



**HIGH COURT OF NAMIBIA MAIN DIVISION
HELD AT WINDHOEK**

JUDGMENT

Case no: **I 575/2014**

In the matter between:

KATIMA MULILO TOWN COUNCIL

PLAINTIFF

and

EVANS SANKASI MASWAHU

FIRST DEFENDANT

SHELTON KAMBINDA NAMBWE

SECOND DEFENDANT

BARTHOLOMEW KAMBINDA

THIRD DEFENDANT

LISWANI EDWIN KAMBINDA

FOURTH DEFENDANT

MINISTER OF LANDS AND RESETTLEMENT

FIFTH DEFENDANT

MAFWE TRADITIONAL AUTHORITY

SIXTH DEFENDANT

Neutral citation: *Katima Mulilo Town Council v Maswahu* (I 575/2014)
[2017] NAHCMD 188 (14 July 2017)

Coram: Bassingthwaighte AJ

Heard: 19-23 June 2017

Delivered: 14 July 2017

Flynote: Eviction – plaintiff's claim is based on ownership of the land occupied by the first to fourth defendants – first to fourth defendants claim that they occupy the land in terms of customary land rights allocated to them during 1962 and that they have a right to be compensated for their land in terms of article 16 (2) of the Constitution read with the Government's Compensation Policy Guidelines for Communal Land – plaintiff denies it has an obligation to compensate because when it acquired the land, it was no longer communal land – the Policy only came into operation in 2008 and it acquired the land in 1998 and the defendants have not proved their customary land rights relied on.

Summary: the plaintiff's claim is for eviction of the defendants from its property situated at Farm Katima Mulilo Townlands No 1328, Kambinda Village/Kazauli Village. Plaintiff claims ownership of the property on the basis of an endorsement made to it in respect of the said property in terms of section 3(3) of the Local Authorities Act in 1998. The defendants, who claim to have been in occupation of the said property on the basis of customary land rights given to their late father when the property was allocated to him in 1962, resisted the eviction proceedings on the basis that they are entitled to be compensated for the loss of their customary land rights in accordance with article 16(2) read with article 66 of the Namibian Constitution and the Government's Policy Guidelines for Communal Land;

Held – that the defendants failed to proof the customary land rights relied on and that they are in lawful occupation of the land in question;

Held – further that the reliance on article 16 (2) of the Constitution is misplaced as the defendants are not and never have been the owners of the land in question and in any event, there was no expropriation as contemplated by article 16 (2) of the Constitution;

Held – further that the Government's Policy Guidelines for Communal Land is not applicable as the policy came into operation long after the land was acquired by the plaintiff and the land in question does not constitute communal land.

ORDER-

- (1) The defendants and all those who claim through them are ejected from the plaintiff's town and townlands at the place known as Kambinda Village/ Kazauli Village, Katima Mulilo.
- (2) The defendants are ordered to pay the plaintiff's costs in respect of plaintiff's claim, such costs to include the costs of one instructing and one instructed legal practitioner.
- (3) The defendants' counterclaim is dismissed.
- (4) The defendants are ordered to pay the plaintiff's costs in respect of the defendants' counterclaim, such costs to include the costs of one instructing and one instructed legal practitioner

JUDGMENT

BASSINGTHWAIGHTE, AJ

- (a) Plaintiff issued summons against the first to fourth defendants in which it seeks an order that the defendants and all those who claim through them be ejected from the plaintiff's town and townlands at Kambinda Village, Katima Mulilo. In its particulars of claim the plaintiff alleges that it is the owner of certain townlands located at Katima Mulilo (which includes the Kambinda Village) Katima Mulilo by virtue of a certificate of registered title No T4789/1991 since 20 September 1998. It is further alleged that the defendants are and have been in unlawful occupation and possession of a portion of the said town and townlands referred to as Kambinda Village (Kazauli Village).

- (b) All four defendants defended the matter. In their plea the first to fourth defendants deny that the plaintiff obtained the certificate of registered state title lawfully as the land was already alienated to the defendants in 1962. The first to fourth defendants alleged that in terms of section 18 of the Deeds Registries Act, Act No 47 of 1937 such a certificate could only be obtained in respect of unalienated State land. According to the first to fourth defendants, Kambinda Village was allocated to their families by the Chief of the Mafwe Royal Establishment in 1962, which allocation constitutes an alienation done in terms of the customary law of the Mafwe tribe.
- (c) The first to fourth defendants further allege that they have customary land rights in respect of the said Kambinda Village, which rights are recognised by Article 66 of the Namibian Constitution and that the plaintiff could only interfere with such rights if it did so in terms of Article 16(2) of the Namibian Constitution. The first to fourth defendants alleged that the plaintiff obtained its title in contravention of Article 16(2) and therefore its title in respect of Kambinda Village is invalid, void and of no legal consequences.
- (d) The first to fourth defendants furthermore alleged that Kambinda Village does not form part of plaintiff's land, nor has the plaintiff become the lawful owner thereof. As they are lawfully in possession of the land, the first to fourth defendants allege that they are entitled to refuse to vacate.
- (e) The first to fourth defendants subsequently joined the fifth and sixth defendants and filed an amended counterclaim, only against the plaintiff. In they seek an order declaring the declaration of Kambinda Village as townland unconstitutional and of no force and effect, ordering that the first to fourth defendants be restored

to undisturbed occupation of Kambinda Village and that the plaintiff be evicted from Kambinda Village. In the alternative the first to fourth defendants seek an order in terms of which the plaintiff is ordered to compensate the first to fourth defendants in terms of Article 16(2) of the Constitution read with the Compensation Policy Guidelines for Communal Land. The main relief is sought on essentially the same grounds as those forming the basis of the defendants' defence to the plaintiff's claim.

- (f) As basis for the alternative relief, the first to fourth defendants allege that they have erected structures in the form of homesteads and ploughed the field for their daily livelihood at Kambinda Village. It is further alleged by the defendants that Kambinda Village is communal land forming part of the area under the jurisdiction of the Mafwe Traditional Community and was allocated to the Kambinda family in 1962 which includes the first to fourth defendants.
- (g) According to the first to fourth defendants, the endorsement of Kambinda Village for the benefit of the plaintiff is subject to just compensation in terms of Article 16(2) of the Namibian Constitution read with the Compensation Policy Guidelines for Communal Land adopted by Cabinet on 1 April 2008. The defendants further allege that the Minister of Urban and Rural Development during or about March 2016 instructed the plaintiff to withdraw the case against the first to fourth defendants and to resolve the matter amicably. The first to fourth defendants also accuse the plaintiff of being selective as to which parties it consults and compensates for loss of use of communal land. First to fourth Defendants allege that plaintiff consulted with a certain Opperman and the Roman Catholic Church and duly compensated them in terms of the Compensation Policy in respect of portions of Kambinda Village which they occupied.

- (h) The parties subsequently agreed to limit the issues for determination by this court in a proposed pre-trial order dated 29 September 2016. This was made an order of court on 9 June 2017.
- (i) During closing arguments, counsel for the first to fourth defendants, Ms Shifotoka, indicated that the first to fourth defendants no longer challenge the legality of the plaintiff's acquisition of ownership over the land in question. She also informed the court that the first to fourth defendants are now only seeking an order that be engaged and compensated by the plaintiff before eviction takes place. This limited the issues to be determined by the court considerably.
- (j) The fifth and seventh defendants did not take part in the proceedings at all. Where I therefore refer to 'defendants' below, it is a reference to first to fourth defendants collectively.

The Issues

- (k) The parties attempted to define the issues for determination in a pre-trial order. With the concession made by the defendants during argument the issues need to be redefined slightly. The following issues remain for determination by this court:

10.1 Whether the defendants are in lawful occupation of the land in question and whether they occupy such land in terms of customary land right;

10.2 Whether the plaintiff is under an obligation to consult and compensate the defendants in terms of article 16(2) of the Constitution read with the Compensation Policy Guidelines on Communal Land before it is entitled to an order for eviction;

The Evidence

- (l) Plaintiff called two witnesses, Mr Patrick Lifasi Lilungwe and Mr Ntesa Mahoto. Mr Lilungwe is the Acting Chief Executive Officer of the plaintiff and Mr Mahoto is a Surveyor Technician employed by the plaintiff. The defendants also called two witnesses, Mr Evans Sankasi Maswahu (first defendant) and Mr Liswani Edwin Kambinda (fourth defendant). The second and third defendants did not testify.
- (m) Mr Lilungwe in his evidence dealt with how the plaintiff acquired Farm Katima Mulilo Townlands No 1328 (hereafter referred to as "Katima Mulilo Townlands"). He identified the area from which the plaintiff seeks to evict the defendants which is commonly known amongst all parties concerned as Kambinda Village/Kazauli Village. I simply refer to it as Kambinda Village. The boundaries of Katima Mulilo Townlands are identified on Diagram 332/91 which is annexed to the Certificate of Registered State Title which was issued to Government on 18 November 1991 and endorsed in favour of the plaintiff in terms of section 3(3)(b) of the Local Authorities Act, Act 23 of 1992 on 10 September 1998 (Exhibit A).
- (n) Mr Lilungwe identified the area from where the plaintiff seeks to evict the defendants with an X on the diagram. The area is close to the beacon "O" which is depicted on the diagram in the top right hand corner thereof. This was subsequently confirmed by Mr Mahoto and was not put in dispute by the defendants in their evidence. It also became clear during evidence that Kambinda Village is partly on Katima Mulilo Townlands and partly on what is still identified as State Land on the diagram. The village is divided by one of the boundaries of Katima Mulilo Townlands formed by Beacons "O" and "P" on the eastern side of Katima Mulilo Townlandlands.

- (o) The plaintiff's case is only in respect of that part of Kambinda Village which falls within the boundaries of Katima Mulilo Townlands as it does not have any say in respect of that part of Kambinda Village falling on State Land.
- (p) During cross-examination it was put to Mr Lilungwe that it is only the first defendant who has structures on that portion of Kambinda Village which falls within the boundaries of Katima Mulilo Townlands. Defendants' counsel was then requested to indicate whether the other three defendants who do not have any structures on that part of Kambinda Village which forms part of Katima Mulilo Townlands still oppose the eviction order sought by the plaintiff despite the fact that they seemingly do not occupy the area. After taking instructions, Ms Shifotoka indicated that her instructions are that all four defendants still oppose the eviction proceedings. I understood her to say that they all claim to have customary land rights in respect of the said land and therefore persist in their defence and counterclaim.
- (q) Mr Mahoto testified that based on the information appearing on Diagram 332/91 Katima Mulilo Townlands were surveyed from July 1987 until June 1991.
- (r) It is common cause that the Government of Namibia then applied for and was issued with a Certificate of Registered State Title in terms of section 18 of the Deeds Registries Act, Act 47 of 1937 in respect of Farm Katima Mulilo Townlands No 1328 which is depicted on the diagram.
- (s) Mr Lilungwe testified that Katima Mulilo is deemed to be a town in terms of section 3(5) of the Local Authorities Act, Act 23 of 1992 since the first election of the members of the Town Council. It is also the third town listed in Schedule 2 of the Local Authorities Act. It is common cause that Farm Katima Mulilo Townlands No

1328 was endorsed to the plaintiff on 10 September 1998 and has since vested in the plaintiff. This includes part of Kambinda Village.

- (t) Mr Lilungwe testified that as far as he knows, it is only the first defendant who has a homestead on that part of Kambinda Village which falls within the boundaries of Katima Mulilo Townlands.
- (u) Mr Lilungwe confirmed that the plaintiff has been applying the Government's Compensation Policy Guidelines for Communal Land ("the Policy") since 2008 in the event that it acquires land which is already occupied on the basis of customary land rights. Prior to 2008 there was no compensation policy and no one was compensated. He, however, also kept emphasising that they only pay compensation in applicable cases. The procedure applied by the plaintiff is to engage with the affected to agree on the compensation payable and to then inform the Ministry of Urban and Regional Development of the agreed compensation. The Ministry would then provide the funds for compensation. If an erf or plot is to be provided as the compensation, such erf or plot would be made available by the plaintiff. Mr Lilungwe, however, said that there is no resolution taken by the plaintiff to approve the application of the policy which is in fact a government policy and not a policy adopted by the plaintiff.
- (v) Mr Lilungwe was unable to say whether the defendants were engaged prior to his time. But since he has been acting CEO there has not been engagement based on a decision taken by the plaintiff. According to Mr Lilungwe, the Policy does not apply in this case as the land was acquired from Government at a time when it was no longer communal land. Furthermore, the Policy was only approved after the plaintiff had already acquired the land.

- (w) During re-examination Mr Lilungwe was asked whether any person has since 2008 received compensation from the plaintiff in terms of the Policy and his response was no. It would thus appear that the plaintiff has never paid any compensation in terms of this Policy to any person.
- (x) Mr Lilungwe was confronted in cross – examination with the allegations of inconsistency made in the defendants' plea and counterclaim. It was put to him that the Roman Catholic Church and a certain Mr Opperman have been treated differently whilst the land they occupy was also part of Kambinda Village and was in fact given to them by the Kambinda Family. He testified that both occupy the land legally. The Roman Catholic Church either bought it or received it as a donation and Mr Opperman bought and paid for his property but it has not been transferred from the plaintiff to him. The latter initially had a permission-to-occupy (PTO) in respect of the land.
- (y) At Ms Shifotoka's request some further documents were produced in respect of these transactions whilst Mr Lilungwe was under cross-examination. From these documents it appears that the land was in fact allotted to the Roman Catholic Church in 1944. It is not clear from the evidence on what basis the Roman Catholic Church currently still occupies the land but Mr Lilungwe testified that the land was either sold or donated to it. Mr Opperman was granted a PTO by the Ministry of Regional and Local Government and Housing (as it was previously known) during 1992 and then again during 1994 in respect of the land he occupies.
- (z) During re-examination Mr Lilungwe testified that the land occupied by the Roman Catholic Church was previously surveyed but that Council decided that it must be done again where after the land will be transferred to the Roman Catholic Church.

- (aa) Mr Maswahu, the first defendant, testified that he has a traditional home and ploughing fields at Kambinda Village. He testified that Kambinda Village was allocated to his late father, Richard Kambinda Nambwe, by Chief Mamili, the Chief of the Mafwe Royal Establishment and took occupation thereof in 1963. Since then, the Kambinda family has been ploughing their fields in Kambinda Village and have their traditional homes and a family grave yard on the land. Mr Maswahu provided what appeared to be a google map print of Kambinda Village and pointed to the location of the Village on this map with 4 X's drawn with a highlighter (Exh "M"). This map was not shown to the plaintiff's witnesses in cross-examination. Mr Maswahu, after much prompting under cross – examination, eventually admitted reluctantly that he does not know the origin of the document. He testified that there is a road going through the village – Ngoma Road which he also identified with the green highlighter.
- (bb) Mr Maswahu testified that the Kambinda family is the rightful owner of Kambinda Village since 1962 when it was allocated to his late father. He relied on their customary land rights for his claim of ownership. Thus, he said, the land could not have been considered to be unalienated at the time when Government obtained the certificate of registered state title. According to him, "unalienated "means that it has not been allocated or given to anyone.
- (cc) He furthermore testified that the plaintiff cannot evict him and his relatives from the land until it has consulted and compensated them in terms of the Policy. The plaintiff has on several occasions been told by the Minister to consult but has simply not done so. He also testified that it is the plaintiff who has the obligation to consult and compensate.
- (dd) Mr Maswahu testified that he works for the Ministry of

Urban and Rural Development and knows the process which must be followed. The process must commence with the affected persons being consulted. The Minister appropriates funds which they give to the local authority to compensate affected persons for their land. Compensation is then done in accordance with the guidelines set out in the Policy. He urged the plaintiff to treat them the same way it has treated the Roman Catholic Church and Mr Opperman. He testified that Mr Opperman approached his family in 1994 and the family then permitted him to settle on a piece of their land. They previously used that piece to plough maize and other crops.

(ee) During cross-examination, Mr Maswahu agreed that whatever customary land rights were allocated to his father in 1962 are subject to the law applicable at that time and this also applies to the tenure, nature and extent of the rights which they may have acquired in respect of the land at the time. He confirmed that he was not born at the time when the land was allocated to his father. The land was not identified with any pegs or beacons but the boundaries have been pointed out to him when he was growing up with reference to trees and other landmarks.

(ff) Mr Maswahu also admitted that there is a difference between land given by a Chief in terms of customary law and someone who has a registered title in respect of their land. He then explained that "alienated" as referred to in the Deeds Registries Act refers to the European way of giving land. Mr Maswahu testified that he is the only one who has any structure on that part of Kambinda Village which falls within the boundaries of the town. He only found out long after 1991 that the land belongs to Government. He built his house about 2 to 3 years ago. Mr Maswahu furthermore testified that when the Government surveyed the land and obtained the Certificate of Registered State Title in 1991, it should have

consulted them as affected persons.

(gg) The defendants' second witness, Mr Liswani Edwin Kambinda, the third defendant testified that the first PTO which was issued to Mr Opperman (Exh "H") was only for his house, 1609 square metres. The second PTO was for 10000 square meters. He has no legal document to reside there because, according to him, PTO's have been abolished and therefore they are all on an equal footing and must thus be treated the same. He also pointed out that it appears from one of the documents produced by the plaintiff whilst Mr Lilungwe was testifying, that the land which was allocated to the Roman Catholic Church was part of Chief Mamili's land (Exh "G"). The document referred to appears to be a Permit issued in favour of the Seventh - Day Adventist Mission Society to occupy a specified site. It does not seem to apply to the Roman Catholic Church. The point he was, however, trying to make is that the Roman Catholic Church occupies land in the same area as the defendants or that it once formed part of Kambinda Village yet they are being treated differently.

(hh) Mr Kambinda furthermore testified that it appears from the documents that the plaintiff has been engaging the Roman Catholic Church since 1998 but they have not been consulted once. They were only told of the town boundaries 2 years ago. He testified that they are not insisting on compensation, only to be treated equally.

(ii) During cross-examination Mr Kambinda testified that he has a house in Kambinda Village but on that part which falls outside the boundaries of the town. He confirmed that he is familiar with title deeds as it is part of his work. He said that he is aware of beacon "O" which is located close to his brother's house (first defendant), that they were only informed of the boundaries 3 years ago and

that they then tried to meet with the plaintiff but to no avail. He testified that he worked for the plaintiff from 1996 until 2004 but admitted that he could not testify about the contractual relations of the plaintiff with other parties. He however pointed out that they did request documents from plaintiff to show on what basis Mr Opperman and the Roman Catholic Church occupies the land which they occupy. (I pause here to mention that the documents were requested whilst Mr Lilungwe was under cross-examination. There was never any request for any further or specific discovery).

Defendants' occupation of the land

- (jj) As indicated above, the defendant's no longer dispute that the plaintiff is the owner of the land. All they want is to be consulted by the plaintiff as affected parties and to be compensated. The defendants rely on their customary rights in respect of the land.

- (kk) One of the facts which are identified as common cause in the pre-trial order is the fact that the defendants have been in occupation of Kambinda Village since 1962 which right they acquired through the Chief of the Mafwe Traditional Authority. Mr Narib argued that the plaintiff does, however, dispute the content of the right, the nature of the right and its nature. Those, he said are determined by the applicable customary law in respect of which no evidence has been led.

- (ll) There is was no evidence that the second to fourth defendant's occupy that part of Kambinda Village which falls within the boundaries of Katima Mulilo Township. It is only the first defendant who has a brick structure there. They all, however, claim that they are entitled to compensation in respect of the land based on their customary land rights.

- (mm) The difficulty I have is that the defendants have not given

any evidence of the customary right they rely on. I do not know what is the nature, extent or tenure of the right relied on. Although it is common cause that Kambinda Village was allocated to the late Richard Kambinda in 1962, there is no evidence of that right being transferred to the defendants either through inheritance or allocation by the Traditional Authority at a time when the land was still under its jurisdiction.

(nn) A customary land right is defined in the Communal Land Reform Act, Act 5 of 2002 as a right to a farming unit, a right to a residential unit and a right to any other form of customary tenure that may be recognised by the Minister.¹ These are the types of customary land rights which may be allocated in terms of the Communal Land Reform Act in respect of communal land. The Act recognises that people may have had pre-existing land rights allocated to them before the Communal Land Reform Act came into operation and allows such persons to apply for recognition and registration of such rights.² The defendants did not provide any evidence that they applied for such recognition and registration. Thus, I must accept that they never applied for such recognition or registration.

(oo) Furthermore, when the Certificate of Registered State Title was issued to Government in 1991 in respect of the land in question, it ceased to be communal land. No customary land could thereafter have been obtained in respect of that land.

(pp) The defendants have not given any other evidence upon which I could find that they are in lawful occupation or possession of the land.

Article 16(2) and the Policy Guidelines

¹ Section 1 read with section 21

² Section 28(2)

(qq) There is a further reason why the defendants defence and counterclaim must fail. The defendants claim they are entitled to compensation in terms of Article 16(2) of the Constitution read with the Compensation Policy.

(rr) The defendants' reliance on article 16(2) is misplaced. Article 16 (1) recognises the fundamental right of all persons to acquire, own and dispose of property in Namibia. Article 16 (2) protects ownership rights. The protection afforded in article 16 (2) is against expropriation without just compensation. Expropriation takes place when someone is deprived of ownership of his property. With the concession made by the defendants, and correctly so in my view, they acknowledged that they do not have ownership of the land. Thus there could not have been any expropriation.

(ss) The land vested in the Government as at independence by virtue of the provisions of Art 124 read with Schedule 5 of the Constitution.

(tt) In terms of Article 124 of the Namibian Constitution read with Schedule 5 thereof:

“All property of which the ownership or control immediately prior to the date of independence vested in the Government of the territory of South West Africa, or in any representative authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or authority immediately prior to the date of independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.”

(uu) Mr Narib referred to a number of proclamations and

ordinances which provided some background to the status of the land just before independence. He first referred to the provisions of the South West African Native Affairs Administration Act, Act 56 of 1954, which in section 4(3) vested all assets, rights, liabilities and obligations of any fund established under any law for purposes of or in connection with communal land in the South African Development Trust. This Trust was the owner of communal land subject to other applicable laws as is apparent from section 4(1) of the said Act.

(vv) In terms of section 3 of the Representative Authorities Proclamation, AG 8 of 1980, representative authorities could be established for the population groups in Namibia. These Representative Authorities were then vested with legislative and executive power in respect of their respective population groups and, *inter alia*, had the power to deal with the communal land. The representative authority for Caprivians was created by Proclamation 29 of 1980. It, like all the other representative authorities, took control of the communal land in respect of the population group for which it was created.

(ww) By virtue of Proclamation AG8 of 1989 the powers that vested in the representative authorities were vested in the Administrator General and this included the power to control communal land. By virtue of article 124 read with Schedule 5 of the Namibian Constitution this power was transferred the Government of the Republic of Namibia along with ownership of such property. The Constitution also repealed all the proclamations in terms of which the various representative authorities were created.³ Thus, all communal land became the property of the Government of Namibia and was subject to its control as at independence.

³ Schedule 8 of the Constitution

- (xx) When Government obtained a certificate of registered title in respect of Farm Katima Mulilo No 1328. This had to be done in order to be able to transfer the land from the State.⁴ For this purpose the land was also separately surveyed. At this point the land ceased to be communal land.
- (yy) Thus, by the time that the plaintiff acquired the land, it was no longer communal land. Even if I am wrong in finding that the land ceased to be communal land once it was declared or deemed to be a town. This must have happened sometime before the endorsement was made in 1998. At that point, the land became the property of the plaintiff and the Registrar of Deeds was authorised to make the endorsement.⁵
- (zz) The Communal Land Reform Act only came into operation in 2002. The purpose of the Act as appears from the preamble was to provide for the allocation of rights in respect of communal land, to establish Communal Land Boards, to provide for the powers of Chiefs and Traditional Authorities and boards in relation to communal land and to make provision for incidental matters. The “existing communal land areas were identified in section 15 read with Schedule 1 of the Communal Land Reform Act. In the Caprivi it was identified as that part of Namibia lying east of the meridian 23E 18° 00°. However, the land comprising the area of a local authority established within the boundaries of any communal land area is expressly excluded from that communal area and shall not be communal land.⁶ Therefore, since Katima Mulilo was established prior to 2002, that part of Kambinda Village which falls within its boundaries, did not form part of communal land even by the time the Communal Land Reform Act came into operation and no compensation is payable to the defendants in terms of section

⁴ See Section 18 of the Deeds Registries Act

⁵ See section 3(3) (a) and (b) of the Local Authorities Act

⁶ See section 15(2) of the Communal Land Reform Act

16(2) as it is simply not applicable.

(aaa) As an aside, section 16(2) and (3) also makes it clear that any compensation payable where land is withdrawn from communal land, is payable by the Minister responsible for affairs relating to land matters. This is so because the land may only be withdrawn once the rights held by any person in respect of such land had been acquired by the State. If the land was communal land and was withdrawn after 2002, the defendants' rights would have been against the State represented by the Minister of Lands and Resettlement.

(bbb) The Policy is a Government Policy approved by Cabinet only on 1 April 2008. The plaintiff did not adopt the policy by way of a resolution. Even if it has, the policy is not applicable in this case as the land in question is not communal land.

Conclusion

(ccc) In light of the above, the plaintiff succeeds and the defendants' counterclaim is dismissed.

(ddd) I thus make the following order:

1. The defendants and all those who claim through them are ejected from the plaintiff's town and townlands at the place known as Kambinda Village/ Kazauli Village, Katima Mulilo.
2. The defendants are ordered to pay the plaintiff's costs in respect of plaintiff's claim, such costs to include the costs of one instructing and one instructed legal practitioner.
3. The defendants' counterclaim is dismissed.
4. The defendants are ordered to pay the plaintiff's costs in respect

of the defendants' counterclaim, such costs to include the costs of one instructing and one instructed legal practitioner.

N BASSINGTHWAIGHTE
Acting Judge

APPEARANCES

PLAINTIFF:

G Narib

Instructed by: Sisa Namandje & Co Inc

FIRST TO FOURTH

E Shifotoka

DEFENDANTS:

of Conradie & Damaseb