REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 1/2018

In the matter between:

EMIL SINDERE MBUTO	**PLAINTIFF**
and	
ETTIENE SCHOLTZ	**FIRST DEFENDANT**
THE CHIEF OF THE UKWANGALI TRADITIONAL AUTHORITY	**SECOND DEFENDANT**
THE CHAIRPERSON OF THE UKWANGALI TRADITIONAL AUTHORITY	**THIRD DEFENDANT**
SECRETARY OF THE KAVANGO EAST COMMUNAL LAND BOARD	**FOURTH DEFENDANT**
MINISTER OF LAND REFORM	**FIFTH DEFENDANT**

Neutral citation: *Emil Sindere Mbuto v Ettiene Scholtz and 4 others* (I 1/2018) [2021] NAHCMD 450 (01 October 2021)

Coram: UEITELE J
Heard: **09 September 2021**
Delivered: **01 October 2021**

Flynote: Special plea – *locus standi* to institute proceedings for ejectment – Communal Land Reform Act 5 of 2002 provides for the ratification of the allocation of a customary land right made by a Chief or a Traditional Authority - Special plea dismissed – Plaintiff has necessary *locus standi* to pursue eviction of the first defendant.

Summary: Mr Mbuto, on 03 November 2016, caused summons to be issued out of the Magistrates Court for the District of Rundu, Kavango West Region, in terms of which he sought an order evicting Mr Scholtz from a certain farming unit known as Farm 1291, Chali Cut Line, Mangetti North, Mankumpi, Kavango West Region. Mr Scholtz entered notice to defendant Mbuto's action and raised a special that the Magistrate's Court for the District of Rundu did not have jurisdiction to hear the matter and that Mr Mbuto did not have *locus standi* to institute proceedings seeking to evict him (Scholtz) from the farming unit.

Initially in 2009 Mr Mbuto was allocated the farming unit for a period of 99 years by the Ukwangali Traditional Authority and thereafter they cancelled the allocation and awarded it to Mr Scholtz. Aggrieved by the decision Mr Mbuto appealed to the Appeals Tribunal, in which the tribunal found in favour of Mr Mbuto. Mr Mbuto on that basis sough the ejectment of Mr Scholtz.

Held that, the critical question is whether or not Mr Mbuto has the necessary *locus standi* to seek the ejectment of Mr Scholtz from the said farming unit.

Held further that, the applicant bears the onus of alleging and proving that he or she has the standing to bring the application. In accordance with the general rule that it is for the party instituting proceedings to allege and prove that he has *locus standi*, the onus of establishing that issue rests upon the applicant. It is an *onus* in the true sense; the overall *onus.* The question thus is whether Mr Mbuto has discharged that *onus.*

Held further that, section 24 of the Communal Land Reform Act, 2002 (simply further will be referred to as the Act) provides for the ratification of the allocation of a customary land right made by a Chief or a Traditional Authority. The section further provides that the allocation of a customary land right under s 22 has no legal effect

unless the allocation is ratified by the relevant board in accordance with the provisions of that section.

Held furthermore that, section 25 provides that once the Board has ratified the allocation of a customary land right under section 24(4)(a) it must cause that right to be registered in the prescribed register in the name of the person to whom it was allocated; and issue to that person a certificate of registration in the prescribed form and manner.

Held furthermore that, in the present matter what cannot be disputed is the fact that Mr Mbuto has been in occupation of the farming unit since at least the year 2004. It follows that Mr Mbuto has *ius possessionis* of the farming unit entitling him to all powers and privileges flowing from the mere basis of him being in possession of that farming unit. It therefore follows that in the present matter where Mr Mbuto is seeking to enforce his possessory claim the question of whether or not his customary right has been ratified and he issued with a certificate of registration is irrelevant.

Held furthermore that, Mr Mbuto has an interest that is not too remote. He has discharged the *onus* resting on him and has demonstrated that he has direct interest in the protection of his possessory claims and has some grievance special to himself. He thus has the necessary *locus standi* to institute eviction proceedings against Mr Scholtz.

ORDER

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1. The first defendants' special plea of *locus standi* is dismissed.

2. The first defendant must pay the plaintiff's' costs occasioned by the special plea.

3. The matter is postponed to 05 October 2021 for purposes of allocating trial dates.

JUDGMENT

UEITELE J:

Introduction

[1] The plaintiff in this matter is a certain Sindere Emil Mbuto, a resident of Rundu in the Kavango Region (I will, for ease of reference, refer to the plaintiff as Mbuto in this judgement). The first defendant is a certain Etienne Scholtz a resident of Oshakati but who refers to himself as a farmer and business person. (I will, for ease of reference, refer to first defendant as Scholtz in this judgement). The second defendant is the Chief of the Uukwangali Traditional Authority, the third defendant is the Chairperson of the Uukwangali Traditional Authority, the fourth defendant is the Secretary of the Kavango East Communal Land Board and the fifth defendant is the Minister responsible for land reform in Namibia.

[2] Mr Mbuto, on 03 November 2016, caused summons to be issued out of the Magistrates Court for the District of Rundu, Kavango West Region, in terms of which he sought an order evicting Mr Scholtz from a certain farming unit known as Farm 1291, Chali Cut Line, Mangetti North, Mankumpi, Kavango West Region. (I will, for ease of reference, refer to Farm 1291, Chali Cut Line as the farming unit, in this judgement).

[3] Mr Scholtz entered notice to defendant Mbuto's action and in his plea raised a number of special pleas two of the special pleas being that the Magistrate's Court for the District of Rundu did not have jurisdiction to hear the matter and that Mr Mbuto did not have *locus standi* to institute proceedings seeking to evict him (Scholtz) from the farming unit.

[4] As a result of the special plea (with respect to the Magistrates Court's jurisdiction) raised by Mr Scholtz the parties (that is Messrs Mbuto and Scholtz) agreed to transfer the matter from the Rundu Magistrates' Court to the Northern Local

Division of the High Court of Namibia. Mbuto later applied to transfer the matter from the Northern Local Division to the Main Division of the High Court of Namibia, which application was granted and the matter was accordingly, transferred to the Main Division on 19 April 2019.

Background

[5] The brief background facts that led to Mr Mbuto instituting these proceedings are as follows. The farming unit known as Farm 1291, Chali Cut Line, is situated in Mangetti North, Mankumpi, in the Kavango West Region of the Republic of Namibia. Prior to the coming into operation the Communal Land Reform Act, 2002[1] the farming units situated in Mangetti North in the Kavango West Region of the Republic of Namibia fell under the jurisdiction of the Uukwangali Traditional Authority and were administered by Uukwangali Traditional Authority.

[6] From the pleadings it emerges that prior to the coming into operation the Communal Land reform Act, 2002 the farming unit in dispute was, in accordance with the Uukwangali Traditional Community's customary practices allocated to the late Amanda Kasoro Josef who died during the year 2004. Mr Mbuto alleges that the late Amanda Kasoro Josef was his brother. After the death of Amanda Kasoro Josef, Mr Mbuto applied to the Ukwangali Traditional Authority to be allocated the farming unit.

[7] By letter dated 09 September 2009 the Uukwangali Traditional Authority approved Mbuto's application and allocated the farming unit to Mr Mbuto for a period of 99 years. On 02 November 2013 the Uukwangali Traditional Authority by letter under the signature Hompa Daniel Sitentu Mpasi, informed Mr Mbuto that the Ukwangali Traditional Authority, has, for reasons set out in that letter, cancelled the allocation of the farming unit to him.

[8] On 26 November 2013 the Ukwangali Traditional Authority issued an '*Approval of Request for Land in the Ukwangali Area*" to Mr Scholtz in terms of which it gave consent to Mr Scholtz to occupy the farming unit for a period of 99 years. On 11 March 2014, Mr Mbuto received a letter from the Uukwangali Traditional Authority informing

[1] Communal Land Reform Act, 2002 (Act No.5 of 2002).

him that the Uukwangali Traditional Authority decided to cancel his customary land right on the land and he must thus vacate the farming unit within a few weeks.

[9] Aggrieved by the Uukwangali Traditional Authority's decision to cancel the allocation of the farming unit to him and ordering him to vacate the farm, Mr Mbuto, in terms of section 39 of the Communal Land Reform Act, 2002 appealed to the Appeals Tribunal. On 30 June 2016 the Appeals Tribunal rendered its award. In its award the Tribunal resolved that:

'The decision of the Uukwangali Traditional Authority is set aside, Mr Sindere should be allowed to register his farm under leasehold land right as he already have a valid consent letter from the Uukwangali Traditional Authority dated 09 September 2009.

The land right of Mr. Scholtz is invalid as it is in contradiction with section 24 (4) of the Communal Land Reform Act, No. 5 of 2002. '

[10] Bolstered by the resolution/decision of the Appeals Tribunal Mr Mbuto as I indicated earlier in this judgement caused summons to be issued out of the Magistrates Court for the District of Rundu, for the ejectment of Mr Scholtz from the farming unit. In his particulars of claim Mbuto amongst other allegations alleges that he is the registered and lawful lease (I take the reference to lease to be an error and it must be lessee) of the farming unit by virtue of a consent letter dated 09 September 2009 from the Uukwangali Traditional Authority; his lease period is 99 years and that Mr Scholtz is in unlawful occupation of the farming unit.

[11] As I indicted earlier Mr Scholtz entered notice to defendant Mr Mbuto's claims. In his plea he raised a number of points *in limine.* The plea that concerns me now is the plea that Mr Mbuto does not have *locus standi* to institute proceedings for the ejectment of Mr Scholtz from the farming unit. Scholtz amended his plea and the amended special plea is formulated in the following terms, I quote verbatim:

'1. Plaintiff's cause of action is premised on him having *locus standi* to institute action for the eviction of First Defendant from Farm 1291, Chali Cut Line, Kavango West … by virtue of a consent issued by Third and/or Fourth defendant (marked EM1 to Plaintiff's

particulars of claim and a ruling made on appeal in the matter between him and Second and Third Defendants by an Appeals Tribunal) … appointed by the Fifth Respondent.

Allocation of Customary land right

2. It is evident from the submissions made on behalf of Plaintiff during the hearing of the appeal (a copy of which is attached hereto and marked "ES 1") as well as the ruling of the Tribunal as contained in the summons (EM2) that it dealt with the appeal on the basis that the Plaintiff did apply for customary land rights to the property in terms of section 22 of the Communal Land Reform Act, Act 5 of 2002 as amended …, that such rights were granted to him and same were unlawfully cancelled by Second and/or Third Defendant. Accordingly it applied provisions 20 to 27 of the Act in determining the outcome of the appeal.

3 Section 23 of the Act read with Regulation 3(1) and (2) of the Regulations promulgated under the Act, clearly do not provide for a customary land right to be issued for a portion of land exceeding 50 ha and if it does exceed, such application must be referred to the Fifth Defendant for his permission and if such permission is not obtained, the Fourth Defendant is in terms of section 24(4)(c) obliged to veto such allocation of a customary land right.

4 It is not alleged that Plaintiff, Second or Third Defendant had obtained such permission from permission from the Fifth Defendant at any stage and as a result the alleged allocation of rights to the property could not have been lawfully issued and is accordingly of no legal force and effect. As a result, Plaintiff has no *locus standi* in law to institute an action for the eviction of the First Defendant as only the Second, Third and/or Fourth Defendants could do so in terms of section 43 of the Act.

5 Alternatively, and only if it is found that it was indeed a customary land right that was awarded to Plaintiff and the Fifth Respondent gave permission for same, then such land rights are of no force or effect until ratified by the Fourth Defendant , which have not been done in terms of section 24(1) of the Act at the time of issuing of the summons, and until such time Plaintiff holds no rights to the property and has no locus standi to institute action for the eviction of the First Defendant. Accordingly, the Plaintiff has no locus standi to institute based on such cause of action.

Consent by second and Third Defendant in terms of Section 30(3).

6 In so far as it may be alleged that or inferred from the allegations made in Plaintiff's summons that Annexure "EM 1", constitutes a consent in terms of section 30(4) of the Act for a leasehold right to be issued in favour of Plaintiff, it is specially pleaded that the Plaintiff has no locus standi to institute action against First Defendant at the time of issuing the summons. In terms of regulation 13(1) such consent may not be given for such a right in respect of a portion of land that exceeds 100 ha. In this matter the portion of land is 5027, 4963ha. Regulation 13(2) requires that the Fifth Defendant must approve such allocation which has not been done. As a result, plaintiff has no locus standi to institute action in this matter in terms of section 43 of the Act.

7 It is further alleged by Plaintiff that First Defendant's occupation is invalid because of the ruling of the Tribunal as set out in paragraph 19(c) of "EM 2". If the matter was dealt with by the Tribunal as consent by the Second and/or Third Defendants for the purposes of an application for leasehold rights, then the above ruling of Tribunal in so far as the First Defendant's occupation is concerned, is unlawful. In the same vein the Fifth Defendant could not pronounce himself on the above issue as it did in its letter of the 30 of May 2016.'

[12] Mr Mbuto replicated to Mr Scholtz' special plea. In his replication Mbuto amongst other allegations pleads that he has *locus standi* in this proceeding as he has a customary land right over the land in dispute. He further pleads that the customary land right is that of a farming unit granted in terms of section 22 of the Communal Land reform Act, 2002 and the requirements of s 22 have been complied, with. He further in the alternative pleads that his customary right to farm on the farming unit is recognized and protected by Article 66 of the Namibian Constitution.

[13] Having briefly set out the background I now proceed to consider the question of whether or not Mr Mbuto has the necessary *locus standi* to seek the ejectment of Mr Scholtz from the farming unit. In considering that question I will start off with the contentions of the parties.

Arguments advanced on behalf of Mr Scholtz.

[14] Mr Greyling who appeared for Mr Scholtz argued that, absent any ratification or a certificate of registration issued under section 25 or 33 of the Communal Land Reform Act, 2002, Mr Mbuto has no legal standing to evict Mr Scholtz from the

farming unit. Mr Greyling further argued that whether or not Mr Mbuto received a consent letter from the Chief of the Ukwangali Traditional Authority, such customary land right allocation or consent or both the allocation and consent if is of no legal force and effect unless the allocation has been ratified by the Communal Land Board. Proof of such ratification is evidenced by the registration of the allocated right in the relevant register, and issuing of a certificate to that effect. Mr Mbuto, argued Mr Greyling, has not submitted any such proof and thus has no standing to seek the ejectment of Mr Scholtz from the farming unit.

[15] Relying on the case of *Kashidulika v Iikeno*[2] where Justice Sibeya said*:*

'This court holds the view that the defendant established that the plaintiff had no registered right over the land and consequently she had no certificate of leasehold issued to her. This court is satisfied that the plaintiff has in the premises not been allocated the title or leasehold over the property and thus she has no standing to bring eviction proceedings in terms of section 43(2) of the Act.'

Mr Greyling submitted that that case (that is the *Kashidulika v Iikeno* case) strikes a decisive blow to the success of Mr Mbuto with an eviction order against Mr Scholtz. He (Mr Greyling) continued and submitted that:

'Moreover, as clearly enunciated by *Kashidulika* case, in the absence of a valid certificate of registration from the plaintiff (*sic*) the plaintiff has no legal standing to invoke the provisions of s 43(2) of the Act in seeking an eviction order.'

[16] In his final submission, Mr Greyling proceeded to criticise the decision of the Appels Tribunal in respect of the appeal submitted to it by Mr Mbuto against the decision of the Ukwangali Traditional authority to cancel the consent letter to him by that traditional authority.

Arguments advanced on behalf of Mr Mbuto.

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2 *Kashidulika v Iikeno (*HC-NLD-CIV-ACT-OTH-2018/00273) [2021] NAHCNLD 25 (15 March 2021).

[17] Mr Namandje who appeared for Mr Mbuto argued that the farming unit was previously allocated to Mr Mbuto's late brother in terms of the customary practice and law of Ukwangali Traditional Community prior to the coming into operation of the Act. After the plaintiff's brother's passing, the plaintiff took over the operation on the land as per customs.

[18] Mr Namandje continued and argued that in terms of s 20 of the Act, Mr Mbuto was thereafter issued with a consent letter, to lease the land for 99 years, by the Ukwangali Traditional Authority on 09 September 2009, which letter was signed by Hompa Daniel Sitentu Mpasi. The land was granted to the plaintiff in terms of section 22 of the Act and the requirements prescribed by this section were fully complied with. Mr Namandje furthermore argued that by virtue of the consent letter and the Ukwangali custom and culture, the plaintiff has customary land right to occupy the land and accordingly has *locus standi* to institute the eviction proceedings against Mr Scholtz.

[19] Mr Namandje further submitted that Mr Mbuto's right to bring proceedings to evict Mr Scholtz from the farming unit is strengthened by the Appeal Tribunal's ruling. Alternatively, argued Mr Namandje, Mr Mbuto has a customary right over the farming unit which right is recognised and protected by Article 66 of the Namibian Constitution as the said customary right was inherited from his late brother in accordance with the Uukwangali Traditional customs and practices and this is in accordance with section 26 (7) of the Act.

[20] Mr Namandje furthermore submitted that Mr Mbuto, as an occupier of the land and having valid consent to occupy the land concerned notwithstanding his right having not been ratified as yet, has a better title than that of Mr Scholtz whose title had definitively and conclusively been invalidated.

[21] Having set out the background and contentions of the parties I now proceed to set out the legal framework that governs the utilisation of communal land.

Legal Framework

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

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

[24] Although the State is, under the communal land tenure system, the owner of the land, it holds the land in trust on behalf of traditional communities and their members who live there. Currently the communal land is administered in terms of the Communal Land Reform Act, 2002. (I will, in this judgment refer to the Communal Land Reform Act, 2002 simply as the Act.). Section 15 of the Act states which areas of Namibia form part of communal land.

[25] Section 17 of the Act makes it very clear that all communal land areas belong to the state, which must keep the land in trust for the benefit of the traditional communities living in those areas. The state is enjoined to put systems in place to make sure that communal lands are administered and managed in the interests of those living in those areas. Section 17(2) of the Act further stipulates that ‘no right conferring freehold ownership is capable of being granted or acquired’ in respect of communal land.

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3 *Kashela v Katima Mulilo Town Council and others* 2018 (4) NR 1160 (SC).

[26] The Supreme Court in the matter of *Joseph v Joseph* and *Joseph v Joseph*[4] observed that the Act intends to regulate the way communal land is allocated to persons living in communal areas and that a system was put in place to achieve this which at the same time creates certainty as to the extent and nature of such allocations and who the right holders in respect of such allocations are. The Supreme Court continued and observed that:

'…, the Land Boards are established to among others, exercise control over allocations of land or the cancellation of such allocations by a Chief, Traditional Authority or the Land Board; to consider applications for leasehold in respect of communal land; and to maintain a register and a system of registration so as to keep up to date registers as to who the right holders are in respect of allocations or leaseholds and the nature of such registered rights'.

[27] The customary land rights recognised in the Act are the 'right to a farming unit' and the 'right to residential unit' and those other rights that may be recognised by the Minister by notice in the *Gazette*.[5] These rights are allocated by the relevant Chief or the Traditional Authority.[6] The Land Board must ratify allocations of land and once this is done they are registered in the prescribed register and the certificate to this effect is issued to the holder of the right.[7] On the death of the rights holder the land reverts to the Chief or Traditional Authority for re-allocation.

[28] The Act furthermore recognizes rights of leasehold.[8] A communal Land Board may, upon application, grant to a person a right of leasehold in respect of a portion of communal land, but a right of leasehold for agricultural purposes may be granted only in respect of land which is situated within a designated area referred to in section 30(2). The Minister, after consultation with the Traditional Authority and the board concerned, must designate by notice in the Gazette, in respect of the communal area of each traditional community, an area within which that board may grant rights of leasehold for agricultural purposes. A board may grant a right of leasehold only if the

4 Supra footnote 3 at para [26].

5 Section 21 of the Act.

6 Section 20 of the Act.

7 Section 25 of the Act.

8 Section 30 of the Act.

Traditional Authority of the traditional community in whose communal area the land is situated consents to the grant of the right[9].

[29] Having briefly set out the legal framework I proceed to discuss the question of whether or not Mr Mbuto has the necessary standing to seek the eviction of Mr Scholtz from the farming unit.

Does Mr Mbuto have the right to seek the eviction or ejectment of Mr Scholtz from the farming unit?

[30] It is now a well-established principle of our law that a person who sues must have an interest in the subject matter of the suit and that interest must be a direct interest. Courts of law are not constituted for the discussion of academic questions, and they require the litigant to not only have an interest, but also an interest that is not too remote. Courts of law have required the party suing to show direct interest in the subject matter of the litigation or some grievance special to himself'.

[31] In the matter of *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*[10] the Supreme Court held that in a constitutional State, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights. An analysis of a party's *locus standi,* involves a two-stage process. Firstly, it involves an examination of whether the litigating party has a sufficient interest in the right which is the subject matter of the litigation[11]. This is the common law rule on standing or *locus standi in judicio.* Secondly, it involves an examination of whether the litigating party has the capacity to sue or be sued.

[32] The applicant bears the onus of alleging and proving that he or she has the standing to bring the application. In accordance with the general rule that it is for the party instituting proceedings to allege and prove that he has *locus standi*, the onus of

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9 Section 30(5) of the Act.

10 *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR726 (SC).

11 *Ibid.*

establishing that issue rests upon the applicant. It is an *onus* in the true sense; the overall *onus.*[12] The question thus is whether Mr Mbuto has discharged that *onus.*

[33] I have observed above that the customary land rights that are recognised in the Act are the 'right to a farming unit', the 'right to residential unit' and those other rights that may be recognised by the Minister by notice in the *Gazette.* I also mentioned the right to a leasehold. I furthermore observed that the customary land rights are, on application, allocated by the relevant Chief or the Traditional Authority. This means that the chief or traditional authority first must decide whether or not to grant an application for a customary land right. Whereas the rights to a leasehold are allocated by the relevant communal land board.

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

[35] Section 24 of the Act provides for the ratification of the allocation of a customary land right made by a Chief or a Traditional Authority. The section further provides that the allocation of a customary land right under s 22 has no legal effect unless the allocation is ratified by the relevant board in accordance with the provisions of that section[13].

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[12] *Mungendje v Kavari* (HC-MD-CIV-MOT-GEN-2017/00399) [2018] NAHCMD 153 (22 November 2017).

[13] Section 24 of the Act Reads as follows:

"24 (1) Any allocation of a customary land right made by a Chief or a Traditional Authority under section 22 has no legal effect unless the allocation is ratified by the relevant board in accordance with the provisions of this section.

(2) Upon the allocation of a customary land right the Chief or Traditional Authority by whom

[36] Section 25 provides that once the Board has ratified the allocation of a customary land right under section 24(4)(a) it must cause that right to be registered in the prescribed register in the name of the person to whom it was allocated; and issue to that person a certificate of registration in the prescribed form and manner.

[37] It is on these two sections, (that is ss 24 and 25) that Mr Greyling anchors his argument. Mr Greyling argues that because the Kavango Communal Land Board has not ratified the communal land right allocated to Mr Mbuto nor issued him with a certificate of registration, Mr Mbuto has no right and can therefore not seek the ejectment or eviction of Mr Scholtz from the farming unit. Mr Greyling furthermore contended that if the Court finds that Mr Mbuto was issued with a customary land right or a right of leased those rights are not lawfully issued because of their noncompliance with Regulation 13 and 25 of the Regulations promulgated under the Act.

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it is allocated must forthwith notify the relevant board thereof and furnish to the board the prescribed particulars pertaining to the allocation.

(3) Upon receipt of a notification and the particulars referred to in subsection (2), the board must determine whether the allocation of the right in the particular case was properly made in accordance with the provisions of this Act.

(4) In exercising its function under subsection (3), a board may make such enquiries and consult such persons as it may consider necessary or expedient for that purpose and –

(a) must ratify the allocation of the right if it is satisfied that such allocation was made in accordance with the provisions of this Act;

(b) may refer the matter back to the Chief or Traditional Authority concerned for reconsideration in the light of any comments which the board may make; or

(c) must veto the allocation of the right, if-

(i) the right has been allocated in respect of land in which another person has a right;

(ii) the size of the land concerned exceeds the maximum prescribed size; or

(iii) the right has been allocated in respect of land which is reserved for common usage or any other purpose in the public interest.

(5) If a board vetoes the allocation of a right under subsection (4)(c) it must inform the Chief or Traditional Authority and the applicant concerned in writing of the reasons for its decision.

[38] In my view Mr Greyling's reasoning is based on in his inability to appreciate the concept of possession. According to the commentator Maasdorp[14] possession can be described as a "*compound of physical situation and mental state involving the physical control (corpus) of a thing by a person and that person's mental attitude (animus) towards the thing*." Although our system of rights was foreign to Roman law, it appears that Roman law, however, recognised possession as a factual relationship that attached consequences, for instance, the protection thereof.[15]

[39] The weight of old authorities in our law seem to favour the view that the possessor enjoyed a real right as a holder. There are, however, other commentators who hold a different view,[16] suggesting that possessor must be regarded as an adjunct of the law of property, or must be classified as a right *sui generis.*

[40] Badenhorst, Pienaar and Mostert opine that the right of possession is often referred to as the *ius possessionis* and must be distinguished from *ius possidendi*, that is, the entitlement and privileges flowing from the mere fact of possession. They proceed and say:

'A *ius possidendi* can flow from either a personal right, like a contract or real right. On the other hand a *ius possessionis* denotes all powers and privileges flowing from the mere basis of being in possession of a thing. An owner, for example, will have both *ius possidendi* as owner and *ius possessionis* whereas a thief will only have the latter. A *ius possidendi* is thus not a requirement for acquiring possession nor is it a requirement for protection thereof … one of the consequences of being in possessionis that the possessor has to be protected against dispossession. '

[41] I, therefore, prefer the approach, where possession as a factual relationship gives rise to certain consequences. If this has to be explained within the paradigm of "right" and "entitlements", then possession within the context of protection can therefore be explained as an "entitlement" conferred by objective rules of law on a

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[14] Maasdorp "*Institutes"* P12, quoted by, Badenhorst Pienaar & Mostert: *Silberberg and Schoeman's The Law of Property. (*5th Edition) P 273.

[15] De Vos W, '*n Bespreking van sekere aspekte van die regspossisie van besitters'* 1959 *Acta Juridica* pages190-194.

[16] Kleyn DG and Boraine A: *Silberberg and Schoeman's The Law of Property. (*3rd Edition)

person to remain in “free and undisturbed” possession, until lawfully ousted, and not through self-help.

[42]. According to traditional approach, the common law required possession to be acquired *Corpore et animo* only. In other words physical control with a particular mental element was essential to constitute possession. However, Silberberg[17] is of the view that physical control is in itself not sufficient to constitute possession. It must be accompanied by a particular intention.

[43] In the present matter what cannot be disputed is the fact that Mr Mbuto has been in occupation of the farming unit since at least the year 2004. It follows that Mr Mbuto has *ius possessionis* of the farming unit entitling him to all powers and privileges flowing from the mere basis of him being in possession of that farming unit. It therefore follows that in the present matter where Mr Mbuto is seeking to enforce his possessory claim the question of whether or not his customary right has been ratified and he issued with a certificate of registration is irrelevant. Also see the comments of Frank AJA in the matter of *Joseph v Joseph* and *Joseph v Joseph*[18] where he said:

> ‘In the normal course, a plaintiff who seeks the eviction or ejectment of someone from the property needs to prove only a possessory claim based on his or her right to possess and that the person he is seeking to evict does not have a better claim than him or her.’

[44] Mr Greyling’s reliance on the matter of *Kashidulika v Iikeno*[19] is misplaced. In that matter the Court found that the plaintiff who was seeking to evict the defendant from a traditional homestead that she alleged she had inherited from her adoptive parents had no better title/claim then the defendant because she was not in occupation or possession of the homestead nor were her alleged customary land rights in respect of that homestead allocated or registered as contemplated in the Act. The Court found that in those circumstances it is only a Chief or a Traditional Authority or the relevant communal land board who could institute legal action for the eviction of any person who unlawfully occupies any communal land. That case is therefore not

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17 *Supra*, footnote 9

18 *Supra* footnote 3 at para [26].

19 *Supra* footnote 2.

authority for the general proposition that only a Chief or a Traditional Authority or the relevant communal land board who could institute legal action for the eviction of any person who unlawfully occupies any communal land.

[45] I am thus satisfied that Mr Mbuto not only has an interest, but also has an interest that is not too remote. He has discharged the onus resting on him and has demonstrated that he has direct interest in the protection of his possessory claims and has some grievance special to himself. He thus has the necessary locus standi to institute eviction proceedings against Mr Scholtz. The conclusion that I have arrived at makes it unnecessary for me to consider the argument whether or not Mr Mbuto's right is a customary land right or a right of leasehold. It also makes it unnecessary for me to consider whether the Appeals Tribunal decision is valid or not.

[46] There exist no factors as to why the ordinary principle applicable to costs must not apply. Thus costs must follow the event, in which case Mr Scholtz must bear the costs of this special plea. In my view the special plea raised by Mr Scholtz has the potential to finally dispose of the matter and is therefore not interlocutory and is accordingly not subject to Rule 32(11). For the reasons set out in this judgment I make the following order:

1. The first defendants' special plea of *locus standi* is dismissed

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2. The first defendant must pay the plaintiff's' costs occasioned by the special plea.

3. The matter is postponed to 05 October 2021 for purposes of allocating trial dates.

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Ueitele SFI

Judge

APPEARANCES

PLAINTIFF:	S Namandje Of Sisa Namandje &Co, Windhoek
FIRST DEFENDANT:	PJ Greyling Of Greyling & Associates, Oshakati
SECOND TO FIFTH DEFENDANTS	Mr Ncube Of Government Attorneys, Windhoek