REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 164/2015

In the matter between:

1.	**GODFRIED NDJAMO TJIRIANGE**	**APPLICANT**

And

CHIEF SAM KAMBAZEMBI	**FIRST RESPONDENT**
KAMBAZEMBI TRADITIONAL AUTHORITY	**SECOND RESPONDENT**
COMMUNAL LAND BOARD OF THE OTJOZONDJUPA REGION	**THIRD RESPONDENT**
THEODOR TJIRIANGE	**FOURTH RESPONDENT**
AMBROSUIS TJIRIANGE	**FIFTH RESPONDENT**
WILLEM TJIRIANGE	**SIXTH RESPONDENT**
ABIUD TJIRIANGE	**SEVENTH RESPONDENT**
JOROKEE KATJIRUA-TJIRIANGE	**EIGHTH RESPONDENT**

Neutral citation: *Tjiriange v Kambazembi* (A 164/2015) [2017] NAHCMD 59 (24 February 2017)

Coram: UEITELE J

Heard: 07 June 2016

Delivered: 24 February 2017

Reasons Released 31 March 2017

Flynote: *Statute* Communal Land Reform Act, 2002 – Application to interdict and restrain respondents from unlawfully evicting the applicants from an area of communal land.

Statute Communal Land Reform Act, 2002 - Rights that may be allocated in respect of communal land under the Communal Land Reform Act, 2002 - are divided into customary land rights and rights of leasehold

Land -Communal land - Section 29 (1) confers on a person the right to graze their livestock on a commonage by virtue of the fact that they are lawful residents of a communal area and not because it has been allocated to them by the Traditional Chief or Traditional Authority. Section 17 read with s 29(1) makes it impossible to deny a resident of a communal area the right to graze his or her livestock in the commonage area of that communal land.

Constitutional law - Administrative justice entrenched by Art 18 of Namibian Constitution - Article requiring administrative bodies to follow rules of natural justice - Administrative bodies should give parties opportunity to be heard- Failure to do so fatal.

Administrative Law- The exercise of power by traditional authorities pursuant to the Traditional Authorities Act, 2000 is plainly the exercise of a public power, and in exercising those powers the traditional authority is an administrative body as contemplated in Article 18 of the Namibian Constitution.

Summary: The applicant and the fourth to the eighth respondents in this matter are members of the Ova-Herero traditional community and have since 1979 resided or conducted farming activities in a village called Ondjamo No. 1 situated in the communal area known as Otjituuo, which communal area is situated in one of the fourteen political regions of Namibia namely the Otjozondjupa Region. The colonial Government fenced off the area of Ondjamo village No.1 into about four camps. Two of the camps being, Camp A and B, have since 1979 been utilized by the Tjiriange family. A dispute arose between the Tjiriange siblings with regard to the

utilization of the camps.

On the 28th day of May 2015 Chief Sam Kambazembi, a certain Alexander Tjihokoru, Erastus Tjihokoru, four police officers, together with Theodor Tjiriange, Ambrosius Tjiriange and Willem Tjiriange arrived at the applicant's residence at Ondjamo No. 1. Chief Kambazembi there and then informed the applicant that he considered the matter and divided the grazing rights as follows; Willem Tjiriange, Abiud Tjiriange and the applicant would henceforth be allocated grazing rights to Camp B, whilst Theodor Tjiriange, Ambrosius Tjiriange and Jorokee Tjiriange Katjirua will be allocated grazing rights to Camp A.

The applicant was furthermore informed by Chief Kambazembi that his (applicant's) livestock had to be removed immediately from Camp A and that once all of the applicant's livestock were out of camp A, the gate between Camps A and B had to be permanently closed. On Sunday 31 May 2015, the employees of Theodor Tjiriange closed the gate between Camps A and B by erecting a fence in its stead. Since Sunday 31 May 2015 the applicant's livestock could not graze in Camp A, and were restricted to Camp B. It is this decision by Chief Kambazembi that has aggrieved the applicant and it is that decision which he impugns in the original notice of motion and which he wants this Court to review and set aside.

The respondents opposed the relief sought by the applicant and in the notice to oppose raised some points *in limine*. The relevant point *in limine* raised by the respondents is based on the contention that the applicant has not exhausted the internal remedies provided for in s 39 of the Communal Land Reform Act, 2002[1] and that the review application is irregular.

Held that the jurisdiction of this Court to review the decision of a Traditional Chief or the Traditional Authority has been neither excluded nor deferred by the provisions of the Communal Land Reform Act, 2002 and that the point *in limine* (namely that the review application was filed without first exhausting all the remedies provided for in the Communal Land Reform Act, 2002) must fail.

Held that the applicant was given less than 24 hours' notice of a meeting which was

1 Act No. 5 of 2002.

held to determine his rights. The court accordingly finds that the applicant was not given reasonable time within which to assemble the relevant information and to prepare and put forward his representations.

Held further that the decision of Chief Sam Kambazembi (where he decided to allocate the grazing rights with respect to Ondjamo No. 1 village to Willem Tjiriange, Abiud Tjiriange and the applicant in respect of Camp B and to Theodor Tjiriange, Ambrosius Tjiriange and Jorokee Tjiriange Katjirua in respect of Camp A) which was communicated to the applicant on 28 May 2015 is thus reviewed and set aside.

Held further that Chief Kambazembi and the Kambazembi Traditional Authority misunderstood the powers conferred on them by s 29 of the Act and acted well beyond their powers when he or they decided to restrict the applicant to graze his livestock to Camp B.

Held that section 29 (1) confers on the applicant, Theodor Tjiriange and Willem Tjiriange (as lawful residents of Ondjamo No. 1) the right to graze their livestock on the commonage of Ondjamo No. 1. *Held further that* that right (i.e. the right to graze their livestock) derives from the fact that they are lawful residents of Ondjamo No. 1 and not because it has been allocated to them by the Traditional Chief or Traditional Authority.

Held that the only power which the Traditional Chief or Traditional Authority may exercise over the applicant, Theodor Tjiriange and Willem Tjiriange with respect to their right to graze their livestock in the commonage of Ondjamo N0.1 is to prescribe the conditions under which the right will be exercised. The Traditional Chief or Traditional Authority can only, under s 29 of the Act, allocate grazing rights to persons who are not residents of Ondjamo No. 1.

Held that the erection of that fence is in direct conflict with s 18 of the Act. By electing not to answer the allegations made by the applicant in his founding affidavit it follows that the facts raised in applicant's founding affidavit were not placed in dispute and should be accepted by the court.

Held that in the absence of an application to the Otjozondjupa Communal Land Board, Chief Kambazembi could not recommend that the fences around Ondjamo No. 1 be retained, he equally had no authority to order the gate to be replaced with a fence. Those actions are beyond his powers and are thus declared invalid.

ORDER

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1. The proceedings, decision or order of Chief Sam Kambazembi or of the Kambazembi Traditional Authority, or of both Chief Sam Kambazembi and the Kambazembi Traditional Authority (whereby he or they decided to allocate the grazing rights with respect to Ondjamo No. 1 village to Willem Tjiriange, Abuid Tjiriange and the applicant in respect of Camp B and to Theodor Tjiriange, Ambrosius Tjiriange and Jorokee Tjiriange Katjirua in respect of Camp A) which was communicated to the applicant on 28 May 2015 is set aside.

2. The decision to prohibit the applicant's livestock from grazing in camp A of the commonage of the communal area at Ondjamo No. 1 village in the Otjozondjupa Region, Namibia and the eviction of the applicant's livestock from that camp is unlawful and invalid.

3. The decision of Chief Sam Kambazembi or the Kambazembi Traditional Authority, or of both Chief Sam Kambazembi and the Kambazembi Traditional Authority to approve or recommend or both approve and recommend the retention and recognition of the fences in respect of Camp A and Camp B at Ondjamo No. 1 village in the Otjozondjupa Region, Namibia is beyond his or its powers and is invalid.

4. The fourth to the eight respondents jointly and severally, the one paying the other to be absolved, must pay the applicant's costs of this application.

JUDGMENT

UEITELE, J

Introduction

[1] This matter once again brings to the fore a dispute with respect to the utilization of agricultural land in the communal areas of Namibia. The applicant and the fourth to the eighth respondents in this matter are members of the Ova-Herero traditional community and reside or conduct farming activities in a village called Ondjamo No. 1 situated in the communal area known as Otjituuo, which communal area is situated in one of the fourteen political regions of Namibia namely the Otjozondjupa Region.

[2] Five of the eight respondents (that is the fourth to the eighth respondents) and the applicant are siblings. The Otjituuo communal area, does for the purposes of traditional matters, fall under the jurisdiction of the Kambazembi Traditional Authority (the second respondent in this matter). The head of the Kambazembi Traditional Authority is Chief Sam Kambazembi (who is the first respondent in this matter.) The affairs of the Kambazembi Traditional Authority which relate to the administration of communal land are subject to the supervision of the Otjozondjupa Communal Land Board (the third respondent in this matter). I will, in this judgment, for purposes of clarity refer to the first to third respondents by their names and the fourth to the eighth respondents collectively as the respondents.

[3] This matter started its life as an opposed urgent application launched, on 08 July 2015, in terms of which the applicant sought (in Part A of the application) an interim order interdicting and restraining the respondents from preventing his livestock from grazing in the commonage of the communal area known as Camp A at Ondjamo No. 1 in Otjituuo, pending the outcome of the review application which he launched in Part B of the same application. All the respondents gave notice that they will oppose both Parts A and B of the application. The first to third respondents have in the meantime withdrawn their opposition to the review application (that is

Part B of the application) and only the fourth to the eighth respondents are persisting with their opposition of the review application.

[4] The urgent application was set down for hearing on 08 August 2015 and on that day the application was struck from the roll because the Court found that the matter was not urgent. The applicant, in terms of Rule 73(5) of this Courts rules, then enrolled the matter in the ordinary course and the matter was thereafter, that is during March 2016, allocated to me for hearing. I set the matter down for hearing on 07 June 2016.

[5] After hearing arguments on that day (i.e. 07 June 2016) I postponed the matter to 16 September 2016 for judgment. I have unfortunately not kept my promise to deliver judgment on 16 September 2016 and for that failure I sincerely apologise to the parties. With this short introduction I will now proceed to briefly sketch the background which gave rise to the current dispute.

Background

[6] The applicant, his parents and his siblings are originally residents of a village simply referred to in the pleadings as Cunib Village. Large parts of Namibia are dry and arid and as such Cunib village experienced a drought and shortage of water and as a result of the drought and shortage of water the applicant and his family were, during 1979, relocated to Ondjamo No. 1 in the Otjituuo communal area.

[7] The versions of the applicant and the respondents relating to the set up at Ondjamo No.1 are conflicting. The applicant alleges that since relocating to and settling at Ondjamo No. 1, the colonial Government fenced off the area into several camps, and his family occupied two camps namely Camp A which measures 1500 hectares and Camp B which measures 700 hectares. The respondents on the other hand allege that the farming unit at Ondjamo No. 1 is about 5000 hectares and was divided into four units of 1250 hectares each being Camps A, B, C and D (I will in this judgment refer to these camps as Camp A, B, C or D). The respondents further allege that Camps C and D were allocated to the extended family whilst Camps A and B were allocated to the applicant, his parents and his siblings (the family).

[8] The applicant furthermore alleges that for over three decades he and his family have utilized both Camp A and B for the grazing of their livestock. He alleges that the arrangements that have been observed for the past three decades were that Camp A was used during winter and draught periods while Camp B was utilized over the rainy period. The respondents dispute that version and allege that as from 1988 their mother, the late Menesia Tjiriange and three siblings namely, Theodore Tjiriange (the fourth respondent), Ambrosius Tjiriange (the fifth respondent), and Jorokee Tjiriange (the eight respondent) were utilizing Camp A whereas the remainder of the other siblings namely, the applicant, Willem Tjiriange (the sixth respondent), Abuid Tjiriange (seventh respondent) and the late Nelson Tjiriange were utilizing Camp B.

[9] The applicant also alleges that problems started with the passing on of their mother. He alleges that after her death, disputes arose about the right of the various family members to reside and farm at Ondjamo No. 1 village. The respondents contradict this version of the applicant and allege that problems started as early as 2001 when the applicant allegedly cut the fence that divides the two camps and moved his livestock into Camp A. The respondents further allege that as a result of those actions by the applicant the other siblings declared a dispute which they referred to the Ova-Herero Traditional Authority, who allegedly instructed the applicant to repair the fence which he had cut and to remove his cattle from Camp A.

[10] What is, however, common cause between the parties is that during the year 2011 Chief Kambazembi and the Kambazembi Traditional Authority decided that the applicant must remove his livestock from Camp A at Ondjamo No.1. The dispute was thereafter referred to the Kambazembi Coblenz Community Court and the Community Court, on 22 July 2012, ordered the applicant to remove his livestock from Camp A.

[11] During March 2013, the fourth respondent in terms of s 23 of the Community Courts Act, 2003[2] approached the Magistrates Court for the District of Grootfontein to enforce the order of the Kambazembi Coblenz Community Court of 22 July 2012. On 26 March 2003 the Magistrates Court for the district of Grootfontein found that

2 Act No. 10 of 2003.

no appeal proper was lodged against the order of the Kambazembi Coblenz Community Court, and ordered that the order of the Kambazembi Coblenz Community Court be executed as contemplated in s 23 of the Community Court's Act, 2003. The clerk of the Magistrates Court for the district of Grootfontein accordingly issued a warrant of execution ordering the eviction of the applicant's cattle from Camp A.

[12] On 5 October 2013 the applicant's livestock were, with the assistance of the Namibian Police as per warrant of execution issued by the clerk of the Magistrates Court for the District of Grootfontein, removed from Camp A. Following the removal of the applicant's livestock from Camp A the applicant, launched an urgent application under case number: A 444/2013 out of this Court. In that application the applicant sought:

(a) An order interdicting the respondents from executing and enforcing the warrant of eviction of the applicant from the premises known as Camp A at Ondjamo No. 1 at Otjituuo, Namibia which warrant was issue on 26 March 2013 by the clerk of the Magistrate's Court of Grootfontein on the strength of the purported judgment or verdict or order of the Kambazembi Coblenz Community Court of 4 March 2011.

(b) An order reviewing the proceedings, decision, or judgment or order of the Kambazembi Coblenz Community Court which were concluded on 4 March 2011 in respect of the proceedings against the applicant and setting aside and declaring such proceedings as unconstitutional invalid and of no force or effect.

(c) An order reviewing the warrant of eviction issued by the clerk of the Magistrate's Court of Grootfontein and setting aside and declaring such of eviction as unconstitutional invalid and of no force or effect.

[13] The urgent application under case number: A 444/2013 was set down for hearing on 18 September 2014. One day prior (i.e. on 17 September 2014) to the hearing of the application the applicant and the first three respondents that is, Chief Kambazembi, the Kambazembi Traditional Authority and the Otjozondjupa

Communal Land Board agreed to settle the matter. The matter was accordingly settled on the terms that:

(a) The warrant of eviction issued against the applicant by the Clerk of the Court of the Magistrate's Court of Grootfontein on 26 March 2013, will not be enforced against the applicant;

(b) The proceedings, decision and judgment of the Kambazembi Coblenz Community Court in respect of the applicant's grazing rights on Camp A situated at Ondjamo No 1 village will not be enforced;

(c) The issue regarding the grazing rights of the applicant and the sixth to ninth respondents in respect of Camp A situated at Ondjamo No. 1 Otjituuo is referred back for re-consideration by the Kambazembi Traditional Authority or by the Otjozondjupa Communal Land Board or by both;

(d) The applicant may proceed with the application against the Sixth to Ninth Respondents of that application (they are now the Third, Fourth, Fifth and Sixth Respondents).

[14] On 18 September 2014 the Court made the terms of the settlement agreement an order of court. The applicant thus alleges that after the matter was settled the remainder of the respondents who are now the fourth to the eighth respondents also withdrew their opposition to the application. The applicant further maintains that he as a result continued to reside and graze his livestock in Camp A and Camp B at Ondjamo No 1 village. The respondents dispute this allegation by the applicant and state that the applicant was periodically violating the eviction order by cutting the fence between the camps and letting his cattle graze in both Camp A and Camp B. They further allege that they did not enforce the eviction order because they were awaiting the outcome of the review application.

[15] On 16 January 2015, a meeting was held at Okakarara at the offices of Chief Kambazembi (the minutes of the meeting of 16th January 2015 indicate that Chief Kambazembi was not present at the meeting) where the utilization of Camps A and B was discussed, all the parties to the dispute were given an opportunity to

present their sides of the dispute. The meeting of the 16 January 2015 was not conclusive and it was postponed to 13 February 2015 and again to 19 February 2015.

[16] The outcome of the meeting of 16 January 2015 (which was postponed to 13 February 2015 and again to 19 February 2015) is also the subject of dispute between the applicant and the respondents. The applicant alleges that the outcome of the meeting was announced or read by one Vetondouua Maharero, a member of the Kambazembi Traditional Authority, which was to the effect that no person owns the communal land, but it is owned by the State, and that all the family members must reside on both Camps A and B, without excluding the other.

[17] The version of the respondents on the other hand is that the meeting of 16 January 2015 was also inconclusive because the final decision had to be made by Chief Kambazembi in his capacity as traditional chief responsible for the Otjituuo area. The respondents allege that at the meeting of 16 January 2015 the outcome of which was announced on 19 February 2015 they were informed that pending the final determination by Chief Kambazembi the parties had to utilize Camps A and B as they have been doing.

[18] On 27 May 2015 the applicant allegedly received a telephone call from a certain Sylvia Kandiimuine of the Kambazembi Traditional Authority, inviting him to meet with Chief Sam Kambazembi at Coblenz village on the same day. The applicant did not attend the meeting of 27 May 2015 because, so he alleges, he had no means to travel to Coblenz (which is about 100 km away from Ondjamo No. 1), and he also informed Ms Kandiimuine that he would not be in attendance of the meeting because of lack of transport.

[19] On the 28th day of May 2015 Chief Sam Kambazembi, a certain Alexander Tjihokoru, Erastus Tjihokoru, four police officers, together with Theodor Tjiriange, Ambrosius Tjiriange and Willem Tjiriange arrived at the applicant's residence at Ondjamo No. 1. Chief Kambazembi there and then informed the applicant that he considered the matter and divided the grazing rights as follows; Willem Tjiriange, Abiud Tjiriange and the applicant would henceforth be allocated grazing rights to Camp B, whilst Theodor Tjiriange, Ambrosius Tjiriange and Jorokee Tjiriange

Katjirua will be allocated grazing rights to Camp A.

[20] The applicant was furthermore informed by Chief Kambazembi that his (applicant's) livestock had to be removed immediately from Camp A and that once all of the applicant's livestock were out of camp A, the gate between Camps A and B had to be permanently closed. On Sunday 31 May 2015, the employees of Theodor Tjiriange closed the gate between Camps A and B by erecting a fence in its stead. Since Sunday 31 May 2015 the applicant's livestock could not graze in Camp A, and were restricted to Camp B. It is this decision by Chief Kambazembi that has aggrieved the applicant and it is that decision which he impugns in the original notice of motion and which he wants this Court to review and set aside.

[21] In the notice of motion filed on 08 July 2015 Chief Kambazembi and the Kambazembi Traditional Authority were called upon to dispatch, the record of the proceedings sought to be corrected together with the reason that the Chief or the Traditional Authority desired to give, to the Registrar of this Court. On 7 and 11 September 2015 the first to third respondents' legal practitioners availed a record of the proceedings which the applicant sought to have corrected to his (i.e. applicant's) legal practitioners.

[22] The record so availed constituted of a judgment or ruling of the Kambazembi Traditional Authority in respect of Case Number OKK 0001/2015, heard on 16 January 2015 and delivered on 19 February 2015 (the judgment or ruling was attached to the applicant's supplementary affidavit as annexure "K") and an unsigned letter dated 26 February 2015 from the Kambazembi Traditional Authority to the Minister of Lands and Resettlement (this letter was attached to the applicant's supplementary affidavit as annexure "L").

[23] In the letter dated 26 February 2015 Chief Kambazembi amongst other things stated (I quote verbatim) the following:

'1. The Traditional Authority hereby recommend for approval the retention and recognition of fence at Ondjamo No. 1 in Otjituuo district in Otjozondjupa.

2. Under section 20(a) of the Communal Land Reform Act, Act 5 of 2002 a

portion of land to the size of 1250 Ha has been allocated to Mr. Theodor Tjiriange of Identity No. 6207270061 at the abovementioned area.

3 The rights allocated are in terms of section 21(a) and (b) of the Communal Land Reform Act, Act 5 of 2002.

4 The Traditional Authority in terms of Council Resolution Number 8/25/02/2015 approved the recommendation for approval.

5 I hereby in terms of the Act provision recommend to Honourable Minister for approval for retention and recognition for the fence in communal area as prescribed in the Act and Regulations of the Communal Land Reform Act, Act 5 of 2002…'

[24] Following the receipt of the record the applicant in terms of Rule 76(9) filed a supplementary affidavit and amended his notice of motion. In the amended notice of motion the applicant sought an order:

'1 Reviewing the proceedings, decision or judgment and/or order of Chief Sam Kambazembi and/or the Kambazembi Traditional Authority, of which the decision is contained in the letter of 24 April 2015 and setting aside and declaring such proceedings as unconstitutional, invalid and of no force or effect.

2 Declaring that the eviction of the Applicant's livestock from and prohibition from grazing the Applicant's livestock in the commonage in camp A of the communal area at Ondjamo No. 1 village in the Otjozondjupa region, Namibia is unlawful and invalid.

3 Reviewing the decision to approve and or recommend the retention and recognition of the fences in respect of Camp A and Camp B at Ondjamo No. 1 village in the Otjozondjupa region, Namibia by the First Respondent and or the Second Respondent, and setting aside and declaring such decision as ultra vires, invalid and of no force or effect.

4 Reviewing the decision of the First Respondent and or Second Respondent to allocate Camp A at Ondjamo No. 1 village in the Otjozondjupa region, Namibia to the Fourth Respondent, Fifth Respondent and the Eighth Respondent and setting aside and declaring such decision as *ultra vires*, invalid and of no force or effect.

5 First, Second, Fourth and Fifth Respondents, jointly and severely, the one paying the other to be absolved, to pay the costs of this application.'

[25] I have indicated above that the respondents opposed the review application. In the opposing affidavit the respondents raised three points *in limine*. The first point *in limine* relates to the urgency of the application. As I have indicated above this Court already dealt with that point *in limine*. The second point *in limine* is based on the contention that the applicant has not exhausted the internal remedies provided for in s 39 of the Communal Land Reform Act, 2002[3] and that the review application is irregular. I will therefore first examine the points *in limine* raised by the respondents before I proceed (if necessary) to the merits of the application.

The points *in limine*

[26] I have, above, indicated that in the answering affidavit the respondent raised a preliminary objection namely that the review application was filed without first exhausting all the remedies provided for in the Communal Land reform Act, 2002. Mr Rukoro who appeared for the respondents argued that s 29 of the Communal Land Reform Act, 2002 vests the power to grant grazing rights within a communal area exclusively in a chief or a traditional authority and that s 39 of that Act provides that any person aggrieved by the decision of a chief or traditional authority may file an appeal with the Minister and the Minister must then appoint an appeals committee.

[27] Mr Rukoro relying on the matter of *Madrassa Anjuman Islamia v Johannes burg Municipality*[4] and Cora Hoexter[5] argued that it is only when the appeals committee takes a decision which the applicant is not happy with that the applicant can approach the High Court to review the decision. He said:

'…the failure on the applicant's side to exhaust the internal remedies provided for in Section 39 of the Act is fatal as this matter would not be ripe for adjudication until an appeal has failed to bear the desired outcome.'

3 Act No. 5 of 2002.

4 1917 AD 718.

5 *Administrative Law in South Africa* 2nd Ed at p 581 and 586.

[28] I do not agree with Mr Rukoro, his reliance on the matter of *Madrassa* is misplaced because that matter is no authority for the proposition that a failure to exhaust internal remedies oust the Court's jurisdiction to review administrative decisions or actions. That matter dealt with the question whether a special statutory remedy, judicial or otherwise replaces the ordinary common law remedies.

[29] Hoexter acknowledges that the right to seek judicial review might be suspended or deferred until the complainant has exhausted the domestic remedies which might have been created by the governing legislation. Hoexter, however, furthermore recognises that this is not automatic as was stated by De Wet J in the matter of *Golube v Oosthuizen and Another* [6] that:

'The mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies.'

[30] In the matter of *Msomi v Abrahams No and Another* [7] Page J said:

'It is clear on the authorities that the Courts will only hold that a person aggrieved by a reviewable irregularity or illegality is precluded from approaching the Courts for relief until he has first exhausted his remedies by appealing to such domestic tribunals as may be available to him, if this is a necessary implication of the statute or contract concerned….The implication of the ouster of the Court's jurisdiction must be a necessary one before it will be held to exist: for there is always a strong presumption against a statute being construed so as to oust the jurisdiction of the Court completely …. The mere fact that a statute provides an extra-judicial remedy in the form of a domestic appeal or similar mechanism which would afford the aggrieved party adequate relief does not give rise to such a necessary implication; in the absence of further conclusive implications to the contrary, it will be considered that such extra-judicial relief was intended to constitute an alternative to, and not a replacement for, review by the Courts.'

[31] The domestic remedy afforded by the statute in the present case is an appeal and not a review. The appellate committee can substitute its decision for

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6 *Supra.*

7 1981 (2) SA 256 (N) at 261.

that of the Traditional Chief but cannot enjoin him to conduct his own enquiry afresh and with due regard to the principles of natural justice. This latter relief is that to which the applicant would be entitled to by way of review by the Court and I am unable to find any indication in the Communal Land Reform Act, 2002 that it was the intention of the Legislature to deprive the applicant of that remedy.

[32] In the light of what I have stated in the preceding paragraphs I am of the view that the jurisdiction of this Court to review the decision of a Traditional Chief or the Traditional Authority has been neither excluded nor deferred by the provisions of the Communal Land Reform Act, 2002 and that the point *in limine* must fail. I return now to the merits of the application.

The basis of the applicant's claim

[33] The applicant premises his application on the allegation that 'without notice to him and without inviting or affording him an opportunity to make any representations, his rights and entitlement to grazing rights in the commonage was summarily and arbitrarily terminated.' This he submits was in violation of his constitutional rights to a fair and reasonable administrative decision and action.

[34] The respondents counter the applicant's assertion that he was not afforded an opportunity to be heard by stating that the applicant on his own version admits that at the meeting of 19 January 2015 the applicant was present and made representations.

The right to be heard

[35] I hereby reiterate what I said in the matter of *Chaune v Ditshabue*[8] namely that:

'There is nothing private or personal about the exercise of the power conferred on traditional authorities. The powers are given to the traditional authorities in the interests of the proper conduct of the affairs of traditional communities[9]. In my view therefore the exercise of power by traditional authorities pursuant to the Traditional Authorities Act, 2000

8An unreported judgment of this Court Case No. (A 5/2011) [2013] NAHCMD 111 (delivered on 22 April 2013).

is plainly the exercise of a public power, and in exercising those powers the traditional authority is an administrative body as contemplated in Article 18 of the Namibian Constitution…'

[36] Article 18 of the Namibian Constitution has been recited in so many of this Court's judgments and its core injunction is that administrative bodies and administrative officials must act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, in the exercise of their administrative powers.

[37] The requirement to act fairly finds its expression in the celebrated principles of natural justice which dictates that a person who is affected by any decision or action must be afforded a fair and unbiased hearing before the decision or action is taken. The principles of natural justice are expressed in the Latin maxims of *audi alteram partem (*hear the other side) and *nemo iudex in propia causa* (no one may judge in his own cause). Baxter[10] explains the operation of the principle as follows:

'The principles of natural justice are flexible. The range and variety of situations to which they apply are extensive. If the principles are to serve efficiently the purposes for which they exist it would be counterproductive to attempt to prescribe rigidly the form which the principles should take in all cases.'

[38] The flexibility of the principles of natural justice was articulated as follows by our Supreme Court in the matter of *Chairperson of the Immigration Selection Board v Frank and Another*[11] where Strydom, CJ said:

'This rule (i.e. *audi alteram partem* rule) embodies various principles, the application of which is flexible depending on the circumstances of each case and the statutory requirements for the exercise of a particular discretion… In the absence of any prescription by the Act, the appellant is at liberty to determine its own procedure, provided of course that it is fair and does not defeat the purpose of the Act. Consequently the Board need not in each instance give an applicant an oral hearing, but may give an applicant an opportunity to deal with the matter in writing.'

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9 See section 3(1) of the Traditional Authorities Act, 2000(Act 25 of 2000).

10 Baxter Lawrence, Administrative Law (1984) at 541.

11 2001 NR 107 (SC) at 174.

[39] Baxter[12] further argues that a fair hearing need not necessarily meet all the formal standard proceedings adopted by courts of law but any individual who will be affected by a decision or action must be afforded a fair opportunity to present his or her case. In the South African case of *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another*[13] Colman, J said:

'It is clear on the authorities that a person who is entitled to the benefit of the *audi alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. For in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the last mentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly *he must be put in possession of such information as will render his right to make representations a real, and not an illusory one.'* (Italicized and underlined for emphasis)

[40] I turn now to the facts of the present case which have a bearing on the application of the *audi alteram partem* rule. What is not in dispute in this matter is the following:

(a) Ondjamo No. 1 which is situated in Otjituuo is situated in the Herero Land West Communal area as defined in s15 of the Communal Land Reform Act, 2002.

(b) On 16 January 2015 a meeting was convened at the offices of the Kambazembi Traditional Authority, Chief Sam Kambazembi was not present at that meeting.

(c) The persons who represented the Kambazembi Traditional Authority are VD

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12 *Supra* (footnote no. 3*).*

13 1980 (3) SA 476 (T).

Maharero, F Kambai and a certain A Kandjeo.

(d) On 27 May 2015 Chief Sam Kambazembi through a certain Sylvia Kandiimuine invited the applicant to a meeting to be held at Coblenz. The applicant due to short notice and lack of transport did not attend the meeting at Coblenz.

(e) On 25 February 2015 the Kambazembi Traditional Authority resolved to recommend to the Minister of Lands and Resettlement that a fence erected around an area of 1250 hectares (which was allegedly allocated to Theodor Tjiriange, the fourth respondent) be recognised and retained.

(f) On 28 May 2015 Chief Sam Kambazembi informed the applicant that he has decided that the applicant is only allocated grazing rights in respect of Camp B and that the gate between Camp A and Camp B must be permanently locked and the applicant is prohibited from grazing his cattle in Camp A.

(g) As from 31 May 2015, the applicant's livestock have not been grazing in Camp A at Ondjamo No. 1 Otjituuo.

[41] The allegation by the applicant that he was called on 27 May 2015 and informed of a meeting that was scheduled at a village that is 100 kilometre away from where he resides is not contradicted by any of the respondents and I thus find as a fact that the applicant was given less than 24 hours' notice of a meeting which was to determine his rights. I accordingly find that the applicant was not given reasonable time within which to assemble the relevant information and to prepare and put forward his representations.

[42] Apart from the fact that the applicant was not given reasonable time to prepare for the hearing it is crystal clear that Chief Sam Kambazembi, was not present at the meeting of 19 January 2015 it thus follows that when he took the decision on 28 May 2015, he did not hear any representations from the applicant.

[43] Parker C[14] argues that an order made contrary to the principles of natural

14 In *Labour Law in Namibia*, Unam Press (2012) at 154-155.

justice is outside jurisdiction and void he said ‘a clear violation of natural justice will in every instance, violate an order and no room for judicial discretion as to whether to set it aside can, in such circumstances exist.’ It is also settled law that a failure of natural justice, which is what procedural fairness guarantees, vitiates the entire process. Hoexter[15] states:

'Procedural fairness in the form of *audi alteram partem* is concerned with giving people an opportunity to participate in the decisions that will affect them, and crucially a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.'

[44] The decision of Chief Sam Kambazembi (where he decided to allocate the grazing rights with respect to Ondjamo No. 1 village to Willem Tjiriange, Abiud Tjiriange and the applicant in respect of Camp B and to Theodor Tjiriange, Ambrosius Tjiriange and Jorokee Tjiriange Katjirua in respect of Camp A) which was communicated to the applicant on 28 May 2015 cannot in the light of the failure to afford the applicant an opportunity to make representations be allowed to stand that decision is thus reviewed and set aside.

[45] I will now proceed to consider the other contentions relating to the utilization of communal land, I will do so by first setting out the legislative framework (which is relevant to the disputes in this matter) created by the Communal Land Reform Act, 2002.

The legislative framework

[46] Section 15 of the Communal Land Reform Act, 2002 (I will from here on refer to this Act simply as ‘the Act’) states which areas of Namibia form part of the communal land. 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.

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15 *Supra* footnote No. 4 at p 363.

[47] 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. Because communal land belongs to the State, the State is enjoined to promote 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-agricultural business activities. The State is furthermore 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. This means that communal land cannot be sold like commercial farmland.

[48] 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[16]. This means that as from 1 March 2003 no new fences may be erected and fences may only be retained if authorization is sought and granted under the Act.

[49] Section 19 sets out the rights that may be allocated under the Act. The following rights may be allocated (granted) under the Act:

(a) Customary land rights.

(b) Rights of leasehold.

[50] 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

16For the purposes of section 18, the Act came into operation on 1 March 2003. (See Government Notice 34 of 2003).

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.

[51] Section 21, provides that the following customary land rights may be allocated in respect of communal land:

(a) a right to a farming unit;

(b) a right to a residential unit;

(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. It is thus clear that only three categories of customary land rights exist in terms of the law, although the last category is a bit vague but may be clarified by the Minister in the relevant notice.

[52] 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.

[53] The section (i.e. s 22) 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 purposes of considering 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.

[54] 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)[17] 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[18] may prescribe the maximum area after consultations with the Minister responsible for agricultural affairs as stated in the Act.

- [55] 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. 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

17 See Regulation 3 of the Regulations in respect of the Communal Land Reform Act, 2005 published under Government Notice No. 37of 2003 in Government Gazette No. 2926 of 1 March 2003.

18 The Minister responsible for land reform.

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.'

[56] 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 under this Act; and

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

Discussion

The right to graze stock on a commonage.

[57] I have indicated above that there is no dispute in this matter that Ondjamo No. 1 is part of Herero-Land West which forms part of the communal area as

defined in Schedule 1 of the Act. The applicant and the respondents have occupied or utilized that area prior to the independence of Namibia. According to the applicant the predecessor government of the independence government commenced to erect fences around the communal area of Otjituuo during 1988 (this allegation is not in dispute and I thus accept it as a fact).

[58] The Act in section 1 defines commonage as "*that portion of the communal area of a traditional community which is traditionally used for the common grazing of stock*"; I am thus satisfied that Camp A and Camp B form the commonage in respect of Ondjamo No. 1.

[59] A proper reading of s 28(1) of the Act suggests that a 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 (that is customary land right), and which was granted to, or acquired by such person in terms of any law or otherwise, continues to hold that right. 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.

[60] A proper reading of s 28(1) of the Act furthermore suggests that the occupation of communal land continues unless the claim to the land is rejected upon application or the land in question is reverted to the State. It is my understanding that if the land which is the subject of proceedings has reverted to the State, then the right to hold or occupy the land in terms of s 28 of the Act thus ceases. In this matter the applicant, Theodor Tjiriange and Willem Tjiriange were issued with a Certificate of Registration of Recognition of Existing Customary Land Right for the purposes of Farming (Crop) and Residential Units meaning that their rights to hold or occupy the land in terms of s 28 of the Act never ceased and they are all therefore lawful residents of Ondjamo No. 1. The statement by Chief Kambazembi, in the letter dated 26 February 2015, that a portion of land making up 1 250 hectares at Ondjamo No. 1 was allocated to Theodore Tjiriange is therefore incorrect and misleading. The correct position is that Mr Theodore Tjiriange was allocated a customary land right for crop farming and residential unit in the extent of one (1) hectare.

[61] Section 29 (1) confers on the applicant, Theodor Tjiriange and Willem Tjiriange (as lawful residents of Ondjamo No. 1) the right to graze their livestock on the commonage of Ondjamo No. 1 (that is Camps A and B). That right (i.e. the right to graze their livestock on the commonage of Ondjamo No. 1) derives from the fact that they are lawful residents of Ondjamo No. 1 and not because it has been allocated to them by the Traditional Chief or Traditional Authority. It thus follows that s 17 read with s 29(1) makes it impossible to deny a lawful resident of a communal area the right to graze his or her livestock in the commonage area of that communal land.

[62] The only power which the Traditional Chief or Traditional Authority may exercise over the applicant, Theodor Tjiriange and Willem Tjiriange with respect to their right to graze their livestock in the commonage of Ondjamo No.1 is to prescribe the conditions under which the right will be exercised. The Traditional Chief or Traditional Authority can only, under s 29 of the Act, allocate grazing rights to persons who are not residents of Ondjamo No. 1.

[63] It is correct that a Traditional Chief or Traditional Authority may withdraw the grazing right of any resident who-

(a) fails to observe in a material respect any condition prescribed by the Traditional Chief or Traditional Authority under s 29(1);

(b) contravenes any provision of s 29(4); or

(c) has access to other land, whether communal land or otherwise, held by such resident under any right the total extent of which is equal to or more than the maximum size prescribed by the Minister under section 23 and which the Chief or Traditional Authority considers to offer sufficient grazing for the stock of such resident.

[64] In the present matter the respondents do not contend or allege that Chief Kambazembi or the Kambazembi Traditional Authority ever prescribed the conditions in terms of which the applicant or the respondents had to graze their

livestock on the commonage in respect of Ondjamo No. 1, nor is it contended or alleged that the applicant contravened the conditions imposed by Chief Kambazembi or the Kambazembi Traditional Authority.

[65] From what I have said in the preceding paragraphs I am satisfied that Chief Kambazembi and the Kambazembi Traditional Authority misunderstood the powers conferred on them by ss 20, 21 and 29 of the Act and acted well beyond their powers when he or they decided to restrict the applicant to graze his livestock to Camp B. I repeat that a resident of a communal area has the right to graze his or her livestock on the commonage of a communal area by virtue of him or her being a resident of the communal area in question but subject to the conditions imposed by the Traditional Chief or the Traditional Authority.

The erection and retention of fences

[66] I have indicated above that the Act takes a strong position against the erection of fences on communal land. 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 in respect of the portion of the land they occupy in the communal land. This means that as from 1 March 2003 no new fences may be erected and fences that were erected before 2003 may only be retained if authorization is sought and granted under the Act.

[67] I have also indicated above that s 28 deals with the recognition of customary land rights which existed immediately before the commencement of the Act. Section 28(2) and s 35(2) make provision for a person who claims to hold a customary land right to apply in the prescribed form and manner to the relevant Communal Land for the recognition and registration of the customary land right under this Act; and 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.

[68] An application for authorisation to retain a fence or fences existing on communal land, must be accompanied by-

(a) Any documentary evidence, if available, which the applicant can submit in support of his or her claim;

(b) A letter from the Chief or Traditional Authority of the traditional community within whose communal area the land in question is situated, furnishing the prescribed information;

(c) Any further information or documents as the board may require.

[69] What is clear from ss 28(2) and 35 (2) is that, a person who wants to retain a fence which is erected on land situated in a communal area, must apply to the Communal Land Board in whose area of jurisdiction the land is situated. The application for the retention of a fence must be done in the prescribed form and manner. In the present matter the relevant board is the Communal Land Board of the Otjozondjupa region. In respect of applications for the retention of fences the role of the Traditional Chief and that of the Traditional Authority is limited to them providing the Communal Land Board with the prescribed information.

[70] In the present matter the applicant alleges that despite the fact that the respondents did not apply in the prescribed form and in the prescribed manner to the Otjozondjupa Communal Land Board to retain the fences which were erected on the land in Ondjamo No.1, Chief Kambazembi and the Kambazembi Traditional authority nonetheless recommended to the Minister responsible for Land Reform that the respondents be allowed to retain the fences which were erected on the land situated at Ondjamo No. 1. The respondents in their answering affidavits did not address these allegations by the applicant. They simply state that the 'issue of the retention of fences is irrelevant for determining grazing rights.'

[71] I do not agree that the issue of the retention of the fences was irrelevant in the context of this application. I say it is relevant because on 28 May 2015 Chief Kambazembi ordered that the gate between Camps A and B at Ondjamo No. 1 be closed permanently by erecting a fence at the place where the gate used to be. The erection of that fence is in direct conflict with s 18 of the Act. By electing not to answer the allegations made by the applicant in his founding affidavit it follows that

the facts raised in applicant's founding affidavit were not placed in dispute and should be accepted.[19]

[72] As I have indicated above the power to approve the retention of a fence which is erected on land which is situated in a communal area is vested in a Communal Land Board of the area in question and the role of the Traditional Chief and the Traditional Authority is limited to them providing the Communal Land Board with the prescribed information. It thus follows that in the absence of an application to the Otjozondjupa Communal Land Board Chief Kambazembi could not recommend that the fences around Ondjamo No. 1 be retained he, equally had no authority to order the gate to be replaced with a fence. Those actions are beyond his powers and are thus declared invalid. It follows that the fences between Camp A and Camp B cannot be used to deny the applicant his right to graze his cattle in the commonage of Ondjamo No. 1.

[73] As to the costs occasioned by this application, there seems to be no reason why the general rule that costs follow the course should not apply to this matter. In the result I make the following order:

1. The proceedings, decision or order of Chief Sam Kambazembi or the Kambazembi Traditional Authority or both Chief Sam Kambazembi and the Kambazembi Traditional Authority (whereby he or they allocated grazing rights in Ondjamo No. 1 village to the applicant, Willem Tjiriange, and Abuid Tjiriange in respect of Camp B and to Theodor Tjiriange, Ambrosius Tjiriange and Jorokee Tjiriange-Katjirua in respect of Camp A) which decision or order was communicated to the applicant on 28 May 2015 is set aside.

2. The decision to prohibit the applicant’s livestock from grazing in camp A of the commonage of the communal area at Ondjamo No. 1 village in the Otjozondjupa Region, Namibia and the decision to evict the applicant’s livestock from that camp (i.e. Camp A) are declared unlawful and invalid.

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19 See : *O'Linn v Minister of Agriculture, Water and Forestry* 2008 (2) NR 792 (HC) at 795F– G.

3. The decision of Chief Sam Kambazembi or the Kambazembi Traditional Authority, or both Chief Sam Kambazembi and the Kambazembi Traditional Authority to approve or recommend or both approve and recommend the retention and recognition of the fences in respect of Camp A and Camp B at Ondjamo No. 1 village in the Otjozondjupa Region, Namibia is beyond his powers or its powers and is thus declared invalid.

4. The fourth to the eight respondents must, jointly and severely, the one paying the other to be absolved, pay the applicant's costs of this application.

SFI Ueitele
Judge

APPEARANCES

APPLICANT	MR. NORMAN TJOMBE Of Tjombe-Elago Inc. Windhoek
1st to 3rd RESPONDENTS:	MR. JABULANI NCUBE Of Government Attorney. Windhoek
4th, 7th and 8th RESPONDENTS:	MR. STEVE RUKORO Instructed by Dr. Weder, Kauta & Hoveka Inc. Windhoek