**

**THE MINISTER OF LAND REFORM**

**SECOND DEFENDANT**

**OHANGWENA COMMUNAL LAND BOARD**

**THIRD DEFENDANT**

**Neutral citation:** *Ndevahoma v Shimwooshili* (HC-MD-CIV-ACT-OTH-2017/03184) [2019] NAHCMD 32 (25 January 2019)

**Coram:** UEITELE, J

**Heard:** 23 October 2018

**Delivered:** 25 January 2019

**Flynote:** Customary Law – Communal Land – Communal land rights – Power to evict a leaseholder from a communal land – Whether the Communal Land Reform Act, 2002 empowers a leaseholder to cancel a sub-lease and evict a sub

lessee from a communal land area.

**Summary:** The uncle of the plaintiff and the first defendant had occupied an area called Eengolo-Ondjiina which forms part of communal land as contemplated in s 15 of the Communal Land Reform Act, 2002 with the blessing of the Oukwanyama Traditional Authority.

As from 2017, the plaintiff had taken over the management of Eengolo-Ondjiina. In April 2015, the plaintiff signed a Notarial Lease Agreement in respect of Eengolo-Ondjiina with the Government of the Republic of Namibia and during April 2017, the plaintiff was issued with a Certificate of Leasehold in terms of s 33 and Regulation 16 of the Agricultural Communal Land Reform Act, 2002.

After the plaintiff was issued with the certificate of leasehold, a dispute arose between the plaintiff and the first defendant, with the plaintiff alleging that, he holds exclusive leasehold or customary land rights in respect of Eengolo-Ondjiina and that he had given the first defendant the right to occupy Eengolo-Ondjiina on certain conditions. Alleging that the first defendant failed to adhere to the conditions in terms of which he was granted permission to occupy Eengolo-Ondjiina, the plaintiff gave notice to the first defendant to vacate Eengolo-Ondjiina by the end of June 2017. The first defendant did not vacate Eengolo-Ondjiina as demanded by the plaintiff and the plaintiff commenced these proceedings.

The plaintiff's primary bone of contention was that because of the first defendant's breach of the conditions in terms of which he was granted permission to occupy Eengolo-Ondjiina, he has withdrawn that permission and the first defendant now occupied Eengolo-Ondjiina without permission, and it is on that ground that he seeks the eviction of the defendant from Eengolo-Ondjiina.

The first defendant was however of the view that the leasehold on which the plaintiff relies is in respect of communal land as contemplated in s 19 of the Communal Land Reform Act, 2002 which is not exclusive and is subject to the rights of others, including his (first defendant) right to occupy such land and further that it does not confer a right on the plaintiff to approach the High Court and evict him.

*Held that* despite the fact that the concept of communal land defies precise definition, it has, in Namibia, generally been understood that communal land include land owned in trust by the government but administered by traditional authorities who make allocation of parcels of land to members of the community, ordinarily but not exclusively to live thereon, till and or graze thereon and generally to make a living, without acquiring ownership or title to that land.

*Held further that* s17 of the Communal Land Reform Act, 2002 makes it very clear that all communal land areas belong to the State, which must keep the land in trust for the benefit of the traditional communities living in those areas. The State is enjoined to put systems in place to make sure that communal lands are administered and managed in the interests of those living in those areas. The Act also makes it clear that communal land cannot be sold as freehold land to any person.

*Held further that* communal lands may only be occupied or used in line with a right granted under the Communal Land Reform Act, 2002. This includes existing customary land rights (under s 28) and other existing rights to use communal land (under s 35). A person who occupies communal land without having the right to do so can be evicted by a Chief, Traditional Authority or a Communal Land Board.

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### ORDER

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a) It is declared that the plaintiff, Matti Toivo Ndevahoma, does not have the necessary *locus standi* to institute action seeking the eviction of the first defendant, Vilho Shimwooshili from a portion of communal land known as 'Eengolo-Ondjiina, Farm No. OH-OK-02, measuring approximately 2526, 7 hectares, situated in the Okongo District of the Ohangwena Region'.

b) The plaintiff must pay the first defendant's costs of suit such cost to include the costs of one instructing and one instructed counsel.

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## JUDGMENT

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### UEITELE, J

#### Introduction

[1] The plaintiff is Matti Toivo Ndevahoma who is a part time farmer residing at Okongo, in the Ohangwena Region, in the northern part of Namibia.

[2] The first defendant is a certain Vilho Shimwooshili who is also a part time farmer residing at Omedi Village, in the Ohangwena Region in the northern part of Namibia. The Minister of Land Reform and the Chairperson of the Ohangwena Communal Land Board have been added as second and third defendants because of the interest they have in the matter, however they opted not to participate in these proceedings.

[3] For the sake of convenience, I will, in this judgment refer to parties by their first names. I do not intend any disrespect to the parties by referring to them by their first names, it is simply as I said for convenience.

[4] On 30 August 2017, Matti commenced proceedings by issuing summons out of this Court in terms of which he sought an order ejecting Vilho, from an area referred to as 'Eengolo-Ondjiina, Farm No. OH-OK-02, measuring approximately 2526.7 hectares, situated in the Okongo District of the Ohangwena Region. (I will in this judgment refer to this area as Eengolo-Ondjiina).

#### Factual history

[5] From the pleadings and other documents filed of record in this matter, I gathered that the background to Matti's action is briefly this. Matti's father, a certain Nahas Ndevahoma (I will, in this judgement, also for convenience sake refer to him by his first name namely Nahas) who is also Vilho's uncle, has since 1988, been in

occupation of Eengolo-Ondjiina.

[6] Nahas has, since 1988, been occupying Eengolo-Ondjiina with the blessing of the Oukwanyama Traditional Authority. During the early 1990's, Nahas accommodated his nephews namely Joseph Halweendo, Natangwe Halweendo and Vilho together with their livestock at Eengolo-Ondjiina. While the Halweendos arrived at Eengolo-Ondjiina during 1990, Vilho arrived at Eengolo-Ondjiina during 1994.

[7] As from 2017 Matti appeared to have taken over the management of Eengolo-Ondjiina. The circumstances under which, Matti took over the management of Eengolo-Ondjiina are not clear from the papers before me, but what is clear is that during April 2015, Matti signed a Notarial Lease Agreement in respect of Eengolo-Ondjiina with the Government of the Republic of Namibia. It is furthermore clear that during April 2017, Matti was issued with a Certificate of Leasehold in terms of s 33 and Regulation 16 of the Agricultural Communal Land Reform Act, 2002.

[8] After Matti was issued with the certificate of leasehold, (during June 2017) a dispute regarding the utilisation of Eengolo-Ondjiina arose between him (Matti) and Vilho. Matti alleges that, he holds exclusive leasehold or customary land rights in respect of Eengolo-Ondjiina and that he had given Vilho the right to occupy Eengolo-Ondjiina on certain conditions. Matti does, however, not say when it is that he gave the right or how he gave the right to Vilho.

[9] Alleging that Vilho failed to adhere to the conditions in terms of which he was granted permission to occupy Eengolo-Ondjiina, Matti by letter dated 21 June 2017 gave notice to Vilho, for the latter to vacate Eengolo-Ondjiina by the end of June 2017. Vilho did not vacate Eengolo-Ondjiina as demanded by Matti and as result Matti commenced these proceedings.

The pleadings.

*Matti's particulars of claim*

[10] As I indicated above, Matti issued summons during August 2017, which he amended on 18 June 2018. In the amended particulars of claim, Matti alleges that;

(a) on 21 April 2017, he was awarded a leasehold, alternatively a customary land right in respect of Eengolo-Ondjiina,

(b) he is the exclusive leasehold/customary land right holder with respect to Eengolo-Ondjiina, and

(c) at the time of obtaining the leasehold/customary land right he gave permission to Vilho to occupy the Eengolo-Ondjiina on the conditions that Vilho:

(i) must not keep more than 120 head of cattle on Eengolo-Ondjiina,

(ii) must contribute towards the installation and maintenance of the water infrastructure, and

(iii) must contribute towards the upkeep and maintenance of the fence around Eengolo-Ondjiina.

[11] Matti furthermore alleges that, because of Vilho's breach of the conditions in terms of which he was granted permission to occupy Eengolo-Ondjiina, he has withdrawn that permission and Vilho now occupies Eengolo-Ondjiina without permission, and it is on that ground that he seeks the eviction of Vilho from Eengolo-Ondjiina.

*Vilho's plea.*

[12] Vilho pleaded to the amended particulars of claim and in his amended plea, he raises two special pleas. First, Vilho pleads that the leasehold or customary

land right on which Matti relies:

- (a) is not established in a clear fashion to allow enforcement in Court,
- (b) is in respect of communal land as contemplated in s 19 of the Communal Land Reform Act, 2002 which is not exclusive and is subject to the rights of others including his right to occupy such land;
- (c) does not confer a right on Matti to approach the High Court and evict him.

[13] The second point *in limine* raised by Vilho is that of non-joinder but this point has become moot since the Minister and the Ohangwena Communal Land Board were joined as second and third defendants.

[14] As regards the merits of Matti's claim, Vilho in essence pleaded that, in terms of the Communal Land Reform Act, 2002 the Chief of a Traditional Community in respect of which Communal Land is situated must determine the dispute concerning the occupation of communal land, he thus denies that the High Court has original jurisdiction to determine the dispute over the utilisation of Eengolo-Ondjiina. Vilho further pleads that during June 2017 he signed an agreement as a sub-lessee of Eengolo-Ondjiina and Matti thus does not have the right to evict him.

[15] After exchanging pleadings, the parties filed a 'special case for adjudication in terms of Rule 63'<sup>1</sup> on the basis of which they asked this Court to determine some

<sup>1</sup> Rule 63 of this Court reads as follows:

**'Special case and adjudication upon points of law and facts**

63. (1) The parties to a dispute may, after institution of proceedings, agree on a written statement of facts in the form of a special case for adjudication by the managing judge.

(2) The statement referred to in subrule (1) must set out the facts the parties agree on and the questions of law in dispute between the parties and their individual contentions and the statement must be –

- (a) divided into consecutively numbered paragraphs and accompanied by copies of documents necessary to enable the managing judge to decide on the questions; and
- (b) signed by each party's legal practitioner or where a party sues or defends personally by such party and the signed documents must be annexed to the statement.
- (3) The managing judge must set down a special case for hearing.
- (4) ...
- (5) At the hearing of a special case the managing judge and the parties may refer to the entire contents of the documents referred to in subrule (2) and the managing judge may draw any inference

points of law. The dispute that this Court is asked to resolve is framed as follows (I quote verbatim):

**'A. Facts agreed on by parties**

- (a) The parties agree on the following facts for the purposes hereof:
- 1.1. Plaintiff asks this court for defendant's eviction from land described as OKONGO PCLD VILLAGE in Okongo district, measuring 2526.7 ha;
  - 1.2. Plaintiff relies on his right as leaseholder, alternatively, customary land right holder awarded to him by the Ohangwena Communal Land Board (the board) in terms of section 33 of the Communal Land Reform Act 5 of 2002 (the Act). A copy of the certificate of award on which plaintiff relies is annexed marked "MTN1"; and
  - 1.3. The parties are party to the agreement annexed to defendant's plea marked "VS1" in respect of the occupation of the land in question. A copy of the agreement is annexed hereto.

**B. Questions of law in dispute**

The following questions of law are in dispute between the parties:

- 1.4. Plaintiff's *locus standi*. The first question is whether the fact that the land in question is 2526.7 ha in extent which exceeds the maximum of 100 ha prescribed in regulation 13 of the Regulations in terms of the Communal Land Act published under GN 37 in GG 2926 of 1 March 2003 invalidates the right plaintiff relies on? Plaintiff contends: No, it does not. Defendant asserts that it does.
- 1.5. Defendant contends that in any event that plaintiff has no *locus standi* to evict him since the right he relies on is in respect of communal contemplated in section 19 of the Act which is not exclusive and is subject to the rights of others including the defendant's right to occupy. Plaintiff disputes the contention;

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of fact or of law from the facts and documents as if proved at a trial.

(6) ....

(7) ....

(8) When considering a question in terms of this rule the court may give such decision as is appropriate and may give directions with regard to the hearing of other issues in the proceeding which may be necessary for the final disposal of the cause or matter. (9) If the question in dispute is one of law and the parties are agreed on the facts, the facts may be admitted and recorded at the trial and the managing judge may give judgment without hearing evidence.'



- 1.6. Defendant contends further that the right in respect of communal land does not confer the right on plaintiff to approach this court to evict another occupant such as defendant. In terms of section 43 of the Act a chief, traditional authority or the board may evict any person who occupies communal land without the right to do so and that excludes the court's jurisdiction, alternatively, should be exhausted first. Plaintiff disputes the contention;
- 1.7. Defendant also contends that the right plaintiff relies upon cannot be enforced in this court since section 37(2) of the Act confers the authority to investigate the occupation, use or control of land by a person on the board. Plaintiff disputes this contention;
- 1.8. Defendant contends that according to the certificate (marked **MTN1**) annexed to the particulars of claim, plaintiff was granted a leasehold for 'any purpose other than agricultural purposes' described as a Small Scale Commercial Farm by the board. The farm is not adequately identified in the certificate. Consequently the right plaintiff relies on is not established in a clear fashion allowing its enforcement in court, since its description in the certificate is contradictory and it does not describe the land in respect of which it is allegedly granted in any identifiable manner. Plaintiff disputes this contention; and
- 1.9. Defendant also contends that the agreement annexed hereto (and to defendant's plea), marked "**VS1**" dictates the rights of the parties. In terms thereof the board has exclusive jurisdiction to determine occupation of the land in question.'

[16] In *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others*<sup>2</sup> the Supreme Court held where parties ask a Court to determine certain issues, the parties have limited themselves to the issue they defined and they are bound by those issues and so is the Court. I therefore now turn to the issues that I am required to resolve.

### The issues

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<sup>2</sup> *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others*: Case No: SA 15/2017 delivered on 16 November 2018.

- [17] The issues that this Court has to decided are:
- (a) Whether the mere fact that the size (being 2526. 7 hectares) of Eengolo-Ondjiina exceeds the prescribed maximum size (being 100 hectares) invalidates Matti's right of leasehold or customary land right.
  - (b) Whether Matti's right of leasehold or customary land right is exclusive to him.
  - (c) Whether Matti's right of leasehold or customary land right confers on him the right to initiate eviction proceedings against Vilho.
  - (d) Whether s 37 (2) of the Communal Land Reform Act, 2002 oust this Court's jurisdiction to determine the utilisation of land which is situated in an area of a traditional authority.
  - (e) Whether the area constituting Eengolo-Ondjiina is identified or identifiable.

The legislative framework.

[18] Namibia has two main land tenure systems: the freehold land tenure system and the customary land tenure system on communal land. In *Kashela v Katima Mulilo Town Council* matter<sup>3</sup> the Supreme Court (Per Damaseb DCJ) commented that the concept (of communal land) defies precise definition. Despite the fact that the concept of communal land defies precise definition, it has, in Namibia, generally been understood that communal land include land owned in trust by the government but administered by traditional authorities who make allocation of parcels of land to members of the community, ordinarily but not exclusively to live thereon, till and or graze thereon and generally to make a living, without acquiring ownership or title to that land.

[19] In contradistinction, freehold land tenure system finds application in respect of surveyed pieces of land in urban areas and 'commercial farms'. The distinguishing characteristic between communal land and freehold land is that under the freehold land tenure system (whether in an urban area or a commercial

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<sup>3</sup> *Ibid.*

farm) the land is surveyed and capable of being privately owned.

[20] Although the State is, under the communal land tenure system, the owner of the land, it holds the land in trust on behalf of traditional communities and their members who live there. Currently the communal land is administered in terms of the Communal Land Reform Act, 2002. (I will, in this judgment refer to this Act simply as the Act)

[21] Section 15 of the Act states which areas of Namibia form part of communal land.<sup>4</sup> Under s 16, with the approval of the National Assembly, the President may by proclamation: declare any defined State land to be communal land, add any State land to an existing communal land area, or withdraw a defined area from communal land.

[22] Section 17 of the Act makes it very clear that all communal land areas belong to the State, which must keep the land in trust for the benefit of the traditional communities living in those areas. The State is enjoined to put systems in place to make sure that communal lands are administered and managed in the interests of those living in those areas. The Act also makes it clear that communal land cannot be sold as freehold land to any person.

[23] The Act takes a strong position against the erection of fences on communal lands. Section 18 prohibits the erection of new fences without proper authorization obtained in accordance with the Act. Similarly, that section provides that fences that existed at the time when the Act came into operation have to be removed, except where, the people who erected these fences applied for and were granted permission to keep the fences on communal land.<sup>5</sup> This means that from 1 March 2003 no new fences may be erected in a communal area and fences may only be retained if authorization is sought and granted under the Act.

[24] Section 19 stipulates that the rights that may be allocated in respect of communal land under the Act are divided into customary land rights and rights of leasehold. While s 21 sets out the customary land rights that may be allocated in

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<sup>4</sup> The areas which make up communal land are set out in Schedule 1 to the Act.

<sup>5</sup> For the purposes of s 18, the Act came into operation on 1 March 2003. (See Government Notice 34 of 2003).

respect of communal land as:

- (a) a right to a farming unit;
- (b) a right to a residential unit; and
- (c) a right to any other form of customary tenure that may be recognised and described by the Minister by notice in the *Gazette* for the purposes of this Act.

[25] Section 20 identifies the person in whom the power to allocate or cancel customary land rights is vested. The primary power to allocate and cancel customary land rights is vested in the Chief of a traditional community, or if the Chief so decides, in the Traditional Authority of the particular traditional community. This means that the Chief or Traditional Authority first must decide whether or not to grant an application for a customary land right. Only once this decision has been made, will the matter be referred to the Communal Land Board for ratification of the decision by the Chief or Traditional Authority.

[26] Section 22 of the Act sets out the procedures that must be followed when applying for a land right in respect of a communal land. It provides that an application for the allocation of a customary land right in respect of communal land must be made in writing in the prescribed form; and be submitted to the Chief of the traditional community within whose communal area the land in question is situated. The section further provides that an applicant for a land right in respect of a communal land must, in his or her application for the land right, furnish such information and submit such documents as the Chief or the Traditional Authority may require for purpose of consideration of the application. The section furthermore provides that when considering an application for a customary land right in respect of communal land, a Chief or Traditional Authority may-

- (a) make investigations and consult persons in connection with the application;  
and
- (b) if any member of the traditional community objects to the allocation of the

right, conduct a hearing to afford the applicant and such objector the opportunity to make representations in connection with the application, and may refuse or, grant the application.

[27] Section 23 of the Act limits the size (the current limit is 20 hectares for a residential land right and 50 hectares for a farming unit)<sup>6</sup> of land which may be allocated and acquired as a customary land right. If the land applied for exceeds the limit set by the Act, the Minister responsible for Land Reform must approve the allocation in writing. The Minister<sup>7</sup> may prescribe the maximum area after consultations with the Minister responsible for agricultural affairs as stated in the Act.

[28] Section 28 recognises existing customary land rights, it provides that any person who immediately before the commencement of the Act held a right in respect of the occupation or use of communal land, being a right of a nature referred to in s 21, and which was granted to or acquired by such person in terms of any law or otherwise, shall continue to hold that right.

[29] Section 29 deals with grazing rights. That section, amongst other things, provides that the commonage in the communal area of a traditional community is available for use by the lawful residents of such area for the grazing of their stock, but the right is subject to such conditions as may be prescribed or as the Chief or Traditional Authority concerned may impose. The conditions that may be imposed include conditions relating:

- (a) to the kinds and number of stock that may be grazed;
- (b) to the section or sections of the commonage where stock may be grazed and the grazing in rotation on different sections;
- (c) to the right of the Chief or Traditional Authority or the relevant board to utilise any portion of the commonage which is required for the allocation of a right

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<sup>6</sup> See Regulation 3 of the Regulations in respect of the Communal Land Reform Act, 2005 published under Government Notice No. 37 of 2003 in *Government Gazette* No. 2926 of 1 March 2003.

<sup>7</sup> The Minister responsible for Land Reform.

under this Act; and

- (d) to the right of the President under s 16(1)(c) to withdraw and reserve any portion of the commonage for any purpose in the public interest.

[30] Section 30 of the Act confers the power to grant right of leasehold in respect of any portion of communal land on a Communal Land Board. This right of leasehold can only be granted if the Traditional Authority of the traditional community in whose communal area the land is situated consents to the right of leasehold.

[31] It appears that the Act differentiates between a right of leasehold and a right of leasehold for agricultural purposes, I say so because s 31(1) of the Act provides that a right of leasehold for agricultural purposes may only be granted for land that is situated in a designated area. A designated area is an area specified by the Minister in the *Government Gazette* in respect of which a Communal Land Board may grant rights of leasehold for agricultural purposes. This land is identified after consultations with the Traditional Authority and the Communal Land Board concerned.

[32] Section 30(3) of the Act also allows for exceptions to the rule that rights of leasehold for agricultural purposes may only be granted for land situated in designated areas. One exception, for example, would be when a person asks to be granted a right of leasehold for agricultural purposes on land that lies completely or partly outside an area designated for agricultural purposes. In such a case, the person may apply to the Minister for approval on Form 6.<sup>8</sup> After consulting with the Traditional Authority and the relevant Communal Land Board, the Minister may allow the application, but only if the Minister is satisfied that the granting of the right of leasehold will not unreasonably interfere with or restrict the use of the commonage by members of the traditional community and good reasons exist why the application must be approved.

[33] Section 30 basically sets out the procedures with regard to the application for a leasehold right. The section provides that application must be made to the

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<sup>8</sup> See Regulation 12.

Communal Land Board of the area in which the land is situated. The application must be made on Form 5.<sup>9</sup> Section 31(3) provides that a right of leasehold may not be granted over land to which someone else has a customary land right. However, the holder of the customary land right may agree to give up his or her right to the land if paid an agreed compensation, and suitable arrangements for his or her resettlement have been made on alternative land. The Communal Land Board can grant a right of leasehold as it thinks fit, but only if the Traditional Authority agrees to it. Section 30(4) provides that where the size of the land is larger than what has been prescribed<sup>10</sup> for a particular land use, the Minister must give written approval before the Board may grant a right of leasehold.

[34] Section 32 sets out conditions that must be met or fulfilled before the Board may grant a right of leasehold. The conditions mainly relate to the payment of prescribed fees. Section 33 of the Act sets out what happens after a right of leasehold is granted. That section provides that the Board must ensure that the right is registered in the prescribed register, in the name of the applicant and issue a certificate of leasehold to the applicant. If the land in question has been surveyed under the Land Survey Act, 1993 (No. 33 of 1993), and the duration of the lease is for ten years or more, the right of leasehold must be registered under the Deeds Registries Act, 1937 (No. 47 of 1937).

[35] Section 34 of the Act sets out the period for which a land right may be issued for a maximum period, being 99 years, but the person who applied for and received the right of leasehold and the Board must agree to the period. Leases for longer than ten years are not valid unless approved by the Minister. Section 35 deals with rights to communal land that existed prior to 01 March 2003 when the Act came into operation. The section provides that any person who immediately before the commencement of this Act held a right, not being right under customary law, to occupy any communal land, whether by virtue of any authority granted under any law or otherwise, may continue to occupy such land under that right, subject to the same terms and conditions on which the land was occupied immediately before the commencement of this Act, until-

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<sup>9</sup> See Regulation 11.

<sup>10</sup> Regulation 13 prescribes that the maximum size of land can be no larger than 50 hectares.

- (a) such right is recognised and a right of leasehold is granted to such person in respect of the land upon acceptance of an offer made in terms of subsec (7);
- (b) such person's claim to the right to such land is rejected upon an application contemplated in subsec (2);
- (c) such person declines or fails to accept an offer of a right of leasehold made in terms of subsec (7); or
- (d) such land reverts to the State by virtue of the provisions of subsec 13.

[36] Section 36 deals with the cancellation of a right of leasehold, it provides that in addition to the grounds for cancellation set out in a deed of leasehold, a right of leasehold may be cancelled by a board if the leaseholder fails to comply with the requirements or to adhere to any restrictions imposed by or under any other law pertaining to the utilisation of the land to which the right relates.

[37] Section 43 prohibits the unlawful occupation of communal land. Communal lands may only be occupied or used in line with a right granted under the Act. This includes existing customary land rights (under s 28) and other existing rights to use communal land (under s 35). A person who occupies communal land without having the right to do it can be evicted by a Chief, Traditional Authority or a Communal Land Board can also take legal action to have a person evicted.

### Factual Findings

[38] Before I deal with the issue that I am required to answer in this matter, I will record the findings that I have made in this matter. These findings I have made on the basis of the pleadings that were filed by the parties.

[39] I am satisfied and thus find that Eengolo-Ondjiina forms part of communal land as contemplated in s 15 of the Act. I furthermore find that Eengolo-Ondjiina falls under the jurisdiction of the Oukwanyama Traditional Authority and that the Ohangwena Communal Land Board is the Board that is entrusted with the



administration of the communal land where Eengolo-Ondjiina is situated. I furthermore make the finding that both Matti and Vilho are members of the Oukwanyama traditional community and have occupied and utilised Eengolo-Ondjiina prior to 1 March 2003.

[40] I make the further finding that, on 18 March 2014 the Minister responsible for the then Ministry of Lands and Resettlement (now the Ministry of Land Reform) granted approval to the Ohangwena Communal Land Board to allocate a leasehold right in respect of a portion of communal land measuring 2526.7 hectares to Matti for the purposes of conducting small scale commercial business farming inside a designated area, although the Minister at the time of granting permission did not identify the designated area.

[41] I furthermore make the finding that the Ohangwena Communal Land Board did not, as the Minister approved, grant a leasehold right in respect of a portion of communal land measuring 2526.7 hectares to Matti for the purposes of conducting small scale commercial business farming, but granted a right of 'leasehold for any purposes other than agricultural purposes outside the designated area' as evidence by Certificate of Leasehold Number OHCLB –PCLD 16.

[42] I furthermore make the finding that on 22 April 2015, Matti and the Minister responsible for Land Reform signed a Notarial Lease Agreement in respect of the occupation and utilisation of Eengolo-Ondjiina. The evidence before me furthermore establishes that the Notarial Lease Agreement has not been registered in the Deeds Registry. I furthermore make the finding that on 08 June 2015 the Okongo East Communal Farmers on the one hand and Nahas as main leaseholder and, Matti, Natangwe and Vilho as sublease holders on the other hand signed an addendum to the Lease Agreement between the Communal Land Board and the main lease holder.

[43] The Notarial Lease Agreement signed between the Minister and Matti, amongst other terms, provides in clause 12 as follows:

**'12 CONDITIONS OF OCCUPATION BY OTHER PERSONS**

12.1 In the event that a leaseholder is occupying the property with any other person(s) who has /have been living and farming on such property prior to the enactment of the Land Reform Act, such arrangement shall continue on the following conditions:

12.1.1 The leaseholder shall notify the Communal Land Board in writing of such occupation by other person(s) and obtain written ratification of the CLB to recognise such arrangement.

12.1.2 The leaseholder shall occupy the leased property together with **Natangwe Halweendo** and **Vilho Shimwooshili** subject to the conditions as may be stated by the CLB concerned referred to under clause 12.1.1 above.

12.1.3 The notification in terms of 12.1.1 and 12.1.2 must be accompanied by:-

- (a) proof of such occupation by such other person(s) from the Traditional Authority;
- (b) the number of such persons;
- (c) the size of hectare or farm occupied by such other persons; and
- (d) the number of animals owned by such person(s).

12.1.4. The Communal Land Board may give or withhold consent for the continuation of such occupation...'

[44] The final finding I make is that a dispute with respect to the utilisation of Eengolo-Ondjiina has arisen between Matti and Vilho and it is because of the dispute that Matti instituted these proceedings seeking the eviction of Vilho from Eengolo-Ondjiina. I now turn to answer the issue that confront me in this matter.

The points for adjudication.

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[45] I indicated above that the first contentious issue between Matti and Vilho is the question whether the mere fact that the size (being 2526.7 hectares) of Eengolo-Ondjiina exceeds the prescribed maximum size (being 100 hectares)

invalidates Matti's right of leasehold or customary land right. At the hearing of this matter, Mr Coleman who appeared on behalf of Vilho indicated that he concedes to Matti's contention that the fact that the size of Eengolo-Ondjiina exceeds 50 hectares does not invalidate Matti's leasehold right. I am of the view that the concession is properly made.

[46] The second question is whether Matti's right of leasehold or customary land right is exclusive to him. I pause here to, before I deal with the question, clarify one aspect. Matti in his particulars of claim alleges that he was awarded a right of leasehold alternatively a customary land right in respect of a portion of communal land.

[47] I indicated early in this judgment that I found as a fact that the Minister responsible for Land Reform granted approval to the Ohangwena Communal Land Board to allocate a leasehold right in respect of a portion of communal land measuring 2526.7 hectares to Matti for the purposes of conducting small scale commercial business farming. The rights that may be allocated in respect of communal land are customary land rights and rights of leasehold.<sup>11</sup> The customary land rights that may be allocated in respect of communal are:

- (a) a right to a farming unit;
- (b) a right to a residential unit; and
- (c) a right to any other form of customary tenure that may be recognised and described by the Minister by notice in the *Gazette* for the purposes of this Act.

[47] The certificate that was issued to Matti clearly states that he was granted a right of leasehold and not a customary land right in respect of Eengolo-Ondjiina. His claim that in the alternative he was allocated a customary land right is inaccurate. Customary land rights are granted or allocated under s 21 and they are a right to a farming unit or a right to a residential unit or any other form of customary tenure. Matti was granted none of these rights.

[48] I am of the further view that the contention of Matti that the right of leasehold

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<sup>11</sup> See s19 of the Act.

that he was granted is exclusive to him is fallacious. I say so because s 17 of the Act<sup>12</sup> clearly provides that Communal land vests in the State and which holds in trust for the benefit of the traditional communities residing in those areas. This clearly excludes the concept of exclusivity.

[49] In addition to s 17 of the Act, s 35 of the Act makes provision that any person who immediately before the commencement of this Act held a right, not being right under customary law, to occupy any communal land, whether by virtue of any authority granted under any law or otherwise, may continue to occupy such land under that right, subject to the same terms and conditions on which the land was occupied immediately before the commencement of this Act, until such right is recognised and a right of leasehold is granted to such person or such person's claim to the right to such land is rejected upon an application, such person declines or fails to accept an offer of a right of leasehold.

[50] I made the factual finding that Vilho has occupied and utilised the communal land at Eengolo-Ondjiina since 1994, which is prior to 2003 when the Act came in to operation. Section 35 provides that Vilho continues to occupy such land (namely Eengolo-Ondjiina) under that right, subject to the same terms and conditions on which the land was occupied immediately before the commencement of this Act until one of the conditions set out in s 35(1) find application. There is no evidence or factual finding that any of those conditions occurred. The Notarial Lease Agreement signed between Matti and the Minister actually confirm that the leaseholder (namely Matti or Nahas) must occupy Eengolo-Ondjiina together with Vilho.

[51] The third question for adjudication is whether Matti's right of leasehold confers on him the right to initiate eviction proceedings against Vilho. I answer this

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<sup>12</sup> Section 17 reads as follows:

**'17 Vesting of communal land**

(1) Subject to the provisions of this Act, all communal land areas vest in the State *in trust for the benefit of the traditional communities residing in those areas* and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.

2) No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land.'

question in the negative. The right of leasehold granted to Matti does not confer the power on Matti to initiate eviction proceedings against Vilho or any other person for that matter. I say so for the following reasons.

[52] In *Shimuadi v Shirungu*<sup>13</sup> Levy, J held that:

'It is trite that in order to eject a defendant from immovable property, a plaintiff need only allege that he is the owner and that the defendant is in occupation thereof. Should the defendant deny any one of these elements, namely that the plaintiff is the owner or that the defendant is in occupation, the *onus* is on the plaintiff to prove the truth of the element which is denied. The plaintiff would succeed in discharging the *onus* of proof in respect of ownership by providing registered title deeds in his favour. An inference that plaintiff is the owner would then justifiably be drawn. Should the defendant dispute the validity of the title deeds or that ownership, despite the deeds, is of a 'nominal character' (*'nominale aard'*), as in the present case, the *onus* is on the defendant to prove this.'

[53] In addition to this well-established principle of our law, s 43 of the Act provides that 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). I have thus come to the conclusion that Matti does not have *locus standi* to institute these proceedings.

[54] In view of the conclusions that I have arrived at, I find it unnecessary to answer the remaining questions or points agreed to by the parties for adjudication. What remains is the question of costs. I am of the view that the general rule namely that costs follow the cause will apply.

### Order

I accordingly make the following order:

- a) It is declared that the plaintiff, Matti Toivo Ndevahoma, does not have the necessary *locus standi* to institute action seeking the eviction of the first defendant,

<sup>13</sup> 1990 (3) SA 347 (SWA), also see the case of *Shukifeni v Tow-in-Specialist* CC 2012 (1) NR 219 (HC); *Angula v Mavulu* (I 2690/2010) [2014] NAHCMD 250 an unreported judgment of this Court delivered on 22 August 2014.

Vilho Shimwooshili from a portion of communal land known as 'Eengolo-Ondjiina, Farm No. OH-OK-02, measuring approximately 2526, 7 hectares, situated in the Okongo District of the Ohangwena Region'.

b) The plaintiff must pay the first defendant's costs of suit such cost to include the costs of one instructing and one instructed counsel.

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SFI UEITELE  
Judge

**APPEARANCES**

PLAINTIFF:

S ENKALI

Of Kadhila Amoomo, Windhoek

FIRST DEFENDANT:

G COLEMAN

Instructed by ANGULA CO. INC. Windhoek